

# AFFIDAVITS AND PRELIMINARY JUDGMENTS

The foreclosure process involves affidavits. Affidavits are named “*Commandement de payer valant saisie*” and consists in documents in which the court bailiff attests to a set of facts. Foreclosure affidavits typically involve the mortgage holder confirming that the foreclosure is valid specifically and that he has a right to foreclose because the mortgagee has defaulted on the mortgage.

## 1 PRELIMINARY JUDGMENT

Mortgage holders looking to foreclose must ask the High court (« *Tribunal de Grande Instance* ») for a preliminary judgment named “*jugement d’orientation*”, which means they want the court to rule in order to be granted clearance that the foreclosure is in order.

To show the court that it should order foreclosure, the mortgage holder typically submits affidavits and other proof (such as the mortgage note) showing who in fact owns the mortgage in question.

Foreclosure affidavits also include statements about the status of the mortgage account, such as payment history, what is currently owed, when it went into default and how far behind the mortgagee is.

If the borrower does not contest the foreclosure, many foreclosure cases end at this point, with the judge granting a preliminary judgment for the mortgage holder.

This allows the foreclosure to be executed and the property to be sold.



## 2 AFFIDAVITS

Affidavits / “*Commandement de payer valant saisie*” are documents submitted to the court in which a court bailiff attests to personal knowledge as to what is contained.

This means that the bailiff signing a foreclosure affidavit should have verified all information he or she is stating to be true.

In cases where the mortgage holder did not review underlying documentation, foreclosure affidavits signed by the bailiff may be challenged as inadequate to prove that foreclosure should occur.

Affidavits must include copies of all documentation on which the affidavits rely, and failure to include such documentation could also be challenged.

Affidavits must also be published and listed on the Mortgage Public Registry (“*Centre des Impôts Fonciers*”, formerly “*Conservation des Hypothèques*”).

## 3 CHALLENGING AFFIDAVITS

The mortgagee can only challenge the foreclosure affidavits at the point when the bank or mortgage holder has requested preliminary judgment.

One way to challenge the affidavits is to challenge any inaccurate information about the mortgage and payment history contained in the affidavits.

Though foreclosure affidavits are often perfectly accurate, sometimes they may contain bad information, or have been irregularly published.

One example might be if the affidavits state an inaccurate amount owed or payment history, as mortgages may have been reviewed or renegotiated many times, with information as to payment potentially lost in the shuffle.

Other times, fees may have been attached to the account improperly.

## 4 WHAT HAPPENS NEXT

Showing that a mortgage holder's foreclosure affidavits are inadequate does not resolve the underlying dispute about the property and whether it will be foreclosed.

Lenders and mortgage holders typically rely on affidavits in order to gain preliminary judgment in foreclosure actions.

In cases where the affidavits are successfully challenged or found lacking by the court, the borrower may not have won a final victory, but has staved off a final decision.

Such borrowers then may face the lender or holder at trial to resolve whether the property, in fact, may be foreclosed and sold.

