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

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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

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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

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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

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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
Total	$1,560.00

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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

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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 <u>into</u> escrow account
    - All payments <u>out of</u> 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")

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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)

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	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	$\boxed{\text{* -780}}$	* 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

From Page 7 of Escrow 101

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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

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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"

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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

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	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

From Page 9 of Escrow 101

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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

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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

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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

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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

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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.

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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

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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

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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

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Escrow 102: the POC

What Goes Into the Proof of Claim?

In re Campbell, 545 F.3d 348 (5th Cir. 2008)

- Countrywide was attempting to recoup the prepetition escrow shortage over 12 months, outside the plan, pursuant to its rights under RESPA
- The 5th Circuit rejected Countrywide's argument that the bankruptcy court did not have the power to modify Countrywide's rights under RESPA
- The 5th 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."

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Escrow 102: the POC

What Goes Into the Proof of Claim?

In re Campbell, 545 F.3d 348 (5^{th} Cir. 2008)

- The 5^{th} 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

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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

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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

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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^{th} might not be effective until April 1^{st} or May 1^{st}
- 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

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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

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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

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Form 410A – Replaces PoC Attachment

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

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

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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

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Revised 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?

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Revised Proof of Claim Forms

Form 410A – Part 1

Mortgage and Case Information

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

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

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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:	______________

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Proof of Claim Forms

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

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

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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:	________

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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:	________

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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:	________

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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:	________

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Revised Proof of Claim Forms

The History Generates the Deficiency

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

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

Part 2: Total Debt Calculation

Principal balance: ________
Interest due: ________
Fees, costs due: ________
Escrow deficiency for funds advanced: 500.00
Less total funds on hand: – ________
Total debt: ________

Part 3: Arrearage as of Date of the Petition

Principal & interest due: ________
Prepetition fees due: ________
Escrow deficiency for funds advanced: 500.00
Projected escrow shortage: ________
Less funds on hand: – ________
Total prepetition arrearage: ________

Part 4: Monthly Mortgage Payment

Principal & interest: ________
Monthly escrow: ________
Private mortgage insurance: ________
Total monthly payment: ________

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

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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: ________

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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:	$\boxed{\text{________}}$

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Form 410A – Part 3

Arrearage as of the Date of the Petition

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

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

Part 2: Total Debt Calculation

Principal balance:	________
Interest due:	________
Fees, costs due:	________
Escrow deficiency for funds advanced:	________
Less total funds on hand:	– ________
Total debt:	$\boxed{\text{________}}$

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:	$\boxed{\text{__________}}$

Part 4: Monthly Mortgage Payment

rincipal & interest:	__________
onthly escrow:	__________
rivate mortgage nsurance:	__________
otal monthly ayment:	$\boxed{\text{__________}}$

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

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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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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 & interest due:	________
Prepetition fees due:	________
Escrow deficiency for funds advanced:	________
Projected escrow shortage:	________
Less funds on hand:	– ________
Total prepetition arrearage:	________

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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:	_________

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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 & interest due:	_________
Prepetition fees due:	_________
Escrow deficiency for funds advanced:	_________
Projected escrow shortage:	_________
Less funds on hand:	– _________
Total prepetition arrearage:	_________

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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:	________

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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:	________

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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 & interest due:	__________
Prepetition fees due:	__________
Escrow deficiency for funds advanced:	__________
Projected escrow shortage:	__________
Less funds on hand:	– __________
Total prepetition arrearage:	__________

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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 & 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 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

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

Part 2: Total Debt Calculation

Principal balance: ________
Interest due: ________
Fees, costs due: ________
Escrow deficiency for funds advanced: ________
Less total funds on hand: – ________
Total debt: ________

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: __________

Part 4: Monthly Mortgage Payment

Principal & interest: __________
Monthly escrow: __________
Private mortgage insurance: __________
Total monthly payment: __________

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

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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 & interest: __________
Monthly escrow: __________
Private mortgage insurance: __________
Total monthly payment: __________

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Escrow 102: the POC

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

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Escrow 102: the POC
Recent Case Law

In re Deguiseppi (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

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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.

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Escrow 103
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

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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

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Escrow 103
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

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Escrow 103
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"

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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

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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

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Escrow 103
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

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Escrow 103

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

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	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

From Page 8 of Escrow 101

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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 & interest:	__________
Monthly escrow:	$130
Private mortgage insurance:	__________
Total monthly payment:	__________

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Escrow 103
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)

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Escrow 103
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

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Escrow 103
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

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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

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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

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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

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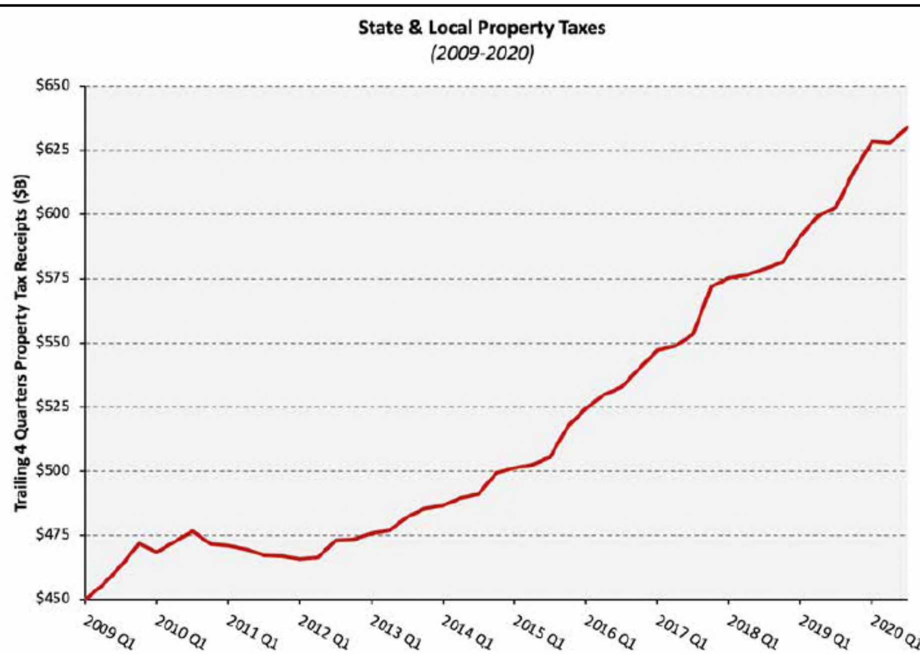

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COVID and Escrow

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

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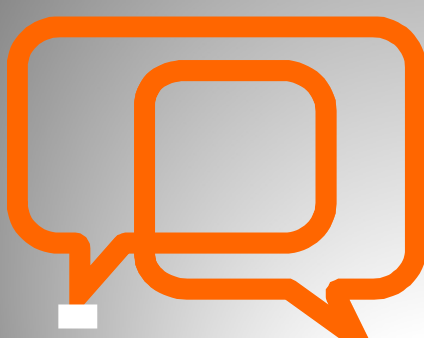

Questions?

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THANK YOU

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