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Colorado Real Estate Commission- approved contracts: Title objections

This is the ninth 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, the seller, the property, water rights, ordering the title commitment and owner's extended coverage. This article addresses the buyer's title review.

The steps envisioned in the contract for the review of title include: 1) ordering the title commitment or title abstract; 2) the buyer receiving the title commitment and the title documents by the record title deadline; 3) the buyer reviewing title; 4) the buyer making any objections it wants to make in a notice of title objection or terminating the contract in a buyer's notice to terminate by the record title objections deadline; 5) if the buyer gives a notice of title objection, the seller either satisfying the buyer as to the title objections in it, or not; and 6) if the seller does not satisfy the buyer as to any title objections, the buyer either withdrawing those title objections or letting the contract automatically terminate by the title resolution deadline. **Trap:** *That the contract automatically terminates if title objections are not resolved can be tough on a party that really wants the deal to close because the objection may give the other party a way out of the contract.* Later installments in this series of articles address contract termination in more detail.

Trap: *A buyer's title objection does not need to be reasonable; it only needs to be made in good faith.* Section 8.2 of the contract provides that the buyer, on or before the title objection deadline selected by the parties, may give a notice



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of title objection "based on any unsatisfactory form or content of title commitment ... or any other unsatisfactory title condition, in buyer's sole subjective discretion." Section 29 states the requirement that the buyer act in good faith. Proving in a legal action that the buyer is not acting in good faith is very difficult. The leeway given to the buyer means the seller rarely can challenge the buyer's right to make a particular title objection. All the seller can do is choose not to address it and risk losing the deal.

Trap: *If the buyer has any title objections, it may elect to terminate the contract under §8.4, without giving the seller an opportunity to cure the buyer's title objections.* Section 8.2 allows the buyer to make its title objections "notwithstanding §13," which refers to a number of title exceptions that are presumed to be acceptable. The issues raised by §13 are addressed in a subsequent article. If the seller wants to limit the objections the buyer may make, the seller needs to add a provision to the contract that sets out what the buyer may not object to, such as, for example, the title matters listed in §13.

Trap: *A buyer may terminate the contract on account of "any unsatisfactory title matter."* Under §§8.2 and 8.4, a notice of title objection is not limited to record title, the title documents, off-record matters or §13 matters. In short, title objections give the buyer a huge

way out of the contract. Throughout this series of articles, we will point out how hard it is for the seller to have a firm contract so long as title matters have not been fully resolved.

Trap: *The buyer has an option to terminate the contract for a title objection; the seller does not.* The buyer can get out of the contract if any aspect of title is not acceptable. The seller can get out of the contract only by refusing to address all of the buyer's title objections. **Trap:** *The contract does not require the seller to do anything to cure an objection made in a notice of title objection.* Indeed, the seller does not even have to respond to the notice of title objection. If the seller does not respond, or the seller declines to address everything in the notice of title objection, the buyer has a choice. It can accept the title matter it objected to or let the contract terminate, which happens automatically if the buyer does not, by the objection resolution deadline, withdraw all of the title objections the seller does not address.

Tip: *If the buyer is lodging a title objection, the buyer should do so clearly and by stating objections, not just requests.* A notice of title objection is often written as a series of requests to the seller or the title insurance company, without clearly stating that the buyer objects to the title matter. Perhaps the buyer is trying to hedge its bets by not clearly making an objection. This is not a wise approach. **Trap:** *If the buyer makes requests without calling them objections, the seller ignores them, and the buyer does not then withdraw them before the title resolution deadline, the contract may automatically terminate.* The buyer needs to know in its own mind what is and is not an acceptable title matter, since the contract forces

the buyer to decide what title matters are deal breakers if they remain. Similarly, the seller needs to decide what title objections it will not fix even if it means losing the deal.

Trap: *If the buyer does not timely object to a title matter shown in the title commitment and the title documents, the buyer is deemed to have accepted the condition of title shown in those documents.* The last sentence of §8.2 makes clear that silence is acceptance. That sentence has a peculiar twist to it. It applies only if "seller has fulfilled all of seller's obligations, if any, to deliver to buyer all documents required by §8.1." The seller has no obligation to deliver copies of the title documents. **Trap:** *Thus, if the buyer does not receive copies of all of the title documents, it must lodge a title objection by the record title deadline; if it does not, the buyer will have accepted the condition of title disclosed by the title documents it has not seen.* **Trap:** *If the buyer is required to obtain the title commitment and does not receive it in time to give its notice of title objection, the buyer will have accepted the condition of title shown in the title commitment.*

Tip: *The best approach for the buyer, although not always feasible, is for the buyer to complete its title review early enough so the buyer can find out which exceptions the title insurance company is willing to remove, alter or insure over with an endorsement.* Once the buyer knows where it stands with the title insurance company, it can put in its notice of title objection only the items that require the seller to do something the seller has to do in order for the buyer to close satisfied with the condition of title. ▲