

CRE-approved contracts: Obtaining owner's extended coverage

This is the eighth in a series of a dozen or so articles that come from some years of experience using the Colorado Real Estate Commission-approved contracts for purchase and sale of real estate for commercial real estate transactions. Previous articles addressed the buyer's name, the seller, the property, water rights and ordering the title commitment. This article continues the title commitment discussion by focusing on choices and difficulties relating to obtaining owner's extended coverage.

The parties must choose whether the title commitment will or will not agree to delete the so-called "standard exceptions" from the title insurance policy. The standard exceptions are: 1) parties in possession; 2) unrecorded easements; 3) survey matters; 4) unrecorded mechanics' liens; 5) gap period (period between the effective date and time of the title commitment to the date the deed is recorded); and 6) unpaid taxes, assessments and unredeemed tax sales prior to the year of closing. The contract refers to the deletion of the standard exceptions as "owner's extended coverage," or "OEC." If the buyer wants OEC, the parties have to choose whether the buyer or the seller pays for it. **Tip:** Before you start a major negotiation about who pays for OEC, find out how much it costs. The cost might be so little that it's not worth discussing.

Trap: What the parties often miss when deciding whether the buyer gets OEC is finding out what is required to obtain OEC. For example, the contract does not require the seller to sign the title company's title affidavit or agreement, yet one is almost always required to obtain OEC. In most ordinary residential and commercial transactions, it is presumed that the seller simply will sign what the title insurance company requires or will succeed in getting it revised. But should the seller refuse, the buyer might have a problem getting OEC.



Beat U. Steiner
Partner, Holland &
Hart LLP, Boulder

Tip: Before settling on a title insurance company for the transaction and agreeing to obtaining OEC, find out what kind of title affidavit or agreement is required to provide OEC. The title affidavit or agreement can be quite onerous. Some title insurance companies require an affidavit executed under penalties or perjury (invoking criminal penalties for a false statement). A seller understandably might not sign one of those. Further, these agreements often include indemnifications that, if the seller thinks about them, could be quite costly if called upon. Many title insurance companies use an affidavit or agreement that is far more extensive than the seller's deed warranties. In some cases, it replicates what the title insurance company is insuring, allowing the title insurance company to sue the seller if a claim is made by the buyer on its title insurance policy. The seller wants the agreement to be limited to matters that the title company can't readily search: the existence of leases and unrecorded agreements, if any; violations of covenants, if any; and, most importantly, that no work has been done on the property that is not paid for and could be the basis for a mechanics' lien. **Tip:** Consider agreeing in advance the contents of the title affidavit or agreement each party will be required to sign.

The number of claims under mechanics' lien coverage skyrocketed following the 2008 crash in the real estate market. Today, title insurance companies are reluctant to provide mechanics' lien coverage. Even affirmations and indemnities by the seller often do not satisfy the title insurance company, as the

sellers' indemnity is only as good as the solvency of the seller. Sometimes, title insurance companies dismiss mechanics' lien coverage out of hand if the seller is a single-purpose entity whose sole asset is the property, which, of course, the seller will no longer own following the closing.

Tip: Before settling on a title insurance company for the transaction and agreeing to obtain OEC, the seller should find out if the title insurance company will delete the mechanics' lien exception from the title insurance policy and, if so, what the company will require of the seller in order to do so.

OEC usually requires a tax certificate showing no taxes due. These certificates are customarily obtained from county treasurers for a modest fee (see CRS § 39-10-115). Unpaid taxes usually pose no problems at closing since they can be paid from the amount payable to the seller. If the taxes are not to be fully paid at or before closing, the contract should say so. In addition, the seller should exclude the real property taxes exception from OEC and alter §§ 2.5.2 and 13 of the contract accordingly, as these sections require title to the property and inclusions be delivered free and clear of the lien of taxes.

The last major requirement to obtain OEC is a new improvement location certificate or new survey. The first three standard exceptions of the title commitment are sometimes referred to as the "survey exceptions" because they disappear when the title insurance company gets a satisfactory new ILC or new survey. Future articles in this series will discuss ILCs and surveys.

Trap: Certain choices regarding title and survey may make the survey and OEC provisions illogical. For example, the contract does not make sense if it provides for OEC, but does not require the seller or the buyer to obtain a new ILC or new survey satisfactory to the title insurance company so OEC can be obtained. Similarly, if the contract requires the seller to obtain OEC and the buyer to obtain the new ILC or new sur-

vey, it only makes sense that the contract relieve the seller of its obligation to obtain OEC if the buyer does not timely obtain the new ILC or new survey. The contract does not require, or even prompt, the parties to make only logical choices about the title commitment and the survey. The parties have to do that for themselves. **Tip:** When the contract requires the seller to obtain OEC, it also should include a requirement that the seller use commercially reasonable efforts to do what is required in order to obtain OEC.

The contract makes no mention of endorsements to the title insurance policy the buyer might require the seller to obtain. Endorsements are customarily a buyer's expense, but that could be a subject of negotiation, especially if the endorsement cures a title problem any normal buyer would insist be cured. Commonly requested endorsements include the so-called "comprehensive" endorsement when the property is burdened by covenants (one of the ALTA 9 series) and mineral endorsements (100.30 or ALTA 9) when mineral rights have been or will be severed from the property.

Obtaining endorsements is often handled outside the contract, with the buyer dealing directly with the title insurance company to have them added to the title commitment. Otherwise, endorsements are handled as part of the title objection and resolution process, with the buyer lodging an objection to title unless the title commitment is revised to provide that the desired endorsements will be part of the title insurance policy issued to the buyer following the closing. **Trap:** A buyer who requires a title endorsement and lodges it as a title objection takes the risk that the seller will refuse and the contract will terminate, unless the buyer is willing to waive the requirement prior to the title resolution deadline. If the buyer knows that it will require certain endorsements to its title insurance policy, the buyer is much better off if it adds that requirement to the contract.▲