

**ADDENDUM TO SPECIAL MASTER'S SECOND REPORT
CONCERNING WELLS FARGO BANK, NA**

This Addendum describes the Special Master's observations, made during his Court-appointed monitoring review of certain uncontested residential mortgage foreclosures under Docket Number F-059533-10 ("the Review"), concerning the process used by various foreclosure plaintiffs' attorneys in satisfying the Certificate/Affidavit of Diligent Inquiry requirements of *Rule 4:64-1(a)(2)* and *4:64-2(d)* (collectively, "the Attorney Certification").

As amended June 9, 2011, the New Jersey Court Rules governing foreclosure practice require that:

In all residential foreclosure actions, plaintiff's attorney shall annex to the complaint a certification of diligent inquiry:

(A) confirming that the attorney has communicated with an employee or employees of the plaintiff or of the plaintiff's mortgage loan servicer (i) who personally reviewed the complaint and confirmed the accuracy of its content, as mandated by paragraphs (b)(1) through (b)(10) and (b)(12) through (b)(13) of this rule, based on business records kept in the regular course of business by the plaintiff or the plaintiff's mortgage loan servicer, and (ii) who, if employed by the plaintiff's mortgage loan servicer, (a) identified the relationship between the mortgage loan servicer and the plaintiff, and (b) confirmed the authority of the mortgage loan servicer to act on behalf of the plaintiff; and

(B) stating the date and mode of communication employed and the name(s), title(s) and responsibilities in those titles of the plaintiff's or plaintiff's mortgage loan servicer's employee(s) with whom the attorney communicated pursuant to paragraph (2)(A) of this rule.

R. 4:64-1(a)(2) (emphasis added); and that:

Plaintiff's counsel shall annex to every motion to enter judgment in a residential mortgage foreclosure action an affidavit of diligent inquiry stating: (1) that the attorney has communicated with an employee or employees of the plaintiff or the plaintiff's mortgage

loan servicer who (A) personally reviewed the affidavit of amount due and the original or true copy of the note, mortgage and recorded assignments, if any, being submitted and (B) confirmed their accuracy; (2) the date and mode of communication employed; (3) the name(s), title(s) and responsibilities in those titles of the plaintiff's employee(s) or the employee(s) of the plaintiff's mortgage loan servicer with whom the attorney communicated pursuant to this rule; and (4) that the aforesaid documents comport with the requirements of R. 1:4-8(a).

R. 4:64-2(d) (emphasis added).

In his Review, the Special Master has observed that the phrasing of the certification of diligent inquiry submitted by many foreclosure counsel may convey an incomplete picture of the "communication" process that has occurred in the case. As observed in the Review, it appears that the nearly universal practice among New Jersey plaintiffs/servicers and foreclosure counsel is to base the "communication," necessary for the Attorney Certification, on counsel's review of a document prepared by the foreclosing servicer's employee. The servicer's employee, after reviewing the servicer's files and the pleadings to be submitted to the Court will complete a document known as a Statement of Review. The Statement of Review is a signed and dated statement by the employee that he or she has reviewed the documents to be submitted to the Court and has confirmed their accuracy based on the servicer's business records.

After the Statement of Review is completed, it is transmitted to foreclosure counsel, in hard copy, by email, by a program such as LPS Desktop or similar, or by some other means. Counsel then reviews the Statement of Review and signs the Attorney Certification based on the representations the servicer's employee has made in it. It should be noted that the apparent practice is for the servicer to send the Statement of Review to the law firm generally, not directed to any particular attorney. The attorney

completing the Certification will look in the firm's file on the matter and see the Statement of Review among the other documents received from the servicer. If all is in order the attorney will then complete and sign the Certification of Diligent Inquiry. The attorney will follow up and directly contact the employee who signed the Statement of Review only if necessary. In most cases there is usually no person-to-person contact between foreclosure counsel executing the Certification of Diligent Inquiry and the servicer's personnel who complete the Statement of Review form.

At issue is what the Supreme Court intended by the requirement that "the attorney has communicated with an employee or employees" of the mortgage servicer. This issue transcends the six respondents subject to this Review in that the practice is widespread and therefore implicates, in general, the foreclosure bar's compliance with the Court Rules. As such, strictly speaking, this issue is beyond the scope of the Special Master's Review and charge from the Court. It is, however, an issue that the Judiciary might not readily identify but for the Special Master's Review. As part of the Review, the Special Master was able to examine the Statement of Review forms and the internal practice of interaction between the servicer's employees and foreclosure counsel and thus gained a perspective that would otherwise not be available to the Court or to the Office of Foreclosure.

On their face, the Court Rules do not offer any guidance as to what the Court envisioned when requiring a "communication" between the foreclosure attorney and the plaintiff/servicer's employee. The Special Master is not aware of any New Jersey case that has interpreted what the revised Court Rules mean by the term "communication," or what interaction is required to satisfy that communication prerequisite. Indeed, given that

neither any party nor the Office of Foreclosure would ever see the Statement of Review underlying the "communication," the Special Master doubts that it is likely that any set of facts might raise the issue in a manner that would allow a Court to consider what the Rules mean by the term "communication."

A review of the foreclosure procedures in the twenty-one other States that have a court-supervised foreclosure process reveals that only three appear to have enacted an attorney certification requirement similar to New Jersey's, namely Ohio, Vermont, and New York. *See Cuyahoga County Court of Common Pleas Local Rule 24.0* and form attorney affidavit available at:

<http://cp.cuyahogacounty.us/Internet/CourtDocs/web/fi/AttorneyAffidavitForms.pdf>

(Ohio); *Vt. R. of Civ. Proc.* 80.1 (Vermont); *N.Y. Admin. Orders* 548/10 & 431/11, 22 *NYCRR* 202.12-a(f) (New York) (since held invalid on State Constitution grounds, *see LaSalle Bank v. Pace*, 919 N.Y.S.2d 794 (N.Y. Sup. Ct. 2011), *Bank of New York Mellon v. Izmirligil*, 980 N.Y.S.2d 733 (N.Y. Sup. Ct. 2014)).

Like New Jersey, each of these States' provisions require that the attorney communicate with an employee of the party seeking foreclosure and aver that such employee confirmed the accuracy of the foreclosure documents. Unlike New Jersey, however, none of these States' provisions require that the attorney certification state the mode of such communication. Rather, these States merely require that the attorney file an affidavit stating that he or she communicated with the employee, and that the employee confirmed the accuracy of the pleadings. Thus, these other States' foreclosure rules do not offer any help as to what a "communication" should be in this context, or by what modality that communication should occur.

The Special Master notes that the Attorney Certification is alternatively called a "Certification" or "Affidavit of Diligent Inquiry" See R. 4:64-1(a)(2), 4:64-2(d) (emphasis added). On its face this suggests that the Rules expect that the attorney will make a "diligent inquiry" and that the Attorney Certification will be a description of that. As such it would seem that the language presupposes a certain level of action and affirmative conduct taken by the attorney in order to fulfill this requirement: *i.e.*, to have inquired diligently into the accuracy of the foreclosure documents.

Such a reading is also suggested by *dicta* found in the Supreme Court's decision in *U.S. Bank NA v. Guillaume*, 209 N.J. 449 (2012). That decision dealt primarily with the requirements of the Fair Foreclosure Act's Notice of Intent to Foreclose. In the final portions of the opinion, however, the Court makes several statements about the amended Court Rules and what they require. *Id.* at 484-85. Specifically, the Court notes that "[t]he current version of *Rule 4:64-2* clarifies that an attorney's obligation is to confer with an employee or employees of the plaintiff or its mortgage loan servicer who has authenticated the proofs submitted, not to personally inspect the original documents and compare them to the copies filed with the court." *Id.* (emphasis added). The Court further noted that:

Pursuant to 2010 and 2011 amendments to *Rules 4:64-1* and *4:64-2*, before filing a foreclosure action, an attorney for a foreclosure plaintiff is required to execute a Certification of Diligent Inquiry (CODI) confirming that the attorney has communicated with an employee of the plaintiff or its loan servicer and confirmed the accuracy of the Note and other foreclosure documents. *Id.* at 485 n.7 (emphasis added).

Both of these passages from *Guillaume* similarly imply action on the part of the attorney; that the attorney is "conferring" and "confirming" through this

"communication." Indeed, the first passage equates the word "communication," as found in the amended Court Rules, with "conferring." The second *Guillaume* statement provides that the Attorney Certification requirement has the attorney "communicate" and "confirm": again implying a certain degree of action on the part of the attorney.

Synthesizing these statements from the Supreme Court in the *Guillaume* decision with the natural interpretation of the language of the amended Rules themselves, the question is raised as to whether the intent behind the Attorney Certification requirement was to have foreclosure counsel take active steps: *i.e.*, actually confer with the employee at the plaintiff or servicer who reviewed the servicer's records, to confirm the accuracy of the documents being filed with the Court. If that is the case then the current common practice of a servicer's employee completing a Statement of Review, which is then sent to the law firm generally and added to the file to be referenced by the attorney when completing the Attorney Certification, may not be what was contemplated by the Supreme Court in adopting the recent amendments to the Rules.

In the alternative, if the current practice, now employed by the servicers and foreclosure counsel, does meet the Supreme Court's expectations, the Special Master's review has identified one additional problem inherent in the use of the Statement of Review. The current drafting of the certification of diligent inquiry commonly used by foreclosure counsel is ambiguous in describing the nature of the communication between foreclosure counsel and the servicer's employee. The following representative example will illustrate this point. The servicer's employee performs his/her review on June 1, 2014 and signs and dates the Statement of Review on that date. The Statement of Review is then transmitted by LPS Desktop to foreclosure counsel's law firm on June 4, 2014.

The law firm downloads it on June 5, 2014, and the attorney reviews it and completes the CODI on June 10, 2014. The question that is raised concerns when the "communication" occurred. Given this chronology the Special Master has seen examples where counsel has stated in the Attorney Certification that he/she communicated with the servicer's employee "by written communication" on June 10, 2014: the date the attorney reviewed the Statement of Review. Under this same set of hypothetical facts, the Special Master has also seen examples where the attorney says he/she communicated "by written communication" on June 1st: the date the Statement of Review was signed; "by electronic communication" on June 4th: the date the Statement of Review was transmitted by the servicer; and on June 5th: the date the law firm downloaded and retrieved the Statement of Review.

Other than confirming that a written communication occurred, none of the hypothetical examples clearly indicates precisely how and when that communication occurred. In fact, the hypothetical examples give four different dates in describing the same set of facts concerning the communication between the attorney and servicer's employee.

Using this same hypothetical example, a more accurate and complete description of the method of communication - and one which would be supported by the file - would be something along the lines of: "I, Ms. Attorney, communicated with Mr. Employee by reviewing on June 10, 2014 a Statement of Review that Mr. Employee completed and signed on June 1, 2014, which stated that he personally reviewed the complaint ..." etc.

On October 31, 2013, the Special Master communicated this observation to counsel for the six respondent servicers subject to the Review. The Special Master

requested that the servicers apprise foreclosure counsel of these observations and suggested that going forward, the Attorney Certifications be completed using complete and full descriptions of the means of communication, as mentioned above. All six servicers have represented that they conveyed this request to local foreclosure, through various means.

Despite this request by the Special Master and instructions from the six respondent servicers, the Special Master found only nominal compliance with this request by foreclosure counsel. Even for Attorney Certifications significantly post-dating the October 31, 2013 request date, a large number of foreclosure counsel continued to submit Attorney Certifications that were technically accurate, in that there was evidence of a written communication via the Statement of Review found in the servicer's file, but in which the date and description of the communication was ambiguous for the reasons described above.

Whether the current practice employed by foreclosure counsel in preparation of the Certification of Diligent Inquiry meets the requirements of Rules 4:64-1(a)(2) and 4:64-2(d) is a question of law that is beyond the Power of the Special Master to answer.

It is also a practice that involves foreclosure counsel for more than the six servicers within the jurisdiction of the Special Master. However, because the practice was revealed during the course of the Special Master's review and because it would appear to directly relate to a critical provision of the Supreme Court's Rule amendments in response to the "robosigning" crisis, the matter is being called to the Court's attention for whatever clarification or action, if any, the Court deems appropriate.