

"(I Can't Get No) Satisfaction": New Statutory Requirements for Payoff Letters and Satisfactions

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Practice Area: Banking and Commercial Finance & Real Estate

A new Wisconsin statute – Section 708.15 – went into effect on December 14, 2013. The statute establishes requirements for secured creditors in real estate transactions with regard to payoff letters and the satisfaction of mortgages. This *Update* focuses on the requirements affecting commercial real estate only. There are certain additional requirements that apply to payoff letters and mortgage satisfactions for one-to-four family dwellings that are not discussed herein.

A person entitled to assert rights under this statute is defined as an "entitled person." An entitled person is any of the following: (a) the person liable for payment or performance of the obligation secured by the real property collateral; (b) the landowner; (c) the person responsible for the preparation of the settlement statement for the conveyance of real property; or (d) the authorized agents for any of them. An entitled person can include an individual, a business, an estate, a trust, a governmental unit, or any other legal or commercial entity.

Payoff Letters

A secured creditor must provide, upon written request, one payoff statement every two months free of charge, but may charge a fee of \$25 for each additional payoff statement requested during any two-month period. Other new requirements regarding payoff statements include:

- The secured creditor must honor a request from an entitled person for a payoff statement within a "reasonable time" (of which the shortest reasonable time period would be seven days, per the statute) of the effective date of the request.
 - A request sent by U.S. Postal Service or other standard delivery service is effective three days after it is mailed or deposited with the delivery service.
 - A request sent by overnight delivery is effective the day after it is deposited with the delivery service.
 - A request sent by fax or email is effective on the day it is sent.
- The payoff statement must be sent to the entitled person who requested it or to the entitled person's authorized agent (if so directed).
- The payoff statement must include:
 - The date it was prepared and the amount as of the date it was prepared;
 - The information reasonably necessary to calculate the payoff amount as of the requested payoff date, including the *per diem* interest;
 - A charge for the \$25 payoff statement fee, if applicable;
 - The payment deadline;
 - Where the payment must be made; and
 - Any limitations on method of payment.
- A secured creditor "may not qualify a payoff amount or state that the payoff amount is subject to change before the payoff date." Among other things, a secured creditor may not expressly reserve the right in the payoff statement to collect additional funds before or subsequent to its receipt of the payoff amount to correct an error or omission in the payoff amount.

The payoff amount that the secured creditor is required to include in the payoff statement is "the sum necessary to satisfy ... [an obligation the payment or performance of which is secured by a security interest]." Therefore, as is always the case, a secured creditor should include in its payoff statement the amount of all expenses and fees to which it is entitled under its loan documents, as well as any debt that is cross-collateralized by the real property collateral. If a secured creditor understates the payoff amount for any reason, then it may send a corrected payoff statement, but such corrected statement will not bind any person that has already "reasonably and detrimentally" relied upon the previously understated payoff amount.

One of the shortfalls of the statute is that it fails to address how a secured creditor should deal with indemnification or other obligations that are not yet determined, but which, by the terms of the mortgage, are secured by the real property collateral. A secured creditor is required to provide "information reasonably necessary to calculate the payoff amount" in the payoff statement, but unliquidated obligations by definition cannot be calculated. The statute essentially forces the secured creditor to omit unliquidated obligations from its payoff statement and release its real property collateral as security for such obligations.

However, by its express terms, Section 708.15 does not "[a]ffect the right of a secured creditor to recover any sum that it did not include in a payoff amount from any person liable for payment of the secured obligation." As a result, the secured creditor may enforce the omitted obligations against the obligated party – even though such obligations will be unsecured.

Except in limited circumstances (discussed below), if a secured creditor fails to comply with these new requirements, it will be liable for actual damages, plus \$500.

Mortgage Satisfactions

In addition to governing payoff statements, this legislation also imposes new requirements with regard to the recording of mortgage satisfactions and establishes liability for failure to timely satisfy a mortgage.

Section 708.15(5)(a) requires a secured creditor to "submit for recording a satisfaction of a security instrument within 30 days after the secured creditor receives full payment or performance of the secured obligation as provided in a payoff statement ..." (and receipt of a request that the secured creditor terminate the line of credit, if the mortgage secures a line of credit or future advances). A document is deemed a "satisfaction" under the statute if it expressly states that the mortgage has been paid or satisfied in whole or part. As discussed above, the statute does not bar the secured creditor from recovering the difference between an understated amount in a payoff statement and the correct amount from any person liable for payment of the obligation, or any other omitted amount, but if any party "reasonably and detrimentally" relies upon an incorrect payoff amount, then the secured creditor is still obligated to satisfy its mortgage upon receipt of payment of the understated amount.

Further, Section 708.15 defines "submit for recording" as delivering, with required fees and taxes, a document sufficient to be recorded thereunder. The statute does not specify which party – e.g. the entitled person or the secured creditor – must bear the cost of the recording fees.

Finally, if a secured creditor fails to file a mortgage satisfaction within 30 days, it will be liable for actual damages, plus \$500, plus attorneys' fees and costs. The only circumstances in which a secured creditor will not be liable is if the secured creditor (a) has established a "reasonable procedure to achieve compliance" with Section 708.15; (b) has complied with that procedure in good faith; and (c) was unable to comply because of "circumstances beyond its control." Therefore, a secured creditor should make sure it establishes internal procedures relating to payoff statements and mortgage satisfactions.

Please contact us with any questions, or for assistance in preparing payoff letters and/or satisfactions of mortgages that comply with the new statutory requirements. In addition, please contact us for information on additional payoff letter and mortgage satisfaction requirements that apply only to one-to-four family residential properties.

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