LTAC Land Title Association of Colorado

Responsible Producers for our Colorado Consumers

PROPOSED CHANGES TO COLORADO REAL ESTATE CONTRACT 13.1

THE PROBLEM: Section 13.1 currently provides that the Seller shall convey title subject to "those specific recorded documents reflected in the Title Documents accepted by Buyer in accordance with Record Title." An unintended result of this language, which was introduced in 2002, is that potentially hundreds of thousands of deeds have been recorded throughout Colorado that include a reference to exceptions to title matters that are not directly referenced in the deed. Pursuant to Section 38-35-108, C.R.S., this makes the exceptions enforceable only as between Buyer and Seller, not heirs, successors and assigns, and may lead to disputes as to what was actually accepted by Buyer prior to closing. Although it is unclear how frequently such disputes have arisen in the past sixteen years, if at all, LTAC agrees that this unintended consequence is a potential problem.

BACKGROUND: The proposed change continues the practice whereby the title company, as scrivener for a Broker, unintentionally advises a Seller as to the Seller's warranties of title. Rather than make a reference to the unrecorded list of Schedule B exceptions, the proposed change requires the title company to insert the Schedule B Exceptions directly into the recorded deed. The proposed amendments do NOT resolve a Broker's unauthorized reliance on the Title Documents to advise the Seller as to warranty issues, and would continue to create liability between the Broker and the Seller for title defects that are both intentionally and unintentionally left off the Title Documents. *The discretion used to prepare Title Documents goes well beyond the selection of forms and filing in of blanks*.

As outlined below, we believe that neither a title company nor a broker is authorized to review title on behalf of a seller in order to advise a seller with respect to the sellers warranties of title. ALTA has recently addressed this issue by specifying in the 2017 ALTA Commitment form that *a title commitment is a contract between the title insurer and the buyer* and may not be relied on by other parties.

Although there are many reasons why LTAC is opposed to the proposed amendments, the following bullet point list highlights what we believe are the most relevant to Brokers:

1. UNAUTHORIZED PRACTICE OF LAW. the proposed change would cause Brokers and Title Companies to violate the unauthorized practice of law, and could potentially result in the Broker being liable to a seller if certain title defects are not listed in the Title Documents (as the result of accepted title review practices or mistake) and are therefore not included in the list of special exceptions, and the Seller is sued for breaches of warranty of title.

In order to avoid the unauthorized practice of law, either a Broker or an Attorney will have to provide the Title Company with a list of special exceptions based on an independent review of title. This is because neither a Broker nor a Seller may rely on the Title Commitment/Policy to prepare the list of special exceptions:

- The proposed language disregards the widely accepted legal limitations of a Title Commitment as a representation of the status and title to property. Arapahoe Land Title, Inc. v. Contract Financing, Inc., 28 Colo. App. 393, 472 P.2d 754, 756-57 (1970).
- A Title Company cannot practice law by advising either party as to what language should be used to address a seller's deed warranty liability. That decision is supposed to be based on the legal judgment of the parties, their brokers and attorneys. Given the legal limitations of a title commitment discussed below, it cannot be used by a Broker to prepare a list of special exceptions to warranties in the deed.

2. **A TITLE COMMITMENT IS NOT AN ABSTRACT OF TITLE.** Paragraph 8.1.1 of the Contract gives the parties a choice of using an abstract or a title commitment as evidence of title. There are significant legal differences between the documents. The current and proposed language in 13.1 attempts to use a title commitment as an abstract of title. A title commitment is a contract for insurance and is not intended as a guaranty or representation as to the complete state of title. First Federal Sav. & Loan v. Transamerica Title, 793 F. Supp 265, 270 (D. Colo. 1992), aff'd, 19 F.3d 528 (10th Cir. 1994). Unlike an abstract, a title

commitment need not list all impairments of record. See C.R.S., §10-11-106(2). A title company is only obligated to conduct a reasonable examination of title and determine insurability in accordance with sound underwriting practices. Id., §10-11-106(1). The listing of exceptions in a title insurance commitment involve judgment and discretion by the title company. Accordingly, a Broker cannot rely on a title committment to advise a seller what warranty liability to provide to a buyer. Choosing specific exceptions is not the same as the accepted practice of choosing general warranty vs. special warranty.

3. **CONTRACTUAL RELATIONSHIP IS ONLY WITH THE BUYER.** A Title Company does not prepare its commitment as an agent for buyer or seller to determine warranty liability, or for any other reason. A title Company may have contractual liability to the insured buyer, but there is no contractual relationship with the Seller. Jimerson v. First American Title Ins. Co., 989 P.2d 258 (Colo. App. 1999). Accordingly, if a seller is sued for breaches of warranty of title, a seller would not be able to recoup from that title company.

4. **INCREASED BROKER LIABILITY.** Our understanding is that part of the purpose of this change is to reduce Broker liability, but in fact it will increase it. The Broker is responsible for the accuracy of the documents a Title Company prepares as a scrivener. Thus, if a broker relies on a title commitment that missed a title defect and the seller is sued for a breach of warranties of title, the seller could seek to recover any loss from the Broker. This would be true if the Broker were to independently review title; it would also be true if the Broker copied and relied on the commitment because the commitment was not prepared for that purpose.

5. **REVIEW OF OTHER STATE SOLUTIONS.** Other states have harmonized the need to limit a Seller's warranties, maintain a clear public record, and avoid the unauthorized use of the Title Documents by using a deed equivalent to Colorado's Special Warranty Deed. For example, a "California Grant Deed" only guarantees that the transferor has done nothing to cause a title defect. The warranty in a grant deed does not apply to anything that happened before the transferor acquired the property. When a person transfers California real estate using a grant deed, the terms of the warranty are not specified in the grant deed itself. Instead, the warranty of title is implied under California Civil Code § 1092. Public policy supports the use of the California Grant Deed because title insurance insures the risk of any title issues, even those that arose earlier in the chain of title. Before writing a title insurance policy, a title company will search the land records and other resources to be sure that title is clear. This additional due diligence helps ensure that any title issues are caught before the transfer.

6. **ALTERNATIVE SOLUTION:** LTAC believes that a Special Warranty Deed can accomplish the same result as the proposed amended language without continuing what we believe to be a second unintended consequence, where Brokers and Sellers are relying on the Title Documents without a legal right to do so. However, it would be possible to make the default deed a Special Warranty Deed unless the parties specifically chose another form of deed. Another possible solution would be to create a new Statutory Deed similar to that in California.

CONCLUSION: We are happy to work with the real estate community on a solution to the problem outlined above, but we strongly believe that the proposed amendments to Sections 13 and 13.1 will not have the result that the forms committee is seeking. It will in fact, cause additional problems and liability for the broker. We believe a Special Warranty Deed resolves all of the concerns without creating any liability for Brokers.

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