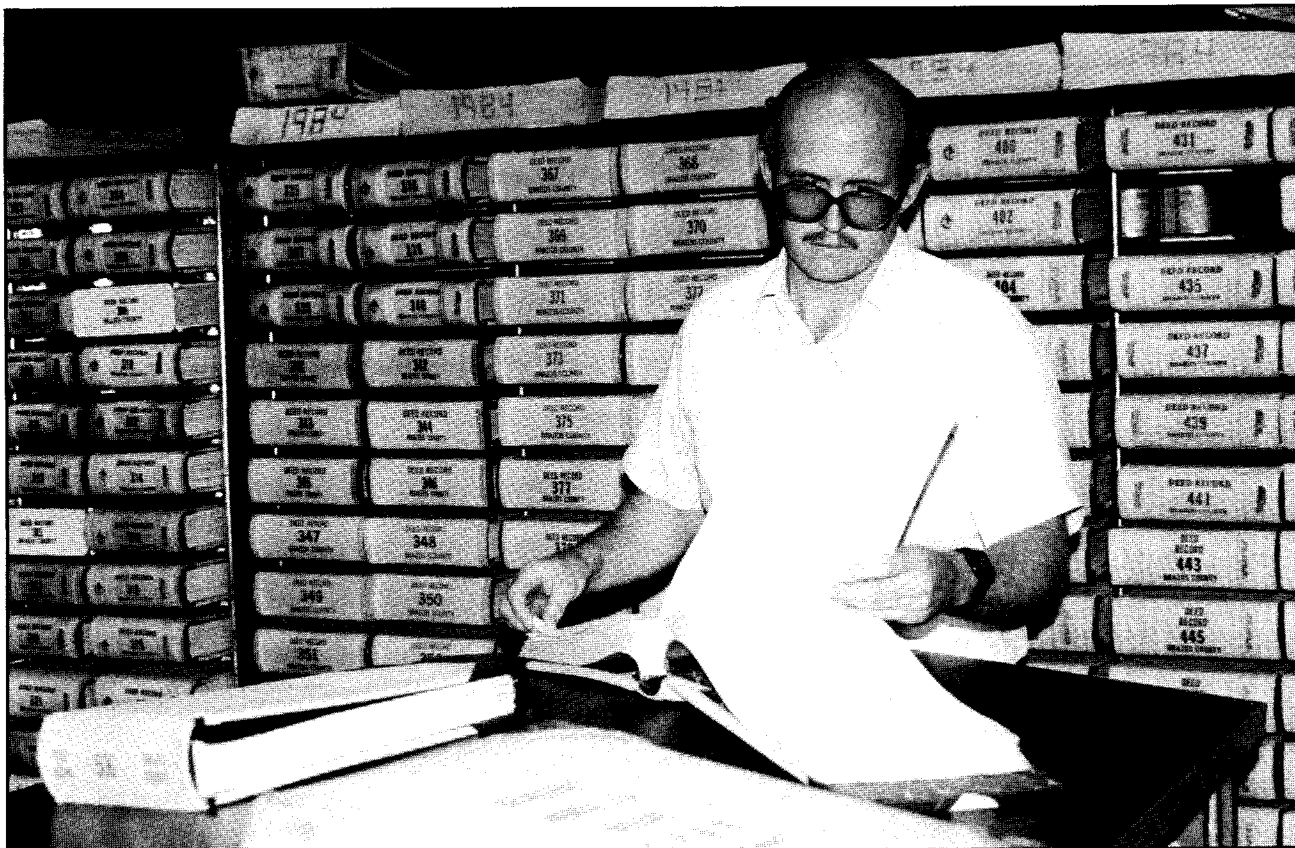
Safeguarding Property Rights



BOB BEALS

Protection Varies with Deed and Warranty

Property title usually is conveyed through a deed. Deeds and warranties differ, however, so protection varies accordingly. A general warranty deed is required by Texas' promulgated contract forms, but Texas law recognizes three other types—a special warranty deed, a deed without warranty and a quitclaim deed. Damages may be awarded if a warranty is breached.

By Judon Fambrough

Sellers are contractually required to convey title to property by way of a general warranty deed. This requirement is established by the promulgated earnest money contract forms in Paragraph 14 (d). Although real estate agents cannot change the requirement, other types of deeds are recognized and used in Texas.

This article covers the requirements for a deed to convey title and to be recorded in Texas, the types of warranties imparted by a deed, the types of deeds recognized in Texas and the determination of damages for the breach of a warranty.

Basic Requirements

Certain basic requirements must be met for the deed to convey title, regardless of the type. Briefly, the requirements include a written instrument containing:

- the grantee's name (the grantee must be living or an existing business entity),
- an adequate description of the property,
- a manifestation of a present (not future) transfer of interest and
- an execution (subscription) by the grantor.

In addition, the deed must be delivered unconditionally to the grantee or the grantee's agent and thereafter accepted.

No consideration is necessary. Because a deed is not a contractual arrangement, consideration is irrelevant. Gift deeds, which recite the grantor's love and affection for the grantee as consideration, exemplify valid conveyances devoid of consideration.

Deed Recordation

Deeds need not be recorded. An unrecorded deed is effective between the grantor, the grantee and those who have actual knowledge of the conveyance. However, an unrecorded deed does not protect the grantee's title against subsequent bona fide purchasers or from subsequent lien creditors without actual knowledge of the transfer. A bona fide purchaser is one who takes title by warranty deed for adequate consideration and without notice of the prior unrecorded deed.

Consequently, the grantee should record the deed as soon as possible after delivery. All deeds may not be in recordable form, however. According to the Texas Property Code, a deed may not be recorded unless signed and acknowledged by the grantor in the presence of two or more credible, subscribing witnesses. A credible witness is one more than 14 years old, competent to testify in court to the fact of execution and with no interest in the conveyance. Alternatively, the deed may be recorded if signed and acknowledged before an officer authorized to take acknowledgments, such as a notary public. The notary, however, can be disqualified if he or she has an interest in the conveyance.

Other miscellaneous recording requirements currently in effect include:

- the deed must be written in the English language,
- the deed must be recorded in the county where all or a part of the land is located,
- the deed must contain the mailing address of each grantee or be subject to a penalty of no less than $25 and
- the deed must satisfy the requirements of Article 3930 (c) of the Texas Civil Statutes that specifies paper size, size and number of attachments, headings, legibility of print and other items. Failure to comply with Article 3930 (c) permits the county clerk to charge a filing fee in excess of that normally allowed.

Types of Warranties

Four warranties may be given in a deed. Two are implied; two are expressed. The two implied warranties arise by law whenever the words *grant* or *convey* are used as words of conveyance in a deed. The two implied warranties are detailed in Section 5.023 of the Texas Family Code:

- the estate is free from encumbrances or liens and
- the grantor has not previously conveyed the estate or any right, title or interest therein to any person.

The two express warranties are contained at the end of the deed known as the covenant of warranty. It states the grantor, his or her heirs, personal representatives, successors and assigns will warrant and forever defend the title to the property unto the grantee, his or her heirs, personal representatives, successors and assigns forever. Texas law does not require a covenant of warranty in a deed. The covenant of warranty is not part of the conveyance but merely inserts additional covenants or promises from the grantor.

Interestingly, the two express warranties parallel, reinforce and even duplicate the two implied warranties. The two express warranties garnered from the covenant of warranty are known as the Warranty of No Encumbrances and the Warranty of Title.

The first express warranty promises that, at the time of the conveyance, the property is free from all encumbrances unless stated otherwise in the deed. The term *encumbrances* has been held to include such things as tax assessments and liens. Also, it includes anything that diminishes the grantee's full dominion over the property, such as easements, leases, water diversion agreements and similar terms.

The second express warranty covers circumstances involving a partial or complete failure of title. A failure of title occurs when the grantor has no title to a part or all of the property. It arises when a third party has a valid claim to the property by virtue of having:

- adversely possessed the property,
- received title through a separate chain of title or
- received prior title from the immediate grantor or a predecessor in interest.

The implied and express warranties overlap. However, there are two major differences. The implied warranties are personal between the grantor and grantee. If they are breached, only the immediate grantee may sue the grantor. The express warranties are not personal. They run with the land. Consequently, if they are breached, any subsequent grantee may sue the grantor. However, Texas statute of limitations may bar any lawsuit brought after 25 years of the conveyance.

Deeds Recognized in Texas

Four types of deeds are recognized in Texas. These include a general warranty deed, a special warranty deed, a deed without warranty and a quitclaim deed. The basic differences among them are the type or types of warranties they impart.

A general warranty deed gives the buyer maximum protection. It contains both the two implied warranties because both the words *grant* and *convey* are used in the conveyance. Likewise the deed contains a convenant of warranty that includes both express warranties.

The distinguishing feature of a general warranty deed is its language in the covenant of warrant. It

states that the grantor warrants and agrees to forever defend the title against every person lawfully claiming or who will claim all or any part thereof.

The language has been held to mean that the grantor guarantees the chain of title against defects from the time the land was patented (conveyed from the sovereign) until the present transfer. In Texas, this could exceed 150 years.

A special warranty deed gives the buyer the next best protection. Like the general warranty deed, it contains the two implied warranties and the two express warranties. Its distinguishing feature again lies in the language of the covenant of warranty. Here it states that the grantor warrants and agrees to forever defend the premises against every person lawfully claiming or who will claim all or any part thereof, by, through or under the grantor but not otherwise.

A general warranty deed gives the buyer maximum protection. The distinguishing feature of a general warranty deed is its language in the covenant of warrant. It states the grantor warrants and agrees to forever defend the title.

The additional phrase "by, through or under the grantor, but not otherwise" has been held to mean that the grantor guarantees the title only from the time he or she received it until the present transfer. No protection is given for defects occurring in the chain of title arising prior to the grantor's receiving title.

Currently, special warranty deeds are being used by lenders who have foreclosed on property. The special warranty deed shields the lender from liability for any irregularities that may have occurred during the foreclosure process.

A deed without warranty provides the buyer the third best protection. As the name implies, the deed contains no covenant of warranty. Thus, the deed is devoid of all express warranties. However, it does contain the two implied warranties because the words *grant* and *convey* are used.

Deeds without warranty are used to clear title when the grantor has or may have a possessory interest in property. Securing a deed without warranty from each possible heir of someone who died intestate is a good example. The grantors, in such instances, may prefer to use a quitclaim deed.

A quitclaim deed gives the buyer the least protection. In fact, sometimes it is said not to be a true deed. It contains no implied warranties and no express warranties.

Unlike the three previous warranty deeds, a quitclaim deed does not purport to convey the property to the grantee. It merely releases or "quits" the grantor's interest, if any, in the property. Because of the lack of warranties, the grantee has no recourse against the grantor should there be an encumbrance on the property or a failure of title. There are other drawbacks.

First, a quitclaim will not allow the grantee to obtain subsequent title from a grantor by a doctrine known as after-acquired title. The concept affects situations when a person conveys title to unowned property. If the ownerless grantor later acquires title, it immediately goes to the former grantee, as the following example illustrates.

Suppose "A" has no title or interest in Blackacre. "A" conveys "B" title by way of a warranty deed. Later "A" inherits Blackacre. Here title immediately vests in "B" because of the doctrine of after-acquired title.

However, if "A" had originally quitclaimed title to "B," Blackacre would remain with "A" following the inheritance. The quitclaim deed does not permit "B" to receive the property by after-acquired title.

Second, a quitclaim deed will not allow a grantee to receive title by adverse possession under the three- and five-year statutes. It will permit adverse possession under the 10- and 25-year statutes when entry by a deed is not required. The three warranty deeds do allow adverse possession under the three- and five-year statutes if the specified requirements are met.

And, finally, a quitclaim deed may cause title companies to refuse to issue a title policy. In fact, they may refuse to insure a conveyance by warranty deed when a quitclaim appears in the recent chain of title.

Because quitclaim deeds are not true deeds, their use is rarely recommended. However, quitclaim deeds are appropriate for clearing title when the grantor has or may have a non-possessory interest in property. Securing a quitclaim deed from a junior lienholder following a deed in lieu of foreclosure to evidence the termination of a right of redemption is a good example.

Breach of Warranty

The following addresses the issue of damages only between the grantor and subsequent grantees. There is no discussion of damages when the grantee may have secured third-party assurance of title such as title insurance or an attorney's abstract opinion.

The damages for breaching a deed warranty depends upon which warranty was breached. Actually only two warranties are extended in a deed. One is the warranty of no encumbrances, the other the warranty of title. The implied and express warranties duplicate each other.

In many instances, the grantor may breach simultaneously both an implied and express warranty in a deed. For example, suppose the grantor conveys encumbered property without waiving or excepting the encumbrance in a general warranty deed. Here the grantee could sue either under the implied or express warranty of no encumbrances. Both warranties have been breached, but the damages for either are the same.

As noted earlier, there are two ways to breach the warranty of no encumbrances. The first is the existence of an actual lien on the property. The other is an impediment against the grantee's exercise of full dominion over the estate.

If there is a lien on the property, not waived or excepted, the damages are the amount of money necessary to discharge the lien or encumbrance. If there is an impediment, not waived or excepted, the damages are the difference in the value of the estate at the time of the conveyance with and without the impediment. (Note that the measure of damages is the *difference in value*, not the difference in the purchase price.)

Determining damages for a breach of warranty of title depends upon whether there has been a total or partial failure of title.

If there has been a total failure of title, i.e., no estate passed to the grantee by virtue of the deed, the measure of damages is the amount of consideration paid the grantor with interest. Note that here the damages are based on the purchase price (consideration) and not the value of the estate.

The damages for a partial failure of title—when only part of the estate passes to the grantee by virtue of the deed—depend on the nature of the title failure.

If the partial failure of title is to a specific number of acres, and if all the acres in the entire tract are of uniform value, the damages are determined by dividing the number of acres for which title failed by the total number of acres in the entire tract. The resulting fraction is multiplied by the consideration paid the grantor.

However, if all the acres in the entire tract are not of uniform value, the damages are determined by dividing the value of the acres to which title failed by the value of all the acres in the entire

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tract. The resulting fraction is multiplied by the consideration paid the grantor.

The calculations are not as clearly defined when the failure of title is to an undivided interest in the entire tract. The benchmark (or inference) for determining damages is found by dividing the total consideration paid the grantor by the value of the acres in the entire tract *at the time of the conveyance*. The resulting fraction is then multiplied by the percentage of the undivided interest for which the title failed. However, the final determination of damages may be more or less than the resulting figure according to the case of *Humble Oil and Refining Co. v. Kishi*, 291 S.W. 538.

The three formulas for determining damages for partial failure of title may not apply if the grantee purchases the outstanding interest from the rightful owner. Here the amount of damages would be the reasonable purchase price but not to exceed the total amount paid the grantor for the entire acreage.

In addition to recovering the described damages for either a complete or partial failure of title, the grantee also may recover interests, taxes paid, attorney's fees and other costs for such breach.

Shortage in Area

A similar issue related to the partial failure of title is that of damages for a shortage in area.

A partial failure of title results from the grantor owning less than total interest in the tract conveyed. In contrast, a shortage in area results when the grantor owns all the interest in the tract conveyed, but the deed describes fewer acres than the subject of the transaction.

A shortage in area may arise when the deed uses a metes and bounds description. After all calls are made, the deed recites ". . . containing x number of acres, more or less." The parties assume the metes and bounds description coincides with the specified number of acres. It becomes the basis for the transaction. In fact, the description contains far fewer acres.

Under these circumstances, there would be no recourse for a breach of warranty for the shortage. There may be recovery under other theories of law such as fraud, misrepresentation, mutual mistake or even equitable theories but not for a breach of warranty.

Although a general warranty deed is required by the promulgated contract forms in Texas, three other types of deeds are recognized by Texas law. The differences among them is the type and extent of warranties imparted to the transferee.

This article is for information only. It is not a substitute for competent legal counsel. ⊞

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A Special Issue

The birthday of the U.S. Constitution is the backdrop for this reflection on a basic American freedom. Private rights to property is a fundamental tenet of real estate ownership. Without this right, there is no real estate industry.

Texas real estate professionals realize the importance of preserving this right. Many, however, find it difficult to express their thoughts as persuasively as has John Allen.

This article was excerpted from the 500th publication of the Real Estate Center. *Private Rights to Property: The Foundation of Freedom, Prosperity and Harmony* is a 75-page monograph now available from the Center. Use the enclosed reader service card and request publication 500. Copies are $2.50 each ($5 outside Texas).

Property Value and Economic Behavior

The value of an asset depends on the bundle of rights attached to the asset. If the bundle is somehow altered, the value of the property also is altered.

For example, suppose someone has agreed to purchase an automobile for $5,000, and that the exchange is scheduled for noon tomorrow. The price is influenced in large part by the buyer's perception of the current structure of property rights and the probability of this structure remaining intact for the foreseeable future. Suppose that at 8 a.m. tomorrow a governmental decree announces that henceforth all automobiles are public (communal) property. Anyone can use any automobile that is not currently in use. The bundle of property rights to automobiles has been altered, and the value of rights to the automobile also has been changed. Indeed, the value of the automobile has fallen because no one has any reason to give up cash for an asset that can no longer be controlled.

The structure of property rights also influences care of property. Consider again the example of automobiles declared common property. Under these circumstances what incentive is there for anyone to be concerned about the auto's maintenance? Who would bother to replace a broken windshield or repair a flat tire? Clearly there is little incentive to maintain this asset. It takes no great insight to forecast what would happen to the quality of the nation's stock of automobiles.

People do not treat their own autos this way because their autos are part of their wealth. People naturally defend their property from abuse by others. Cars and homes are locked to deter theft. People do not throw garbage into their yards, write on their bathroom walls, place gum under their tables or crush out cigarettes on their floors.

The existence and enforcement of property rights also induce people to take account of the social costs (the negative effects or harm to others) of their actions. People are careful not to damage other's property, for if they do, they will have to provide compensation for the losses at the expense of their personal wealth.

Communal Rights to Property

How is economic behavior affected when property rights are communal instead of private? Communal means property is available to all on a first-come, first-served basis. Such properties are controlled either by government (roads, parks, seashores, forests) or by no one (open sea, atmosphere, moving waters, wildlife).

When property rights are communal, people tend to ignore the social costs of their actions. Environmental pollution is a classic example of the "tragedy of the commons." Virtually all adults, people who are by and large responsible citizens, knowingly pollute the environment when they drive their vehicles. Is this a Jekyll-and-Hyde behavior? Not really. In fact, people are behaving as expected when property rights are communal. In deciding whether or how to use any resource, private or communal, people assess the benefits and costs of its use. Here they weigh the benefits against the costs of polluting. The benefit from polluting (using vehicles) is viewed as the utility received from not walking or biking. However, individuals view their cost of polluting as virtually zero. This is because individuals

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On the cover. Riverway Properties towers behind a Houston residence where the original owner of the property still lives. Once the site of a sand pit, the development was photographed by Kenneth L. Appelt near Buffalo Bayou off Loop 610.