SPECIAL WARRANTY DEEDS: A PREVIEW

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INTRODUCTION[1]

In many jurisdictions in the United States, the form of deed contemplated in a commercial real estate purchase and sale agreement (PSA) is a special warranty deed. Such a deed allows recovery for a title defect caused by the acts of the grantor. But there are several variations in the approach to, the consequences of, and the nomenclature for these special warranty deeds. Some are confusing and some are surprising. While local counsel may provide the relevant form of deed, local counsel may not know how the local practice varies from the practice in the jurisdiction of the client (or the client's lead counsel, if different from local counsel); consequently, it may not occur to local counsel to advise of all the differences. The potential variations and the dearth of literature on the subject prompted the Acquisitions and Title Insurance Committees of the American College of Real Estate Lawyers (ACREL) to seek a better understanding of the special warranty deeds used throughout the United States in the context of a commercial real estate sale.

This project evolved as a result of the December 2022 ACREL Report, which includes 14 local riders to a pre-negotiated form PSA.[2] Before publication, each of those riders included a local form of deed. But the local deed forms were eliminated because the ACREL Acquisitions Committee failed to reach a consensus on several deed questions, including whether and when to use generic title exceptions or even a quitclaim deed (to address potential exposure under a special warranty deed). This confusion highlighted the need to gain a better understanding of special warranty deeds, and the variations in their treatment among different jurisdictions.

This article will preview some of the deed questions that will be addressed in a more detailed article on special warranty deeds that is expected to be published by ACREL later this year. This article will address the following questions:

- What are the commonly used deeds?
- Is it customary to use a special warranty deed?
- What is (are) the name(s) of the local form(s) of special warranty deed?
- Is there a statutory form of special warranty deed?

- What are the customary title covenants in a special warranty deed?

WHAT ARE THE COMMONLY USED DEEDS?

Most practitioners have a general sense of the meanings of, and the differences between, the various deeds used to convey real estate in the United States and in particular, in their respective jurisdictions. To keep things simple, deeds in the United States are often classified into one of three types: (i) general warranty deeds; (ii) special warranty deeds; or (iii) quitclaim deeds. These different deed types are sometimes viewed along a spectrum as follows:

At one extreme are *general warranty deeds*, which typically contain a covenant of *general* warranty (under which the grantor promises to protect the grantee against lawful title claims regardless of their source).

At the other extreme are *quitclaim deeds*, which typically contain no covenant of warranty (or any other covenant of title) and purport to convey only whatever interest, if any, the grantor may have in the property.

In the middle between these two extremes are *special warranty deeds*, which typically contain a covenant of *special* warranty (under which the grantor promises to protect the grantee against lawful title claims traceable to the grantor).[3]

There is ample room for confusion, however, in distinguishing between and understanding different types of deeds. For example:

- A *general warranty deed* is sometimes called, in the alternative, a *warranty deed*. Yet, the literal wording suggests that *general warranty deeds* and *special warranty deeds* are both *warranty deeds*, but of two different types. This literal interpretation is frequently, if not usually, adopted instead.
- Among the various covenants of title that may be included in a *warranty deed*, only one is a covenant of *warranty*.
- Although most covenants of title are not covenants of *warranty*, some writers and many practitioners refer to title *warranties* and title *covenants* interchangeably.
- Some deeds do not contain a covenant of *warranty* even though they may be considered to fall within the category of *special warranty deeds*.
- A *covenant of warranty* may go by different names.
- In some jurisdictions, deeds called quitclaim deeds do contain covenants of title.
- In some jurisdictions, a deed with no covenants of title is not necessarily called a *quitclaim deed*.
- More generally, there are numerous variations in terminology, interpretation, and practice in different jurisdictions.

General and Special Warranty Deeds—Terminology

One might be tempted to classify deeds with covenants so that a *general warranty deed* has one or more *general* covenants, and a *special warranty deed* has one or more *special* covenants. Unfortunately, there might be some overlap (in particular, in some jurisdictions, a special warranty deed might contain one or more general covenants). It might seem more precise to distinguish between a *general warranty deed* and a *special warranty deed* by focusing only on the nature (i.e., general or special) of the one covenant of title, namely, a *covenant of warranty* that, as indicated earlier, is typically included in a warranty deed. One scholar observed that, strictly speaking:

> A warranty deed is a deed with a covenant of warranty. It may or may not contain other covenants. An instrument with a covenant of special warranty is a special warranty deed. An instrument with a covenant of general warranty is a general warranty deed. Local practice dictates whether it is customary for warranty deeds to include other covenants. Sometimes these other covenants are all general, all special, or mixed.[4]

But these definitions are not adopted either because some deeds that are considered to fall within the category of *special warranty deeds* (assuming the three-tier classification stated at the outset) do not have a covenant of warranty.

Special Warranty Deed

In this article, we generally refer to a *special warranty deed* to mean a deed that has one or more special covenants of title, regardless of whether the deed also includes one or more general covenants of title. Accordingly, under our terminology, a deed with a mix of special covenants and general covenants will be deemed to be a special warranty deed and not a general warranty deed.

We considered referring instead to a *limited warranty deed*, which seems more descriptive. But a limited warranty deed suggests that there is some, albeit limited, covenant of warranty. Yet, as noted above, there may be none (e.g., in the statutory form of California grant deed). We then considered adopting new terminology to more accurately cover the deeds we wanted to capture: a *limited covenant deed*. But adding a new term to an already confusing subject might be less helpful than explaining the potential confusion with existing terminology. We concluded that it would be prudent simply to advise readers not to rely too much on what a deed is called or how it is classified; instead, one should understand which covenants are included (explicitly or implicitly) in the actual deed in the relevant jurisdiction.

General Warranty Deed

In this article, we generally refer to a *general warranty deed* to mean a deed that has one or more general covenants of title and does not contain any special covenants of title.

IS IT CUSTOMARY TO USE A SPECIAL WARRANTY DEED?

Some title insurance company local custom guides indicate that general warranty deeds are customary in many, if not most, jurisdictions. Similar statements appear in much of the literature on deeds. Some books indicate that special warranty deeds are customary in only a minority of states, but local customs and practices have been changing. "Traditionally, most deeds have full covenant and warranty, but there has long been a slow but steady trend against warranties, particularly in the larger cities."[5]

The authors suspect that special warranty deeds are customary in commercial transactions throughout the United States today and statements suggesting that it is customary to use general warranty deeds are either outdated or based on the custom for residential transactions. The jurisdiction-by-jurisdiction analysis contemplated by this ACREL project should confirm whether or not our suspicion is accurate.

WHAT ARE THE NAMES OF THE LOCAL FORMS OF SPECIAL WARRANTY DEEDS?

Special warranty deeds go by different names depending on the jurisdiction. For example:

Act of Sale: In Louisiana, practitioners generally refer to *acts of sale* rather than deeds for transfers of commercial real estate. Although the authors have seen Louisiana acts of sale captioned "Special Warranty Deed (Act of Sale with Limited Warranty)" or "Special Warranty Deed (Act of Sale)," it is our understanding that there is no established custom regarding the nomenclature for an act of sale that functions like a special warranty deed.

Bargain and Sale Deed: A special warranty deed in some states (e.g., New York and Washington) may be called a bargain and sale deed, although sometimes (e.g., in Washington) there may be another special warranty deed with a different name that could be used instead. While many bargain and sale deeds may function as special warranty deeds, that is not always the case. Sometimes bargain and sale deeds have no covenants of title. And sometimes they might even function as general warranty deeds. These potential variations may require additional language to avoid confusion, especially in those jurisdictions (e.g., New York) in which bargain and sale deeds may come in different varieties (some of which are not special warranty deeds).

> [I]f the deed assures title against any defects, no matter from what source they arise, the deed is labeled a bargain and sale deed with full covenants. If the deed merely certifies that the grantor has done nothing to cause a defect in the title, then the deed is known as a bargain and sale deed with covenants against grantor's acts. If the deed contains no covenants whatsoever, it is a bargain and sale deed without covenants.[6]

Covenant Deed: Michigan's covenant deed is the rough equivalent of the special or limited warranty deed used in other states (and constitutes a special warranty deed as we have defined it). However, using the correct local terminology is particularly important in Michigan; it would be a mistake to draft a covenant deed in Michigan and call it a special warranty deed or use the word warranty within it. Indeed, "[u]sing the word warranty to describe any deed other than a general warranty deed may be a crime in Michigan."[7]

Grant Deed: A special warranty deed in California is called a grant deed.

Limited Warranty Deed: A special warranty deed in several states (e.g., Ohio) is called a limited warranty deed. However, a limited warranty deed is not always a special warranty deed under our definition. It is possible that a limited warranty deed has no special covenants; it might simply not have all the traditional general covenants in the relevant jurisdiction.

Quitclaim Deed: A special warranty deed in a few states (e.g., Maine and Massachusetts) is called a quitclaim deed. This nomenclature may be very confusing to practitioners in other jurisdictions because a quitclaim deed typically contains no covenant of warranty (or any other covenant of title). Unless otherwise indicated, references in this article to a "quitclaim deed" will have their normal meaning.

Special Warranty Deed: A special warranty deed in many states (e.g., Colorado and Delaware) is called a special warranty deed.

IS THERE A STATUTORY FORM OF SPECIAL WARRANTY DEED?

In some states, there is a statutory form of special warranty deed. However, in some of these states, such as California and Colorado, the parties are not required to, and do not always, follow the statutory forms. Even if there is no mandated form, the drafter should keep in mind that, in many jurisdictions, certain words may imply covenants of title.

WHAT ARE THE CUSTOMARY TITLE COVENANTS IN A SPECIAL WARRANTY DEED?

Covenants of title (which may also be called *covenants for title*, deed covenants for title, *deed covenants of title*, *deed covenants*, or *title covenants*) may be split into two categories: general and special. "Special covenants ... protect a grantee only against title defects traceable to the grantor or those claiming under the grantor. General covenants protect a grantee against all title defects, whatever their source."[8] Many books and cases identify six traditional general covenants of title:

- Seisin: a promise that the grantor owns the property (but it may be subject to encumbrances);
- Right to convey: a promise that the grantor has the right to convey the property;
- Against encumbrances: a promise that the property is not encumbered;
- Warranty: a promise to warrant and defend the grantee's title from lawful claims;
- Quiet Enjoyment: a promise that the grantee's possession will not be disturbed by superior title claims; and
- Further Assurances: a promise to execute documents needed to perfect the title the grantor purports to convey.

However, the reader is cautioned that the descriptions above are rough generalizations; there may be local variations.

Each of the *general covenants* of title described above may be limited in a manner to create a

corresponding *special covenant* of title. The *special* counterpart of the covenant against encumbrances or the covenant of warranty, or both, are frequently found in special warranty deeds. For the covenants of *seisin* and the *right to convey*, however, creating a corresponding special covenant may appear challenging. But it is possible to convert each of these general covenants to a *special covenant* simply by indicating that the grantor is liable for a breach of the covenant only if it is caused by the grantor and not the grantor's predecessors. Thus, a general covenant of *seisin* or a general covenant of the *right to convey* may be replaced by a promise that the grantor has not done anything to divest itself of title (if any) or the right to convey (if any). When these covenants are so limited, we may refer to them in this article as a *special covenant of seisin* and a *special covenant of the right to convey*, respectively. As indicated earlier, in a few jurisdictions, some deeds have names that might suggest to outsiders that they have only *special* covenants, but they may in fact contain one or more *general* covenants by implication or statute.

Special Covenants—Grantor's Acts Versus Omissions

Special warranty deeds typically allow for recovery for a defect in title "if the defect arises because of the acts of the grantor."[9] But they may do more. In some jurisdictions, the customary special covenants in a special warranty deed may allow the grantee to recover not only for title defects arising from *acts* of the grantor but also for some title defects arising from *omissions* of the grantor. For example, the California grant deed (which is customarily used in California) covers, by statute, "encumbrances done, made *or suffered* by the grantor or any person claiming under him."[10] A similar special covenant is included in some bargain and sale deeds.[11] The scope of the word *suffered* is not entirely clear:

> [T]he paucity of relevant decisions makes it difficult to determine fully the meaning of 'suffered.' It is used in its passive, not active sense, meaning to endure, sustain, or to apply to something done *in invitum*.[12]

Another author also expressed concern with this uncertainty:

> Further, the grantor's covenant that it has not "suffered" the encumbering of the premises is of uncertain meaning. For example, has the seller warranted against prescriptive rights obtained by reason of an encroachment not objected to by the seller?[13]

Indeed, the part of the special covenant relating to encumbrances *suffered* "has been held broken by a grantor's failure to pay municipal assessments and his permitting creation of rights by adverse possession."[14] And it has been held that a grantor may *suffer* a title defect under a special warranty deed even without actual knowledge of the title defect.

In some jurisdictions, the statutory special covenants do not use or imply such "suffered" language. In Massachusetts, for example, this language was viewed by legislators as a trap:

> "[T]he omission of the words 'or suffered' is not only 'of significance,' but was deliberate and fully understood at the time, ... [Prior to the statute] it was the common practice of experienced practitioners to cross out the words 'or suffered' which appeared in the [then] common printed form .... Accordingly, in drafting the statutory ... covenant, ... we omitted the words 'or suffered' to protect grantors from the trap of uncertainty involved in those words."[15]

The risks associated with the special covenants encompassing matters "suffered" may be most troubling in those jurisdictions with expansive definitions of an *encumbrance* (which, may sometimes include, for example, violations of certain governmental regulations).[16]

General Covenants

More importantly, in some jurisdictions (e.g., Colorado and Washington) special warranty deeds may also include a general covenant of seisin (and sometimes other general covenants of title), which, as

indicated above, is basically the seller's assurance to the buyer that the seller owns the property. In the unlikely event of a total title failure, a general covenant of seisin may be a shock to the seller/grantor. Some sellers may assume the buyer's title insurance company will take care of the problem, especially if the seller paid for the buyer's title insurance. But if the buyer's title insurance company makes the buyer whole, then the buyer's title insurance company may then turn around and sue the seller, as occurred in Texas in *Chicago Title Ins. Co. v. Cochran Inv., Inc.*[17]

> Even if the grantor does not provide a general warranty deed, the title insurer has sought to recover from the grantor pursuant to the covenant of seisin. In the *Cochran* case, the title insurer asserted a right to subrogation against the seller/grantor to its insured based on the covenant of seisin, even though the conveyance was made by a special warranty deed.[18]

The seller typically will have obtained title insurance when it purchased the property, and that policy becomes a *warrantor's policy* when the seller sells the property. But if the seller sells the property for more than the amount of its title insurance, then its title insurance may not provide complete protection.

CONCLUSION

Local Counsel

There are many jurisdiction-by-jurisdiction variations regarding deeds. Most of the differences are state-by-state (including for this purpose, the District of Columbia), but there may also be differences within a state (e.g., recordation requirements at the county level). Engaging local counsel is essential to ensure local law and practice regarding deeds are understood and taken into account in any purchase and sale of commercial real estate.

Risk of General Covenants

One of the most troubling local issues is the fact that in some jurisdictions, the local special warranty deed may include a general covenant of seisin or other general covenants of title. If these general covenants are not eliminated, the seller may want to obtain a title insurance policy for itself to increase the coverage of its title insurance to match the purchase price.

Value of Covenants of Title

The likelihood of making a successful claim under a deed has been diminished by the common practice of using a single purpose entity (with no other assets) to own real estate and liquidating the entity shortly after the expiration of the survival period in the PSA. Even if the seller/grantor continues to exist and is solvent, a *special* warranty deed provides limited protection when compared to a *general* warranty deed because it typically has fewer and less expansive covenants of title (and even when it might otherwise contain one or more *general* covenants, those may be eliminated by the seller). But, regardless of the form of the deed, covenants of title are not generally considered an effective means of title assurance. Consequently, it is usually of paramount importance for the buyer to obtain a title insurance policy from a reputable and creditworthy title insurance company.

We hope the contemplated jurisdiction-by-jurisdiction analysis will provide a basic framework to give practitioners a better understanding of what to expect in deeds used in other jurisdictions.

Notes

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2 The December 2022 ACREL Report may be purchased by visiting the ACREL website at https://www.acrel.org/acrel/default.asp or by contacting one of the executive directors of ACREL at jaburgess@acrel.org or cdmcgrew@acrel.org.

3 A special warranty deed is viewed by some as an oxymoron: "When sellers of goods or services promise buyers something 'special,' this usually means something better than the usual. 'Special,' in a 'special warranty deed' means the exact opposite for the grantee." George Lefcoe, Real Estate Transactions, Finance, and Development (6th ed. 2015), Ch. 17 § IIIB, at 352.

4 Robert G. Natelson, Modern Law of Deeds to Real Property (1992), § 12.2, at 311.

5 Milton R. Friedman & James Charles Smith, 2 Friedman & Smith on Contracts and Conveyances of Real Property (8th ed. 2021), § 28:2, at 28-3 (footnote omitted).

6 14 Michael Allan Wolf, Powell on Real Property (2022) [hereinafter Powell], § 81A.03[1][b], at 81A-29 (footnote omitted).

7 John C. Cameron, Jr., Michigan Real Property Law (3rd ed. 2023) § 10.20 at 360.

8 Natelson, supra note 4, § 3.8 at 70.

9 14 Powell, supra note 6, § 81A.03[1][b][iii], at 81A-28.

10 Cal. Civ. Code § 1113 (emphasis added).

11 2 Friedman & Smith, supra note 5, § 28:2, at 28-4 ("The grantor covenants that he has not done or suffered anything whereby the said premises have been encumbered in any way whatsoever.").

12 Id., § 28:2, at 28-5 (footnote omitted).

13 David M. Goldberg, 1 Real Estate for the General Practitioner (2018) § 1-1(r), at 38.

14 2 Friedman & Smith, supra note 5, § 28:2, at 28-5, n. 18.

15 Silverblatt v. Livadas, 164 N.E.2d 875, 878 (Mass. 1960) at n. 2 (quoting from an article explaining the legislative history of the Massachusetts statute).

16 The term suffered also appears in the acts of the insured Exclusion 3a of the 2006 and 2021 ALTA owner's title insurance policy forms, but this other context may involve a different interpretation because of the rules of construction for title insurance policies.

17 602 S.W. 3d 895, 901 (Tex. 2020).

18 James L. Gosdin, Title Insurance – A Comprehensive Overview of the Law and Coverage (5th ed. 2022), § VIII.E, at 1074.