

CRE Commission-approved contracts: Ordering the title

This is the seventh 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 and water rights.

The contract is contingent on the buyer being satisfied with the condition of title to the property. The first step in the title review process is ordering the title search as to which the parties have several choices stated in §8.

Section 8.1 of the contract offers the parties a choice between a title commitment and an abstract of title. An abstract of title is a listing and short summary of every document affecting title to the property that has been prepared by an attorney or other title examiner who has searched the entire county grantor-grantee index for the property. "In the old days," an abstract provided the title search a buyer (or the buyer's attorney providing a title opinion) needed to determine the condition of title to the property. As title insurance companies computerized the real estate records, abstracts became obsolete, except in some of the rural counties. Almost universal today is a title commitment, which does not give the complete history of documents affecting title to the property, but does identify those documents that still affect title to the property. In addition, a title commitment provides the terms upon which the title insurance will (commits to) provide title insurance to the buyer to insure its title to the property when the property is purchased.

If an abstract of title is not chosen, as is usually the case, §8.1.6 requires the seller to deliver to



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

the buyer any abstracts in the seller's possession. This requirement is often ignored. In the rare instances when a title insurance policy has never been issued before for a particular property, and only an abstract of title exists, the title insurance company might require the seller to deliver the original abstract to the title insurance company as a condition to issuing the title commitment.

The contract next requires the parties to choose whether the buyer or the seller will order and pay for the title commitment and the title insurance policy. A title commitment generally is issued at no cost, although a fee may be charged by the title insurance company if the title commitment is ordered with the insured party to be determined (i.e., "TBD"), or if the title commitment is subsequently cancelled. Otherwise, the title insurance policy premium paid at closing covers the cost of the title commitment.

The custom in Colorado is for the seller to provide the title commitment and to pay for the buyer's title insurance policy at closing. **Trap:** The contract gives the seller or the buyer the choice of selecting the title insurance company, but with that choice comes the obligation to order the title commitment, deliver it to the other party by the "record title deadline," and to pay for the title insurance policy. That tie between who selects and who pays makes some sense, but, as title insurance costs do not vary greatly among

underwriters and the buyer is the beneficiary of the title insurance policy, the buyer may care which title insurance company issues the title commitment. At the same time, the seller may want to use the title insurance company that issued a policy to the seller when the seller purchased the property. If the seller's existing title insurance insures over a particular title problem, the seller may have a strong interest in not switching title insurance companies so the seller does not have to cure the problem all over again for the new title insurance company. **Tip:** A buyer who wishes to select a particular title insurance company, but wants the seller to order and pay for the title policy, needs to add a provision to the contract that says that.

Tip: If the buyer selects an agent to issue the title commitment (as opposed to a title insurance company that actually issues the title insurance policy), the buyer also should specify which title insurance company will issue the title insurance policy. While some title agents write title insurance policies only for one title insurance company, some write for two or more. Some lenders and institutional buyers, generally in very large transactions, will not accept a title commitment issued by an agent; it must be issued by a title insurance company. **Tip:** If an agent issues the title commitment, the buyer might want an "insured closing letter," also called a "closing protection letter," from the title insurance company. This letter insures the party receiving title insurance against claims arising out of the agent's dishonesty or fraud and the agent's failure to comply with closing escrow instructions. Although more commonly requested by a lender, it is available to a buyer – if someone tells you it is only issued to a lender,

don't believe it and insist. The contract should be supplemented to provide that the title insurance company will deliver this letter to the buyer and its lender, although title insurance companies often give it simply upon request.

Under §8.1, the buyer also is entitled to receive copies of the "title documents" by the record matter deadline. **Trap:** Since the requirement to deliver copies of the title documents is not the covenant of a particular party, the failure to receive them is not a breach of the contract. The buyer's sole remedy appears to be an extension of time to review the title documents under §8.2. **Trap:** The contract does not expressly provide that the buyer may terminate the contract if it never receives copies of all the title documents. A strong argument can be made, however, that the buyer retains the right to terminate.

Trap: The buyer can terminate the contract only if it gives the seller a notice of termination in accordance with §25.1. Failure to object is a waiver under the contract.

"Title documents" include 1) copies of any plats, declarations, covenants, conditions and restrictions burdening the property, and 2) copies of any other documents (or, if illegible, summaries of such documents) listed in the schedule of exceptions (exceptions) in the title commitment. **Trap:** Note that the buyer is not entitled to a summary of plats, declarations, etc., if they are illegible, even though they frequently are. The buyer is entitled only to summaries of illegible "other documents." Modifying the contract to solve that error is worthwhile. **Tip:** Often, the recorder's office can produce a legible copy of a recorded document when the title insurance company cannot, and vice versa.)▲