



## THE CASE FOR INTERPLEADER

By Douglas M. Karlen  
Vice President and Regional Counsel  
Chicago Title Insurance Company  
July 2015

When parties to an escrow agreement dispute the disposition of escrow deposits, the escrowee's interpleader action may be the best means of resolving the impasse. A recent interpleader case, for example, shows how sloppy drafting can lead to problems that require a court to clean up an escrow mess. See *Wiczor v. Wojciak*, 2015 IL App. (1st) 123753.

### Background

Details, LLC owned a car wash business and the real estate upon which the business operated. The business experienced financial difficulties. At the time in question, Details owed \$2.15 million on its mortgage. Wojciak was interested in purchasing the business and real estate. The parties agreed on a purchase price of \$2.15 million, but Wojciak was willing to pay only \$1.75 million. Four individual members of Details, LLC agreed to put up \$400,000 as earnest money to cover the difference.

With some degree of understatement, the appellate court says, "Although this

circumstance was unusual in that the sellers, as opposed to the buyer, were making an earnest money deposit, Wojciak wanted to ensure that the sale closed."

An escrow agreement was prepared before an asset purchase agreement. The escrow agreement identified seller as Details, LLC and buyer as "Details Acquisition, LLC, an Illinois limited liability company in formation."

The escrow agreement appointed Wiczor, Wojciak's attorney, as "temporary escrowee" and Ticor as the escrowee. Notwithstanding the identification of parties, the only signatories to the escrow agreement were the four individual members of Details, LLC, who had agreed to put up the \$400,000. Neither Details, LLC, as seller, nor Wojciak as buyer, nor Ticor as escrowee signed the escrow agreement. Details Acquisition, LLC, the buyer, was never formed. The four individual members of seller forwarded the \$400,000 to Wiczor, who deposited the funds in his IOLTA account. Wiczor never sent the money to Ticor.





The escrow agreement required deposit of earnest money by the seller and return of the earnest money to buyer, instead of seller, if the transaction did not close.

Wiczer testified that Wojciak wanted the earnest money if the transaction did not close because he was “concerned from the start that the car wash purchase was problematic and he wanted protection to at least cover his expenses.” Counsel for the four individual members testified that they agreed to deposit the \$400,000 in escrow “because they owed their bank \$400,000 more than Wojciak was willing to pay for the business and they wanted to mitigate their losses and sell the business and the real estate.”

Later, an asset purchase agreement provided that earnest money was to be deposited by buyer in accordance with an escrow agreement to be executed by the parties and simultaneously delivered and attached to the asset purchase agreement. Earnest money, under the asset purchase agreement, was to be returned to buyer if the transaction did not close. The escrow agreement was never attached. The asset purchase agreement

was signed by Details, LLC, as seller by its manager, and by Details Acquisition, LLC “to be formed,” as buyer by Wojciak.

In October of 2009, Wojciak served notice that he was terminating the purchase, as permitted by provisions of the asset purchase agreement. There was no allegation of breach of contract. In quick succession, the four individual members of Details, LLC made demand on Wiczer for the return of the \$400,000 deposit; Wojciak made demand on Wiczer for delivery to him (Wojciak) of the \$400,000; and Wiczer claimed \$98,250 from the deposits as Wojciak’s expenses.

Wiczer filed an interpleader action, seeking guidance from the court for the proper disposition of the funds held by Wiczer. The four individual members and Wojciak all filed cross-complaints, each seeking recovery of the deposits. After a trial, the trial court found in favor of the four individual members and ordered Wiczer to return the deposits to them. The appellate court affirmed.

## Analysis

1 The appellate court noted that escrow agreements are not stand-alone contracts and must be read in conjunction with the underlying sales contract. Escrow instructions constituting part of the same transaction must be construed together, although executed separately, in order to resolve disputes as to the proper disposition of the escrow. An escrow document is not a substitution for the original contract





but is merely an auxiliary instrument created to help implement or execute the primary agreement.

**2** An instrument may incorporate all or part of another instrument by reference. The reference, however, must demonstrate an intention to incorporate the document and make it part of the contract. Documents that incorporate other documents are to be construed as a whole.

**3** Here, the asset purchase agreement does incorporate the escrow agreement by reference, but also requires as a condition precedent that the escrow agreement be executed, delivered, and attached. Because there is no escrow agreement attached, the asset purchase agreement presents an ambiguity that allows for extrinsic (parole) evidence. The appellate court ruled, however, that there was only one escrow agreement and everyone knew of its existence. Therefore, the court deemed it incorporated into the contract.

**4** The court found, however, that there were several problems with the escrow agreement. First, the four individual members signed the escrow agreement in their individual capacities and not as representatives of Details, LLC, the seller. Seller never signed the escrow agreement, notwithstanding that the asset purchase agreement required “the parties” to execute and deliver the escrow agreement. Thus, seller did not agree to the terms of the escrow agreement.



**5** Second, the terms of the escrow agreement contradict the terms of the asset purchase agreement. The escrow agreement called for seller to deposit earnest money, with delivery to buyer in the event the transaction did not close. The asset purchase agreement called for buyer to deposit earnest money, with return to buyer in the event the transaction did not close. This conflict is evidence that there was no meeting of the minds regarding earnest money and therefore no agreement.

**6** Finally, the conditions of the escrow were not satisfied. As noted, seller never signed the escrow agreement. Ticor, the escrowee, never signed the escrow agreement. Wojciak, as buyer’s representative, never signed the escrow agreement. The escrow agreement was not executed “by the parties” and delivered, as the asset purchase agreement required as a condition precedent to the escrow agreement’s effectiveness.

**7** The appellate court summed up this final point as follows:

Where the conditions of the escrow have been satisfied, the escrowee is under an obligation to deliver the subject matter deposited with him to the grantee or obligee, whereas if the conditions of the escrow are not met, the escrowee must return the subject matter to the depositor. *Columbia Homes, Inc. v. Sirois*, 115 Ill. App. 3d 651 (1983).

Because the escrow conditions were not satisfied, the earnest money is



rightfully returned to the depositors. The Wiczer case highlights the need for attention to detail in transactional drafting. All documents must be signed by the proper parties. All required attachments should be properly placed. All documents should be reviewed so that inconsistent provisions may be eliminated.

At Chicago Title, we might say that an escrow agreement should stand alone. It is more correct, however, to say that an escrowee's duties are governed entirely by the escrow agreement. Disputes between the other parties, however, may be resolved by reading the underlying transactional documents together with the escrow agreement. Under this formulation, the value of an interpleader remedy is obvious.

This article may not be re-distributed or re-formatted without the written consent of the author.

**For additional #CTtalk articles, visit the News & Events page on our website at [www.ChicagoNCS.ctic.com](http://www.ChicagoNCS.ctic.com).**

**We welcome your topic suggestions for future #CTtalk issues. If you are interested in submitting your ideas, please email us at: [Annie.Bardelas@ctt.com](mailto:Annie.Bardelas@ctt.com).**