

## WFG Underwriting Bulletin



To: All New York Policy Issuing Agents of WFG National Title Insurance Company

From: WFG Underwriting Department

Date: January 7, 2020

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Subject: NY Residential Foreclosures and “Lack of Standing” Defense

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Please be advised that on December 23, 2019, the Governor of the State of New York signed an amendment to RPAPL section 1302. As a result of this new amendment, the defense of lack of standing, which traditionally was deemed waived if not raised in a defendant’s responsive pleading such as an answer, is no longer waived and can be raised later in the action by a defendant/mortgagor. **THE CHANGES TO THE LAW ARE EFFECTIVE IMMEDIATELY.**

The text of the law is as follows:

**§ 1302-a. Defense of lack of standing; not waived.** Notwithstanding the provisions of subdivision (e) of rule thirty-two hundred eleven of the civil practice law and rules, any objection or defense based on the plaintiff’s lack of standing in a foreclosure proceeding related to a home loan, as defined in paragraph (a) of subdivision six of section thirteen hundred four of this article, shall not be waived if a defendant fails to raise the objection or defense in a responsive pleading or pre-answer motion to dismiss. A defendant may not raise an objection or defense of lack of standing following a foreclosure sale, however, unless the judgment of foreclosure and sale was issued upon defendant’s default.

In a nutshell, the “lack of standing” is a defense in which the foreclosed owner/defendant claims that the plaintiff/foreclosing bank is not the true owner and holder of the note and mortgage being foreclosed.

From a title insurance perspective this new law creates a risk to the company. The majority of mortgage foreclosure judgments are entered due to a defendant’s default and can result in the foreclosed owner/defendants bringing actions seeking to set aside the foreclosure judgments, meritorious or not. This in turn may trigger an underwriter’s duty to defend, which will result in legal fees being incurred at the minimum, claim payments at the maximum.

As a result, every foreclosure action must be carefully scrutinized, including the responsive pleadings. Every foreclosure action that is to be insured must be analyzed on a case-by-case basis and WFG National Title Insurance Company may possibly require undertakings from the foreclosure counsel that they will defend any actions brought to set aside a foreclosure on a “lack of standing” basis.

Please be advised that WFG National Title Insurance Company will be providing more information and/or clarification as it becomes available. In the interim please feel free to contact us if you have any questions or concerns.

NOTE: The information contained in this Bulletin is intended solely for the use of employees of WFG National Title Insurance Company, its title insurance agents and approved attorneys. Disclosure to any other person is expressly prohibited unless approved in writing by the WFG National Title Insurance Company's Underwriting Department.

**The Agent may be held responsible for any loss sustained as a result of the failure to follow the standards set forth above.**