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CRE Commission-approved contracts: Tips & traps – the deed

This is the 16th in a series of 18 articles that come from 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's name, the seller, the property, water rights, ordering the title commitment, owner's extended coverage, making title objections, off-record matters, special taxing districts, ordering and reviewing the new improvement location certificate or new survey, owners' associations, rights of first refusal, contract approval and the §13 trap. This article relates to the transfer of title to the property and, in particular, the form of the deed.

Section 13 of the contract gives the buyer the opportunity to identify what kind of deed it wants the seller to use to convey the property. In Colorado, there are essentially four choices: a quitclaim deed, a bargain and sale deed, a special warranty deed and a general warranty deed. All of them are sufficient to convey the property. They differ, however, in the kind, of warranties about title that the seller makes to the buyer.

Before getting into the deed warranties, however, it is important to remember something about the relationship of the contract to the deed. Under Colorado law, everything in the contract "merges" into the deed. Thus, after the closing, the seller no longer has any obligations to the buyer under the contract. The contract can, however, provide that certain of its provisions "survive the closing." As to those provisions, the seller's obligations continue. **Tip:** *If the buyer expects the seller to bear any responsibility under the contract after the closing, the buyer must make sure the contract provides that the obligation survives the closing or the obligation is included in the deed or in another document executed and delivered at the closing.* Section 26 of the contract provides that "Any right or obligation in this contract that, by its terms, exists or is intended to be performed after … closing survives the same." Divining what "is intended" can be difficult, so the contract should clearly state what rights and obligations are to apply after the closing.

As to deed warranties, a quitclaim deed conveys the seller's property without any warranties of title. A quitclaim deed does not, however, convey

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"after-acquired property," that is, an interest in real property to which the seller acquires title after delivering the deed. Thus, a quitclaim deed is better for confirming that the grantor has no interest in the property than it is for conveying real property. A bargain and sale deed is the better alternative, especially for the grantee, for conveying all the interests in the property the grantor may or may not have. A bargain and sale deed also conveys the property without any warranties of title, it is generally believed, but it also conveys any after-acquired property to the buyer. Because a quitclaim deed and a bargain and sale deed contain no warranties of title, they are not favored by buyers in the typical commercial purchase and sale transaction. Special and general warranty deeds are the deeds of choice. A special warranty deed conveys the property with after-acquired property, with the four customary warranties of title – 1) seisen (i.e., possession of the property); 2) the right and power to convey; 3) freedom from encumbrances; and 4) quiet and peaceable possession – and with a covenant to defend title (see C.R.S. § 38 30 113(2)). In the special warranty deed, the warranties are limited, however, to matters arising "by, through or under" the seller. If the seller did not create the title defect, the seller is not liable on the warranty. The most complete title protection is given by the general warranty deed. The general warranty deed conveys the property and after-acquired title with the four customary warranties of title and the covenant to defend title as against all persons.

General warranty deeds are most commonly used in residential transactions, and farm and ranch transactions, while special warranty deeds are most common in Front Range commercial transactions. Bargain and sale deeds and quitclaim deeds are used when the seller is not willing to warrant title. Deeds from personal representatives or trustees, for example, are generally bargain and sale deeds. As discussed in the sixth article in this series, bargain and sale deeds and quitclaim deeds also are commonly used to convey water rights.

What if the buyer, after conducting its title and survey review, concludes that it should obtain a different type of deed than is provided in §13 of the contract? **Trap:** *It is hard to see how requiring a change in the type of deed is, in and of itself, an appropriate title objection.* The buyer should think carefully about what deed it selects in §13 of the contract. That said, a buyer might lodge an objection to a title matter that could be cured by the seller's agreement to provide a different form of deed. And, of course, if the buyer does not want to close without a different type of deed than the contract specifies, and the buyer has a right to terminate the contract, the seller might be persuaded to amend the contract to provide for the type of deed the buyer wants.

Section 13 presumes that the seller will convey the property "free and clear of all taxes except the general taxes for the year of closing." The title insurance policy will most likely take an exception for "real property taxes and assessments for the year of closing and subsequent years, a lien not yet due or payable." If the buyer is to acquire title to the property subject to any taxes, the contract must be changed to achieve that result.

Section 13 also presumes that title to the property will be conveyed "free and clear of all liens, including any governmental liens for special improvements, installed as of the date of buyer's signature hereon, whether assessed or not." Thus, if the seller intends to convey the property to the buyer subject to any liens, the contract must be changed to specify the outstanding liens. The reference to assessments for special improvements is to address the assumed expectation of the buyer that the purchase price includes the property as it exists at the time of the contract, and that the buyer will not have to pay "extra" for existing improvements by way of an outstanding governmental assessment.

If a special warranty deed or a general warranty deed will be used to convey the property, the seller will want existing matters that affect title to the property to be exceptions to the warranty of title. Thus, the warranty clause in the deed usually will end with the words, "subject to" and a list of the exceptions. In a special warranty deed, the seller need only list matters that arise "by, through or under" the seller, but most special warranty deeds will list all the exceptions that are shown in the title commitment because it is easier to do that than to think through which of the exceptions are the seller's responsibility. The seller is making the warranty, however, so if it knows of any other exception to title, the seller should add it (which, of course, means that the title insurance company may add it to the title commitment, and the buyer may be able to object to it under §8.2 of the contract).

In the previous article, we discussed how §13 can cause problems for the title review and approval process in the contract. I referred to a number of ways in which §13 is "insidious." What makes §13 most insidious is that some title insurance companies have adopted the practice of reciting §§13.1 through 13.5, verbatim, as exclusions from the seller's warranties in the deed of conveyance. I am told that some title insurance companies prefer this approach over actually listing the title exceptions contained in the title commitment in the deed because some upstart title insurance companies started using the recited exceptions in recorded deeds as their means of searching title, rather than fully searching the grantor/grantee index, which is prohibitively time-consuming and expensive, or paying to use one of the private databases that allows for computer searching of titles by tracts. Reciting §§13.1 through 13.5 is a terrible practice. It can cause future title problems since the title commitment is not recorded and who knows what the buyer knew when it closed. For the seller, it creates the possibility of liability under the title warranty because, under C.R.S. §38 35 108, a reference to an unrecorded document in a recorded document is not binding on third parties. Since a title warranty is binding on successors and assigns of the grantor and runs with the land (see C.R.S. §38 30 113(3)), future purchasers can ignore any reference to the contract or to the title documents as defined in the contract. **Tip:** *When representing the seller or the buyer, provide that you, as the seller's or the buyer's counsel, and not the broker or the title insurance company, will prepare the deed. When representing the buyer, be sure the form of the deed is agreed to as part of the title review under the contract.*▲