

Law & Accounting

What are the statutory exceptions in a real estate deed?

You recently may have noticed the phrase “subject to the statutory exceptions” in a commercial real estate deed. Do you know what it means?

■ **What are the statutory exceptions?** In 2019, the Colorado Legislature enacted a bill under which the buyer may accept title in a warranty deed “subject to statutory exceptions,” C.R.S. 38-30-113(5)(a). The statute defines the “statutory exceptions” to mean: real estate taxes for the calendar year in which the conveyance occurred and subsequent years that are not yet due and payable; matters that would have been disclosed by an improvement survey plat or ascertained by an inspection if such matters were not created by, or known to, the grantor; and all matters recorded in the real estate records of the county clerk and recorder for the county in which the conveyed property is located. This article is a general discussion of issues regarding the statutory exceptions. You should consult with a lawyer to address specific circumstances that may be applicable to your situation.

■ **Statutory exceptions may be used by default.** Section 13 of the commercial real estate



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purchase contract form approved by the Colorado Real Estate Commission states that if title will be conveyed via general or special warranty deed then it will be subject to the statutory exceptions unless the parties agree otherwise. That means the default under the form is using the statutory exceptions in the conveyance deed. Furthermore, C.R.S. § 38-30-116.5 (preparation of deeds) says that if a title company prepares a warranty deed then the title company must use the statutory exceptions unless the title company is instructed otherwise in writing. Accordingly, we can expect to see the statutory exceptions in many commercial real estate deeds for years to come.

■ **The first and second exceptions.** The first statutory exception is similar to what you would see in a title commitment with respect to real estate taxes.

The second statutory exception

is similar to a title commitment, however it may be vague. For example, what does “ascertained by an inspection” mean? Does it mean an inspection by a professional surveyor, an engineer, a layperson or someone else? Also note that the second exception excludes matters that would be disclosed on an improvement survey plat. If the buyer gets a less expensive improvement location certificate, which did not disclose a problem that would have been disclosed on an improvement survey plat, then the problem may be excluded from the seller’s warranty of title and the buyer may be left without recourse against the seller.

Note that the second statutory exception does not include matters that were created or otherwise known by the seller. In 2021, a trial court in Larimer County held that a buyer had a plausible claim for breach of warranty of title under the second statutory exception because, even though the seller alleged that an inspection could have ascertained the existence of an unrecorded lease, the buyer alleged that the seller had actual knowledge about the unrecorded lease and did not disclose it to the buyer.

■ **The third exception.** The

third statutory exception is broad because it includes anything recorded in the clerk and recorder’s office in the county where the property is located. The buyer has some protection with respect to unrecorded documents so long as they were not ascertainable via an inspection or improvement survey plat. However, this will not help the buyer if the buyer and/or the title company fail to discover a document recorded in the county where the property is located.

In the Larimer County trial court case referred to above, the court held that the buyer’s breach of warranty claim regarding an unrecorded lease, which was referred to in a recorded document but not itself recorded, was not barred by the third statutory exception because under the traditional race-notice statute, the buyer was not charged with knowledge of the unrecorded lease because the buyer was not a party to it. It will be interesting to see how the courts apply the race-notice statute, as well as other Colorado real estate statutes, to the statutory exceptions in any future litigation.

■ **Let the buyer and seller beware.** Before using the statutory exceptions in a warranty

deed, think carefully about your needs in the transaction. A buyer generally wants exceptions to the warranty of title to be as narrow as possible. That way, if a title problem comes up after closing, there is a better chance it will be covered by the warranty as opposed to being excluded by the exceptions. So, a buyer may not want to use the statutory exceptions and instead use a specific list of exceptions to the deed that may be based upon the exceptions in the title commitment.

On the other hand, a seller generally wants exceptions to the warranty of title to be as broad as possible. That way there is a better chance a title problem will be excluded from the warranty of title by the exceptions. So the seller may want the statutory exceptions to apply. However, in certain situations, the seller may want to include specific exceptions in the deed so that they are excluded from the warranty of title.

In sum, the statutory exceptions are not one size fits all and you should consider the circumstances specific to your transaction. ▲

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