

## Are You Really Selling Your Home “As Is”?

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Many home sellers want to sell their home “as is.” Sometimes the seller does not want to have to negotiate with a potential buyer about repairs, but another common reason for selling “as is” is the seller’s desire to avoid 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 form (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 the seller from claims based on alleged property defects. That’s wrong. Let me explain why.

### “Except as Otherwise Provided...”

The key clause is, “Except as otherwise provided in this Contract...” It’s difficult for non-lawyers to understand to the Contract. The Contract consists of twenty pages, contains 14,814 words, and has a 17% passive voice rate. The Contract 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).

The “Except as otherwise provided in this Contract...” clause may expose a seller to significant potential liability despite the “As Is” language. There are three main Contract provisions that may allow a buyer to overcome the Contract’s “As Is” language.

### 1. Seller’s Duty to Complete the Seller’s Property Disclosure Form

Paragraph 10.1 of the 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 Colorado Real Commission includes this language in the Contract, no statute requires a seller to complete the Seller’s Property Disclosure (SPD) form.<sup>1</sup> No statute prevents the parties from removing this language.<sup>2</sup> However, even if the parties remove this language, a buyer may

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<sup>1</sup> There are statutes that require a seller to disclose specific items. For instance, Section 38-35.7-103, C.R.S. requires a seller make a methamphetamine disclosure.

<sup>2</sup> The Colorado Real Estate Commission’s Real Estate Manual instructs licensed agents and brokers, “Any 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.”

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.<sup>3</sup> 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 form and be thorough in completing it. No buyer has ever successfully sued a seller for disclosing more than the contract required.

When a buyer files a suit alleging the seller breached the contract by failing to make the required disclosures under paragraph 10.1, the factfinder (judge or jury) 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.

## **2. Seller's Duty to Disclose Material Adverse Facts**

Paragraph 10.2 of the 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 Contract does not define "adverse material facts." That may be a problem. Suppose a seller completed a bathroom remodel without obtaining the required permit fifteen years prior to the transaction. The seller may believe that is an improvement rather than an "adverse material fact," but the factfinder 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.

## **3. Due Diligence Requirements**

Paragraph 10.6 of the 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 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 a material adverse 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 Contract required.

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<sup>3</sup> *Gandrey v. Robarge*, Boulder County Dist. Ct. Case No. 23 CV 30671.

## 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.” *Town of Alma v. AZCO Constr., Inc.*, 10 P.3d 1256, 1264 (Colo. 2000).

However, the Colorado Court of Appeals has held that the Colorado Real Estate Commission Contract does not preclude a buyer from asserting tort claims. See, *In re Estate of Gattis*, 318 P.3d 549 (Colo. App. 2013). This increases a seller’s potential liability because a plaintiff bringing intentional tort claims may ask the court for leave to seek exemplary damages if the buyer presents evidence showing that the seller’s conduct was attended by circumstances of fraud, malice, or willful and wanton conduct. See, Section 13-21-102, C.R.S. 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. See, e.g., 11 U.S.C. § 523.

The *Gattis* court 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, or (4) represents that the buyer is relying only on the buyer’s own independent investigation. See, *Former TCHR, LLC v. First Hand Mgmt. LLC*, 317 P.3d 1226 (Colo. App. 2012); *Hamon Contractors, Inc. v. Carter*, 229 P.3d 282, 292–93 (Colo. App. 2009). 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 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 non-invasive, 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.<sup>4</sup> Buyers tend to mistakenly believe that the Seller’s Property Disclosures 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.

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<sup>4</sup> See, e.g., InterNACHI’s Residential Standards of Practice at <https://www.nachi.org/SOP.htm>. ASHI’s SOP’s contain similar limitations and exclusions.

## Modifications to the Contract to Reduce the Seller's Potential Liability

With all of this as background, I offer some possible modifications to the Contract intended to protect a seller selling a home "as is." While each transaction is unique, here are some modifications sellers should consider. (I understand 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 from the Contract. 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 of the Contract and strike any inapplicable provisions. Under paragraph 10.6.1.6 (Other Documents), write, "**NONE.**" The parties may also delete paragraph 6.1 and instead include language in paragraph 30 stating, "The parties have intentionally deleted paragraph 6.1 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 of the Contract (if you keep paragraph 10.1):

a. Except as provided in paragraph 10.1 of this agreement, 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 the Seller, other than as expressly contained in this agreement 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 agreement, and Buyer expressly holds Seller harmless in relation to such matters. If Buyer brings an action against Seller notwithstanding the provisions in this agreement, Buyer's remedies shall be limited to a suit for rescission or breach of contract; in no event may Buyer bring a tort claim.

If the parties include paragraph 10.1 in the Contract, add, "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).

b. The 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. The Buyer agrees to read any home inspection contract carefully, and any standards of practice referenced in any such contract, so that the Buyer fully understands the limited scope of the home inspection.

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

### **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 is misleading because the language preceding that includes "Except as otherwise provided in this Contract..."

The parties are free to modify the Contract to limit the Seller's duties and the buyer's remedies. However, the law will rarely protect a Seller who commits fraud.

### **Disclaimer**

*I do not intend this article to be legal advice and my posting this article does not create any attorney-client relationship. I intend it only as my summary of applicable Colorado law and my thoughts on certain issues. Any person or entity selling or buying real estate should consult qualified counsel before entering any such transaction.*

### **About the Author**

Mark Cohen has 41 years of experience as a lawyer. He earned a B.A. in Economics at Whitman College and earned his law degree at the University of Colorado in Boulder. He earned an LL.M. Agricultural and Food Law from the University of Arkansas, where he also taught advanced legal writing. His diverse legal career includes service as an Air Force JAG, a Special Assistant U.S. Attorney, a prosecutor, a municipal judge for Boulder, six years on the Advisory Board of The Colorado Lawyer (including one as chairperson), and service on the Executive Board of the Colorado Municipal League. In 2022, Gov. Polis appointed Mark to serve on the Colorado Combative Sports Commission, formerly the Colorado Boxing Commission, and Mark served on that Commission until February of 2025.

Mark wrote six articles in the Am.Jur. *Proof of Facts* series, including the seminal article on piercing the corporate veil. He has written numerous articles and book reviews for The Colorado Lawyer. In 2004, he won 2nd prize in the SEAK National Legal Fiction Writing Competition. He wrote two mysteries published by Time Warner, and his first mystery, *The Fractal Murders*, became a Book Sense ® mystery pick and was a finalist for the Colorado Book of the Year. His non-legal articles have appeared in magazines such as *Inside Kung Fu*, *Camping & RV*, and *Modern Dad*. He is a member of the Institute of General Semantics and the Mystery Writers of America. He writes a regular column for the Nederland Mountain-Ear.

Mark's practice focuses on real estate transactions and litigation, and on drafting and reviewing legal documents including contracts, corporate documents, real estate documents, employment documents, intellectual property documents, motions, pleadings, and briefs. He also litigates cases arising out of poorly drafted documents. He enjoys helping businesses and other lawyers improve their legal and non-legal documents by translating them from Legalese into plain English. Learn more at [Plain English Consulting](#).

Mark holds a black belt in karate and serves on the board of directors of [Dart, Inc.](#), a Boulder non-profit that offers training in personal safety, violence prevention, and appropriate dating relationships.