

## abiLIVE Faculty: Escrow 101-103 and COVID's Impact on Its Treatment in Bankruptcy Cases

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# Escrow 101-103 and the Impact of COVID on the treatment of escrow in a bankruptcy case

# Escrow & COVID

This presentation will address the following topics:

- Escrow 101 – an overview of Regulation X and how to perform an escrow analysis
- Escrow 102 – Escrow and the Proof of Claim
- Escrow 103 – Post-Petition Escrow Accounting (PCNs)
- The impact of COVID and the CARES Act on the treatment of escrow in a bankruptcy case

# Escrow Analysis Definition

An escrow analysis is the accounting a servicer conducts in the form of a trial running balance for an escrow account to:

- Determine appropriate target balances
- Compute borrower's monthly payments for the next escrow account computation year and any deposits needed to establish or maintain the account; and
- Determine whether shortages, surpluses or deficiencies exist

# Escrow Analysis

## **An escrow statement should clearly itemize:**

- the amount of the borrower's current monthly payment
- the portion of the monthly payment being placed in the escrow account
- **the total amount paid into the escrow account during the period**
- **the total amount paid out of the escrow account during the period for taxes, insurance premiums and other charges (separately identified)**
- the balance in the escrow account at the conclusion of the period
- an explanation of how any surplus is being handled by the servicer
- an explanation of how any shortage or deficiency is to be paid by the borrower; and
- if applicable, the reason(s) why the estimated low monthly balance was not reached, as indicated by noting differences between the most recent account history and last year's projection

# Escrow Analysis – Step 1

- The first step in the analysis is to list **all** anticipated disbursements to be paid out of escrow account over the next 12 months
- Example assumes \$1200 for property taxes (\$500 paid July 25 and \$700 paid December 10) and \$360 for hazard insurance on September 20.

County Taxes	\$1,200.00
Homeowner's Insurance	\$ 360.00
	<hr/>
Total	\$1,560.00



## Escrow Analysis – Step 2

Second step in analysis is to calculate the regular monthly escrow component (i.e., what is needed on a monthly basis to cover the anticipated disbursements over the next 12 months)

- This is done by dividing the total from Step 1 by twelve (12) monthly payments
- In our example:

$$\$1,560 / 12 = \$130$$





## Escrow Analysis – Step 3

- Third step in escrow analysis requires servicer to create trial running balance for the next twelve (12) months
  - This requires listing:
    - All payments into escrow account
    - All payments out of account
    - When the anticipated disbursements from Step 1 are expected to be paid
- In preparing the statement, servicer **may** assume scheduled payments/disbursements will be made for the final 2 months of escrow account computation year (the operative word is “may”)

## Escrow Analysis – Step 4

Step 4 requires servicer to increase all monthly balances to bring the lowest point in the account up to zero

- This is sometimes referred to as the “theoretical low point”
- Usually low point comes in the month property taxes have been paid
- In our example, the low point comes in December (-780)



payment		disbursement	3) balance	4) balance
Jun	-	-	0	780
Jul	130	500	-370	410
Aug	130	0	-240	540
Sep	130	360	-470	310
Oct	130	0	-340	440
Nov	130	0	-210	570
Dec	130	700	* -780	* 0
Jan	130	0	-650	130
Feb	130	0	-520	260
Mar	130	0	-390	390
Apr	130	0	-260	520
May	130	0	-130	650
Jun	130	0	0	780

## Escrow Analysis – Step 5

This step directs the servicer to add any cushion the lender requires to the monthly balances

- The cushion may be a maximum of one-sixth of the total escrow charges anticipated over the next 12 months
- If the loan documents provide for lower cushion limits than under the Regulation, then the terms of the loan documents apply
- Where the loan documents do not specifically establish an escrow account, whether a servicer may establish an escrow account for the loan is determined by State law



## Escrow Analysis – Step 5

- Is a servicer required to have a borrower maintain a reserve or cushion? NO. See Reg. X Section (c)(1)(ii).
- *Throughout the life of an escrow account, the servicer **may** charge the borrower a monthly sum equal to one-twelfth ( $1/12$ ) of the total annual escrow payments which the servicer reasonably anticipates paying from the account. **In addition**, the servicer **may add** an amount to maintain a cushion no greater than one-sixth ( $1/6$ ) of the estimated total annual payments from the account*
- The operative word in this paragraph is “may”

## Escrow Analysis – Step 5

- If the loan document is silent on the escrow account limits and a servicer establishes an escrow account under State law, then the limitations under the Regulation apply unless State law provides for a lower amount
- If the loan documents provide for escrow accounts up to the RESPA limits, then the servicer may require the maximum amounts consistent with the Regulation, unless an applicable State law sets a lower amount
- In our example,  $1/6$  of \$1,560 = \$260.00
- Following the RESPA / HUD guidelines, the maximum the servicer could require in the escrow account is \$1,040



	payment	disbursement	balance
Jun	-	-	1040
Jul	130	500	670
Aug	130	0	800
Sep	130	360	570
Oct	130	0	700
Nov	130	0	830
DEC	130	700	* 260
Jan	130	0	390
Feb	130	0	520
Mar	130	0	650
Apr	130	0	780
May	130	0	910
Jun	130	0	1040

# Surpluses, Shortages & Deficiencies

## Surpluses

- After the analysis is performed, the servicer then compares the “required” amount (otherwise known as the “target balance”) to the actual account at the time the escrow analysis was being performed
- If the amount in the escrow account exceeds the required amount, then there is a “surplus” in the escrow account
- Where the surplus is less than \$50, the servicer *may* apply the surplus to reduce the amount of the escrow payment, or may choose to return the surplus to the borrower

# Surpluses, Shortages & Deficiencies

## Surpluses

- If the surplus is more than \$50, the servicer must return the surplus to the borrower within 30 days of performing the escrow analysis
- These rules for handling a surplus only apply if the borrower is current at the time of the escrow analysis
  - A borrower is considered to be current if the servicer receives the borrower's payments within 30 days of the payment due date
- If the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may retain the surplus in the escrow account pursuant to the terms of the loan documents

# Surpluses, Shortages & Deficiencies

## Shortages

- If the amount in the escrow account is **positive**, but less than the required amount, then there is an escrow shortage
- If the amount of the escrow shortage is less than one month's escrow payment, the servicer *may* ask the borrower to pay this shortage within 30 days, or the servicer *may* spread it out over 12 months (Query: if the borrower had 60 months to repay, isn't that better for the borrower?)
- If the amount of the escrow shortage is greater than one month's escrow payment, then the servicer must spread the shortage out over at least 12 months
- A servicer *may* also do nothing and allow an escrow shortage to exist

# Surpluses, Shortages & Deficiencies

## What usually causes an escrow shortage?

- The borrower is delinquent on regular payments
- The actual disbursements in the prior escrow computation period exceeded the amount of anticipated disbursements
- Anticipated disbursements for the upcoming year are higher than the previous escrow computation period
- A combination of two or more of the above will increase the size of the escrow shortage



# Surpluses, Shortages & Deficiencies

## Deficiencies

- If the amount in the escrow account not only falls below the required amount, but is negative, then there is an escrow deficiency
- If the amount of the deficiency is less than one monthly escrow payment, the servicer *may* require the borrower to pay the deficiency within 30 days
- If the amount of the deficiency is equal to or greater than one monthly escrow payment, the servicer *may* require the borrower to repay the amount over 2-12 months
- A servicer also has the option to allow the deficiency to exist and do nothing to change it.



# Surpluses, Shortages & Deficiencies

## Deficiencies

- These provisions regarding deficiencies apply only if the borrower is current at the time the servicer is performing the escrow account analysis
- A borrower is considered to be current under the Regulation if the servicer receives the borrower's payments within 30 days of the payment due date
- If the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may recover the deficiency pursuant to the terms of the loan documents

## Escrow 102: the POC

# What Goes Into the Proof of Claim?

- The case law in this area is sparse
- Traditionally (i.e., since the mid-90s) servicers included only the escrow deficiency in the proof of claim
- This practice resulted from several cases that vaguely and indirectly required servicers to bring the escrow account up to zero
  - *In re Davideit*, 1995 WL 912451 (Bankr. D.N.H. 1995)
  - *In re McCormack*, 203 B.R. 521, 526 (Bankr. D.N.H. 1996)
- Bringing the escrow account is only half the battle – we still need to fund next year's disbursements and required cushions
- When the servicer increased the post-petition mortgage payment to recoup the escrow shortage, the servicer was often accused of double-dipping, i.e., collecting the same amount in the proof of claim and in the post-petition mortgage payment
  - However, the amounts collected are for different purposes

## Escrow 102: the POC

# What Goes Into the Proof of Claim?

*In re Rodriguez*, 629 F.3d 136 (3d Cir. 2010)

- Countrywide was attempting to recoup the prepetition escrow shortage over 12 months, outside the plan, pursuant to its rights under RESPA
- The issue before the court was whether the automatic stay prevented Countrywide from accounting for the escrow shortage in its post-petition calculation of the debtors' future monthly escrow payments
- The Supreme Court had observed that the language "right to payment" in the definition of "claim" meant "nothing more nor less than an enforceable obligation"...Congress intended by this language to adopt the broadest available definition of "claim"
- A claim can exist under the Bankruptcy Code before a right to payment exists under state law
- Therefore, Countrywide had a claim for unpaid escrow "before" that amount was needed to cover taxes, insurance, and other charges that were due

## Escrow 102: the POC

# What Goes Into the Proof of Claim?

*In re Campbell*, 545 F.3d 348 (5<sup>th</sup> Cir. 2008)

- Countrywide was attempting to recoup the prepetition escrow shortage over 12 months, outside the plan, pursuant to its rights under RESPA
- The 5<sup>th</sup> Circuit rejected Countrywide's argument that the bankruptcy court did not have the power to modify Countrywide's rights under RESPA
- The 5<sup>th</sup> Circuit stated that its holding did not limit Countrywide's rights under RESPA or the Bankruptcy Code, and that "the automatic stay operates to halt collection of prepetition claim, even those held by a creditor protected by the anti-modification provision of Section 1322."



## Escrow 102: the POC

# What Goes Into the Proof of Claim?

*In re Campbell*, 545 F.3d 348 (5<sup>th</sup> Cir. 2008)

- The 5<sup>th</sup> Circuit stated: the stay does not determine a creditor's claim but merely suspends an action to collect the claim outside the procedural mechanisms of the Bankruptcy Code.
- Therefore, staying Countrywide's attempt to collect pre-petition escrow amounts does not bar Countrywide from asserting its contractual rights in the bankruptcy court.
- "The principle of protecting the debtor from all efforts to collect pre-petition claims outside of the Chapter 13 structure takes precedence over Countrywide's other rights under RESPA to recalculate the escrow payments" 545 F.3d at 353-54

## Escrow 102: the POC

# What Goes Into the Proof of Claim?

- After the *Campbell* and *Rodriguez* decisions, servicers started putting the escrow shortage into the proof of claim, instead of just the escrow deficiency
- While this increased the size of the prepetition arrears, the debtor now had 60 months to repay the escrow shortage, instead of having the post-petition payment increased in the first year of the Chapter 13 so the debtor could repay the shortage over only 12 months pursuant to RESPA



## Escrow 102: the POC

# What Goes Into the Proof of Claim?

- But servicers used different approaches for calculating the escrow shortage
- For instance, one servicer would only put into the proof of claim the amount of the shortage attributable to missed payments into the claim, while still attempting to recoup through the post-petition payments any shortage attributable to an increase in anticipated disbursements
  - If one follows the approach that “claim” is used “broadly”, neither *Campbell* nor *Rodriguez* seems to allow for this distinction
- Our firm advised clients to put the entire shortage into the proof of claim

## Escrow 102: the POC

# What Goes Into the Proof of Claim?

- The effective date of the escrow shortage was inconsistent between servicers
- Some servicers used a recent escrow analysis instead of performing an escrow analysis immediately after the filing of the case
- Servicing systems are usually forward looking
- An analysis run on February 5<sup>th</sup> might not be effective until April 1<sup>st</sup> or May 1<sup>st</sup>
- What is the amount of the escrow payment during this gap period?
- We often advised servicers not to include any escrow in the payments before the effective date

## Escrow 102: the POC

# What Goes Into the Proof of Claim?

- In 2008 Judge Elizabeth Magner (Ret. E.D. La.) entered an administrative order requiring an escrow analysis to be performed after the filing of the case, and that the effective date of the payment change would be the first date of the first month after the filing of the case
- On December 1, 2011, amended Rule 3001 required servicers to attach to the proof of claim an escrow analysis performed as of the petition date
- Servicers will typically use the first date of the first month after the bankruptcy filing – this works fine provided there is no escrow activity between the petition date and the first day of the next month
- Amended Rule 3001 did not provide any guidance on how to calculate the escrow shortage and how much “escrow” goes into the proof of claim
  - This answer came 4 years later

Revised

## Proof of Claim Forms

# Form 410A – Replaces PoC Attachment

- Developed by Elizabeth Magner and Deb Miller
- Only required if loan is secured by principal residence
- A detailed payment history that can be automated should be attached to the PoC
- The disclosure requirements should be uniform nationwide; local variations should be prohibited
- The amount of regular monthly mortgage payment as of the petition date should be included
- Calculation of the total claim should be shown

[illegible]



## Proof of Claim Forms

### Form 410A – Loan History

- The loan history shows:
  - When payments are due
  - When the debtor made payments
  - How payments were applied
  - When fees and charges were incurred
  - What the balances were for various components of the loan after amounts were received or fees and charges were incurred



## Proof of Claim Forms

### Form 410A – Loan History

- The new form requires a home mortgage claimant to provide a loan history starting with the first date of default
- This is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage
  - unless the note was subsequently brought current with no principal, interest, fees, escrow payment, or other charges “immediately payable”
  - Query: what if a borrower reinstates by paying all the delinquent payments and late charges, but the fee for an inspection performed while the loan was delinquent is later assessed? Or what if the debtor does not pay the late charge and it remains the only fee outstanding for several years?

# Form 410A – Part 1

## Mortgage Proof of Claim Attachment

{12/15}

Part 1: Mortgage and Case Information	Part 2: Total Debt Calculation	Part 3: Arrearage as of Date of the Petition	Part 4: Monthly Mortgage Payment
Case number: _____	Principal balance: _____	Principal & interest due: _____	Principal & interest: _____
Debtor 1: _____	Interest due: _____	Prepetition fees due: _____	Monthly escrow: _____
Debtor 2: _____	Fees, costs due: _____	Escrow deficiency for funds advanced: _____	Private mortgage insurance: _____
Last 4 digits to identify: _____	Escrow deficiency for funds advanced: _____	Projected escrow shortage: _____	Total monthly payment: _____
Creditor: _____	Less total funds on hand: - _____	Less funds on hand: - _____	
Servicer: _____	Total debt: <span style="border: 1px solid black; padding: 2px;">_____</span>	Total prepetition arrearage: <span style="border: 1px solid black; padding: 2px;">_____</span>	
Fixed accrual/daily simple interest/other: _____			

### Part 5 : Loan Payment History from First Date of Default

[illegible]

# Proof of Claim Forms

## Form 410A – Part 1

### Mortgage and Case Information

- Case number
- the names of Debtor 1 and Debtor 2
- last 4 digits of number used to identify the mortgage
- the creditor's name
- the servicer's name, if applicable
- the method used to calculate interest on the debt (i.e., fixed accrual, daily simple interest, or other method)

#### Part 1: Mortgage and Case Information

Case number:	_____
Debtor 1:	_____
Debtor 2:	_____
Last 4 digits to identify:	__ _ _ _
Creditor:	_____
Servicer:	_____
Fixed accrual/daily simple interest/other:	_____

# Form 410A – Part 2

# Total Debt Calculation

## Mortgage Proof of Claim Attachment

{12/15}

If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information	Part 2: Total Debt Calculation	Part 3: Arrearage as of Date of the Petition	Part 4: Monthly Mortgage Payment
Case number: _____	Principal balance: _____	Principal & interest due: _____	Principal & interest: _____
Debtor 1: _____	Interest due: _____	Prepetition fees due: _____	Monthly escrow: _____
Debtor 2: _____	Fees, costs due: _____	Escrow deficiency for funds advanced: _____	Private mortgage insurance: _____
Last 4 digits to identify: _____	Escrow deficiency for funds advanced: _____	Projected escrow shortage: _____	Total monthly payment: _____
Creditor: _____	Less total funds on hand: - _____	Less funds on hand: - _____	
Servicer: _____	Total debt: _____	Total prepetition arrearage: _____	
Fixed accrual/daily simple interest/other: _____			

### Part 5 : Loan Payment History from First Date of Default

[illegible]

# Proof of Claim Forms

## Form 410A – Part 2

### Total Debt Calculation

- the principal balance on the debt
- the interest due and owing
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing
- Any escrow deficiency for funds advanced
  - the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed

#### Part 2: Total Debt Calculation

Principal balance: \_\_\_\_\_

Interest due: \_\_\_\_\_

Fees, costs due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Less total funds on hand: - \_\_\_\_\_

Total debt: \_\_\_\_\_



## Proof of Claim Forms

## Form 410A – Part 2

**Total Debt Calculation**

- the principal balance on the debt
- the interest due and owing
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing
- Any escrow deficiency for funds advanced
  - the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed

**Part 2: Total Debt Calculation**

Principal balance: \_\_\_\_\_

Interest due: \_\_\_\_\_

Fees, costs due: \_\_\_\_\_

Escrow deficiency for  
funds advanced: \_\_\_\_\_

Less total funds on hand: - \_\_\_\_\_

Total debt: \_\_\_\_\_

## Proof of Claim Forms

### Form 410A – Part 2

#### Total Debt Calculation

- the principal balance on the debt
- the interest due and owing
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing
- Any escrow deficiency for funds advanced
  - the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed

#### Part 2: Total Debt Calculation

Principal balance: \_\_\_\_\_

Interest due: \_\_\_\_\_

Fees, costs due: \_\_\_\_\_

Escrow deficiency for  
funds advanced: \_\_\_\_\_

Less total funds on hand: - \_\_\_\_\_

Total debt: \_\_\_\_\_

# Proof of Claim Forms

## Form 410A – Part 2

### Total Debt Calculation

- the principal balance on the debt
- the interest due and owing
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing
- Any escrow deficiency for funds advanced
  - the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed

#### Part 2: Total Debt Calculation

Principal balance: \_\_\_\_\_

Interest due: \_\_\_\_\_

Fees, costs due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Less total funds on hand: - \_\_\_\_\_

Total debt: \_\_\_\_\_



# The History Generates the Deficiency

{12/15}

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	_____	Principal balance:	_____	Principal & interest due:	_____	Principal & interest:	_____
Debtor 1:	_____	Interest due:	_____	Prepetition fees due:	_____	Monthly escrow:	_____
Debtor 2:	_____	Fees, costs due:	_____	Escrow deficiency for funds advanced:	<b>500.00</b>	Private mortgage insurance:	_____
Last 4 digits to identify:	____ _	Escrow deficiency for funds advanced:	<b>500.00</b>	Projected escrow shortage:	_____	Total monthly payment:	<div style="border: 1px solid black; width: 100px; height: 30px;"></div>
Creditor:	_____	Less total funds on hand:	- _____	Less funds on hand:	- _____		
Servicer:	_____	Total debt:	<div style="border: 1px solid black; width: 80px; height: 30px;"></div>	Total prepetition arrearage:	<div style="border: 1px solid black; width: 80px; height: 30px;"></div>		
Fixed accrual/daily simple interest/other:	_____						

		Account Activity				How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance
														-500		

## Proof of Claim Forms

## Form 410A – Part 2

**Total Debt Calculation**

Also disclose the *Total amount of funds on hand*.

- This amount is the total of the following, if applicable:
- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

**Part 2: Total Debt Calculation**

Principal balance: \_\_\_\_\_

Interest due: \_\_\_\_\_

Fees, costs due: \_\_\_\_\_

Escrow deficiency for  
funds advanced: \_\_\_\_\_

Less total funds on hand: = \_\_\_\_\_

Total debt: 

\_\_\_\_\_



Revised

# Proof of Claim Forms

## Form 410A – Part 2

### Total Debt Calculation

To determine the total debt due:

Total the amounts owed

Then subtract the total funds on hand

Insert this amount under *Total debt*.

#### Part 2: Total Debt Calculation

Principal balance: \_\_\_\_\_

Interest due: \_\_\_\_\_

Fees, costs due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Less total funds on hand: → \_\_\_\_\_

Total debt: \_\_\_\_\_

# Form 410A – Part 3

## Mortgage Proof of Claim Attachment

{12/15}

**If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.**

Part 1: Mortgage and Case Information	Part 2: Total Debt Calculation	Part 3: Arrearage as of Date of the Petition	Part 4: Monthly Mortgage Payment
Case number: _____	Principal balance: _____	Principal & interest due: _____	Principal & interest: _____
Debtor 1: _____	Interest due: _____	Prepetition fees due: _____	Monthly escrow: _____
Debtor 2: _____	Fees, costs due: _____	Escrow deficiency for funds advanced: _____	Private mortgage insurance: _____
Last 4 digits to identify: _____	Escrow deficiency for funds advanced: _____	Projected escrow shortage: _____	Total monthly payment: <div style="border: 1px solid black; width: 100px; height: 20px;"></div>
Creditor: _____	Less total funds on hand: - _____	Less funds on hand: - _____	
Servicer: _____	Total debt: <div style="border: 1px solid black; width: 100px; height: 20px;"></div>	Total prepetition arrearage: <div style="border: 1px solid black; width: 100px; height: 20px;"></div>	
Fixed accrual/daily simple interest/other: _____			

### Part 5 : Loan Payment History from First Date of Default

[illegible]

# Proof of Claim Forms

## Form 410A – Part 3

### Arrearage as of the Date of the Petition:

- Insert the amount of the principal and interest portion of all prepetition monthly installments that remain outstanding as of the petition date
- **The escrow portion of prepetition monthly installment payments should NOT be included in this figure**

#### Part 3: Arrearage as of Date of the Petition

Principal & interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

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## Proof of Claim Forms

## Form 410A – Part 3

**Arrearage as of the Date of the Petition:**

- Insert the amount of fees and costs outstanding as of the petition date
  - This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P

**Part 3: Arrearage as of Date of the Petition**

Principal &amp; interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

Revised

# Proof of Claim Forms

## Form 410A – Part 3

### Arrearage as of the Date of the Petition:

- Insert any escrow deficiency for funds advanced
- This amount should be the same as the amount of escrow deficiency stated in Part 2

#### Part 3: Arrearage as of Date of the Petition

Principal & interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_



Revised

## Proof of Claim Forms

## Form 410A – Part 3

**Arrearage as of the Date of the Petition:****IMPORTANT**

- The escrow deficiency amount (i.e., the negative balance in the escrow account on the day the case was filed) is ordinarily the starting balance for the escrow analysis
- Although not spelled out in the instructions, it has been determined that because the escrow deficiency is being listed on a separate line in Part 3, the escrow account needs to be brought up to zero prior to running the escrow analysis
- This may require a programming change for the first escrow analysis run after the filing of a bankruptcy case

**Part 3: Arrearage as of Date of the Petition**

Principal &amp; interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds  
advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

Revised

# Proof of Claim Forms

## Form 410A – Part 3

### Arrearage as of the Date of the Petition:

- Insert the projected escrow shortage as of the date the bankruptcy petition was filed (should be based on and consistent with escrow analysis performed as of the date of the petition under Rule 3001)
- The calculation should include 1/6 of the anticipated annual charges against the escrow account or 2 months of the monthly pro rata installments due by the borrower as calculated under RESPA guidelines

#### Part 3: Arrearage as of Date of the Petition

Principal & interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

# Proof of Claim Forms

## Form 410A – Part 3

### Arrearage as of the Date of the Petition:

- The shortage is the difference between the actual amount in the escrow account and the required amount
- The amount actually held should equal the amount of a positive escrow account balance as shown in the last entry in Part 5, Column O
- The amount actually held should also equal the ending balance for the previous escrow computation period on the escrow analysis

#### Part 3: Arrearage as of Date of the Petition

Principal & interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

Revised

# Proof of Claim Forms

## Form 410A – Part 3

### Arrearage as of the Date of the Petition:

#### **IMPORTANT**

- The escrow portion of missed prepetition mortgage payments will not be recovered as a separate line item

#### Part 3: Arrearage as of Date of the Petition

Principal &amp; interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds  
advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

## Proof of Claim Forms

## Form 410A – Part 3

**Arrearage as of the  
Date of the Petition:**

- Insert the amount of funds on hand as of the petition date
- Subtract this number from the total amounts due listed in Part 3 to arrive at the Total Prepetition Arrearage

**Part 3: Arrearage as of Date of the Petition**

Principal &amp; interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds  
advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_



# Revised

# Form 410A – Part 4

# Monthly Mortgage Payment

## Mortgage Proof of Claim Attachment

{12/15}

**If you file a claim secured by a security interest in the debtor's principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.**

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	_____	Principal balance:	_____	Principal & interest due:	_____	Principal & interest:	_____
Debtor 1:	_____	Interest due:	_____	Prepetition fees due:	_____	Monthly escrow:	_____
Debtor 2:	_____	Fees, costs due:	_____	Escrow deficiency for funds advanced:	_____	Private mortgage insurance:	_____
Last 4 digits to identify:	____ _	Escrow deficiency for funds advanced:	_____	Projected escrow shortage:	_____	Total monthly payment:	<div style="border: 1px solid black; width: 100px; height: 20px; margin-top: 5px;"></div>
Creditor:	_____	Less total funds on hand:	- _____	Less funds on hand:	- _____		
Servicer:	_____	Total debt:	<div style="border: 1px solid black; width: 100px; height: 20px; margin-top: 5px;"></div>	Total prepetition arrearage:	<div style="border: 1px solid black; width: 100px; height: 20px; margin-top: 5px;"></div>		
Fixed accrual/daily simple interest/other:	_____						

### Part 5 : Loan Payment History from First Date of Default

[illegible]

## Proof of Claim Forms

## Form 410A – Part 4

**Monthly Mortgage Payment:**

- The Total Monthly Payment is the sum of the principal and interest, monthly escrow, PMI, and other amounts (e.g., credit life insurance)
- If the monthly escrow amount is incorrect because of inaccuracies in Steps 1 or 2 of the escrow analysis, the Total Monthly Payment will be incorrect.
- The monthly payment should not include any escrow shortage

**Part 4: Monthly Mortgage Payment**

Principal &amp; interest: \_\_\_\_\_

Monthly escrow: \_\_\_\_\_

Private mortgage insurance: \_\_\_\_\_

Total monthly payment: \_\_\_\_\_

## Quick Trick to Calculating the Shortage for the PoC

- The Projected Escrow Shortage (PES) is the difference between the required balance (including cushions) and the actual balance in the escrow account
- Where the escrow balance on the day the case is filed is positive:
  - $PES = \text{Required balance} - \text{Actual Balance}$
- Where the escrow balance on the day the case is filed is negative:
  - $PES = \text{Required balance} - \$0$  (because the negative balance was placed on the Escrow Deficiency Line in Part 3)

## Escrow 102: the POC Recent Case Law

### In re Deguisseppi (Chase case)

- RESPA allows a claim for a projected escrow shortage at the time it is calculated, not only when a shortage occurs, indicating in this context it can be a prepetition claim
- The Instructions for Mortgage Proof of Claim Attachment (Official Form 410A) support this interpretation; they state the total prepetition arrearage should include the projected escrow shortage

# Escrow 102: the POC

## Recent Case Law

### In re Chew (Shellpoint), 627 B.R. 112 (E.D. Pa 2021)

- Official Form 410A drills down and requires a claimant to itemize the delinquency in terms of delinquent unpaid principal and interest, delinquent escrow (both deficiency and shortage) and other unpaid charges for which the debtor is responsible
- The *Rodriguez* opinion provides two (2) clear, binding guideposts on how to analyze the treatment of a debtor's contractual, escrow obligation in determining the amount of a mortgagee's allowed secured claim for prepetition arrears:
  - 1. Escrow shortages that exist as of the commencement of a chapter 13 case are allowable prepetition claims that may be treated in a chapter 13 plan under Section 1322(b)(5); and
  - 2. In an escrow analysis effective on the date of the bankruptcy filing, the lender must take into account (and give the debtor credit) for the escrow component of the unpaid monthly instalments that fell due prepetition because those are prepetition debts that will be repaid as part of the lender's claim for prepetition mortgage arrears.



### What happens in Years 2, 3, 4, 5?

## Escrow Analyses During the Case

- Section (f)(5) of Regulation X requires the servicer to provide the borrower with notice of any shortage or deficiency in the escrow account on at least an annual basis
- Therefore, any exception or exemption from having to provide an annual escrow statement, such as where the loan is delinquent or the borrower is in a bankruptcy case, does not excuse the servicer from having to provide notice of an escrow shortage or deficiency on at least an annual basis
- the Regulation also provides that if a servicer advances funds for a borrower, then the servicer must perform an escrow account analysis before seeking repayment of the deficiency

## Escrow 103

What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- The post petition ongoing payments received during the bankruptcy should be applied to the first payment due post petition, with the proper escrow component shown in the analysis.
- The escrow calculation is done on a post petition basis- NOT a contractual basis.
- That requires the first payment due after the date of filing is the starting date of the subsequent analysis, with the payments being applied as delineated in the escrow statements and Form B410A as to principal and Interest and escrow

## What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- Once the debtor's chapter 13 plan is confirmed in a case involving the cure of a long-term mortgage debt, the creditor's claim is split into two claims - the underlying debt and the arrearages
- The debtor's ongoing postpetition mortgage payments must be applied from the petition date to the underlying debt based on the mortgage contract terms and original loan amortization as if no default exists

## What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- This separate accounting for pre- and postpetition payments is consistent with industry standards
- Under the topic of “Processing Pre-Petition and Post-Petition Payments,” the Fannie Mae Servicing Guide states: “The servicer must monitor and separately account for all pre-petition and post-petition payments”
- Once a Chapter 13 bankruptcy plan has been confirmed, the Fannie Mae Servicing Guide states the servicer must “continue to monitor the timely receipt of all payments for the pre-petition arrearages and any post-petition payments that come due”



## Escrow 103

What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- This same bankruptcy accounting applies to the treatment of escrow accounts
- The portion of each postpetition mortgage payment that is attributable to escrow must be applied as if no default exists
- This means that the monthly postpetition escrow payments must be applied as deposits to the escrow account in accordance with the escrow account analysis prepared as of the petition date, and all subsequent postpetition analyses done during the case
- The escrow portion of postpetition payments must not be applied to any prepetition escrow deficiency or shortage, as this is being paid separately as part of the prepetition arrearage



## Escrow 103

What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- The failure of a servicer to manage escrow accounts in accordance with industry practice and the Bankruptcy Code can have a devastating impact on debtors in Chapter 13 cases
- By misapplying postpetition payments, a debtor's escrow account will be either underfunded or overfunded, depending upon the circumstances
- If the escrow account is overfunded, the debtor is asked to deposit more than is required, and this may cause postpetition defaults and unnecessary dismissal of the Chapter 13 case

## What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- If the escrow account is underfunded and the error is not discovered until the end of the plan, it may not be feasible for the plan to be amended so as to bring the account fully current
- Even worse, debtors may complete their plans believing that they are fully current, only to receive notice of an escrow deficiency once the bankruptcy case is closed

## What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- Chapter 13 trustees around the country are beginning to look at how payments and escrow deposits have been applied when a notice of mortgage payment change is filed
- If the escrow payment in the escrow activity or historical portion of the new escrow analysis does not match the analysis attached to the PoC or previous payment change notice, expect an inquiry or objection

payment		disbursement	3) balance	4) balance
Jun	-	-	0	780
Jul	130	500	-370	410
Aug	130	0	-240	540
Sep	130	360	-470	310
Oct	130	0	-340	440
Nov	130	0	-210	570
Dec	130	700	* -780	* 0
Jan	130	0	-650	130
Feb	130	0	-520	260
Mar	130	0	-390	390
Apr	130	0	-260	520
May	130	0	-130	650
Jun	130	0	0	780

## Escrow 103

What happens in Years 2, 3, 4, 5?

## Form 410A – Part 4

**Monthly Mortgage Payment:**

- The Total Monthly Payment is the sum of the principal and interest, monthly escrow, PMI, and other amounts (e.g., credit life insurance)
- According to our analysis, the monthly escrow payment is \$130

**Part 4: Monthly Mortgage Payment**

Principal &amp; interest: \_\_\_\_\_

Monthly escrow: \_\_\_\_\_

**\$130**

Private mortgage insurance: \_\_\_\_\_

Total monthly payment: \_\_\_\_\_

_____
-------



## What happens in Years 2, 3, 4, 5?

# Post-Petition Escrow Accounting

- Assuming the servicer receives 12 payments in the next escrow computation period, there should be no escrow shortage on the subsequent analysis unless there is an increase in the amount of anticipated disbursements
- If there is a true post-petition escrow shortage, the servicer can raise the mortgage payment as allowed under RESPA to recoup the shortage. See *Hosley v. Wells Fargo Bank Minnesota*, 2008 WL 516953 (N.D.N.Y. 2008)

# What happens in Years 2, 3, 4, 5?

## Post-Petition Escrow Accounting

What to Look For:

- On the historical portion of the Year 2 Escrow Analysis, the Actual Starting Balance in the Historical Portion of the Escrow Analysis should be the Actual Balance in the Escrow Account on the day the case was filed
- The amounts for the monthly escrow deposit should be the amount of the monthly escrow deposit in Part 4 of Form 410A on the PoC
- The start of the escrow computation period should be the same each year

### What happens in Years 2, 3, 4, 5?

# Payment Change Notices

#### What to Look For:

- Unless the loan has been transferred, the loan number and claim number should match the PoC and any prior payment change notices filed in the case
- In Year 2:
  - The “Current Escrow Payment” should be the same as the “Monthly Escrow” in Part 4 of Form 410A from the PoC
- In Years 3, 4, and 5:
  - The “Current Escrow Payment” should be the same as the “New Escrow Payment” from the Payment Change Notice filed the previous year

## Escrow 103

### What happens in Years 2, 3, 4, 5?

## Payment Change Notices

Other issues that may lead to a Post-Petition Escrow Shortage or which require more investigation when there is a shortage:

- Failure to credit the debtor for the escrow amounts included in the proof of claim, or failure to accurately reduce the adjustment as funds from the trustee are received
  - The error can go both ways (e.g., loan modification)
- Less than 12 months of history (e.g., service transfer)
- Change in insurance policies by the debtor
- Timing of disbursements
- Timing of escrow analysis



## COVID and Escrow



## CARES Act - Escrow

- A mortgage servicer's obligation to file payment change notices or perform an escrow analysis pursuant to RESPA is not altered under the Act; nor is the obligation to make disbursements for taxes and insurance
- Keep in mind that the monthly escrow payment for the next 12 months is calculated with an assumption the debtor or trustee will be making 12 regular mortgage payments, including the escrow component
- When the next escrow analysis is performed and the servicer has received less than 12 payments of escrow (and often zero), the escrow balance will be far less than anticipated



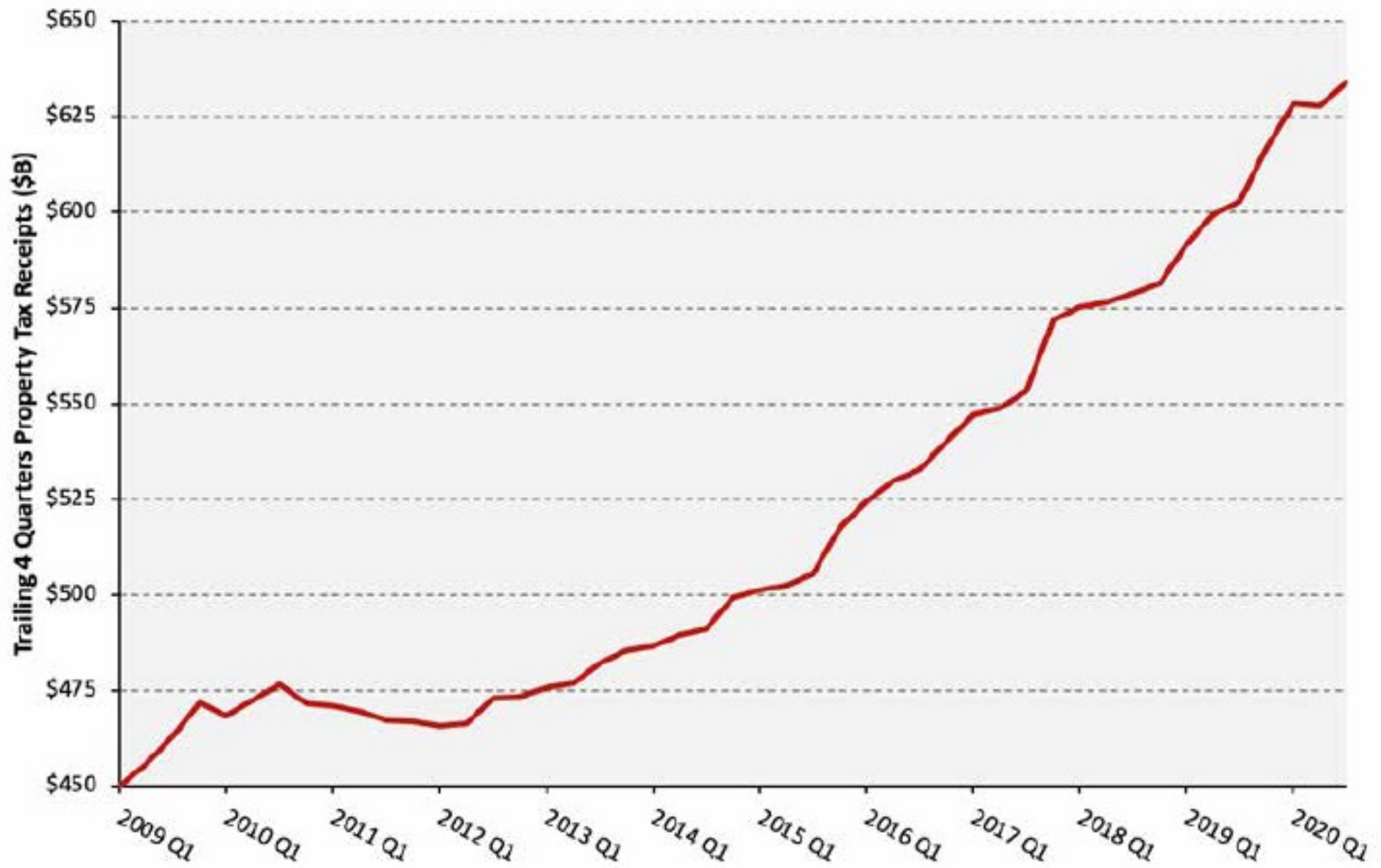
## COVID and Escrow



## CARES Act - Escrow

- Many counties have been increasing property taxes
- Property values have increased dramatically in the last 12 months in certain areas of the country, leading to even higher tax assessments and a higher cost for property insurance
- This means there is an increased possibility there will be an escrow shortage, and an increase in the mortgage payment so that shortage can be spread out over 12 months

## State & Local Property Taxes (2009-2020)



## COVID and Escrow



## CARES Act - Escrow

- The payments in forbearance have now come due for most borrowers in Chapter 13 (forbearance doesn't mean forgiven)
- Forbearances are usually cured in one of three (3) ways
  - Through the Chapter 13 plan (if feasible)
  - Deferment to the end of the loan
  - Loan modification
- Many deferments and loan mods will be P&I only
  - For Fannie, Freddie and other GSEs – shortage should be cured over 60 months
  - CFPB Final Rules says shortage can be part of a loan mod
- HAF funds can cure escrow shortfalls



Questions?



MIRLP

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THANK YOU



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## **Escrow 101 (Updated)**

### **Introduction**

Several court decisions have discussed a mortgage servicer's obligations with regard to escrow accounts after the filing of a bankruptcy. In addition, borrowers and their attorneys often have difficulty understanding the numbers contained on an escrow analysis. This article is an update to primer article initially written in 2009 that outlined the proper steps in conducting an escrow analysis, as well as some of the servicer's obligations and options for having a borrower cure an escrow shortage or escrow deficiency.

In a subsequent article I will discuss how a mortgage servicer's requirements and options with respect to escrow accounts are affected by a bankruptcy filing.

### **RESPA and Regulation X**

The Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. § 2601, *et seq.*) became effective on June 20, 1975. It requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures about the nature and costs of the real estate settlement process. RESPA also prohibits practices such as kickbacks, and limits the use of escrow accounts. The Department of Housing and Urban Development (HUD) originally published Regulation X (herein, "the Regulation"), which implemented RESPA.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111–203 (July 10, 2010) (Dodd-Frank Act) granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB). In December 2011, the CFPB restated HUD's implementing regulation to 12 CFR Part 1024.

Section 10 of RESPA<sup>1</sup> places limits on the amount a lender or servicer may require a mortgagor to keep in his or her escrow account to cover the payment of taxes, insurance or other disbursements.<sup>2</sup> This section also governs a servicer's obligations with respect to providing an annual escrow account statement (i.e., escrow analysis)<sup>3</sup> and notice "not less than annually" of any shortage in the escrow account.<sup>4</sup> The regulation dealing with escrow accounts can be found at part 1024.17.

Regulation X defines an escrow account as:

any account that a servicer establishes or controls on behalf of a borrower to pay taxes, insurance premiums (including flood insurance), or other charges with respect to a federally related mortgage loan, including charges that the borrower

and servicer have voluntarily agreed that the servicer should collect and pay. The definition encompasses any account established for this purpose, including a "trust account", "reserve account", "impound account", or other term in different localities. An "escrow account" includes any arrangement where the servicer adds a portion of the borrower's payments to principal and subsequently deducts from principal the disbursements for escrow account items. For purposes of this section, the term "escrow account" excludes any account that is under the borrower's total control.

## **Initial and Annual Escrow Statements**

### **Initial Statement**

A servicer that establishes an escrow account in connection with a “federally related mortgage”<sup>5</sup> must provide the borrower a statement which clearly itemizes the estimated taxes, insurance premiums, and other charges that are reasonably anticipated to be paid from the escrow account during the first twelve months after the escrow account is created. This statement must be provided to the borrower either at closing, or within 45 days after creation of the escrow account. If the initial statement is provided to the borrower at closing of the loan, the servicer may incorporate such statement in the uniform settlement statement.<sup>6</sup>

### **Annual Statement**

A servicer that has established or continued an escrow account must provide the borrower with statement at least once for each 12-month period (otherwise known as the “escrow account computation year”)<sup>7</sup> during which the servicer maintains the escrow account that “clearly” itemizes:

- i) the amount of the borrower’s current monthly payment;
- ii) the portion of the monthly payment being placed in the escrow account;
- iii) the total amount paid into the escrow account during the period;
- iv) the total amount paid out of the escrow account during the period for taxes, insurance premiums and other charges (as separately identified);
- v) the balance in the escrow account at the conclusion of the period;
- vi) an explanation of how any surplus is being handled by the servicer;
- vii) an explanation of how any shortage or deficiency is to be paid by the borrower; and
- viii) if applicable, the reason(s) why the estimated low monthly balance was not reached, as indicated by noting differences between the most recent account history and last year’s projection.<sup>8</sup>

The Regulation allows the servicer to provide or deliver the annual escrow statement to the borrower along with other statements or materials, including Form 1098, which is provided for federal income tax purposes.<sup>9</sup>

If at the time the servicer *conducts the escrow account analysis* the borrower is more than 30 days overdue, then the servicer is exempt from the requirements of providing an annual escrow account statement to the borrower under Section (i) of the Regulation. This exemption also applies where the servicer has brought an action for foreclosure under the underlying mortgage loan, or where the borrower is in a bankruptcy case. However, if the servicer does not issue an annual statement pursuant to this exemption and the loan subsequently is reinstated or otherwise becomes current, the servicer must provide a history of the account since the last annual statement (which may be longer than 12 months) within 90 days of the date the account became current.<sup>10</sup> It is important to note that even if the servicer chooses not to provide a borrower with a copy of an escrow analysis under this exemption, the servicer nevertheless still has an obligation to perform the escrow analysis on an annual basis. Moreover, as is emphasized later in this article, this exemption is independent from the servicer's obligation to provide the borrower with notice of any shortage or deficiency in the escrow account on at least an annual basis.<sup>11</sup>

### Short year statements

A servicer may issue a short year annual escrow account statement ("short year statement") to change one escrow account computation year to another. By using a short year statement, a servicer may adjust its schedule for its entire portfolio or alter the escrow account computation year for the escrow account. The short year statement has the effect of ending the "escrow account computation year" for the escrow account and establishing the beginning date of the new escrow account computation year. Therefore, the servicer must deliver the short year statement to the borrower within 60 days from the end of the short year.

If a borrower pays off a mortgage during the escrow account computation year, the servicer is *required* to send a short year statement to the borrower within 60 days after receiving the payoff funds.<sup>12</sup>

### Transfer of Servicing

If servicing of the loan is transferred and the new servicer changes either the monthly payment amount or the accounting method used by the transferor (i.e., old servicer), then the *new* servicer must provide the borrower with an initial escrow account statement within 60 days of the date of servicing transfer. If the new servicer provides an initial escrow account statement upon the transfer of servicing, the new servicer must use the effective date of the transfer of servicing to establish the new escrow account computation year. On the other hand, where the new servicer retains the monthly payments and accounting method used by the old servicer, the new servicer may continue to use the escrow account computation year established by the old servicer or may choose to establish a different computation year using a short-year statement. At the completion of the escrow account computation year or any short year, the new servicer must

perform an escrow analysis and provide the borrower with an annual escrow account statement.<sup>13</sup> Regardless of whether the new servicer changes or retains the payment amount of accounting method used by the old servicer, upon the transfer of servicing, the *transferor* (i.e., **old servicer**) must provide a short year statement to the borrower within 60 days of the effective date of the transfer of servicing.<sup>14</sup>

### Penalties and Remedies

Section 10(d) of RESPA provides that for *each* failure to provide a borrower with an escrow statement, the lender or escrow servicer may be assessed a civil penalty of \$50. However, the total amount that may be imposed on a lender or escrow servicer during any 12-month period is limited to \$100,000.<sup>15</sup> But if any failure to provide the escrow statement is “due to intentional disregard of the requirement” to provide the escrow statement, then the penalty for each failure is \$100. Moreover, the \$100,000 limit does not apply.

It is important to note that while other sections of RESPA provide a borrower with a private remedy (e.g., where a servicer fails to respond to a qualified written request), a borrower does not have private remedy against a servicer under Section 10 of RESPA for failing to provide an escrow statement as required.<sup>16</sup>

### The Escrow Analysis

For purposes of Regulation X, an escrow analysis is the accounting that a servicer conducts in the form of a trial running balance for an escrow account to:

- i) Determine the appropriate target balances;
- ii) Compute the borrower's monthly payments for the next escrow account computation year and any deposits needed to establish or maintain the account; and
- iii) Determine whether shortages, surpluses or deficiencies exist.

In general, there are five steps in completing an escrow analysis which are delineated in Section (d) of the Regulation. This new accounting method requires borrowers to maintain a lesser amount in their escrow accounts than the “single-item” method used by lenders.

An easy straightforward example of the steps in conducting an escrow analysis appears on the CFPB’s website.<sup>18</sup> To simplify the explanation below, I will use the same numbers contained in the example on the CFPB’s website.

#### Step 1 - Anticipated Escrow Disbursements

The first step in the analysis is to list all the anticipated disbursements that will be paid out of the escrow account over the next 12 months. The example assumes \$1200 for property taxes (\$500 paid July 25 and \$700 paid December 10) and \$360 for hazard insurance on September 20.

County Taxes	\$1,200.00
Homeowner's Insurance	\$ 360.00
Total	<hr/> \$1,560.00

If the borrower has a payment for flood insurance, which is ordinarily paid every three years, the Regulation requires the servicer to project a trial balance over the three-year period.<sup>19</sup>

Section (c)(3) of the Regulation says “[i]n conducting the escrow account analysis, the servicer must estimate the disbursement amounts according to paragraph (c)(7) of this section.” Section (c)(7) says the servicer shall estimate the amount of escrow account items to be disbursed. If the servicer knows the charge for an escrow account item<sup>20</sup> in the next computation year, then the servicer shall use that amount in estimating disbursement amounts. But if the charge is unknown to the servicer, the servicer *may* base the estimate on the preceding year's charge, or the preceding year's charge as modified by an amount not exceeding the most recent year's change in the national Consumer Price Index for all urban consumers (CPI, all items). (emphasis added). In estimating the amount to be disbursed, a servicer should be mindful that unless a borrower's payments are not more than 30 days overdue, the servicer must pay the escrow items in a timely manner to avoid a penalty.<sup>i</sup>

If the taxing authority does not offer a discount for disbursements on a lump sum annual basis, and does not impose any additional charge, fee or penalty for installment disbursements, the servicer *must* (emphasis added) make disbursements on an installment basis. However, if the taxing authority does offer a discount for disbursements on a lump sum annual basis or imposes any additional charge or fee for installment disbursements, the servicer *may* (emphasis added) make lump sum annual disbursements to take advantage of the discount for the borrower or avoid the additional charge or fee for installments. The CFPB encourages (but does not require) the servicer to follow the preference of the borrower, if such preference is known.<sup>ii</sup> The servicer and borrower can also agree to a different disbursement basis (installment or annual) or different disbursement date for property taxes provided the agreement complies with the other requirements of Regulation X. The agreement must also be voluntary. Therefore, approval of the loan or any term of the loan cannot be conditioned on the borrower agreeing to a disbursement date.<sup>iii</sup>

If an escrow account has been established for the payment of hazard insurance, a servicer may not purchase forced-placed insurance unless a servicer is unable to disburse funds from the borrower's escrow account to ensure the insurance premiums are paid in a timely manner. This inability exists only if the servicer has a reasonable basis to believe that the insurance policy was canceled or not renewed for reasons other than nonpayment of the insurance premiums,<sup>iv</sup> or the property is vacant. Notably, a servicer shall *not* (emphasis added) be considered unable to disburse funds from the borrower's escrow account because the escrow account does not contain sufficient funds for paying the insurance premiums.<sup>v</sup>



## Step 2 - Calculating the Monthly Escrow Component

The second step in the analysis calls for the servicer to divide the total from Step 1 by twelve (12) monthly payments (\$1,560 divided by 12 = \$130).

## Step 3

The third step in the escrow analysis requires the servicer to create a trial running balance for the next twelve (12) months, listing all payments into the escrow account and all payments out of the account, and when the anticipated disbursements above are expected to be paid.

This of course leads one to ask, what is the servicer required to assume about payments coming into the escrow account between the time the escrow analysis is performed and the effective date of the analysis, which is usually a month or two later? Some borrowers (and their attorneys) believe that a servicer is *required* to assume the payments for the last few months of the escrow computation period, that is, leading up to the effective date of the new analysis, will come into the escrow account. In fact, Section (i)(1) of the Regulation says in preparing the statement, the servicer *may* assume scheduled payments and disbursements will be made for the final 2 months of the escrow account computation year.<sup>21</sup> To emphasize, the operative word is “may”. This is important for projecting the initial balance in the escrow account on the effective date.

## Step 4

Step 4 requires the servicer to increase all the monthly balances to bring the lowest point in the account (in the CFPB example, December -\$780) up to zero. This is sometimes referred to as the theoretical low point. Usually the low point comes in the month during or after the largest disbursement for the escrow computation period has been paid.<sup>22</sup>

	payment	disbursement	3) balance	4) balance
Jun	-	-	0	780
Jul	130	500	-370	410
Aug	130	0	-240	540
Sep	130	360	-470	310
Oct	130	0	-340	440
Nov	130	0	-210	570
Dec	130	700	* -780	* 0
Jan	130	0	-650	130
Feb	130	0	-520	260
Mar	130	0	-390	390
Apr	130	0	-260	520
May	130	0	-130	650
Jun	130	0	0	780

### Step 5

Step 5 directs the servicer to add any cushion the lender requires to the monthly balances. The cushion may be a maximum of one-sixth of the total escrow charges anticipated over the next 12 months.<sup>23</sup> The Regulation provides that the servicer shall examine the loan documents to determine the applicable cushion and limitations for each escrow account. If the loan documents provide for lower cushion limits than under the Regulation, then the terms of the loan documents apply. Where the terms of any loan document allow greater payments to an escrow account than allowed by the Regulation, then the Regulation controls the applicable limits. Where the loan documents do not specifically establish an escrow account, whether a servicer may establish an escrow account for the loan is determined by State law. If the loan document is silent on the escrow account limits and a servicer establishes an escrow account under State law, then the limitations under the Regulation apply unless State law provides for a lower amount. If the loan documents provide for escrow accounts up to the RESPA limits, then the servicer may require the maximum amounts consistent with the Regulation, unless an applicable State law sets a lower amount.<sup>24</sup>

In the example provided

$$1/6 \text{ of } \$1,560 = \$260.00$$

	payment	Disbursement	Balance
Jun	-	-	1040
Jul	130	500	670
Aug	130	0	800
Sep	130	360	570
Oct	130	0	700
Nov	130	0	830
DEC	130	700	* 260
Jan	130	0	390
Feb	130	0	520
Mar	130	0	650
Apr	130	0	780
May	130	0	910
Jun	130	0	1040

Following the CFPB guidelines, the maximum the servicer could require in the escrow account is \$1,040.

### Surpluses, Shortages and Deficiencies

At this point, the servicer then compares the “required” amount (otherwise known as the “target balance”) to the actual account at the time the escrow analysis was being performed (in the example provided, the escrow analysis is being performed in the month of June).<sup>25</sup> If the amount in the escrow account exceeds the required amount, then there is a “surplus” in the escrow account. Where the surplus is less than \$50, the servicer *may* apply the surplus to reduce the amount of the escrow payment, or may choose to return the surplus to the borrower. If the

surplus is more than \$50, the servicer must return the surplus to the borrower within 30 days of performing the escrow analysis.

It is important to note that these provisions regarding surpluses only apply if the borrower is current at the time of the escrow account analysis. According to the Regulation, a borrower is considered to be current if the servicer receives the borrower's payments within 30 days of the payment due date. However, if the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may retain the surplus in the escrow account pursuant to the terms of the loan documents.

If the amount in the escrow account is positive, but less than the required amount, then there is an escrow shortage.<sup>26</sup> If the amount of the escrow shortage is less than one month's escrow payment, the servicer *may* ask the borrower to pay this shortage within 30 days, or the servicer *may* spread it out over 12 months. If the amount of the escrow shortage is greater than one month's escrow payment, then the servicer must spread the shortage out over at least 12 months. A servicer *may* also do nothing and allow an escrow shortage to exist.<sup>27</sup>

In general, escrow shortages are caused by:

- The borrower is delinquent on regular payments
- The actual disbursements in the prior escrow computation period exceeded the amount of anticipated disbursements
- Anticipated disbursements for the upcoming year are higher than the previous escrow computation period

A combination of two or more of the above will increase the size of the escrow shortage

If the amount in the escrow account not only falls below the required amount, but is negative (i.e., where the servicer has had to use its own funds to make a disbursement) then there is an escrow deficiency.<sup>28</sup> If the amount of the deficiency is less than one monthly escrow payment, the servicer *may* require the borrower to pay the deficiency within 30 days or it may require the borrower to repay the deficiency in two (2) or more equal payments. However, if the amount of the deficiency is equal to or greater than one monthly escrow payment, the servicer *may* require the borrower to repay the amount over 2-12 months. A servicer also has the option to allow the deficiency to exist and do nothing to change it.<sup>29</sup>

It is again important to note that these provisions regarding deficiencies apply only if the borrower is current at the time the servicer is performing the escrow account analysis. A borrower is considered to be current under the Regulation if the servicer receives the borrower's payments within 30 days of the payment due date. However, if the servicer does not receive the borrower's payment within 30 days of the payment due date, then the servicer may recover the deficiency pursuant to the terms of the loan documents.<sup>30</sup>

Regulation X also contains additional requirements with regard to escrow shortages or escrow deficiencies. To begin with, Section (f)(5) requires the servicer to provide the borrower with notice of any shortage or deficiency in the escrow account on at least an annual basis.<sup>31</sup> Since this requirement appears in a different section of the Regulation other than the requirement

to provide the borrower with an annual escrow statement, the two requirements are independent of each other. Therefore, any exception or exemption from having to provide an annual escrow statement, such as where the loan is delinquent or the borrower is in a bankruptcy case, does not excuse the servicer from having to provide notice of an escrow shortage or deficiency on at least an annual basis.<sup>32</sup> Moreover, the Regulation also provides that if a servicer advances funds for a borrower, then the servicer must perform an escrow account analysis before seeking repayment of the deficiency. Arguably, the phrase “seeking repayment of the deficiency” could include seeking repayment of the deficiency through a bankruptcy case by way of a proof of claim.

### **Frequently Asked Questions**

**1) Is a servicer required to have a borrower maintain a reserve or cushion?** NO. See Regulation X Section (c)(1)(ii).<sup>33</sup>

A lender or servicer (hereafter servicer) shall not require a borrower to deposit into any escrow account, created in connection with a federally related mortgage loan, more than the following amounts:

*(ii) Charges during the life of the escrow account. Throughout the life of an escrow account, the servicer **may** charge the borrower a monthly sum equal to one-twelfth (1/12) of the total annual escrow payments which the servicer reasonably anticipates paying from the account. **In addition, the servicer may add** an amount to maintain a cushion no greater than one-sixth (1/6) of the estimated total annual payments from the account. However, if a servicer determines through an escrow account analysis that there is a shortage or deficiency, the servicer **may** require the borrower to pay additional deposits to make up the shortage or eliminate the deficiency, subject to the limitations set forth in [§ 1024.17\(f\)](#).*

The operative word in this paragraph is “may”.

This paragraph also recognizes there can be a charge equal to 1/12 of the anticipated disbursements over the next year, plus a cushion or reserve up to 1/6 of the estimated total payments (Step 5). Finally, if there is a shortage or deficiency, the servicer may require additional deposits to make up or eliminate the deficiency (Step 4).

The introduction to Section (d) of the regulation, which sets forth the steps for conducting an escrow analysis, confirms that while the steps in conducting the analysis are required steps, the cushions are nevertheless permissive. In particular, section (d) provides:



The steps set forth in this section derive maximum limits. Servicers may use accounting procedures that result in lower target balances. In particular, servicers **may** use a cushion **less** than the permissible cushion **or no cushion at all**. This section **does not require the use of a cushion**.

Section (c)(8) of the Regulation further provides if the loan documents provide for escrow accounts up to the RESPA limits, then the servicer may require the maximum amounts consistent with this section, unless an applicable State law sets a lesser amount.

**2) How does a servicer estimate the disbursements for next year?** Section (c)(3) of the Regulation provides “In conducting the escrow account analysis, the servicer must estimate the disbursement amounts according to paragraph (c)(7) of this section.” Section (c)(7) says the servicer shall estimate the amount of escrow account items to be disbursed. If the servicer knows the charge for an escrow item in the next computation year, then the servicer shall use that amount in estimating disbursement amounts. But if the charge is unknown to the servicer, the servicer may base the estimate on the preceding year's charge, or the preceding year's charge as modified by an amount not exceeding the most recent year's change in the national Consumer Price Index for all urban consumers (CPI, all items).

**3) What are the servicer's option when there is an escrow shortage greater than or equal to one month's escrow account payment?** The servicer has two (2) options. See Regulation X Section (f)(3)(ii).<sup>34</sup>

(A) The servicer may allow a shortage to exist and do nothing to change it; or

(B) The servicer may require the borrower to repay the shortage in equal monthly payments over at least a 12-month period.

**4) What are the servicer's option when there is a deficiency in the escrow account?** See Regulation X Section (f)(4).<sup>35</sup>

(4) Deficiency. If the escrow account analysis confirms a deficiency, then the servicer **may** require the borrower to pay additional monthly deposits to the account to eliminate the deficiency.

(i) If the deficiency is less than one month's escrow account payment, then the servicer:

(A) May allow the deficiency to exist and do nothing to change it;

(B) May require the borrower to repay the deficiency within 30 days; or

(C) May require the borrower to repay the deficiency in 2 or more equal monthly payments.

(ii) If the deficiency is greater than or equal to 1 month's escrow payment, the servicer **may allow the deficiency to exist and do nothing** to change it **or may require the borrower to repay the deficiency in two or more equal monthly payments**.

**5) What are the steps in conducting an escrow analysis?** See Regulation X Section 1024.17(d)(1) for aggregate analysis. See also the Public Guidance Documents entitled “Annual Escrow Account Disclosure Statement—Format” and “Annual Escrow Account Disclosure Statement—Example” for examples.<sup>36</sup>

### **Steps 1-3**

(A) The servicer first projects a trial balance for the account as a whole over the next computation year (a trial running balance). In doing so the servicer assumes that it will make estimated disbursements on or before the earlier of the deadline to take advantage of discounts, if available, or the deadline to avoid a penalty. The servicer does not use pre-accrual on these disbursement dates. The servicer also assumes that the borrower will make monthly payments equal to one-twelfth of the estimated total annual escrow account disbursements.

### **Step 4**

(B) The servicer then examines the monthly trial balances and adds to the first monthly balance an amount just sufficient to bring the lowest monthly trial balance to zero, and adjusts all other monthly balances accordingly.

### **Step 5**

(C) The servicer then adds to the monthly balances the permissible cushion. The cushion is two months of the borrower's escrow payments to the servicer or a lesser amount specified by State law or the mortgage document (net of any increases or decreases because of prior year shortages or surpluses, respectively). See Regulation X, Section (c).<sup>37</sup>

**6) What is a servicer required to or permitted to assume regarding payments made during the final months of the escrow computation year leading up to the effective date of the escrow analysis? In other words, what is the servicer required to or permitted to assume about the beginning balance?** Section 1024.17(i)(1) says in preparing the statement, the servicer **may** assume scheduled payments and disbursements will be made for the final 2 months of the escrow account computation year. Again, the operative word is “may”.

**7) Can lenders be required to pay interest on escrow accounts?** No. Legislation was introduced in Congress in 1992 and 1993 that would have required lenders to pay interest on escrow account balances, but this legislation never passed. Nevertheless, some states do require interest to be paid on escrow account funds (e.g., Alaska, California, Connecticut, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, Oregon, Rhode Island, Utah, Vermont, and Wisconsin).

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1. 12 U.S.C. § 2609.

2. 12 U.S.C. § 2609(a).

3. 12 U.S.C. § 2609(c).

4. 12 U.S.C. § 2609(b).

5. 12 U.S.C. § 2602(1) provides: (1) the term “federally related mortgage loan” includes any loan (other than temporary financing such as a construction loan) which—

(A) is secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B)(i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government, or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased by the Federal Home Loan Mortgage Corporation; or

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(iv) is made in whole or in part by any “creditor”, as defined in 15 U.S.C. § 1602(f), who makes or invests in residential real estate loans aggregating more than \$1,000,000 per year, except that for the purpose of this chapter, the term “creditor” does not include any agency or instrumentality of any State.

6. 12 U.S.C. § 2609(c)(1). *See also* 12 CFR § 1024.17(g) and 12 U.S.C. § 2603. Regulation X defines the term “initial escrow account statement” as the first disclosure statement that the servicer delivers to the borrower concerning the borrower's escrow account.

7. 12 U.S.C. § 2609(c)(2)(B). Regulation X defines the term “escrow account computation year” as a 12-month period that a servicer establishes for the escrow account beginning with the borrower's initial payment date. The term includes each 12-month period thereafter, unless a servicer chooses to issue a short year statement under the conditions stated in § 1024.17(i)(4).

8. 12 U.S.C. § 2609(c)(2)(A) and 12 CFR § 1024.17(i)(1).

9. 12 CFR § 1024.17(i)(3).

10. 12 CFR § 1024.17(i)(2).

11. *See In re Laskowski*, 384 B.R. 518, 534 (Bankr. N.D. Ind. 2008).

12. 12 CFR § 1024.17(i)(4)(iii).

13. 12 U.S.C. § 2609(e).

14. 12 CFR § 1024.17(i)(4)(ii).

15. *See* 12 U.S.C. § 2609(d).

16. *See Hardy v. Regions Mortg.*, 449 F.3d 1357, 1359 (11<sup>th</sup> Cir. 2006)(“Under §10, no private right of action exists because ‘The Secretary shall assess to the lender or escrow servicer failing to submit the statement a civil penalty’”(citing 12 U.S.C. § 2609). *See also State of La v. Litton Mortg.*, 50 F.3d 1298 (5<sup>th</sup> Cir. 1995)(“Congress did not intend to create a private right of action under Section 10 of RESPA”; *Allison v. Liberty Sav.*, 695 F.2d 1086 (7<sup>th</sup> Cir. 1982)(Real Estate Settlement Procedures Act of 1974 creates no implied private right of action for violation of § 2609 since neither language of Act nor legislative history indicate congressional intention to create private cause of action under § 2609).

17. *See* <https://www.consumerfinance.gov/rules-policy/regulations/1024/e/>.

18. 12 CFR § 1024.17(c)(9).

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19. Regulation X defines the term “escrow account item” or “separate item” as any separate expenditure category, such as “taxes” or “insurance”, for which funds are collected in the escrow account for disbursement. An escrow account item with installment payments, such as local property taxes, remains one escrow account item regardless of multiple disbursement dates to the tax authority.

20. 12 CFR § 1024.17(k).

21. 12 CFR § 1024.17(k)(3).

22. 12 CFR § 1024.17(k)(4).

23. The CFPB has provided examples on its website of “reasonable basis” to believe that a policy has been canceled or not renewed.

The following are examples of where a servicer has a reasonable basis to believe that a borrower's hazard insurance policy has been canceled or not renewed for reasons other than the nonpayment of premium charges:

i. A borrower notifies a servicer that the borrower has cancelled the hazard insurance coverage, and the servicer has not received notification of other hazard insurance coverage.

ii. A servicer receives a notification of cancellation or non-renewal from the borrower's insurance company before payment is due on the borrower's hazard insurance.

iii. A servicer does not receive a payment notice by the expiration date of the borrower's hazard insurance policy.

<https://www.consumerfinance.gov/rules-policy/regulations/1024/interp-17/>

24. 12 CFR § 1024.17(k)(5).

25. 12 CFR § 1024.17(i)(l).

26. 12 CFR § 1024.17(d)(2)(i)(B).

27. 12 CFR § 1024.17(d)(2)(i)(C). Regulation X defines the term “cushion” as funds that a servicer may require a borrower to pay into an escrow account to cover unanticipated disbursements or disbursements made before the borrower's payments are available in the account, as limited by § 1024.17(c).

28. 12 CFR § 1024.17(c)(8).



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29. Regulation X defines the term “target balance” as the estimated month end balance in an escrow account that is just sufficient to cover the remaining disbursements from the escrow account in the escrow account computation year, taking into account the remaining scheduled periodic payments, and a cushion, if any. 12 CFR § 1024.17(b).

30. Regulation X defines the term “escrow shortage” as “an amount by which a current escrow balance falls short of the target balance at the time of the escrow analysis.” 12 CFR § 1024.17(b).

31. 12 CFR § 1024.17(f)(3).

32. Regulation X defines an escrow deficiency as the amount of a negative balance in an escrow account.

33. 12 CFR § 1024.17(f)(4).

34. 12 CFR § 1024.17(f)(4)(iii).

35. 12 CFR § 1024.17(f)(5) provides:

The servicer shall notify the borrower at least once during the escrow account computation year if there is a shortage or deficiency in the escrow account. The notice may be part of the annual escrow account statement or it may be a separate document.

36. *See also* Section 10(b) of RESPA (12 U.S.C. § 2609(b)) which provides “the servicer shall notify the borrower not less than annually of any shortage of funds in the escrow account.”; *In re Johnson*, 384 B.R. 763, 771 (Bankr. E.D. Mich. 2008)(Even though, due to borrower’s bankruptcy case, mortgage lender was excused by regulation from sending the borrower an annual escrow statement, it still had an obligation, pursuant to the notice requirements under RESPA, to provide the borrower with notice regarding any escrow account shortage or deficiency).

37. 12 CFR § 1024.17(c)(1)(ii).

38. 12 CFR § 1024.17(f)(3)(ii).

39. 12 CFR § 1024.17(f)(4).

40. <https://www.consumerfinance.gov/rules-policy/regulations/1024/e/>

41. 12 CFR § 1024.17(c).

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## **Escrow 102**

### **Introduction**

In the prior article (i.e., Escrow 101), I outlined the proper steps in conducting an escrow analysis, as well as some of the mortgage servicer's obligations and options for having a borrower cure an escrow shortage or escrow deficiency.

In this article I will discuss a mortgage servicer's obligations with respect to the escrow account upon learning that the borrower has filed a bankruptcy case. In a subsequent article, I will discuss a mortgage servicer's obligations during the bankruptcy case after the initial proof of claim has been filed.

### **RESPA, Regulation X, and the Bankruptcy Code**

Recall that the Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. § 2601, *et seq.*) requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures about the nature and costs of the real estate settlement process. The Department of Housing and Urban Development (HUD) originally published Regulation X (herein, "the Regulation"), which implemented RESPA.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, P.L. 111–203 (July 10, 2010) (Dodd-Frank Act) granted rule-making authority under RESPA to the Consumer Financial Protection Bureau (CFPB). In December 2011, the CFPB restated HUD's implementing regulation to 12 CFR Part 1024.

Section 10 of RESPA<sup>1</sup> places limits on the amount a lender or servicer may require a mortgagor to keep in his or her escrow account to cover the payment of taxes, insurance or other disbursements.<sup>2</sup> This section also governs a servicer's obligations with respect to providing an annual escrow account statement (i.e., escrow analysis)<sup>3</sup> and notice "not less than annually" of any shortage in the escrow account.<sup>4</sup> The regulation dealing with escrow accounts can be found at part 1024.17.

Beyond that, however, Regulation X offers little guidance regarding a mortgage servicer's obligations when a bankruptcy case is filed, and in particular, how any escrow shortage in existence at the time the case is filed should be calculated or treated. Similarly, other than the prohibition in 11 U.S.C. § 362(a) against the collection of a prepetition claim,<sup>5</sup> the Bankruptcy Code does not provide guidance to mortgage servicers regarding the treatment of escrow accounts after a bankruptcy case has been filed. In fact, to the best of my knowledge, the word "escrow" (as it pertains to a residential mortgage) appears only once in the Bankruptcy Code. See 11 U.S.C. § 101(27B), which provides:

The term “incidental property” means, with respect to a debtor’s principal residence—

(A) property commonly conveyed with a principal residence in the area where the real property is located;

(B) all easements, rights, appurtenances, fixtures, rents, royalties, mineral rights, oil or gas rights or profits, water rights, escrow funds, or insurance proceeds; and

(C) all replacements or additions.

## **The History of Escrow Treatment in Bankruptcy**

### **Prior to 2008**

Unfortunately, the case law in this area is sparse. The earliest reported case I found discussing a mortgage servicer’s obligations with respect to escrow accounts after the filing of a bankruptcy case was *McCormack v. Federal Home Loan Mortg. Corp. (In re McCormack)*,<sup>6</sup> wherein the court stated “they should have zeroed out the escrow account post-confirmation, i.e., to start out at zero, to exclude any pre-confirmation liabilities that were cured under the plan or would be paid under the plan, and then to show the escrow account in terms of current obligations, liabilities, etcetera that would exist and would occur in the normal course post-confirmation.”

Accordingly, the practice for many years was for the mortgage servicer to include only the escrow deficiency balance (i.e., the negative balance in the escrow account at the time the case was filed) in the arrearage portion of the proof of claim. Of course, bringing the escrow account up to zero is only one-half the story: the escrow account still needs to be funded for the next twelve (12) months. Indeed, the situation is similar to when a purchaser first buys a home and an escrow account is created: the escrow balance is zero and the escrow account needs to be funded to cover anticipated disbursements for the first twelve months. Depending on the time the escrow analysis is performed versus the amount of time before a disbursement is anticipated for taxes and/or insurance, an escrow shortage might exist. And if there was a shortage, the post-petition mortgage payment would need to include a shortage spread to recoup the shortage.

Unfortunately, when the servicer increased the post-petition mortgage payment to recoup the escrow shortage, the servicer was often accused of double-dipping, i.e., collecting the same amount in the proof of claim and in the post-petition mortgage payment, when ordinarily that was not the case; the amount of escrow collected in the proof of claim was for a different purpose than the amount of escrow included in the ongoing mortgage payment.

### ***In re Campbell* (Fifth Circuit Court of Appeals)**<sup>7</sup>

In *Campbell*, the mortgage servicer was attempting to recoup the prepetition escrow shortage over twelve (12) months, outside the plan, pursuant to its rights under RESPA. The Fifth Circuit Court of Appeals stated that while RESPA may allow the mortgage servicer to recalculate a debtor’s mortgage payment to cover insufficient escrow funds due under the loan

documents, RESPA did not override bankruptcy principles. Nevertheless, the creditor can file a proof of claim. A "claim" is a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."<sup>8</sup> The concept of a claim is broad, and it includes "all legal obligations of the debtor, no matter how remote or contingent . . . [that will] be dealt with in the bankruptcy case."<sup>9</sup>

The mortgage servicer's argument that it had no rights against the debtors until the escrow expenses were paid was rejected by the Court. Instead, as the Court stated, there was a right to the pre-petition escrow payments (which matured into a claim on behalf of the mortgage servicer), each time the debtors failed to make the payment.<sup>10</sup>

The Court intended for the scope of its decision to be limited, determining only that unpaid escrow payments which accumulate pre-petition in the year a bankruptcy petition is filed, and which the creditor had a right to collect under the loan documents, constitute a "claim" under the Bankruptcy Code. The Court did not address a right to recalculate the amount of escrow payments in subsequent years.<sup>11</sup>

### *In re Rodriguez* (Third Circuit Court of Appeals)<sup>12</sup>

At the time they filed their Chapter 13 case, Francisco and Anna Rodriguez were \$20,844.40 in arrears on eight (8) months of mortgage payments, plus foreclosure fees and costs. While the bulk of the arrearage was for principal and interest payments, \$5,657.60 was an escrow arrearage for taxes, insurance, and other charges. Of the \$5,657.60 amount, \$3,869.91 was attributable to payments which Countrywide had already made for taxes, insurance, and other charges. The remaining \$1,787.69 was the amount for which the servicers had not made corresponding payments for taxes, insurance, and other charges.

After the bankruptcy filing, the mortgage servicer issued the debtors a revised escrow analysis and demand for payment which indicated that it had increased the monthly escrow payment amount to \$947.77 from \$707.20. The new \$947.77 figure was comprised of \$650.10 for the base escrow payment, \$210.65 for the "[s]hortage payment," and \$87.02 for the "[r]eserve requirement." According to the servicer, the basis for the increased escrow amount was a *post*-petition escrow shortage.

The mortgage servicer calculated the revised escrow payments by presuming that the escrow balance at the time of the bankruptcy filing was \$0.00 because the Rodriguezes had not contributed any funds to the account. In other words, the servicer did not treat the \$1,787.69 cushion as funds that existed at the time of the bankruptcy filing. Instead, by starting with a balance of \$0.00 in the escrow account, the servicer calculated the post-petition escrow shortage as including the \$1,787.69 cushion that the Rodriguezes had never paid.

The issue before the Third Circuit Court of Appeals was whether the automatic stay prevented the mortgage servicer from accounting for the escrow shortage in its post-petition calculation of the debtors' future monthly escrow payments.

The Court found *Campbell* persuasive in deciding that the loan documentation was relevant in determining whether there is an obligation to make an escrow payment and whether that obligation is enforceable.<sup>13</sup> As in *Campbell*, the terms of the Rodriguezes' mortgage

established that the obligation to pay into the escrow account was enforceable. Thus, the mortgage servicer had a claim for the unpaid escrow at the time their bankruptcy case was filed.

The Court explained the U.S. Supreme Court had observed that the language “right to payment” in the definition of “claim” meant “nothing more nor less than an enforceable obligation” and that Congress intended by this language to adopt the broadest available definition of “claim.” Therefore, the focus should not be on when the claim accrues (with disbursement of the servicer’s own funds), but whether a claim exists.<sup>14</sup> In other words, the mortgage servicer’s right to successfully collect may have been contingent on a disbursement by the servicer of its own funds to satisfy an escrow item for which there is a deficiency. Nevertheless, the “contingent nature of the right to payment does not change the fact that the right to payment exists, even if it is remote, and thereby constitutes a “claim” for purposes of 11 U.S.C. § 101(5).”<sup>15</sup>

### After *Campbell* and *Rodriguez*

Other courts began to follow the *Campbell* and *Rodriguez* decisions,<sup>16</sup> and servicers started putting the escrow shortage into the proof of claim, instead of just the escrow deficiency. While this increased the amount of the prepetition arrears in the proof of claim, the debtor now had up to sixty (60) months to repay the escrow shortage, instead of having the post-petition payment increased in the first year of the Chapter 13 case so the debtor could repay the shortage over only 12 months pursuant to RESPA. However, servicers used different approaches for calculating the amount of the escrow shortage to include in the proof of claim.

For instance, one servicer would only include in the proof of claim the amount of the shortage attributable to missed payments into the claim, while still attempting to recoup through the post-petition payments any shortage attributable to an increase in anticipated disbursements. If one follows the approach that “claim” is used “broadly”, neither *Campbell* nor *Rodriguez* seem to allow for this distinction.

The effective date of the escrow analysis was also inconsistent between servicers. Some servicers used a recent escrow analysis instead of performing an escrow analysis immediately after the filing of the case, thus measuring the escrow shortage as of the date the prepetition analysis was performed, instead of the date the case was filed. In addition, servicing systems are usually forward looking: an analysis run on February 5<sup>th</sup> might not be effective until April 1<sup>st</sup> or May 1<sup>st</sup>. Therefore, the question arises: what is the amount of the escrow payment during this gap period? Should the post-petition payments between the date the case was filed and the effective date of the escrow analysis include an escrow component, and if so, how much should that escrow component be?

In 2008, U.S. Bankruptcy Judge Elizabeth Magner (Ret. E.D. La.) entered an administrative order requiring an escrow analysis to be performed immediately after the filing of the case, and providing that the effective date of the payment change would be the first date of the first month after the filing of the case.

## Bankruptcy Rule 3001

Fed. R. Bankr. P. 3001 (herein, “Rule 3001”) governs the filing of a proof of claim, including who may execute a proof of claim and the supporting information that should be included with the proof of claim. On December 1, 2011, Rule 3001 was amended to provide: “[i]f an escrow account has been established in connection with the claim, an escrow account statement prepared as of the date the petition was filed and in a form consistent with applicable nonbankruptcy law shall be filed with the attachment to the proof of claim.”<sup>17</sup> Although the text of amended Rule 3001 does not mention RESPA, the Committee Notes on the 2011 amendments provide:

“The statement must be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.*, 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act). Thus the holder of the claim may provide the escrow account statement using the same form it uses outside of bankruptcy for this purpose.”

Therefore, the escrow analysis included with the proof of claim should contain the following information:

- i) the amount of the borrower’s current monthly payment;
- ii) the portion of the monthly payment being placed in the escrow account;
- iii) the total amount paid into the escrow account during the period;
- iv) the total amount paid out of the escrow account during the period for taxes, insurance premiums and other charges (as separately identified);
- v) the balance in the escrow account at the conclusion of the period;
- vi) an explanation of how any surplus is being handled by the servicer;
- vii) an explanation of how any shortage or deficiency is to be paid by the borrower; and
- viii) if applicable, the reason(s) why the estimated low monthly balance was not reached, as indicated by noting differences between the most recent account history and last year’s projection.<sup>18</sup>

Servicers typically use the first date of the first month after the bankruptcy filing as the effective date for any payment change caused by performing the escrow analysis. This works fine provided there is no escrow activity between the petition date and the first day of the next month. In such a case, a manual adjustment to the account may be necessary to properly reflect the status of the escrow account as of the petition date.

Unfortunately, amended Rule 3001 did not provide any guidance on how to calculate the escrow shortage and how much “escrow” goes into the proof of claim. This answer finally came four (4) years later.



## Official Form 410A

On December 1, 2015, Official Form 410A (herein, “Form 410A” or “the Form”) became effective. This attachment to the proof of claim is only required if the loan is secured by the debtor’s principal residence. In addition to a breakdown of the arrears to be paid (Part 3), this new mortgage attachment includes a breakdown of:

- the total claim (Part 2); and
- the amount of the post-petition mortgage payment (Part 4).

Form 410A requires a home mortgage claimant to provide a loan history starting with the first date of default.<sup>19</sup> This is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payment, or other charges “immediately payable.” The loan history in Part 5 of the Form shows:

- When payments are due
- When the debtor made payments
- How payments were applied
- When fees and charges were incurred
- What the balances were for various components of the loan after amounts were received or fees and charges were incurred

### Mortgage Proof of Claim Attachment

(12/15)

If you file a claim secured by a security interest in the debtor’s principal residence, you must use this form as an attachment to your proof of claim. See separate instructions.

Part 1: Mortgage and Case Information		Part 2: Total Debt Calculation		Part 3: Arrearage as of Date of the Petition		Part 4: Monthly Mortgage Payment	
Case number:	_____	Principal balance:	_____	Principal & interest due:	_____	Principal & interest:	_____
Debtor 1:	_____	Interest due:	_____	Prepetition fees due:	_____	Monthly escrow:	_____
Debtor 2:	_____	Fees, costs due:	_____	Escrow deficiency for funds advanced:	_____	Private mortgage insurance:	_____
Last 4 digits to identify:	_____	Escrow deficiency for funds advanced:	_____	Projected escrow shortage:	_____	Total monthly payment:	<div style="border: 1px solid black; width: 100px; height: 20px;"></div>
Creditor:	_____	Less total funds on hand:	_____	Less funds on hand:	_____		
Servicer:	_____	Total debt:	<div style="border: 1px solid black; width: 100px; height: 20px;"></div>	Total prepetition arrearage:	<div style="border: 1px solid black; width: 100px; height: 20px;"></div>		
Fixed accrual/daily simple interest/other: _____							

### Part 5 : Loan Payment History from First Date of Default

Account Activity						How Funds Were Applied/Amount Incurred						Balance After Amount Received or Incurred				
A.	B.	C.	D.	E.	F.	G.	H.	I.	J.	K.	L.	M.	N.	O.	P.	Q.
Date	Contractual payment amount	Funds received	Amount incurred	Description	Contractual due date	Prin, int & esc past due balance	Amount to principal	Amount to interest	Amount to escrow	Amount to fees or charges	Unapplied funds	Principal balance	Accrued interest balance	Escrow balance	Fees / Charges balance	Unapplied funds balance

With respect to escrow, as payments are received and applied to principal, interest and escrow (columns H, I, and J respectively in Part 5 of Form 410A), the running escrow balance in

column O will change (i.e., increase). On the other hand, disbursements from the escrow account will have the effect of reducing the escrow balance.

In calculating the total debt (Part 2 of Form 410A) and the arrearage of the date of the petition (Part 3 of Form 410A), the most important number in Part 5 is the balance in the escrow on the date the case is filed. If this number is negative, this amount is to be included on the “Escrow deficiency for funds advance” lines in Part 2 and Part 3 of the Form, but as a positive amount since the escrow deficiency is an amount to be recovered from the debtor. In the example above, if we assume the balance in the escrow account is -\$500.00 on the day the bankruptcy case is filed (column O), the amount that should be included on escrow deficiency lines in Part 2 and Part 3 should be +\$500.00.

Part 2: Total Debt Calculation	
Principal balance:	_____
Interest due:	_____
Fees, costs due:	_____
Escrow deficiency for funds advanced:	_____
Less total funds on hand: -	_____
Total debt:	<div style="border: 1px solid black; padding: 2px;">_____</div>

The Instructions to Form 410A provide that the total debt is calculated by adding the first four (4) rows in Part 2:

- the principal balance on the debt
- the interest due and owing
- any fees or costs owed under the note or mortgage and outstanding as of the date of the bankruptcy filing
- Any escrow deficiency for funds advanced (i.e., the amount of any prepetition payments for taxes and insurance that the servicer or mortgagee made out of its own funds and for which it has not been reimbursed)

and then subtracting total funds on hand, which is the sum of:

- a positive escrow balance,
- unapplied funds, and
- amounts held in suspense accounts.

If the balance in the escrow account is positive on the date the bankruptcy case is filed, the escrow deficiency lines in Part 2 and Part 3 of the Form should either be left blank or contain \$0.00.

### Part 3: Arrearage as of Date of the Petition

Principal & interest due: \_\_\_\_\_

Prepetition fees due: \_\_\_\_\_

Escrow deficiency for funds  
advanced: \_\_\_\_\_

Projected escrow shortage: \_\_\_\_\_

Less funds on hand: - \_\_\_\_\_

Total prepetition arrearage: \_\_\_\_\_

On the first line of Part 3, the mortgage servicer should insert the aggregate of the principal and interest component of each regular monthly payment outstanding as of the date the bankruptcy case was filed, taking into consideration changes that have occurred in the amount of the monthly payment. On the second line of Part 3, the mortgage servicer should insert the amount of fees and costs outstanding as of the petition date. This amount should equal the *Fees/Charges balance* as shown in the last entry in Part 5, Column P of the Form. This amount should also be the same amount that was entered in Part 2 of the Form for “Fees, costs due.” This is the last entry in Column P of the Part 5 of the Form.

The third line of Part 3 is for the *escrow deficiency for funds advanced*. This amount should be the same as the amount of the *escrow deficiency* stated in Part 2 of the Form. This amount comes from the last entry in column O of Part 5 of the Form, if and only if the amount is negative. Again, the amount entered should be the absolute value or positive amount of the escrow deficiency since it is an amount to be recovered from the debtor.

On the fourth line of Part 3, the mortgage servicer should insert the projected escrow shortage (PES) from the escrow analysis performed pursuant to Rule 3001 and Regulation X under RESPA.<sup>20</sup> However, if the escrow balance on the day the bankruptcy case is filed is negative (i.e., the last entry in Column O is negative), the escrow analysis should be performed with the assumption there is a zero balance in the escrow account. On the other hand, if the escrow account is positive, the starting balance for the escrow analysis should be the actual amount in the escrow account (i.e., the last entry in Column O of Part 5).

The intent of the drafters of Form 410A in including a separate line for the escrow deficiency and the projected escrow shortage (and starting the escrow analysis at zero) was to measure the true escrow shortage at the time the bankruptcy case was filed.

The projected escrow shortage should be the difference between the target balance or what should be in the account, and the actual balance actually held, taking into consideration the allowable cushions under RESPA and Regulation X.

To summarize:

- Where the escrow balance on the day the case is filed is positive:
  - $PES = \text{Required balance} - \text{Actual Balance}$
- Where the escrow balance on the day the case is filed is negative:
  - $PES = \text{Required balance} - \$0$  (because the negative balance was placed on the Escrow Deficiency Line in Part 3)

## Part 4: Monthly Mortgage Payment

Principal & interest: \_\_\_\_\_

Monthly escrow: \_\_\_\_\_

Private mortgage  
insurance: \_\_\_\_\_

Total monthly  
payment: 

\_\_\_\_\_

This is the part of the Form where the post-petition mortgage payment is calculated.

The first line is for principal and interest (P&I) portion of the payment. This isn't a number that is calculated on the Form; rather, the amount comes from the servicer's system and the loan documents. The next line is for showing the escrow portion of the post-petition mortgage payment. Since the escrow deficiency and the escrow shortage existing on the date the case was filed are being paid through the proof of claim (see Part 3), the amount on this line should be the amount needed to fund the anticipated disbursements for taxes and insurance for the next twelve (12) months, pro-rated on a monthly basis (i.e., Step 2 out of 5 in performing an escrow analysis). This amount is sometimes referred to as the "raw" or "base" escrow amount.

The next line is for PMI, if applicable.

The total monthly payment is the sum of the three (3) rows in Part 4:

$$\text{P\&I} + \text{Escrow} + \text{PMI} = \text{Total Monthly Payment}$$

### **The Shortage-Only Arrears Claim**

Occasionally, running the escrow analysis right after the filing of the bankruptcy case leads to an escrow shortage even though the debtor might be current with respect to regular mortgage payments. Although the debtor may argue that it is impossible for there to be an escrow shortage when the debtor is current with respect to payments, there is nothing inappropriate about the servicer filing a proof of claim where the arrears in Part 3 of the Form are comprised only of an escrow shortage (i.e., all the rows in Part 3 are blank with the exception of the row for the projected escrow shortage). It is important to recall that, in general, an escrow shortage is the result of:

- The borrower is delinquent on regular payments
- The actual disbursements in the prior escrow computation period exceeded the amount of anticipated disbursements
- Anticipated disbursements for the upcoming year are higher than the previous escrow computation period

It is not unusual for there to be an escrow shortage outside of bankruptcy even though the borrower is current on regular payments. This often happens when the amount of the actual disbursements for taxes or insurance exceeds the amount of the projected disbursements and/or the amount for anticipated disbursements for the following year is higher than the previous escrow computation period. Therefore, since an escrow shortage can exist outside of bankruptcy when the borrower is otherwise current, it is illogical to conclude that it is impossible for such a condition to exist after the filing of a bankruptcy case, especially if the servicer has performed the escrow analysis pursuant to Regulation X and adhered to the requirements of Rule 3001 and the Instructions to Official Form 410A.

There are no exceptions listed in Rule 3001, the case law, or the instructions to Form 410A for the situation when the loan is current with respect to regular payments. Further, Regulation X specifically states that the provisions regarding escrow shortages only apply if the

borrower is current.<sup>21</sup> Therefore, RESPA specifically contemplates that an escrow shortage can exist when the loan is current with respect to payments.

Recall further that the Supreme Court directs that the term “claim” is to be interpreted broadly.<sup>22</sup> By putting the shortage in the proof of claim, the debtor has 60 months to repay the escrow shortage (instead of 12).

## **Conclusion**

In this latest article I have attempted to outline a mortgage servicer’s obligations with respect to the escrow account after learning about a bankruptcy filing and how the law in this area has developed over time. In the next article I will discuss a mortgage servicer’s obligations with respect to escrow after the initial proof of claim is filed (e.g., in the second year of the case when the next escrow analysis is performed).

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<sup>1</sup> 12 U.S.C. § 2609.

<sup>2</sup> 12 U.S.C. § 2609(a).

<sup>3</sup> 12 U.S.C. § 2609(c).

<sup>4</sup> 12 U.S.C. § 2609(b).

<sup>5</sup> See *Campbell v. Countrywide Home Loans, Inc. (In re Campbell)*, 545 F.3d 348, 353 (5<sup>th</sup> Cir. 2008). See also *Silva v. Riverside County Tax Collector et al (In re Silva)*, No. 19-10026, BAP No. 20-1237, 2021 WL 2814699, 2021 Bankr. LEXIS 1791 (B.A.P. 9<sup>th</sup> Cir. July 6, 2021)(It was not a stay violation for the mortgage servicer to pay taxes from an escrow account because the funds held by the servicer in the escrow account were not part of the bankruptcy estate. Similarly, Riverside County did not violate the stay because it merely accepted payment from the mortgage servicer and did nothing to enforce its lien or collect a prepetition debt from the debtor)(citing *Zotow v. Johnson (In re Zotow)*, 432 B.R. 252, 260 (B.A.P. 9<sup>th</sup> Cir. 2010)).

<sup>6</sup> 203 B.R. 521, 526 (Bankr. D.N.H. 1996)(citing *In re Davedeit*, 1995 WL 912451 (Bankr. D.N.H. 1995).

<sup>7</sup> *Campbell v. Countrywide Home Loans, Inc. (In re Campbell)*, 545 F.3d 348 (5<sup>th</sup> Cir. 2008).

<sup>8</sup> *Id.*, at 353 (citing *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 127 S. Ct. 1199, 1204, 167 L. Ed. 2d 178 (2007) (quoting 11 U.S.C. §101(5)(A))).

<sup>9</sup> *Id.* (citing *In re Egleston*, 448 F.3d 803, 812 (5<sup>th</sup> Cir. 2006)).

<sup>10</sup> *Id.*, at 354.

<sup>11</sup> *Id.*, at 354.

<sup>12</sup> *In re Rodriguez*, 629 F.3d 136 (3d Cir. 2010).



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<sup>13</sup> *Rodriguez*, 629 F.3d at 142 (citing *Campbell*, 545 F.3d at 354).

<sup>14</sup> *Id.*, at 142 (citing *JELD-WEN, Inc. v. Van Brunt (In re Grossman's Inc.)*), 607 F.3d 114, 121 (3d Cir. 2010).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., *In re Beaudet*, 455 B.R. 671 (Bankr. M.D. Tenn. 2011)(an escrow shortage is a pre-petition claim which cannot be included in ongoing future mortgage payments). See also *In re Edwards*, 2012 Bankr. LEXIS 1165 (Bankr. E.D.N.C. 2012); *In re Harris*, 2012 Bankr. LEXIS 1781 (Bankr. C.D. Ill. 2012); *In re Garcia*, 603 B.R. 640 (Bankr. E.D. Cal. 2019).

<sup>17</sup> See, e.g., *In re Milliman*, 2018 Bankr. LEXIS 858 (Bankr. Kan. 2018)(discussing the information and documentation that must be included with a proof of claim).

<sup>18</sup> 12 U.S.C. § 2609(c)(2)(A) and 12 CFR § 1024.17(i)(1).

<sup>19</sup> See, e.g., *In re Brown* (Bankr. S.C. 2019)(“the 2015 Committee Note for the Official Form notes that the payment history is important for both the calculation of a total amount of a claim and the claim's arrearage amount, indicating that the “[a]ttachment of a loan history with a home mortgage proof of claim will also provide transparency about the basis for the claimant's calculation of the claim and arrearage amount.”)(emphasis added). See also *In re Bowen*, 619 B.R. 135 (Bankr. S.C. 2020)(A complete and accurate payment history is critical to substantiate the amount of a mortgage creditor’s claim).

<sup>20</sup> See *JPMorgan Chase Bank, Nat’l Ass’n v. Deguseppi*, 2019 U.S. Dist. LEXIS 66125, \*7 (C.D. Ill. 2019)(“The Instructions for Mortgage Proof of Claim Attachment (Official Form 410A) support this interpretation; they state the total prepetition arrearage should include the projected escrow shortage.”)

<sup>21</sup> 12 CFR § 1024.17(f).

<sup>22</sup> *Johnson v. Home State Bank*, 501 U.S. 78, 83, 111 S. Ct. 2150, 115 L. Ed. 2d 66 (1991).