



FOSTER PEPPER PLLC

PAYOFF STATEMENT LITIGATION

Recently, a number of lawsuits have been filed throughout the country, including here in Washington State, alleging claims based upon the form of the Payoff Statements used by various lenders and related fees. Specifically, the lawsuits allege that the Payoff Statements are misleading in that certain unsecured administrative fees, such as re-conveyance fees, recording fees and facsimile fees, are placed and/or located on the face of the Payoff Statement adjacent to the amounts due for principal and interest, leading the borrower to believe that the administrative fees are secured by the deed of trust and must be paid before the property can be re-conveyed to the borrower. This “capacity to deceive” serves as the basis for a claim under the Washington Consumer Protection Act, RCW 19.86.020. Related claims for breach of contract and unjust enrichment are also alleged on the theory that the loan documents do not authorize certain charges, such as facsimile fees.

Foster Pepper PLLC has successfully defended a number of these class actions, more than any other firm in the Northwest. A number of similar Payoff Statement class actions have been filed recently in Washington. See *Sando v. Homestreet Bank*, King County Superior Court, No. 05-2-28946-5SEA; *Bina v. Sterling Savings Bank*, King County Superior Court, No. 05-2-28948-1SEA; *Gerber v. First Horizon Home Loans Corp.*, King County Superior Court, No. 05-2-25832-2SEA; *Davis v. Homecomings Financial*, King County Superior Court, No. 05-2-24492-5SEA; and *McCune v. Wilshire Credit Corp.*, King County Superior Court, No. 05-2-24615-4SEA. Class litigation related to Payoff Statements is also pending in other jurisdictions. See *Senterfitt v. Suntrust Mortgage*, 2005 WL 2100594 (U.S. Dist. Ct., S.D. Georgia). Litigation related to Payoff Statements has been around for a number of years and this rash of new class action litigation continues that trend.

Washington courts have addressed issues related to Payoff Statements in two cases: *Cain v. Source One Mortgage Services*, 1999 WL 674776 (Wash.App.Div.1), and *Dwyer v. J.L. Kislak Mortgage Corporation*, 103 Wash.App. 542, 13 P.3d 240 (2000). In *Dwyer*, the court held that including non-secured fees, such as facsimile fees and re-conveyance fees, in the same column of a Payoff Statement with secured fees has the capacity to deceive reasonable consumers into believing that they must pay the fees before the deed of trust will be released. In *Cain*, the court did not address the consumer protection or unjust enrichment claims because of statute of limitation problems, but it did find that charging a facsimile fee did not constitute a breach of contract since the borrower expressly requested the statement be sent by facsimile to his new lender.

Based on the initiation of these new lawsuits nationally, I am advising my mortgage banking clients to review the substance and form of their payoff statements with the following issues in mind: *First*, are miscellaneous or administrative fees unsecured by the deed of trust

listed in the same column or adjacent to the secured sums on your Payoff Statement? If they are, the form of the Payoff Statement may need to be modified such that the unsecured fees are listed separately. *Second*, are the administrative or miscellaneous fees charged to the borrower authorized by the loan documents or other agreement? For example, if the borrower requests that a payoff statement be sent by facsimile, the lender should make some written record of the request and the borrower should be advised of the charge. Also, ensure that all unsecured charges are authorized. Note that some loan documents, such as the standard FNMA (“Fannie Mae”) Deed of Trust at Paragraph 22, provide that once the loan is paid in full the property shall be re-conveyed “without warranty and without charge,” arguably precluding a re-conveyance fee.

Douglas Lowell Davies is a partner in the Seattle office of Foster Pepper PLLC. He has represented national and global financial institutions in litigation and business matters for twenty-five years, including major banks, asset-backed lenders, secondary market investors, mortgage lenders and brokers. Mr. Davies has lectured and presented educational materials for numerous organizations on a variety of topics impacting financial institutions, including corporate ethics and antitrust issues. He is frequently published and recently spoke at the National Association of Mortgage Brokers 2007 Annual Conference. Mr. Davies is actively involved in a number of local and national organizations, including the Mortgage Bankers Association and the Western Regional Mortgage Brokers Conference, and has been interviewed and quoted on mortgage industry issues by *Reuters*, *The New York Herald Tribune*, and *The Washington Post*.

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