



Contract vendee title insurance - by Thomas Kearns and Hyman Kindler

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When negotiating a real estate contract of sale, buyers and sellers often disagree on how to allocate the risk of a recorded title exception first being discovered after the contract is executed. While uncommon, such discoveries are often made shortly before closing when the title company runs an update, and realizes that an encumbrance had been erroneously dropped from its initial title report.

A contract vendee title insurance policy (the premium for which is calculated only on the amount of the contract deposit, and is paid for on the day the contract is signed) shifts the risk onto the title company by insuring a buyer as to the state of title as of the day the contract is executed. The insured amount is equal to the contract deposit. If a recorded title exception is first discovered after the contract is executed, and buyer is obligated under the contract to close notwithstanding such exception, buyer can default under the contract knowing it can turn to the title company and make a claim for the deposit. If no such claim is made, and the closing ultimately occurs, buyer gets a 100% credit (equal to the vendee policy premium) against the premium for its closing title policy.

The ability to shift the risk to the title company is sometimes even appealing to sellers. We were involved in one transaction where the seller kept insisting that the buyer take subject to all matters of record, but the buyer kept insisting that it was not going to risk its significant deposit on the accuracy of the title report it had obtained (even though the report was from its title company). The resolution: seller paid the premium for the buyer's vendee policy!

The contract provided that if closing proceeded with no claim being made on the vendee policy, then at closing buyer would credit seller the vendee premium cost (since the buyer was getting a credit on its closing title policy equal to the vendee premium cost). If an old title exception has been discovered before closing, and the buyer defaulted under the contract and forfeited its deposit, the seller would get to keep the deposit (albeit at a slight cost relative to the deposit, i.e., the vendee premium it had paid), and buyer would be able to get its deposit “back” through a claim under the vendee policy.

In addition to payment of the premium, there are typically several other requirements for issuance of the vendee policy, including seller authority documents. Therefore, include a clause in the contract that the funded deposit does not become the contract deposit unless seller has made the required deliveries, and get the title company involved early. There is also a requirement for a memo of contract to be recorded. However, we have found that most title companies are willing to issue a vendee policy without a memo of contract if the buyer is willing to take an exception in its vendee policy for lack of a memo of contract – which should be acceptable to most buyers given that the reason for obtaining the vendee policy is generally unrelated to a memo of contract.

Contract vendee policies can be a useful tool in resolving certain title negotiations between buyers and sellers, and, while beyond the scope of this article, can also be useful when navigating and negotiating complicated title insurance matters with title insurance companies prior to contract signing.

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