Escrow Agreements with Title Companies for Post-Closing Matters

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ESCROW AGREEMENTS

I. Introduction

In Texas, title insurance agents almost always act as the escrow agent for a real estate transaction. This is in contrast to the practice in some states, most notably California, wherein the escrow function is performed by pure escrow companies, and in New York, wherein attorneys typically act as the escrow agent. Because Texas title insurance agents are generally hesitant to act as escrow agents in transactions wherein they will not be issuing a title policy, in those instances the parties may turn to a bank's trust department or an attorney. This article will describe the duties of escrow agents with regard to funds held, and will provide sample language for the typical circumstances wherein escrow agents are asked to hold funds for principals. The opinions and statements in this article are solely those of the author, and do not necessarily represent the positions of Heritage Title Company of Austin, Inc., Chicago Title of Texas, LLC, Chicago Title Insurance Company, or any of their affiliated companies.

II. Dual Agency Role of the Escrow Agent

A. Special Agent Rather than General Agent. Since an escrow agent is acting as a stakeholder, it owes duties to both parties to a transaction. In this "dual agency" role, it is required to act as a neutral third party. While the escrow agent is often referred to as owing fiduciary duties to both parties, these duties are described as being "special" fiduciary duties, since a duty of neutrality is also imposed, which duty is lacking from the duties applicable to other types of fiduciary relationships, such as a trustee or a director.

A title company's role as a "special agent", rather than as a "general agent", when acting as an escrow agent has been discussed in a number of cases. For example, in *Boatwright v Texas American Title Co.,* 790 S.W.2d 722, 728 (Tex. App.-El Paso 1990, err. dismissed), the court noted that the title company's duty as an escrow agent was limited to preparing the escrow papers, advising both parties regarding the status of title, accepting and cashing checks, and holding critical documents and money in escrow. In this limited role, the court found that the escrow agent was not a general agent (subject to the control of one party or the other), but rather, was a special agent for the limited purposes of carrying out escrow instructions. *See Texas Reserve Life Insurance Co. v, Security Title Co.,* 352 S.W.2d 347, *350* (Tex. Civ. App-San Antonio 1961, writ ref d, n.r.e.); *King v. Ladd,* 624 S.W.2d 195, 197 (Tex. Civ. App-El Paso 1981, no writ); *Wilson v, Carver Federal Savings & Loan Association,* 774 S.W.2d. 106, 107 (Tex. App. -Beaumont 1989, no writ); *Vector Industries, Inc.* 793 S.W.2d. 97, 101 (Tex. App. -Dallas 1990, no writ); *Capital Title Co. v. Donaldson,* 739 S.W.2d. 384, 389 (Tex. App. -Houston [1st Dist.] 1987, no writ); *Chilton v. Pioneer National Title Insurance Co.,* 554 S.W.2d. 246, 249 (Tex. Civ. App. Waco 1977 , writ refd n. r. e.); and *Trevino v. Brookhill Capital Resources, Inc.,* 782 S.W.2d. 279 (Tex. App. -Houston (1st Dist.] 1989, writ denied).

B. <u>Duties.</u> In addition to the escrow agent's dual agency role, escrow agent is required to act with utmost good faith and avoid any act of self-dealing which would place its personal interests ahead of his obligations to the parties for whom it is acting. *Slay v. Burnell Trust.* 187 S.W.2d 377, 387-88 (Tex.1945). Courts have fleshed-out this admonition by assigning the following duties to escrow agents: (1) the duty of loyalty; (2) the duty to make full disclosure; and (3) the duty to exercise a degree of care to conserve the money and pay it only to those persons entitled to receive it. *City of Fort Worth v. Pippen,* 439 S.W.2d 660 (Tex. 1969).

1. Challenges Arising in Connection With Duty of Disclosure.

Escrow agents constantly receive communications from the parties. Sometimes, those comments are prefaced with words such as, "Don't tell the seller, but…" This can place the escrow agent in an impossible position. If the information imparted might be deemed to be information which the seller would have considered to have a material impact on the seller's obligations or performance under the contract, the escrow agent might be faced with a claim for breach of the duty of full disclosure for not disclosing it to the seller, and conversely, expose the escrow agent to a claim for breach of the duty of loyalty to the buyer for disclosing the information.

For example, sometimes the buyer is attempting to assemble a number of tracts of land in anticipation of a large development project. The buyer wants to keep his plans confidential in order to avoid "price creep". Similarly, the buyer may have a well-known name and wishes to keep his identity secret for the same reason. As such, the buyer may appoint a broker to act on behalf of the buyer as trustee, for the purpose of submitting a purchase contract. If the buyer or the agent discloses to the escrow agent the buyer's real identity or the buyer's plans for the assemblage, is the escrow agent under a duty to disclose this information to the seller? What if the seller actually asks the escrow agent about the buyer's true identity or plans? Can the escrow agent keep this information confidential?

Similarly, if, while a transaction is pending between A as seller and B as buyer, B receives an offer from C to purchase the property as soon as B receives title (a typical "flip" transaction), is the escrow agent under a duty to disclose to A the pendency of the B to C transaction? Is the escrow agent under a duty to disclose to C the price that B is paying in the A to B transaction? Does the escrow agent have any similar duties to C's lender? Remember, A is not a party to the B and C conveyance and has no reason to know about the B to C conveyance, as it is a separate, subsequent transaction.

What if A is conducting a "short sale" (i.e., A's lender is accepting as a payoff, less than what is owing on the mortgage? Does the escrow agent have a duty to tell A's lender about the other transaction between B and C, and that the price being paid by C is greater than what A's lender is accepting in the short sale between A and B?

One commentator presents a strong argument that under an A to B and then a B to C sale situation, an escrow agent has no duty to disclose facts known to the escrow agent by reason of participating in the first transaction to the parties in the second transaction:

"As previously mentioned, there is a duty of full disclosure to the parties in the escrow arrangement. In a single A to B to C transaction, there are two escrows, two separate guaranty files, and two separate transactions referenced. The first one is a transaction from A to B, which is one transaction. The duty of disclosure in the first transaction and fiduciary incidents thereto do not extend to a party that is outside that transaction. If title companies are to be trusted as escrow agents, disclosing any information to a party outside the transaction (even though they are in another transaction in the same title company) puts the title company in the inexplicable

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