

Escrow Analysis Beyond the Basics

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Escrow Analysis Beyond the Basics

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OVERVIEW OF RESPA AND ESCROW



OVERVIEW OF RESPA

What does RESPA have to do with escrow?

- Real Estate Settlement Procedures Act
- 12 U.S.C. §§2601 – 2617
- Provides guidelines & requirements for lenders at the time of real estate closings



OVERVIEW OF RESPA – CONT.

- RESPA does *not require* an escrow cushion, but rather allows for one
- 12 U.S.C. § 2609 *limits* “escrow deposits” that a lender can collect
- Lender can have a maximum of 1/6 annual disbursements (2 months’ worth of the deposits) as a cushion

OVERVIEW OF RESPA – CONT.

- 12 U.S.C. § 2609 also requires lenders to provide an initial disclosure statement as well as annual statements thereafter
- Federal Rule of Bankruptcy Procedure 3001(c)(2)(C) requires an escrow analysis run “as of the date of filing” in a form consistent with applicable law (RESPA) – an escrow disclosure statement (applies to primary residences)

What Items are “Escrowed”?

- Property taxes
- Hazard Insurance
- Flood Insurance
- Life Insurance (optional)
- Private Mortgage Insurance - this figure is not used to calculate the escrow cushion



Monthly Escrow Deposit

- Monthly escrow deposit is $1/12^{\text{th}}$ of the annual disbursements made on behalf of the borrower
- Example:
 - \$6,000.00 annual property taxes
 - \$3,000.00 annual hazard insurance
 - \$3,000.00 annual flood insurance
 - Total: \$12,000
 - Monthly Escrow Deposit = $1/12^{\text{th}}$ of \$12,000
 - Monthly Escrow Deposit = \$1,000.00



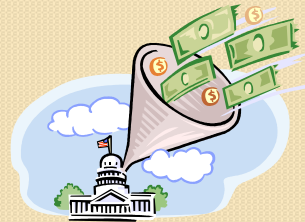
ESCROW CUSHION

- RESPA allows lenders to maintain a maximum of $1/6^{\text{th}}$ of the annual disbursements in the escrow account at the account's low point
- This figure is referred to as the cushion



ESCROW CUSHION

- The purpose of maintaining an escrow cushion is to cover any estimated shortfalls in the upcoming year
- Shortfalls occur when there is an unforeseen increase for taxes and/or insurance



ESCROW CUSHION

How is the escrow cushion calculated?

- Example:
 - \$6,000.00 annual property taxes
 - \$3,000.00 annual hazard insurance
 - \$3,000.00 annual flood insurance
 - Total: \$12,000
 - Allowable cushion is $\frac{1}{6}$ th of \$12,000.00
 - Allowable cushion is \$2,000.00 - 2 months' deposit at the account's low point

The Escrow Analysis

- First, figure out the annual disbursements, monthly escrow deposit and allowable cushion:
 - Annual disbursements of \$12,000.00
 - Monthly escrow deposit = \$1,000.00
 - Allowable cushion: \$2,000.00

The Escrow Analysis – cont.

- Then, determine when money will be paid into the escrow account and when money will be disbursed from the escrow account
 - January
 - \$1,000.00 Deposit
 - \$3,000.00 Disbursed for Taxes
 - February
 - \$1,000.00 Deposit
 - \$3,000.00 Disbursed for Hazard Insurance
 - \$3,000.00 Disbursed for Flood Insurance
 - March
 - \$1,000.00 Deposit
- Continue this process for the entire year

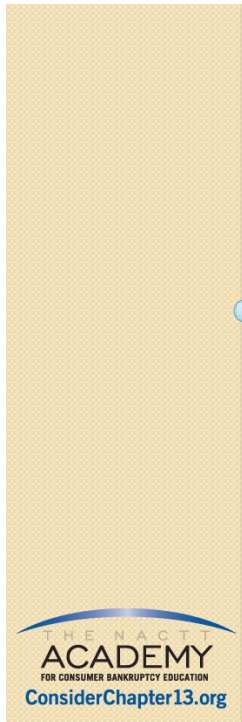


CALCULATING THE ESCROW SHORTAGE



- Look for where the “low point” occurs (month with the lowest balance)
- During the “low point” month, the account can have a maximum of the cushion.
 - If there is less than the allowable cushion, there is a shortage
 - If there is more than the allowable cushion, there is a surplus

APPLICATION TO BANKRUPTCY: PROOFS OF CLAIM & PAYMENT CHANGES



Escrow & Bankruptcy

- A general shift in ideology and politics has put a spotlight on lenders, opening up their records to heightened scrutiny from the public at large, the Debtors' bar, and the United States Trustee's Office
- As a result, Proofs of Claim that are filed need to be reviewed for accuracy, especially in the escrow area



Escrow & Bankruptcy

- Rule 3001(c)(2)(C)
 - If a security interest is claimed in property that is the debtor's principal residence...If 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



Escrow & Bankruptcy

- *Campbell v. Countrywide Home Loans Inc.*, 545 F.3d 348 (5th Cir. 2008)
 - The increase in the post-petition payment amount was a pre-petition claim
 - Increasing the post-petition payment amount alone was not enough to be considered a stay violation



Escrow & Bankruptcy

- *In Re Rodriguez*, 629 F.3d 136 (3rd Cir. 2010)
 - Escrow cushion is a pre-petition claim
 - Collecting an escrow cushion in the post-petition payment is a violation of the automatic stay
 - Case remanded for hearing on damages for violating the stay



Escrow & Bankruptcy

- Proof of Claim: Where to Look
 - Escrow Advances (if provided)
 - Escrow Installments
 - Escrow Shortage
- Escrow Statement: What to Review
 - Escrow Advances
 - Escrow Shortage
 - Escrow Balance Required at Filing



Escrow & Bankruptcy

- Escrow Advances + Escrow Required at the time of filing can typically be found on the escrow statement attached to the POC
- Escrow Installments + Escrow Shortage should be found on the proof of claim
- See if it balances out:
 - $EA + ER = EI + ES$



ESCROW & BANKRUPTCY

Proof of Claim

- First, determine what the escrow advances were at the time of filing
- Second, determine how much money is being collected for delinquent escrow installments and add that to the amount claimed as a shortage in the Proof of Claim.



ESCROW & BANKRUPTCY

Proof of Claim

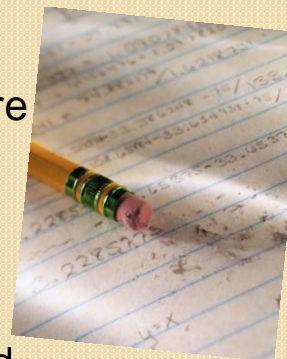
- Figure out what the required balance was at the time of filing and add that to the escrow advanced at the time of filing.
- Finally, compare the Escrow Advances + Escrow Required to the Escrow Installments + Escrow Shortage ($EA + ER = EI + ES$)



ESCROW & BANKRUPTCY

Proof of Claim

- If the figures do not balance, there should be a reason for the difference
 - Money advanced post-filing, pre-escrow analysis
 - Case filed 1/2/2011, taxes disbursed 1/15/2011, first post-payment due 2/1/2011



ESCROW & BANKRUPTCY

Payment Change Notices

- Rule 3002.1(b)
 - The holder of the claim shall file and serve on the debtor, debtor's counsel, and the trustee a notice of any change in the payment amount, including any change that results from an interest rate or escrow account adjustment no later than 21 days before a payment in the new amount is due

ESCROW & BANKRUPTCY

Payment Change Notices

- Typically, if a payment changes due to an escrow analysis, the escrow analysis is attached to the notice of payment change
- Even if a case is in an active bankruptcy case, an escrow analysis should still be run pursuant to RESPA

APPLICATION TO BANKRUPTCY: COMMON ESCROW ISSUES



COMMON ESCROW ISSUES

Loans with Large Defaults

- Some loans have been in default for years
- Once the complaint is filed, the loan is accelerated
- The Servicer *may not* be required to run an annual escrow analysis
- This can lead to sticker shock when a bankruptcy is filed

COMMON ESCROW ISSUES

Loans with Large Defaults

- The amount needed to pay escrow items may have increased dramatically during the time the loan was accelerated, leading a Debtor to underestimate the regular monthly payment amount



COMMON ESCROW ISSUES

The Phantom Surplus

- There are times when an escrow analysis run at filing shows that, if the loan were current, there would be a surplus
- The surplus funds can only be returned to the debtor if/when the loan becomes contractually current



COMMON ESCROW ISSUES

Double-Dipping

- Double-dipping is a term that describes when a Servicer is collecting escrow shortage in the proof of claim and in the post-petition payment amount
- Depending on your jurisdiction, collecting the shortage in the post-petition amount is a violation of the stay
- Regardless of your jurisdiction, collecting the shortage in the claim and the post-petition payment is impermissible

COMMON ESCROW ISSUES

Double-Dipping

- Double-dipping can be a problem not just with the proof of claim, but during the course of an entire Chapter 13 case
- It is important to look at the payment amounts on the payment change notices and on any motion for relief

COMMON ESCROW ISSUES

Forced Place Insurance

- Forced place insurance requires notice to the borrower per the Dodd-Frank Act
- The Consumer Financial Protection Bureau is reviewing the practice of forced place insurance



COMMON ESCROW ISSUES

Loan Modifications

- When a borrower gets a loan modification, the escrow advances are typically capitalized
- The escrow cushion is not capitalized
- When an escrow analysis is run for a recently modified loan, there is frequently a shortage

COMMON ESCROW ISSUES

Important Resources

- Though RESPA does not provide a private right of action for violations, RESPA guidelines are helpful in deciphering escrow statements
- Read the underlying agreement – every mortgage likely has a paragraph related to escrow and how funds will be applied.
 - Fannie/Freddie uniform instrument: refer to paragraphs 2 and 3

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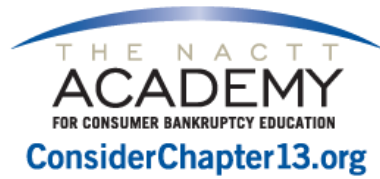
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This and other resources
can be found at
ConsiderChapter13.org