

**Business Law Monthly Practice Tip**  
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**District Court rejects disappointed investors' claim that a bank holding money in escrow for a third party owes a contractual or fiduciary duty to the investors.**

*Scott v. Branch Banking and Trust Co.*, 588 F. Supp. 2d 667 (W.D. Va. 2008).  
<http://www.vawd.uscourts.gov/OPINIONS/CONRAD/SCOTTBB&TMOTDIS.PDF>

**Appeal currently pending in the United States Court of Appeals for the Fourth Circuit.**

**Facts of the case:**

- In February 2006, the plaintiff investors entered into subscription agreements with a developer who was in the process of building condominiums on Smith Mountain Lake. Under these agreements, the investors' funds -- totaling \$750,000 -- were to be returned if the developer was unable to sell \$1.5 million worth of condominium units by a stated deadline in 2006.
- The developer failed to meet this sales objective and filed for bankruptcy in April 2008.
- Branch Banking and Trust Co. (BB&T), who the developers owed \$21 million in unpaid loans, refused to return the investors' money, which had been deposited into a single account along with the developer's other funds.
- The investors claimed that the bank breached contractual and fiduciary duties by paying out the investors' money to the developer despite being aware of language in the subscription agreement implying an escrow arrangement such that the investors' funds would be returned if the \$1.5 million sales target was not met by the stated deadline.
- In granting BB&T's Rule 12(b)(6) motion to dismiss, Judge Glen E. Conrad found that the investors were not "customers" of the bank, even if the bank was aware of the escrow language in the subscription agreement. Therefore, BB&T had no contractual or fiduciary duty to the investors.

**Analysis:**

- The district court determined that a bank owes a contractual duty only to its customers regardless of the source of the funds held within the account. *United Virginia Bank v. E.L.B. Tank Construction, Inc.*, 266 Va. 551 (1984). Wiring funds to an account is not sufficient to render the sender of those funds a customer of the bank. Furthermore, Judge Conrad found that "a bank's acceptance of money from a third party is insufficient to support contract or tort claims by the third party." *Collins v. First Union National Bank*, 272 Va. 744 (2006).

- Therefore, simply being aware of an escrow agreement between a bank customer and a third party does not make the bank an escrow agent for the funds deposited by the third party into the account of the bank customer. Only the existence of an actual escrow account or agreement would impose these duties to the investor upon the bank.

**Takeaway:**

- Concerned investors should obtain a copy of the escrow agreement and confirm it with the escrow agent. The investors should have insisted that the developer set up a separate escrow account with the bank whereby the bank formally assumed the duties of escrow agent and investor funds were segregated from the developer's other funds. Without such safeguards, banks have no contractual or fiduciary duties to third party investors.

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