

OFFER TO PAY

Memorandum of California Law

California Code of Civil Procedure, Section 2074.

Rejected offer as equivalent to production and tender of money, instrument, or property.

An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property. (Enacted 1872)

Under this section, where circumstances authorized the use of mails, was effective when deposited in the mail and was equivalent to tender on the mailing date.

When homeowners or borrowers seek to challenge foreclosures against them, California courts have long recognized the “full tender rule”, an equitable principle that requires the challenger to tender the amount owed as a prerequisite to making the challenge. The rule requires the homeowner to offer to pay the full amount owed before a foreclosure sale has already occurred, or offer to cure any default if the sale is still pending.

There is a long-recognized “Right of Equitable Redemption” in all fifty states: that anytime before the “decree of foreclosure” cried by auctioneer, the homeowner in possession has the right to redeem her property by tendering full payoff. The recognition under the law of what then would constitute lawful tender and timely tender, is codified in statutes governing Tender of Debt.

California Code of Civil Procedure, Section 2076. Objections to tender; time; specification.

The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the

amount, terms, or kind which he requires, or be precluded from objecting afterwards. (Enacted 1872)

"The rationale of the requirement of the specific objection is that the offeror should be permitted to remedy any defects in his tender; the offeree is therefore not allowed to remain silent at the time of the tender and later surprise the offeror with hidden objections." Thomassen v. Carr, (1967) 250 C.A.2d 341; 58 Cal. Rptr. 297.

"Provisions of this section concerning requirements for objections to tender applies when tender is made".

Canal-Randolph Anaheim, Inc. v. Moore (App. 4 Dist. 1978) 144 Cal.Rptr. 474, 78 Cal.App.3d 477.

"This section is liberally construed".

Kofoed v. Gorden (1898) 122 Cal. 314, 54 P. 1115.

"West's Ann.Cal.C.C.P. Section 2076, requiring objections to tender to be specified and West's Ann.Cal.Civ.Code Section 1501, providing that all objections to mode of offer or performance are waived by creditor if not stated at time to person making offer, should be read together". Sanguansak v. Myers (App. 1 Dist. 1986) 223 Cal.Rptr. 490, 178 Cal.App.3d 110.

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"West's Ann.Cal.C.C.P. Section 2076, and West's Ann.Cal.Civ.Code Section 1501 are primarily intended to protect debtors/offerors who perform or tender performance in good faith from harm by creditors/offerees who refuse to accept or intentionally fail to demand proper tender".

Sanguansak v. Myers (App. 1 Dist 1986) 223 Cal.Rptr. 490, 178 Cal.App.3d 110.

"Purpose of statutes requiring that person to whom tender is made must specify any objection he has to tender is to allow debtor who is willing and able to pay his debt to know what his creditor demands so that debtor may, if he wishes, make conforming tender".

Noyes v. Habitation Resources, Inc. (App. 2 Dist. 1975) 123 Cal.Rptr. 261, 49 Cal.App.3d 910.

“Provision of this section requiring person to whom tender is made to specify any objection he has to money or be deemed to have waived it are for purpose of informing debtor, who is willing and able to pay his debt, that he may if he chooses, make offer conform.

Still v. Plaza Marina Commercial Corp. (App. 5 Dist. 1971) 98 Cal.Rptr. 414, 21 Cal.App.3d 378.

“If creditor objects to mode of tender, it must be on ground that there is no lawful offer of money.

Noyes v. Habitation Resources, Inc. (App. 2 Dist. 1975) 123 Cal.Rptr. 261, 49 Cal.App.3d 910.

“Where there is no objection by payee to form of offer, and writing itself prescribes no particular form, physical tender of money itself is unnecessary”.
Moriarty v. Carlson (App. 2 Dist. 1948) 83 Cal.App.2d 745, 189 P.2d 51.

“A tender need not be kept good when it appears that it will not be accepted”.
Hossom v. City of Long Beach (App. 2 Dist. 1948) 83 Cal.App.2d 745, 189 P.2d 787.

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“Rational of requirement that offeree make specific objection to offeror’s tender or waive objection to conditions imposed by offeror is that offeror should be permitted to remedy any defects in his tender”. Layton v. West (App. 1 Dist. 1969) 76 Cal.Rptr. 507, 271 Cal. App.2d 508.

“The basis of the rule that objections to a tender not raise are deemed waived is that ordinarily a party who makes an improper tender, through no fault of his own, should be given an opportunity to correct it”.

Weinberg v. Dayton Storage Co. (App. 1 Dist. 1942) 50 Cal.App.2d 750, 124 P.2d 155.

“A creditor who objects to mode of an offer of performance, which creditor has an opportunity to state, must so state it, if objection could have been obviated by the other party, otherwise it will be waived”. Hohener v. Gauss (App. 2 Dist. 1963) 34 Cal.Rptr. 656, 221 Cal.App.2d 797.

“Creditor may not remain silent regarding tender and later surprise debtor with hidden objections thereto”.

Noyes v. Habitation Resources, Inc. (App. 2 Dist. 1975) 123 Cal.Rptr. 261, 49 Cal.App.3d 910.

“Defendant, not having objected to amount and terms of tender, cannot first urge on appeal that tender was subterfuge”.

Weyse v. Biedebach (App. 2 Dist. 1927) 86 Cal.App. 736, 261 P. 1092.

“Objections to time and mode of tender, not having been made at time nor till trial, are deemed waived”.

Smith v. Lobb (App. 1917) 33 Cal.App. 790, 166 P. 1026.

“All objections to a tender by personal check, cashier’s check or by money are waived by the creditor if not then stated”.

Rose v. Hecht (App. 2 Dist. 1949) 94 Cal.App.2d 662, 211 P.2d 347.

“By failure to object to a tender as to the mode of the offer, the party to whom the tender is made waives the grounds of the objections which he had an opportunity to state at the time and which could then have been obviated by the tenderer”.

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Smith v. Central & Pacific Imp Corp. (App. 1 Dist. 1919) 45 Cal.App. 348, 187 P. 456.

Uniform Commercial Code, Section 3603 (b). Tender of Payment.

“If tender of payment of an obligation to pay an instrument is made to a person entitled to enforce the instrument and the instrument is refused, there is discharge, to the extent of the amount of the tender of the obligation of an indorser or accommodation party having a right of recourse with respect to the obligation to which the tender relates”.

Uniform Commercial Code, Section 3604. Tender of Payment.

(1) Any party making full tender of payment to a holder when or after it is due is discharged to the extent of all subsequent liability for interest, costs, and attorney’s fees.

(2)The holder’s refusal of such tender wholly discharges any party who has a right of recourse against the party making tender.

(3) Where the maker or acceptor of an instrument payable otherwise than on demand is able and ready to pay at every place of payment specified in the instrument when it is due is equivalent to tender.

Operation of Law.

“Operation of law means the practical effect of what the law is intended to be on the subject”.

American Bitumuls & Asphalt Co. v. U.S., Cust.Ct. 146 F.Supp. 703, 713, 714.

“In its usual signification, “operation of law” is generally applicable to matters involving title and refers to situations in which rights, and sometimes liabilities, are created without actions by the parties; it is said also to mean the obligation of law; or its practical working and effect”.

American Bitumuls & Asphalt Co. v. U.S., Cust.Ct. 146 F.Supp. 703, 713, 714.

Default.

“Default. By its derivation, a failure. An omission of that which ought to be done. Town of Milton v. Brusco, 111, Vt. 82, 10 A.2d 203, 205. Specifically, the omission or failure to perform a legal or contractual duty, Easterwood v. Willingham, Tex.Civ.App., 47S.W2d. 393, 395; to observe a promise or discharge an obligation (e.g. to pay interest or principal on a debt when due), Bradbury v. Thomas, 135 Cal.App. 435, 27 P.2d 402; or to perform an agreement, Eastman v. Morgan, D.C.N.Y., 43 F.Supp. 637, 641. The term also embraces the idea of dishonest, and of wrongful act, Greco v. S.S. Kresge Co., 277 N.Y. 26, 12 N.E.2d 557, 52; or an act of omission discreditable to one’s profession, Hilkert v. Canning, 58 Ariz. 290, 119 P.2d 233, 236.”

Black’s Law Dictionary, Sixth Edition, page 417.

Discharge.

"As applied to demands, claims, rights of action, incumbrances, etc., to discharge the debt or claim is to extinguish it, to annul its obligatory force, to

California Civil Code, Section 1487. Person required to make offer.

California Civil Code, Section 1488. Procedure in making offer.

An offer of performance must be made to the creditor, or to any one of two or more joint creditors, or to a person authorized by one or more of them to receive or collect what is due under the obligation, if such creditor or authorized person is present at the place where the offer may be made; and if not, wherever the creditor may be found. (Enacted 1872. Amended by Code Am.1873-74, c. 612, p. 240, Section 183.)

California Civil Code, Section 1489. Place of offer.

WHERE OFFER MAY BE MADE. In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor:

At any place appointed by the creditor; or,

Wherever the person to whom the offer ought to be made can be found; or,

If such person cannot, with reasonable diligence, be found within this State, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the State; or,

If this cannot be done, then at any place within this State (Enacted 1872)

**“Where mortgagee is absent from the state during the period of redemption, the tender to redeem must be made as required by the provision of this section that the tender may be made at his residence or place of business, if the same can be found, and, if not, at any place within the state”. (Emphasis added)
Swain v. Jacks (1889) 57 P. 989, 125 C. 215.**

California Civil Code, Section 1490.

Time of offer.

WHEN OFFER MUST BE MADE. Where an obligation fixes a time for its performance, and offer of performance must be made at that time, within reasonable hours, and not before nor afterwards. (Enacted 1872)

“Where considering the whole transaction, a mortgage is evidently intended, a tender upon the exact day is not strictly necessary to preserve the rights of the parties as to redemption”.

Pioneer Gold Min. Co. v. Baker (C.C.1885) 23 F. 258,

California Civil Code, Section 1496. Production of thing to be delivered.

PRODUCTION OF THING TO BE DELIVERED NOT NECESSARY. The thing to be delivered, if any, need not in any case be actually produced, upon an offer of performance, unless the offer is accepted”. (Enacted 1872)

“Where there is no objection by payee to form of offer, and writing itself prescribes no particular form, physical tender of money itself is unnecessary”.
Moriarty v. Carlson (1960) 7 Cal.Rptr. 282, 184 C.A.2d 51.

“In view of this section and Section 1501 declaring that all objections to the mode of an offer which could be stated at the time to the person making the offer, and could be then obviated by him, are waived unless then stated, in case of an offer to pay money, actual production of it is waived unless demanded at the time”.

Green v. Barney (1894) 36 p. 1026, 4 C.U. 665.

California Civil Code, Section 1501. Time for objection to mode of offer.

OBJECTIONS TO MODE OF OFFER. All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated. (Enacted 1872)

“Purpose of this section requiring that person to whom tender is made must specify any objection he has to tender is to allow debtor who is willing and able to pay his debt to know what his creditor demands so that debtor may, if he wishes, make conforming tender”.

Noyes v. Habitation Resources, Inc. (App. 2 Dist. 1975) 123 Cal.Rptr. 261, 49 Cal.App.3d 910, 82 A.L.R.3d 1192

“This section and C.C.P. Section 2076, providing that objections to tender are waived if not specifically made, must be read as though parts of same statute”.
Hind v. Oriental Products Co. (1925) 235 P. 438, 195 C. 655.

“This section is not restricted to objections to the thing offered, and the time and mode of offering it, but applies also to objections to the conditions on which the tender is made”.

Kofoed v. Gordon (1898) 54 P. 1115, 122 C. 314.

“The basis of the rule that objections to a tender not raised are deemed waived is that ordinarily a party who makes an improper tender through no fault of his own should be given an opportunity to correct it”.

Weinberg v. Dayton Storage Co. (1942) 124 P.2d 155. 50 C.A.2d 750.

“If creditor objects to mode of tender, it must be on ground that there is no lawful offer of money.

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Hohener v. Gauss (App. 2 Dist. 1963) 34 Cal.Rptr. 656, 221 Cal.App.2d 797.

“In view of this section and Section 1496, which provides that, unless an offer of performance be accepted, the thing to be delivered need not be actually produced in case of an offer to pay money, actual production of it is waived unless demanded at the time”.

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California Civil Code, Section 1504.

Effect of offer on interest and incidents of obligation.

EFFECT OF OFFER ON ACCESSORIES OF OBLIGATION. An offer of payment or other performance, duly made, though the title to the thing offered by not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof. (Enacted 1872)

“Validity of tender was not impaired by coupling with it demand for return of property pledged as security, in view of Sections 1498 and this section”.
(Emphasis added.) Berry v. Bank of Bakersfield (1918) 170 P. 415, 177 C. 206.

“Where a tender is made of the full amount due before suit is brought, and the tender is kept good and brought into court, the judgement should be for plaintiff for the amount tendered and for defendant for his costs.”

Curiac vs. Abadie, (1864) 25 Cal 502.

“Tender of amount of obligation must be duly made and in good faith to discharge lien given as collateral security thereof.” (Emphasis added.)
Sondel v. Arnold (1934) 39 P.2d 793, 2 C.2d 87.

“Tender of mortgage debt with interest and title examination fee and mortgagee’s refusal without objection discharged mortgage lien.” (Emphasis added.)
Wiemeyer v. Southern Trust & Commerce Bank (1930) 290 P. 70, 107 C.A. 165.

California Civil Code, Section 1511. Causes excusing performance.

The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:

1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just;

3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time. (Enacted 1872. Amended by Stats. 1968, c. 1730, p. 3888, § 1.)

California Civil Code, Section 1512. Performance prevented by creditor.

If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties. (Enacted 1872. Amended by Code Am. 873-74, c. 612, p. 240, § 184.)

State v. Agostini (App. 1 Dist. 1956) 139 Cal.App.2d 909, 294 P.2d 769.
California Code of Civil Procedure, Section 2075.

Right to receipt for payment or delivery.

Whoever pays money, or delivers an instrument or property, is entitled to a receipt therefore from the person to whom the payment or delivery was made, and may demand a proper signature to such receipt as a condition of the payment or delivery. (Enacted 1872)

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