

Is Your Client Really Selling Their Home “As Is”?

BY MARK COHEN





This article explains why an “as is” clause in a real estate contract might not offer the protection from liability that sellers expect.

Many home sellers want to sell their home “as is.” Sometimes the seller does not want to negotiate with potential buyers about repairs, but another common reason is the seller’s desire to minimize potential liability if the buyer discovers an alleged defect after the closing. The desire to sell “as is” is so common that paragraph 10.2 of the Colorado Real Estate Commission’s Contract to Buy and Sell Real Estate form (the CREC contract) provides:

Except as otherwise provided in this Contract, Buyer acknowledges that Seller is conveying the Property and Inclusions to Buyer in an “As Is” condition, “Where Is” and “With All Faults.”

Many sellers (and agents) mistakenly believe this language protects sellers from claims based on alleged property defects. This article explains why that’s wrong and offers options for modifying the CREC contract to strengthen protections for sellers.

“Except as Otherwise Provided”

It’s difficult for non-lawyers to understand the CREC contract. It consists of 20 pages, contains 14,814 words, has a 17% passive voice rate, and scores 35.7 out of a possible 100 on the Flesch-Kincaid ease of reading scale (the higher the score, the easier the document is to read). But the contract’s key clause—“except as otherwise provided in this contract”—could expose unwary sellers to significant liability. In fact, there are several provisions in the contract that may allow a buyer to overcome its “as is” language.

Seller’s Duty to Complete the Seller’s Property Disclosure Form

Paragraph 10.1 of the CREC contract provides:

On or before Seller’s Property Disclosure Deadline, Seller agrees to deliver to Buyer the most current version of the applicable

Colorado Real Estate Commission’s Seller’s Property Disclosure form completed by Seller to Seller’s actual knowledge and current as of the date of this Contract.

Although the CREC contract includes this language, no statute requires a seller to complete the Seller’s Property Disclosure (SPD) form.¹ No statute prevents the parties from removing this language from the CREC contract.² However, even if the parties remove this language, a buyer may still attempt to hold a seller liable using common law theories such as misrepresentation, nondisclosure, and/or concealment.

Although the SPD form provides that the seller must only provide information that is correct to the seller’s “current actual knowledge,” it also provides, “If Seller has knowledge of an adverse material fact affecting the Property or occupants, it must be disclosed whether there is a specific item on this SPD or not.” At least one court has found the SPD form to be ambiguous, thus creating factual questions about the parties’ intent.³ The passive voice rate for the SPD form is 27.6%. Therefore, if the parties do not delete paragraph 10.1, the seller should carefully review the SPD form and be thorough in completing it. No buyer has ever successfully sued a seller for disclosing more than the CREC contract required.

When a buyer files a suit alleging the seller breached the CREC contract by failing to make the required disclosures under paragraph 10.1, the fact finder must often determine whether the seller had “current actual knowledge” of some matter when the seller completed the SPD form. This involves some amount of Monday morning quarterbacking. And although the form purports to require that a seller disclose only those matters of which the seller had “current actual knowledge,” a judge or jury may not believe a seller’s claim that the seller did not know or had forgotten about a matter the seller did not disclose on the form.

Seller's Duty to Disclose Material Adverse Facts

Paragraph 10.2 of the CREC contract provides, in relevant part, "Seller must disclose to Buyer any adverse material facts actually known by Seller as of the date of this Contract." The CREC contract does not define "adverse material facts." That may be a problem. Suppose a seller completed a bathroom remodel without obtaining the required permit 15 years before the transaction. The seller may believe that is an improvement rather than an "adverse material fact," but the fact finder may see it differently.

What is clear is that even if the seller completes the SPD form to the seller's current actual knowledge, a buyer may still bring an action based on the allegation that the seller failed to disclose an adverse material fact as required by paragraph 10.2 of the CREC contract.

Due Diligence Requirements

Paragraph 10.6 of the CREC contract requires the seller to provide certain due diligence documents pertaining to the property. No statute imposes a general duty on a seller to provide due diligence documents, but the CREC contract imposes many such requirements. Thus, even if the facts don't support a buyer's claim that the seller failed to complete the SPD form to the seller's current actual knowledge under paragraph 10.1, or a claim for failure to disclose an adverse material fact under paragraph 10.2, a buyer may still be able to successfully sue a seller for failing to provide all the due diligence documents the CREC contract required.

The Economic Loss Rule and Tort Claims Against a Seller

Colorado follows the economic loss rule (ELR). The ELR provides that "a party suffering only economic loss from the breach of an express or implied contractual duty may not assert a tort claim for such a breach absent an independent duty of care under tort law."⁴

However, the Colorado Court of Appeals has held that a "standard form" contract does not preclude a buyer from asserting tort claims.⁵ This increases a seller's potential liability because a plaintiff bringing intentional tort claims may ask the court for leave to seek exemplary damages

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if the buyer presents evidence showing that the seller's conduct was attended by circumstances of fraud, malice, or willful and wanton conduct.⁶ A contract that allows tort claims also increases the risk to the seller because a seller found liable on a fraud claim may have difficulty discharging any judgment in bankruptcy.⁷

The court in *In re Estate of Gattis* noted that the ELR may prevent a buyer from asserting tort claims if the contract (1) limits the parties' rights

and liabilities to the categories of information specified in the SPD, (2) contains a standard of care, (3) disclaims the buyer's reliance on the seller's statements, and (4) represents that the buyer is relying only on the buyer's own independent investigation.⁸ Be warned that the ELR in Colorado is somewhat unclear, the application of it tends to be fact specific, and it is constantly evolving as new cases reach the appellate courts.

Home Inspections

Paragraph 10.3 of the CREC contract gives a buyer "the right to have inspections (by one or more third parties, personally or both) of the Property, Leased Items, and Inclusions (Inspection), at Buyer's expense." If a buyer finds an inspection unsatisfactory, the buyer may give the seller a notice of objection and negotiate the issue or terminate the contract.

A common problem is that most buyers pay for a home inspection and don't realize the limited scope of that inspection. For instance, the typical home inspection contract provides that the inspection will be a noninvasive, visual inspection that will not include any inspection for code or zoning violations or inspection of any system or component that is not readily accessible.⁹ Buyers tend to mistakenly believe that the SPD combined with a routine home inspection will identify all possible defects or adverse facts. Sellers can protect themselves in "as is" transactions by making sure the buyer understands the limited scope of a home inspection.

Modifying the CREC Contract to Reduce the Seller's Potential Liability

With all of this as background, below are some possible modifications to the CREC contract intended to protect a seller selling a home "as is." Because each transaction is unique, these are simply some modifications sellers may want to consider. However, understand that these modifications may scare potential buyers and make the property less appealing. Each seller must decide what is most important for that seller.

1. Consider striking paragraphs 10.1 and/or 10.2. You may want to keep paragraph

10.1 because in Colorado most real estate agents and buyers expect the seller to complete the SPD form. Additionally, keeping paragraph 10.1 and adding additional language as suggested below may help a seller avoid tort claims by establishing a contractual standard of care.

2. Review paragraph 10.6 and strike any inapplicable provisions. Under paragraph 10.6.1.6 (Other Documents), write, “NONE.” The parties may also delete paragraph 10.6 entirely and instead include language in paragraph 30 stating, “The parties have intentionally deleted paragraph 10.6 and all its subparagraphs. The parties agree that, except as required by law, the Seller has no duty to provide the Buyer with any due diligence documents.”
3. Consider adding language like this in paragraph 30 (if you keep paragraph 10.1):
 - a. Except as provided in paragraph 10.1 of this Contract, neither Seller nor anyone acting for Seller has made any representation, warranty, statement or promise to Buyer concerning the property, quality, value, physical aspects or condition thereof, or any other matter with respect to the property. Buyer expressly releases Seller from all such matters and represents Buyer is relying solely on Buyer’s own investigation and has not and will not rely upon any representation, statement, or warranty of Seller or anyone acting for Seller, other than as expressly contained in this Contract, and is purchasing the property “as is,” “where is,” and “with all faults.” Buyer waives and Seller disclaims all warranties of any kind with respect to property, expressed or implied. Buyer has not relied and will not rely on, and Seller is not liable for or bound by, any express or implied warranties, guaranties, statements, representations, or information pertaining to the property made or furnished by Seller or any real estate broker or agent representing or purporting to represent Seller, to whomever made or

given, directly or indirectly, verbally or in writing, unless specifically set forth in this Contract, and Buyer expressly holds Seller harmless in relation to such matters. If Buyer brings an action against Seller notwithstanding the provisions in this Contract, Buyer’s remedies shall be limited to a suit for rescission or breach of contract; in no event may Buyer bring a tort claim.

- b. Buyer understands that a typical home inspection is limited in scope and does not include an inspection of many matters such as code and zoning violations or an inspection of systems or components that are not readily accessible. Buyer agrees to read any home inspection contract carefully, and any standards of practice referenced in any such contract, so that Buyer fully understands the limited scope of the home inspection.
- c. Seller is selling the property to Buyer at the agreed price based on Buyer’s willingness to agree to the terms in

this Contract, including those terms that limit Seller’s duties and Buyer’s remedies, and is relying on Buyer’s representations in this Contract. Seller would not sell the property at the agreed price if Buyer had not agreed to any provision in this Contract.

- d. Buyer agrees to be bound by the Advisory to Buyer in the Seller’s Property Disclosure. (The *Gattis* court held that the Buyer Advisory on the SPD was not a contractual term that bound the buyer.)

Conclusion

Although the Colorado Real Estate Commission’s Contract to Buy and Sell Real Estate provides that the buyer is buying the property and inclusions in an “as is” condition, “where is,” and “with all faults,” that language is misleading because it is preceded by the phrase “except as otherwise provided in this contract.”

The parties are free to modify the CREC contract to limit the seller’s duties and the buyer’s remedies. However, the law will rarely protect a seller who commits fraud. CL



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NOTES

1. There are statutes that require sellers of residential property to disclose specific items. For instance, CRS § 38-35.7-103 requires sellers to make a methamphetamine disclosure.
2. The Colorado Real Estate Commission’s Real Estate Manual instructs licensed agents and brokers that “[a]ny deletion or modification to the printed body of a Commission-Approved Form must result from negotiations or the instruction(s) of a party to the transaction. Any deletion must be made directly on the printed body of the form by striking through the deleted portion in a legible manner that does not obscure the deletion that has been made.” Department of Regulatory Agencies, Division of Real Estate, Colorado Real Estate Commission, Colorado Real Estate Manual, 7.2(C).
3. *Gandrey v. Robarge*, No. 23 CV 30671 (Boulder Cnty.Dist.Ct.).
4. *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000).
5. See *In re Estate of Gattis*, 318 P.3d 549 (Colo.App. 2013).
6. See CRS § 13-21-102.
7. See, e.g., 11 USC § 523.
8. See *Gattis*, 318 P.3d at 556; *Former TCHR, LLC v. First Hand Mgmt. LLC*, 317 P.3d 1226 (Colo.App. 2012); *Hamon Contractors, Inc. v. Carter & Burgess, Inc.*, 229 P.3d 282, 292-93 (Colo.App. 2009).
9. See, e.g., International Association of Certified Home Inspectors, Residential Standards of Practice, <https://www.nachi.org/SOP.htm>. The American Society of Home Inspectors standards of practice contain similar limitations and exclusions.