



New York State Office of the State Comptroller
Thomas P. DiNapoli

Division of State Government Accountability

Reporting on Foreclosure of Real Property Funds - Kings County

**New York State Unified Court System
Office of Court Administration**



Executive Summary

Purpose

To determine whether referees are properly reporting and accounting for foreclosure funds in Kings County. Our audit covers from January 1, 2010 through March 13, 2013.

Background

The Office of Court Administration is responsible for directing and overseeing the administrative operations of all courts in the New York State Unified Court System (UCS). This system serves the State's 62 counties through 13 districts. The borough of Brooklyn (Kings County) is in the 2nd District. The County Clerk's Office acts as the clerk of the respective county's Supreme Court. It receives, indexes, and files all Supreme Court documents and miscellaneous papers, and collects all associated filing fees, fines, and surcharges.

During the foreclosure process, when the plaintiff (lender) determines that the defendant (borrower) is unable to negotiate a settlement, the plaintiff requests judicial intervention. If the foreclosure process continues, the court will appoint a referee to determine the amount of the debt and, upon issuing a judgment of foreclosure, the referee proceeds to sell the property. The referee schedules the sale, appears in court on the appointed date and time and sells the property at auction, closes the sale, distributes the proceeds of the sale (including payment of any surplus funds to the County Clerk within five days of closing), and files the Report of Sale with the County Clerk within 30 days of closing, unless the court grants an extension.

Referees are selected from a list of eligible referees established under Part 36 of the Rules of the Chief Judge (Part 36 Eligible Fiduciary List). The court verifies the eligibility of the referee before appointment. A judge can also appoint a referee who is not on the list if he/she determines there are special circumstances, and must then notify the fiduciary clerk and the administrative judge of this decision in writing.

Key Findings

- We found that the court-appointed referees did not always properly report and account for foreclosure funds. We reviewed 10 of 35 foreclosures with surplus funds during our audit period and determined that the funds for nine were incorrectly reported by the referee.
- Referees deposited surplus funds late in five of the 10 sales sampled and the Reports of Sale were late for two of these 10 sales.
- Ten of the referees we sampled were not listed on the Part 36 Eligible Fiduciary List as of December 28, 2012. UCS officials subsequently provided proof of registration for seven referees, but they did not provide any documentation for three referees.

Key Recommendations

- Remind all referees of their responsibility as an appointee of the court to file an accurate and timely Report of Sale and accompanying schedules.
- Remove referees from the Part 36 Eligible Fiduciary List if they are found to be negligent in performing their duty to provide an accurate Report of Sale.

- Document and maintain the eligibility of each appointed referee as of the date of the appointment or assignment by a judge.

Other Related Audits/Reports of Interest

[Court and Trust Funds County of Westchester: Report of Examination Period Covered: January 1, 2005 - January 1, 2009 \(2009M-170\)](#)

[Court and Trust Funds County of Orange: Report of Examination Period Covered: January 1, 2005 - January 1, 2009 \(2009M-229\)](#)

[Court and Trust Funds County of Niagara: Report of Examination Periods Covered: January 1, 2007 - January 1, 2008 and January 1, 2008 - January 1, 2009 \(2009M-239\)](#)

**State of New York
Office of the State Comptroller**

Division of State Government Accountability

December 12, 2013

Honorable A. Gail Prudenti
Chief Administrative Judge
New York State Unified Court System
Office of Court Administration
25 Beaver Street
New York, NY 10004

Dear Judge Prudenti:

The Office of the State Comptroller is committed to helping State agencies, public authorities and local government agencies manage their resources efficiently and effectively. By so doing, it provides accountability for tax dollars spent to support government operations. The Comptroller oversees the fiscal affairs of State agencies, public authorities and local government agencies, as well as their compliance with relevant statutes and their observance of good business practices. This fiscal oversight is accomplished, in part, through our audits, which identify opportunities for improving operations. Audits can also identify strategies for reducing costs and strengthening controls that are intended to safeguard assets.

Following is our audit entitled *Reporting on Foreclosure of Real Property Funds - Kings County*. This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

This audit's results and recommendations are resources for you to use in effectively managing your operations and in meeting the expectations of taxpayers. If you have any questions about this report, please feel free to contact us.

Respectfully submitted,

*Office of the State Comptroller
Division of State Government Accountability*

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This report is also available on our website at: www.osc.state.ny.us

Background

The Office of Court Administration manages the State's Unified Court System (UCS). The System includes 13 judicial districts overseen by a chief administrative judge with one deputy chief administrative judge for courts within New York City and one deputy administrative judge for courts outside of New York City. In addition, each judicial district has an administrative judge. The borough of Brooklyn (Kings County) is in the 2nd District.

During the foreclosure process, when the plaintiff (lender) determines that the defendant (borrower) is unable to negotiate a settlement, the plaintiff requests judicial intervention. If the foreclosure process continues, the court will appoint a referee to determine the amount of the debt and, upon issuing a judgment of foreclosure, the referee proceeds to sell the property. The referee schedules the sale, appears in court on the appointed date and time, and sells the properties at auction, closes the sale, distributes the proceeds of the sale (including payment of any surplus funds to the County Clerk within five days of closing), and files the Report of Sale with the County Clerk within 30 days of closing, unless the court grants an extension.

Referees are selected from a list of eligible referees established under Part 36 of the Rules of the Chief Judge. The court verifies the eligibility of the referee before appointment. A judge can also appoint a referee who is not on the list if he/she determines there are special circumstances, and must then notify the fiduciary clerk and the administrative judge of this decision in writing.

Referees making the sale are required to file with the clerk their Report of Sale, accompanied by the vouchers of the persons to whom payments were made, within 30 days after the completion of the sale (i.e., the closing). The court can extend the deadline for filing the report within the first 30 days if the request is made within said 30 days.

Section 182 of the State Finance Law requires that all moneys paid into the New York City courts shall be deposited into a bank as shall be designated by the State Comptroller, and as soon as received by the custodian thereof. Section 2601 of the New York Civil Practice Law and Rules requires that all moneys and securities paid into the courts be delivered to the Commissioner of Finance within two days after receipt.

The County Clerk's Office acts as the clerk of the respective county's Supreme Court. It receives, indexes, and files all Supreme Court documents and miscellaneous papers, and collects all associated filing fees, fines, and surcharges. The County Clerk deposits surplus foreclosure funds it receives into its checking account and then writes a check payable to Finance. For the three-year period ended December 31, 2012, the Kings County Clerk's Office reportedly collected and transferred to Finance surplus foreclosure funds totaling \$9.9 million.

Audit Findings and Recommendations

Report of Sale

The Reports of Sale for 9 of 10 sampled foreclosures with surplus deposits into court contained errors in the calculation of interest due and/or other mathematical errors. In two of the nine sales the amount of the surplus reported was incorrect. For example:

- In one Report, the total due to plaintiff was understated by \$4,500. In addition, the calculated surplus should have been \$712,770; however, the reported surplus was \$617,346, a difference of \$95,424. The referee refused our request to meet to discuss this Report.
- In a second Report, the surplus was initially reported on December 22, 2009 as \$24,000; however, the referee admitted that this figure actually represented 10 percent of the sale, not the total surplus from the sale. The Report of Sale was amended on January 4, 2011 and reported an additional \$98,055.60.
- In a third Report, interest due to the plaintiff for two separate periods was miscalculated; the first was understated by \$56 and the second was overstated by \$821.

We also found that the court-appointed referees did not properly report and account for foreclosure funds for sales with no surplus. The Reports for 7 of 15 sampled auctions held from January 1, 2010 to December 31, 2012 contained 11 different errors. For example:

- The amount disbursed in one instance was overstated by \$416.
- In another instance, the interest due on the mortgage note was overstated by \$588.
- Also, in one instance the interest due was incorrect because the mortgage note was overstated. The total amount allowed to plaintiff was understated, due to a mathematical error, by \$500.

To obtain an understanding of how a referee determines the amounts on the Report of Sale, we contacted several of the referees who prepared the Reports in our sample. We interviewed eight referees, who confirmed that the plaintiff or plaintiff's attorneys compute the various costs related to the foreclosed property and transmit the figures to the referee. The plaintiff or plaintiff's attorneys - not the referee - have the original invoices. The referees merely incorporate the plaintiff's figures into the Report of Sale; they do not verify the amounts due others such as attorney's fees, water bills, advertising costs or the accuracy of these amounts.

This results in a process where the borrower/defendant may be unaware of a surplus. In addition, errors in the Report of Sale may reduce the amount due to the plaintiff or defendant. In those cases where the referees do not transmit the full surplus to the County Clerk as required, there is no process in place to detect the error.

County Clerk officials responded to our preliminary findings report that they do not have the legal authority to remind referees of their duties as a court appointee, to track the manner in which

auctions are conducted, or to verify the accuracy of the Report of Sale and the accompanying documentation. To do so would be intruding on the judicial authority of the Supreme Court.

Deposit of Surplus Moneys

According to Real Property Actions and Proceedings Law, Section 1354(4), all surplus moneys must be paid into court by the officer conducting the sale. These moneys should be deposited within five days of receipt. Property sales are recorded in the County Clerk's office and referees make payment by depositing surplus moneys with the County Clerk as required by the court order.

- Our sample of 10 foreclosures with surplus funds disclosed five instances where the referee did not deposit surplus moneys within five days as required. The deposits were late from 44 days to 56 days. Two deposits were made timely. For the remaining three cases, the referee's Report of Sale did not contain the date of closing.
- For the 10 cases with surplus funds, we also determined that the Report of Sale was filed late in two instances (13 days and 27 days). Two of the Reports did not have the date of closing recorded and six Reports were filed on time.
- For 15 cases with no surplus funds, five Reports of Sale were filed on time, three Reports were not filed, six Reports did not provide a date of closing needed to determine timeliness and for one case no Report was due because it was "stayed by the court."

Supreme Court officials responded to our preliminary findings report that the Order of Referral already contains direction to the referee to file the Report timely in accordance with statute. The court will review this language and strengthen its emphasis and will include language in the Order to remind referees of their responsibility to file an accurate report. They indicated that the courts rely upon the parties in the adversary process to review and contest the accuracy of the calculations. Where referees are found to be negligent in performing their duty to provide accurate Reports of Sale, the UCS can remove them from the list of eligible Part 36 appointees. Furthermore, Supreme Court officials responded that they may refer attorneys to the appropriate disciplinary or grievance committee for some cases.

Recommendations

1. Remind all referees of their responsibility as an appointee of the court to file an accurate and timely Report of Sale and accompanying schedules and the obligation to deposit surplus moneys with the Court within five days of receipt.
2. Ensure referees submit their Reports of Sale timely.
3. Remove referees from the Part 36 Eligible Fiduciary List if they are found to be negligent in performing their duty to provide an accurate Report of Sale.

Referee Appointments

According to Part 36.2[b] [1] of the Rules of the Chief Judge, a judge presiding over a foreclosure property case should appoint a referee off of the Part 36 Eligible Fiduciary List (eligible list).

Under Part 36.2[b] [2] of the Rules of the Chief Judge, a judge may appoint a referee not on the eligible list upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the appointment. The judge shall send a copy of such writing to the Chief Administrator.

Our review of 77 referees who were assigned to foreclosure properties that were auctioned off during 2002 - 2012 showed that 10 referees were not listed on the eligible list as of December 28, 2012. UCS officials subsequently provided proof of registration for seven referees, but they did not provide any documentation for the other three referees such as a document from a judge that he/she appointed a referee who was not on the list. They explained that two appointments predated June 1, 2003, when the system was changed and the old list was superseded. They also indicated that their approved records management schedule calls for destruction of paper application forms after three years. However, one of the referees with no documentation conducted a sale in January 2013.

Maintaining documentation of a referee's eligibility, either from the eligible list or from another source for those appointed from outside the list, is a simple control that provides assurance that only qualified referees are appointed.

Recommendation

4. Document and maintain the eligibility of each appointed referee as of the date of the appointment.

Audit Scope, Objective and Methodology

Our objective was to determine whether referees are properly reporting and accounting for foreclosure funds in Kings County. The audit covers from January 1, 2010 through March 13, 2013.

To accomplish our objective, we met with Officials of the Office of the County Clerk - Kings County and Supreme Court - Kings County officials to gain an understanding of their policies and procedures for foreclosure auctions. We also reviewed the County Clerk's process for surplus foreclosure deposits into court. In addition, we reviewed the laws, regulations and Rules of the Chief Judge pertaining to foreclosure auctions. We reviewed foreclosure advertisements listed in various newspapers and attended foreclosure auctions conducted in the Brooklyn Supreme Court.

We reviewed a randomly selected sample of 15 out of 541 auctions held from January 1, 2010 to

December 31, 2012 and a judgmental sample of 10 of the 35 auctions that resulted in a surplus during our scope period to determine whether they were properly reported and accounted for. We also interviewed eight referees who were appointed to handle foreclosure auctions in our sample. We reviewed court documents and other information maintained on both the County Clerk's and the Supreme Court's computer systems. In addition, we attended five foreclosure auctions in January and February 2013.

We conducted our performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In addition to being the State Auditor, the Comptroller performs certain other constitutionally and statutorily mandated duties as the chief fiscal officer of New York State. These include operating the State's accounting system; preparing the State's financial statements; and approving State contracts, refunds, and other payments. In addition, the Comptroller appoints members to certain boards, commissions and public authorities, some of whom have minority voting rights. These duties may be considered management functions for purposes of evaluating organizational independence under generally accepted government auditing standards. In our opinion, these functions do not affect our ability to conduct independent audits of program performance.

Authority

This audit was performed pursuant to the State Comptroller's authority under Article V, Section 1 of the State Constitution and Article II, Section 8 of the State Finance Law.

Reporting Requirements

A draft copy of this report was provided to Unified Court System - Office of Court Administration officials for their review and comment. We considered their comments in preparing this final report and they are included in their entirety at the end of this report.

Within 90 days after final release of this report, as required by Section 170 of the Executive Law, the Chief Administrative Judge of the Unified Court System shall report to the Governor, the State Comptroller, and the leaders of the Legislature and fiscal committees, advising what steps were taken to implement the recommendations contained herein, and where recommendations were not implemented, the reasons why.

Contributors to This Report

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Vision

A team of accountability experts respected for providing information that decision makers value.

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To improve government operations by conducting independent audits, reviews and evaluations of New York State and New York City taxpayer financed programs.

Agency Comments



NEW YORK STATE Unified Court System

OFFICE OF COURT ADMINISTRATION
INTERNAL AUDIT SERVICES

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CHIEF ADMINISTRATIVE JUDGE

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November 21, 2013

Ms. Carmen Maldonado
Audit Director
Office of the State Comptroller
Division of State Government Accountability
123 William Street - 21st Floor
New York, NY 10038

Dear Ms. Maldonado:

On behalf of the Chief Administrative Judge, thank you for the opportunity to respond to the draft audit report (2013-S-2) entitled *Reporting on Foreclosure of Real Property Funds - Kings County*. We appreciate the efforts of the audit team in conducting this audit.

The draft report included three recommendations related to Reports of Sale and deposits of surplus moneys. The Unified Court System (UCS) has taken steps to address these recommendations, as follows:

The Order of Referral already contains direction to the referee to file the report timely and in accordance with statute. The Court will include language in the Order to remind referees of their responsibility to file an accurate report.

The UCS Inspector General has responsibility for investigating allegations of unsatisfactory performance by court appointed fiduciaries. The Inspector General's Office will review the referees cited in this report and determine if investigation is appropriate. Where referees are found to be negligent in performing their duty to provide accurate and timely reports of sale, the UCS can -- and will -- remove them from the list of eligible Part 36 appointees; likewise, where attorneys deliberately proffer erroneous figures to the court, they may be referred to the appropriate disciplinary or grievance committee by the court.

The audit report cited three reports of sale which were not filed. The Court held a conference on one of the cases. The Report of Sale, showing a deficiency, was filed on July 3, 2013. A hearing has been scheduled for December 17, 2013 for the second case to determine why the Report of Sale is still outstanding. The referee was previously disbarred in the third case, and the court is in the process of scheduling a conference with the plaintiff.

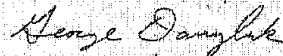
Regarding referee appointments, the draft audit report recommends that the court system document and maintain the eligibility of each appointed referee as of the date of the appointment.

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The court system has maintained this documentation since 2003. A current list of registered referees has been maintained on-line and available to the appointing judge. Further, a database of all registered referees dating back to 2003 is maintained at OCA. This database provided proof of registration for the seven referees cited in the report. Therefore, as stated in our response to the preliminary report, this recommendation is unnecessary.

Thank you for your consideration of this response in preparation of the final audit report.

Very truly yours,



George Danyluk

/smw

c: Hon. A. Gail Prudenti
 Hon. Fern Fisher
 Ronald Younkens, Esq.
 Eugene Myers
 Hon. Lawrence Knipel
 Hon. Nancy T. Sunshine
 Maria Logus, Esq.
 Sherrill Spatz, Esq.
 Brian Mason

*

Comment

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* See State Comptroller's Comment, page 13.

State Comptroller's Comment

1. Contrary to UCS' response, the recommendation is necessary because 10 of the referees we sampled were not on the December 28, 2012 list of eligible referees. In addition, there was no database information for these 10 referees. It was only after the closing conference on June 18, 2013 that UCS provided any evidence that seven of the 10 were eligible. All of the information provided were copies of documents.