CONVEYANCES – RECENT DEVELOPMENTS, DEEDS, RESERVATIONS AND EXCEPTIONS, AND THINGS I HAVE TO LOOK UP EVERY FOUR YEARS

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CONVEYANCES – RECENT DEVELOPMENTS, DEEDS, RESERVATIONS AND EXCEPTIONS, AND THINGS I HAVE TO LOOK UP EVERY FOUR YEARS

I. INTRODUCTION

This article is intended to provide (i) an overview of a recent problematic appeals court case related to conveyances, (ii) a brief overview of commonly used deeds, (iii) protective provisions which may be incorporated into deeds to limit grantor liability, (iv) drafting tips related to establishing reservations from conveyances, and (v) clarity as to the difference between quitclaim deeds and deeds without warranty, whether landlords are entitled to unreasonably withhold the consent to an assignment of a lease, and as whether a right of first refusal may be circumvented by the conveyance of interests in an owner entity.

II. RECENT DEVELOPMENTS: COCHRAN INVESTMENTS, INC. v. CHICAGO TITLE INSURANCE COMPANY

It has long been settled law that "the covenants of seizen and of good right to convey are synonymous, and in the absence of any qualifying expressions […], are read into every conveyance of land or an interest of land, except in quitclaim deeds." *Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.). Under this rule, a conveyance by special warranty deed would include an implied covenant of seizen, which, upon a failure of title in the estate purported to be conveyed via special warranty deed, would entitle the grantee to a remedy against its grantor.

However, recently in June of 2018, in *Cochran Investments, Inc. v. Chicago Title Ins. Co.,* 550 S.W.3d 196, 200 (Tex. App.—Houston [14th Dist.] 2018, pet. denied), the 14th Court of Appeals held that a deed implies the covenant of seizen only if the grant includes in the conveyance a representation or claim of ownership, and that, by virtue, the special warranty deed in question did not include an implied covenant of seizen. *Id.*

In Cochran, a duplex was owned jointly by two individuals in equal shares, subject to a purchase money mortgage held by EMC. William England, one of the two owners of the duplex, conveyed his ½ ownership interest in the duplex to the other owner in September of 2009. A bankruptcy proceeding was commenced against England in December 2009, and the England transfer was set aside as a fraudulent transfer. EMC foreclosed its lien on the duplex in December of 2010, and the duplex was sold to Cochran. Cochran conveyed the duplex to Ayers in June 2011 pursuant to a residential purchase and sale agreement, and title was conveyed via special warranty deed, the relevant provisions of which mimicked the state bar form of special warranty deed.

England's bankruptcy trustee sued EMC and Cochran in June 2011, claiming the foreclosure sale and Cochran's purchase of the duplex violated the bankruptcy stay. Ayers was impleaded as a third-party, and submitted the suit as a title insurance claim to Chicago Title, whom assumed Ayers' defense in the proceeding. Chicago Title agreed to pay both the bankruptcy trustee and the owner of the other ½ interest in the duplex in exchange for transferring their respective interests to Ayers. On motion by the bankruptcy trustee, the bankruptcy court dismissed the suit in September 2012. Chicago Title, as subrogee of Ayers, brought an action against Cochran for breach of the covenant of seisin, among other claims. In a bench trial, the 80th District Court determined that the vendor had breached the covenant of seizen, assessing damages against Cochran, and Cochran appealed, alleging, among other things, that the implied covenant of seizen was inapplicable to a special warranty deed.

The 14th Court of Appeals, citing precedent on the applicability of implied covenants generally, and seeming to ignore the longstanding rule in *Childress* that "the covenants of seizen and of good right to convey are synonymous, and in the absence of any qualifying expressions […], are read into every conveyance of land or an interest of land, except in quitclaim deeds", held that "to determine whether a conveyance implies the covenant of seisin, courts analyze the conveyance's language", and that "a deed implies the covenant of seizen if the grantor includes in the conveyance a representation or claim of ownership. *Id* at 202.

In its analysis, the 14th Court appears to have confused prior courts' analysis as to whether a particular instrument of conveyance was a warranty deed or a quitclaim deed, which involved an interpretation of the intent and language of the parties and therefore whether the implied covenant of seizen was applicable. *See Cochran at 203, citing Peck v. Hensley*, 20 Tex. 673, 677 (Tex. 1858); *Johns v. Karam Dev., Inc.*, 381 S.W.2d 933, 936 (Tex. Civ. App.—El Paso 1964, writ ref'd n.r.e.); *Childress*, 272 S.W.2d at 420. As pled by Chicago, however, the interpretation language was employed by those courts only in the analysis used to determine whether the conveyance was a warranty deed, and that upon such finding, precedent states that the implied covenant of seizen is included in such warranty deed.

Chicago Title appealed the 14th Court's decision, challenging the ruling regarding the covenant of seizen, among other issues. The Texas Land Title Association filed an Amicus Curae with the Supreme Court on behalf of the 15,000+ professionals in the title insurance

industry in Texas, warning that the 14th Court's decision effectively turns a special warranty deed into a quitclaim deed, and could affect thousands of real estate transactions every year which utilize the special warranty deed, which is generally used by governmental entities, lenders, creditors, and commercially property owners. The Texas Supreme Court denied review on February 8, 2019. Chicago Title filed a motion for rehearing on March 12, 2019. The Texas Supreme Court requested a response from Cochran, which was submitted on May 13th. The motion for rehearing is still pending before the Texas Supreme Court.

III. DIFFERENT TYPES COMMONLY USED OF DEEDS AND ONE SPECIAL DEED

A. Conveyances Generally; Implied Warranties

To be an effective conveyance of real property, an instrument is not required to contain specific formal provisions. Under Texas law, a "deed" is a written instrument that purports to convey an interest in real property from one individual or entity to another. *See Johnson v. Cherry*, 726 S.W.2d 4, 5-6 (Tex. 1987). If a written instrument identifies a grantor and grantee, signifies an intent to transfer a real property interest by operative words of grant, contains a sufficient description of the real property interest being conveyed, and is signed by the grantor, such instrument is recognized by Texas law as a deed that effects a legal conveyance. *See Green v. Cannon, 33 S.W.3d* 855, 858 (Tex. App.—Houston [14th Dist.] 2000, pet. denied).

Certain deeds in Texas generally contain specific warranties and covenants that are implied by operation of law (with some exceptions, as discussed herein). A few of the most common warranties implied by law are discussed individually below.

1. <u>"Grant" or "Convey" Language Under Texas Property Code Section 5.023</u>

Under Section 5.023 of the Texas Property Code, the use of the word "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies that the grantor and the grantor's heirs covenant to the grantee that the grantor has not conveyed the estate or any interest therein to any person other than the grantee, and that at the time of the conveyance, the estate is free from encumbrances. TEX. PROP. CODE ANN. § 5.023 (West). This statutory covenant is separate and distinct from the title warranty of the deed, and protects the grantee against third-party claims to encumbrances on the conveyed property which do not implicate the warranty of title. *See Natland Corp. v. Baker's Port, Inc.,* 865 S.W. 2d 52, 61 (Tex. App.—Corpus Christi 1993, writ denied).

2. <u>Covenant of Seizen/Covenant of Good Right to Convey</u>

Any conveyance of real property, except when conveyed via quitclaim deed or when the conveyance is expressly qualified, includes the implied covenant of seizen and good right to convey, which are synonymous. *See Childress v. Siler*, 272 S.W.2d 417, 420 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.). "The implied covenant of seizen is an assurance to the grantee that the grantor actually owned the property being conveyed, in the quantity and quality which he purports to convey, and is breached if the grantor does not own the estate that he undertakes to convey." *Jackson v. Wildflower Prod. Co.*, 505 S.W.3d 80, 89 12 (Tex. App.—Amarillo 2016, pet. denied). Note, however, that as discussed above, a recent decision from the 14th Court of Appeals, that is currently pending rehearing by the Texas Supreme Court has strayed from existing appellate court precedent regarding the implied covenant of seizen' applicability in the context of a special warranty deed.

3. <u>Implied Warranty of Habitability; Good and Workmanlike Construction</u>

Under Texas law, there are two special warranties implied at common law that, unless expressly disclaimed, generally apply to the conveyance of a new home by a homebuilder. These implied warranties do not apply in the commercial context, nor in the re-conveyance of a residence that is no longer new.

The implied warranty of habitability protects the purchaser of a new home from conditions that are dangerous, hazardous, or detrimental to life, health, or safety, by requiring a homebuilder to convey a structure that is safe, sanitary, and fit for human habitation. *See Centex Homes v. Buecher,* 95 S.W.3d 266, 273 (Tex. 2002). This warranty can be waived, but only to the extent that the homebuilder adequately discloses the defects in the structure, and does not apply to patent defects that are disclosed to or known by the purchaser. *Id.*

Additionally, a contractor who constructs a home and conveys it with real property to a buyer makes an implied warranty that the house was constructed in a good and workmanlike manner and is suitable for human habitation. *Id.* The warranty of good workmanlike construction requires the builder to construct a residence as a generally-proficient builder engaged in similar work under similar circumstances would. *Id.* This warranty applies to the conveyance of a new home if the agreement does not provide enough detail as to the performance of the builder, unless the parties expressly disclaim the warranty. *Id.* This warranty is separate and distinct from the warranty of habitability, discussed above, and can be held to be

breached even if a residence is deemed habitable. *See Evans v. J. Stile, Inc.,* 689 S.W.2d 399, 400 (Tex. 1985).

B. General Warranty Deeds

A "general warranty deed" is a deed which contains an express guaranty or assurance of title. *See, e.g., Davis v. Andrews,* 361 S.W.2d 419, 421 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.). "A general warranty deed expressly binds the grantor to defend against title defects created by himself and all prior titleholders." *Munawar v. Cadle Co.*, 2 S.W.3d 12, 16 (Tex. App.—Corpus Christi 1999, pet. denied). Generally speaking, general warranty deeds are more commonly seen in residential and farm and ranch real estate transactions between individuals, and are generally less common in the commercial context, where a special warranty deed is typically used. This is due to the fact that in a commercial transaction, both parties are typically represented by counsel, engage in more extensive due diligence activities (such as title review, surveying, and physical property inspection), and that the entities or individuals conveying the property typically want to reduce potential exposure due to the higher risk associated with the larger transaction size.

C. Special Warranty Deeds

A "special warranty deed" limits the express guaranty found in a general warranty deed by adding the phrase "by, through, or under the grantor but not otherwise", such that the grantor only warrants to defend title against title defects arising from grantor's acts and third parties claiming under the grantor. *See Id.* When a special warranty deed is used, the grantee has protection from the grantor for title defects and encumbrances created by the grantor, but has no protection from the grantor for those created by a prior owner or third-party claiming title under one of grantor's predecessors in title, and would only be able to recover against an applicable grantor's predecessor's warranty of title in the event of a failure of title that does not originate from the grantor.

Note, however, that although a special warranty limits the grantor's duty to defend against claims of defect of title to those that arise "by, under, or through" the grantor, until the *Cochran* decision, a grantee receiving title through a special warranty deed would still have a remedy under the implied covenant of seizen in the event that title failed due the grantor not owning it at the time of conveyance, regardless of whether such failure of title arose through the grantor's action or those of a previous owner or unrelated third party. *See Chesapeake Exploration, L.L.C.*, 2011 WL 3717082 at *4-5. Depending on the Texas Supreme Court's ultimate decision on *Cochran,* however, this may no longer be the case, which would mark a watershed change in long-recognized Texas law.

D. Deeds Without Warranty

A "deed without warranty" is not common in other states, but is similar to a quitclaim deed in that the seller is not liable for title defects, but, unlike a quitclaim deed, operates as an actual conveyance. A deed without warranty uses effective conveyance language, but does not include an express warranty of title, and expressly disclaims implied warranties, including those that arise from common law and those implied statutorily, including Section 5.023 of the Texas Property Code.. The following language is taken from a form of deed without warranty that we use from time to time:

> "provided, however that Grantor does not warrant [his/her/its] title to the property and the conveyance is made without warranty of title, whether express or implied. Grantor expressly disclaims, excepts, and excludes any and all warranties of title or otherwise from this conveyance, including, without limitation, any warranties arising under common law or under Section 5.023 of the Texas Property Code (or its successor) or any other statute."

This language can be inserted after the granting language in lieu of the warranty language to create a deed without warranty. Using a deed without warranty should allow the property to continue to be insurable, while also ensuring that the grantor will not be liable for any defects in title.

E. Quitclaim Deeds

A "quitclaim deed" is an instrument which only purports to convey the grantor's right, title, and interest in property, if any. *See Cook v. Smith*, 107 Tex. 119, 174 S.W. 1094, 1095 (Tex. 1915). In using a quitclaim deed, the grantor makes no covenant of seizen or representation regarding title. *Jackson v. Wildflower Prod. Co., Inc.*, 505 S.W.3d 80, 90 (Tex. App.—Amarillo 2016, pet. denied). *Id.* Use of a quitclaim deed only operates as a conveyance if title in the grantor can be shown. *Id.* "If, when taken as a whole, the instrument discloses a purpose to convey the property itself, and not merely a transfer of the grantor's interest, it will be given the effect of a deed, even though it may have some characteristics of a quitclaim. Conversely, if the instrument, taken as a whole, indicates the grantor's intent to merely transfer whatever interest the grantor may own, it will be treated as a quitclaim deed." *Id.* A grantee claiming title to property under a quitclaim deed is charged with notice of defects in the title, and cannot

be a bona fide purchaser. *See Bright v. Johnson,* 302 S.W.3d 483, 491 (Tex. App.—Eastland 2009, no pet.).

F. Effect of Deeds on Chain of Title and Right to Recover

Under Texas law, a covenant of warranty runs with the land until it is broken. *See Wiggins v. Stephens*, 246 S.W. 84 (Tex. Comm'n App. 1922). Thus, a warranty of title inures to the benefit of subsequent purchasers of the original grantee, and upon a breach of the covenant of warranty, a property owner can pursue a claim against any or all of the warrantors in its chain of title, including its grantor and those under whom its grantor claims. *See Penney v. Woody*, 147 S.W. 872 (Tex. Civ. App.—Amarillo 1912, no writ). Under this rule, even a grantee under a quitclaim deed would be entitled to sue under a covenant of warranty in the deed to its grantor or in one of its grantor's predecessor's deeds, provided the chain of title has not previously been broken. *See Saunders v. Flanniken*, 77 Tex. 662, 665, 14 S.W. 236 (Tex. 1890). Accordingly, although receiving title to property by quitclaim deed, deed without warranty, or special warranty deed may limit your remedies against your grantor, you may be entitled to recover against your grantor's predecessors in title if the claim of superior title existed at the time of such predecessor's conveyance. Note, however, that the measure of damages of the grantee for eviction and breach of warranty is based upon the compensation received by the warrantor(s) pursued by the grantee rather than the amount the grantee paid its grantor for the property. *See Penney v. Woody.*

G. Special Deed Limiting Recovery to Available Insurance Proceeds and Limiting Continuing Warranty (form provided)

It follows that the grantee in a transaction would prefer to receive a deed containing a general warranty of title, while a grantor would prefer to convey by a deed without warranty, a quitclaim deed, or a special warranty deed. In special circumstances, such as when the grantor has significant bargaining power, or when an individual or entity is trying to limit exposure when conveying to an affiliate or a wholly-owned subsidiary, you may consider using a certain special limitations to warranty. Below are a few of these limitations that I have used in specific situations, and attached to this article for reference is a form of warranty deed which includes the special provisions discussed.

1. Warranty Deed Limited to Grantee

Below is a provision is intended to prevent the warranty of title from "running with the land", such that the warranty can only be sued upon by your grantee, but should not give rise to future claims by subsequent vendee's of your client's grantee.

> "Notwithstanding anything herein to the contrary, Grantor's warranty to Grantee herein is for the sole benefit of and personal to Grantee alone and may not be relied upon and/or enforced by any party (including but not limited to Grantee's successors and assigns) other than Grantee herein."

I include this provision in conveyances of property by a client to its wholly-owned subsidiary or affiliate, but depending on the seller's bargaining power, it may be usable in an arms-length transaction.

2. Warranty Deed Limited to Insurance Proceeds

Below is a provision intended to limit the dollar amount of a grantor's exposure in the event of a future warranty claim to proceeds that the grantor is able to obtain under its title policy, rather than to eliminate such exposure altogether.

"Notwithstanding anything herein to the contrary, Grantor's warranty to Grantee is limited to the amount of the coverage available to Grantor under that certain Owner's Policy of Title Insurance [_________________], dated [______________], issued by [_________________]."

This provision can be used in conjunction with the previous limitation, as I tend to do in conveyances to a client's affiliate or wholly-owned subsidiary, or it can be used stand-alone, if the intent is to extend the warranty of title to future vendees, but to continue to limit the exposure to the amount available under the title policy. Use of both special limitations may be preferable in a conveyance to a wholly-owned subsidiary or an affiliate if you anticipate that the property will later be conveyed to another related party, for example.

IV. RESERVATIONS AND EXCEPTIONS

A. Reservations vs. Exceptions.

a. Reservations. Exceptions in deeds and reservations in deeds are not identical concepts in Texas. *Gonzalez v. Janssen*, 553 S.W.3d 633, 638 (Tex. App. 2018). Reservations are made for the benefit of the grantor and create a new interest or right issuing out of the contemplated conveyance in the deed. *Id.*, citing *Klein v. Humble Oil & Refining Co.*, 67 S.W.2d 911, 915 (Tex. Civ. App.—Beaumont 1934). In a reservation the grantor "takes back" some part of the interests

conveyed. *Id.*, citing *Bupp v. Bishop,* No. 04-16-00827-CV, 2018 WL 280408, at 2 (Tex. App.—San Antonio Jan. 3, 2018, pet. filed). In short, "a reservation must always be in favor of and for the benefit of the grantor." *Id.* By way of example, a selling grantor may convey all fee title thereof, but reserve for itself from the conveyance a limited right in the form of an ingress-egress easement, or may convey all of the surface and mineral estate by deed but reserve therefrom a limited royalty interest in the conveyed property.

b. **Exceptions.** Differing from a reservation, an exception is an exclusion of some interest from the contemplated grant. *Id.* Said another way, "[a]n exception in a deed is a clause exempting from the operation of the deed and retaining in the grantor the title to some part of the thing granted, or exempting from the operation of the deed some part of the thing granted the title of which is at the time in another." *Klein*, 67 S.W.2d at 915. So, while a reservation must be in favor the relevant grantor, an exception is a mere exclusion from the purported grant. *Id.* As you likely know, practitioners frequently use the phrase "SAVE AND EXCEPT" to create an exception to the title being conveyed in the deed. By way of example, a selling grantor may use a description of a larger tract to convey some limited acreage therein by describing the larger tract as the conveyed parcel and "save and except" language which excepts the acreage within the larger tract which will not be conveyed.

B. Interpretation of Deeds.

According to the Texas Supreme Court, the "the paramount" goal in construing a deed is "ascertaining and effectuating the parties' intent . . . by conducting a careful and detailed examination of the deed in its entirety." *Wenske v. Ealy*, 521 S.W.3d 791, 792 (Tex. 2017). The court's charge in interpreting a deed is to ascertain the intent of the parties within the four corners of the document. *Gonzalez,* 553 S.W.3d at 638. A court will look within the four corners of a deed to give meaning to all its parts. *Id.* Deeds are construed to confer upon the grantee the greatest estate that the terms of the instrument will allow. *Id.*, citing *Combest v. Mustang Minerals, L.L.C.*, 502 S.W.3d 173, at 180. Further, Texas courts will construe and interpret deeds strictly and against the grantor. *Combest*, 502 S.W.3d at 180.

C. Interpretation of Reservation and Exception Language.

Both reservations and exceptions in deeds should be clear and specific. Texas courts disfavor reservations by implication, so express and clear language regarding any intended reservation is critical. *Id.* In fact, "[a] deed will pass whatever interest the grantor has in the land, unless it contains language showing the intention to grant a lesser estate." *Id.*, citing *Sharp v. Fowler*, 151 Tex. 490, 252 S.W.2d 153, 154 (1952) and *Combest*, 502 S.W.3d at 179. Exceptions are also strictly construed against a grantor, and need to identify with reasonable certainty any property excluded from a larger conveyance. *Id.*, citing *Combest,* 502 S.W.3d at 179–80.

a. **Carefully Craft "Reservation" Language – Use the "Buzz Word".** As a practitioner, extra care to carefully craft reservation and/or exception language should be taken. For example, a recent 2018 ruling by the Supreme Court of Texas in *Perryman v. Spartan Texas Six Capital Partners, Ltd.*, provides insight into a drafting construct which should be avoided when reserving any interest from a conveyance. 546 S.W.3d 110, 114 (Tex. 2018). In *Perryman*, a dispute arose related to the ownership of a royalty interest in property located in Montague County. The disagreement resulted from the "exception" language utilized in the deed when "reservation" language likely should have been utilizing. In 1977 Ben Perryman (who owned all outstanding mineral interests therein) conveyed 207 acres to his son and daughter-in-law, Gary and Nancy, using the following "exception" language:

LESS, SAVE AND EXCEPT an undivided one-half (1/2) of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor.

Thereafter, Ben passed away and his reserved one-half royalty was conveyed to Gary (Ben's son) and Ben's daughter Leasha. The result was that Ben and Nancy owned the surface estate and three-fourths ($3/4^{th}$) or the royalty interests. Several years later, in 1983, Gary and Nancy conveyed the property to a subsequent owner, and attempted to *except*

from such a conveyance one-half of their then-current royalty estate, using the following language:

> LESS, SAVE AND EXCEPT an undivided one-half (1/2) of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor. It being understood that all of the rest of my ownership in and to the mineral estate in and under the above described lands is being conveyed hereby.

The Court engaged in extensive grammatical analysis, but the result was a ruling that Gary and Nancy's 1983 deed reserved *no* royalty interest—the Court ruled that the deed merely "saved and excepted" the prior royalty interest reserved by Ben.

The important considerations to be derived from this recent case are several. First, courts disfavor reservations by implication, *Gonzalez,* 553 S.W.3d at 638, so practitioners must be clear in their drafting and should use words and phrases such as "Grantor does reserve" or "Grantor hereby reserves" or other similar phrase to effectively create a reservation from their clients' conveyances. Second, Texas courts will construe and interpret deeds strictly and against the grantor. *Combest*, 502 S.W.3d at 180. In this case, some grammatical gymnastics were required of the Court in their interpretation—but regardless of the Court's analysis, the conclusion is a good example of the current state of the law in Texas that "[a] deed will pass whatever interest the grantor has in the land, unless it contains language showing the intention to grant a lesser estate." *Gonzalez*, 553 S.W.3d at 638. Had Gary and Nancy's deed utilized express "*reservation*" language regarding their intended reservation of some portion of their royalty interests, a different result likely would have been realized. So, when intending to reserve from a conveyance some portion of an estate which might otherwise be conveyed in a deed, use "reservation" language which a court can rely on in their interpretation later, as opposed to "exception" language or "subject to" language. More on that below.

b. Be Careful of the Use of "Subject To" Language. In *Gonzalez v. Janssen*, 553 S.W.3d 633, the San Antonio Court of Appeals in 2018 published an informative opinion interpreting an attempted reservation of a real property rights in Texas. In 1977 C.M. Griffin conveyed his ownership interests in several parcels of land to the Blanschkes, but reserved to himself an undivided 1/16th royalty interest. Such royalty interest would revert to the property owner (C.M.'s successors-in-interest) in 20 years (in 1997) if not held by oil and gas production at that time. The Blanschkes conveyed all of their interest in the relevant property to CJ Janssen, which conveyance included the reversionary royalty interest. Thereafter, CJ Janssen conveyed the reversionary royalty interest in the properties to his children, one of which was Don Janssen. In 1988, CJ and Don Janssen conveyed their interests in various portions of the property to Ramon Gonzalez, Jr., by deed "SUBJECT TO" the reversionary royalty interest created in the deed executed by C.M. Griffin in 1977 and "SUBJECT TO" the deed whereby CJ Janssen conveyed the reversionary royalty to his children, including Don. In short, Don and CJ intended to for the reversionary royalty interest to be reserved with and remain with Don.

By 2011, EOG was producing in paying quantities from the property and Don demanded to be paid as a holder of a portion of the reversionary royalty. Don pointed to the "SUBJECT TO" language in the deeds to Ramon Gonzalez, Jr., to show that his royalty had not been conveyed (and would have reverted to him in 1997—twenty years after CM Griffin created the interest). The estate of Mr. Gonzalez disagreed with Don's interpretation of the deeds as reserving any interests in the property. The Gonzalezes maintain that the "subject to" language in the deeds did not expressly reserve or except the reversionary royalty interest from the grant and, therefore, the reversionary royalty interest passed to Gonzalez. *Id*. at 637.

Ultimately, the Court ruled against Don. The Court provided that "the habendum clauses in

both deeds state: 'TO HAVE AND TO HOLD the above described premises, *together with all and singular the rights and appurtenances thereto in anywise belonging*, unto the said grantee, its successors and assigns forever....' (Emphasis added). *Id.* at 640. The court, reading the deeds in their entirety, while harmonizing all of their parts, determined that it could not construe them as excluding Don's reversionary royalty from the conveyances. *Id.* The court pointed to the fact that the deeds state that Don conveyed "all" of his interest in the real property described, which would include any reversionary royalty interest he had. Although the conveyances were made "SUBJECT TO" the prior reservations, the deeds did not include language excluding Don's reversionary royalty from the conveyances "*or any language showing that Don was retaining any interest that he had in the real property*." Id. The court determined that "[a]lthough the Texas Supreme Court has recognized that 'subject to' clauses are widely used for other purposes, the principal function of a 'subject to' clause in a deed is to protect a grantor against a claim for breach of warranty when some . . . interest is already outstanding." *Id.* In this instance, the court determined that "nothing in the four corners of the deeds shows that the parties intended the 'subject to' clauses to operate differently or to serve a purpose other than informing the grantees that other interests were still outstanding. *Id.* So, Don was deemed to have conveyed his reversionary right.

Whether one may agree or disagree with the court's ultimate ruling in *Gonzalez*, the lesson is clear. As in the *Perryman* case, had the deeds utilized express "*reservation*" language regarding their intended reservation of the reversionary right—instead of utilizing "SUBJECT TO" language, the grantor's reservation of his reversionary interest would likely have been upheld and effective. So, in practice "SUBJECT TO" language may be used to limit a warranty of title and identify preexisting encumbrances and the condition of title of property to be conveyed, but use express reservation language to reserve an interest from any conveyance.

V. THINGS I HAVE TO LOOK UP EVERY FOUR YEARS

A. The Difference between a Deed Without Warranty and Quitclaim Deed.

A deed without warranty is not common in other states, but is similar to a quitclaim deed in that the grantor under a deed without warranty is not liable for title defects and encumbrances based upon the express disclaimer of express and implied warranties contained therein. Unlike a quitclaim deed, however, a deed without operates as an actual conveyance. Because it purports that the grantor is actually conveying the estate described therein, using a deed without warranty will allow the property to continue to be insurable, while ensuring that the grantor will not be liable for any defects as would be the case if a quitclaim deed were used.

Beyond the use of the "granting" language and the implied transfer of title in a deed without warranty, the other major difference between a deed without warranty and a quitclaim deed is the disposition of after-acquired title obtained by the grantor. A grantee under a quitclaim deed does not obtain title to any interest in property acquired by the grantor after the delivery of the quitclaim deed. *See Renfrow v. Lineberry,* 271 S.W.2d 440 (Tex. Civ. App.—El Paso 1954, writ ref'd n.r.e.). Although there is not appellate court precedent regarding the same, the conveyance language in a deed without warranty would suggest that provided after-acquired title falls within the estate purported to be conveyed via the deed without warranty, used of "granting language" absent a limitation of the conveyance to the "rights, title, and interest of grantor, if any" found in a quitclaim deed may operate to convey the after-acquired title in said estate as well.

B. Withholding Consent to Assignments and Subletting: Is Reasonableness Required?

I know that the Texas Property Code provides for a prohibition against the subleasing or assignment of a lease by a tenant without prior landlord consent. However, I also know that in Texas the right to sell or otherwise transfer your real property is sacrosanct, and so courts do not care for unreasonable restraints on the alienation of real property. Further, special code provisions have been adopted and common law has been created for the protection of Texas citizens, some of which relate to residential leases at a minimum. So, since a leasehold estate is a real property interest and unreasonable restraints are frowned upon, and since some tenants under leases in Texas have from time to time been afforded various special protections, does a landlord in Texas need to be reasonable in withholding their consent to the assignment or subletting of a lease

notwithstanding the plain language on the subject in the Texas Property Code?

As you know, an assignment occurs when a lessee transfers their entire interest as a tenant without retaining any further rights thereunder, including any reversionary interest. *Amco Trust, Inc. v. T.C. Naylor*, 317 S.W.2d 47, 150 (Tex. 1958). Alternatively, if a lessee retains any reversionary interest, its transferee will not be in privity of estate with the lessor and such a transfer is a sublessee—not an assignment. *Id.* As noted, Section 91.005 of the Texas Property Code provides that "[d]uring the term of a lease, the tenant may not rent the leasehold to any other person without the prior consent of the landlord." It has been held that the statutory prohibition set forth in Section 91.005 of the Texas Property Code applies to assignments of leases by tenants and subletting by tenants alike. *718 Associates, Ltd. v. Sunwest N.O.P., Inc.,* 1 S.W.3d 355, 361 (Tex. App. - Waco, 1999, pet. denied). Of course, this statutory provision can be superseded if the lease clearly states otherwise. *Id.* at 360.

In Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex.App.—San Antonio 1987, writ den'd), the court made the following clear:

> The limitation on the transfer of a leasehold estate is for the lessor's sole benefit. A lessor may contract, by provision in the lease, not to unreasonably withhold his consent to an assignment or sublease of the premises . . . . . *Absent this promise, we hold that there is no implied covenant by the lessor to act reasonably in withholding his consent.*

Courts in Texas have, several times, declined to adopt an implied covenant that landlord's must act reasonably in withholding their consent to an assignment of a lease or subletting of a premises. Without express language in a lease whereby limitations or qualifications are established as to a landlord's right to withhold its approval to the assignment or subletting of a commercial or residential lease, a Landlord is not required to act reasonably in withholding their consent.

C. Circumventing a Right of First Refusal Provision in Texas.

In 1996, in *Tenneco Inc. v. Enterprise Products Co*., the Supreme Court of Texas addressed, in a case of first impression, the effect of a stock sale on a right of first refusal memorialized in an operating agreement which governed the control and operations of a natural gas liquids fractionation plant. 925 S.W.2d 640 (1996). Right of first refusal in Texas is not an anti-assignment covenant, but a preemptive or preferential right which "empowers its holder with preferential right to purchase property in question on same terms offered by or to bona fide purchaser." Id. at 640. In *Tenneco*, all of the outstanding stock of an entity-party to the operating agreement related to the natural gas liquids fractionation plant was purchased by a third party. The plaintiffs argued that that transaction was, in substance, a transfer which invoked the right of first refusal. The Court was not persuaded by this argument and held that "[t]he purchaser of stock in a corporation does not purchase any portion of the corporation's assets, nor is a sale of all the stock of a corporation a sale of the physical properties of the corporation. Sound corporate jurisprudence requires that courts narrowly construe rights of first refusal and other provisions that effectively restrict the free transfer of stock." *Id.* at 645. The Court further stated that the preferential right language "says nothing about a change in stockholders. The [parties] could have included a change-of-control provision in the agreements that would trigger the preferential right to purchase. None of the agreements . . . contained such a provision. We have long held that courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained." *Id.* at 646

In conclusion, the Court provided that "[i]n holding that the sale of a corporation's stock does not trigger rights of first refusal, we join courts from other jurisdictions that have considered this issue . . . . We also recognize the insight of commentators who have long maintained that stock sales do not invoke preemptive rights." *Id.*

In *Tenneco*, the Texas Supreme Court opinion was clear in ruling that a simple preemptive right provision will not be triggered by an indirect transfer. It is not clear what the result would be under Texas law if modifiers such as "directly or indirectly" are used in an anti-assignment clause or preemptive right language in Texas. However, we can be confident based on the suggestions of the Court in Tenneco, that "change of control" provision, providing something to the effect of "it is expressly agreed that a change of control of an owner entity shall constitute a transfer of the Property" will restrict change of control transfers—something to consider in your drafting and when advising your clients.

ATTACHMENT 1
Special Deed Limiting Recovery to Available Insurance Proceeds and Limiting Continuing Warranty

AFTER RECORDING RETURN TO:

____
____
____

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER OR YOUR DRIVER'S LICENSE NUMBER.

________________ WARRANTY DEED

THE STATE OF TEXAS §
§ KNOW ALL PERSONS BY THESE PRESENTS:
COUNTY OF [___________] §

THAT THE UNDERSIGNED, [_______________] ("Grantor"), whose address is [_______________________], for and in consideration of the sum of TEN DOLLARS ($10.00), and other good and valuable consideration paid to Grantor by [_______________________] ("Grantee"), whose address is [_______________________], the receipt and sufficiency of which are hereby fully acknowledged and confessed, subject to the matter set forth herein, has GRANTED, SOLD and CONVEYED and by these presents does hereby GRANT, SELL, and CONVEY unto Grantee, that certain real property located in [__________] County, Texas being more particularly described in **Exhibit "A"** attached hereto and made part hereof for all purposes (the "Land"), together with any and all improvements situated on the Land (the "Improvements"); and all right, title and interest of Grantor, if any, in and to any and all appurtenances, strips or gores, roads, easements, streets, and rights-of-way bounding the Land (together with the Land and Improvements, the "Property").

The Property is conveyed to Grantee SUBJECT TO to all items of record (hereinafter called the "Permitted Exceptions");

TO HAVE AND TO HOLD the Property, subject to the Permitted Exceptions, together with all and singular the rights and appurtenances thereto in anywise belonging, unto Grantee and Grantee's successors and assigns forever; and Grantor does hereby bind Grantor and Grantor's successors and assigns to WARRANT AND FOREVER DEFEND all and singular the Property subject to the matters herein set forth, unto Grantee, and Grantee's successors and assigns against every person whomsoever lawfully claiming, or to claim the same, or any part thereof [by, through, or under Grantor, but not otherwise], subject to the Permitted Exceptions.

Notwithstanding anything herein to the contrary, Grantor's warranty to Grantee herein is for the sole benefit of and personal to Grantee alone and may not be relied upon and/or enforced by any party (including but not limited to Grantee's successors and assigns) other than Grantee herein; and

further provided that Grantor's warranty to Grantee is limited to the amount of the coverage available to Grantor under all owner's policies of title insurance covering the Property held by Grantor.

SUBJECT TO GRANTOR'S WARRANTY OF TITLE SET FORTH HEREIN, THE PROPERTY IS CONVEYED TO GRANTEE "AS IS", "WHERE IS", WITH ALL FAULTS AND CONDITIONS THEREON.

This instrument is executed on the date set forth on the acknowledgement set forth below, but is effective for all purposes as of the ___ day of [______________], 20__.

GRANTOR:

____

STATE OF TEXAS §
§
COUNTY OF ___________ §

This instrument was acknowledged before me on the ____ day of [_____________], 20__ by [______________________].

____
Notary Public – State of Texas

EXHIBIT "A"

The Land