



ORDINARY STANDARD WORDS

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Words often sound ordinary. They're reasonable. We've heard them a billion times before. How could anyone object to them? How could they be wrong?

As an example, take some standard language in practically every agreement of purchase and sale of real property. About halfway between the title page and the signature page, the contract says the buyer's obligation to close is conditioned upon the title insurance company's issuance of (or sometimes willingness to issue) a policy of title insurance to the buyer. And the policy must meet certain standards consistent with the contract.

That seems reasonable enough. Why should the buyer have to close if the title insurance company isn't willing to insure the title the buyer is acquiring?

But there are many more pieces to the puzzle, and many elements that need to come together for the title insurance company to be willing to issue that policy.

Some of those elements are within the buyer's control. If the buyer does something — or fails to do something — and, as a result the title insurance company won't issue the required policy of title insurance, does that excuse the buyer from closing? Typically, no. As a general legal principle, the buyer has some implied obligation not to get in the way

of satisfying conditions to its obligations.

How far does that principle go? If the title insurance company needs the buyer to affirmatively do something in order for the company to issue the title policy, does the buyer have an obligation to do it? The answer depends on what needs to be done. In the case of paying the title insurance premium, the contract will typically say that it is the buyer's responsibility. So the buyer can't say the closing condition wasn't satisfied because the buyer failed to pay the premium. Other obligations might not be so clear.

In complex transactions, the buyer's ability to obtain the requisite title insurance policy might depend on third parties beyond the buyer and seller. For example, if the buyer is buying unused development rights from the seller, the buyer might not be able to obtain a title insurance policy insuring the document transferring those rights unless other nearby owners also sign it. If any nearby owner refuses to sign, then the title insurance company won't be willing to issue the requisite title insurance policy to the buyer, and the buyer won't have to close the transaction.

So the "ordinary" contract language that conditions the buyer's obligations on availability of a title insurance policy doesn't work so well for the seller if something or someone outside of either party's control prevents the title insurance company from issuing the required title insurance policy.

In that case, the buyer might escape any obligations under the contract. It might even be able to claim back its deposit because the conditions to its obligations were never met.

A worried seller might try to solve that problem by narrowing the language about title policies. Perhaps if the seller did everything it was supposed to do (e.g., delivering the deed and signing some forms) in order for the title insurance company to be willing to issue a title policy, that should suffice to obligate the buyer to close. With that change, any third party's failure to do something necessary for issuance of the buyer's title insurance policy would not excuse the buyer's obligations.

If a seller asked for that change in the contract language, though, the buyer might balk. It's not standard. Every contract in the history of the world simply conditions the buyer's obligations on availability of a policy of title insurance. Everyone manages to live with that language, even if it's not always right.

It certainly sounds right. But in some circumstances, it can be wrong. It is a great example of how anyone reviewing a contract or thinking about a deal needs to think through ways in which ordinary words won't produce the right result. This is true either generally or in this particular case because of particular facts.

Just because words are standard doesn't mean they're right.