SPECIAL WARRANTY DEED SECTION

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[The author has borrowed liberally from Ken Mills (Brenner & Golden Stuart Woff LLP)'s article Commercial Real Estate Contracts–Very Basic Things You Might have Forgotten, Advanced Real Estate Law Course 2003) for the bulk of the following. Ken's permission to use this is greatly appreciated. I also give recognition and thanks to John C. (Jack) Murray for his article Special and Limited Warranty Deeds]

What is the difference between a general and a special warranty (please note that in some jurisdictions the term 'limited warranty deed' is used)?

Black's Law Dictionary 424 (7th ed. 1999) defines "Special Warranty Deed" as follows:

> A deed in which the grantor covenants to defend the title only against those claims and demands of the grantor and those claiming by, through and under the grantor. Cf. warranty deed.

In contrast, a warranty deed is defined in **Black's Law Dictionary** as:

> A deed containing one or more covenants of title; esp., a deed that expressly guarantees the grantor's good, clear title and that contains covenants concerning the quality of title, including warranties of seisin, quiet enjoyment, right to convey, freedom from encumbrances, and defense of title against all claims.

See also Richard R. Powell, **Powell On Real Property** § 81A.06[2][d] ("if the grantor covenants to warrant and defend the title only against claims arising by, through or under the grantor, it is a special warranty. Under a special warranty, if the claim arose under, or due tot the actions of, a prior owner of the land, the covenantor has no liability"); 11 **Thompson on Real Property**, Thomas Edition, § 94.07(b)(2)(i), at 81-82 (David A. Thomas ed., Supp. 2000) (stating that grantors of special warranty deeds "only promise that no title defects have arisen or will arise due to the acts or omissions of the grantor").

First let's recall what the warranties of title are. The warranties of title, which are given if the words "grant" or "convey" are used in the deed, are that the seller has not sold the property to anyone else, and that there are no encumbrances on the property. This is set out in the Texas Property Code:

§ 5.023. Implied Covenants

(a) Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:

(1) that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and Commercial Real Estate Contracts

(2) that at the time of the execution of the conveyance the estate is free from encumbrances.

(b) An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the conveyance.

Note that the second warranty, that there are no encumbrances, is the reason that it is necessary to list all exceptions to title in the deed; without listing them the seller would be in default of its guaranty as soon as it delivered the deed.)

With a general warranty, seller promises to defend title in the buyer against anyone else who claims it (unless of course the claim is based on one of the exceptions to title). The general warranty extends all the way back to title in the sovereign. So, if a third party asserts title to all or some portion of the estate based, for example, on the basis of a previously unknown instrument delivered by an owner 80 years and five links of the chain of title ago, the grantor under the latest general warranty deed is obligated to defend his grantee's title. Typically, the seller is able to be confident that no such claim will arise because the seller obtained a title insurance policy at the time of its acquisition. If a claim does arise based on an interest that was not listed as an exception to the title policy, the seller will rely on its insurer to step in and defend title (and to make it whole for any losses it suffers).

In a special warranty, the seller only promises to defend title against anyone whose claim to title is derived through the seller, but not otherwise. So, if it turns out that the party from whom the seller acquired the property also "sold" the property to a third person who is now asserting its claim, the seller's own special warranty won't require it to defend its buyer against that claim. That really makes the title insurance policy essential for the Buyer.

Who wants to use a special warranty deed? They are often used for conveyances by trusts and estates, land contract vendors, and financial institutions that have taken back property by foreclosure or deed in lieu of foreclosure in satisfaction of a defaulted mortgage loan. These types of grantors (as well as others who are able to negotiate delivery of a special or limited warranty deed in connection with a property sale) usually will argue that they have only limited, incomplete, or indirect knowledge of the status of title to the property and/or have not been in actual possession of the property, but that they are willing to give the grantee greater protection than would be available by delivery of a quitclaim deed.

Special warranty deeds provide that the grantor warrants only that it has not created or suffered any defect in title to occur during the period that it was in title to the property being transferred, i.e., the grantor warrants against its own acts or omissions and agrees to defend the grantor against any action by another party claiming by, through, or under the grantor that it has a superior title to the property conveyed to the grantee.

Can the use of a special warranty deed be hazardous? You can negate your title insurance by the way you convey. See Chicago Title Ins. Co. v. 100 Investments L.P., 2004 U.S. App. LEXIS 920 (4th Cir. Md. Jan. 22, 2004), where a property was conveyed by special warranty deed from investors into an entity they formed. There was a complete failure of title. The grantee entity claimed back against the grantors who expected to be able to rely on the warrantor's coverage from their owner's title policy. The title company says since there was no warranty there was no claim. Defendant "gave a special warranty [deed], promising only that [defendant] had not itself created any defect in title – a warranty whose breach would be specifically excluded from coverage. At the point of conveyance . . . any preexisting defect in title became [the grantee's] problem and [the grantee] would have to obtain its own title insurance to protect itself from any problem that might be caused by that defect" See also the following: Ask Realty II Corp. v. First Am. Title Ins. Co., 2004 WL 1254005 (D. Md.), at *5 (stating that "[a] special warranty of title is breached only if the grantor's own conduct during its period of ownership creates a claim against the title," and holding that alleged breach of special covenant against encumbrances without establishing that grantor itself created or knowingly allowed an encumbrance on the property would prevent coverage under title policy); Covalt v. First American Title Insurance Co., 1997 U.S. App. LEXIS 261 (unpublished disposition; reported in Table Case format at 105 F.3d 669, 1997 U.S. App. LEXIS 4213), at *4-5 (ruling that transfer of real property, by quitclaim deed, from individual to trust in which individual retained an interest, prevented trust from claiming any rights under the title insurance policy originally issued to individual); Simmons v. Reiner, Ohio. App. LEXIS 5783 (Oh. App. Dec 3, 1999), at *10 (holding that dower interest of husband, who had quit-claimed insured real property to his wife, was a contingent claim which "is not a marketable estate or interest" that would entitle him to coverage under title policy; and further holding that no loss had been incurred under the title policy until after title had been transferred);

General Medicine, P.C. v. Metropolitan Title Co., Mich. App. Ct. No. 216012 (March 2, 2001) (unpublished) (ruling that where plaintiff had conveyed property by quitclaim deed before discovering easement that burdened property, it had no standing to sue under title policy because conveyance was absolute and plaintiff had not retained any title interest); Butera v. Attorneys' Title Guaranty Fund, Inc., 321 Ill. App. 3d 601, 607, 747 N.E.2d 949, 954 (2001) (holding that a deed from a trust to corporation, whose shareholders were the sole beneficiaries of the trust, was a transfer by purchase and not a transfer by operation of law that would provide continuing coverage under the owner's title policy originally issued to the trust); Gray v. First American Title Ins. Co., 2003 Cal. App. Unpub. LEXIS 1163 (March 4, 2003), at *7-8 (ruling that because insured individuals had transferred title to property to partnership consisting of themselves and another individual, previous claim they may have had against title insurer before conveyance was not preserved, and stating that, "[the new partnership] is not an insured under the policy and may not be deemed an insured here"); Austin v. City of Alexandria, 265 Va. 89, 95-96 (2003) (holding that deed to trustee effects change in ownership of property even if grantor, trustee, and beneficiary are same person and beneficiary has complete power to revoke trust); ny cls llc § 203(d) (2003) ("[a] limited liability company formed under this chapter shall be a separate legal entity . . . ").

[SPECIAL] [LIMITED] WARRANTY DEED

THIS INDENTURE, made on the ____ day of ____________, 200__, by and between ____________________________________, [a ________________________ corporation] (hereinafter "Grantor"), and __________________________, a __________ (hereinafter "Grantee").

W I T N E S S E T H:

THAT Grantor, in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, to it paid by Grantee, the receipt of which is hereby acknowledged, does by these presents, sell and convey unto the said Grantee, its successors and assigns, the lots, tracts or parcels of land lying, being and situated in the City of ___________________________, County of ___________________________, State of _________________________, and described on Exhibit "A" attached hereto and incorporation herein by reference subject to the matters set forth on Exhibit "B" attached hereto and incorporated herein by reference.

TO HAVE AND TO HOLD the premises aforesaid with all and singular, the rights, privileges, appurtenances and immunities thereto belonging or in any wise appertaining unto the said Grantee and unto Grantee's heirs, successor and assigns forever, the said Grantor hereby covenanting that the premises are free and clear from any encumbrance done or suffered by Grantor; and that Grantor will warrant and defend the title to said premises unto the said Grantee and unto Grantee's heirs, successors and assigns forever, against the lawful claims and demands of all persons claiming by, under or through Grantor.

IN WITNESS WHEREOF, the said Grantor has executed this [Special] [Limited] Warranty Deed the day and year above written.

________________________________,
[a ______________________________]

ATTEST:

By: _____________________ By: _____________________________

Its: _____________________________