

NOTICE TO THE BAR

NEW FORECLOSURE RULES (EFFECTIVE SEPTEMBER 1, 2008)

The Supreme Court's July 9, 2008 amendments to the Rules of Court, which become effective September 1, 2008 (and which are posted on [njcourtsonline.com](http://www.judiciary.state.nj.us/notices/2008/n080715a.pdf) at <http://www.judiciary.state.nj.us/notices/2008/n080715a.pdf>), include a number of amendments affecting foreclosure practice. This Notice to the Bar highlights certain of those foreclosure rule amendments and how they will be implemented.

Rule 1:34-6. Office of Foreclosure

The nature of orders that the Office of Foreclosure may recommend for entry has been expanded to include: correcting clerical errors in orders or judgments entered by the court; correcting venue; substituting the plaintiff if, during the foreclosure action, the original plaintiff must be replaced because of merger, acquisition, or reorganization or when the mortgage is assigned to another entity; entering default after six months; extending the time to answer, provided no objection is filed with the Office of Foreclosure; permitting the filing of an amended complaint provided the amended complaint does not include a new cause of action or new claim for relief (note: "amendment to complaint" is not an acceptable pleading form); correcting minor technical irregularities in the note, mortgage or legal description, such as, unmistakable typographical errors, transpositions or date errors, when relief for the technical irregularity is pleaded as a separate count in the complaint; substituting heirs and personal representatives for deceased defendants; and handling unopposed surplus money applications made by original parties in the action (see Rule 4:64-3 below). **Each application seeking to have the Office of Foreclosure recommend entry of an order must be supported by an affidavit or certification.**

Rule 4:4-5. Summons; Service on Absent Defendants

Paragraph (c) of Rule 4:4-5 has been amended so as to require that, in an action to foreclose a mortgage, tax sale certificate or condominium or homeowners' association lien, the notice of publication to absent defendants must contain, among other information, the names of the parties to the instrument as well as the recording date, book, and page.

Rule 4:5-1. General Requirements for Pleadings

Paragraph (b) (1) of Rule 4:5-1 has been amended so as to require that all initial foreclosure complaints and answers must be accompanied by a Foreclosure Case Information Statement (FCIS). This new FCIS form is Appendix XII-B(2) of the Rules of Court and can be found on the Judiciary's Internet website. Amended Rule 1:5-6(c) directs the clerk to return to the filer all initial foreclosure papers submitted without a completed FCIS as "received, but not filed (date)."

Rule 4:43-3. Setting Aside Default

Rule 4:43-3 as amended requires that an answer and FCIS or dispositive motion, as well as the filing fee for any answer, must accompany a motion to set aside a default. All motions filed with the Office of Foreclosure to vacate a default must be accompanied by the proposed answer, completed FCIS, and fee. Applications to vacate a default accompanied by a dispositive motion should be filed in the county of venue.

Rule 4:64-1. Uncontested Judgment: Foreclosures Other Than In Rem-Tax Foreclosures

Amended paragraph (d) of Rule 4:64-1 requires that any notice of motion to enter final judgment be served on mortgagors and all other persons obligated on the debt as well as on all other parties who have appeared in the action. The notice must have attached the affidavit of amount due along with the amount due schedule (Rules Appendix XII-J). If an objection is filed, the Office of Foreclosure will transfer the matter to the General Equity judge in the county of venue for resolution of the objection.

Rule 4:64-2. Proof

Paragraph (a) of Rule 4:64-2 as amended now explicitly identifies assignments as among the necessary instruments that must be submitted to support a request that judgment be entered. Unrecorded assignments are insufficient. Only recorded assignments are to be submitted to the Office of Foreclosure in support of a request to recommend entry of judgment.

Paragraphs (b) and (c) are new. Paragraph (b) sets out what must be contained in an affidavit of amount due and the schedule, Rules Appendix XII-J, that must be annexed to that affidavit. Submission of the schedule is mandatory. Paragraph (c) requires that the affidavit must be executed within 60 days of presentation to the court or the Office of Foreclosure and must state the affiant's authority to submit the amount due proofs on behalf of the plaintiff. For example, the affidavit's initial paragraph may state:

Introductory Paragraph Proof of Amount Due By Employee of Plaintiff

1. Affiant, [insert the affiant's name], is employed by plaintiff at its [insert the city/state location where the affiant works] office as a [insert the affiant's title/position] and as such, affiant has the authority to make this affidavit on the behalf of the plaintiff.

Alternative Introductory Paragraph Proof of Amount Due By Employee of Plaintiff's Servicing Company

1. Affiant, [insert the affiant's name], is employed by [insert the mortgage servicing company's name] at its [insert the city/state location where affiant works] office as a [insert the affiant's title/position]. Said company is a mortgage servicing company authorized to service and handle mortgage transactions on behalf of the plaintiff involving the mortgage debtor(s) named in the plaintiff's complaint. The plaintiff has not revoked said mortgage servicing company's authority and, as such, affiant has the authority to make and submit, on behalf of the plaintiff, the computation of amount due herein set forth.

Rule 4:64-3. Surplus Moneys

Surplus money motions must be served in accordance with Rule 1:6-3 on all parties, including defaulted parties. Only such motions made by original parties to the foreclosure action are to be filed with Office of Foreclosure, using the notice of motion form required by Rule 4:64-9. Motions by other than original parties must be filed in the county of venue. If opposed, surplus money motions made by an original party to the action and filed with the Office of Foreclosure will be transferred to a judge in the county of venue for handling.

In order to facilitate the Office of Foreclosure's review of surplus money motions, so that the office may make a recommendation to the judge for entry of an order on such applications pursuant to R.1:34-6(15), the following should accompany a notice of motion for the payout of foreclosure surplus money in the custody of the Superior Court Trust Fund:

- (1) an affidavit or certification supporting the motion stating:
 - (a) the property address that generated the foreclosure surplus money;
 - (b) proof that the applicant is the party named in the foreclosure complaint, for example, a former owner may attach an old utility bill, homeowner insurance declaration page or other evidence establishing his or her previous connection to the property;
 - (c) proof of the applicant's identity by attaching a copy of a document, such as an unexpired passport or valid driver's license;
 - (d) a computation of the amount due on the applicant's claim, including, if applicable, the original amount due, any credits and a computation showing the amount of accrued interest;
 - (e) the identity of other parties with an interest in the surplus money and the factual basis supporting the applicant's claim that his/her/its interest is superior;

- (f) recital of the property's ownership at the time of the sheriff's sale and, if the owners are different from the party or parties who executed the mortgage, the documents showing how the ownership interest was created;
- (2) an affidavit or certificate of service evidencing service of the motion and associated papers on the all parties, including defaulted parties, to which should be attached copies of return receipt requested green cards or the unclaimed certified mail envelope (note: to facilitate the Office of Foreclosure's review, the first paragraph of the proof of service must identify the property address that is the subject of the foreclosure sheriff's sale);
- (3) the proposed form of order;
- (4) a stamped pre-addressed return envelope; and
- (5) a copy of the writ of execution.

Attempted service on the former mortgagor(s) or owner(s) at the foreclosed property address is unsatisfactory unless sufficient proofs are submitted to establish that the former mortgagor or owner remains in possession of the foreclosed property notwithstanding a sheriff's sale generating the surplus money. If service of the motion is made by publication, an affidavit of diligent inquiry must be submitted to the Office of Foreclosure.

If the applicant is a subordinate mortgagee, original or certified true copies of the note, recorded mortgage, and any assignments should be provided. If the applicant is a subordinate judgment creditor, then the "J" or "DJ" number should be provided along with a true copy of the judgment or judgment abstract.

If the applicant is a business entity, an affidavit by the chief executive officer or the governing board's resolution, under the seal of the business entity, should be attached, stating that the representative making the application is a duly authorized representative of the business entity. A representative of a deceased applicant must provide appropriate testate or intestate probate Letters issued less than 60 days before the surplus money application to establish the personal representative's right to act for the decedent's estate.

So that the Superior Court Clerk's Office Trust Fund Unit can verify that the principal sum is on deposit, copies of surplus money applications should also be simultaneously submitted to the Trust Fund Unit along with an IRS form W-9, if accrued interest is to be paid to other than a government agency or a corporation. If the applicant is an individual receiving more than \$2000, a certification from a private search company that no child support judgment lien is extant against the applicant should be provided, along with a stamped pre-addressed envelope.

If the Office of Foreclosure receives an objection or has any question about the correctness of the amount claimed or the propriety of the application, the motion will be referred to the General Equity judge in the county of venue for resolution. The judge will inform the appearing parties of any additional information required and of the time and place of the hearing.

Rule 4:64-9. Motions in Uncontested Matters

The notice language required by this new rule is applicable to all motions in uncontested cases filed with the Office of Foreclosure. Motions in contested matters should be filed in the county of venue, following notice procedures set forth in Rule 1:6-3.

/s/ Philip S. Carchman

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Dated: August 8, 2008