

The Payoff Scam Is Back!



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We've seen this before. You are a lender, the year is circa 2008, and a borrower takes out a loan from you to purchase their new dream property. It's a beautiful multimillion dollar home listed for sale by the current owner. The sale closes and your borrower begins making payments. The loan is current, and things are great, until they aren't. Out of the blue you are served with a new lawsuit, the prior lender is foreclosing on the property – turns out the prior loan was not actually paid off by the prior owner.

What Happened, and as the New Lender What Do You Do?

Perhaps it was all an innocent mistake, but alternatively, the prior owner defrauded the prior lender. The payoff scam used to be a common occurrence in years ago and we are seeing an increase in cases again.

In short, a borrower lists their property for sale and makes several, sometimes up to 5-6 months of payments at once, and then requests a payoff statement. The payoff is generated, taking into account those payments. The property is sold, the borrower tenders the full payoff amount per the statement, and the new purchaser

believes he/she is purchasing the property free and clear. However, unbeknownst to the prior lender, those final payments tendered by the former borrower prior to the payoff statement being generated were not good funds. Sometimes they are NSF, other times they are counterfeit cashier's checks. Those payments bounce and the prior lender goes after the outstanding funds not properly accounted for in the payoff statement.

What is the Remedy?

In California, if you are the new lender, you are in the clear. In the event you find the prior lender foreclosing on the property which secures your lien, simply tender a claim to your insurance carrier. They should send a letter to the prior lender/servicer saying, not so fast!

If you are the prior lender, things are much more difficult. You cannot foreclose – depending on the state, recovery may be limited to an unsecured obligation pursuant to the terms of the Note. For example, California Civil Code Section 2943(d)(3) limits a lender's option for recovering on monies that were not included in the payoff demand, to an

unsecured claim against the prior borrower. In other words, the prior lender cannot go after the property! In cases where the funds not included in the payoff statement is a large amount and the former borrower has assets, it is likely cost effective to file suit and seek an equitable lien against the property. *Ghirardo v. Antonioli*, (1996) 14 Cal.4th 39, 50-5. However, it is on a case-by-case basis and merely locating the former borrower may prove to not be cost effective.

As the Prior Lender, How Do You Protect Yourself?

Under California law, you have 21 days from the date of the request to provide a payoff statement to the beneficiary, or his or her assignees. That payoff statement shall be in writing and include the necessary information to calculate the payoff for a period of time, not to exceed 30 days. Civil Code 2943. Often times, especially when a loan is in foreclosure, additional fees, such as foreclosure fees and costs have to be requested from foreclosure counsel, which increases the work to be performed and eats into the 21 days.

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These payoff scams are successful because the borrower intentionally makes the numerous payments made very close to when a payoff is requested, using that short window to their advantage. You should be cognizant of all payments coming in during that window and ensure the payments have cleared before generating the payoff statement. If you don't, any amounts still owed are an unsecured obligation and you are often left with little recourse to recoup those missing funds.

If you have any questions regarding this article, please do not hesitate to contact Jennifer Brady at jbrady@wrightlegal.net or Robert Finlay at rfinlay@wrightlegal.net.

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