



Primer on when is a Colorado real estate Closing, closed?

ANALYSIS

1. General

A settlement is finalized when –

- a. Closing Instructions received and signed by the parties in accordance with the Contract and/or the Loan Agreement,
- b. Lender gives notice of satisfaction of all lending conditions and funds the loan (when applicable),
- c. Adequate Funds are received from the parties (adequate funds being funds complying with C.R.S. § 38-35-125 or Colorado “Goods Funds” requirements) to complete the transaction, and
- d. All settlement documents are executed and/or notarized by all parties to the transaction. The settlement documents include the execution and provision of a Deed to the property.

The ownership of the real property is transferred once the Deed is executed, acknowledged and delivered by the Seller (Grantor) to the Buyer (Grantee). “Delivery” means in the context of an escrow with change of title is an act that evinces intent of the Grantor to part with control of title. Barnes v. Spangler, 93 Colo. 254, 257-58, 25 P.2d 732, 733 (1933). A delivered Deed does not have to be recorded to be an immediate conveyance of title and risk of loss between the parties. Colorado is a “race-notice” state. The controlling statute is C.R.S. § 38-35-109. Therefore, once the Grantor (Seller) has duly executed the Deed and provided same to Grantee (Buyer) through the Closing Company, and all conditions precedent have been satisfied, the conveyance (change of ownership) has occurred between the parties for the subject property if the only act remaining is disbursement by the Closing Agent from the Adequate Funds on deposit. Conditions are deemed satisfied if the Closing Company is fully obligated and has all deliverables necessary to complete the remaining tasks of settlement including disbursement of funds (payoffs, commissions, proceeds, etc.) and recording of instruments (deed, deed of trust, other documents required via the Buy-Sell Contract and/or for Insurable Title Requirements).

2. Risk of Loss situations

The transfer of ownership (conveyance) is not contingent on disbursement by the Closing Company. The Buy-Sell Contract does not contain terms or conditions that delineate such a contingency. Therefore, if disbursement were to occur after all closing documents have been signed by the parties (i.e., the following business day from physical signing), the conveyance of the subject property has already occurred. Occupancy of the property upon conveyance is a term delineated in the Buy-Sell Contract. Risk of Loss are terms and conditions delineated in the Buy-Sell Contract and inherent in the transfer of ownership of the subject property by Delivery of a Deed. As an example, if a Closing were to occur at 8 pm on a Thursday evening and the property was subject to a house fire at 2:00 am Friday morning (absent a specific agreement to the contrary the ownership of the property) for purposes of establishment of an insurable interest was transferred from the Buyer to the Seller on Thursday. The Risk of Loss would fall upon the Buyer. That would hold true even if the Closing Company has not yet



disbursed all funds and recorded the instruments on deposit for the transaction. Homeowners insurance would be obtainable by the Buyer with coverage triggered by the Delivery of the Deed and would be in full force and effect providing relevant coverage for the incident notwithstanding the pendency of the disbursement of proceeds and/or recording. Premises liability also would change to the Buyer and be an insurable risk. See, § 13-21-115(1), C.R.S. 2007.

The only foreseeable circumstance where risk of loss and premises liability would not change to the Buyer would be in the event of the Seller remained in possession of the property. That situation is typically addressed with a post-occupancy agreement which would normally apply and govern any risk of loss for that party to the transaction.

3. Contingent/Back Up Buyer situations

As provided above, the transfer of ownership and settlement (“we have closed”) has occurred once all documents have been executed by the parties. The ministerial task of completing the disbursement of all funds and recording the instruments applicable to the transaction does not create a contingency to finality of settlement. Mutual performance under the Buy-Sell Contract has occurred based on the terms and conditions of said agreement. Failure (or, more likely, the impossibility) of disbursing “same day” of closing document execution does not create a default event under the Buy-Sell Contract.

4. Disbursements via Checks or Wired Funds

The ability to accept or transmit funds between financial institutions is regulated by the Federal Reserve System. For most Colorado based bank branches, the wire “cut off time” is approximately 2:30 pm mountain time. The cut off time means the funds will not be processed through the US banking system until the following bank business day. Disbursements can occur via hard copy checks from the Closing Company’s escrow account and/or wired funds. Accordingly, a disbursement payment may not be eligible for deposit until the next banking business day if the hard copy or Substitute Check is not presented for deposit same day, or if a wire is commenced after the wire cut off time. A closing that does not result in the issuance of checks until after 5 pm mountain would likely result in such funds being available to deposit the following bank business day (depending upon deposit recognition rules by any given financial institution for hard copy checks). As provided above, the transfer of ownership would not be effected by the disbursement process, that timing, or the timeframe the funds can be deposited in the receiving bank.

5. “Mail Out” Closings or Separate Signings by the Parties

It is not unusual that a Seller and Buyer live in separate parts of the country or even in a foreign country. Accordingly, the physical signing of the parties cannot occur simultaneously at the closing table. Normally, Sellers will sign first in time. Buyers will then sign soon thereafter. If the parties are returning all hard copy documents directly back to the Settlement Agent, it is common practice that the Settlement Agent will then disburse and record the day the documents have all been received (usually by overnight mail). In the case of physical signings happening via a retained mobile notary, the same timing issue may apply. At the discretion of the Closing Company, disbursement could occur upon



verification of documents being executed, or receipt of the original executed documents if being returned directly to the Closing Company by the individual parties.

6. Additional Comments

All Colorado Closing Companies conducting closings governed by Real Estate Commission approved forms would be subject to the same directives, outcomes, and banking rules for all like kind situations. Accordingly, no Closing Company would have any “leg up” on its competitors for the handling and timing of any closing. Colorado case law governs the transfer of ownership of real property in Colorado and no Closing Company can independently cause a differing end result simply by accelerating disbursement or recording. Any representation otherwise is likely false or based upon the use of contract forms and closing instructions that are not the Real Estate Commission approved forms.

This Memorandum is being provided for informational purposes only.

Seek independent legal advice for any specific transaction or individual questions you might have.

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