COLORADO'S NEW DEED LEGISLATION

Daniel A. Sweetser
The Sweetser Law Firm, P. C.

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To address the ongoing issues of merger[1] and the recitation in deeds of provisions contained in the unrecorded contract to buy and sell real estate[2], sellers' misplaced reliance upon the provisions of title company commitments and policies which are contracts with buyers only[3], a seller's ongoing downstream warranty liability[4], the legal fiction of title companies acting as scriveners for real estate brokers, and a couple of other issues discussed below, the Colorado legislature enacted HB 19-1098, revising the provisions of Sections 38-30-113, 115, and 116, C.R.S. and adding a new Section 38-30-116.5, C.R.S.

Prior to the enactment of HB 19-1098, Section 38-30-113, C.R.S. established the statutory form for a general warranty deed and set forth the what matters were warranted by the grantor. Specifically, the grantor warranted that she/he/it was lawfully seized of a fee simple estate to the property with the power to convey[5], that the property was free and clear of all encumbrances except those stated in the deed[6], and that he/she/it will defend the title to the property against all who may claim against it.[7] Former Section 38-30-115, C.R.S. established the form for a bargain and sale deed, being the same form as established in Section 38-30-113 but omitting the words "and warrant title to the same", and a special warranty deed, being the same form as established in Section 38-30-113 but substituting the warranty language "and warrant the title against all persons claiming under me". Former Section 38-30-115 stated that under a special warranty deed the grantor will warrant and defend the title to the property against all persons claiming to hold title by, through, or under the grantor, but contained no other warranties. Specifically, the special warranty deed did not contain a warranty that the grantor was seized of a fee simple estate in the property with the power to convey.

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[1] *Feit v. Donahue*, 826 P.2d 407, 412 (Colo. App. 1992); *Colorado Land & Resources, Inc. v. Credithrift of America, Inc.*, 778 P.2d 320, 322 (Colo. App. 1989).
[2] §38-30-108, C.R.S.
[3] *Jimerson v. First American Title Insurance Company*, 989 P.2d 258 (Colo. App. 1999) (The *Jimerson* Court found that by the plain language of the commitment and the policy only the buyer would be insured and that the seller's obligation to convey good title to a buyer is established at the time of contracting for the sale, not in reliance upon any provisions of the title commitment or the title policy.)
[4] §38-30-121, C.R.S.
[5] Former §38-30-113(2)(a), C.R.S.
[6] Former §38-30-113(2)(b), C.R.S.
[7] Former §38-30-113(2)(c), C.R.S.

The new Sections 38-30-113(1)(a) – (d) now specifically establish the statutory forms for a general warranty deed, a special warranty deed, a bargain and sale deed, and a quitclaim deed rather than simply referring back to the section establishing the general warranty deed form, as was the case before the enactment of HB 19-1098.[8] The warranties that are given in both a general warranty deed and a special warranty deed are now set forth in the new Section 38-30-113(4)(a), C.R.S. and include the warranty of seisen and power to convey.

A new Section 38-30-113(3), C.R.S. has been added, which provides that any deed, when properly executed, effects a conveyance to the grantee recited in the deed "regardless of whether the deed recites valuable consideration or whether valuable consideration has been given for the deed". It is respectfully submitted that the inclusion of this provision was a bit of overkill relative to the already well established Colorado law that a voidable deed (i.e. one not supported by valuable consideration) properly recorded in the chain of title to a property can be enforced against the grantor by subsequent bona fide purchasers of the property, who may rely upon the properly recorded deed.[9] This new section is, nevertheless, consistent with the common practice of using a quitclaim deed to correct a minor title defect without having any consideration given to the grantor for executing and delivering the deed.

More importantly, relative to the troublesome matters of merger and the referencing of unrecorded documents in a deed, sellers' and sellers' counsel's unwitting reliance upon the title commitment and title policy, and sellers' downstream warranty liability, the concept of "statutory exceptions" to title has been established by a new Section 38-30-113(5), C.R.S. The new Section 38-113(5)(a) defines statutory exceptions to the title conveyed in any warranty deed to be: I) real estate taxes for the year of conveyance and subsequent years; II) all matters that would have been disclosed by an improvement survey plat or could have been ascertained by an inspection of the property, which matters were not created or otherwise known by the grantor; and III) all matters of record in the real property records for the county in which the property is located. Section III merely tracks the aforementioned common law that all persons are deemed to have constructive knowledge of all matters of record. Sections I and II are common exceptions already included in nearly every deed used in a commercial real estate transaction.

Finally, to address the legal fiction of title companies acting as scriveners for real estate brokers when drafting deeds, a new Section 38-30-116.5, C.R.S. has been added, which section authorizes title companies themselves to prepare deeds.[10] The new section provides that any warranty deed prepared by a title company ***must*** use the words that title is being conveyed "subject to statutory exceptions" and no other descriptions relative to matters being excluded from the title

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[8] *See* former §§38-30-115 and 38-30-116.

[9] *See*, *Martinez v. Affordable Housing Network, Inc.*, 123 P.3d 1201, 1205 (Colo. 2005) and *Svanidze v. Kirkendall*, 169 P.3d 262, 266 (Colo. App. 2007).

[10] As it is the Colorado Supreme Court, and not the General Assembly, that determines what does and does not constitute the unauthorized practice of law, it remains to be determined whether this authorization given to title companies will ultimately hold up.

being conveyed.[11] From a practical standpoint this new statutory provision will, in the vast majority of residential real estate transactions, protect the unwary seller from unlimited warranty liability to future owners of the property pursuant to Section 38-30-121, C.R.S. For sellers and sellers' counsel, the statutory exceptions established in Section 38-30-113(5), C.R.S. create a safe harbor to be used so that sellers and sellers' counsel need not rely upon the underwriting work of the title companies, with no recourse in the event that work proves to be faulty.

Revision to the Contract to Buy and Sell Real Estate (Residential)

To address the matters established by HB 19-1098, section 13 of the Contract to Buy and Sell Real Property (Residential) has been revised to read as follows:

13. TRANSFER OF TITLE. Subject to Buyer's compliance with the terms and provisions of this Contract, including the tender of any payment due at Closing, Seller must execute and deliver the following good and sufficient deed to Buyer, at Closing:
☐ special warranty deed ☐ general warranty deed ☐ bargain and sale deed ☐ quit claim deed ☐ personal representative's deed ☐ _____ deed. Seller, provided another deed is not selected, must execute and deliver a good and sufficient special warranty deed to Buyer, at Closing. Unless otherwise specified in §30 (Additional Provisions), if title will be conveyed using a special warranty deed or a general warranty deed, title will be conveyed "subject to: statutory exceptions" as defined in §38-30-113(5)(a), C.R.S.

This section has been greatly simplified from what it was and, as is clearly stated, is intended to track the new law established by HB 19-1098. Prior versions stated that title would be transferred subject to specific exceptions "described by reference to recorded documents as reflected in the [schedule B-2 exceptions in the title commitment] accepted by Buyer in accordance with [section 8 of the contract]." This revision to section 13 was prompted, in part, to address the downstream warranties being given by sellers due to the reference to the unrecorded Contract to Buy and Sell, of which sellers were, invariably, unaware.

[11] §§ 38-30-116.5(b)(I) & (II) do allow for alternate language to be used in the deed prepared by the title company if the title company is specifically directed to do so by grantor and grantee or their authorized agents.