

NEW YORK INSTITUTES NEW FILING REQUIREMENT TO CERTIFY ACCURACY OF RESIDENTIAL FORECLOSURE DOCUMENTS

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On October 20, 2010, the New York State court system instituted a new filing requirement in residential foreclosure cases designed to protect the integrity of the foreclosure process and help prevent wrongful foreclosures. Effective immediately, attorneys representing lenders must file an affirmation certifying that counsel has taken reasonable steps — including inquiry to banks and lenders and careful review of the papers filed in the case — to verify the accuracy of documents filed in support of residential foreclosures.

The requirement applies to both new residential foreclosures as well as the nearly 78,000 residential foreclosures currently pending in New York.

In the affirmation, attorneys must certify, “under the penalties of perjury,” that “to the best of my knowledge, information, and belief, the Summons and Complaint and all other documents filed in support of this action for foreclosure are complete and accurate in all relevant respects.”

According to a press release issued by the court, under the new requirement, plaintiff’s counsel in foreclosure matters must submit the affirmation at one of several stages:

- In new cases, the affirmation must accompany the Request for Judicial Intervention.
- In pending cases, the affirmation must be submitted with either the proposed order of reference or the proposed judgment of foreclosure.
- In cases where a foreclosure judgment has been entered but the property has not yet been sold at auction, the affirmation must be submitted to the court referee, and a copy filed with the court, five business days before the scheduled auction.
- Counsel is also obligated to file an amended version of the affidavit if new facts emerge after the initial filing.

The Bottom Line for Lenders and Counsel

Practices & Industries

Bankruptcy, Restructuring &
Commercial Litigation
Financial Services

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The new filing requirement, which is the first of its kind in the nation, was introduced by Chief Judge Jonathan Lippman in response to recent disclosures by major mortgage lenders of significant defects — including widespread deficiencies in notarization and “robosigning” of supporting documents — in residential foreclosure filings in courts nationwide. It is important to note that, as stated on the affirmation form, “The wrongful filing and prosecution of foreclosure proceedings which are discovered to suffer from these defects may be cause for disciplinary and other sanctions upon participating counsel.”

The first step that lenders and their counsel need to take is to review their current policies and procedures relative to residential mortgage foreclosure actions to determine whether the procedural defects and “robosigning” of documents that was the cause for the new filing requirement are taking place at their institutions. Second, standard procedures for processing these actions need to be updated to ensure that the steps set forth in the affirmation are implemented. Third, execution and filing of the affirmation needs to take place at the appropriate point in new and existing residential mortgage foreclosure actions.