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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A18-1554**

In the Matter of Merrill Lynch Mortgage Investors Trust Mortgage Loan Asset-Backed  
Certificates, Series 2006-RM2.

**Filed May 13, 2019  
Affirmed  
Schellhas, Judge**

Ramsey County District Court  
File No. 62-TR-CV-17-53

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LLC)

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Minnesota; and

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York (for respondent Nationstar Mortgage LLC)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Schellhas,  
Judge.

**UNPUBLISHED OPINION**

**SCHELLHAS, Judge**

Appellant challenges the dismissal of its action to prevent the termination of a trust  
and for an instruction related to the administration of the trust. We affirm.

## FACTS

Under a pooling and servicing agreement (PSA) entered into in 2006, Merrill Lynch Mortgage Investors Trust (the trust) holds residential mortgage-backed securities originally valued in excess of \$991 million. Article IX of the PSA specifies that the trust “shall terminate upon the earlier of . . . an Optional Termination” and the later of the maturity or liquidation of the trust’s assets. Following the initial optional termination date, which occurs on the first date that the aggregate stated balance of the trust’s assets is “equal to or less than 10%” of the assets’ original value, the trustee “shall attempt” to terminate the trust by determining the optional termination price based on information provided by the servicer of the trust, respondent Nationstar Mortgage LLC. The trustee then auctions off the assets and, if it receives no bid equal to or above the optional termination price, the servicer of the trust can terminate the trust by purchasing the assets at the optional termination price. After the servicer purchases the trust’s assets, the trustee transfers the assets to the servicer, sends notice of final termination to all certificate holders, makes the final distribution of proceeds to the trust’s beneficiaries, and terminates the trust.

In 2016, the value of the trust’s assets fell below 10% of their original value, triggering Article IX of the PSA. Nationstar exercised its right to purchase the assets at the optional termination price, and the trustee posted a notice of termination on its website on August 31, 2017. Appellant Procure LLC, a trust-beneficiary, petitioned the district court for instructions in the administration of the trust, requesting a temporary restraining order to prevent the trust’s termination and challenging Nationstar’s calculation of the optional termination price. Nationstar then rescinded its offer to purchase the trust’s assets and

moved to dismiss Procure’s petition for lack of a justiciable controversy. Both parties then amended their pleadings, restating their arguments. The court granted Nationstar’s motion to dismiss, concluding that Procure’s amended petition was moot and not ripe, and that Procure lacked standing to bring its action.

This appeal follows.

## DECISION

### I. Procure’s standing before the district court

Procure argues that the district court erred by concluding that Procure lacked standing to bring its claim following Nationstar’s rescission of its offer to terminate the trust. We agree.

“Because standing is a jurisdictional issue, we evaluate a decision on standing *de novo*.” *In re Gillette Children’s Specialty Healthcare*, 883 N.W.2d 778, 784 (Minn. 2016) (quotation omitted). “Standing is the requirement that a party have a sufficient stake in a justiciable controversy.” *Security Bank & Trust Co. v. Larkin, Hoffman, Daly & Lindgren, Ltd.*, 916 N.W.2d 491, 496 (Minn. 2018) (quotation omitted). “A party may acquire standing either as the beneficiary of a statutory grant of standing or by suffering an injury-in-fact.” *Id.* (quotation omitted). The necessary injury in fact must be “concrete” and “actual or imminent, not conjectural or hypothetical.” *In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 560–61, 112 S. Ct. 2130, 2136 (1992)).

Here, the district court concluded that Procure lacked standing “because its ‘particular purpose’ in seeking instructions are based on hypothetical scenarios,” and it had

suffered no injury-in-fact. But standing is the “requisite personal interest that must exist *at the commencement of the litigation.*” *In re Guardianship of Tschumy*, 853 N.W.2d 728, 735 (Minn. 2014) (quotation omitted) (emphasis added). And while Procure may not have faced an actual or imminent injury when the district court dismissed the action, Procure did face such an injury when it filed its claims based on the potential for financial loss if the termination of the trust proceeded. The district court therefore erred when it concluded that Procure lacked standing to bring its suit.

## **II. Procure’s standing to bring appeal**

Nationstar next argues that Procure lacks standing to pursue this appeal because the district court dismissed the action without prejudice. We disagree.

We review issues of standing de novo. *Gillette*, 883 N.W.2d at 784. “To have standing to appeal, a party must be aggrieved by the decision of a court from which the party appeals,” and a party is aggrieved and has standing to appeal when “the adjudication of a court injuriously affects a party’s interests.” *Webster v. Hennepin County*, 910 N.W.2d 420, 434 (Minn. 2018). “The injury to the right impacted by the adjudication must be immediate, and not a possible, remote consequence, or mere possibility arising from some unknown or future contingency.” *In re Custody of D.T.R.*, 796 N.W.2d 509, 513 (Minn. 2011) (quotation omitted). “Thus, a party is ‘aggrieved’ when that person had a direct interest in the litigation and that person’s rights were injuriously affected by the adjudication.” *Id.*

A dismissal without prejudice is generally not appealable, *Sussman v. Sussman*, 178 N.W.2d 244, 244 (Minn. 1970), but we may review such a dismissal if it involves the merits

of the action or if the dismissal affects an appellant's rights, *Fischer v. Perisian*, 86 N.W.2d 737, 740 (Minn. 1957). Here, because the district court dismissed Procure's claims as moot and therefore unreviewable, its order amounted to a dismissal with prejudice, which is reviewable. *See Minn. Ed. Ass'n v. Indep. Sch. Dist. No. 404*, 287 N.W.2d 666, 668–69 & n.6 (Minn. 1980) (allowing appeal from dismissal with prejudice based in part on underlying controversy being moot); *cf. Stransky v. Indep. Sch. Dist.* 761, 439 N.W.2d 408, 409 (Minn. App. 1989) (granting discretionary review of dismissal without prejudice that “amounted to dismissal with prejudice for lack of jurisdiction” because plaintiff was unable to refile action (quotation omitted)), *review denied* (Minn. July 12, 1989). We therefore conclude that Procure has standing to bring this appeal. *See Minn. R. Civ. App. P.* 103.03(e) (stating that appeal may be taken “from an order which, in effect, determines the action and prevents a judgment from which an appeal might be taken”).

### **III. District court's dismissal of Procure's petition**

Procure argues that the district court erred by dismissing its action for lack of a justiciable controversy. We disagree.

“Justiciability is an issue of law, which [appellate courts] review de novo.” *Dean v. City of Winona*, 868 N.W.2d 1, 4 (Minn. 2015). “A court should exercise its jurisdiction to decide a matter only if there is a justiciable controversy.” *In re Risk Level Determination of J.V.*, 741 N.W.2d 612, 614 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). “A controversy is justiciable if it involves definite and concrete assertions of right,” and a “hypothetical injury will not will not satisfy this standard.” *Id.*

In this case, the district court concluded that Procure's action was moot because Nationstar rescinded its purchase of the trust's assets, thereby eliminating the need to determine whether Nationstar wrongfully calculated the optional termination price. "A matter may be dismissed as moot if an event occurs that resolves the issue or renders it impossible for a court to grant effectual relief." *Id.*; see also *Dean*, 868 N.W.2d at 4 (stating that when district court is unable to grant relief, "the jurisdictional question is one of mootness"). "The mootness doctrine is not a mechanical rule that is automatically invoked whenever the underlying dispute between the parties is settled or otherwise resolved," but rather "it is a flexible discretionary doctrine," described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Dean*, 868 N.W.2d at 4–5 (quotations omitted).

In *Dean*, homeowners challenged a municipality's rental ordinance affecting their ability to rent their property. 868 N.W.2d at 4. During the pendency of their appeal from a district court's grant of summary judgment in favor of the municipality, the homeowners sold their home. *Id.* The supreme court dismissed the homeowners' appeal as moot because they did "not have a current interest in the litigation," stating that dismissal of a case as moot is appropriate "when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Id.* at 5.

Here, similar to the homeowners in *Dean*, Procure has no "current interest in the litigation" because Nationstar has rescinded its purchase of the trust. Upon Nationstar's rescission, Procure faced only a "hypothetical injury" that would occur only if Nationstar

decided to invoke its option to terminate the trust in the future and it used an allegedly wrongful calculation of the optional termination price. Any opinion rendered by the district court would have been advisory only, and we therefore conclude that it did not err in dismissing Procure's claims as moot. *See McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 336 (Minn. 2011) (stating that judicial controversy requires claim that "is capable of specific resolution by judgment rather than presenting hypothetical facts that would form an advisory opinion").

Procure argues that an exception to the mootness doctrine applies because Nationstar's alleged wrongful calculation of the optional termination price is likely to occur again. In *Dean*, the supreme court held that "issues that are capable of repetition, yet evade review," present an exception to the mootness doctrine. 868 N.W.2d at 5. This exception applies "when there is a reasonable expectation that a complaining party would be subjected to the same action again and the duration of the challenged action is too short to be fully litigated before it ceases or expires." *Id.* at 5 (emphasis omitted).

We conclude that this exception to the mootness doctrine does not apply here. First, the record contains no evidence that Nationstar will again try to terminate the trust with an allegedly wrongful calculation of the optional termination price, and Procure provides no factual assertions beyond speculation that Nationstar will do so. Second, this case does not present an issue that will likely evade review, because Procure, as a trust-beneficiary, will have the opportunity to challenge Nationstar's alleged wrongful calculation of the optional termination price, as it did here, if Nationstar invokes its option to terminate the trust in the future. *See id.* at 5 (stating that "cases that have been found to evade review involve

disputes of an *inherently limited duration*, such as prior restraints on speech,” and “short-term mental-health confinement orders” (emphasis added)).

Procure also argues that “Minnesota should follow analogous federal precedent establishing the circumstances in which a party’s voluntary cessation of challenged conduct can render a case moot.” Under the voluntary-cessation doctrine, “a defendant’s voluntary cessation of a challenged practice ordinarily does not deprive a federal court of its power to determine the legality of the practice.” *Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs., Inc.*, 528 U.S. 167, 169–71, 120 S. Ct. 693, 709 (2000) (concluding that factory could not avoid litigation regarding its pollution of a river where it voluntarily ceased wrongfully discharging mercury into the river during case and could restart pollution at any time). But the Minnesota Supreme Court has not adopted this doctrine, and we decline to do so here.

Because no exception to the mootness doctrine applies, the district court did not err in dismissing this action as moot. We therefore need not address Procure’s claim that the district erred in concluding that its claims lacked ripeness. *See Court Park Co. v. County of Hennepin*, 907 N.W.2d 641, 645 n.4 (Minn. 2018) (declining to address issue when deciding case on other grounds and addressing issue would not alter outcome of case).

**Affirmed.**