

AMBIGUITY IN DEED OF TRUST'S ESCROW PROVISIONS

On January 4, 2019, the Fifth Circuit Court of Appeals [held](#) that a deed of trust's escrow provisions were ambiguous as to whether the loan servicer was permitted to pay the borrower's non-delinquent 2010 taxes, reversing the district court's entry of summary judgment for the defendant, and remanded the case to the district court for further proceedings.

The escrow provisions provided that the lender would not collect escrow deposits if the plaintiff timely paid real estate taxes, and if the borrower failed to pay his real estate taxes, he was obligated to adjust his monthly payment to establish a fully funded escrow account. In April 2010, the borrower was informed that he was delinquent on his 2009 real estate taxes, which the borrower then paid on June 30, 2010. In December 2010, without notice, the loan servicer paid borrower's 2010 real estate taxes and, unaware of the servicer's payment, the borrower paid his 2010 taxes in January 2011. In June 2011, the servicer sent a letter to the borrower informing him of the 2010 shortage and also informed the borrower that his monthly mortgage payment would increase to make up that shortage. The borrower defaulted and responded with a lawsuit in district court, alleging, among other things, breach of contract by paying borrower's 2010 taxes, starting to escrow, and increasing monthly mortgage payments. The servicer filed a counterclaim for foreclosure, and prevailed on its motion for summary judgment, and the borrower appealed.

The Fifth Circuit parsed the language in the escrow provisions and found two plausible readings in the deed of trust. On the one hand, the escrow provisions permitted the servicer to pay the borrower's 2010 taxes based on the borrower's "fail[ure] to perform the covenants and agreements contained in" the deed of trust. The servicer contended that when the borrower failed to timely pay his 2009 taxes, the servicer acquired the right to pay borrower's 2010 taxes, even though at the time the borrower had already paid his 2009 taxes and the 2010 taxes were not yet delinquent. On the other hand, a separate escrow provision, the court found, permitted the servicer only to pay the borrower's *past-due* 2009 taxes—not to pre-pay his 2010 taxes. The court reasoned that the escrow provisions were subject to two or more reasonable interpretations. Given the conflicting readings, the court applied Texas precedent to hold that the borrower was entitled to proceed to trial on his claim that the loan servicer breached the deed of trust by paying his taxes before the tax lien attached and before they became delinquent.