

Tricks of the Trade or Traps for the Unwary:
What Real Estate Lawyers Need to Know About Standard Forms, Terms of Art
and Relevant Statutes

Sponsored by the Real Estate Section of the Colorado Bar Association

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I. We've Always Done It That Way

A. Real Estate Commission Approved Forms

1. What they are

- a) C.R.S. § 12-61-803(4) permits a broker to complete standard forms, including, those promulgated by the Colorado Real Estate Commission. The Colorado Real Estate commission has promulgated standard forms for use by licensees. Commission Rule F limits modifications to the forms that may be made by brokers. According to the Colorado Real Estate Manual, compiled by the Division of Real Estate, one of the major purposes of Commission Rule F is to insure broker compliance with the Colorado Supreme Court decision in Conway-Bogue.
- b) Conway-Bogue Realty Inc. Co. v. Denver Bar Ass'n., 312 P.2d 998 (Colo. 1957).
- c) The forms are available at <http://www.dora.state.co.us/real-estate/contracts/contracts.htm>.

2. What they aren't

- a) Evidence of custom and usage
- b) Complete for all purposes

B. Title Insurance Tips

1. Title Insurance is defined in C.R.S. § 10-11-102(18) as "insuring, guaranteeing, or indemnifying owners of real property or others interested therein against loss or damage suffered by reason of liens or encumbrances upon, defects in, or the unmarketability of the title to said property."
2. Courts have defined title insurance as a contract of indemnity.
3. Forms of title insurance commitments and policies
 - a) ALTA forms
 - b) Standard exceptions
 - c) Endorsements
4. Determination of insurability required by C.R.S. § 10-11-106.

5. Title agent vs. title insurance company
 - a) A title insurance agent means a person authorized by a title insurance company to solicit insurance or to collect premiums or to issue or countersign policies on its behalf. C.R.S. § 10-11-102(9).
 - b) Title insurance company means a company authorized to insure titles to real estate. C.R.S. § 10-11-102(10).

C. Custom and Practice

1. Tax Proration
 - a) Pursuant to Commission approved forms, the Buyer is deemed to own the property all day on the date of closing and Seller's ownership ends on the day before closing.
 - b) Allocation of tax liability for year of closing if no agreement. C.R.S. §39-1-108.
2. Good Funds – C.R.S. §38-35-125
3. Commissions
 - a) Who pays?
 - b) Sales after expiration of the listing period.
 - c) Rebating a portion of an earned commission. CP-12*.
 - d) Use of *lis pendens* to collect a commission. CP-25.

*CP refers to Commission Positions adopted by the Colorado Real Estate Commission.

- D. Time is of the Essence. If "time is of the essence" to the contract for sale, a delay by the buyer from the time originally set for closing will prevent specific performance in the buyer's favor. The presence of this clause required the trial court to evaluate whether plaintiff was willing and able to close the transaction at the time set for closing, instead of at some later time. Clark v. Scena, 83 P.3d 1191 (Colo.App. 2003).

II. A Rose By Any Other Name

A. Gross Negligence.

1. There is some Colorado case law regarding what constitutes gross negligence and how it differs from "negligence". These cases define "gross negligence" as involving a lack of care so extreme that it appears that the person at fault is conscious of the probable consequences of its carelessness and is indifferent to the danger. Alternatively, courts have considered gross negligence to exist when "the lack of care is so aggravated that it is all but intentional." See Krendl, 7 Colo. Practice, Personal Injury Torts and Insurance §11.11 (2d ed.).
2. Courts from other states do not generally distinguish between the various statutory terms such as "gross negligence," "wilful or wanton misconduct," "reckless operation," "heedlessness" or "reckless disregard of the rights of others," and related terms, concluding that all these terms having in common that the quantum of carelessness is much greater than that of mere negligence. See, 6 A.L.R.3d 769; 119 A.L.R. 654 and cases cited therein. Willful and wanton conduct is purposeful conduct committed recklessly that exhibits an intent consciously to disregard the safety of others; such conduct extends beyond mere unreasonableness. United States Fire Insurance Co v. Sonitrol Management Corporation, 192 P.3d 543 (Colo. App. 2008); Colo. Jury Instr., Civil 9:30 (4th ed.).

B. Except vs. Reserve. Historically a distinction has been drawn between an exception, which refers to some part of the property not included in the conveyance and with which the grantor never parts, and a reservation, which has been interpreted as the creation in the grantor of a new right or interest in the premises conveyed. O'Brien v. Village Land Co., 794 P.2d 296 (Colo. 1990). In O'Brien, however, the court noted that these terms are often used interchangeably without any intent to preserve the historical distinction and that the historical distinction is without significance when the deed itself unambiguously manifests the intent of the parties.

C. Best Efforts.

1. The court relied on the duty of good faith and fair dealing implied by Restatement (Second) of Contracts § 205 (1981) in determining whether a party had met its agreement to use its "best efforts" to satisfy a contract contingency. The Restatement provides that every contract imposes on each party a duty of good faith and fair dealing in its performance.

Comment (a) of the *Restatement* provision explains that good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party. Ruff v. Yuma County Transportation, 690 P.2d 1296 (Colo.App. 1984).

2. An agreement to use “best efforts” to obtain shareholder approval of a purchase agreement required that a company and its board of directors make a reasonable, diligent, and good faith effort to accomplish obtain the approval of the purchase agreement, however, the obligation must be viewed in the context of unanticipated events and the exigencies of continuing business development and would not be construed to require that such events and exigencies be ignored or overcome at all costs. Great Western Producers Cooperative v. Great Western Cooperation, 613 P.2d 873 (Colo. 1980).

D. Not Unreasonably Withheld.

1. Bidwell v. LaSalle and Schiffer, 797 P.2d 811 (Colo.App., 1990) Landlord failed to adequately mitigate its damages by unreasonably refusing to consent to assignment of lease upon tenant's abandonment and breach, where sole ground for its refusal to accept tendered new tenant was that landlord's president “didn't like him.”
2. Cafeteria Operators L.P. v. AMCAP/Denver Ltd. Partnership, 972 P.2d 276, 277 (Colo.App., 1998) adopts the Restatement position that a landlord cannot withhold consent to alienation unreasonably unless a freely negotiated provision in the lease gives the landlord an absolute right to do so. In determining whether a landlord has reasonably refused to consent to a sublease, a court should only consider those factors that relate to a landlord's interest in preserving the value of the property and the court must evaluate whether a reasonably prudent person in the landlord's position would have also refused to consent.

E. Sole and Absolute Discretion.

1. Sentinel Acceptance Corporation v. Colgate, 424 P.2d 380 (Colo. 1967). Where contract gave one party sole discretion as to whether the other party would be paid anything for its performance, the promise is illusory, there is no mutuality, and the agreement is therefore inoperative; citing Restatement of Contracts, Sec. 2, comment (b) and Sec. 80, comment (b).
2. Omedelena v. Denver Options, 60 P.3d 717 (Colo.App. 2003). A contract allowing one party to cancel the contract, in its sole discretion, if it determines that the health, safety, or welfare of persons receiving services may be in jeopardy is not the same as a contract that allows

termination for any reason or no reason. The Court noted that the language gives a measure of flexibility, but requires a determination that the health, safety, or welfare of a developmentally disabled person may be in jeopardy, and requires that the exercise of sole discretion be done reasonably.

3. Del Webb Realty and Mgmt. Co. v. Wessbecker, 628 P.2d 114 (Colo.App. 1981). Where lease provided that in the event of default by tenant, landlord could re-let the premises at such rental and upon such other terms and conditions as Landlord in its sole discretion may deem advisable, landlord did not fail to mitigate damages by attempting to re-let premises at for rent in excess of the lease rent.

F. Realtor

"REALTOR®" is a federally registered collective membership mark used by the National Association of REALTORS® and its constituent state and local associations of REALTORS® to indicate their membership status. Individuals who are members of these associations are called REALTORS®. Lane v. Urgitus, 145 P.3d 672 (Colo., 2006).

- G. Liquidated Damages. In Sorenson v. Connelly, 536 P.2d 328 (Colo.App. 1975). The Following provision was held not to be a valid liquidated damages clause:

Time is of the essence hereof, and if any payment or any other condition hereof is not made, tendered, or performed by either the seller or the purchaser as herein provided, then this contract, at the option of the party who is not in default, may be terminated by such party, in which case the non-defaulting party may recover such damages as may be proper. In the event of such default by the seller, and the purchaser elects to treat the contract as terminated, then all payments made hereon shall be returned to the purchaser. In the event of such default by the purchaser, and the seller elects to treat the contract as terminated, then all payments made hereunder shall be forfeited and retained on behalf of the seller. In the event, however, the non-defaulting party elects to treat this contract as being in full force and effect, then nothing therein shall be construed to prevent its specific performance.'

The court considered the following factors in reaching its conclusion. The provision does not use the term 'liquidated damages,' and does not designate a specific sum as the recoverable damages. Nor are the payments made under the

contract defined to be the only 'proper damages' recoverable by the non-defaulting party.

H. Hereditament.

1. Anything capable of being inherited.
2. An incorporeal hereditament is defined in 73 C.J.S. Property § 7, p. 168 as:

An incorporeal hereditament is a right issuing out of a thing corporate, whether real or personal, or concerning, or annexed to, or exercisable within, it. It is not of a sensation, can be neither seen nor handled, is a creature of the mind, and can exist only in contemplation. * * * An incorporeal hereditament is not the land or think corporeal, but is something merely collateral thereto, an invisible and intangible right; and it must also not be confounded with the profit or thing of a corporeal nature which the right may produce.

Quoted by the court in Radke v. Union Pacific Railroad, 334 P.2d 1077 (Colo. 1959).

III. A Non-Exhaustive List of Colorado Statutes Affecting Real Estate

A. Forms

1. C.R.S. § 38-30-113 – Short form deed and acknowledgement.
2. C.R.S. § 38-30-113.5 – Beneficiary deeds. Reference is made to Title 15 for procedure.
3. C.R.S. § 38-30-115 – Forms of bargain and sale and special warranty deeds.
4. C.R.S. § 38-30-116 – Form of quitclaim deed.
5. C.R.S. § 38-30-117 – Form of short form mortgage.
6. C.R.S. § 38-30-118 – Seal not necessary.
7. C.R.S. § 38-35-101 – Form of acknowledgments and *prima facie* evidence.
8. C.R.S. § 38-35-106.5 – Name and address of author or newly created legal description.

B. Closing and Settlement Issues

1. C.R.S. § 38-30-120 – Conveyance carries right to possession unless a future day is specified.
2. C.R.S. §38-35-124.5 – Effect of a written payoff statement.
3. C.R.S. § 38-35-125 – Good funds.
4. C.R.S. §39-1-108 – Payment of taxes.
5. C.R.S. §39-13-102 –Documentary fee.

C. Real Estate Titles

1. C.R.S. § 7-30-105 - A nonprofit association is an entity for purposes of, and may execute and record a statement of authority pursuant to § 38-30-172.
2. C.R.S. § 7-45-108 - Notice requirements for proposed toll roads and toll highways--removal from titles and voiding of previously filed and recorded documents.
3. C.R.S. § 7-60-110 - Conveyance of real property owned by a partnership.
4. C.R.S. § 30-28-101 - Requirement of compliance with county subdivision regulations for division of property into parcels 35 acres or less. Often referred to as "Senate Bill 35".
5. C.R.S. § 38-30-103 – Livery of seisin not necessary.
6. C.R.S. § 38-30-104 - Vendor's after-acquired title deemed in trust for vendee.
7. C.R.S. § 38-30-105 - An owner of land not in possession may convey.
8. C.R.S. § 38-30-107 - Every estate in land which is granted, conveyed, or devised . . . shall be deemed a fee simple estate of inheritance if a lesser estate is not limited by express words or does not appear to be granted, devised, or conveyed by operation of law.
9. C.R.S. § 38-30-108 - Conveyances to grantee in a representative capacity – including trustees.
10. C.R.S. § 38-30-121 – Which covenants run with the land.

11. C.R.S. § 38-30-123 – Powers of attorney must be recorded.
12. C.R.S. § 38-30-124 – Powers of attorney acknowledged and proved in the same manner as deeds.
13. C.R.S. § 38-30-144 - Conveyance by corporation.
14. C.R.S. § 38-30-166 - Joint ventures--ownership and transfer of property.
15. C.R.S. § 38-30-171 - Survival of remedies and title to corporate property after dissolution.
16. C.R.S. § 38-31-101 - Requirements for a joint tenancy in real property.
17. C.R.S. § 38-34-101 – General policy regarding interpretation of statutes to promote marketability, and to promote reliance on record title “so that the record title of the party in possession is sustained and not defeated by technical or strict constructions.”
18. C.R.S. § 38-35-106 – Unacknowledged instruments as notice.
19. C.R.S. § 38-35-107 – Recitals in instruments which have been recorded for 20 years shall be accepted and received as prima facie evidence of the facts recited therein.
20. C.R.S. § 38-35-108 – A reference in an instrument affecting title to real property to an unrecorded instrument, such reference shall bind only the parties to the instrument and shall not be notice to any other person whatsoever. No person other than the parties to the instrument shall be required to make any inquiry or investigation concerning such recitation or reference.
21. C.R.S. § 38-35-109 – Recording statute. “This is a race-notice recording statute.”
22. C.R.S. § 38-35-110 –*Lis Pendens* as notice.
23. C.R.S. § 38-35-111 – Option to purchase notice for one year only.

24. C.R.S. § 38-35-116 – Variances in names.
25. C.R.S. § 38-35-117 – Mortgages not a conveyance.
26. C.R.S. § 38-35-120 – Record of first and last parcels includes intervening parcels.
27. C.R.S. § 38-35-122 – Inclusion of street address and assessor information with legal description.
28. C.R.S. § 38-35-201 *et seq.* – Spurious liens and documents.
29. C.R.S. § 38-41-106 - Limitation of action seven years--possession under official and judicial conveyance or orders.
30. C.R.S. § 38-41-108 – Limitation of action to eighteen years – adverse possession.

D. Definitions

1. C.R.S. § 2-4-401 – General.
2. C.R.S. § 38-30-150 – Applicable to Articles 30 – 447 Title 38.
3. C.R.S. § 38-35-201 – Spurious liens and documents.

E. Disclosures

1. C.R.S. § 38-35.5-101 – No duty to disclose circumstances psychologically impacting real property.
2. C.R.S. § 38-35.7-101. - Disclosure--special taxing districts--general obligation indebtedness.
3. C.R.S. § 38-35.7-102 - Disclosure--common interest community-- obligation to pay assessments--requirement for architectural approval.
4. C.R.S. 38-35.7-103 - Disclosure--methamphetamine laboratory.
5. C.R.S. § 38-35.7-104 - Disclosure of potable water source.
6. C.R.S. § 38-35.7-105 - Disclosure of transportation projects– rules.

G. Landlord/Tenant

1. C.R.S. § 13-40-101 – Unlawful detention defined.
2. C.R.S. § 38-12-101 *et seq.* – Wrongful withholding of security deposit.
2. C.R.S. § 38-12-301 - Control of rents by counties and municipalities prohibited.

3. C.R.S. § 38-12-503 - Implied warranty of habitability in leases of residential real property.

F. Miscellaneous

1. C.R.S. § 2-4-209 - Statutory references - A reference to any portion of a statute applies to all reenactments, revisions, or amendments thereof.
2. C.R.S. § 2-4-212 - Liberal construction - All general provisions, terms, phrases, and expressions, used in any statute, shall be liberally construed, in order that the true intent and meaning of the general assembly may be fully carried out.
3. C.R.S. § 5-12-102 - Statutory interest.
4. C.R.S. § 5-12-103 - Maximum interest rate.
5. C.R.S. § 5-12-105 - Interest upon foreclosure – when real estate is sold under execution or foreclosure, the indebtedness and costs for which any certificate of purchase may issue shall bear interest at the rate specified in the original instrument.
6. C.R.S. § 10-4-114 - No lender may require a borrower under a loan secured by real property to provide hazard insurance coverage on that property in an amount exceeding the replacement value of the improvements on the property.
7. C.R.S. § 38-10-108 - Statute of frauds, requiring a writing for leases for a longer period than one year, or for the sale of any lands.
8. C.R.S. § 38-10-109 - Agent may subscribe instrument required by § 38-10-108 if authorized in writing.
9. C.R.S. § 38-10-112 - “Void agreements” – also under “statute of frauds” relates to agreements not to be performed within one year, and agreements to be liable for the debts of another.
10. C.R.S. § 38-10-116 - Every instrument required by any of the provisions of this article to be subscribed by any party may be subscribed by the lawful agent of such party.
11. C.R.S. § 38-10-118 - Grant or assignment of trust - Every grant or assignment of any existing trust in lands, goods, or things in action, unless the same is in writing and subscribed by the party making the same or by his agent lawfully authorized, shall be void.
12. C.R.S. § 38-10-124 - Credit agreements--required to be in writing.
13. C.R.S. § 38-11-101 - Personal property in joint tenancy--how created--vesting upon death.

14. C.R.S. § 38-30-167 - Right of purchaser to obtain partial specific performance.
15. C.R.S. § 38-30-168 - Unreasonable restrictions on renewable energy generation devices.
16. C.R.S. § 38-30-169 - Instruments of conveyance--removal of void and unenforceable restrictive covenants which are based upon race or religion.
17. C.R.S. § 39-1-119 - Funds held for payment of taxes--refund--reduction and increase of amounts.

APPENDIX

C.R.S. § 38-35-109 [Emphasis Added]

Instrument may be recorded--validity of unrecorded instruments--liability for fraudulent documents

(1) All deeds, powers of attorney, agreements, or other instruments in writing conveying, encumbering, or affecting the title to real property, certificates, and certified copies of orders, judgments, and decrees of courts of record may be recorded in the office of the county clerk and recorder of the county where such real property is situated; except that all instruments conveying the title of real property to the state or a political subdivision shall be recorded pursuant to section 38-35-109.5. No such unrecorded instrument or document shall be valid against any person with any kind of rights in or to such real property who first records and those holding rights under such person, except between the parties thereto and against those having notice thereof prior to acquisition of such rights. This is a race-notice recording statute. *In all cases where by law an instrument may be filed in the office of a county clerk and recorder, the filing thereof in such office shall be equivalent to the recording thereof, and the recording thereof in the office of such county clerk and recorder shall be equivalent to the filing thereof.*

(1.5)(a) Any person may record in the office of the county clerk and recorder of any county a master form mortgage or master form deed of trust. Such forms shall be entitled to recordation without any acknowledgment or signature; without identification of any specific real property; and without naming any specific mortgagor, mortgagee, trustor, beneficiary, or trustee. Every instrument shall contain on the face of the document "Master form recorded by (name of person causing instrument to be recorded)." The county clerk and recorder shall index such master forms in the grantee index under the name of the person causing it to be recorded.

(b)(1) Any of the provisions of such master form instrument may be incorporated by reference in any mortgage or deed of trust encumbering real estate situated within the state, if such reference in the mortgage or deed of trust states the following:

(A) That the master form instrument was recorded in the county in which the mortgage or deed of trust is offered for record;

(B) The date when recorded and the book and page or pages or reception or index number where such master form was recorded;

(C) That a copy of the provisions of the master form instrument was furnished to the person executing the mortgage or deed of trust; and

(D) If fewer than all of the provisions of the referenced master form are being adopted or incorporated, a statement identifying by paragraph, section, or other specification method which will clearly identify the incorporated provision or provisions, provided that in the absence of specific designation, the entire referenced master form will be deemed to be incorporated.

(II) The recording of any mortgage or deed of trust which has incorporated by reference any of the provisions of a master form recorded as provided in this section shall have the same effect as if such provisions of such master form had been set forth fully in the mortgage or deed of trust.

(2) All deeds dated after January 1, 1977, and recorded with the county clerk and recorder pursuant to subsection (1) of this section shall include a notation of the legal address of the grantee of the instrument, including road or street address if applicable. Any such deed submitted to the county clerk and recorder lacking such address shall not be recorded and shall be returned to the person requesting the recordation. Acceptance of a deed by the county clerk and recorder in violation of this subsection (2) shall not make such deed invalid. A notation as required in this subsection (2) may be made by a person other than the grantee after the execution of the deed.

(3) Any person who offers to have recorded or filed in the office of the county clerk and recorder any document purporting to convey, encumber, create a lien against, or otherwise affect the title to real property, knowing or having a reason to know that such document is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid, shall be liable to the owner of such real property for the sum of not less than one thousand dollars or for actual damages caused thereby, whichever is greater, together with reasonable attorney fees. Any grantee or other person purportedly benefited by a recorded document that purports to convey, encumber, create a lien against, or otherwise affect the title to real property and is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid who willfully refuses to release such document of record upon request of the owner of the real property affected shall be liable to such owner for the damages and attorney fees provided for in this subsection (3).

(4) Repealed by Laws 1997, H.B.97-1143, § 3, eff. March 20, 1997.

(5)(a) *An affidavit, executed under penalty of perjury* stating facts enumerated under paragraph (b) of this subsection (5) and made by a person who has actual knowledge of, and is competent to testify in a court of competent jurisdiction about, the facts in such affidavit may affect the title to real property within the state and may be recorded in the office of the county clerk and recorder in the county in which the real property is situated.

(b) When recorded, an affidavit as described in paragraph (a) of this subsection (5), or a certified copy of such affidavit, shall constitute prima facie evidence of one or more of the following facts:

(I) The name, age, identity, residence, or service in the armed forces of any party;

(II) Whether the land embraced in any conveyance or any part of such land or right therein has been in the actual possession of any party or parties within the chain of title;

(III) If furnished by a registered surveyor, a statement or survey that reconciles conflicts and ambiguities in descriptions of land in recorded instruments;

(IV) *A scrivener's error.*

(c) An affidavit filed under this subsection (5) shall state that the affiant has actual knowledge of, and is competent to testify to, the facts in the affidavit and shall include a description of the land, the title that may be affected by facts stated in such affidavit, a reference to an instrument of record containing such description, the name of the person appearing by the record to be the owner of such land at the time of the recording of the affidavit, and an acknowledgment that the affiant is testifying under penalty of perjury. The recorder shall index the affidavit in the name of the record owner.

CREDIT(S)

Amended by Laws 1976, H.B.1025, § 2; Laws 1980, S.B.103, § I; Laws 1984, S.B.55, § I; Laws 1989 S.B.73 § 2; Laws 1996, H.B.96-369, § I, eff. July 1, 1996; Laws 1997, H.B.97-1016, § 2, eff. July 1, 1997; Laws 1997, H.B.97-1143, § 3, eff. March 20, 1997; Laws 2001, Ch. 08, § I, eff. July 1, 2001; Laws 2003, Ch. 98, § 3, eff. Aug. 6, 2003.

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