

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 353 Mortgage Payoff Letters

**SPONSOR(S):** Civil Justice & Property Rights Subcommittee, Insurance & Banking Subcommittee, Fabricio

**TIED BILLS:** IDEN./SIM. **BILLS:** CS/SB 1016

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	16 Y, 0 N, As CS	Hinshelwood	Luczynski
2) Civil Justice & Property Rights Subcommittee	17 Y, 0 N, As CS	Mathews	Jones
3) Commerce Committee	22 Y, 0 N	Hinshelwood	Hamon

### SUMMARY ANALYSIS

A mortgage payoff letter may be requested by a mortgagor who is selling the property that is collateral for the mortgage loan, refinancing the mortgage loan, or paying off the mortgage loan. Florida law requires that a mortgage lender or servicer deliver to the requestor, within 14 days after receipt of a written request, a mortgage payoff letter with the unpaid balance of the loan. When a mortgage loan has been fully paid, the mortgage lender or servicer must execute in writing an instrument acknowledging satisfaction of the mortgage and have the instrument acknowledged and duly entered in the official records of the proper county. Within 60 days after receiving full payment of the mortgage loan, the mortgage lender or servicer must send the borrower the recorded satisfaction.

A mortgage payoff letter may sometimes include language reserving the mortgage servicer's or lender's right to change the amounts listed in the payoff letter and disclaiming the reliance of others on the payoff letter. In the event that the mortgage lender or servicer determines after sending the mortgage payoff letter that the borrower owes additional money, the mortgage lender or servicer may sometimes return the funds received from the closing which were sent in reliance on the amount stated in the mortgage payoff letter. In turn, this may cause continued accrual of interest and potential fees during the pendency of resolving the discrepancy in the amount owed. Further, as long as the discrepancy or dispute remains unresolved, there may not be clear title to the property.

The bill:

- Includes legislative findings that a mortgage payoff letter's accuracy and timeliness are critical, and that the addition of disclaimer language within such letters creates unnecessary delays within the real estate market.
- Reduces from 14 days to 10 days the timeframe within which a lender or servicer must send a requested mortgage payoff letter.
- Standardizes the contents of the mortgage payoff letter as to all of the authorized requestors.
- Except where the property is in foreclosure or the borrower is in bankruptcy, prohibits the lender or servicer, from qualifying, reserving the right to change, or conditioning or disclaiming the reliance of others on the information provided in a mortgage payoff letter; and provides that any attempt to do so is void and unenforceable.
- Allows the lender or mortgage servicer to send a corrected mortgage payoff letter superseding a prior payoff letter so long as the corrected payoff letter is received by 3 p.m. at least one business day before payment is made in reliance on the payoff letter.
- Prohibits the lender or servicer from denying the accuracy of the mortgage payoff letter against any person who relied on it.
- Requires the lender or servicer to promptly apply a payment received in reliance on the payoff letter.
- Specifies the process by which a mortgage payoff letter may be requested and sent.
- Requires the lender or servicer, within 60 days after the mortgage loan has been paid pursuant to the mortgage payoff letter, to execute, have duly entered in the official records of the proper county, and send to the mortgagor or record title owner an instrument acknowledging satisfaction of the mortgage.

The bill has no fiscal impact on state and local governments and an indeterminate fiscal impact on the private sector.

The bill provides an effective date of October 1, 2022, and states that it applies to all mortgages existing as of such effective date or entered into afterwards, as well as to all loans secured by such mortgages.

**This document does not reflect the intent or official position of the bill sponsor or House of Representatives .**

**STORAGE NAME:** h0353c.COM

**DATE:** 2/24/2022

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background

##### Estoppel Letters

In general, an estoppel letter (or estoppel certificate) is a legal document provided by one party that enables another party to rely on the document's accuracy, and that prevents the first party from later claiming different facts or terms regarding an agreement.<sup>1</sup> With respect to real estate, these types of letters are typically used to confirm amounts of moneys owed that attach to a certain piece of property, such as mortgage debt, condominium association fees, homeowners' association fees, and outstanding claims or deposits due to tenants. These types of letters are often sought prior to closing on a real estate transaction as part of due diligence to confirm proper amounts due that can affect the settlement of such transaction.

##### Mortgage Payoff Letters

In Florida, s. 701.04, F.S., provides the requirements for estoppel letters with respect to real estate mortgages; such letters are also commonly known as "mortgage payoff letters."<sup>2</sup> A mortgage payoff letter<sup>3</sup> may be requested by a mortgagor<sup>4</sup> who is selling the property that is collateral for the mortgage loan, refinancing the mortgage loan, or paying off the mortgage loan. Florida law requires that a mortgage lender or servicer deliver to the requestor, within 14 days after receipt of a written request, a mortgage payoff letter setting forth the unpaid balance of the loan secured by the mortgage.<sup>5</sup> The request may be made by a mortgagor, a record title owner of the property, a fiduciary or trustee lawfully acting on behalf of a record title owner, or any other person lawfully authorized to act on behalf of a mortgagor or record title owner of the property.<sup>6</sup>

Florida law specifies the information that must be contained in the mortgage payoff letter, depending on who requests the letter, as follows:<sup>7</sup>

- If the mortgagor, or any person lawfully authorized to act on behalf of the mortgagor, makes the request, the mortgage payoff letter must include an itemization of the principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance.
- If a record title owner of the property, or any person lawfully authorized to act on behalf of a mortgagor or record title owner of the property, makes the request, the mortgage payoff letter may include the itemization of the information required above, but must at a minimum include the total unpaid balance due under or secured by the mortgage on a per-day basis.

When the amount of money due on any mortgage loan has been fully paid, the mortgage lender or servicer must execute a written instrument acknowledging satisfaction of the mortgage and have the instrument acknowledged, or proven, and duly entered in the official records of the proper county.<sup>8</sup> Within 60 days after receiving full payment of the mortgage loan, the person required to acknowledge satisfaction of the mortgage must send or cause to be sent the recorded satisfaction to the person who

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<sup>1</sup> CREPedia, *Estoppel Letter*, <https://www.crepedia.com/dictionary/definitions/estoppel-letter/> (last visited Feb. 14, 2022); Redfin, *What is an Estoppel Certificate*, <https://www.redfin.com/definition/estoppel-certificate> (last visited Feb. 14, 2022).

<sup>2</sup> S. 701.041, F.S., defines an estoppel letter in regards to mortgages as a statement of the amount of the unpaid balance of a loan secured by a mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage; and the interest on a per-day basis for the unpaid balance.

<sup>3</sup> Referred to as an "estoppel letter" in Florida statutes. See ss. 701.04 and 701.041, F.S.

<sup>4</sup> Mortgagor means "[s]omeone who mortgages property; the mortgage-debtor, or borrower." Black's Law Dictionary (11th ed. 2019).

<sup>5</sup> S. 701.04(1), F.S.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> S. 701.04(2), F.S.

has made the full payment.<sup>9</sup> In a civil action arising out of this requirement, the prevailing party is entitled to attorney fees and costs.

Section 701.04(2), F.S., requires the full payment of the mortgage, not the amount specified in an estoppel letter provided pursuant to 701.04(1), F.S. This is in contrast with homeowners' association estoppel certificates in Florida, where s. 720.30851(3), F.S., specifically states that a homeowners' association "waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns." Sections 718.116(8)(c), and 719.108(6)(c), F.S., provide similar language regarding estoppel certificates for any unpaid condominium association assessments and unpaid rents, and assessments due to cooperatives ("co-ops"), respectively.<sup>10</sup> A mortgagee is not necessarily held to the same waiver of rights to collect additional moneys from a mortgagor upon the provision of an estoppel letter, as s. 701.04, F.S., does not provide a similar waiver provision as those applying to homeowners' associations, condominium associations, and cooperatives.<sup>11</sup>

Some mortgage servicers and lenders, when sending the estoppel letter required under s. 701.04(2), F.S., include language which seeks to reserve that servicer's or lender's right to change the amounts listed in the payoff letter or disclaiming the reliance of others on the information in the payoff letter. Examples of such language include the following statements:

- "The payoff figures provided are subject to final verification by the Note Holder. The noteholder reserves the right to adjust these figures and refuse or accept any funds which are insufficient to satisfy the full indebtedness for any reason."
- "The payoff amount is subject to our final verification once we receive payoff funds.... If the payoff funds received are insufficient to pay off the account in full for any reason including, but not limited to, error in calculation, NSF, or additional escrow disbursements and/or adjustments. [We] reserve the right to decline to pay the account in full. In addition, any and all interest will be due at the time of payoff."
- "All payoff figures are subject to final verification of the mortgage lender. We may adjust any portion of this payoff statement, at any time, for the following reasons, including but not limited to: escrow disbursements made on behalf of the loan holder(s), fee advances, items returned by your financial institution including previously made payments, additional fees or charges, and any good faith and/or inadvertent clerical errors."
- "We will not be bound by errors and/or omissions contained herein."
- "Agent hereby reserves the right to adjust Payoff Amount or the Per Diem Amount in the event that we discover a mathematical, typographical, bookkeeping or clerical error."
- "Borrower forever releases and discharges Agent, the Lenders, and their respective officers, directors, employees, agents, representatives, successors and assigns...from any and all claims, causes of action, damages and liabilities of any nature whatsoever, known or unknown, which such person ever had, now has or might hereafter have against [the parties] which relates, directly or indirectly, to any of the Loan Documents or the Loan."<sup>12</sup>

Such language can frustrate the parties involved in a real estate transaction since such language essentially attempts to remove the mortgagee's right to rely on the amounts provided therein. In the event that the mortgage lender or servicer determines after sending an estoppel letter that the borrower

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<sup>9</sup> *Id.*

<sup>10</sup> S. 701.116(8)(c) states that a condominium association "waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns." 719.108(6)(c), F.S. states that a cooperative association "waives the right to collect any moneys owed in excess of the amounts specified in the estoppel certificate from any person who in good faith relies upon the estoppel certificate and from the person's successors and assigns."

<sup>11</sup> *But see, Rissman on Behalf of Rissman Inv. Co. v. Kilbourne*, 643 So. 2d 1136, 1139 (Fla. 1st DCA 1994), where the 1<sup>st</sup> District Court of Appeal found that a lender could be estopped from claiming additional moneys after an estoppel letter. The facts of this case, however, were rather unique. As the court mentioned, the mortgagee regularly reaffirmed the amount given in the estoppel letter over a number of years. In addition, the mortgagor made a number of transactions based in detrimental reliance on the amount provided by the mortgagee.

<sup>12</sup> See Email from Melissa Murphy, Executive Vice President, Chief Legal Officer & General Counsel, The Fund (Feb. 4, 2022, 11:46 EST) (on file with the Senate Banking and Insurance Committee), which provided samples of escrow letters that were sent to Florida borrowers.

owes additional money beyond that provided in the estoppel letter, some mortgage lenders or servicers return all of the funds received from the closing and demand full payment, even if such funds were sent in reliance on an estoppel letter that was never corrected or revised by the lender or servicer. This can result in the continued accrual of interest on the full amount of the mortgage (not just the amount in dispute) during the pendency of resolving the discrepancy in the amount owed. Further, as long as the discrepancy or dispute continues, there may not be clear title to the property.<sup>13</sup>

## Effect of the Bill

The bill reduces from 14 days to 10 days the timeframe within which a mortgage lender or servicer must send a requested mortgage payoff letter setting forth the unpaid balance of the mortgage loan. If the request for a mortgage payoff letter is made by a person other than the mortgagor,<sup>14</sup> the request must include a copy of the instrument showing such person's title in the property or other lawful authorization, and the mortgage lender or servicer must notify the mortgagor of the request.

The bill standardizes the information that must be contained in the mortgage payoff letter, regardless of whether the requestor is the mortgagor, a record title owner, or a person lawfully authorized to act on behalf of the mortgagor or record title owner. The letter must at least include the unpaid balance of the loan properly due under or secured by the mortgage as of the date specified in the letter, including an itemization of the principal, interest, and any other charges comprising the unpaid balance.

The bill specifies the process for requesting a mortgage payoff letter. A written request for a mortgage payoff letter must be sent to the mortgage lender or servicer by first-class mail, postage prepaid; by common carrier delivery service; or by e-mail, facsimile, or other electronic means at the address made available by the mortgage lender or servicer for such purpose, or through an automated system provided by the mortgage lender or servicer for requesting a mortgage payoff letter. The request is considered received:

- Five business days after the request sent by first-class mail is deposited with the United States Postal Service;
- The day the request is delivered by a common carrier delivery service; or
- The day the request is sent by e-mail, facsimile, or other electronic means or through an automated system provided by the mortgage lender or servicer for requesting a mortgage payoff letter.

If any of the foregoing days fall on a Saturday, Sunday, or legal holiday, the request for a mortgage payoff letter is considered timely received by the mortgagee or mortgage servicer on the next business day.

The bill also specifies the process by which a mortgage payoff letter must be sent. The mortgage lender or servicer must send a mortgage payoff letter by first-class mail; by common carrier delivery service; or by e-mail, facsimile, or other electronic means, as directed in the written request, or through an automated system provided by the mortgage lender or servicer for this purpose. However, the mortgage lender or servicer is not required to pay for a common carrier delivery service. If the 10-day period after a written request is received by the mortgage lender or servicer ends on a Saturday, Sunday, or legal holiday, the mortgage payoff letter is considered timely if it is sent by the close of business on the next business day.

The bill prohibits the mortgage lender or servicer from qualifying, reserving the right to change, or conditioning or disclaiming the reliance of others on the information provided in a mortgage payoff letter, and any attempt to do so is void and unenforceable. However, this prohibition does not apply to

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<sup>13</sup> *Id.*

<sup>14</sup> Definition of "mortgagor", *supra* note 4.

mortgages for which a notice of lis pendens<sup>15</sup> in a foreclosure action or a suggestion of bankruptcy<sup>16</sup> has been properly filed and recorded.

If the mortgage lender or servicer determines that any of the information in the mortgage payoff letter was inaccurate, the mortgage lender or servicer may send a corrected mortgage payoff letter. The corrected mortgage payoff letter supersedes any prior mortgage payoff letter so long as the corrected payoff letter is received by 3:00 p.m.<sup>17</sup> at least one business day before payment is made in reliance on the mortgage payoff letter. The bill provides that the corrected estoppel letter is considered received by the person who requested the original estoppel letter:

- Five business days after the corrected estoppel letter sent by first-class mail is deposited with the United States Postal Service;
- The day the corrected estoppel letter is delivered by a common carrier delivery service; or
- The day the corrected estoppel letter is sent by e-mail, facsimile, or other electronic means or through an automated system provided by the mortgagee or mortgage servicer for requesting an estoppel letter.

If any of the information in the mortgage payoff letter was inaccurate and there was not a timely corrected payoff letter, the bill prohibits the mortgage lender or servicer from denying the accuracy of the mortgage payoff letter against any person who relied on it.

If a payment is received at the location and in the manner specified by the mortgage lender or servicer, the mortgage lender or servicer must accept, and may not return, any payment received in reliance on the mortgage payoff letter, and the mortgage lender or servicer must promptly apply such payment to the unpaid balance of the mortgage loan.

The bill requires the mortgage lender or servicer, within 60 days after the mortgage loan has been fully paid or paid pursuant to the mortgage payoff letter, to execute, send for recording in the official records of the proper county, and send to the mortgagor or record title owner an instrument acknowledging satisfaction of the mortgage. The prevailing party in a civil action brought against the mortgage lender or servicer to enforce this requirement is entitled to reasonable attorney fees and costs.

The bill conforms the definition of “estoppel letter” in s. 701.041, F.S., to the estoppel letter requirements in s. 701.04, F.S.

The bill provides a statement of legislative intent and clarifies that the bill is applicable to all mortgages existing at the time of the effective date of the bill and to all mortgages entered into on or after the effective date as well as to all loans secured by such mortgages.

The bill provides an effective date of October 1, 2022.

## B. SECTION DIRECTORY:

**Section 1.** Amends s. 701.04, F.S., relating to cancellation of mortgages, liens, and judgments.

**Section 2.** Amends s. 701.041, F.S., relating to title insurer; mortgage release certificate.

**Section 3.** Provides a statement of legislative intent.

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<sup>15</sup> A notice of lis pendens is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome. Black’s Law Dictionary (11th ed. 2019). See also s. 48.23, F.S., relating to lis pendens.

<sup>16</sup> “Suggestion of bankruptcy is a document filed with a court to put it on notice that the defendant in a pending lawsuit has filed a bankruptcy case. A party can file a suggestion of bankruptcy whenever a party believes that the bankruptcy or automatic stay provision of bankruptcy code has an effect on a state court case.” US Legal, <https://definitions.uslegal.com/s/suggestion-of-bankruptcy/> (last visited Feb. 14, 2022).

<sup>17</sup> The corrected estoppel letter must be received by the person who requested the original estoppel letter by 3:00 p.m. in such person’s time zone.

**Section 4.** Provides that the bill applies to all mortgages entered into before and after the effective date.

**Section 5.** Provides an effective date of October 1, 2022.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill has an indeterminate impact on the private sector. The bill may lead to smoother real estate closings to the extent that mortgage lenders or servicers provide more accurate information in mortgage payoff letters. Additionally, the bill may help ensure clear title to the property.

### D. FISCAL COMMENTS:

None.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

Due in part to the federal and state constitutional Contracts Clauses, the Legislature generally may not impair existing contractual obligations.<sup>18</sup> Florida courts have generally interpreted the state's Contract Clause to mirror the U.S. Constitution's Contract Clause; thus, Florida courts have sometimes struck down laws retroactively burdening or altering contracts.<sup>19</sup> The bill states that it applies to all mortgages that are in existence as of its effective date. Whether the Contracts Clauses or other constitutional provisions may be implicated by this provision will likely depend on the facts of each particular case.

### B. RULE-MAKING AUTHORITY:

None.

<sup>18</sup> Art. I, s. 10, U.S. Const.; art. I, s. 10, Fla. Const.; see also U.S. Const. amends. V and XIV (prohibitions against violating due process).

<sup>19</sup> See, e.g., *Citrus Cnty. Hosp. Bd. v. Citrus Mem'l Health Found., Inc.*, 150 So. 3d 1102, 1108 (Fla. 2014).

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

On January 27, 2022, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from HB 353 in the following ways:

- Amends the process for requesting and sending a mortgage payoff letter.
- Exempts mortgages for which a foreclosure action or a suggestion of bankruptcy is filed from the prohibition on a mortgage lender or servicer sending a payoff letter that qualifies, reserves the right to change, or conditions or disclaims the reliance of others on the information provided in the payoff letter.
- Amends provisions relating to sending a corrected payoff letter.
- States certain rights and defenses of parties.
- Amends the provision requiring a mortgage lender or servicer to promptly apply funds received in reliance on the payoff letter.
- Removes a cause of action and related damages.
- Amends the definition of “estoppel letter”.
- Makes other technical changes.

On February 16, 2022, the Civil Justice & Property Rights Subcommittee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute differs from CS/HB 353 in that it:

- Provides the circumstances by which the corrected estoppel letter is considered to be received by the party who requested the original estoppel letter;
- Removes a provision specifying that the bill does not affect the right of a mortgagee to recover any sum that it did not include in an estoppel letter from any person liable for the payment of the loan;
- Removes a provision which provided that the recorded release of the mortgage does not relieve the mortgagor from any personal liability on the loan;
- Provides a statement of legislative intent;
- Clarifies that the bill applies to all mortgages, not just mortgages entered into after the effective date; and
- Makes other clarifying and technical changes.

This analysis has been updated to reflect the committee substitute as passed by the Civil Justice & Property Rights Subcommittee.