No. 10-__

IN THE

Supreme Court of the United States

COUNTRYWIDE HOME LOANS, INC.,
Petitioner,

v.

FRANCISCO & ANNA RODRIGUEZ,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Bankruptcy Code's automatic stay, 11 U.S.C. §362, take precedence over a mortgage lender's right under the Real Estate Settlement Procedures Act, 12 U.S.C. §2609(a)(2), to require a borrower to deposit additional funds into his escrow account after filing for Chapter 13 bankruptcy protection when those funds are needed to cover the borrower's anticipated post-petition taxes, insurance, and other escrow obligations?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties before the United States Court of Appeals for the Third Circuit.

The appellee below was Countrywide Home Loans, Inc.. Appellants below were Francisco and Anna Rodriguez.

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner Countrywide Home Loans, Inc. states that it is a wholly-owned subsidiary of Countrywide Financial Corporation. Countrywide Financial Corporation was formerly a publicly-traded company, but now is a wholly-owned subsidiary of Bank of America Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Countrywide Home Loans, Inc. ("Countrywide") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals opinion (Pet. 1a-22a), including Judge Sloviter's dissenting opinion (Pet. 16a-22a) is reported: *In re Rodriguez*, 629 F.3d 136 (3d Cir. 2010). The denial of the petition for rehearing and rehearing en banc is reprinted in the Appendix. (Pet.

48a-49a). The underlying decision of the bankruptcy court (Pet. 23a-39a) that is subject to this appeal is also reported: *In re Rodriguez*, 391 B.R. 723 (Bankr. D.N.J. 2009). The district court's decision in this case is not reported, but is reprinted in the Appendix. (Pet. 40a-47a).

JURISDICTION

The court of appeals entered judgment on December 23, 2010. Countrywide filed a timely petition for rehearing and rehearing en banc on January 6, 2011. The court of appeals denied the petition on January 19, 2011. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the impact of a Chapter 13 bankruptcy filing on the provisions of the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. §2601 *et seq.*, and the Department of Housing and Urban Development's "Regulation X", 24 C.F.R. §3500.17. The pertinent provisions of RESPA and Reg. X are reproduced in the Appendix. (Pet. 50a-57a).

STATEMENT OF THE CASE

A. Introduction

Congress enacted the Real Estate Settlement Procedures Act ("RESPA") in part to govern escrow accounts for home mortgage loans, *see* 12 U.S.C. §§2605, 2609, and delegated authority to the Department of Housing and Urban Development ("HUD") to adopt regulations to implement RESPA's mandates, *see* 12 U.S.C. §2617(a); 24 C.F.R. §3500.17 ("Reg. X"). A mortgage lender must follow RESPA and Reg. X

when administering escrow accounts.[1] RESPA and Reg. X impose mandatory disclosure and payment obligations on mortgage lenders, *see, e.g.,* 12 U.S.C. §§2605, 2609. They also establish the formulas to use when determining the amount of money borrowers must deposit into those accounts on an ongoing basis. *See* 12 U.S.C. §2690(a); 24 C.F.R. §3500.17. RESPA and Reg. X use a forward-looking analysis to insure that a borrower deposits sufficient funds into the escrow account to cover anticipated tax, insurance, and other obligations owed by a borrower to third parties for the upcoming year. RESPA and Reg. X expressly allow a mortgage lender to reanalyze borrower escrow accounts as needed to recover actual or anticipated deficiencies that may occur in those accounts. *See* 12 U.S.C. §2609(a)(2); 24 C.F.R. §3500.17(f)(1)(ii).

Neither Congress nor HUD exempted debtor/borrowers in Chapter 13 bankruptcy cases from complying with their escrow deposit obligations while they are in bankruptcy. Moreover, neither Congress nor HUD limited a mortgage lender's right to require debtor/borrowers to fund their escrow accounts to meet anticipated future obligations for taxes, insurance, and other escrow items. In short, there is no bankruptcy exception to RESPA's and Reg. X's escrow account formulas and procedures.[2]

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[1] Countrywide services residential mortgage loans, which involves handling and administering loan payments and escrow disbursements on behalf of mortgage lenders, and where necessary, advancing funds to pay taxes and insurance when the amount escrowed is insufficient. Hereinafter, mortgage servicers and lenders will be referred to as "mortgage lenders" or "lenders."

[2] Although Congress and HUD adopted exceptions from RESPA and Reg. X to account for bankruptcy filings, *see, e.g.,* 12 U.S.C.

Despite the lack of a bankruptcy exception, the Third Circuit Majority held that Countrywide violated the Bankruptcy Code's automatic stay, 11 U.S.C. §362, when Countrywide exercised its express rights under RESPA and Reg. X to reanalyze the debtors' escrow account to determine the amount of money that the debtors needed to deposit to cover *post-petition* taxes, insurance, and other escrow obligations. Instead of following this Court's teachings that courts must harmonize competing federal statutes, *see Morton v. Manchuria,* 417 U.S. 535, 551 (1974), the Third Circuit Majority gave "precedence" to the Bankruptcy Code over RESPA, claiming it was following the Fifth Circuit's decision in *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348 (5th Cir. 2008).[3] (Pet. 14a n.4). To make matters worse, neither the Third Circuit Majority nor the Fifth Circuit has offered any guidance on how a mortgage lender should handle post-petition escrow accounts for Chapter 13 debtors, other than to hold that the lender could not follow the mandatory statutory and regulatory procedures enacted by Congress and HUD as they are written. If the mortgage lender is unable to follow the regulatory scheme actually adopted by Congress and HUD, what is it supposed to do? The

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§2605(b) & (c); 24 C.F.R. §3500.17(i)(2); 24 C.F.R. §3500.21(d)(2)(ii), they did not alter the statutory scheme for administering an escrow account based on a bankruptcy filing. Courts should not create exceptions to a complex regulatory scheme when Congress and HUD elected not to. *See United States v. Johnson*, 529 U.S. 53, 58 (2000).

[3] In *Campbell*, the Fifth Circuit framed the issue as whether a mortgage lender's right to reanalyze escrow accounts under RESPA "overrides bankruptcy principles." 545 F.3d at 353. Contrary to the Fifth Circuit's formulation, the real issue is whether the statutes may be harmonized. *Morton*, 417 U.S. at 551.

Third Circuit Majority and Fifth Circuit Opinions hold that the escrow reanalysis permitted by RESPA violates the automatic stay of Section 362(a) of the Bankruptcy Code. If that is correct, a lender risks exposure for actual damages, attorneys' fees, and punitive damages under Section 362(k) of the Bankruptcy Code, *see In re Campbell*, 361 B.R. 831 (Bankr.S.D.Tex 2007), even though the lender is not collecting escrow funds to satisfy a debt, but rather to protect the debtor's home from tax liens or casualty loss.

Countrywide petitions for review of this case because the problem regarding the proper treatment of debtor escrow accounts in Chapter 13 bankruptcies is an important, recurring, industry-wide issue for the servicing of residential mortgage loans that would affect a substantial majority of the 300,000+ Chapter 13 cases filed each year.[4] Contrary to the holdings of the Third Circuit and Fifth Circuit, RESPA, Reg. X, and the Bankruptcy Code do not conflict. Mortgage lenders must always comply with the burdens imposed by RESPA and Reg. X, even while a bank-

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[4] The "Judicial Business of the United States 2009 Annual Report" (*available at* www.uscourts.gov/Statistics/JudicialBusiness.aspx) reports the number of Chapter 13 bankruptcy filings per year as follows:

2005	429,316
2006	272,937
2007	310,802
2008	353,739
2009	398,212

Id. at 32. "The primary reason that individuals file for Chapter 13 is to forestall foreclosure on their home—over 96 percent of Chapter 13 filers are homeowners and 70 percent of filers propose a plan to repay overdue mortgage payments." H.R. REP. 111-19 at 32, 2009 WL 460642 (2009).

ruptcy case is pending; accordingly, mortgage lenders should be allowed to rely on RESPA and Reg. X when determining how to handle all escrow accounts, including those for debtor/borrowers in Chapter 13 bankruptcy cases. The Third Circuit's and Fifth Circuit's decisions electing to ignore RESPA and Reg. X are in direct conflict with decisions from this Court and from other courts of appeals. In fact, as will be shown below, the Third Circuit and Fifth Circuit do not even agree with each other on this important issue. This Court should grant this Petition to resolve the confusion in the law because it adversely impacts the tens of thousands of pending Chapter 13 bankruptcy cases.

B. The Rodriguez Default and Unfunded Escrow Account

The facts of this case are straightforward and not in dispute. Francisco and Anna Rodriguez ("Debtors") owned a home in Monmouth County, New Jersey, that was subject to a purchase money mortgage held and serviced by Countrywide. Debtors executed a Note obligating them to make monthly principal and interest payments to Countrywide. Debtors also entered into a Security Instrument pledging their home as security for the required Note payments. That Note and Security Instrument were standardized Federal Housing Authority ("FHA") form documents.

Under Paragraph 2 of the Security Instrument, Debtors agreed to make monthly deposits into an escrow account in an amount determined using the RESPA escrow analysis to cover anticipated insurance and tax obligations. Countrywide, in turn, had an obligation to use the funds (if any) in Debtors'

escrow account to pay taxes, insurance, and other charges as they became due. 12 U.S.C. §2605(g); 24 C.F.R. §3500.17(k). If Debtors pay too much money into their escrow account, Debtors are entitled to receive a return of the excess funds pursuant to both the Security Instrument and Reg. X, *see* 24 C.F.R. §3500.17(f)(2)(i). Accordingly, the funds held in an escrow account are not Countrywide's—they are an asset to be used for the Debtors' benefit. *See* 24 C.F.R. §3500.17(b) (defining an "escrow account" as "any account that a servicer establishes or controls *on behalf of a borrower* . . .").

Debtors filed their bankruptcy petition on October 10, 2007. Prior to that date, Debtors missed eight (8) payments under their Note, and their loan was in active foreclosure. Debtors owed Countrywide $15,186.60 for the missed principal and interest payments due under the Note. Debtors also owed Countrywide $3,869.91 to cover the costs of the tax and insurance payments that Countrywide had paid out-of-pocket on Debtors' behalf prior to the petition date that were in excess of the amount of money Debtors had deposited in their escrow account. This amount was a "deficiency," as that term is defined in Regulation X.[5] 24 C.F.R. §3500.17(b).

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[5] A "deficiency" is defined as "the amount of a negative balance in an escrow account." 24 C.F.R. §3500.17(b). A "shortage," by contrast, is defined as "an amount by which the current escrow account balance falls short of the target balance at the time of escrow analysis." 24 C.F.R. §3500.17(b). The "target balance," in turn, is calculated by preparing a trial balance using a ledger of anticipated deposits of base escrow and projected disbursements for taxes and insurance over the upcoming twelve months. 24 C.F.R. §3500.17(b) & (d)(2). If the "lowest monthly trial balance" shown on the ledger is negative, there is a projected "shortage" in the account that may be recovered over a

Under Paragraph 7 of the Security Instrument, Countrywide had the right to pay Debtors' tax and insurance obligations on their behalf to protect their interest in their home, as well as to protect the lender's interest in the home as collateral for the loan Countrywide serviced. Under Paragraph 7, if Countrywide pays Debtors' tax and insurance obligations in excess of the amount in escrow:

> [a]ny amount disbursed by Lender under this paragraph shall become an additional debt of Borrower and is secured by the Security Instrument. These amounts shall bear interest from the date of disbursement at the Note rate, and at the option of Lender shall be immediately due and payable.

Debtors do not dispute that they had an obligation to reimburse the $3,869.91 deficiency for taxes and insurance Countrywide paid on their behalf pre-petition.

Debtors also do not dispute that Countrywide was entitled to recover $2,227.00 in pre-petition foreclosure fees and costs Countrywide incurred due to Debtors' default.

C. Countrywide's Proof of Claim

Countrywide filed its Proof of Claim on Official Bankruptcy Form 10. When doing so, Countrywide followed a straightforward approach that is in full

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period of time under 24 C.F.R. §3500.17(f)(3). Although some courts appear to have confused the terms "deficiency" and "shortage" due to the similarity of their ordinary meanings, the intentional decision to define those two terms as different terms of art in the escrow context indicates they are intended to have different meanings. *See Rusello v. United States*, 464 U.S. 16, 23 (1983).

compliance with RESPA and Reg. X—Countrywide submitted a claim that included Debtors' pre-petition escrow deficiency (the $3,869.91 Countrywide had advanced on the Debtors' behalf for taxes and insurance in excess of the amount Debtors had deposited in escrow), and then it continued to follow RESPA and Reg. X going forward.

When filing that Proof of Claim, Countrywide distinguished between its total "claim" (the amount required to be stated in Official Form 10) and the amount of Debtors' "arrearage." That "arrearage" represents the amount of money in default, which Debtors could cure over the life of their Chapter 13 plan. 11 U.S.C. §1322(b)(5). A fundamental error made by both the Third Circuit Majority in this case and the Fifth Circuit in *Campbell*, is that they confused the concepts of what is a "claim" with what is the "arrearage" or "default" that may be cured during a Chapter 13 plan.

The term "claim" is defined in Section 101(5) of the Bankruptcy Code to mean a "right to payment." *See* 11 U.S.C. §101(5). This Court has recognized that "a 'right to payment' . . . 'is nothing more nor less than an enforceable obligation.'" *Cohen v. De La Cruz*, 523 U.S. 213, 218 (1998) (quoting *Pennsylvania Dept. of Pub. Welfare v. Davenport*, 495 U.S. 552, 559 (1990)). Looking to its loan documents, Countrywide calculated the total amount due from Debtors as $326,783.21, which is the sum of the unpaid principal ($308,390.15), accrued and unpaid interest ($12,296.15), foreclosure fees ($700.00), foreclosure costs ($1,527.00), and the escrow deficiency ($3,869.91) owing on Debtors' loan on the petition date. This was the amount of debt that Countrywide could "enforce" against Debtors. Countrywide did not include the

amount of any missed pre-petition escrow deposits in its calculation because those amounts are not part of the "debt" that is owed to Countrywide.[6] *See Johnson v. Home State Bank*, 501 U.S. 78, 84 n.5 (1991) ("the terms 'debt' and 'claim' are coextensive.").[7]

Countrywide determined that the amount of the "arrearage" or "default" that could be cured through Debtors' Chapter 13 Plan was $21,283.71 (consisting of $15,186.60 for missed principal and interest + $3,869.91 for the escrow deficiency + $2,227 in foreclosure fees and costs). That amount represented the full payment due to bring Debtors current on their mortgage debt as of the petition date. The reason that only the escrow deficiency is included in the calculation, and not the amount of the missed estimated escrow deposits is that, under Paragraph 7 of the Security Instrument, only the amount of the deficiency became "debt" that "at the option of Lender shall be immediately due and payable." With the

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[6] The Third Circuit recognized that the missed estimated escrow deposits were not part of the "debt" owed to Countrywide. (Pet. 14a).

[7] The Third Circuit dismissed *Johnson's* language explaining the relationship between a "claim" and a "debt" as "a footnote addressing a different issue." (Pet. 10a). But the Third Circuit ignored the origin of this language, *see* S. REP. No. 95-989 at 23, 95th Cong., 2d Sess. 1978, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5809; *Johnson v. Home State Bank*, 501 U.S. 78, 84 n.5 (1991) (citing *Pennsylvania Dept. of Revenue v. Davenport*, 495 U.S. 552, 558 (1990)), as well as the extent to which it has been accepted as a correct statement of the law on how to define a "claim." *See* 2 COLLIER ON BANKRUPTCY ¶101.05[1]. The Third Circuit also ignored the settled principle that words used in a statute should be construed to have the same meaning throughout the statute. *Gufstafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995).

exception of the deficiency, all other escrow analyses and issues were required to be handled under RESPA and Reg. X. *See* 24 C.F.R. §3500.17(f)(4)(iii) (providing the only exception to Reg. X—to allow recovery of a deficiency under loan documents).

In addition to determining the amount of its claim, Countrywide followed RESPA and Reg. X to calculate the amount of the post-petition escrow deposits that were due from the Debtors to cover the Debtors' anticipated post-petition tax and insurance obligations that would be paid over the next year.[8] Countrywide started its analysis with a zero balance because it was undisputed that there was no money in the Debtors' escrow account. In fact, before the bankruptcy filing (and Countrywide's pursuit of the "deficiency" through a proof of claim), the Debtors' account actually had a negative balance. Neither the Third Circuit nor the Debtors are disputing the actual method used to calculate the Debtors' escrow payments; they only dispute the number that should be reflected in the account at the beginning of the analysis.

D. Countrywide's Refusal to Make an Involuntary Loan

Countrywide started its post-petition escrow account analysis with a zero balance because Countrywide had no obligation to loan money to the Debtors to fund their escrow account to cover post-petition obligations. As Judge Sloviter correctly observed in her dissent: "it makes little sense to credit [Debtors]

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[8] The Third Circuit acknowledged that Countrywide had the right to reanalyze the Debtors' escrow account post-petition. (*See* Pet. 5a). *See* 24 C.F.R. §3500.17(f)(1)(ii) (stating that the lender has the right to reanalyze escrow).

for payments never made." (Pet. 20a). That is particularly true given that the artificial inflation of the amount of money in the escrow account necessarily means that the lender will be paying out more of its own money to cover the debtors' taxes, insurance, and other escrow obligations, while the debtors can defer funding those additional payments (usually without interest) through the life of the plan. Nevertheless, the Third Circuit would require Countrywide to start the Debtors' account with a positive balance, as if Debtors had actually deposited money into their escrow account pre-petition. (The Fifth Circuit's opinion is silent as to what it would allow, other than to prohibit the reanalysis in the manner that was used.)

Mortgage lenders have sound financial reasons not to loan additional funds to debtors post-petition to fund escrow accounts. The best-case scenario for a lender under the Third Circuit approach is that the lender would need to loan a debtor funds to be paid back over the life of the Chapter 13 plan (from three to five years) to cover the debtor's taxes, insurance, and other escrow items. But what happens when (as is often the case) a debtor defaults on the Chapter 13 plan? If the lender has already paid the debtor's taxes or insurance as those items became due (as required by RESPA, 12 U.S.C. §2605(g)), how will the lender be able to recover the funds it was forced to loan to the debtor? Even when there is collateral for the loan, it is not uncommon for the collateral to be insufficient to cover the amount of the secured obligations. Neither the Third Circuit nor the Fifth Circuit cites any authority to explain how a lender can be forced to loan money to debtors under these circumstances. In contrast, RESPA and Reg. X both expressly allow mortgage lenders to require

additional deposits into an escrow account to minimize the circumstances under which a lender must loan money to cover the borrower's escrow obligations. *See* 12 U.S.C. §2609(a)(2) (the lender "shall not be prohibited from requiring additional monthly deposits" to avoid an anticipated deficiency); 24 C.F.R. §3500.17(f)(2) (allowing recovery of additional escrow deposit to cover a projected "shortage").[9]

A fundamental problem with the analyses employed by the Third Circuit and the Fifth Circuit is that both courts treated Countrywide's refusal to make a post-petition loan to Debtors as an attempt to "recoup" the estimated escrow deposits that were not made pre-petition. (Pet. 1a, 14a n.4). But, as Judge Sloviter recognized, RESPA and Reg. X require a 100% forward-looking analysis to determine the amount of post-petition escrow deposits. (Pet. 16a n.1). The analysis does not look back in time to pre-petition events or to "recoup" anything. The Third Circuit's and Fifth Circuit's decisions to view this issue as a "recoupment" matter arises from their mistaken belief that Countrywide had a pre-petition "claim" for missed escrow deposits that Countrywide could be compelled to pursue through the bankruptcy. Here, the Third Circuit believed that Countrywide had a pre-petition escrow-related "claim" for $1,787.60 in addition to the amount of the escrow deficiency claim Countrywide asserted.[10] (Pet. 15a).

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[9] *See* fn. 4 above for an explanation of the "shortage" calculation.

[10] The Third Circuit does not state how it calculated the $1,787.60 amount. That number appears to be the difference between the amount of the pre-petition escrow deposits that Debtors should have made (totaling $5,657.60) and the amount of the deficiency that actually existed (totaling $3,869.91). The Third Circuit does not explain why it believes this calculation is

The following paragraph from the Third Circuit Majority opinion highlights what is wrong with the court's reasoning:

> Countrywide calculated the escrow payments by presuming that the escrow balance at the time of the bankruptcy filings was $0.00 because the Rodriguezes had not contributed any funds to the account. In other words, Countrywide did not treat the $1,787.60 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, Countrywide calculated the post-petition escrow shortage as including the $1,787.69 cushion that the Rodriguezes never, in fact, paid.

Setting aside the court's misuse of the statutory term "cushion,"[11] *see* 24 C.F.R. §3500.17(b), the court never reviews the merits of how Countrywide calculated the escrow. The missed escrow deposits (including the Majority's $1,787.69 "cushion") formed no part of that analysis. Moreover, the Majority does not explain what is wrong with a lender "not treating the $1,787.69 cushion as funds that existed at the time of the bankruptcy filing" when that money was "never, in fact, paid" by the Debtors. (Pet. 4a). It appears that the Majority would require Countrywide to start

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proper. Moreover, it does not cite anything in RESPA or Reg. X to support its approach.

[11] A "cushion" is defined 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 § 3500.17(c)." 24 C.F.R. §3500.17(b). Section 3500.17(c) limits the amount of the cushion that may be required to one-sixth of the total estimated annual disbursements from the escrow account using aggregate analysis accounting. 24 C.F.R. §3500.17(c).

its post-petition escrow analysis with a positive but non-existent balance of $1,787.69. Therefore, for Countrywide to make the tax and insurance payments coming due, *see* 12 U.S.C. § 2605(g), it must advance (i.e. loan) funds to the Debtors in that amount.

E. Procedural History

After Countrywide provided notice of its escrow account reanalysis, Debtors filed a motion to enforce automatic stay on December 2, 2007. The bankruptcy court denied that motion, finding that Countrywide did not violate the Bankruptcy Code's automatic stay when Countrywide followed RESPA and Reg. X to reanalyze the Debtors' escrow account. The bankruptcy court refused to use an:

> . . . "Alice in Wonderland" approach to mortgage servicing, in which lenders are required to credit an escrow account for payments not made, while coming out of pocket to advance additional payments of taxes and insurance on behalf of Chapter 13 debtors.

(Pet. 33a-34a). The district court affirmed the bankruptcy court's decision, but the Third Circuit reversed in a 2-1 decision.

REASONS FOR GRANTING THE WRIT

This case warrants review because it presents an important and frequently recurring issue in Chapter 13 bankruptcy cases regarding how to handle debtors' residential home mortgage loan escrow accounts post-petition, particularly with respect to calculating the amount of money debtors must deposit into escrow to cover the debtors' anticipated post-petition tax, insurance, and other escrow obligations. Congress

was unequivocal in granting mortgage lenders the right to reanalyze escrow accounts to avoid having to loan additional funds to borrowers to cover anticipated escrow items:

> That in the event the lender determines that there will be or is a deficiency [in the borrower's escrow account], he *shall not be prohibited* from requiring additional monthly deposits in such escrow account to avoid or eliminate such deficiency.

12 U.S.C. §2609(a)(2) (emphasis added). The Third Circuit Majority ignored that clear language, choosing instead to give "precedence" to the Bankruptcy Code's automatic stay over RESPA's exception-free rights. (Pet. 14a n.4). By failing to try to harmonize the language of RESPA with the Bankruptcy Code, the Third Circuit acted in direct conflict with this Court's decision in *Morton v. Manchuria,* in which the Court explained:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

417 U.S. 535, 551 (1974). RESPA and the Bankruptcy Code can co-exist. If the Third Circuit had simply followed the logical reasoning of the Second Circuit in *In re Villarie*, 648 F.2d 810 (2d Cir. 1981), as Judge Sloviter urged in her dissent (Pet. 21), the court should have found that there was no conflict in the statutory authorities and that, as a result, Countrywide had the right to follow RESPA to avoid loaning additional money to Debtors post-petition.

Not only did the Third Circuit fail in its duty to give effect to all statutes enacted by Congress, to achieve its conclusion the Third Circuit employed a strained reading of what constitutes a "contingent claim" in bankruptcy that is in direct conflict with other circuit courts, including the very court that the Third Circuit purported to follow—the Fifth Circuit. The Third Circuit explained that Countrywide had a "contingent claim"—not a matured "claim"—for missed escrow deposits:

> Here, Countrywide's right to successfully collect may be contingent on a disbursement by Countrywide of its own funds to satisfy an escrow item for which there is a deficiency. But 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 § 101(5).

(Pet. 14a). Although the Third Circuit and the Fifth Circuit both found that the automatic stay applied to limit the mortgage lender's right to rely on RESPA, the Fifth Circuit did so by concluding that Countrywide had a matured claim, not a contingent one:

> There was a right to the pre-petition escrow payments—which matured into a claim on behalf of Countrywide—each time the [debtors] failed to make the payment. Countrywide's argument that it had no rights against the [debtors] until the escrow expenses were paid ignores the terms of the loan documents.

Campbell, 545 F.3d at 354. Notably, the Fifth Circuit rejected as "imaginative" Countrywide's argument that its rights were dependent on future events (including the requirement to pay money on the debtors'

behalf). *Id.* at 353. Countrywide respectfully submits that there is nothing imaginative about the need to satisfy tax obligations payable post-petition to avoid the risk of a taxing authority's priming lien or to advance hazard insurance payments to protect against fire, hail, wind or other damage to a borrower's home. Both the Third Circuit and the Fifth Circuit reached the wrong decision because they ignored RESPA when analyzing a mortgage lender's rights in bankruptcy. Had the Third Circuit employed the Second, Fifth, and Ninth Circuit's standard to determine when a contingent contract claim exists in bankruptcy, the Third Circuit should have concluded that Countrywide did not have any claim, contingent or otherwise, to the missed pre-petition escrow deposits. Accordingly, the Bankruptcy Code's automatic stay would not apply to or take precedence over Countrywide's rights under RESPA and Reg. X.

The decisions of the Third Circuit and Fifth Circuit, though, are even further in conflict. Even if one accepts the erroneous premise that a mortgage lender has a claim relating to missed estimated escrow deposits, the Third Circuit and Fifth Circuit do not agree on the scope of that claim. The Third Circuit's reasoning suggests that Countrywide would have a claim for $5,657.60, which is the total amount of the missed escrow deposits. The Fifth Circuit, by contrast, has adopted a claim analysis that, if applied to this case, would result in a total claim of $9,527.51, which is the sum of the escrow deficiency plus the missed escrow deposits in the "bankruptcy year". But the method to calculate an escrow-based claim should not vary from circuit to circuit. Countrywide respectfully submits that the correct analysis, mandated by RESPA and Reg. X, would support a claim in the amount of $3,869.91 (*i.e.* the escrow deficiency), with

the mortgage lender retaining its right to continue to follow RESPA & Reg. X post-petition.

Immediate review of the Third Circuit's decision is a matter of pressing importance. There are tens of thousands of pending Chapter 13 bankruptcy cases in the federal courts involving debtors with escrow accounts for their home mortgage loans. Mortgage lenders must know what rules apply when trying to administer those accounts during the pending bankruptcies. There is little doubt that lenders will be held to their obligations under RESPA §2605(g):

> If the terms of a federally related mortgage loan require the borrower to make payments to the servicer of the loan for deposit into an escrow account for the purpose of assuring payment of taxes, insurance premiums, and other charges with respect to the property, the servicer shall make payments from the escrow account for such taxes, insurance, and other charges in a timely manner as such payments become due.

12 U.S.C. §2605(g). This Court should not allow courts to limit mortgage lenders' rights under RESPA §2609(a)(2) to require sufficient funds to be placed into the escrow account to meet the anticipated obligations. There is nothing in the laws enacted by Congress that supports the Third Circuit's and Fifth Circuit's conclusions that a mortgage lender can be compelled to loan more money to a borrower simply because the borrower has sought bankruptcy relief to permit cure of a pre-petition mortgage arrearage.

A. The Third Circuit's Refusal to Consider the Substantive Law Under RESPA and Reg. X When Analyzing What Constitutes Countrywide's Claim Is in Direct Conflict with Precedent from this Court and Other Circuit Courts.

1. To meet its duty to harmonize statutes that are capable of coexistence, *see Morton*, 417 U.S. at 551, a court must necessarily analyze the terms of the applicable statutes to determine whether they are in conflict. As Judge Sloviter observed, though, the Third Circuit Majority did not attempt to do this. (Pet. 19a). Although the Third Circuit Majority discusses the Bankruptcy Code at length, it does not cite the controlling provision of RESPA—§2609(a)(2). Moreover, when purporting to analyze whether Countrywide had a "claim" for missed pre-petition estimated escrow deposits, the Third Circuit Majority does not even discuss Reg. X, which is the regulatory scheme that controls the escrow analysis.[12] By failing to address the applicable laws and regulations, the Third Circuit opinion is squarely in conflict with *Morton*.

2. By analyzing whether a "claim" exists in bankruptcy without addressing the regulatory scheme governing that claim, the Third Circuit opinion is also in conflict with *In re Villarie*, 648 F.2d 810 (2d Cir. 1981). In *Villarie*, the Second Circuit had to determine whether a creditor—the city—held a claim against the debtor for a loan the debtor had taken

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[12] The Third Circuit cites Reg. X only once, in passing, in a footnote. (Pet. 14a n.4). In *Campbell*, the Fifth Circuit does not cite Reg. X at all. By contrast, Judge Sloviter began her dissent in this case at the proper starting point, by analyzing the mortgage lender's rights under RESPA and Reg. X.

against the city annuity plan. There was no dispute that the city was entitled to receive reimbursement for the amount of that loan. But the city's rights were constrained by administrative regulations. Although the city had the right to deduct money from the debtor's future paychecks and distributions to repay the loan, the city could not sue the debtor to enforce the loan. *Id.* at 812. Focusing on the city's rights under the applicable regulations, the Second Circuit concluded that the city did not have a "claim" against the debtor.

The Bankruptcy Code's legislative history also shows that context is important when determining what constitutes a "claim" in bankruptcy. Congress explained:

> This definition of "debt" and the definition of "claim" on which it is based . . . does not include a transaction such as a policy loan on an insurance policy. Under that kind of transaction, the debtor is not liable to the insurance company for repayment; the amount owed is merely available to the company for setoff against any benefits that become payable under the policy. As such, the loan is not a claim (it is not a right to payment) that the company can assert against the estate . . . .

S. REP. No. 95-989 at 23. Accordingly, context matters. Not every dispute over a monetary payment qualifies as a "claim" in bankruptcy. Although a "claim" under 11 U.S.C. §101(5) is defined broadly, "the broad definition of claim is not boundless." 2 COLLIER ON BANKRUPTCY ¶101.05[1] (16th ed. rev. 2009).

3. The Third Circuit's refusal to consider the context in which escrow obligations arise is very impor-

tant; it is outcome determinative, and places bankruptcy courts in the dangerous position of having to alter or ignore HUD's escrow account regulations in bankruptcy cases. Had the Third Circuit reviewed Reg. X, which governs the mortgage lender's escrow account analysis, the court should have concluded that Countrywide did not have a contingent claim for the missed pre-petition escrow deposits that are in dispute in this Petition.

Reg. X is a complex and complete administrative scheme in itself. 24 C.F.R. §3500.17. It imposes mandatory duties on mortgage lenders, and establishes the formulas to use to determine escrow deposit requirements. 24 C.F.R. §3500.17. It expressly allows for additional deposits to cover anticipated escrow "shortages" in the upcoming year. 24 C.F.R. §3500.17(f)(3). It also establishes the procedures that must be followed to seek recovery of an escrow "deficiency," when the mortgage lender has paid out more money than was deposited into the debtor's escrow account. 24 C.F.R. §3500.17(f)(4).

In the present case, there is a fundamental disagreement between Countrywide and the Third Circuit over the cause of the increase in Debtors' required monthly post-petition escrow deposit. Countrywide's view is that the monthly post-petition escrow deposit increased because, using the escrow analysis mandated by RESPA and Reg. X, the escrow account analysis revealed a post-petition shortage that Countrywide was allowed to recover over a twelve-month period. The Third Circuit's view is that the monthly deposit requirements increased because, as a result of the Debtors' missed pre-petition escrow deposits, there was a possibility that there would be a post-petition deficiency in the Deb-

tors' escrow account. (Pet. 5a, 14a). But regardless of which view is accepted, the provisions of RESPA and Reg. X are complete within themselves, and do not give rise to a claim using the analytical approach from *Villarie*.

Countrywide's position is based on the undisputed evidence that the forward-looking, post-petition escrow analysis of Debtors' account showed that there was an anticipated post-petition "shortage" of $2,527.80 in that account during the escrow year. Reg. X expressly states how a mortgage lender can recover that shortage from the debtor/borrower:

> (2) If an escrow account analysis discloses a shortage that is greater than or equal to one month's escrow account payment, then the servicer has two possible courses of action:
>
> (A) The servicer may allow the shortage to exist and do nothing about it; or
>
> (B) The servicer may require the borrower to repay the shortage in equal monthly payments over at least a 12-month period.

24 C.F.R. §3500.17(f)(3). Notice that the mortgage lender has the right to require future payments to make up for the anticipated shortage in the upcoming year. 24 C.F.R. §3500.17(f)(3); *see also* 12 U.S.C. §2609(a)(2). But the lender does not have the right to go outside of the regulatory scheme to pursue the borrower for the shortage. Applying the logic of *Villarie*, the Third Circuit should have held that there was no bankruptcy claim for that post-petition shortage.

Even under the Third Circuit's approach, there is no claim when this case is viewed in light of the

mandatory statutory and regulatory scheme for escrow accounts. The Third Circuit's view was that Countrywide had an enforceable right to payment from Debtors for the missed pre-petition estimated escrow deposits that was "contingent on a disbursement by Countrywide of its own funds to satisfy an escrow item for which there is a deficiency."[13] (Pet. 14a). But even if the missed pre-petition escrow deposits could be viewed as giving rise to a post-petition deficiency, Reg. X still provides the only means under which Countrywide could act to pursue recovery of that 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 amount, 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.

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[13] If Countrywide's claim is "contingent" on the existence of a post-petition "deficiency," this creates an additional administrative problem in the bankruptcy court regarding how to determine whether it actually will exist, and how to value such a claim. Instead of focusing on a possible post-petition deficiency, the court should have focused on whether there was an anticipated "shortage" using the required RESPA and Reg. X analysis.

> (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.
>
> (iii) These provisions regarding deficiencies apply if the borrower is current at the time of the escrow account analysis. A borrower is 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 recover the deficiency pursuant to the terms of the mortgage loan documents.*

24 C.F.R. §3500.17(f)(4) (emphasis added). The only exception allowing a mortgage lender to recover funds against a borrower outside of Reg. X is for a "deficiency" when a borrower is in default under the loan documents. 24 C.F.R. §3500.17(f)(4)(iii). Absent a post-petition breach of the loan documents, mortgage lenders must pursue collection of all escrow funds through Reg. X. And, if there is a post-petition breach of the loan document, the mortgage lender can only pursue the escrow "deficiency" that exists; it cannot pursue collection of the missed estimated escrow payments.[14] Courts should not be adding bankruptcy exceptions into RESPA and Reg. X that simply are not there.

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[14] Following these express rules, Countrywide included Debtors' pre-petition escrow deficiency in its proof of claim because Debtors were in default on their loan and those funds were, therefore, additional debt due under the note. These rules would not allow Countrywide to pursue missed pre-petition estimated escrow deposits through its proof of claim.

When Countrywide's rights against Debtors are viewed in the context of the RESPA and Reg. X regulatory scheme, Countrywide does not have a contingent claim for missed estimated escrow deposits that could be handled through Debtors' Chapter 13 bankruptcy. As a result, the Bankruptcy Code's automatic stay does not apply here, and there is no conflict in the governing laws. The Third Circuit had no legal basis for giving "precedence" to the Bankruptcy Code's automatic stay over RESPA and Reg. X.

B. The Third Circuit's Holding that Countrywide Had a "Contingent Claim" Is in Direct Conflict with Precedent from Other Circuit Courts Defining a Contingent Claim.

As noted above, the missed estimated escrow deposits should not be included as part of Countrywide's "claim" because those amounts are not part of the enforceable debt Debtors owed to Countrywide under the applicable loan documents. Nevertheless, the Third Circuit held that Countrywide had a "contingent claim" for those missed estimated escrow deposits that was "contingent on a disbursement by Countrywide of its own funds to satisfy an escrow item for which there is a deficiency." (Pet. 14a). The Third Circuit's analysis of a "contingent claim" arising from a contractual relationship is in direct conflict with the definition of a contingent claim employed by the Second, Fifth, and Ninth Circuits. The Third Circuit's holding that Countrywide had a contingent claim for the missed estimated escrow deposits is also in direct conflict with the Fifth Circuit's holding on the same issue.

1. The Second, Fifth, and Ninth Circuits define contingent contract claims as "obligations that will

become due upon the happening of a future event that was 'within the actual or presumed contemplation of the parties at the time the original relationship between the parties was created'." *In re Water Valley Finishing, Inc.*, 139 F.3d 325, 328 (2d Cir. 1998); *In re Seko Investment, Inc.*, 156 F.3d 1005, 1008 (9th Cir. 1998); *In re Sims*, 994 F.2d 210, 220 (5th Cir. 1993). "The classic example [of a contingent claim] is a wager between two parties; until the wagered-on event comes to pass, both have contingent liabilities in the amount of the debt." *In re Seko*, 994 F.2d at 1008. Waiting for a debtor to breach his contractual obligations post-petition is not a contingent claim; it is not fairly within the contemplation of the parties that the other would breach its contract. Surely a debtor cannot file for bankruptcy protection to seek discharge for the consequences of his upcoming, post-petition actions. *See O'Loghlin v. County of Orange*, 229 F.3d 871, 875 (9th Cir. 2000) (holding that the "fresh start" provided in bankruptcy is not a license to continue violating the law post-petition).

The Third Circuit's opinion in this case shows that the court is applying a different standard than its sister circuits. The Third Circuit has not expressly adopted a standard for contingent contract claims. *In re Grossman's, Inc.*, 607 F.3d 114 (3d Cir. 2010) (en banc). But when faced with the issue in this case, the Court merely applied *Grossman's*—its authority for determining when contingent tort claims exist—as its only authority for determining whether Countrywide had contingent claim. (Pet. 14a). The Third Circuit concluded that Countrywide had a contingent claim for the missed estimated escrow deposits based on the possibility that there will be a "deficiency" in the Debtors' escrow account post-petition. Under Reg. X, though, Countrywide would only have a

right to seek payment for that deficiency (outside of the regulatory scheme) if Debtors are in default of their post-petition escrow deposit obligations. *See* 24 C.F.R. §3500.17(f)(4)(iii). Accordingly, the Third Circuit has defined a contingent claim in bankruptcy cases that is dependent upon a post-petition breach of contract by Debtors. This is not a "contingent" claim under the standard adopted by the other circuit courts.

2. The Third Circuit's contingent claim analysis is not even consistent with the Fifth Circuit decision it purported to follow. When the Fifth Circuit was faced with the issue regarding how to handle missed pre-petition escrow deposits, the Fifth Circuit did not find the mortgage lender's rights to be "contingent." *Campbell*, 545 F.3d at 354. The Fifth Circuit held that an actual, matured claim existed for the missed pre-petition escrow deposits. *Id.* Countrywide disagrees with the Fifth Circuit's conclusion too because, like the Third Circuit, the Fifth Circuit rendered its decision without addressing the controlling language of RESPA and Reg. X that expressly governs the mortgage lender's rights to recover escrow funds. Nevertheless, the conflict in the reasoning between the Fifth Circuit and the Third Circuit on this issue highlights the need for guidance from this Court.

C. There Is Also a Conflict Among the Circuits Over What Is Included Within the "Claim" Found by the Third and Fifth Circuits.

The Third Circuit's and Fifth Circuit's refusal to follow RESPA and Reg. X creates an additional problem—how should one calculate a claim that

includes escrow items? There are now three competing approaches:

The correct statutory approach (that was used by Countrywide) is simple and workable: file a claim covering the pre-petition deficiency in the escrow account (which represents the enforceable debt arising under the Note), and then continue to follow RESPA and Reg. X going forward. Here, that means that Countrywide would have an arrearage claim for the $3,869.91 that was actually due to Countrywide under the loan documents based on the pre-petition negative balance in Debtors' escrow account—a claim Debtors may cure under their plan under Bankruptcy Code §1322(b)(5). All post-petition escrow items would be covered by the post-petition RESPA and Reg. X analysis.

The Third Circuit rejected Countrywide's approach. The Third Circuit agreed that Countrywide had a claim for the $3,869.91 pre-petition deficiency that Debtors could cure through their bankruptcy plan. But the Third Circuit also found that Countrywide had a claim for a "$1,787.69 cushion" that should have existed in Debtors' escrow account if they had made all of their pre-petition payments. (Pet. 15a). The Third Circuit then would have Countrywide treat this $1,787.69 as funds that actually existed in the escrow account when performing the post-petition escrow analysis, resulting in Countrywide extending the involuntary loan discussed above. (*See* Pet. 19a-20a).

The Fifth Circuit also rejected Countrywide's approach, but it did not adopt the same analysis as the Third Circuit. The Fifth Circuit did not dispute that a mortgage lender has a claim for the pre-

petition escrow deficiency, which is $3,869.91 in this case. However, the Fifth Circuit explained:

> Our decision is a narrow one. We determine only that unpaid escrow payments that accumulate pre-petition in the year that 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.

Campbell, 545 F.3d at 354. In *Campbell*, the Fifth Circuit included the four missed estimated escrow deposits for the "bankruptcy year" as part of Countrywide's "claim," but the court ignored the other eleven missed estimated escrow deposits in its analysis. *Id* at 351, 354. In the present case, Debtors missed eight pre-petition escrow deposits, all in the bankruptcy year. Accordingly, under the Fifth Circuit's reasoning, Countrywide would have a claim for $5,657.60 for the eight missed escrow deposits, plus $3,869.91 for the deficiency, resulting in a total claim of $9,527.51.

Applied to the present case, the three approaches may be summarized in the following chart:

	Deficiency	Estimated Payments	Total Claim
Countrywide	3,869.91	0	3,869.91
Third Circuit	3,869.91	1,787.69	5,657.60
Fifth Circuit	3,869.91	5,657.60	9,527.51

The current circuit court precedent on how to handle escrow accounts is anything but uniform.

CONCLUSION

Mortgage lenders appear and file claims in a substantial majority of the more than 300,000 Chapter 13 bankruptcy cases filed each year. This Court should not allow confusion to continue to exist regarding mortgage lenders' rights and claims, otherwise the bankruptcy courts will be swamped with countless proceedings to resolve these issues. The application of uniform national rules is needed. Those rules exist—they are the ones specifically adopted by Congress and HUD to govern escrow accounts. The general policies of the Bankruptcy Code do not conflict with or supersede RESPA and Reg. X. This Court should grant this petition and overrule the erroneous decisions of the Third and Fifth Circuits.

Respectfully submitted,

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