

COLORADO REAL ESTATE COMMISSION

1900 Grant Street, Suite 600
Denver, CO 80203

**LTAC’S PETITION FOR RECONSIDERATION, FOR DECLARATORY ORDERS UNDER
RULE I AND REQUEST FOR STAY**

Land Title Association of Colorado (“LTAC”), by and through its attorneys, Karsh, Fulton, Gabler & Joseph, P.C., submits the following Petition and Request for Stay to the Colorado Real Estate Commission (“Commission”).

INTRODUCTION

1. Pursuant to C.R.S., § 12-61-803(4), real estate brokers are authorized to use standard real estate forms promulgated by the Commission.
2. Pursuant to Commission Rule F, brokers must use the Commission’s standard forms. Other forms must be prepared by the parties or their attorneys.
3. The Commission’s standard form contracts are used by both brokers and non-brokers in the overwhelming majority of real estate transactions in Colorado, especially residential transactions.
4. LTAC is an association of title insurance companies and agents (collectively “title entities”) in this state. It has an address of 527 Oriole Drive, Grand Junction, CO 81502. LTAC is not licensed pursuant to C.R.S. § 12-61-101, *et seq.*
5. Title entities are in the business of issuing contracts for insurance, including title commitments and title policies.
6. Title entities may also perform closing and settlement services for real estate transactions.
7. Title entities are not parties to the Commission’s standard form contracts.
8. As a “Closing Company,” title entities may be parties to the Commission’s standard form Instructions for Earnest Money and Closing (the “Closing Instructions”).
9. Although not legally required to do so, any title entity wanting to participate in the business of issuing title insurance for, and closing, real estate transactions in this state must agree to close transactions using standard form contracts and other Commission approved forms.

10. The Commission does not include any representative of the title insurance industry.
11. The Commission has no jurisdiction over title entities, who are regulated by the Division of Insurance.
12. The Commission has recently revised its standard form Residential (CBS 1-5-04), Commercial (CBS 2-5-04) and Vacant Land-Farm-Ranch (CBS 3-5-04) contracts (the “Contracts”) in rule making proceedings. The Contracts contain revisions to Provisions 12.a and 7.a.
13. The Commission has also recently revised its standard form Closing Instructions (CL8-5-04).
14. As more fully addressed below, LTAC and its members are adversely affected and aggrieved by the Commission’s actions.
15. As more fully addressed below, the Commission’s actions are improper and should be reconsidered.

PROVISION 12.a

1. Revised Provision 12.a provides that title shall be conveyed subject to:

Those specific Exceptions which shall be listed and described by the individual recordation information (book and page or reception number) of the recorded documents as reflected in the Title Documents accepted by Buyer in accordance with § 8a [Title Review]. . . .

To the best of LTAC’s knowledge, Colorado is now the only state that has a standard form contract mandating the attachment of specific warranty exceptions.

2. **Revised Provision 12.a should be reconsidered because it entails a misuse of title commitments.**

- a. A title commitment is an insurance contract, stating what a title company is willing to insure and under what circumstances. Arapahoe Land Title, Inc. v. Contract Financing, Inc., 472 P.2d 754, 756-57 (Colo. App. 1970). The exceptions in Schedule B-2 are generated for the benefit of the insurance underwriter: They specify what will not be insured. The commitment is not an abstract, guaranty, or representation as to the state of title. The Commission has recognized the difference. 2003 Real Estate Manual (the “Manual”) at 9-1 to 9-3.

b. A title commitment and title policy are “not analogous to a warranty of title found in the deed.” Federal Savings & Loan v. Transamerica Title, 19 F.3d 528, 530 (10th Cir. 1994). However, that is exactly the use of a title commitment compelled as “standard” by revised Provision 12.a.

c. Provision 12.a inserts title entities in the middle of an issue that should be between buyers and sellers: To what extent does the seller agree to warrant title to his/her own property.

d. Compelling the use of title commitment exceptions to measure a seller’s deed warranty liability is likely to mislead buyers and sellers into believing they can rely on the commitment as a representation and warranty of title. Buyers can rely on a title commitment as their insurance contract. Sellers are not a party to the commitment, however, and have no right to rely on it. See, Jimerson v. First American Title Ins. Co., 989 P.2d 258 (Colo.App. 1999). To the contrary, a seller may be sued for breach of warranty by a title company when it pays and becomes subrogated to a buyer’s claim under the insurance policy.

3. Provision 12.a adversely affects title entities by misappropriating their work product.

a. Colorado law recognizes that there is a proprietary interest in a business product that is developed by the expenditure of labor, skill and money, which competitors should not be allowed to misappropriate. American Telephone & Communications Corp. v. Manning, 651 P.2d 440 (Colo.App. 1982); Heller v. Lexton-Ancira Real Estate Fund, Ltd., 809 P.2d 1016 (Colo.App. 1990), rev’d on other grounds, 826 P.2d 819 (Colo. 1992).

b. Title entities expend labor, skill and money in assembling title plants and evaluating the information needed to develop the schedule B-2 exceptions for their title commitments. Revised Provision 12.a would compel public dissemination of this title entity work product when the deed and exceptions are recorded.

c. Provision 12.a will negatively impact the state’s business climate by putting local and existing title insurance businesses, both small and large, at an unfair disadvantage relative to competing out-of-state and new businesses. See C.R.S., §24-4-101.5. For subsequent transactions involving the same property, or property within the same subdivision, competitors would have an unfair advantage by being able to generate title commitments using, for free, the work product that another title company has been compelled to disclose pursuant to Provision 12.a.

d. The guiding principle of the Department of Regulatory Agencies, Office of Economic Competitiveness and Regulatory Reform, is in making sure that Colorado’s government abides by the principle: “**First, do no harm!**” Revised 12.a harms title entities and without a compelling reason for doing so.

4. **The Commission's action is arbitrary, capricious and an unwarranted exercise of its discretion.** Id. § 24-4-106(7). The revision to Provision 12.a is harmful to title entities without having any substantial practical benefit for buyers or the public in general.

a. Giving buyers greater warranty rights against sellers was the ostensible purpose for revised 12.a.

b. Almost without exception, buyers with title claims pursue such claims under their title insurance policies, and not with breach of warranty lawsuits against sellers. Losses under title policies are measured as of the date the title defect is discovered. Happy Canyon Inv. Co. v. Title Ins. Co. of Minn., 560 P.2d 839, 843 (Colo.App. 1976). In contrast, the measure of damages for a breach of warranty claim is limited to the value of the land at the time of the conveyance. Taylor v. Wallace, 37 P. 963 (Colo. 1894).

c. LTAC had favored a change to Provision 12.a with language that has been used as a matter of standard practice for decades without harm to either the public or title entities. That language was initially approved by the forms committee. The Commission not only subsequently rejected the tentatively approved change, but it revised Provision 12.a with language even more harmful to title entities. There was no evidence of actual harm or "warranty problems" suffered by buyers that would justify revised Provision 12.a with its adverse effects on title entities.

d. **Revised Provision 12.a also does not benefit the public interest.** See, C.R.S. § 24-4-101.5.

- i. The public believes that standard forms promulgated by the Commission will be neutral as to the parties. Revised Provision 12.a is not neutral. It favors buyers at the expense of sellers, who are 50% of the public participating in real estate sales. While revised Provision 8.g advises buyers to consult with legal counsel regarding title matters, there is no similar advisory to sellers.
- ii. Provision 12.a reduces consumer choice as to the appropriate warranty language to be used. See, C.R.S. § 24-4-101.5.
- iii. Provision 12.a will increase producer and consumer costs. See id. It will generate more work and risk for title entities, who may be compelled to charge more for commitments and closing services.

- iv. In addition, LTAC estimates that revised 12.a could result in the recording of over 200,000 additional pages of warranty exceptions a year; an increased yearly cost to the public of over \$1,000,000.00.

5. The Commission does not have authority to compel the disclosure of title entity work product.

a. The Commission has no jurisdiction over title entities, and no jurisdiction to dictate that title entities publicly disclose their title commitment exceptions.

b. Title entities are not parties to the Contracts. Compelling public disclosure of the Schedule B-2 exceptions in their title commitments is contrary to the state's policies favoring freedom of contract and free enterprise. C.R.S., §21-4-101.5.

6. The Commission has exceeded its jurisdiction, authority and purposes. See, C.R.S. § 24-4-106(7).

a. The Commission has been authorized to develop standard forms that real estate brokers can use and advise their customers regarding their use. C.R.S., § 12-61-803(4).

b. The Commission does not have jurisdiction or authority to promulgate contracts that favor buyers over sellers. Recognizing that buyers and sellers may have conflicting interests, the Commission has not promulgated a standard deed form; instead it advises brokers to use their best judgment. Manual at 5-3. Although there is a similar conflict with regard to warranty exceptions, the Commission has imposed an inflexible Provision 12.a, which is not appropriate for a standard form contract as authorized by statute.

c. Because it is not a simple, fill-in-the-blanks, standard provision, revised 12.a can generate two significant negative consequences for real estate brokers:

- i. By using Contracts with revised 12.a, brokers will be imposing on sellers what their warranty liability will be. Neither the brokers nor the Commission have that legal authority, and LTAC assumes brokers do not want to assume that legal responsibility.
- ii. Brokers will be determining warranty liability of sellers without full disclosure and without sellers knowing until they are sued for breach of warranty. The Commission has recognized that title exceptions are sometimes deleted by title entities when specifically requested by

buyers or their brokers. Manual at 9-2. Under revised 12.a, for every such deletion, the sellers' warranty liability is automatically expanded without their knowledge. The problem is compounded by the fact that while provision 8.g of the Contracts provides a title advisory for buyers to consult legal counsel, there is no similar advisory for sellers.

7. Provision 12.a should be reconsidered because LTAC, and others, have never had an opportunity to respond to the current language.

a. It is not proper to introduce evidence or information into a rulemaking record from outside of hearings and without notice and an opportunity to respond. C.R.S. § 24-4-103(8.1)(c).

b. While a number of versions of 12.a were discussed at rulemaking hearings held on February 5 and February 19, 2004, the language eventually adopted by the Commission was not. The Commission's March 3, 2004 minutes directed the forms committee to not amend Provision §12(a), but to leave it as written in CBS-1-99. The current language is a post-hearing development, on which LTAC has not previously been given an opportunity to respond.

8. Provision 12.a should be reconsidered because it fosters the unauthorized practice of law.

a. The Commission itself is not authorized to practice law, but it has been given authority to promulgate standard forms so that brokers can practice law within the limitations set by the Supreme Court in Conway-Bogue Realty Investment Co. v. Denver Bar Ass'n, 312 P.2d 998 (1957). See Manual at 5-3, 25-1.

b. Conway-Bogue allowed brokers to practice law for the benefit of their customers to the extent of filling in blanks and advising the parties regarding simple standard real estate forms. Conway-Bogue, supra at 1004-1006. More complicated legal problems involve practice of law issues better suited for attorneys. Id. at 1010.

c. Specific exceptions in a title commitment may involve difficult legal issues. The effect of such exceptions on warranty liability is too complicated an issue for brokers to competently advise their customers on. The Commission has recognized that the issue is complicated enough that a purchaser's attorney should review the title commitment and its exceptions. Manual at 9-3.

d. The Commission should not be fostering the unauthorized practice of law by dictating the use of exceptions that are intended to limit coverage under the

buyer's title insurance policy.

e. In doing so, the Commission complicates the unauthorized practice of law issue even further by favoring the rights of buyers at the expense of sellers.

i. In Conway-Bogue, the Supreme Court said customers should be able to choose whether to be represented by their brokers or their attorneys in a real estate transaction. Conway-Bogue, supra at 1007.

ii. Implicit, if not explicit, in Conway-Bogue is that, when brokers practice law, just as attorneys, they owe their clients/customers a duty to act in their best interests.

iii. Buyer-agents could explain to the buyer that Provision 12.a favors his interests.

iv. Seller-agents might be negligent if they do not advise their clients that their potential warranty liability has been expanded by "standard" 12.a's listing of those specific exceptions contained in the buyer's title commitment, as opposed to more general warranty exception language that has been used historically. The seller will likely be required to give a greater warranty of title than the seller received when he/she purchased the property. If a seller wanted to change a provision, he/she would have to hire a lawyer to vary the standard form of Contracts, which would increase the cost of the transaction to the consumers.

v. Transaction brokers will be practicing law by using the Contracts. As intermediaries, however, they cannot advise buyer or seller without becoming an advocate. An attorney cannot advise both buyer and seller in a transaction. When exercising their limited right to practice law as permitted under Conway-Bogue, transaction brokers cannot do what attorneys cannot do. See Unauthorized Practice of Law Committee v. Grimes, 654 P.2d 822 (Colo. 1982). Transaction brokers will engage in the unauthorized practice of law if they advise, or do not advise, buyers and sellers as to their conflicting warranty interests regarding Provision 12.a.

PROVISION 7.a

1. Provision 7.a now includes the following:

Such Title Commitment shall set forth all matters of record necessary to permit a determination whether title is merchantable or satisfactory to Buyer.

2. There are a number of uncertainties regarding this language in Provision 7.a.

a. It is uncertain whether the provision purports to create obligations on the seller or the title entity.

b. The meaning of the language is uncertain. What matters are “necessary” for a buyer to determine whether title is merchantable? What matters are “necessary” for a buyer to determine whether title is “satisfactory”? This uncertainty is detrimental to both sellers and title entities.

c. Provision 7.a should be reconsidered. In the alternative, a declaratory order under Commission Rule I would be appropriate to remove its uncertainties regarding whom it applies to and what it means.

3. The revision to Provision 7.a is an abuse and a clearly unwarranted exercise of the Commission’s discretion because it is not necessary. See, Id. § 24-4-106(7).

a. If the terms of the commitment are not satisfactory, the buyer can give notice to the seller under Provision 8.a of the Contracts. Provision 8.a addresses all known buyer concerns.

b. The provisions of the title commitment and title policy address unknown title concerns that may develop in the future.

c. The revised Provision 7.a creates problems for both title entities and sellers without any corresponding practical benefit to other members of the public.

4. Revised Provision 7.a adversely affects title entities by treating title commitments as title abstracts.

a. The Contracts provide a choice as to the seller’s providing a title commitment or an abstract.

i. An abstract sets forth all matters of record and is a representation as to the state of title. An abstract is usually more expensive and requires an attorney’s opinion.

ii. In contrast, title commitments are based on a “reasonable” examination of title, sound underwriting standards, and

they need not list all possible impairments of record. C.R.S. § 10-11-106.

b. A title entity's liability under a commitment is contractual and terminates with the issuance of its title policy.

i. Contractual liability allows title entities to better manage risks and keep rates lower. If an insurable matter were not disclosed in a title commitment, a buyer would have a claim under the title policy. If Provision 7.a were applicable, however, a buyer might claim the title commitment did not set forth all matters necessary to determine whether title was "satisfactory." Provision 7.a inappropriately exposes title entities to potential abstractor liability when issuing a title commitment.

ii. The revision to Provision 7.a is not in the public interest because it will increase producer and consumer costs to address potentially expanded and open-ended abstractor liability. See, C.R.S. § 24-4-101.5.

5. The Commission has no jurisdiction to regulate the contents of a title commitment.

a. Title entities are subject to regulation by the Division of Insurance, not the Commission.

b. The contents of title commitments are regulated by statute (C.R.S. § 10-11-106), Division of Insurance regulations, and the underwriting practices of title entities.

c. The Commission can adopt a standard form contract between buyer and seller. As part of that contract, however, it cannot dictate the contents of a title commitment. In particular, it cannot dictate that it contain all record matters "necessary" or "satisfactory" to a buyer, whatever that might mean.

6. Provision 7.a interferes with Colorado's "strong policy of freedom of contract." See, Parrish Chiropractic Centers, P.C. v. Progressive Casualty Inc., Co., 874 P.2d 1049, 1053 (Colo. 1994).

a. The legislature has declared that agency rule making should not restrict freedom and should encourage fee enterprise. C.R.S. § 24-4-101.5.

b. Provision 7.a purports to dictate what title commitments shall include when title entities are not even parties to the Contracts.

CLOSING INSTRUCTIONS

1. Page 4 of the revised Closing Instructions contains a purported standard form agreement between a broker and the “Closing Company” regarding the preparation of legal documents (the “legal document agreement”). In its revisions to the Closing Instructions, the Commission added the following language:

Closing Company agrees to prepare, on behalf of Broker, the indicated legal documents pursuant to the terms and conditions of the Contracts.

2. **This language should be reconsidered and stricken because LTAC, and others, were never given an opportunity to address it.** See C.R.S., §24-4-103(8.1)(c). The Commission’s Notice of Proposed Rule Making for the February 5 and February 19, 2004 hearings did not disclose this revised language in the Closing Instructions. This language is a post-hearing development on which LTAC has not previously been given an opportunity to respond.

3. **The Commission has exceeded its jurisdiction, authority and purposes by purporting to bind title entities to a standard form agreement with brokers.** See C.R.S., §24-4-106(7). Because Rule F requires brokers to use the Commission’s standard forms, the Commission’s standard forms dictate who can do business with brokers. Title entities who do not want to prepare legal documents in a form that they deem unsatisfactory are faced with a Hobson’s choice: They either must act against their own best interest and judgment, or they cannot do business with brokers.

a. “The legislature has said that brokers **may** complete standard forms **including** those promulgated by the Colorado Real Estate Commission...” C.R.S., §12-61-803(4). There is no authority in the statute for the Commission to mandate brokers can **only** use its standard forms, and there is no authority in the statute for the Commission to dictate how brokers will conduct business with title entities. The Commission has no jurisdiction over title entities, and no jurisdiction to dictate how a title entity must prepare legal documents as a condition for their doing business with brokers.

4. **The added language in the Closing Instructions interferes with Colorado’s “strong policy of freedom of contract.”** See Parrish Chiropractic Centers, P.C. v. Progressive Casualty Inc., Co., 874 P.2d 1049, 1053 (Colo. 1994). See also C.R.S., §24-4-101.5. The language adopted by the Commission would seem to effectively preclude the ability of title entities and brokers to amend, or to attach addenda to, closing instructions because the Commission has mandated that only its forms may be used. Even if brokers, the parties and the title entity agreed to the preparation of legal documents in a form acceptable to all, the Commission’s compulsory legal

document agreement precludes the parties' agreeing among the themselves. Revised Provision 12.a of the Contracts provides only one standard form for warranty exceptions, and the added language in the Closing Instructions compels a title entity, or other Closing Company, to prepare legal documents only in that manner. The Commission seems driven to compel what title entities view as the misuse and misappropriation of their work product even if the parties would choose to agree otherwise. The Commission has no jurisdiction to restrict brokers and title entities from choosing how they may do business with each other.

REQUEST FOR STAY

1. Provision 12.a purports to require public disclosure of title entity work product as the standard measure of a seller's deed warranty obligations.
2. Provision 7.a purports to prescribe what title commitments shall contain in order to satisfy the buyer.
3. The legal document agreement in the Closing Instructions purports to limit how title entities and brokers can contract with each other.
4. As addressed above, LTAC and its members are adversely affected and aggrieved by the Commission's actions. The Commission's new "standards" are inflexible, preventing title entities from trying to protect their own interests while still accommodating the interests of buyers, sellers and brokers.
5. As addressed above, the Commission's actions with regard to Provisions 12.a and 7.a and the Closing Instructions are improper. They should be reconsidered, amended and corrected.
6. LTAC and its members will suffer irreparable injury if the new Provisions 12.a and 7.a of the Contracts, and the legal document agreement in the Closing Instructions, go into effect.
7. LTAC and its members may deem the usage of the new provisions to be inappropriate for them, which could generate confusion and conflicts between brokers and settlement service providers.
8. In addition, considerable confusion could result for both the public and the broker community if brokers begin using the new contract forms and their provisions are found to be invalid by either the Commission or on judicial review.
9. Pursuant to C.R.S. § 24-4-106(5), the Commission should postpone the effective date of the new revisions to Provisions 12.a, 7.a., and the legal document preparation language added to the Closing Instructions pending a determination of this Petition and/or judicial review of the Commission's actions.

Dated this _____ day of June, 2004.

Respectfully submitted,

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By: _____

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