COLORADO PURCHASE AND SALE ISSUES FOR BUYERS

EDWARD N. BARAD is a shareholder with Brownstein Hyatt Farber Schreck, P.C. a law firm with offices in Colorado, California, Nevada, New Mexico, New Jersey, and Washington, DC.

Steve Carey provided the inspiration for the concept of this article. I followed his lead in deciding how to approach this presentation. I am deeply indebted to him. Special thanks to Reid Galbraith, Michael Kapoor, Kathy Oster, and Sarah Reinhart for their important and invaluable devotion of time and assistance in research, drafting, and citation in the midst of their busy schedules. And to Terri McNabb and Jane Padilla for their important contributions.

Sincerest thanks also to Steve Carey, Larry Treece, Mark Senn, Bill Lawrence, Greg Berger, Joe Monzon, David Knapp, and Peter Griffiths for their careful critiques of the concepts that I struggled with. I am grateful for their patience.

The real estate purchase and sale agreement in Colorado (the "**PSA**") is negotiated in many different ways, with common law and custom being the main controlling factors for determining the substance of the final contract. Unlike states such as California, very few statutes control PSA practice in Colorado (*See* Property – Real and Personal, Colo. Rev. Stat. §§ 38-1-101 – 38-53-110 (2017)). This article is intended to provide buyer's counsel with a review of such law and custom in Colorado that the author believes will be helpful in negotiating a final agreement.

1. RECITALS

Recitals are always utilized in PSA's. They can help set up the story that is to follow in the body and sometimes aid in developing defined terms. However, use of recitals also creates risk. The deal can change during negotiations resulting in ambiguity or error in the recitals. It is very easy to go through many drafts of a PSA and get so tired of reading it that the recitals get lost in the course of negotiation. Recitals that contradict the substance of the PSA can be used as proof of ambiguity to obtain admission of parol evidence though the language in the body of the PSA is perfectly clear. "While recitals may have a material influence on the construction of the instrument and the determination of the intent of the parties, they are not strictly any part of the contract." Las Animas Consolidated Canal Co. v. Hinderlider, 68 P.2d 564, 566 (Colo. 1937) (citing 13 C.J. § 502, p. 538). Drafters do not want their recitals to control the outcome of a dispute. The rule should be: Keep recitals short, minimal, and tight!

2. DUE DILIGENCE TERMINATION RIGHT; THE "FREE LOOK"

A buyer is usually afforded the right to terminate the PSA during the due diligence period for any or no reason in its sole and absolute discretion and to obtain a refund of the earnest money deposit. This is commonly called the "free look." The breadth of the buyer's right to use its sole discretion in this convention has changed in practice from the right to terminate for certain discrete reasons, such as a physical defect or environmental contamination, to the right to terminate for "any or no reason."

In Texas and California, it has been held that use of this unrestricted right of termination may create the risk of a failure of consideration that converts the PSA into an unenforceable option contract. Consideration may be deemed to be insufficient unless (i) the PSA contains an agreement of the buyer to assume an obligation that cannot be avoided by the right of termination or (ii) if part performance of an obligation in fact occurs during the due diligence period (e.g., submissions for platting). See Stevens A. Carey, California Purchase and Sale Issues for Buyers, 32 Prac. Real Est. Law. 38, 40 (July 2016); Stevens A. Carey, John R. Cauble, Jr., and Richard H. MacCrakcken, The "Free Look" in California—You Get What You Pay For, 33 Real Property Law Reporter 89 (July 2010), available at www.pircher.com/media/publication/28_FreeSAC.pdf. In such states, practitioners structure a nominal earnest money deposit (e.g., $100) into the PSA as independent consideration that is not refundable in the event buyer terminates during the due diligence period.

However, in Colorado, no court has held that a failure of consideration exists in a PSA that provides for a "free look," and practitioners do not generally utilize the concept of independent consideration. It has been held (though in a case that did not involve analysis of a "free look") that "[a] promise exchanged for a promise imposes mutual obligations and is sufficient consideration to render the contract enforceable." DeFeyter v. Riley, 606 P.2d 453, 454 (Colo. App. 1979) (citing Hoagland v. Murray, 123 P. 664 (Colo. 1912)). It has also been held (in a case involving an arbitration clause for the benefit of only one party) that "every contractual obligation need not be mutual as long as each party has provided some consideration to the contract." Vernon v. Qwest Communications Int'l., Inc., 857 F. Supp.2d 1135, 1154 (D. Colo. 2012) (citing Rains v. Foundation Health Systems Life & Health, 23 P.3d 1249, 1255 (Colo. App. 2001)).

This issue involves the distinction between a sales contract and an option contract. A sales contract must contain language that may reasonably be construed as a promise by buyer to purchase the property or to assume some obligation under the contract. Stelson v. Haigler, 165 P. 265, 268 (Colo. 1917). An option contract "gives the right to purchase, within a limited time, without imposing any obligations to purchase." Id. In an option contract, the option payment is not refundable if buyer elects not to close.

If the PSA can be terminated by buyer for any or no reason with a resultant refund of the deposit, is it really a sales contract? Does buyer have any true obligations or are buyer's obligations illusory? If buyer's obligations during due diligence include inspection requirements, such as an agreement to maintain insurance before entering the property, are these conditions or obligations? What if the obligations are contingent (e.g., an agreement to repair damage caused by inspection)? Is an agreement to maintain the confidentiality of due diligence materials sufficient consideration once due diligence materials have been delivered to the buyer? Does part performance (e.g., repairing damage) or conversion of a contingent obligation to a fixed obligation (e.g., causing damage and thereby triggering a restoration obligation) before expiration of the due diligence period constitute assumption of an obligation? Would the use of nominal independent consideration provide sufficient consideration to avoid conversion of a PSA into an unenforceable option? How much should the independent consideration be? See Rude v. Levy, 96 P. 560 (Colo. 1908) (where consideration of $1.00 stated was insufficient to render an offer irrevocable, because such consideration is only nominal); see also 2 Colo. Prac. Methods Of Practice § 61:5, Westlaw (database updated Mar. 2017) (stating, "[t]he sum paid, or the value delivered, should have some reasonable relation to the right acquired.").

These issues have not been answered in Colorado. Since Colorado courts have found sufficient consideration in contracts providing only promises and at least some consideration other than independent consideration, current practice may not change. But practitioners seeking to avoid the risks created by provision of a "free look" in the PSA may wish to provide for independent consideration.

3. TITLE INSURANCE AND ESCROW

3.1 Title Company Statute and Regulation

A title insurance company is subject to the provisions of the Title Insurance Code of Colorado, Colo. Rev. Stat §§ 10-11-101 – 126, and regulated by the Colorado Division of Insurance (the "**Division**"), 3 Colo. Code. Regs. § 702-8 (2017). Title insurers are required to file rates along with justifications for them with the Division before charging such rates to the public. 3 Colo. Code. Regs. § 702-8:8-1-1, §6.G (2017). Rates must be similar to other rates of the title insurer in the same county, for products of the same size, risk, and other factors. 3 Colo. Code. Regs. § 702-8:8-1-1, § 6.F (2017). Rates cannot differ from those that are filed. No rate may be charged on an unfairly discriminatory basis. 3 Colo. Code. Regs. § 702-8:8-1-1, §6.J (2017).

3.2 Customary Forms of Policy and Endorsements

Title insurance companies use the ALTA Owner's Policy of Title Insurance Form - 2006 Rev. and the ALTA Loan Policy of Title Insurance Form - 2006 Rev. Extended coverage is most desirable for owners, because it deletes standard exceptions 1 – 4 and gives broader coverage over parties in possession, easements not shown in the public record, facts that a correct survey would show, and mechanics liens. Extended coverage costs a nominal amount and is customarily paid for by seller. Commercial custom is that seller pays the premium for the basic policy, and buyer pays for any endorsements that it requires. Private mineral rights are often severed from surface rights in Colorado. Buyer should seek to obtain Endorsement 100.31 for the Owner's Policy

and 100.30 for the Loan Policy. These insure against loss sustained as a result of physical, but not aesthetic, damage to improvements existing on the land as of the date of the policy or constructed thereafter, resulting from the exercise, after the date of the policy, of any rights to use the surface of the land under the mineral interests excepted on Schedule B of the policy. Insurance for improvements "constructed thereafter" is obviously of critical importance for developers.

Customized endorsements may be negotiated, but title companies will resist diverging from the filed endorsements. A commitment to insure is effective for six months but can be extended if it is reissued every six months. There is also a "hold-open" process that provides a way for the buyer to postpone obtaining a policy until resale of the property. If the policy is held open, buyer pays 10% of the basic premium and closes but does not obtain an Owner's Policy. This will allow a savings of 40% to a buyer that intends to "flip" a property, because the re-issue rate for a second policy would otherwise be 50% of filed rates. An additional premium will be charged for any increase in policy liability from initial closing to the second closing.

3.3 Title Commitments

Abstracts are no longer used in title practice except for mineral rights review. The title commitment is not an abstract. See Commitment to Insure, Conditions and Stipulations, ALTA Form 2006 Rev. Preliminary reports are not used. The commitment is issued for the sole benefit of the buyer. If the conditions of the commitment are satisfied, the beneficiary is entitled to issuance of the policy pursuant to the terms of the commitment. The commitment is effective only (i) "upon payment of the premiums and charges and compliance with the requirements" and (ii) "when the identity of the Proposed Insured and the amount of the policy committed for have been inserted in Schedule A by the Company." See Commitment to Insure, ALTA Form 2006 Rev. If the commitment is in error and the conditions are satisfied, the beneficiary can enforce its right to obtain the policy and pursue relief subject to its terms. The title company is not liable to the seller under contract or tort theory. See Jimerson v. First Am. Title Ins. Co., 989 P.2d 258 (Colo. App. 1999), (where the Court of Appeals held that: (i) the title insurer owed no contractual obligations to seller by virtue of the title commitment and (ii) seller did not reasonably rely on the title commitment and thus had no claim for negligent misrepresentation).

3.4 The Escrow Agent

Closings in Colorado are usually consummated with the title company acting as escrow agent. If the title company is escrow agent and between the time of closing and recording (the "**Gap Period**") an item goes of record, the title company is required to insure the owner for the item, subject to the terms of the commitment. 3 Colo. Code. Regs. § 702-8:8-1-2, Section 5.H (2017). This effectively provides coverage over standard exception 5 of the commitment.

3.5 Inquiry Notice

Colorado is a "race-notice" jurisdiction, meaning that in a contest between two buyers, both of whom claim to have purchased the same property, a bona fide purchaser for value (a "**BFP**") will prevail over an earlier BFP if the subsequent BFP (i) recorded its instrument or document before the first BFP and (ii) had no notice of the earlier transfer. Colo. Rev. Stat. § 38-35-109(1) (2017). Because notice includes not only actual notice, but also implied and constructive notice, buyers have a duty to inquire into potential adverse claims to property. *See Andreatta v. Andreatta*, 537 P.2d 748, 752 (Colo. App. 1975) (holding that notice, as used in Colo. Rev. Stat. § 38-35-109 (2017) includes actual, constructive, or implied notice). Failure to undertake such inquiry could result in an owner losing BFP status and thus first priority in title, even if it holds a first priority in record title.

3.6 Mechanics Lien Coverage for Construction Lenders

Buyers often find it difficult in Colorado to satisfy the necessary first priority lien requirements of construction lenders. The priority of mechanics' liens for all work on a project relates back to the first work, and the first work will always precede the lien of the construction loan (*e.g.,* the engineering for survey and plat). Buyer must try to get the best protection available for its lender by obtaining certain modifications of the title policy, with the ultimate protection for the lender being "date down" endorsements at the time loan advances are to be made showing that no liens or claims for liens then exist.

3.6.1 Relation Back

The rule of relation back is that all mechanics' liens "relate back to the time of the commencement of work

under the contract between the owner and the first contractor, or, if said contract is not in writing, then such liens shall relate back to and take effect as of the time of the commencement of the work upon the structure or improvement, and shall have priority over any lien or encumbrance subsequently intervening, or which may have been created prior thereto but which was not then recorded and of which the lienor, under this article, did not have actual notice." Colo. Rev. Stat. § 38-22-106(1) (2017).

3.6.2 Title Protection

The mechanics' lien exception in the loan policy can be modified to read as follows with the noted deletion: "Any lien or right to a lien, for services, labor or material ~~[heretofore or]~~ hereafter furnished, imposed by law and not shown by the Public Records." The words "heretofore or" are deleted so that the loan policy only takes exception for liens arising from work furnished after the deed of trust is recorded. An ALTA 32-06 (Construction Loan – Loss of Priority Endorsement) should be issued with the loan policy, which allows the date of the policy and the amount disbursed to be updated by an ALTA 33-06 (Disbursement Endorsement) (i.e., a "date down") issued at the time of each construction draw. Any liens that are recorded will be shown on the ALTA 33-06. If lender thus discovers any previously unrecorded liens, it will not make the next additional advance. In order to obtain such title protection, owner and the general contractor (with respect to its work and the work of its subcontractors) will be required to provide an affidavit and indemnity to the title company for unpaid work furnished before and after the deed of trust is recorded. Issuance may also be dependent on review and approval of the owner's and contractor's financial statements.

3.6.3 Disburser's Notice

The construction lender as "disburser" has a duty prior to the first disbursement under the loan to record a disburser's notice that includes the name and address of the owner, the names, addresses, and phone numbers of the principal contractor and the disburser, and the legal description and address of the property being improved. If a disburser fails to record a disburser's notice, it becomes liable for amounts validly claimed by a lien claimant or, if less, the total amount disbursed by the disburser. If the disburser does record the notice, the disburser's interest may still be subject to liens asserted by the lien claimant, but the disburser retains all defenses otherwise available with respect to lien claims (e.g., timeliness of filing, timeliness of foreclosure). Upon such notice being received by the disburser, it is the duty of the disburser, before disbursing any funds to the person designated in the notice with whom a claimant has contracted, to ascertain the amount due to the claimant on any disbursement date, and to pay such amount directly to the claimant out of any undisbursed funds available for and due to the person designated in the notice on such date. If the disburser fails to comply with the foregoing and the claimant suffers loss by reason of such failure, the disburser will be liable to the claimant for the amount that the disburser should have paid the claimant to the extent of the claimant's loss. See Colo. Rev. Stat. §38-22-126 (2017).

4. CLOSING MATTERS

4.1 Closing Documents

4.1.1 Form of Deed

Colorado statutes provide for four types of deeds: general warranty (Colo. Rev. Stat. §38-30-113 (2017)), which sets forth a statutory form of deed (the "**Statutory Form**"), special warranty (Colo. Rev. Stat. § 38-30-115 (2017)), quitclaim (Colo. Rev. Stat. § 38-30-116 (2017)), and bargain and sale (Colo. Rev. Stat. § 38-30-115 (2017)).

(a) The General Warranty Deed

A deed with the words "sell(s) and convey(s)" and "warrant(s) the title to the same" is a general warranty deed. Colo. Rev. Stat. § 38-30-113(1)(a) (2017); Colo. Rev. Stat. § 38-30-113(1)(c) (2017). The warranties made are that: (i) grantor is lawfully seized of indefeasible estate in fee simple title with good right and full power to convey the property, (ii) title is free and clear of all encumbrances, except as set forth in the deed, and (iii) grantor warrants the quiet and peaceable possession of the property and covenants to defend the same. Colo. Rev. Stat. § 38-30-113(2) (2017). Conveyance of the property "with all appurtenances" constitutes a conveyance of grantor's interest "in any vacated street, alley, or other right-of-way that adjoins the property unless expressly excluded in the deed." Colo. Rev. Stat. § 38-30-113(1)(d) (2017).

The risk of using a general warranty deed is that the grantor guarantees title "against any defects arising

before the grantor acquired title as well as against those that arose *during* the grantor's ownership." *See* 2 Colo. Prac., Methods Of Practice § 64:2, Westlaw (database updated Mar. 2017) (emphasis added).

(b) The Special Warranty Deed

Customary use of the general warranty deed has been supplanted by use of the special warranty deed in commercial (but not residential) transactions, in large part due to the fact that sellers customarily pay for the premium of the owner's title insurance policy and thus provide buyers with insurance coverage as to prior unrecorded encumbrances. A special warranty deed is given when the Statutory Form is utilized with: (i) omission of the words "and warrant the title to the same" and (ii) addition of the words "and warrant the title against all persons claiming under me." The special warranty deed constitutes a covenant of the grantor that title is free and clear of all encumbrances caused or created by, through, or under grantor, except as set forth in the deed. Colo. Rev. Stat. §§ 38-30-115 (2017). Seller may want to except from its warranties all matters of record, but this is not customary and allows for the anomaly of seller causing a matter to go of record before closing that is not known to buyer and not covered by seller's warranties. Buyer will want to limit the exceptions set forth in the deed to those set forth in the title commitment.

(c) The Quitclaim Deed

A quitclaim deed is given when the Statutory Form is utilized with: (i) the word "quitclaim" substituted for the word "convey" and (ii) the words "warrant the title to the same" omitted. Colo. Rev. Stat. § 38-30-116 (2017). A quitclaim deed does not convey land but only grantor's present interest in the land, and therefore it is ineffectual to pass after-acquired title. Tuttle v. Burrows, 852 P.2d 1314, 1316 (Colo. App. 1992).

(d) The Bargain and Sale Deed

A bargain and sale deed is given when the Statutory Form is utilized with omission of the words "and warrant the title to the same." A bargain and sale deed passes after-acquired title of grantor and is without warranty. Colo. Rev. Stat. § 38-30-115 (2017).

4.1.2 Tenant Notices

For residential properties only, in order to obtain release from any obligation with respect to a security deposit, the deposit must be transferred to the buyer and notice thereof must be mailed to the tenant with the transferee's name and address. Colo. Rev. Stat. § 38-12-103(4)(a) (2017). The Security Deposit Act (Colo. Rev. Stat. § 38-12-101 – 104 (2017) does not apply to commercial properties. Colo. Rev. Stat. § 38-12-102(2) (2017); see Mountain Queen Condominium Ass'n, Inc. v. Haan**,** 753 P.2d 1234 (Colo. 1988).

4.1.3 State Tax Withholding Certificate

Foreign entities are subject to withholding of taxes at closing as described in **Schedule 1**. If the transferor is a partnership as defined in §761(a) of the Internal Revenue Code and required to file an annual federal return of income under §6031(a) of the Internal Revenue Code, it is not required to withhold. Since a limited liability company is taxed as a partnership, it is also not required to withhold.

4.2 Closing Cost Allocations

Real estate taxes are paid in arrears. The parties often prorate based on the prior year's tax bill and "true-up" following receipt of the tax bill for the year of closing. Transfer taxes are negotiated but usually are paid by buyer, especially if the city or town ordinance specifies that buyer is the obligor. See **Section 8.2.3** and **Schedule 3**. Buyer pays the documentary fee. See **Section 8.2.4**.

5. WARRANTIES AND REPRESENTATIONS

5.1 Seller's Liability

There are many views as to what the structure for Seller warranty liability should be. The author suggests that the following is generally acceptable to the parties:

5.1.1

If a warranty or representation is untrue when made and its falsity is known to buyer at or prior to the closing, buyer will be entitled to terminate the PSA, to receive a refund of the earnest money deposit, and to recover buyer's actual out-of-pocket costs incurred in connection with pursuit of the transaction subject to a "cap."

5.1.2

If a warranty or representation is untrue when made and its falsity is not known to buyer until after the

closing, buyer will be entitled to recover actual damages subject to a higher "cap."

5.1.3

If a warranty or representation is true when made, but becomes false at or prior to closing for a reason other than violation of seller's obligations under the PSA, buyer will be entitled only to terminate the PSA and receive a refund of the earnest money deposit. This situation is often discovered when the warranties and representations are remade at closing. For example, if seller represented that no governmental notice with respect to violation of law had been received as of the time of execution, but thereafter, such a notice is received, the representation would be remade stating the new fact, and buyer would have no claim against seller. If it is material matter, buyer may elect to terminate the PSA and obtain a refund of the deposit as its sole remedy. However, the same result would not apply if seller misrepresented a fact that was untrue at the time of execution and is thereafter subject to conditions within seller's control. Thus, if seller represented that it had not breached any leases, but it then did so in violation of the PSA, buyer would have a right to terminate and claim damages to the extent the PSA allows.

5.1.4

If the falsity of any representation or the breach of any covenant is known to buyer prior to closing, and buyer nevertheless elects to close, seller will have no liability to buyer for the breach.

5.2 Warranties and Representations as Conditions Precedent

The parties often agree upon conditions precedent to their respective obligations to close. If a warranty or representation is not true when made, a condition precedent may not be satisfied. If a condition precedent is not satisfied or if a warranty becomes untrue as described in Section **5.1.3**, it may not follow that a default has occurred. If buyer intends that seller is obligated to perform certain actions, the drafter should structure such obligations as covenants and not simply conditions precedent.

5.3 The Knowledge Rep

A contentious part of PSA negotiations is whether to qualify certain warranties and representations by use of the phrase "to the best of seller's knowledge." Does this qualifier include seller's constructive knowledge or actual knowledge, and what duties, if any, are imposed by the use of the language? Though it seems to impose the highest level of knowledge, one author has commented that most reported cases have held that use of the term "best knowledge" in an affidavit, application, or representation "embodies a level of uncertainty." Edward J. Levin, "Best" Is Not Always Best When it Comes To Knowledge, 30 Prob. & Prop. 44, 45 (Jan. Feb. 2016). There is no case law or statutory interpretation of this qualifier in Colorado. Without express definitions in the PSA, the word "knowledge" could imply either "actual" or "constructive" knowledge. "Actual knowledge" refers to a conscious and direct awareness of the information at issue. Actual Knowledge, Black's Law Dictionary (10th ed. 2014). "Constructive knowledge" is "knowledge that one using reasonable care or diligence should have, and therefore that is attributed by law to a given person." Constructive Knowledge, Black's Law Dictionary (10th ed. 2014). The author submits that buyer is better protected by a warranty that seller has "no knowledge," and seller is better protected by a warranty that it has "no actual knowledge." But to date, custom remains that the parties strike compromise by use of the qualifier "to the best of seller's knowledge." In all events, the drafter should precisely define the meaning of language related to "knowledge" in the PSA.

5.4 Survival of Warranties, Representations, and Covenants

It is customary to agree that the warranties and representations of seller survive closing for an agreed period of time. This insures that there is no ambiguity as to their effectiveness following closing. However, the parties do not always expressly agree as to which covenants survive closing. Thus, a question commonly arises as to whether covenants that are intended to be performed following closing automatically survive without express language indicating that they do so, or do they merge into the closing instruments?

5.4.1 Merger

In general, "a deed delivered and accepted as complete performance" of the PSA "merges all prior negotiations and agreements into the deed." Colorado Land & Resources, Inc. v. Credithrift of America, Inc., 778 P.2d 320, 322 (Colo. App. 1989). However, "the doctrine of

merger…is not a rule of property; the question of merger depends upon intent." Hart v. Monte Vista Bldg. Ass'n, 257 P. 1079, 1079 (Colo. 1927). All covenants in a PSA "that are not intended by the parties to be incorporated in the deed, or that are not necessarily satisfied by the execution and delivery of the deed, are collateral agreements and are preserved from merger." Coe v. Crady Davis Corp., 60 P.3d 794, 796 (Colo. App. 2002). "If the terms of a sale and purchase agreement are fulfilled by the delivery of a deed, there is a merger; but if the delivery of the deed is only one of a number of things to be performed under the terms of the contract, the delivery of the deed constitutes part performance, and the other matters to be performed remain obligatory." Glisan v. Smolenske, 387 P.2d 260, 263 (Colo. 1963). Therefore, it is not necessary to expressly agree in the PSA that covenants intended to be performed following closing are to survive, but the drafter should be certain that the parties' intent is clearly expressed.

> For covenants relating to title to survive and not be merged in the deed, the parties' intent must be explicitly stated in the PSA. Absent express language to the contrary, the doctrine of merger only extinguishes those covenants relating to "title, possession, quantity or emblements of the land." City of Westminster v. Skyline Vista Develop. Co., 431 P.2d 26, 29 (Colo. 1967) (quoting Urban Farms, Inc. v. Seel, 208 A.2d 434, 437 (N.J. Super. Ct. Ch. Div. 1965)); accord Coe v. Crady Davis Corp., supra. However, the doctrine of merger will not "[prevent] the reformation of a deed in which the words of description or of conveyance fail to describe correctly or to convey the land or interest that was agreed upon." See Dennett v. Mt. Harvard Development Co., 604 P.2d 699, 701 (Colo. App. 1979) (quoting 3 A. Corbin, Contracts, §604 at 631 (1963)).

5.4.2 Seller Guaranties of Surviving Obligations

In many transactions, buyers seek some form of assurance that surviving obligations of seller will be performed. These often include representations and warranties, brokers' fees, and "true-ups." Seller is usually a single purpose entity owning only the asset that has been conveyed. Following conveyance of the asset, seller will distribute all proceeds of the sale to its members or partners in liquidation. Creditors of a limited liability company formed under the laws of Colorado may not assert a claim for unlawful distributions against the members of the company under Colo. Rev. Stat. § 7-80-606 (2017). See Weinstein v. Colborne Foodbotics, LLC, 302 P.3d 263 (2013) (holding that only the company may assert a claim against its members for an unlawful distribution and that the manager of an insolvent limited liability company does not owe the creditors of the company the same fiduciary duty that is owed by an insolvent corporation's directors to the corporation's creditors). Therefore, buyers often require that a creditworthy person guaranties the surviving obligations of seller.

A guaranty usually provides a waiver of surety rights or defenses. Surety defenses are not codified in Colorado, but have been established by common law. A waiver of surety defenses is enforceable. See Armed Forces Bank, N.A. v. Hicks, 365 P.3d 378, 385-86 (Colo. App. 2014) (upholding contractual waiver of all defenses based on suretyship).

5.4.3 Statute of Limitations

If the PSA does not limit the period of survival, the statute of limitations will control. In general, the statute of limitations for a PSA is three years. Colo. Rev. Stat. § 13-80-101(a) (2017) states that "[t]he following civil actions, regardless of the theory upon which suit is brought, or against whom suit is brought, shall be commenced within three years after the cause of action accrues, and not thereafter: (a) All contract actions,… except as otherwise provided in § 13-80-103.5." Under Colo. Rev. Stat. § 13-80-103.5(a) (2017), when the action is based on breach of contract where the plaintiff seeks a liquidated, determinable amount of money due from the defendant, the action is governed by the statute permitting an action to be commenced within six years for actions of debt founded upon any contract. Uhl v. Fox, 498 P.2d 1177, 1178 (Colo. App. 1972). For purposes of determining whether Colo. Rev. Stat. § 13-80-103.5 applies, a debt is deemed "liquidated" if the amount due is capable of being ascertained by reference to an agreement or by simple computation. The statute of limitations for a PSA can be waived or shortened by agreement. Parties to a contract could require that actions founded on the contract be commenced within a shorter period of time than that prescribed by the applicable statute of limitations as long as the applicable statute does not contain language prohibiting contractually shortening the limitations period. Grant Family Farms, Inc. v. Colo. Farm Bureau Mut. Ins. Co., 155 P.3d 537, 539 (Colo. App. 2006).

6. THE "AS IS" PROVISION AND DISCLAIMERS

6.1 Disclaimers

It is customary in Colorado to exculpate the seller from liability for defects in the physical condition of the property and suitability for a particular purpose by use of an "as-is" provision that disclaims representations and sometimes releases the seller from liability for loss due to physical conditions.

6.1.1 The Fraud Exception

Language providing that buyer takes the property "as is" places the risk on buyer as to the existence of latent defects for which neither party has knowledge. However, it does not protect a seller from failure to disclose a latent defect if the seller has knowledge of the defect. See Haney v. Castle Meadows, Inc., 839 F. Supp. 753, 757 (D. Colo. 1993), (where (i) a broad disclaimer of "no representations and warranties" as to the condition of the property and Haney's acceptance of the agreements based on his own inspection of the property, (ii) an "as is" and release of liability clause, and (iii) a recital that the agreements were made among "financially sophisticated and knowledgeable parties" were held to be ineffective to protect a seller, and claims were allowed based on the fraudulent concealment of latent defects of which seller allegedly had knowledge).

To gain some certainty as to the issue of fraud, a trend in some states has been to expressly agree that a claim for fraud is not waived by the "as-is" provision. Seller's risk of liability under such an agreement may be broader than it intends. For example, actual knowledge and intent to deceive do not need to be proven in order to hold a person liable for fraud, because in certain situations, the law may impute a fraudulent intent. See Sodal v. French, 531 P.2d 972 (Colo. App. 1974), aff'd, 547 P.2d 923 (Colo. 1976) (where a broker for seller told the buyer of a home that a well would provide enough water for a family of five without having an honest belief as to the truth of the representation).

In addition, by agreeing that it may be exposed to claims of fraud, seller may obviate its ability to use the defense of the economic loss rule. The economic loss rule has been described as follows: "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." Town of Alma v. Azco Construction, Inc., 10 P.3d 1256, 1264 (Colo. 2000). The economic loss rule may bar a buyer's claims of fraud when a buyer has incurred only economic losses and the agreement expressly provides for the seller's duties of disclosure that are alleged to be the basis of the tort claim. See Former TCHR, LLC v. First Hand Management LLC, 317 P.3d 1226, 1232 (Colo. App. 2012) (where the "as is" clause in the purchase and sale agreement was extremely broad and included disclaimers and releases of warranties along with express reliance solely on buyer's own investigation, plaintiff's fraud-based claim was barred). The Court in Former TCHR found that (i) Former TCHR alleged only economic losses, (ii) although there is a common law duty to refrain from fraudulent misrepresentation and concealment, any such duty existed solely because of the sale agreement, and (iii) the tort duties that Former TCHR invoked were imposed by the sale agreement and did not differ from the contract duties, including the implied covenant of good faith and fair dealing. Id. at 1233.

6.1.2 Environmental Releases

The trend in Colorado is to provide a release of seller for liability relating to any environmental conditions, except to the extent of express warranties and representations. Environmental warranties and representations are customarily made to the "best of seller's knowledge." This model puts a burden on seller to disclose what it knows and a burden on buyer to perform a thorough inspection of all environmental aspects of the property to be certain that there is no condition that seller did not know of or did not disclose.

One commentator has written the following with respect to exculpation from loss due to environmental conditions:

> First, the doctrine of caveat emptor has been eroded in real estate transactions by the enactment of mandatory disclosure laws and the recognition by courts of a duty to disclose known environmental conditions. While caveat emptor generally still may apply in commercial real estate transactions, the usefulness of the clauses is severely limited in states with mandatory disclosure laws. Second, an as is clause may not relieve a seller of direct cleanup liability, such as liability under CERCLA, which holds former owners and operators strictly, jointly and severally liable for cleanup costs regardless of culpability. An

as is clause in a contract will not protect a party against possible tort claims. *Accordingly, to receive the full benefit of an as is clause, it should be used in conjunction with indemnities and releases.* As with indemnity provisions, the party's intent to include environmental conditions should be stated expressly in the provision so there is no question as to which party is accepting the risk. See David Goossen, Contractual Allocation of Environmental Liabilities in Real Estate Transactions, 25 Colo. Law. 79, 81 nn.13-16 (March 1996) (emphasis added).

6.2 Requirements for Seller Disclosures.

6.2.1

The following disclosures are required by statute for residential real property:

(a) The existence of special taxing districts and the risk of levies for general obligation indebtedness. Colo. Rev. Stat. § 38-35.7-101 (2017).

(b) A lead based paint warning if the residence was built before 1978. 42 U.S.C. § 4852d(a)(3).

(c) For real property in a common interest community, disclosure with respect to the obligations of such a community. Colo. Rev. Stat. § 38-35.7-102 (2017).

(d) The existence of a methamphetamine laboratory. Colo. Rev. Stat. § 38-35.7-103 (2017).

(e) The source of potable drinking water. Colo. Rev. Stat. § 38-35.7-104 (2017).

(f) The existence of any proposed or existing transportation project that affects or is expected to affect the real property. Colo. Rev. Stat. § 38-35.7-105 (2017).

(g) The potential for separate ownership of the mineral estate and for use of the property for oil and gas activities. Colo. Rev. Stat. § 38-35.7-108 (2017).

6.2.2

There are no statutory requirements for disclosures in non-residential transactions.

7. GOOD FAITH AND BEST EFFORTS

7.1 The Covenant of Good Faith

The covenant of good faith is an express or implied term in a contract that imposes a duty of good faith upon each party in its performance under the contract. Colo. Rev. Stat. § 4-1-201 (2017) defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." The obligation of good faith attaches to contracts "to effectuate the intentions of the parties or to honor their reasonable expectations." Amoco Oil Company v. Ervin, 908 P.2d 493, 498 (Colo. 1996).

"Under Colorado law, every contract contains an implied duty of good faith and fair dealing." City of Golden v. Parker, 138 P.3d 285, 292 (Colo. 2006). While the implied covenant initially developed in contract law as a principle of contract interpretation requiring a claim for breach of an express covenant that was violated in bad faith, Colorado law now holds that violating the implied covenant can constitute an independent cause of action. Id.; see Cary v. United of Omaha Life Ins., 68 P.3d 462, 466 (Colo. 2003).

However, use of the implied covenant has not gained wide application. Colorado courts have only imposed the implied covenant "when the manner of performance under a specific contract term allows for discretion on the part of either party." Amoco, supra, 908 P.2d at 498.

The implied covenant cannot be used to contradict terms or conditions that a party has bargained for within the agreement, and it cannot be drafted out of an agreement through the use of provisions precluding it. Thus, an agreement with a covenant precluding the use of an implied covenant along with the use of an integration or merger clause did not allow parties to circumvent the implied covenant of good faith and fair dealing by limiting the parties' obligations only to application of the express language of the agreement, because "the reasonable expectations of the parties remain vital considerations in every contract." Amoco, supra, 908 P.2d at 499.

In addition to reliance upon the implied covenant of good faith, the parties may expressly agree that the performance of certain obligations must be made in good faith. The breach of an express covenant of good faith can give rise to a claim for breach of contract.

7.2 Best Efforts

The PSA often requires one of the parties to use a requisite level of effort in performing certain actions. Drafters often use the phrases "best efforts", "reasonable efforts", "commercially reasonable efforts", and other variants believing there is a clear hierarchy in the level of effort they impose. "Best efforts" is thought to be at the top of the scale. It is generally accepted to mean that the party making the covenant will take all steps to perform including sacrificing its own interests. "Commercially reasonable efforts" is generally believed to reduce and to limit both the effort and the obligations of the party making the covenant. However, a review of case law demonstrates no universally accepted definitions or standards for interpreting these provisions, because they must all be defined contextually. In truth, these standards are vague and may be equivalent. Kenneth A. Adams, Understanding "Best Efforts" And Its Variants (Including Drafting Recommendations), 50 Prac. Real Est. Law. 11, 14 (August 2004) (stating that "instead of representing different standards, other efforts standards mean the same thing as best efforts, unless a contract definition provides otherwise.") Because the efforts standards give the covenanting party a large measure of discretion in performing its duties, the drafter should provide some context regarding the standard's meaning (e.g., specifying time periods, expectations of the other party, amount of time or money expended, and limitations such as "without litigation"). *See* Memorandum from Arthur Wright to the Judicial Interpretations Working Group of the M&A Committee regarding Judicial Interpretation of "Best Efforts" Clauses, April 16, 2010 (on file with author).

8. ENTITY, PROPERTY, TRANSFER AND SALES TAXES

8.1 Entity Taxes

There is no franchise tax in Colorado, only a nominal filing fee for the annual period report.

8.2 Real Property Taxes.

8.2.1 Priority

Real property taxes have a super priority that will "prime" any mortgage or deed. "Taxes levied on real and personal property, together with any delinquent interest, advertising costs, and fees prescribed by law with respect to any such taxes as may have become delinquent, shall be a perpetual lien thereon, and such lien shall have priority over all other liens until such taxes, delinquent interest, advertising costs, and fees shall have been paid in full." Colo. Rev. Stat. § 39-1-107 (2) (2017). Therefore, the lien of real estate taxes for the year of closing will always be an exception to coverage in the owner's title policy and to any warranties in the deed. Title protection should be obtained by modifying the applicable exception to read "taxes and assessments not yet due and payable."

8.2.2 Assessments

Colorado law states that roughly 55% of all property taxes must be borne by commercial properties and 45% by residential properties. The commercial assessment ratio is set in law at 29% of actual value. The residential assessment ratio floats to maintain the 55/45 split. There are no roll-back taxes assessed in Colorado. Colorado counties reappraise real estate every other year, employing the "base year" method of valuation, meaning that current year assessments are based upon data from the past. January 1 of each year is the official assessment date. Tax bills issued in January of 2017 are for the 2016 assessment year. Owners may choose to pay in two installments, due February 28 and June 15, or in a single payment due April 30. There is no discount for either method of payment. See **Schedule 2**.

8.2.3 Transfer Taxes

There is no statewide transfer tax. Transfer taxes have been promulgated by municipal entities as set forth on **Schedule 3**. Local ordinances usually require the buyer to pay the tax, but often the obligation to pay is negotiated. Under the Colorado Constitution, any municipal entity that did not impose the tax as of December 31, 1992, cannot impose it thereafter. Colo. Const., art. X, § 20 (8)(a). Nor can a municipal entity raise its transfer tax rate above the rate as of the same date. Id.

8.2.4 Documentary Fees

At closing, the buyer is obligated to pay a documentary fee of $.01 per $100 of the amount paid for the property without regard for the amount of any mortgage. Colo. Rev. Stat. § 39-13-102 and § 39-13-105 (2017). The recorder will mark the documentary fee on the deed, so prices paid for the property will always be public information.

8.3 Sales and Use Taxes

Any exchange involving tangible personal property is taxable. Colorado's sales and use tax statute provides for a sales tax upon the retail sale of tangible personal property unless it qualifies for an express exemption. Colo. Rev. Stat. § 39-26-104 (2017). This includes the sale of tangible personal property as part of the sale of real property. Hotels and restaurants usually have significant tangible personal property for which this tax will be assessed. There are nearly 100 home rule towns and cities in Colorado that each may assess this tax in differing amounts and sometimes with different rules. Local tax ordinances in addition to the state statute must be reviewed for tax rates. Casual or occasional sales are not exempt. The buyer of a business will generally be held liable for any unpaid sales and use taxes owed by the seller regardless of whether the transaction is an asset or stock acquisition. The statute requires buyer to pay the tax, but this is often negotiated in the PSA. Colo. Rev. Stat. §39-26-108 (2017). Unless the buyer holds back a sufficient amount of the purchase money to cover the amount of taxes due and unpaid, seller files its final return within 10 days after the sale, and buyer obtains a tax clearance certificate from the Department of Revenue, buyer can be responsible for unpaid sales and use taxes. Colo. Rev. Stat. § 39-26-117(1) (2017). Clearance certificates are not commonly used, so it is customary for the parties to agree to indemnification provisions for any tax due during their respective periods of ownership. *See* Bruce M. Nelson, James T. Collins & John C. Healy, Sales and Use Tax Answer Book (2008).

9. PROPERTY- AND TRANSACTION-SPECIFIC MATTERS

9.1 Bulk Sale Requirements

Bulk sales notice requirements in Colorado were repealed in 1991. S. 91-127, 58th Gen. Ass., §1 (Co. 1991).

9.2 Subdivision Platting

Transfers of unplatted land comprised of less than 35 acres are prohibited, except as may be allowed by home rule entities. Colo. Rev. Stat. § 30-28-110(4)(e) (2017).

9.3 Rights of First Refusal

Statutory amendments passed in 1991 and 2006 have all but eviscerated any remnants of the Rule Against Perpetuities ("**RAP**") in Colorado. As a result, parties are not required to terminate options or rights of first refusal prior to the expiration of any lives in being. Transfers made prior to May 31, 1991 are subject to the common law RAP, but a statutory reformation period applies, where a court, upon the petition of an interested person, "shall reform the disposition by inserting a savings clause that preserves most closely the transferor's manifested plan of distribution and that brings that plan within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created." Colo. Rev. Stat. § 15-11-1106(2) (2017). Any transfers made after May 31, 1991 are not subject to the RAP. See Colo. Rev. Stat. § 15-11-1107(2) (2017) (superseding and abolishing the RAP for nonvested interests created after May 31, 1991). The current version of Colorado's RAP only applies to interests in trust and powers of appointment. Colo. Rev. Stat. § 15-11-1102.5 (2017).

10. REMEDIES

10.1 Buyer Default.

10.1.1 Liquidated Damages

A liquidated damage provision is the customary exclusive remedy for a default by buyer. There are no statutes controlling the validity or requirements of liquidated damage provisions. It is defined in the common law. The provision is enforceable if: (i) the damages to be anticipated are uncertain in amount or difficult to be proved, (ii) the parties intended to liquidate them in advance, and (iii) the amount stated is a reasonable one, not greatly disproportionate to the presumable loss or injury. Perino v. Jarvis, 312 P.2d 108, 109 (Colo. 1957). "In contrast to a valid provision for liquidated damages, a contract is for a penalty when there is an agreement to pay a stipulated sum in case of default which is intended to coerce performance or punish default rather than provide for the payment of a reasonable sum as anticipated damages. Penalty provisions of this type are not enforceable and are in the nature of a forfeiture which is not favored in the law." 6 Colo. Prac., Civil Trial Practice § 12.12, Westlaw (database updated August 2016).

10.2 Seller Default

Custom varies widely with respect to the seller default provision. The options that are usually considered are as follows:

10.2.1

Buyer will have the right to seek specific performance or general damages (but not consequential, punitive, incidental, or special damages); or

10.2.2

Buyer will have the right to seek specific performance (with the right to record a lis pendens) but not damages, unless seller intentionally conveys to a third party before closing in violation of its obligations under the PSA or fails to satisfy a covenant that cannot be remedied by specific performance; and

10.2.3

Buyer's damages will be limited in all events to a certain amount that is often a percentage of the purchase price (e.g., a damage "cap").

10.3 Specific Performance

Specific performance is an equitable remedy that is generally disfavored in Colorado and is granted in the discretion of the court. CollectACheck, Inc. v. Check Collection & Recovery, Inc., 2009 WL 1279329, at *4 (D. Colo. May 6, 2009); Schreck v. T&C Sanderson Farms, Inc., 37 P.3d 510, 515 (Colo. App. 2001). However, because "[d]ifferent tracts of land are not of equal type and value like bushels of wheat from the same bin," specific performance will be granted even when the plaintiff-buyer "might be fully compensated in damages for any injury resulting from a failure of the [defendant-seller] to convey." Prosser v. Schmidt, 197 P.2d 318, 320 (Colo. 1948); White v. Greenamyre, 234 P. 164, 165 (Colo. 1925). Specific performance may be denied if it can be shown that a property encumbrance makes seller's performance impossible. Prosser, supra, 197 P.2d at 320. However, in other circumstances, a seller "may be required to convey subject to encumbrance with compensating abatement of the purchase price." Id. at 320.

10.4 Damages

The general measure of compensatory damages is the difference between the contract price and the market value of the property at the time of breach. See Bennett v. Price, 692 P.2d 1138, 1140 (Colo. App. 1984) (purchaser's damages for breach by seller of its obligation to convey). For breaches of warranties and representations, the "measure of damages is the difference between the actual value of the property at the time of purchase and its value as of that time had the representations [or warranties] been true." Denver Business Sales Co. v. Lewis, 365 P.2d 895, 897 (Colo. 1961); see Loveland Essential Group, LLC v. Grommon Farms, Inc., 251 P.3d 1109 (Colo. App. 2010) (where the Seller "warranted that it would 'transfer the Property free and clear of all liens and encumbrances other than those agreed to…,'" but sold the property subject to a written lease.)

10.5 Dispute Resolution

10.5.1 Jury Trial Waiver

Parties often agree to a waiver of the right to jury trial, because it is generally believed that arbitration or trial to the court will obtain a speedier result that is determined by a more reliable decision-maker. There is no constitutional right to a jury trial. But "…the courts have held that the right is important enough that it can be lost only as expressly provided in the rules." Stephen A. Hess, Jury Demand and Jury Waiver, 5A Colo. Prac., Handbook On Civil Litigation, §9:2 (2016 ed.); *See* Colo. R. Civ. P. 39(a)(1) (controlling waiver).

10.5.2 Arbitration

The right to arbitrate is voluntary in Colorado and must be agreed to in the PSA. "Voluntary arbitration is governed by the particular agreement to arbitrate the particular dispute, and if no particular rules are agreed upon by the parties, provisions of the Colorado Uniform Arbitration Act will probably apply." 2 Colo. Litig. Forms & Analysis § 47:1, Westlaw (database updated October 2016). If the PSA does not specify which arbitration rules and procedures are to be used, then the Colorado Uniform Arbitration Act governs. Colo. Rev. Stat. § 13-22-203 (2004).

11. MISCELLANEOUS PROVISIONS

11.1 Plural and Singular

Certain drafters use a convention in which a noun is drafted in the singular with an "(s)" following it to indicate that the singular includes the plural. This is an archaic device that will lead to ambiguity in construction if it is not used uniformly throughout the PSA. The author recommends that the PSA include a rule of construction that the plural includes the singular, and the singular includes the plural. The same rule is used for

the interpretation of Colorado statutes. Colo. Rev. Stat. § 2-4-102 (2017).

11.2 Brokers

Brokers have a right to lien the property that is the subject of the PSA pursuant to the requirements of the Commercial Real Estate Brokers Commission Security Act. Colo. Rev. Stat. §§ 38-22.5-101 – 111.

11.3 Assignment

Buyer's rights under the PSA are assignable unless assignment is prohibited by contract, operation of law, or where the contract involves matters of personal trust or confidence, or matters constituting personal services. Matson v. White, 220 P.2d 864, 867 (Colo. 1950); Roberts v. Holland & Hart, 857 P.2d 492, 495 (Colo. App. 1993); Parrish Chiropractic Centers, P.C. v. Progressive Casualty Ins. Co., 874 P.2d 1049, 1052 (Colo. 1994). A party with the right to consent must be reasonable without a freely negotiated provision giving it the absolute right to withhold consent. See Cafeteria Operators L.P. v. AMCAP/Denver Limited Partnership, 972 P.2d 276 (Colo. App. 1998) (where a landlord's right to withhold consent was considered). If the absolute right to withhold consent is agreed upon, seller should retain the right with language that it is not required to be reasonable. One commentator has written in this regard:

> [A] party may specifically bargain for the right to act in its sole and absolute discretion. A common example of such "bargained-for discretion" is the right to withhold consent under an agreement (for example, to a subsequent assignment of the agreement, the sale of underlying collateral pursuant to a security agreement, or the expansion of the uses of an easement), *even if such consent may be unreasonably or arbitrarily withheld.* In such cases, courts routinely uphold a party's right to exercise such bargained-for discretion where the parties have negotiated for such a provision. This is entirely consistent with well-established principles of contractual interpretation and the overriding purpose of effectuating the intentions of the parties to the agreement. E. Lee Reichert, Good Faith and Fair Dealing Developments – Part I, 27 Colo. Law. 115, 118 (June 1998) (emphasis added).

If the PSA states that consent is not to be unreasonably or arbitrarily withheld, the standard imposed will be what a reasonably prudent person would do. See List v. Dahnke, 638 P.2d 824, 825 (Colo. App. 1981).

Generally, assignment to certain affiliates is allowed without required consent. Buyer will need that right to enable it to acquire the property in a newly formed special purpose entity.

Notwithstanding the rights that parties negotiate with respect to consent to assignment, the concept is not as crucial as it often seems. If the seller will not consent to an assignment, buyer can always close into an escrow whereby it immediately delivers a conveyance to a third party. The only problem with such a mechanism is that the warranties and representations of the seller will not have been assigned to the third party, so the buyer as assignor may be required to remake them.

11.4 Time of the Essence

The covenants of the PSA are always made subject to a provision that "time is of the essence." This term should be enforceable, but an express contractual provision stating that time is of the essence is not conclusive where there is nothing in the record to show that time was in fact of the essence. Houy v. Davis Oil Co., 486 P.2d 18, 21 (Colo. 1971) (where the driller commenced performance after expiration of the prescribed period, the owner was deemed to be estopped from asserting breach as a discharge of its obligation to perform due to violation of the time of the essence provision). Regardless of the provisions of a contract, the circumstances surrounding the transaction must show that timely performance was in fact essential. Id. at 21.

11.5 Integration

An integration or merger clause is drafted to limit future contractual disputes between parties to the express obligations set forth in the final executed agreement. Matthew K. Hobbs, Boilerplate Provisions: Traps Exposed for the Drafter, 31 Colo. Law. 105 (July 2002). Thus, if any ancillary documents are to survive the final executed agreement, they should be specifically identified in the PSA.

A boilerplate integration clause will not bar claims of negligent or fraudulent misrepresentation. Keller v. A.O. Smith Harvestore Products, Inc., 819 P.2d 69, 73 (Colo. 1991). Implied covenants of good faith and fair dealing would be effectively meaningless if parties could escape liability for negligent or fraudulent assurances

made in negotiations with an integration clause footing the final contract. Hobbs, supra. See **Section 7.1** above.

11.6 Business Days

Business days are often not defined in the PSA. In that case, the Rules of Civil Procedure for litigation may apply. Colo. R. Civ. P. 6. See **Schedule 4**.

11.7 Attorney's Fees

Attorney's fees are collectible: (i) if there is a provision specifically allowing for collection. See Butler v. Lembeck, 182 P.3d 1185, 1189-90 (Colo. App. 2007) (citing Negro Nest, LLC v. Mid–Northern Mgmt., Inc., 839 N.E.2d 1083, 1085 (Ill. Ct. App. 2005) ("denying attorney fees because the contractual provision did not specifically state that 'attorney fees' are recoverable; it merely provided that management company would be responsible for 'all collection costs' incurred") and (ii) if they are reasonable (as determined by the trial court). Hartman v. Freedman, 591 P.2d 1318, 1322 (Colo. 1979).

11.8 Statute of Frauds

The Statute of Frauds requires a writing for a transfer of an interest in land. The writing must be signed by the party by whom the sale is to be made and must include the identities of "the parties to the transaction, the terms and conditions, a description of the property, and the consideration." Luttgen v. Fischer, 107 P.3d 1152, 1155 (Colo. App. 2005); Colo. Rev. Stat. § 38-10-108 (2017). Further, a PSA "cannot be validly changed or modified as to a material condition…by a subsequent oral agreement, without more, so as to make the original [PSA], as orally modified, an enforceable obligation. Burnford v. Blanning, 540 P.2d 337, 340 (Colo. 1975).

SCHEDULE 1
FORM DR 1083

In general. With certain exceptions, all sales of Colorado real property in excess of $100,000 made by nonresidents of Colorado on or after January 1, 1993, will be subject to withholding tax in anticipation of the Colorado income tax that will be due on the gain from the sale.

A transferor who is an individual, estate, or trust will be subject to the withholding tax if either the federal Form 1099-S to be filed with the Internal Revenue Service to report the transaction or the authorization for the disbursements of the funds resulting from the transaction shows a non-Colorado address for the transferor.

A corporate transferor will be subject to the withholding tax if immediately after the transfer of the title to the Colorado real property interest, it has no permanent place of business in Colorado. A corporation will be deemed to have a permanent place of business in Colorado if it is a Colorado domestic corporation, if it is qualified by law to transact business in Colorado, or if it maintains and staffs a permanent office in Colorado.

Amount of Withholding. The withholding shall be made by the title insurance company or its authorized agent or any attorney, bank, savings and loan association, savings bank, corporation, partnership, association, joint stock company, trust, unincorporated organization or any combination thereof acting separately or in concert that provides closing and settlement services. The amount to be withheld shall be the lesser of two percent of the selling price of the property interest or the net proceeds that would otherwise be due to the transferor as shown on the settlement statement.

"Closing and settlement services" are services for the benefit of all necessary parties in connection with the sale, leasing, encumbering, mortgaging, creating a secured interest in and to the real property, and the receipt and disbursement of money in connection with any sale, lease, encumbrance, mortgage, or deed of trust, [10-11-102(3.5), C.R.S..]

Exceptions to Withholding. Withholding shall not be made when:

1. the selling price of the property is not more than $100,000; the transferor is a corporation incorporated under Colorado law or currently registered with the Secretary of State's Office as authorized to transact business in Colorado;

2. the transferor is an individual, estate, or trust and both the Form 1099-S and the authorization for

disbursement of funds show a Colorado address for the transferor;

3 the transferee is a bank or corporate beneficiary under a mortgage or beneficiary under deed of trust and the Colorado real property is acquired in judicial or nonjudicial foreclosure or by deed in lieu of foreclosure; or

4 the transferor is a corporation incorporated under Colorado law or currently registered with the Secretary of State's Office as authorized to transact business in Colorado;

5. the transferor is a partnership as defined in section 761(a) of the Internal Revenue Code required to file an annual federal return of income under section 6031(a) of the Internal Revenue Code; or

6. the title insurance company or the person providing the closing and settlement services, in good faith, relies upon a written affirmation executed by the transferor, certifying under the penalty of perjury one of the following:

   (a) that the transferor, in an individual, estate, or trust is a resident of Colorado;

   (b) that the transferor, if a corporation, has a permanent place of business in Colorado;

   (c) that the Colorado real property being conveyed is the principal residence of the transferor which could qualify for the rollover of gain provisions of section 1034 of the internal revenue code; or

   (d) that the transferor will not owe Colorado income tax reasonably estimated to be due from the inclusion of the actual gain required to be recognized on the transaction in the gross income of the transferor.

Normally Colorado tax will be due on any transaction upon which gain will be recognized for federal income tax purposes. Gain will normally be recognized for federal income tax purposes any time the selling price of the property exceeds the total of the taxpayer's adjusted basis in the property plus the expenses incurred in the sale of the property. The taxpayer's adjusted basis of the property will normally be the taxpayer's total investment in the property minus any depreciation thereon he has previously claimed for federal income tax purposes.

Partnership as Transferor. Effective for tax years beginning on or after January 1, 1996, sales of real property interests by organizations recognized as partnership for federal income tax purposes and required to file annual federal partnership returns of income will not be subject to the Colorado withholding tax.

This exception will not apply to joint ownerships of property which are not recognized as partnerships for federal income tax purposes. The sale of property jointly owned by a husband and wife, for example, is a sale by two individuals, not a sale by a partnership, and not exempt from withholding tax.

Completion of Form DR 1083. Form DR 1083 must be completed and submitted to the Department of Revenue with respect to sales of Colorado real property occurring on or after January 1, 1993, if Colorado tax was withheld from the net proceeds from the sale, or if Colorado tax would have been withheld but for the signing of an affirmation by the transferor.

SCHEDULE 2
2017 COLORADO NARRATIVE

2017 will be a reappraisal year for Colorado property owners. Assessor's offices across the state will mail Notices of Valuation on or before May 1, 2017, for 2017 and 2018 values. 2017 and 2018 values are meant to reflect the fair market value of taxable real property as of June 30, 2016. Cost, market, and income data were gathered from the period beginning January 1, 2015, through June 30, 2016, for commercial properties. Market data was gathered from the same period for all residential and multi-family housing. Colorado law recognizes only the market approach to value and the gross income multiplier for properties with residential classification, (including apartments).

Real estate taxes are paid in arrears in Colorado. Tax bills issued in January of 2017 are for the 2016 assessment year. Owners may choose to pay in two installments, due February 28 and June 15, or in a single payment due April 30. There is no discount for either method of payment.

Colorado counties reappraise real estate every other year, employing the 'base year' method of valuation, meaning that current year assessments are based upon data from the past. January 1 of each year is the official assessment date. Subsequent to 2017, the next reappraisal is set for May 2019. At that time cost, market, and income data from January 1 of 2017 to June 30, 2018 will be used to calculate assessments for commercial properties. Market data, (comparative sales), and rental information will be gathered from that same period of time to calculate single family, apartment, and nursing home assessments. Cost, market, and income data from beyond the close of the gathering period is technically not allowable for consideration by assessor's offices. In reality, such information does influence assessments, particularly in the case of newly constructed or recently sold properties.

Personal property used for business purposes, (furniture, fixtures, and equipment), is taxable in Colorado. Valuations are based on acquisition cost new, less depreciation. Declarations, (rendition forms), are mailed annually, and must be returned no later than April 15.

Real estate values issued in 2017 will remain in place until 2019, unless changed by appeal action, or a material change at the property in question; (new construction or demolition).

There are two methods of real estate tax appeal in Colorado. Owners may avail themselves of one or the other, but not both. The primary and most common method is to file an immediate appeal in response to a notice of valuation. Appeals filed in this manner must be received in the local assessor's office by June 1 of each year. The assessor's office has until June 30 to respond. The appeal may be carried on to the county board of equalization, with a filing deadline of July 15. If the petitioner remains dissatisfied, the appeal may go forward to either the Colorado Board of Assessment Appeals, the District Court, or submitted for binding arbitration, provided the filing is completed within 30 days of the date of the county board decision.

The second method of appeal is known as 'abatement'. This is when an owner chooses not to file an immediate appeal, but rather, opts to wait for the tax bill to be issued for the assessment in question. In this circumstance, the abatement petition can be filed for a period of up to two years following the issuance of the tax bill. For tax bills sent in January 2017, the final day abatements could be filed would be December 31, 2018. The abatement petition has certain advantages and disadvantages that must be considered. The advantages are that the petition can be filed for an extended period of time, and owners have the opportunity to see how increased assessments will actually impact their properties prior to filing appeals. A disadvantage is that the owner is responsible for paying the tax bill while the abatement is being dealt with, or accrue substantial penalty interest and the possibility of tax sale.

A property owner may file an appeal for each assessment year, irrespective of whether or not a reappraisal has been completed. A property owner may file an appeal for the current year notwithstanding the outcome of any prior appeal. Each assessment year is regarded as being separate and distinct. An appeal filed for the current year would not necessarily be prejudiced by the denial of a prior appeal.

Colorado property taxes are calculated as follows: Assigned actual value by county assessor's office, multiplied by the assessment ratio as prescribed by law, multiplied by the local mill levy as set by the various taxing districts, equals taxes. (Value x ratio x mill levy = taxes).

Colorado law states that roughly 55% of all property taxes must be borne by commercial properties and 45% by residential properties. The commercial assessment ratio is set in law at 29% of assigned actual value. The residential assessment ratio floats to maintain the 55/45 split. For 2015 and 2016 the residential assessment ratio was set at 7.96% of actual value.

A million dollars worth of commercial property had a 2015/2016 assessed value of $290,000. A million dollars worth of residential property had a 2015/2016 assessed value of $79,600.

2017/2018 valuations for assessment will reflect the sustained economic upswing experienced in the Colorado real estate market for the last 4-6 years, with 2016 representing a new high water mark. Certain value increases

may exceed 25%, particularly in the multi-family category. Other property classes which should expect substantial increases are Class A offices, industrial warehouses, and lodging properties. Values for retail, Class B and C offices, vacant land, and single family residential improved, as well. Property owners who receive a Notice of Valuation in May of 2017 and believe that their assigned 2017/2018 value exceeds fair market value as of 6-30-2016 should consider filing an appeal.

SCHEDULE 3

State of Colorado - Local Real Estate Transfer Tax Table

REAL ESTATE TRANSFER TAX

COUNTY	CITY, TELEPHONE, AND WEBSITE	ORDINANCE	PAYEE AND ADDRESS	TAX RATE	FORMS (*=Forms available online)
Eagle	**Avon** (970) 748-4019 www.avon.org	Ch. 3.12 Updated 3/24/2015 - Ordinance No. 15-02	Town of Avon PO Box 975 Avon, CO 81620	2% For Primary Residences - the first $160,000 of the purchase price is exempted from the 2% transfer tax, therefore the maximum exemption is $3,200	RETT Application for Exemption* RETT Tax Exemption Promissory Note and Affidavit for Primary Residence Exemption ($26 processing fee)*
Eagle	**Gypsum** 970-524-7514 www.townofgypsum.com	Ch. 3.12	Town of Gypsum PO Box 130, Gypsum, CO 81637	1%	Exemption Certificate ($5 processing fee)*
Eagle	**Minturn** (970) 827-5645 www.minturn.org	Ch. 4 Art. 4	Town of Minturn PO Box 309 Minturn CO 81645	1%	Applications for and Certificate of Exemptions
Pitkin	**Vail** 970-479-2119 www.vailgov.com	Section 2-6-2	Town of Vail Town Attorney Town of Vail 75 S Frontage Rd. W, Vail, CO 81657	1%	Exemption Application*
Grand	**Winter Park** 970-726-8081 www.wpgov.com	Ch. 10	Town of Winter Park PO Box 3327 Winter Park, CO 80482	1%	Application for Exemption

COUNTY	CITY, TELEPHONE, AND WEBSITE	ORDINANCE	PAYEE AND ADDRESS	TAX RATE	FORMS (*=Forms available online)
Gunnison	**Crested Butte** 970-349-5338 www.crestedbutte-co.gov	Art. 4-3	Town of Crested Butte PO Box 39 Crested Butte, CO 81224	3%	Application for Exemption Transfer Tax*
Pitkin	**Aspen** 970-920-5029 www.aspenpitkin.com	Ch. 23.48	City of Aspen Finance Dept. 130 S. Galena St. Aspen, CO 81611	2 separate RETTs totaling 1.5%. 0.5% for Wheeler Opera House, Plus 1% Housing Real Estate Transfer Tax above 100,000	Transmittal* Application for Exemption*
Pitkin	**Snowmass Village** 970-923-3796 http://co-snowmassvillage.civicplus.com/index.aspx?nid=299	Art. V Sec. 4-91	Town of Snowmass Village Town Manager PO Box 5010, 130 Kearns Road Snowmass Village, CO 81615	1%	Application for Exemption ($25 processing fee)* Certificate of Tax Paid*
San Miguel	**Telluride** 970-728-3071 www.telluride-co.gov	Ch. 3.12	Town of Telluride PO Box 397 113 W. Columbia Telluride, CO 81435	3%	Application for Exemption* Receipt for Transfer Tax*
San Miguel	**Ophir** 970-728-4943 www.colorado.gov/ophir	79-3	Town of Ophir PO Box 683 Ophir, CO 81426	4%	
Summit	**Frisco** 970-668-5276 www.townoffrisco.com	160-10 et seq.	Town of Frisco PO Box 4100 Frisco, CO 80443	1%	Application for Exemption

COUNTY	CITY, TELEPHONE, AND WEBSITE	ORDINANCE	PAYEE AND ADDRESS	TAX RATE	FORMS (*=Forms available online)
Summit	**Breckenridge** 970-453-2251 www.townofbreckenridge.com	Title 2 Ch.16	Town of Breckenridge Town of Breckenridge Attn: RETT Processing 150 Ski Hill Road, 3rd Floor, PO Box 8629, Breckenridge, CO 80424	1%	Application for Exemption* Verification of Gross Consideration*
Arapahoe	**City of Glendale** 303-759-1513 www.Glendale.co.us	Real Estate Transfer Tax was repealed by section 2014-5 – Repeals Ch. 3.24, real property		N/A	

SCHEDULE 4

C.R.C.P. RULE 6
RULE 6. TIME

(a) COMPUTATION

(1) In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. Thereafter, every day shall be counted, including holidays, Saturdays or Sundays. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(2) As used in this Rule, "Legal holiday" includes the first day of January, observed as New Year's Day; the third Monday in January, observed as Martin Luther King Day; the third Monday in February, observed as Washington-Lincoln Day; the last Monday in May, observed as Memorial Day; the fourth day of July, observed as Independence Day; the first Monday in September, observed as Labor Day; the second Monday in October, observed as Columbus Day; the 11th day of November, observed as Veteran's Day; the fourth Thursday in November, observed as Thanksgiving Day; the twenty-fifth day of December, observed as Christmas Day, and any other day except Saturday or Sunday when the court is closed.

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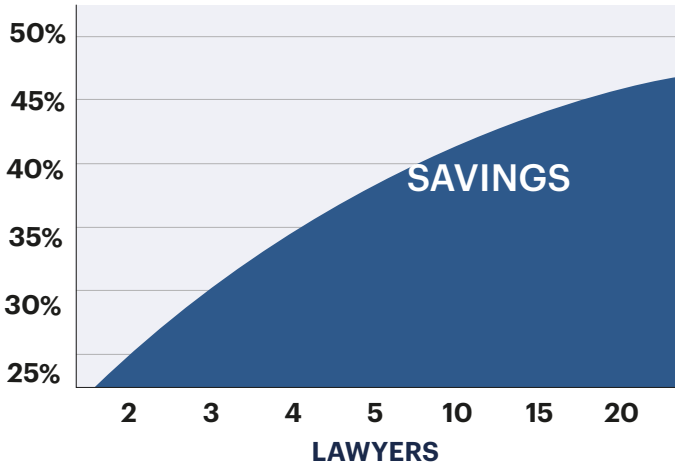

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