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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 2

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USE OF THE SPECIAL WARRANTY IN OKLAHOMA AND TEXAS OIL AND GAS TRANSACTIONS

JAMES R. STRAWN*

I. Introduction.

The overwhelming majority of oil and gas property conveyances contain granting words that appear to qualify the conveyance as a quitclaim. Such granting words are usually something similar to “grants and conveys all right, title and interest of Grantor.” Though the words “grant and convey” imply certain title related covenants,¹ the expression of the quantum of interest conveyed as “all right, title and interest” clarifies that the intent of the conveyance is to quitclaim, and courts commonly find them to be quitclaims². If there is no provision in the conveyance illustrating otherwise, the “all right, title and interest” conveyance will be deemed a quitclaim, and there will be no implied title related covenants. However, these same conveyances almost always contain what is known as a special warranty. The special warranty clause usually says something like “Grantor warrants [title] to the [property] against claims by, through and under Grantor, but not otherwise.” Whether the inclusion of the special warranty morphs the conveyance into something more than a quitclaim is a

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1. OKLA. STAT. ANN. tit. 16 §19 (2016).

2. The conveyance of “all, right, title and interest” is universally understood to accomplish a quitclaim. *Hamman v. Keigwin*, 39 Tex. 34, 35 (1873).

question I often confront. The answer can be elusive and requires careful reading of the entire instrument, including any exhibits, to determine (a) what exactly is being conveyed, (b) whether there is an express or implied warranty that applies, and (c) what the scope of any such warranty is. The purpose of this paper is to address these questions and suggest drafting considerations so that grantors and grantees can make sure they end up with a conveyance that meets their needs under the circumstances.

The most common form of conveyance used is the general warranty deed. The typical home buyer receives title under a general warranty deed. In Oklahoma it is defined as a deed that complies with Title 16 and as such implicitly conveys covenants of title.³ The covenants are the covenant of seisin, the covenant of right to convey, the covenant against encumbrances, the covenant of warranty and the covenant of quiet enjoyment.⁴ Unless it is limited by express words, such a deed conveys an estate in fee simple and of inheritance.⁵

The primary reason that general warranty deeds are used in residential real estate transactions is that the typical seller has little or no bargaining power against buyers, realtors and mortgagees to avoid using anything less than a general warranty deed. In commercial real estate transactions like oil and gas property sales, sellers have more bargaining power and it is more common to see them use quitclaim conveyances.

A quitclaim transfers only the rights the grantor has in the described lands, without any warranty or representation that it owns anything at all, and is often characterized as such by the use in the granting clause of the words “all of grantor’s right, title and interest.”⁶ However, in the oil and gas industry, though it is a standard to use the quitclaim words “all right, title and interest,” the status of the conveyance as a quitclaim can be called into question by inclusion in the conveyance of a warranty against title related claims “by, through and under grantor, but not otherwise.” The first clause is intended to craft the form as a quitclaim, and the second is commonly referred to as the “special warranty.”⁷

As stated earlier, the two clauses are used together in almost all oil and gas property conveyances, to the point of being standard boilerplate. Even so, once the special warranty is pasted in, the “all right, title and interest” quitclaim clause may not work as such.

3. OKLA. STAT. ANN. tit. 16 §19 (2016).

4. *Id.*

5. *Id.* § 29.

6. *Id.* § 18.

7. BLACK’S LAW DICTIONARY 1725 (9th ed. 2009).

II. Origin of the Quitclaim in America.

In order to better understand the nature of the quitclaim deed and the effect of using the two clauses in the same instrument, it helps to understand the history of the quitclaim deed.

In the age of American westward expansion, the enormous demand for land transactions meant that deeds had to become simple and standard. They had to be standardized due to a lack of trained draftsmen, and mass-produced to accommodate mass use.⁸

Complications such as livery of seisin were of little or no use in America and abolished early on.⁹ Deeds needed to follow a simple, rational form so lawyers worked out two basic types of deed. The warranty deed grew out of the old deed of bargain and sale, with covenants of warranty. The quitclaim deed developed from the common-law release.¹⁰ The common law release was convenient to resolving title issues related to possible current or past events of ownership or possession by the grantor and was made to a current possessor. In such case, the alleged possessor/grantor released claims to title without representation or warranty.

A warranty deed was used to make a full transfer of land from one owner to another. The seller guaranteed that it had and could transfer good title. The quitclaim deed made no such promises. It simply transferred whatever rights the transferor had, good or bad, and was so understood. Grantors used quitclaim deeds to transfer cloudy or contingent rights to land. Deed forms were available in popular form books, and in various versions of *Every Man His Own Lawyer*, or books with similar titles, which sold thousands of copies in America. Using these books, laymen could make deeds on their own.¹¹

III. Origin of Use of the Clauses in Oil and Gas Transactions.

All experienced landmen, brokers and oil and gas attorneys are familiar with the clauses “grants all right title and interest” and “warrants by, through and under Grantor, but not otherwise.” However, not all understand how these clauses became standard in every oil and gas property transaction.

8. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* chapt. 5 (2nd edition 1985).

9. The New York legislature expressly abolished the approaches. N.Y. REAL PROP § 149 (1827) (current version at N.Y. Real Prop. § 241(1909)).

10. 3 AMERICAN LAW OF PROPERTY, 223 (A. James Casner, ed., 1952).

11. FRIEDMAN, *supra* note 8, at 237.

In my experience, the reasons the clauses have become standard differ depending on whether the transaction involves exploratory property versus productive property.

As to exploration property in the United States, oil and gas rights are deemed of little value until there is a related discovery that is determined to be economically developable. Until such a discovery, the oil and gas rights can usually be acquired or leased for little value, and held by the buyer or lessee for exploration or speculation. In areas where exploration might be warranted, such rights or leaseholds are typically acquired by oil and gas land brokers who purchase acreage often in large blocks to sell to oil companies. The broker and company may have an agreement under which the company funds the acquisitions, and/or pays a per acre fee. In some cases, there may be seismic, or exploratory drilling being conducted in the area that could invite competition for acreage, so secrecy as to both the acquisition and who is buying are important to the parties. At the time of the broker's acquisition, due to the fact that the rights are typically of relatively low value, and the need to acquire them quickly before competition arrives, the broker conducts just enough title investigation to identify those who might have a claim to title. Considering that the broker is usually paid by the acre, it is incentivized to acquire leases covering as much property from as many potential claimants as possible, as quickly as possible. For these reasons, the broker is not in a position to make any representation or warranty to its buyer as to the quality or quantity of title, so a quitclaim conveyance is used to transfer the rights from the broker to the buyer. The buyer understands this, and expects nothing more than a quitclaim from the broker. The buyer is also not in a position to do much title due diligence until it decides to drill, a relatively expensive proposition that justifies the expense of thorough title examination. On the other hand, when the buyer acquires from the broker, it expects some assurance that the broker has not encumbered the property, perhaps by conveying a cost free royalty or overriding royalty interest to a third party before the conveyance to the buyer is recorded. For this reason, it is commonplace for the broker to provide in the conveyance that it will protect the buyer from title claims "by, through and under" the broker, but not otherwise (a special warranty).

The above factors explain how quitclaims including a special warranty became standard in transactions involving speculative oil and gas rights, but they do not explain why such clauses are standard in sales of producing oil and gas properties. The factors that led to standardized use in broker transactions do not apply to sales of producing properties. Producing properties have been developed, often at considerable expense. Before

drilling, prudent developers confirm that their property rights are valid by acquiring a comprehensive title opinion from a competent oil and gas title specialist. Title issues identified in the opinion are then resolved using fill-in acquisitions and curative instruments. Considering that title should have been thoroughly scrubbed by the time of the first sale of oil and gas, and that the secrecy and expedience factors in broker acquisitions do not apply to producing property acquisitions, it should be reasonable for buyers of producing properties to expect a full title warranty from their seller. Nevertheless, quitclaims including a special warranty are standard in producing property sales for several reasons.

The producing property seller is usually selling because it is totally exiting ownership positions in the area, and wants assurance that it will not be subject to costly title claims of any kind after the sale. Even though the seller or its predecessors may have scrubbed the title at some time, both the seller and the buyer know that because title issues can be challenging to identify and cure, previously unknown title issues could crop up during or after the sale. Even known potential title issues may have been ignored by the seller or its predecessors as inconsequential or left as “skeletons in the closet” never to be opened. Both parties also understand that a title claim covering producing properties could impact not only the value of producing wells, but the value of future development opportunities. The cost of curing bad title and paying true owners could be significant and even exceed the sale price. Recouping revenue from overpaid non-owners is often impossible after a sale, especially recoupment by a seller that has exited the area. The seller may be planning to invest the sale proceeds on other projects and expects the sale price to remain firm after closing, so it does not expect to be subject to title claims the buyer might uncover, or let out of the closet after the sale. For these reasons, producing property sellers prefer the quitclaim.

The buyer understands that an oil and gas property seller is not going to provide a full warranty, so the buyer accepts a quitclaim. Even if it could get a full title warranty, it may not be prudent for the buyer to rely on assurances of title from the seller, who may not be able to honor them; the seller may have sold all its assets, or otherwise may not be in a financial position to honor the warranty.

Due to the fact that sellers are unwilling to warrant title, and that prudent buyers realize that they should not rely on warranties if given, standard purchase agreements provide that the seller will allow and facilitate the buyer’s evaluation of title before closing. The typical agreement provides that title defects discovered by the buyer shall either be cured before

closing, or the purchase price will be adjusted downward at closing by the value of the defective interest. Considering that the buyer will have evaluated title before closing, it would be understandable for a buyer to accept a quitclaim without a special warranty. Nevertheless, buyers typically ask for a special warranty, and sellers usually provide them. The buyer's reason for asking for a special warranty is that it expects assurance from the seller, as the party that owns and controls the property, that it has not encumbered the property during its watch. This is not asking much of the seller, who is presumed to know what it has or has not done to encumber the property.

IV. Impact of Inclusion of a Special Warranty in a "Right, Title and Interest" Conveyance.

Considering that the grantor prefers using a quitclaim because it offers no warranty of title, the question of whether the inclusion of a special warranty implies something more or changes the instrument's status as a quitclaim needs to be answered. In addressing this question, it is convenient to view the quitclaim as a conveyance that represents and warrants no quantum of interest other than zero. Essentially, the grantor is representing that it owns nothing, and by adding the special warranty, it is guaranteeing title to it (nothing) against those claiming by, through or under grantor. Nevertheless, even though a reasonable person might think that a clause limiting a "warranty to nothing" to claims brought only by a certain class of claimants (those making claims, by through or under grantor) should be considered meaningless surplusage, courts have, as you might guess, pressed to attribute some degree of usefulness to the special warranty in "all right, title and interest" conveyances.

The other possible effect to consider is whether the special warranty resurrects implied warranties that apply in non-quitclaim conveyances.

Following is an analysis of relevant laws and cases under Oklahoma and Texas law dealing with the use of both clauses in the same instrument.

A. Texas

1. Implied Title Warranties in Texas

The Texas Property Code specifies that unless a conveyance expressly provides otherwise, the use of the terms "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies grantor covenants that (1) 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 (2) at the time of the conveyance the estate is free from encumbrances.¹² “An implied covenant under this section may be the basis for a lawsuit as if it had been expressed in the conveyance.”¹³

“The [statutory] covenant against encumbrances is distinct from the warranty of title and protects the grantee against interests in third persons which, though consistent with the fee being in the grantor, will diminish the value of the estate conveyed.”¹⁴ This statute only applies to conveyances by which an estate of inheritance or the fee simple is granted. Therefore, the covenants specified will not be implied from the use of the word “grant” or “convey” in a quitclaim deed.¹⁵ Likewise, the provision has no application to deeds that do not purport to pass any estate of inheritance but merely the respective grantors’ right, title, and interest.¹⁶

The following sections explore the case law in Texas to explain when, a grantor granting only its “right, title and interest” may be held liable for breach of a special warranty of title, when that grantor does not actually own an interest in the assigned property, and concludes that in Texas, whether the inclusion of a special warranty in an “all right, title and interest” conveyance creates something more than quitclaim is determined by the level of specificity in the definition of the conveyed interest.

2. The Special Warranty in Texas

Under Texas law, a warranty deed expressly binds the grantor to defend against title defects created by grantor and all prior titleholders.¹⁷ A special warranty deed limits the warranty of title so that the grantor will warrant to defend title against encumbrances or clouds on the title created by the grantor during its ownership or possession of the property.¹⁸ A grantee relying on a special warranty remains vulnerable to claims by anyone making a claim to the interest by, through, and under owners prior to the grantor in the chain of title or by a stranger in title.¹⁹

In Texas, a covenant of title in a conveyance may either be express or implied from the use of the words “grant” or “convey” in the assigning

12. Tex. Prop. Code Ann. § 5.023(a) (West 1984).

13. *Id.* § 5.023(b).

14. *Natland Corp. v. Baker’s Port, Inc.*, 865 S.W.2d 52, 61 (Tex. App. 1993, writ denied).

15. *Baldwin v. Drew*, 180 S.W. 614, 618 (Tex. App. 1915, no writ).

16. *Renfrow v. Lineberry*, 271 S.W.2d 440, 442 (Tex. Civ. App. 1954, writ ref’d n.r.e.).

17. WILLIAM V. DORSANEO III ET AL., TEXAS LITIGATION GUIDE, §254.02 (1994).

18. *Id.*

19. *Id.*

document.²⁰ However, a grantor may expressly limit a covenant of title by stipulating in the conveyance that the grantor is only bound to defend title against persons claiming “by, through, or under” the grantor.²¹ Such an express limitation of the covenant of title prevents a grantor from breaching its warranty of title, unless the adverse claim of title is asserted by someone “by, through, or under” the grantor.²² “A warranty clause in a conveyance, either general or limited, is no[t] part of the conveyance proper; it neither strengthens, enlarges, nor limits the title conveyed, but is a separate contract on the part of the grantor to pay damages in the event of failure of title.”²³

So, it follows that the quantum of interest conveyed in an “all right, title and interest” conveyance should not be affected by inclusion of the special warranty clause; it would be deemed a quitclaim. However, Texas courts would not necessarily agree where the deed describes the property with more detail.

3. *Warranty Deed vs. Quitclaim Deed*

In Texas, Courts interpret the language in the entire instrument to determine whether it provides a warranty of title, or if it is merely a quitclaim of whatever interest a grantor may own. For example, the words “I hereby grant lot 1” would indicate a deed of property, and the words “I hereby grant all of my right, title and interest in lot 1” would indicate a quitclaim. A warranty deed conveys property, while a quitclaim deed conveys the grantor’s rights in that property, if any.²⁴ When making the determination whether an instrument is a quitclaim or warranty deed, courts look to the parties’ intent as it appears from the language of the instrument

20. *See Fannin Invest. & Dev. Co. v. Neuhaus*, 427 S.W.2d 82 (Tex. Civ. App. 1968, no writ).

21. *Id.* at 88; *also Whitehead v. State*, 724 S.W.2d 111, 112 (Tex. App. 1987, writ ref’d); *James v. Adams*, 64 Tex. 193 (Tex. 1885) (explaining that a limitation of warranty of title that is clearly expressed in the deed will displace the implied covenant and restrict the remedy to the covenant expressed in the deed).

22. *Garrett v. Houston Land & Trust Co.*, 33 S.W.2d 775, 777 (Tex. App. 1930, writ ref’d, n.r.e.); *Sour Lake Co. v. Jackson*, 130 S.W. 662, 663 (Tex. Civ. App. 1910, no writ) (no warranty of title if the outstanding title was not acquired “through or under” the grantor, but rather, adversely to the grantor’s title).

23. *Bond v. Bumpass*, 100 S.W.2d 1047, 1049 (Tex. Civ. App. 1936), (citing *Richardson v. Levi*, 3 S.W. 444, 447 (Tex. 1887)).

24. *Enerlex, Inc. v. Amerada Hess, Inc.*, 302 S.W.3d 351, 354 (Tex. App. 2009, no pet.); *Geodyne Energy Income Production v. The Newton Corporation*, 161 S.W.3d 482, 486 (Tex. 2005) (explaining that a quitclaim deed conveys a grantor’s complete interest or claim in certain real property without warranting or professing that the title is valid).

itself.²⁵ Courts look to whether the language of the instrument, taken as a whole, conveyed the property itself (a warranty deed or special warranty deed) or merely the grantor's rights (a quitclaim deed).²⁶ The controlling factor is not whether the grantor actually owned the title to the conveyed land, but whether the deed purported to convey the property.²⁷ Therefore, a conveyance appearing to provide a warranty of title could be interpreted as a quitclaim of the grantor's rights as opposed to a conveyance of property.

In *Enerlex*, the grantor used a "Mineral Deed" to convey "[a]ll right, title and interest" in property, with the intent to "convey all interest in the said county" whether or not the provided legal description contained the interest.²⁸ The conveyance also contained a general warranty of title.²⁹ Even though the deed contained an express general warranty, the court reasoned it was significant that the grantor did not represent she actually owned any mineral interest by the fact that she made no attempt to quantify that interest; therefore the warranty language did not bar the deed from being considered a quitclaim deed.³⁰ The court held that the language of the deed, when viewed in its entirety, did not purport to convey a specific interest, but broadly conveyed all the grantor's interest whatever it might be, effectively construing it to be a quitclaim deed.³¹ On the other hand, if the property is described in more detail, then courts could interpret it as a property conveyance, not a quitclaim.³² If the conveyance were to be interpreted as a quitclaim and the grantor did not own any interest in the property, the grantor would not be in breach of the special warranty.

25. *Enerlex*, *supra* note 24, at 354 (citing *Winningham v. Dyo*, 48 S.W.2d 600, 603 (Tex. 1932)).

26. *Geodyne*, *supra* note 24, 486 (explaining that the assignment never stated the nature or percentage of the interest that was being conveyed, and was therefore a quitclaim deed); *see also* *Porter v. Wilson*, 389 S.W.2d 650, 654 (Tex. 1965), *Threadgill v. Bickerstaff*, 29 S.W. 757 (Tex. 1895).

27. *Enerlex*, *supra* note 24, at 355.

28. *Id.* at 354.

29. *Id.*

30. *Id.* at 355 (citing *Clark v. Gauntt*, 161 S.W.2d 270, 272 (Tex. 1942)).

31. *Id.*

32. *See generally id. Contra Whitehead*, *supra* note 21, at 113 (holding that a conveyance with a special warranty containing the words "by, through, or under me, but not otherwise" granting specifically described property was a special warranty deed and not a quitclaim deed because it did not contain the words "quitclaim" nor "remise, release, and forever quitclaim..."); *but see* *Cook v. Smith*, 174 S.W. 1094 (Tex. 1915) (holding that the mere use of the term "quitclaim" is not of itself, a conclusive test of its character).

Courts have looked not only to the granting clause and property description to discern its character as a warranty deed or quitclaim deed, but also considered language in the habendum clause.³³

Texas courts have analyzed the distinction between a conveyance of property and a conveyance of whatever rights a grantor has to property (a quitclaim) when determining whether to honor special warranty language in a conveyance.³⁴ In cases wherein courts have construed an instrument employing the words “all my right, title and interest” as one purporting to convey the land itself, they have found some wording in the instrument which evidenced an intention to convey the land itself rather than the right, title and interest of the grantor.³⁵ One court has held that the words “it is my intention to convey ... the real estate” as demonstrating the intent to convey land even though the instrument states that it is a quitclaim of all right, title and interest.³⁶

In *Chesapeake*, lessors leased land to Chesapeake for oil and gas exploration, including a special warranty of title in the lease.³⁷ Chesapeake later discovered that the lessors did not own the leased property.³⁸ The court held, by interpreting the lease as a whole, that granting the oil and gas lease with a special warranty of title was a conveyance of a determinable fee interest in the land, and could not be construed as a quitclaim of the lessors’ right to the property, whatever those rights might be.³⁹ Therefore, Chesapeake was not barred from a claim of breach of the covenant of seisin, where the lessors did not own the leased property.⁴⁰ However, the court did not address the fact that the lessors granted a special warranty to defend title “by, through and under” them, which would have barred the claim for breach of warranty of title.⁴¹

33. *Garrett v. Christopher*, 12 S.W.67 (Tex. 1889) (use of the word “premises” in the habendum clause of a deed otherwise a quitclaim will enlarge its effect into that of a deed).

34. *See generally Enerlex*, *supra* note 23, at 354; *Chesapeake Exploration, L.L.C. v. Dallas Parkinsonism Soc’y, Inc.*, No. 07-10-0397-CV, 2011 Tex. App. LEXIS 6813 (Tex. App. Aug. 24, 2011, no pet.).

35. *Porter*, *supra* note 26, at 655.

36. *See generally Cook v. Smith*, 174 S.W. 1094 (Tex. 1915).

37. *Chesapeake*, *supra* note 34, at *5.

38. *Id.* at *6.

39. *Id.* at *13 (*citing Parker v. Standard Oil Co. of Kansas*, 250 S.W.2d 671, 681 (Tex. Civ. App. 1952, writ ref’d n.r.e.); *Whitehead*, *supra* note 21, at 111; *Van Cleave v. Bell Oil & Gas Co.*, 102 S.W.2d 1103, 1105 (Tex. Civ. App. 1937, writ dism’d w.o.j.); *Huling v. Moore*, 194 S.W. 188, 192 (Tex. Civ. App. 1917, writ ref’d)).

40. *Chesapeake*, *supra* note 34, at *14.

41. *See generally id.* (Reversing and remanding to the trial court.).

4. Analysis and Conclusions - Texas

It appears that a court in Texas should hold that a conveyance of “all right, title and interest” in property with a special warranty and no specific description of the interest conveyed in such property is a quitclaim of whatever interest the grantor has in that property, without any warranty that the grantor actually owns an interest in that property.⁴² Presumably, the grantor would not be liable for a breach of the special warranty if it did not own any interest at the time of the conveyance even if it previously conveyed that interest to a different party. Since the definition of the interest or rights would be so unspecific and broad, the court would treat it as a quitclaim of whatever interest, if any, that the grantor owned at the time of the conveyance.

If the “all right, title and interest” conveyance contains a more specific property or interest description, it could be constituted as more than a quitclaim. The limiting special warranty language would protect the grantor as long as the interest was claimed through a prior owner in the chain of title, and so long as the grantor never stipulated that it owned perfect title at the time of the conveyance.⁴³ However, if the grantor made a previous conveyance of part of its interest in sufficiently described property to one party, and under the subject deed it is conveying the remaining interest to a second party in a conveyance including a specific description of a larger interest in the property than the grantor owns at the time of the second conveyance, the specific description of the interest could lead a court to believe the parties intended the conveyance to convey property, and therefore the special warranty to defend title “by, through, and under” the grantor would be applicable to those described interests; the grantor previously conveyed a portion of the described interest to a different party, so the grantee of the second conveyance could have a claim for breach the special warranty of title.

It appears that courts in Texas will interpret the conveyance of “all right, title and interest” based on the level of specificity of the description of the conveyed interest in the conveyance or the PSA (if effectively referenced in the conveyance). The broader and less specific the definition of the interest, the more likely the court will construe it to be a mere quitclaim of the grantor’s right, if any, to the property, rendering any special warranty language useless to the grantee. A more narrow and specific definition of the conveyed interest would allow the court to honor the special warranty

42. See generally *Enerlex*, *supra* note 24, at 351.

43. *McIntyre v. De Long*, 8 S.W. 622, 623 (1888).

language and interpret it as a conveyance of that specific interest in property.

B. Oklahoma

1. Implied Title Warranties and Deed Construction in Oklahoma

Under Oklahoma law, a deed that substantially complies with the statutory requirements implicitly conveys covenants of title.⁴⁴ The covenants are the covenant of seisin, the covenant of right to convey, the covenant against encumbrances, the covenant of warranty and the covenant of quiet enjoyment.⁴⁵ Further, unless limited by express words, a general warranty deed will convey an estate in fee simple and of inheritance.⁴⁶

Oklahoma courts have previously noted that the granting clause is the most essential element of the deed.⁴⁷ The granting clause contains the words of transfer, and without it, the deed is ineffective to convey real property. Additionally, the habendum clause is not absolutely necessary to make a deed effective.⁴⁸ The habendum clause merely defines the extent of ownership in the thing granted to be held and enjoyed by the grantee. In Oklahoma, if the granting clause and the habendum clause are so incompatible as to be irreconcilable, the granting clause will control and the habendum clause will be rejected as void.⁴⁹ This rule only applies when the habendum clause attempts to enlarge the estate described in the granting clause. Accordingly, a reservation may be inserted into a deed following the granting clause to *diminish* the interest or estate first described.⁵⁰

Placing this importance on the language contained in the granting clause is consistent with the language used in the statutory form of the general warranty deed in which the habendum clause contains narrower covenants than implied under the statute.⁵¹ In the granting clause of this form, grantors “grant, bargain, sell and convey” the real property to the grantee, “and warrant the title to the same,” but the habendum clause provided in the

44. OKLA. STAT. ANN. Tit. 16 §19 (2016).

45. *Id.*

46. *Id.* § 29.

47. *Reed v. Whitney*, 169 P.2d 187 (Okla. 1945).

48. *Id.*

49. *Id.*

50. *See Colonial Royalties Co. v. Keener*, 266 P.2d 467 (Okla. 1954) (“Where the intention of the parties is clearly expressed by an explanatory clause incorporated in the habendum clause, or in a separate clause, the latter may control over the granting clause of the deed.”).

51. OKLA. STAT. ANN. tit. 16 §40 (2016).

statutory warranty deed only reflects a covenant against encumbrances.⁵² As mentioned earlier, in Oklahoma a deed in substantial compliance with the minimal language provided by the statutory form of a warranty deed contains the usual covenants of title.

2. Background

There is little Oklahoma case law discussing special warranties, but from the limited authority, it appears that like those in Texas, Oklahoma courts will look at the intent of the parties from the language in the entire deed to determine whether it is a conveyance of property, or a quitclaim.

3. Discussion

As with Texas, in Oklahoma, a special warranty is one that limits the covenants offered therein to particular persons or claims.⁵³ Typically, a special warranty deed contains all of the covenants of title which a general warranty deed contains, but limits the grantor's liability to only those problems arising as a result of the grantor's ownership.⁵⁴ In Oklahoma cases, the language that qualifies a special warranty as such does not appear to be defined. However, cases show that it typically contains all of the covenants of title that a general warranty contains, but the clause which states "and warrants title to the same" is replaced with "and warrants the title to the same, against any challenge claiming by, through or under, the grantor, but not otherwise," or similar language. Under a special warranty deed, the grantor will not be liable for any defects in title which occurred prior to the grantor's ownership of title.⁵⁵

In contrast, the quitclaim deed conveys whatever right, title, and interest the grantor may have in the real property stated therein at the time of the conveyance.⁵⁶ The grantor under a quitclaim deed does not offer any of the covenants of title associated with a general warranty deed. The quitclaim deed does not transfer the real property itself to the grantee, but merely the grantor's "right, title, and interest" in and to such real property.⁵⁷ Because of this, quitclaims generally include a broad, non-specific property

52. *Id.* (The habendum clause in the statutory form of warranty deed states that the real property is to be held "free, clear and discharged of and from all former grants, charges, taxes, judgments, mortgages and other liens and encumbrances of whatsoever nature.").

53. *Whayne v. McBirney*, 157 P.2d 161 (Okla. 1945).

54. *Id.*

55. *Id.*

56. *First Nat'l Bank & Trust Co. of Tulsa v. Price*, 228 P.2d 623 (Okla. 1951).

57. *Schuman v. McLain*, 61 P.2d 226, 227-28 (Okla. 1936).

description and if the grantor does not own an estate in the real property, none is conveyed. Essentially, the use of a quitclaim deed can be regarded as notice to the grantee that there may be outstanding equities against the grantor's title.⁵⁸ If a grantor who executes a quitclaim deed intends to reserve or retain any interest in realty, such reservation should be expressly stated in the deed.⁵⁹

Oklahoma courts generally hold that the intention of the parties as expressed in a deed is determined from the entire instrument and, where the intention is clearly expressed by an explanatory clause, the latter may control over the granting clause of the deed.⁶⁰ Whether a deed is ambiguous is a question of law, and the test for ambiguity is whether the language is "susceptible to two interpretations on its face . . . from the standpoint of a reasonably prudent lay man, not from that of a lawyer."⁶¹ Where a written instrument is not ambiguous, the courts will determine the intent of the parties without resorting to extrinsic evidence; however, when ambiguity arises the intentions of the parties may be ascertained by circumstances surrounding the language.⁶²

Though there may be a lack of case law in Oklahoma dealing with special warranties in quitclaim deeds, there are cases involving deed construction that shed some light on how Oklahoma courts might deal with such instruments.

One particular case illustrates the straightforward application of a quitclaim deed. In *Rox Petroleum*, the grantor conveyed a 1/3 mineral interest for a term of ten years and so long after as oil and gas is produced.⁶³ In subsequent quitclaim deeds, the grantor conveyed the property "except all oil, gas and other minerals, all that portion of such mineral now owned by the grantors being reserved by them." These deeds also contained a description of the property referred to. When the plaintiff sought to quiet title in the minerals arguing that the quitclaim deed excepted the possibility of reverter, the court held that the grantors clearly expressed their intent to reserve from the grant all their interest in the conveyed minerals, and that

58. *See id.*

59. *Anchor Stone & Material Co. v. Pollok*, 344 P.2d 559, 561 (Okla. 1959).

60. *See Price*, *supra* note 56, at 623; *see also Messner v. Moorehead*, 787 P.2d 1270, 1271 (Okla. 1990).

61. *American Economy Ins. Co. v. Bogdahn*, 89 P.3d 1051, 1054 (Okla. 2004) (quoting *Cranfill v. Aetna Life Ins. Co.*, 49 P.3d 703, 706 (Okla. 2002)).

62. *Bryan v. Everett*, 365 P.2d 146 (Okla. 1961).

63. *Rox Petroleum, L.L.C. v. New Dominion, L.L.C.*, 184 P.3d 502 (Okla. 2008).

this reservation included the possibility of reverter previously reserved.⁶⁴ This case shows that even though a quitclaim purports to convey all right, title, and interest, a reservation in a quitclaim deed will be upheld by the court.

Another such case is *Young v. Vermillion*, where grantor Fields conveyed property to Young via quitclaim deed, reserving an undivided one-half interest in the oil and gas and other minerals underlying a certain tract of land.⁶⁵ At the time of the conveyance, Fields had already conveyed 7/8th of the minerals to a third party, leaving Fields with only a 1/8th interest. Several years later, Fields conveyed an undivided 1/8th interest to Wheeler.⁶⁶ Young brought suit claiming ownership of the minerals, asserting that by the time Fields conveyed to Wheeler, he had already divested himself of all his ownership in the property because the quitclaim language covered everything Fields owned, and in order to reserve minerals one must expressly limit the granting language. The court first pointed out that the quitclaim to Young did not purport to convey a mineral interest and since a quitclaim deed conveys only the interest the grantor holds in the property described in the deed, the language of the reservations would be surplusage if it were not intended to retain one-half of the minerals.⁶⁷ The court then held that Fields had no duty to notify Young of any interest he did not own, and that the reservation had the effect of reserving one-half of the mineral interest in Fields regardless of the amount he actually owned at the time of the conveyance.⁶⁸

Another Oklahoma case illustrates what happens when a deed contains quitclaim as well as warranty language. In *Price*, the grantor, Price, conveyed a 1/4 interest in the oil, gas, and minerals on the land through a deed that specifically stated “quitclaim, bargain, sell, convey, and set over.”⁶⁹ Additionally, the deed described the land to be conveyed and included a clause stating that the intent was to convey the lands acquired by the grantor’s husband in a conveyance on September 15, 1938.⁷⁰ It was later discovered that Price’s husband had conveyed an undivided 1/8 and 6/200 to other persons before Price’s conveyance and the husband’s brother had conveyed another 1/4 interest to Price after Price’s conveyance. Upon

64. *Id.*

65. 992 P.2d 917, 919 (Okla. 1999).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Price*, *supra* note 56, at 625.

70. *Id.*

learning this, the grantee's claimed that they were entitled to the full 1/4 mineral interest as was in the deed and that the 1/4 interest conveyed to Price by her brother in law vested in them under the provisions of the original deed.⁷¹ The court determined that (1) only the interest the grantor owned at the time of the deed was conveyed and did not include the 1/4 later conveyed to Price and (2) the fact that Price thought she was conveyed a full 1/4 interest was immaterial by virtue of the quitclaim deed.⁷² Even though the deed contained warranty language, the court determined that the word "quitclaim," along with the specificity in describing the land and the purpose of the deed clearly showed the intention of the parties.

In *Blythe v. Hines*, the grantor used a special warranty deed to "grant, bargain, sell and convey," "all her right, title and interest," "in and to the surface estate."⁷³ The plaintiffs brought an action to quiet title to the sand, gravel, limestone, and rock in, upon and underlying the questioned property. The court held that the grant of the "surface estate" with no reservations of minerals was ambiguous. However, the court notably did not address whether the phrase "all her right, title and interest" was indicative of a possible quitclaim deed, or how this affected the special warranty. Instead, the case was reversed and remanded to determine what the parties intended "surface" to actually mean.⁷⁴

In *St. Louis-San Francisco Ry. Co. v. Humphrey*, the court took a different approach in construing the deed at issue. In this case, the deed said that the grantor "bargain[ed], s[old] and convey[ed]," "for the right of way of," a railroad company, "the following real property," followed by a description of the property.⁷⁵ The issue was whether the deed conveyed a right-of-way only, or an estate in fee simple in the strip of land involved. The court looked to controlling case law and applied a grammatical test to the pertinent language to find that "the direct object of the verbs of conveyance is not 'the right of way,'" but was the strip of land described.⁷⁶ Additionally, the court noted that "every estate in land which shall be granted, conveyed or demised . . . shall be deemed an estate in fee simple . . . unless limited by express words." Finding no such words of limitation,

71. *Id.*

72. *See id.*

73. 577 P.2d 1268, 1270 (Okla. 1977).

74. *Id.*

75. *St. Louis-San Francisco Ry. Co. v. Humphrey*, 446 P.2d 271, 272 (Okla. 1968).

76. *Id.* at 276.

and following controlling case law, the court held the estate conveyed was in fee simple.⁷⁷

Further, the Oklahoma courts require that the description of the premises conveyed be so certain and definite as to enable the land to be identified. In *Plano Petroleum, LLC v. GHK Exploration, L.P.*, Eldrige and Weems assigned “all right, title and interest in and to that certain wellbore, all leasehold” to Clydesdale Energy.⁷⁸ About six years later, Clydesdale assigned its interest to Plano using the same language but adding a legal description of the lease. Two months later, the original grantors, Eldrige and Weems, assigned “all of Assignor’s rights, titles, and interest” to GHK.⁷⁹ This assignment included a description of the lease, but excepted from the lease “those rights thereunder pertaining to the well bore.” The court held that the term “all leasehold” with no accompanying legal description of the leased premises was ambiguous and required extrinsic evidence. The court held that the requirement of a legal description “is more than a legal nicety, it is essential for recording in the county clerk’s office and for establishing a chain of title,” and that “a deed that does not sufficiently describe the property interest conveyed is void on its face.”⁸⁰ However, the court notably did not address the issue surrounding the quitclaim language used in the deed. The case was reversed and remanded to determine what the term “all leasehold” was intended to mean.⁸¹

In *Boswell Energy Corp. v. Arrowhead Homes*, the McCalebs conveyed two parcels to Arrowhead via warranty deeds, which had “less and except all mineral interest” typed after the warranty language.⁸² The McCalebs subsequently leased the minerals, which were later assigned to Boswell. Arrowhead also conveyed their interest away, which subsequently was acquired by Petrocorp.⁸³ Both Petrocorp and Boswell claimed ownership of the minerals. Boswell claimed the deeds unambiguously reserved the minerals to the McCalebs, while Petrocorp argued that the placement of the exception in the warranty clause rather than the granting clause served to except the minerals from the covenant of warranty.⁸⁴ Finding that the deeds were subject to two possible interpretations, the case was initially remanded

77. *Id.*

78. 250 P.3d 328, 329 (Okla. 2011).

79. *Id.*

80. *Id.* at 331-32.

81. *Id.*

82. 99 P.3d 1229, 1230 (Okla. Civ. App. 2004).

83. *Id.*

84. *Id.*

to resolve the ambiguity. On remand, the trial court found that the McCalebs reserved the minerals themselves, quieting title to the minerals in the McCalebs and the leasehold in Boswell.⁸⁵ The Court of Civil Appeals affirmed, noting that the controlling factor was the intent of the parties, not the location of the exception.⁸⁶

4. Analysis and Conclusions – Oklahoma

How Oklahoma courts construe deeds seems to turn on the specificity included in the conveying instrument. Regardless of the words used, the courts will nevertheless look to the intent of the parties. Where an instrument conveys “all right, title and interest,” with no special warranty language the courts will hold that the grantor quitclaimed the entire described interest with the exception of any reservations included in the deed.

When a conveyance contains words of special warranty but also purporting to convey “all right, title and interest,” things become less clear. In *Price*, the court held the quitclaim deed with warranty language was nevertheless a quitclaim deed due to the specific property description and the intent clause at the bottom of the deed that clarified the intent to convey all interest acquired from another deed. However, in *Blythe*, the deed was specifically a special warranty deed with quitclaim language, but the court failed to even address this issue, instead holding that the description of the land was ambiguous. A lack of case law concerning special warranties makes it difficult to predict which way the Oklahoma courts would rule on this issue.

In the case of warranty deeds, the courts require more specificity and look to words of limitation to decide what exactly was conveyed. For example in *St. Louis*, the lack of any words of limitation led the court to find that the land was conveyed in fee-simple, even though the deed said the land was only to be used for a right of way. Additionally, in *Boswell* the deed expressly contained reservations of mineral interests. The court held that these reservations were unambiguous despite the fact that they were placed in the warranty clause rather than the granting clause, and found that the deed reserved the minerals in the grantor, rather than excepted them from the warranty.

It appears that Oklahoma courts will interpret the conveyance of “all right, title and interest” based on how specific the instrument is concerning

85. *Id.* at 1233.

86. *Id.*

the conveyed interest. While there is a lack of case law on special warranties, ideally such a warranty would contain a legal description as well as a description of the particular interest being conveyed. Similarly, the courts require warranty deeds to state the interest conveyed, as well as any limitations, reservations, or exceptions in order for them to be enforceable. In contrast, all that is required of quitclaim deeds is the terms “quitclaim,” or “all right, title and interest.” It follows that an Oklahoma court would use these same measures where a conveyance with a special warranty contains quitclaim language. If the instrument contains language that does not specify the type of interest being conveyed, they will likely construe it as a mere quitclaim of interests. On the other hand, if there are words describing the specific interest being conveyed, the courts will likely deem the instrument a special warranty deed.

V. Avoiding Unwanted Results by Careful Drafting.

A. Carefully Defining What Property is Conveyed and Reserved.

The granting clause description of the interest (in the case of a quitclaim) in property conveyed should be clear and consistent with the description in the property exhibit. The grantee should also want the description of the property in the warranty clause to match the description in the granting clause and exhibit. The grantor should make sure that anything not being conveyed is expressly reserved. For example, if the granting clause and warranty clause refer to “leases described on Exhibit A,” and there is a column in this exhibit that specifies depth limitations, the assignor needs to clarify in the body of the conveyance that excluded depths described in the exhibit are being reserved.

B. Warranting to Specified Working and Net Revenue Interests.

If the conveyance grants all of the grantor’s right, title and interest, the grantee must make sure that the special warranty guarantees a specified quantum of interest in particular lands, leases, depths and/or wells described. A warranty of title with respect to a conveyance of merely all or a specified portion of the grantor’s right, title and interest in a property is essentially worthless, because it is impossible to breach such a warranty.

To avoid this result, the grantee should make sure that the warranty clause refers to the interests represented by the grantor in an exhibit to the conveyance. Alternatively, the granting language in the conveyance can be bifurcated into two parts – one part conveying the specified represented

interests, and another conveying any remaining interest of the grantor in the more broadly defined property.

C. Making the Conveyance “Subject To” Certain Agreements and Encumbrances.

When granting a special warranty, the grantor should not only consider whether it has previously conveyed an interest in the property, such as a royalty or overriding royalty interest; it should be careful to clarify that the grantee is aware of and receiving the property subject to other arrangements affecting the property that could be considered encumbrances or otherwise affect the grantee’s working and net revenue interests, and thereby be grounds for a claim of breach of the special warranty. For example, after closing of the transaction, a grantee might be in a position to successfully claim that an undisclosed agreement including but not limited to any of the following agreements encumbers that property in breach of the special warranty: joint operating agreements, easements or right of ways, farmout agreements, area of mutual interest agreements, gathering, transportation, production, sale or processing agreements, long term equipment leases, joint exploration or development agreements, gas balancing agreements, preferential rights, first refusal or drag along agreements, or pooling or unit agreements.⁸⁷ To avoid such a result, the grantor should clarify that the special warranty does not guarantee against claims arising under such agreements, perhaps listing them in the conveyance as permitted encumbrances, or incorporating them as such by reference to a purchase and sale agreement.

D. Specifying What is Warranted.

The drafter should be careful to specify what is being warranted. Is it more than the title that is being warranted? For example, in Oklahoma the statutory implied warranty includes five covenants. If the special warranty clause is drafted to be nothing more than limiting the enforcement of these covenants against claims by, through and under the grantor, then more than title is warranted. If the grantor intends the special warranty to cover less than the five covenants, it needs to so specify. Without specification, the

87. For discussion of how these agreements might encumber the property, and the effect of including “subject to” language in the conveyance, see Milam Randolph Pharo and Sam Niebrugge, *Industry Agreement Affecting Record Title*, 52 Rocky Mtn. Min. L. Inst. 2015.

scope of the warranty can be subject to interpretations that do not meet the grantor's expectations.⁸⁸

88. *Wagner vs. Cutler*, 232 Mont. 322 (1988) (interpreting a Special Warranty Deed to include a warranty as to condition of the property, even though applicable statutory warranty implied no such covenant).