Texas Supreme Court Opinion Has Buyers Checking The Language In Their Deeds

By: Robbie S. Morris, GrayReed

In a closely watched case, the Texas Supreme Court (the "Court") held that the special warranty language used in a special warranty deed "qualifies" an implied covenant that the person conveying the land owns what he/she is conveying (this implied covenant is known as the "covenant of seisin"). For buyers, this should be addressed by requiring that the otherwise implied covenant be expressly stated in the deed. The Court handed down its decision on June 19, 2020 (*Chicago Title Insurance Company v. Cochran Investments, Inc.*, No. 18-0676 (Tex. 2020).

First, a simplified recounting of the facts of the case is in order. England and Garza owned land, and had mortgaged the land to EMC. In 2009, England had an involuntary bankruptcy commenced against him. In 2010, EMC foreclosed its lien, and Cochran Investments, Inc. ("Cochran") purchased the land at a foreclosure sale. In 2011, Cochran sold the land to Ayers, and in conjunction with that sale, Ayers obtained not only a special warranty deed from Cochran (the fact that it was a special warranty deed is of particular significance in the instant case), but also an owner's title policy from Chicago Title Insurance Company ("Chicago"). England's bankruptcy trustee sued to set aside the foreclosure sale because it had violated the automatic stay, and Ayers was joined as one of the defendants. Chicago defended Ayers and paid off the bankruptcy trustee, and as Ayers' subrogee, sued Cochran for the purchase price paid by Ayers, plus its attorney's fees. In the lawsuit, Chicago asserted, among other things, a breach of the implied covenant of seisin. The trial court entered judgment for Chicago. On appeal, the 14th Court of Appeals (the "14th") held that because the deed to Ayres "does not represent or claim that Cochran is the owner of the land, it does not imply the covenant of seisin." (*Cochran Investments, Inc. v. Chicago Title Insurance Company*, 550 S.W.3d 196 Tex. App. – Houston [14th Dist.] 2018).

The Court affirmed the decision of the 14th, but its reasoning with respect to the existence (or not) of an implied covenant of seisin while nuanced, was nevertheless different. This is understandable because the sum and substance of the 14th's contorted logic was that "…a covenant is implied in a real-property [*sic*] conveyance only if it appears from the deed's express terms that the parties clearly contemplated the covenant to be implied…" (emphasis added) – a seemingly contradictory premise.

As previously mentioned, with respect to the conveyance of land, a covenant of seisin is a covenant that the conveying grantor owns the land, both in quantity and quality, which such grantor purports to convey. The Childress case (*Childress v. Siler*, 272 S.W.2d 417 [Civ. App. – Waco 1954, ref. n.r.e.]) has long stood for the proposition that there is a covenant of seisin written into (and thus implied in) every conveyance of land unless the terms of the deed expressly limit the same (this too takes on special significance in the instant case), or where the conveying instrument is a quitclaim deed. In this case, the deed was not a quitclaim deed. Therefore, the question was whether or not Cochran breached the implied covenant of seisin in its deed to Ayers.

The Court side-stepped the issue of squarely deciding whether or not there is an implied covenant of seisin read into every deed (other than a quitclaim deed) stating that "[the Court] need not resolve whether the special warranty deed here implies the covenant of seisin because, even assuming it does, the deed contains a 'qualifying expression[]' that disclaims Cochran's liability for the alleged breach of that covenant here", thus deciding that the special warranty itself, by virtue of the fact that it limited Cochran's warranty to claims made by, through, and under Cochran, but not otherwise, served as the "qualifying expression" necessary to negate the covenant of seisin. The Court also reminded its audience that a warranty in a deed is not a part of the conveyance itself, but is a separate and distinct contractual mechanism whereby a grantor agrees to indemnify a grantee by paying the grantee damages (and interest) in the event there is an impediment to, or failure of, title.

Chicago cogently argued that the warranty of title is indeed distinct from the principle of seisin (*i.e.*, owning the land that the grantor is purporting to convey) and moreover, not only is it separate from the warranty of title, it is a prerequisite to grantor's warranty to defend title against third-party claims. In other words, you don't even get to the issue of limitations on a grantor's warranty if the grantor has breached the covenant of seisin. This is a pretty basic and straight-forward argument which boils down to this – a grantor, whether the grantor is giving a general warranty or a special warranty must, at minimum, own the land the grantor purports to be conveying!

But the Court was not to be dissuaded. The Court determined that Cochran's warranty constituted a "qualifying expression" which cut down any covenant of seisin, and the bankruptcy trustee's suit to set aside the Cochran conveyance to Ayers was a claim on the part of a claimant which arose neither by, through, nor under Cochran. Even more sobering was the fact that the Court also cited a couple of cases from the 1800s which held that when a grantee accepts a special warranty deed, there is a presumption of law that he/she acts upon his/her own knowledge and judgment of the title, and he/she will not be heard to complain that he/she has not acquired perfect title!

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So what's the prospective takeaway? Because special warranty deeds have long been the preferred type of deed used in commercial real estate transactions, something should be done to address the impact of the *Cochran* opinion. Lawyers pride themselves in being able to "draft around" issues, and drafting around "judge-made law" appears to be the order of the day in this circumstance. Practice Tip: In all deeds (just to be safe), but particularly in special warranty deeds, it will become best practice for the drafting lawyer to insert language whereby the grantor expressly covenants that he/she owns the land which he/she is purporting to convey, both in terms of the quantity of the land described therein and the quality of the title set forth therein, and that he/she has good right to convey the same!

Retrospectively, the takeaway is that if the grantee under a special warranty deed is confronted with a failure of title on account of a claimant which is not a claimant by, through, or under such grantee's grantor, such grantee will either be compelled to develop some equitable theory of recovery, or, if the grantee obtained a title policy, make a claim under the policy, whereupon it will become the title insurance company's decision of whether to assert novel equitable claims.

ABOUT THE AUTHOR

Robbie S. Morris, Counsel

With 45 years of legal practice focused on partnering with companies in the real estate industry, Robbie Morris has the experience and know-how to help clients structure real estate deals and solve the numerous problems impacting their businesses.

Board Certified in Commercial Real Estate by the Texas Board of Legal Specialization, his practice is primarily focused on guiding both sellers and buyers through a variety of commercial real estate transactions, farm and ranch transactions and high-end residential transactions. Robbie is a trusted resource for clients of all types and sizes, including publicly-traded corporations, developers, lenders, landowners and entrepreneurs.