

ESCROW AGENT LIABILITY: A TRIAL LAWYER'S PERSPECTIVE

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ESCROW AGENT LIABILITY: A TRIAL LAWYER'S PERSPECTIVE

I. INTRODUCTION

Sometimes transactions fail. Sometimes transacting parties disagree as to whether there has been compliance with agreed terms, and sometimes parties to a transaction simply have second thoughts about the deal they made. If an escrow agent was involved in the transaction, and a lawsuit is filed, it is not uncommon for the escrow agent to be included among the named parties. Claims against the escrow agent may include claims for breach of contract, violation of fiduciary duties, tortious interference, fraud, and other claims. This paper discusses the nature of the escrow relationship and the duties it entails, and how courts have interpreted those duties under different fact patterns.

II. WHAT IS AN ESCROW AGENT?

A. The escrow agent

An escrow agent is a third party depository of an escrow. See *Smith v. Daniel*, 288 S.W. 528, 531 (Tex. Civ. App.—Beaumont 1926, writ dismissed). It is a neutral third party which holds documents or other property (often instruments, such as deeds, or funds) until the occurrence of a specified event, at which time the agent makes disbursement or delivery in accordance with the parties' instructions. *Hudgins v. Krawetz*, 558 S.W.2d 131, 133-34 (Tex. Civ. App.—San Antonio 1977, no writ). An escrow agent is an impartial stakeholder. *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157, 161 (Tex. App. — Dallas 1992, writ denied).

B. The escrow

An escrow is a document or other property held by a third party until the occurrence of an event, at which time the third party delivers the document or property as instructed. The purpose for requiring a promisor to place documents or property in escrow is to protect the promisee by having a neutral third party hold the deposited items or funds until the happening of an agreed event. *Vector Indus., Inc. v. Dupre*, 793 S.W.2d 97, 101 (Tex. App.—Dallas 1990, no writ). An escrow must be supported by a valid underlying contract. *La Roe v. Davis*, 333 S.W.2d 222, 224 (Tex. Civ. App.—Amarillo 1960, no writ).

C. The escrow agreement

An escrow agreement is the instructions given to a third party depository of an escrow. It is an agreement made for the purpose of preserving documents or property so they will be available for

disbursement or delivery when authorized. *EMC Mortg. Corp. v. Jones*, 252 S.W.3d 857, 868 (Tex. App.—Dallas 2008, no pet. h.)

D. An escrow agent is not a title insurer

It is important to remember that, in real property transactions, an escrow agent is very different from a title insurer. Title insurance is a contract of indemnity. The duty imposed on a title insurer by a title insurance policy is to indemnify the insured against losses caused by defects in title. *Chicago Title Ins. Co. v. McDaniel*, 875 S.W.2d 310, 311 (Tex. 1994). This duty to indemnify against losses does not constitute a representation of the status of title to the property. *Id.*; *Chicago Title Ins. Co. v. Alford*, 3 S.W.3d 164, 167 (Tex. App.—Eastland 1999, pet. denied) (title insurance policy cannot form basis of an actionable representation under the Texas Deceptive Trade Practices-Consumer Protection Act).

The distinction between an escrow agent and a title insurer, and the duties undertaken by and imposed upon each, can be particularly important when one person or entity serves as both escrow agent and title insurer. In those circumstances it is necessary to distinguish between actions taken in the capacity of an escrow agent and actions taken in the capacity of a title insurer. *E.g., Holder-McDonald v. Chicago Title Ins. Co.*, 188 S.W.3d 244, 247-48 (Tex. App.—Dallas 2006, pet. denied).

III. IS AN ESCROW AGREEMENT NECESSARY FOR AN ESCROW?

Generally, yes. To create an escrow, the parties must agree on the terms under which the escrow agent is to retain the deposited documents or property and to make disbursement or delivery of the deposited items. In Texas, an escrow agent is generally appointed through a specific written instrument which describes the legal obligations undertaken. *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429, 438 (Tex. App.—Hous. [14th Dist.] 2000, pet. denied).

It has been held that the duties of an escrow agent may arise even where no formal escrow agreement has been entered into. When the underlying contract involves the deposit of funds or items with a third party, but the underlying contract does not qualify as a true escrow agreement, the neutral third party is nonetheless bound to comply with the terms of the contract and may be found to owe fiduciary duties akin to those of an escrow agent to the parties. *Watkins v. Williamson*, 869 S.W.2d 383 (Tex. App.—Dallas 1993, no writ). One who accepts funds for disbursement in a closing transaction for a fee may be found to be an escrow agent. *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728, 731 (Tex. App.—Hous. [14th Dist.]

2006, pet. denied). Even without an escrow agreement, one who accepts funds accompanied by specific instructions as to how the funds are to be applied may be found to owe a fiduciary duty to the person from whom the funds are received. *City of Fort Worth v. Pippen*, 439 S.W.2d 660, 665 (Tex. 1969).

IV. CAN A LAWYER SERVE AS AN ESCROW AGENT?

Of course. Difficult issues can arise, however, when one of the parties to the escrow is also the lawyer's client. See Texas Disciplinary Rules 1.06(b) (a lawyer is generally prohibited from representing a client when the representation "reasonably appears to be . . . adversely limited by the lawyer's . . . responsibilities to . . . a third person"); 1.02(b) ("A lawyer may limit the scope, objectives and general methods of representation if the client consents after consultation."); 1.05 (defining confidential client information to include both privileged information and certain unprivileged information); 3.08 (lawyer as witness). The situation is best avoided. The Hawaiian Supreme Court put it well when it stated "[w]e caution attorneys about the potential for conflicts of interest in situations such as this where an attorney for one party also purports to act 'as escrow' for the transaction between the attorney's client and another party." *Fong v. Oh*, 172 P.3d 499, 512 (Hawaii 2007).

A. Lawyers as escrow agents

Although prudence suggests that the situation is best avoided, lawyers do sometimes assume the duties of an escrow agent in addition to their attorney-client duties.

In *Robertson v. ADJ Partnership, Ltd.*, 204 S.W.3d 484 (Tex. App.—Beaumont 2006, pet. denied), a lawyer was sued for his role in a series of lease and mineral interest transactions by an individual he had represented and worked with for a number of years. Reviewing a jury finding that there was a fiduciary relationship between the attorney and the plaintiff which had been breached, the court acknowledged that fiduciary duties arise in both an attorney-client relationship and in an escrow relationship. "To the extent [attorney] provided legal services to [plaintiff], such a formal fiduciary relationship existed. Likewise, to the extent [attorney] acted as escrow agent, a formal duty of disclosure arose." *Id.* at 491. Although the court determined that the jury finding of breach of duty was supported by the evidence, the court did not identify whether, under the particular circumstances of the case, the fiduciary relationship which had been breached arose from the attorney-client relationship (the attorney testified he felt he had no attorney-client relationship with

plaintiff), the attorney's service as escrow agent, from a long term relationship of trust and confidence between the two, or from all three roles. See *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 176 (Tex. 1997) (an informal relationship may give rise to a fiduciary duty where one person trusts in and relies on another).

B. Claims that lawyers are escrow agents

In an effort to impose additional duties on a lawyer, claims are sometimes made that a lawyer has acted as an escrow agent.

In *Chapman Children's Trust v. Porter & Hedges, L.L.P.*, 32 S.W.3d 429 (Tex. App.—Hous. [14th Dist.] 2000, pet. denied), plaintiff and defendant agreed that proceeds from defendant's claim against a third party would be paid, after deduction for costs and fees, by defendant's lawyers to a bank designated as escrow agent. When plaintiff disagreed with the lawyers' conduct during the distribution of proceeds, the plaintiff sued the lawyers claiming, among other things, that the lawyers themselves had acted as escrow agents and had breached their duties undertaken as escrow agents, to his damage. *Id.* at 434. The court avoided discussion of the potentially conflicting duties owed by the lawyers when it concluded that the lawyers had not, in fact, been escrow agents. In the court's words, "[a]bsent a written agreement which appointed [lawyers] as an escrow agent, [lawyers] had no duty to act as one." *Id.* at 438.

In *Bradshaw v. Bonilla*, No. 13-08-00595-CV, 2010 WL 335676 (Tex. App.—Corpus Christi, Jan. 28, 2010, pet. filed) (mem. op. not designated for publication), a grandmother paid fees to a lawyer to represent her granddaughter, and the lawyer allegedly disbursed the fees to the granddaughter contrary to the grandmother's direction. The court rejected the suggestion that the lawyer acted as an escrow agent, and undertook duties as such, concluding that a series of letters did not "evidence a specific legal document appointing [the lawyer] escrow agent of the monies," and determining that "an escrow agent relationship is based on a written agreement that sets out the duties owed." *Id.* at *5, f.n. 6.

For a lawsuit between lawyers arguing over allocation of a fee, in which one lawyer unsuccessfully claimed that another lawyer acted as escrow agent, and so owed him specific fiduciary duties, see *Jones v. Blume*, 196 S.W.3d 440 (Tex. App.—Dallas 2006, pet. denied) ("Absent a written agreement appointing [lawyer 1] as an escrow agent, [lawyer 1] had no duty to act as one and owed no fiduciary duty to [lawyer 2] as an escrow agent." *Id.* at 448.)

C. Lawyers found to have duties of escrow agents

A lawyer who received money from a prospective purchaser of corporate stock, accompanied by specific

instructions on how the money was to be applied, while negotiations for the stock continued, was found to be required “to act as an escrow agent and to comply with the duties inherent in that role.” *Newington, Ltd. v. Forrester*, No. 3:08-CV-0864-G ECF, 2008 WL 4908200, *3 (N.D. Tex. Nov. 13, 2008). The federal court stated it reached this conclusion because “[t]he [Texas] Supreme Court has imposed the duties of an escrow agent onto the holder of funds when the situation closely parallels an escrow arrangement.” *Id.*, citing *City of Fort Worth v. Phippen*, 439 S.W.2d 660 (Tex. 1969).

V. FIDUCIARY DUTIES OWED BY AN ESCROW AGENT

The common law imposes fiduciary duties on an escrow agent. It is settled that an escrow agent is in a fiduciary relationship with the contracting parties. *E.g.*, *Zimmerman v. First American Title Co.*, 790 S.W.2d 690, 695 (Tex. App.—Tyler 1990, writ denied); *Capital Title Co. v. Donaldson*, 739 S.W.2d 384, 389 (Tex. App.—Hous. [1st Dist.] 1987, no writ). This is true whatever the subject of the escrow may be. In an often quoted passage, the Dallas court stated:

“An escrow agent owes fiduciary duties to both the buyers and the sellers of the property, including the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to those persons entitled to receive it.”

Holder-McDonald v. Chicago Title Ins. Co., 188 S.W.3d 244, 248 (Tex. App.—Dallas 2006, pet. denied). “In its escrow agent capacity, the fiduciary not only owes a fiduciary duty to all parties involved in a contract, but must also act with utmost good faith and avoid self-dealing that places its interest in conflict with its obligations to the beneficiaries.” *Gonzales v. American Title Co. of Houston*, 104 S.W.3d 588, 598 (Tex. App.—Hous. [1st Dist.] 2003, pet. denied).

A. Dual agency

Escrow agents owe duties to separate principals whose interests conflict. “Although sharing the name ‘agent,’ general agents and escrow agents are dissimilar in one important respect: a general agent is forbidden from having conflicting interests, but an escrow agent necessarily serves two conflicting principals.” *Equisource Realty Corp. v. Crown Life Ins. Co.*, 854 S.W.2d 691, 696-97 (Tex. App.—Dallas 1993, no writ). As such, escrow agents have been

referred to as “dual agents,” and, sometimes at trial, as “double agents.”

B. Duty of loyalty

The fiduciary duty of loyalty requires that an escrow agent act in good faith and solely in its principals’ best interests. An escrow agent must avoid any act of self-dealing that places its personal interest in conflict with its obligations to its beneficiaries. *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157, 161 (Tex. App.—Dallas 1992, writ denied); *see* Restatement (Third) of Agency § 8.01 (2006). An escrow agent was found to have breached its duty of loyalty (among others) when it concealed the fact that a buyer’s earnest money check was drawn on a closed bank account and was backed by insufficient funds, and the agent encouraged the buyer to sue the seller for specific performance, all in an effort to retain its escrow fees. *NRC, Inc. v. Huddleston*, 886 S.W.2d 526 (Tex. App.—Austin 1994, no pet.).

C. Duty of full disclosure

The fiduciary duty of full disclosure requires that an escrow agent fully disclose to its principals material information which affects the interests of its principals. A fiduciary duty of full disclosure ordinarily requires disclosure of all known material facts that might affect the rights of the person to whom the duty is owed. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996); *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513-14 (Tex. 1942).

An escrow agent may be found to have breached this duty by failing to disclose a fraudulent misapplication of funds. *See City of Fort Worth v. Phippen*, 439 S.W.2d 660 (Tex. 1969). However, in *Bell v. Safeco Title Ins. Co.*, 830 S.W.2d 157 (Tex. App.—Dallas 1992, writ denied), an escrow agent was found not to have breached its fiduciary duty of disclosure when it did not explain the consequences of certain interlineations in a contract. The court explained that “to do so would have breached its duty to both parties to remain a neutral third party at the closing.” *Id.* at 161.

Of course, a duty to disclose cannot arise absent knowledge of the information which is required to be disclosed. For example, in *Holder-McDonald v. Chicago Title Ins. Co.*, 188 S.W.3d 244 (Tex. App.—Dallas 2006, pet. denied), the buyers of a home learned, after living on the property for a number of years, that an easement which provided access from their property to a public highway had expired before they purchased the property. But buyers’ claim for breach of the fiduciary duty of full disclosure failed because there was no evidence that the escrow agent knew of the erroneous legal description of the property when the transaction closed. *Id.* at 248-49.

D. Duty of care

The fiduciary duty of care requires that an escrow agent act with diligence and prudence in conserving the documents or other property in escrow and delivering or disbursing them only as instructed. *See Texas First Nat'l Bank v. Ng*, 167 S.W.3d 842, 857 (Tex. App.—Hous. [14th Dist.] 2005, pet. granted, judgment vacated, remanded by agr.). An escrow agent is liable for any deposit that is not held or delivered in accordance with the escrow agreement.

If funds are accepted for a specific purpose and use, the funds must be disbursed for that particular purpose and use. But an escrow agent does not owe a duty, and so has no negligence liability, to a non-party creditor of a party to an escrow agreement. *Gary E. Patterson & Assoc., P.C. v. Holub*, 264 S.W.3d 180, 203 (Tex. App.—Hous. [1st Dist.] 2008, pet. denied); *but cf. Home Loan Corp. v. Texas American Title Co., infra*.

VI. HOME LOAN CORPORATION AND TO WHOM FIDUCIARY DUTIES ARE OWED

It goes without saying that an escrow agent's fiduciary duties are owed to the contracting parties. However, at least one Texas appellate court appears to have rejected the notion that an escrow agent's duties are limited only to those duties set forth in a written agreement. In *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728 (Tex. App.—Hous. [14th Dist.] 2006, pet. denied), a third party lender sued an escrow agent for, among other things, failing to disclose that, at the seller's request, the escrow agent disbursed the lender's funds differently from the HUD-1 settlement statement. Although the parties had not entered into a formal escrow agreement, the court held that a title company which accepts funds for disbursement in a closing transaction for a fee owes fiduciary duties to the party remitting those funds, citing *City of Fort Worth v. Pippen*, 439 S.W.2d 660 (Tex. 1969). The court was reluctant to limit an escrow agent's fiduciary duty of disclosure, and its reasoning is worth reviewing. The court offered the following:

(1) fiduciary duties arise as a matter of law, not contract; (2) they exist in special relationships in which a high degree of trust warrants that the fiduciary's conduct be measured by higher standards than ordinary contractual dealings between parties and that those standards not be "whittled down by exceptions;" and (3) contracts between fiduciaries and those to whom they owe a fiduciary duty carry a presumption of unfairness.

Id. at 733 (footnotes omitted). The court concluded, however, that an escrow agent's duty of disclosure does not ordinarily extend to information concerning the merits of the underlying transaction.

To the extent an escrow agent is employed only to close a transaction in accordance with a contract that has already been entered into by the parties, it is not apparent how the agent's duty of disclosure could extend beyond matters affecting the parties' rights in the closing process to those concerning the merits of the underlying transaction.

Id. at 733-4. Put another way, the court determined that the duties owed by the escrow agent were limited by the scope of the fiduciary relationship undertaken by the escrow agent. However, the court did not provide additional detail as to what might be included within "matters affecting the parties' rights in the closing process," as it reversed the summary judgment entered by the trial court in favor of the title company and against the lender on its fiduciary duty claim and remanded the matter for further proceedings.

It can be argued that the court's discussion of duties extending beyond the scope of an escrow agreement is dicta, because in the *Home Loan Corporation* case "no formal escrow agreement was entered into by the parties." *Id.* at 730. Nonetheless, this opinion has been the focus of some attention as it appeared to open the door to potential escrow agent liability to lenders, who are typically neither parties to escrow agreements nor to underlying purchase and sale agreements.

However, contrary to the concerns of some when the opinion was issued, the *Home Loan Corporation* opinion did not result in a broad expansion of potential escrow agent liability to strangers to the escrow agreement and to the purchase and sale agreement. Indeed, Texas appellate opinions following *Home Loan Corporation* have limited an escrow agent's duties to those set out in the escrow agreement and have generally found an escrow agent's duties running only to parties to the agreement. *See e.g., Gary E. Patterson & Assoc., P.C. v. Holub*, 264 S.W.3d 180, 203 (Tex. App. – Hous. [1st Dist.] 2008, pet. denied) (escrow agent does not owe duty to non-party creditor of a party to the escrow agreement); *Trahan v. Lone Star Title Co. of El Paso, Inc.*, 247 S.W.3d 269, 287 (Tex. App.—El Paso 2007, pet. denied) ("an escrow agent's duties are strictly limited and the scope of the agent's duties are defined by the escrow agreement").

For an overview of how other states have articulated an escrow agent's duty of disclosure, ranging from, on the one hand, there being no duty of

disclosure unless expressly specified by agreement, to, on the other, there being a duty to disclose all matters coming to the agent's notice which are material for a principal to know for its protection or guidance, see *Home Loan Corp. v. Texas American Title Co.*, *supra*, at 731-32.

VII. DETERMINING AND APPLYING AN ESCROW AGENT'S DUTIES

It is sometimes easier to describe an escrow agent's duties in general terms (e.g. loyalty, full disclosure, care), than it is to apply those duties to specific facts. Some light may be shed on the subject by reviewing situations with which the author is familiar.

A. The altered transaction and the escrow agent

1. Facts

Buyer and seller entered into a sales agreement concerning seller's real properties, some of which were encumbered by loans and some of which were unencumbered. Buyer agreed to pay a certain amount of cash and to assume the loans on seller's encumbered properties. Buyer and seller entered into a separate escrow agreement which included instructions concerning retention and delivery of buyer's funds and seller's deeds by escrow agent.

When lenders' approval for assumption of the loans on the encumbered properties was delayed, buyer and seller agreed that the unencumbered properties should be transferred to buyer immediately, buyer's funds in escrow should be disbursed to seller, and the deadline to obtain lenders' approval for the encumbered properties should be extended. Escrow agent made disbursement and delivery as instructed. When lenders' approval was still not obtained within the extended deadline period, the escrow agent, at the request of seller, returned seller's deeds to the encumbered properties to seller. This left the buyer with title to the unencumbered properties, the seller with buyer's funds and title to the encumbered properties, and the escrow agent holding no instruments or funds.

Buyer sued the escrow agent for breach of contract and also for breach of fiduciary duty for failing to maintain possession of the conveyance documents for the encumbered properties. Buyer also sued seller.

2. Argument

Buyer argued that the original sales agreement was indivisible, that is to say, that all of the properties, or none of the properties, were to be sold by seller and transferred to buyer. Seller and escrow agent argued that, by their words and conduct, the parties had modified the original agreement to make two separate

sales agreements; the first, a cash sale of the unencumbered properties, and the second, an assumption of loans for the encumbered properties. Seller and escrow agent also argued that a series of communications among the parties and the escrow agent, together with the parties' conduct, resulted in the creation of a second escrow agreement in connection with the second sales agreement.

3. Analysis: was there a second escrow agreement?

The court began its analysis of the escrow agent's liability by examining the claimed second escrow agreement. In order to create an escrow, the parties must come to an agreement as to the terms on which the third party escrow agent is to hold and make delivery of the instruments and funds. Applying basic contract principles, the court determined that there was no meeting of the minds concerning the essential terms of the second claimed escrow agreement, and therefore rejected the argument that a second escrow agreement had been made. *Prime Prods, Inc. v. S.S.I. Plastics, Inc.*, 97 S.W.3d 631, 636 (Tex. App. – Hous. [1st Dist.] 2002, pet. denied) (describing elements of valid contract). As a result, the initial escrow agreement governed the escrow agent's duties and obligations, and the escrow agent therefore had no duty to hold the conveyance documents (or funds) beyond the deadline in the initial escrow agreement. The escrow agent therefore had no liability to the buyer for returning the seller's deeds to seller.

The court did not discuss the fact that the escrow agent had retained the deeds to the encumbered properties, following expiration of the deadline in the initial escrow agreement, with the knowledge and the consent of the buyer and seller.

B. The escrow agent who revealed confidences outside the office

1. Facts

Buyer was acquiring properties for development of a shopping center. Buyer told escrow agent, "I need just two more lots to begin the development I've planned for years." When the escrow agent met friends at a restaurant after work, he was asked how his day had been. Escrow agent said he had been busy, that buyer had acquired almost all the lots he needed for a development north of town, and that he would be glad when the whole process was over. One of the friends passed this information on to his in-laws who owned property in the area which buyer intended to develop. When the buyer later approached the in-laws to purchase their property, in-laws demanded a price which was well above market value. Buyer learned that they knew of his development plans, and traced their knowledge of his planned development to the escrow agent. Buyer sued the escrow agent for damages.

2. Argument

Buyer argued that the escrow agent had breached its agreement with him. The escrow agreement applicable to buyer's other purchase transactions included a confidentiality clause which expressly provided:

Escrow Agent recognizes and agrees that the terms of this Agreement, the existence of the Contract between Buyer and Seller, and any information Escrow Agent obtains in connection with this Agreement and the Contract are confidential and shall not be disclosed under any circumstances by Escrow Agent to any person or entity without the prior written consent of Buyer and Seller.

Buyer also argued that the escrow agent breached its fiduciary duty of loyalty to him.

3. Analysis: breach of contract, breach of duty of loyalty, tortious interference

A breach of contract occurs when a party fails or refuses to do something he has promised to do. It requires proof of the existence of a contract, performance or tendered performance by plaintiff, breach of the contract by defendant, and damages sustained by plaintiff resulting from the breach. *E.g.*, *Dorsett v. Cross*, 106 S.W.3d 213, 217 (Tex. App.—Hous. [1st Dist.] 2003, pet. denied). Buyer's claimed damages included the inflated purchase price demanded by in-laws. There was no evidence that the buyer had given his consent, written or otherwise, to escrow agent's disclosure of buyer's development plans. Furthermore, it was undisputed that the escrow agent had acquired information concerning buyer's land assemblage in connection with the earlier escrow agreements, and escrow agent ultimately acknowledged liability for breach of contract.

The escrow agent also had exposure for a claim for breach of the fiduciary duty of loyalty. This claim requires proof of the existence of a fiduciary relationship, and breach of fiduciary duty, which results in injury to the plaintiff or benefit to the defendant. *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006, pet. denied).

The Texas Pattern Jury Charge ("PJC") for breach of fiduciary duty, as applied to these facts, provided in part:

PJC 104.2 Question and Instruction – Breach of Fiduciary Duty

Did Escrow Agent comply with its fiduciary duty to Buyer?

As Buyer's agent, Escrow Agent owed Buyer a fiduciary duty. To prove he complied with its duty, Escrow Agent must show:

...

b. Escrow Agent made reasonable use of the confidence that buyer placed in it.

Answer: _____

A central issue for the jury, therefore, would have been whether the escrow agent's statement to friends after work constituted a "reasonable use" of the buyer's confidence - an uphill battle at best.

An aggressive plaintiff's lawyer might have considered claiming that the escrow agent tortiously interfered with the buyer's prospective relations. A claim for this type of tortious interference requires proof of a reasonable probability plaintiff would enter into a business relationship with a third party, that defendant intentionally interfered with the relationship, defendant's conduct was wrongful, and actual damages were proximately caused thereby. *Astoria Indus. of Iowa v. SNF, Inc.*, 223 S.W.3d 616, 632-33 (Tex. App.—Fort Worth 2007, pet. denied). A claim for tortious interference with prospective relations under these facts would not have been strong because of the requirement that defendant's conduct be independently tortious, i.e. that defendant's conduct (here, sharing confidences with friends) was actionable under a recognized tort. *Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001).

If the buyer had already entered into other contracts for development of the shopping center, which were known to the escrow agent, the buyer might have chosen to sue the escrow agent for tortious interference with contract. This claim requires proof of the existence of a contract subject to interference, willful and intentional interference with that contract without right or justification, and actual damage or loss proximately caused by the interference. *Gary E. Patterson & Assoc., P.C. v. Holub*, 264 S.W.3d 180, 202 (Tex. App.—Hous. [1st Dist.] 2008, pet. denied). For example, in *Capital Title Co. v. Donaldson*, 739 S.W.2d 384, 391 (Tex. App.—Hous. [1st Dist.] 1987, no writ), an escrow agent was found to have lied to a seller about the date it received a prospective purchaser's earnest money payment, thereby causing another prospective purchaser to cancel its contract with seller, at a higher price. The court upheld a jury verdict awarding actual and punitive damages against the escrow agent for tortious interference.

C. The escrow agent who did not share a new survey with the seller

1. Facts

Buyer and seller negotiated a contract for the sale of a non-residential property. The price of the property was based on the size of the property, and was a multiple of the number of square feet in the property. Based on an earlier survey, the buyer and seller both believed the property included 73,000 square feet. After a title commitment was obtained, the buyer had a new survey conducted. The new survey determined that the earlier survey erroneously included an alley, which was not owned by the seller. The new survey determined the property included 67,500 square feet, 5,500 square feet less than was earlier believed. This would result in a significant reduction in price. Neither the purchase agreement, nor the escrow agreement, said anything about escrow agent having to provide a survey to either party. Neither the buyer nor the escrow agent shared the new survey with the seller. Seller learned of the new survey, and the resulting reduction in price, for the first time at closing. Seller closed, but "reserved all rights." Seller then sued the escrow agent for failing to disclose the new survey.

2. Argument

Seller argued that the escrow agent breached its fiduciary duties by failing to disclose the new survey to him when the escrow agent received it. Seller also alleged fraudulent concealment, and suggested that the escrow agent had wrongfully acted in collusion with the buyer.

3. Analysis: fiduciary duties, fraud, conspiracy

Seller's primary claim against the escrow agent was for breach of fiduciary duty. The Texas Pattern Jury Charge for breach of fiduciary duty, as applied to these facts, provided:

PJC 104.2 Question and Instruction – Breach of Fiduciary Duty

Did Escrow Agent comply with its fiduciary duty to Seller?

As Seller's agent, Escrow Agent owed Seller a fiduciary duty. To prove he complied with his duty, Escrow Agent must show:

...

c. Escrow Agent acted in the utmost good faith and exercised the most scrupulous honesty toward Seller;

d. Escrow Agent placed the interests of Seller before its own, did not use the advantage of its position to gain any benefit for itself at the

expense of Seller, and did not place itself in any position where its self-interest might conflict with its obligations as a fiduciary; and

e. Escrow Agent fully and fairly disclosed all important information to Seller concerning the transaction.

Answer: _____

A central issue for the jury, therefore, would have been whether failure to disclose the survey to the seller was inconsistent with the escrow agent's duty to act in "utmost good faith" and to exercise the "most scrupulous honesty." Other issues would have been whether the escrow agent failed to disclose the survey in order to assure itself of a fee, or some other benefit, and whether the survey constituted "important information" within the scope of the escrow agent's fiduciary relationship, which should have been disclosed to the seller. See *Gonzales v. American Title Co. of Houston*, 104 S.W.3d 588, 598 (Tex. App.—Hous. [1st Dist.] 2003, pet. denied). Under *Home Loan Corp. v. Texas American Title Co.*, 191 S.W.3d 728 (Tex. App.—Hous. [14th Dist.] 2006, pet. denied), a question may have been whether a new survey which resulted in a material reduction in the purchase price qualified as a "matter affecting the parties' rights in the closing process," and therefore arguably subject to disclosure, or whether, instead, because the price earlier agreed to by the parties was a multiple of the property's square footage, this was a "matter concerning the merits of the underlying transaction," and therefore outside the disclosure obligation. *Id.* at 733-34.

A fraud claim can be based on a material misrepresentation of fact or, when there is a duty to disclose, on a failure to disclose a material fact. *E.g.*, *Springs Window Fashions Div., Inc. v. Blind Maker, Inc.*, 184 S.W.3d 840, 875 (Tex. App.—Austin 2006, pet. granted, remanded by agr.). A fraud claim based on an affirmative misstatement requires proof of a material misrepresentation, known to be false or made recklessly without knowledge of the truth, which was intended to be and was reasonably relied on, and which caused damage. See *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990). Escrow agents have been found liable for fraud. *E.g.*, *Capital Title Co. v. Donaldson*, 739 S.W.2d 384, 388 (Tex. App.—Hous. [1st Dist.] 1987, no writ). The seller in the facts described above argued that since the escrow agent had a fiduciary duty of full disclosure, its failure to disclose the new survey constituted fraudulent concealment.

Seller also suggested that the escrow agent conspired with the buyer to damage seller. An actionable civil conspiracy consists of a combination of two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means.

Chapman Children's Trust v. Porter & Hedges, L.L.P., 32 S.W.3d 429, 441 f.n. 9 (Tex. App. – Hous. [14th Dist.] 2000, pet. denied). Essential elements of a conspiracy claim are two or more people, an object to be accomplished, a meeting of minds on the object or course of action, one or more unlawful overt acts, and damages proximately caused. *Id.*; *Gary E. Patterson & Assoc., P.C. v. Holub*, 264 S.W.3d 180, 204 (Tex. App.—Hous. [1st Dist'] 2008, pet. denied).

D. The escrow agent who misstated title insurance

1. Facts

Buyer was interested in acquiring a property which had a fence on its east side. Acreage was important to the buyer. Seller told the escrow agent he was not sure the fence was on the property line. Buyer asked the escrow agent if title insurance protected him and ensured that he was “getting what he’s paying for, all the way to the fence.” Buyer testified that the escrow agent said “Don’t worry. That’s why you have title insurance,” and “You can count on it.” After the transaction closed, the buyer learned that the fence on the east side of the property was eight feet beyond the property line. The title policy excluded “the rights of parties in possession.” (This exception applies if the nature of the possession alleged is such that it charges the purchaser with notice of a third party’s possession. *Koenig v. First American Title Ins. Co. of Texas*, 209 S.W.3d 870, 875 (Tex. App.—Hous. [14th Dist.] 2006, no pet.)) Buyer sued the escrow agent for damages.

2. Argument

Buyer argued that he relied on the escrow agent’s erroneous representation concerning insurance coverage, and that, but for this misrepresentation, he would have renegotiated the underlying transaction or taken other action. Buyer also claimed that the escrow agent’s misrepresentation was a “knowing” deceptive practice under the Deceptive Trade Practices-Consumer Protection Act, thereby entitling him to treble damages and recovery of his attorneys’ fees.

3. Analysis: merger clause, negligent misrepresentation, DTPA

In this instance, the buyer claimed that the escrow agent was liable for negligent misrepresentation. The elements of this tort claim are that defendant made a representation in the course of his business, or in a transaction in which he has an interest, the representation was supplied for the guidance of others, defendant acted without reasonable care in obtaining or communicating the information, and plaintiff justifiably relied on the

representation and was proximately damaged. *McCernish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

Interestingly, the escrow agreement provided that the buyer was not relying on any statements outside the agreement. The agreement included a clause, providing:

It is agreed that this agreement contains the entire agreement of the parties and that no statements or representations not included in this agreement have been made or relied on.

Where a written contractual provision, which disclaims reliance on representations not included in the contract, is negotiated by sophisticated parties represented by counsel, fraudulent inducement claims are precluded as a matter of law. *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 58-61 (Tex. 2008); *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997). This rationale has also been applied to negligent misrepresentation claims. *Garza v. CTX Mortg. Co., LLC*, 285 S.W.3d 919, 927 (Tex. App.—Dallas 2009, no pet.). In this case, however, the buyer was not an experienced businessman, was not represented by counsel, and had not negotiated the agreement, but had instead simply signed the escrow agent’s “standard” preprinted form.

Buyer also made a claim against the escrow agent under the Deceptive Trade Practices-Consumer Protection Act (“DTPA”). TEX. BUS. & COM. CODE §17.41 *et seq.* The DTPA prohibits deceptive or misleading practices, which are broadly defined. The prohibited practices include “failing to disclose information concerning... services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed,” *id.*, §17.46(b)(24), “representing that... services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have,” *id.*, §17.46(b)(5), and “representing that an agreement confers or involves rights, remedies or obligations which it does not have or involve.” *Id.* §17.46(b)(12).

Although the DTPA has been amended many times since its enactment in 1973, the DTPA still has teeth. A DTPA plaintiff need not prove wrongful intent, can recover his attorneys fees, and, if the wrongdoing is shown to be “knowing,” may recover treble damages. *Id.* §17.50(b)(1), (d). One who seeks or acquires escrow services qualifies as a consumer under the DTPA. *Commercial Escrow Co. v. Rockport Rebel, Inc.*, 778 S.W.2d 532, 536 (Tex. App.—Corpus Christi 1989, writ denied).

It should be noted that there are a number of exemptions from the applicability of the DTPA. For example, certain professional services are exempted. *Id.* §17.49(c)(1)-(4) (“Nothing in this subchapter shall apply to a claim for damages based on the rendering of professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill.”). But it is not clear whether an escrow agent’s services qualify as professional services under this exemption. In *United Genesis Corp. v. Brown*, No. 04-06-00355-CV, 2007 WL 1341358 (Tex. App.—San Antonio 2007, no pet.) (mem. op. not designated for publication), a lawyer who acted both as closing attorney and escrow agent was sued under the DTPA. The court found the claim was barred by the “professional service” exemption because the wrongdoing alleged involved use of professional judgment and skill and plaintiff’s complaint involved acts that were “arguably acts that [lawyer’s] legal knowledge or training should have prompted him to undertake.” Although not entirely clear, the opinion appears to apply the professional service exemption to the lawyer in his capacity as closing attorney, rather than in his capacity as escrow agent.

Other exemptions included in the DTPA include causes of action “arising from a transaction... involving total consideration by the consumer of more than \$500,000, other than a cause of action involving a consumer’s residence,” *id.*, §17.49(g), and claims arising out of a written contract if the contract relates to a transaction “involving total consideration by the consumer of more than \$100,000,” if the consumer was represented by counsel in negotiating the contract, and the contract does not involve the consumer’s residence. *Id.* §17.49(f).

Claims of violations of the DTPA continue to be made against escrow agents. *E.g.*, *Shoalmire v. U.S. Title of Harrison County*, No. 06-09-00034-CV, 2010 WL 271302 (Tex. App.—Texarkana Jan. 26, 2010, no pet.) (mem. op. not designated for publication).

The Texas Pattern Jury Charges closely track the statutory DTPA language. For example, under the facts described above, the jury would likely have been instructed as follows:

PJC 102.5 Failure to Disclose Information (DTPA Sect. 17.46(b)(24))

Do you find that Escrow Agent failed to disclose information about services that was known at the time of the transaction with the intention to induce Buyer into a transaction he otherwise would not have entered into if the information had been disclosed?

Yes _____
No _____

PJC 102.2 Description of Goods or Services or Affiliation of Persons (DTPA Sect. 17.46(b)(5))

Do you find that Escrow Agent represented that services had or would have characteristics that they did not have?

Yes _____
No _____

PJC 102.4 Misrepresented and Unlawful Agreements (DTPA Sect. 17.46(b)(12))

Do you find that Escrow Agent represented that an agreement confers or involves rights that it did not have or involve?

Yes _____
No _____

E. The escrow agent in short sales

A short sale is the sale of property in which the sale proceeds fall short of what the property owner owes on the mortgage. A lender may agree to a short sale in order to avoid a foreclosure, and may agree to waive the shortfall of the amount owed on the mortgage.

It is not unusual for the buyer of the property at a short sale to resell the property to a third party at a higher price. Sometimes the property is “flipped” immediately. The same escrow agent may be involved in both transactions.

In such situations, questions arise as to what, if any, disclosures the escrow agent is required to make to the short sale seller, and perhaps also to the short sale seller’s lender. Do the escrow agent’s duties of full disclosure and loyalty to the short sale seller require that it disclose its knowledge of the second sale at a higher price? If the escrow agent is employed only to close a transaction already entered into by the parties, does the escrow agent’s knowledge of the second sale at a higher price concern the “merits of the underlying transaction” and therefore fall outside the duty of disclosure? If the escrow agent has a duty to disclose its knowledge of the second sale, might its failure to disclose expose it to a claim for fraudulent concealment? What, if anything, should the escrow agent say if the second buyer asks the escrow agent what it knows about the property?

A prudent escrow agent should consider seeking authority to disclose to the second buyer the price the seller paid to buy the property at the short sale.

Similarly, consideration should be given to seeking authority to disclose to the short sale lender that the short sale buyer is flipping the property in a subsequent transaction and of the price being paid for the property in the subsequent transaction. The escrow agent would also do well to consider notifying the lender for the second buyer of the price the seller paid to buy the property at the short sale. Such disclosures could serve to avoid a number of issues later.