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DEED COVENANTS OF TITLE AND THE PREPARATION OF DEEDS: THEORY, LAW, AND PRACTICE IN ARKANSAS

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I. INTRODUCTION

Let's assume *A* sold *B* his 50-year-old bungalow, located on a platted, fenced city lot in Little Rock. *A* conveyed a typical "general warranty deed" to *B*. The legal description in the deed contained the lot and block number. Delighted, *B* moved in; but her delight turned to dismay when she looked at an old survey *A* left behind when he moved out and saw that the fence was inside her lot lines by several feet, on two sides of her property. *B* was a lover of plants and wanted more room for her garden, so she pulled down the fence, tearing up her neighbors' plants within the lot lines as shown on the survey, in order to expand her own yard.

The neighbors then sued *B* to quiet title. *B* contacted the title agency that conducted the closing, which referred her to the company that issued her insurance.[1] From the insurer, she learned that they would not defend her because the matter was not covered by her title insurance.[2] Under the doctrine of boundary by acquiescence,[3] the court ruled that the neighbors, and not *B*, actually owned the property. Angered by what she perceived as injustice, *B* sued *A* on the warranties in *A's* deed to her.

By stating that he would "grant, bargain and sell" his property, *A* had promised that he had seisin to all of the land covered by the legal description, which included the areas lost by the court decree. *A* had further promised that there were no encumbrances created by A. Finally, *A* promised that *B* would not be disturbed in her enjoyment of the property, and that he would defend her if she were. *B* argued in the alternative that either *A* breached the covenant of seisin if, at the time of the conveyance, the neighbors already owned the encroaching property by boundary by acquiescence; or, that *A* breached the covenant against encumbrances if, at the time of the conveyance, the neighbors' title had not yet ripened and their encroachment constituted an encumbrance. *B* sued *A* within five years of the conveyance, thus within the statute of limitations for breach of covenants of title, and won her suit. *A* had to compensate *B* for the value of the property that the neighbors now owned plus interest. Under the covenant of warranty, if *B* had notified *A* when the quiet title action was filed, *A* could also be liable for *B's* attorney's fees for the cost of her unsuccessful defense against her neighbors' litigation. In fact, *A* could also be liable for *B's* attorney's fees against him.[4]

These facts are very similar to those in *Riddle v. Udouj*,[5] except that in *Riddle*, the plaintiff did not sue within the five year statute of limitations.[6] According to the dictum in the decision, had the plaintiff sued within five years of the conveyance, the plaintiff would have been successful. The *Riddle* decision is a warning signal to all those attorneys who prepare deeds for clients. Encroachments should be an exception in the many deeds where this or a similar fact situation exists and is not covered by the buyer's title insurance.

The foregoing hypothetical illustrates one of the ways in which deed covenants for title are still an important part of real estate law today. A deed is a conveyance of real property. Unlike a contract for sale, a deed contains no implied covenants—contractual provisions that bind the grantor.[7] American common law recognizes six covenants of title that must be expressed in a deed to be enforced: the covenants of seisin, the right to convey, against encumbrances, quiet enjoyment, general warranty, and further assurances.[8] The following article will discuss the treatment of these covenants in Arkansas case law, including the measure of damages and the issue of attorney's fees, in breach of deed covenant cases.

Further, as disputes continue to arise over the mineral interests that comprise the Fayetteville Shale Play, future litigation will continue to concern covenants of title. One section of the article covers special considerations regarding mineral titles.

Not all deeds contain the same type of covenants, or even any covenants at all—a quitclaim deed contains no covenants. The common law differentiates between three types of deeds: general warranty, special warranty, and quitclaim. This article will explore the differences among these three types of deeds.

Arkansas statutory law supplies certain warranties in any deed containing the phrase "grant, bargain, and sell." The authors will discuss the nature of these statutorily-supplied warranties, which do not exactly coincide with the six warranties of common law.

The authors have examined over three hundred deeds filed in Pulaski County, Arkansas in June 2011, to see whether the practice of deed preparation conforms to the theory. What is the boundary line between a general warranty deed and a special warranty deed? What reservations and exceptions commonly appear in deeds? Are there significant differences between the covenants in commercial and residential deeds? These questions and more will be explored in light of our examination of the deeds.

Deed covenants of title, along with recording statutes and title insurance, are the three types of assurances of title to real property. One may ask why covenants of title, the oldest form of title assurance, should be a concern, given the prevalence of title insurance in real estate conveyances today. There are several reasons why covenants of title are important. First, buyers may not purchase or receive title insurance,[9] either by choice or because of ignorance of its benefits. Thus, the covenants of title may be the only remedies they have after closing, because the contract has merged with the deed.[10] Second, covenants of title may provide a ground for a successful lawsuit even if the title defect is not covered by title insurance or the amount of title insurance is insufficient. This is particularly true of adverse possession, boundary by acquiescence, and mineral rights. Third, title insurers who pay claims to insured purchasers or lenders may be able to sue sellers on the covenants of title under a subrogation theory.[11] Fourth, deed preparers may be unaware of all of the implications of the warranties they include in their deeds.[12] Deed covenants are legal devices that can help level the playing field in favor of buyers in this area of property law where "caveat emptor" is still the predominant rule.

So, what are Arkansas practitioners really doing when it comes to preparing deeds? The authors wished to answer this question, and did so, by conducting a study of all general and special warranty deeds filed in Pulaski County during a specified date range. The authors selected a two-week period ranging from June 6 through June 17, 2011 (the "date range"). This two-week date range was selected somewhat at random with the hope that it was a representative sample of normal transactions in Pulaski County. The date range occurred in the middle of the year, did not contain any holidays, and was not situated near key tax or year-end deadlines.

The search of the county records produced a sample of 311 deeds.[13] Of these, 246 deeds (79.1%) purported to be general warranty deeds, sixty-four (20.6%) purported to be special warranty deeds, and one deed (0.3%) was impossible to characterize. The study specifically excluded deeds purporting to be quitclaim deeds,[14] beneficiary deeds, and tax sale deeds from the Commissioner of State Lands. The study found that 270 (86.8%) of the deeds conveyed residential real estate, only five (1.6%) conveyed commercial property,[15] and thirty-six (11.6%) could not be identified as either residential or commercial. The study found that 290 (93.2%) of the deeds were drafted either by Arkansas-licensed attorneys (17.7% of the deeds) or by title agents using forms prepared by Arkansas-licensed attorneys (76.6% of the deeds). Seven (2.3%) of the deeds were prepared by the grantor or the grantee. The remaining fourteen (4.5%) were prepared by corporations, real estate agencies, out-of-state attorneys, or out-of-state title agents.[16]

Under Arkansas law, parties to a deed are effectively required to reveal the amount of consideration paid because transfer tax stamps are affixed to the face of the deed.[17] Of the 217 transactions where the transfer tax was reported (some transactions are exempt by statute), the average purchase price per transaction was $171,551. The median purchase price was $135,000. The largest transaction was $1,000,000. The smallest non-exempt transaction was $1000.

II. THE SIX COMMON LAW WARRANTIES OR COVENANTS[18]

A. The Covenant of Seisin

The covenant of seisin promises that the grantor is seised of the premises he is conveying.[19] This has three alternative meanings in American law, depending on the jurisdiction.[20] A few states merely require possession of the property conveyed to fulfill the covenant of seisin, whether or not the possession is wrongful.[21] A majority of states hold the covenant of seisin to mean that the grantor has title to the estate he is conveying in the whole of the land that is described by the deed. These states do not require the grantor to have possession.[22] Thus, for a cotenant to convey a fee simple absolute would be a breach of the covenant, as would a deed from a grantor who did not own the mineral rights.[23] A minority of states, among them Arkansas, add the requirement that the grantor must also be in possession.[24] In Arkansas, "seisin . . . is a covenant that is broken . . . if the grantor has not possession, the right of possession, and the complete title."[25]

Although over thirty Arkansas appellate decisions mention the covenant of seisin, those concerning whether it was breached are rare. At the most basic starting point, one who does not own land but conveys it by warranty deed, breaches the covenant of seisin.[26] In *Cannon v. Foster*, the court stated the rule that breach of the covenant of seisin also exists where a grantor conveys, by warranty deed, land that she had already conveyed to someone else.[27] The case was remanded to determine if in fact this reconveyance had actually taken place.[28] If so, the court stated, the grantor would be liable for the value of the land that she warranted as hers, but did not in fact own at the time of the second conveyance.[29]

Another instance of breach occurred in *Bosnick v. Hill*, when at the time of the purchase, a third party was adversely possessing part of the tract, had fenced it, and was running cattle on it.[30] In this case, damages consisted of the cost of the successful suit by the grantees against the adverse possessors.[31] In *Riddle v. Udouj*, where neighbors were encroaching on the edges of the city lot at the time of conveyance, the court stated in dictum that breach of the covenant of seisin is decided "on the basis of who has possession" at the time of the conveyance.[32] In this case, there would have been a breach of the covenant of seisin, but it was not pled.[33]

Although there seem to be no Arkansas opinions on this point, breach of the covenant of seisin also occurs when a grantor conveys, by warranty deed, real property without any one of its appurtenances.[34] However, an encumbrance on property does not necessarily constitute a breach of seisin.[35] One may be seised of property that is nonetheless encumbered.

It is not necessary to allege eviction to win a claim for breach of covenant of seisin,[36] but eviction or constructive eviction may be present at the time of conveyance.[37] In *Bosnick v. Hill*, for example, a third party had fenced 2.7 acres of the property conveyed to grantees and was running cattle on it.[38] The court decided the case on the basis of breach of the covenant of seisin, but noted that the grantees were evicted from those acres at the time of the sale.[39]

In one case, the court allowed grantees to recover damages allowed for breach of the covenant of seisin even after the statute of limitations had run. In *Turner v. Eubanks,* the grantees purchased land from the defendant grantors under a warranty deed, and conveyed a mortgage and note to the grantors.[40] The grantees were later successfully sued by an adverse possessor, who won .94 acres of their land.[41] When the grantees received process, they contacted their grantors, who refused to defend the grantees.[42]

The grantees then withheld the cost of .94 acres from their payments to the grantors on the note, and in turn, the grantors refused to release the mortgage.[43] The grantees sued for breach of the covenants of title.[44] The court ruled that the statute of limitations for the covenant of seisin had already run; nonetheless, it awarded plaintiffs the value paid for the property, plus interest from the time of eviction, as well as attorney's fees. These amounts were allowed as a setoff to the mortgage payments.[45] The court stated that even though the statute of limitations had run with respect to the warranty claim, it did not apply to the affirmative defense of setoff or recoupment raised by the plaintiffs in response to the defendants' counterclaim.[46]

On the other hand, there was no breach of the covenant of seisin in *Kieffer v. Williams*.[47] There , the deed did not mention any specific amount of acreage.[48] At the time of conveyance to the grantee, a third party was in possession of approximately four percent, or 2.36 of the acres in question, and had been in possession for at least eight years.[49] In the same lawsuit, the grantee lost the boundary dispute and suffered the dismissal of his breach of warranty claim against his grantor.[50] The court stated that there was no "gross defect" or "fraud" that would constitute a breach of the covenants of title.[51]

The court also declined to find a breach of the covenant of seisin in *Wyatt v. Henry*, where a son was a life tenant by virtue of a devise from his father.[52] He was also the only heir. His father's will did not contain a residuary clause and thus did not devise the remainder. Accordingly, the doctrine of merger rendered the son the owner of a fee simple absolute, and thus, there was no breach in the warranty deed that he conveyed.[53] Likewise, it was not a breach of seisin for a grantor who first conveyed land by warranty deed as an infant to disaffirm the prior deed on reaching his majority.[54] In *Beauchamp v. Bertig*, the court stated that even if the grantor disaffirmed the earlier, voidable warranty deed with a quitclaim deed on reaching majority, the covenants in the earlier deed could not be enforced after disaffirmation; the right of disaffirmation is more fundamental and trumps any covenants in the original deed.[55]

Some believe, erroneously, that a title insurance policy will provide a defense to some breach of seisin claims, such as the boundary by acquiescence dispute illustrated by the *Riddle* case.[56] However, a typical commitment for a title insurance policy includes a standard exception to coverage that eliminates coverage for policy holders facing a boundary by acquiescence problem.[57] A typical commitment used in Arkansas contains five "standard exceptions:"

1. Defects, liens, encumbrances, adverse claims or other matters, if any, created, first appearing in the public records or attaching subsequent to the effective date hereof but prior to the date the proposed insured acquires for value of record the estate or interest or mortgage thereon covered by this commitment.

2. Rights or claims of parties in possession not shown by the public records.

3. Easements, or claims of easements, not shown by the public records.

4. Any discrepancies, conflicts, encroachments, servitudes, shortages in area and boundaries or other facts which a correct survey would show.

5. Any lien, or right to a lien, for services, labor or material heretofore or hereafter furnished, imposed by law and not shown by the public records.[58]

The standard exceptions listed in numbers two and four (and number three in the case of a prescriptive easement), eliminate coverage against boundary by acquiescence claims. By leaving these exceptions in the title policy, the buyer has no remedy except to fall back on the deed covenants.

In many instances, it is possible to obtain extended or enhanced coverage through the deletion of one or more of the standard exceptions.[59] Most title companies require a recent survey and an affidavit from the owner to delete the third and fourth exceptions. Typically, only sophisticated attorneys are aware of the option to delete the standard exceptions, and it is rare that residential title insurance consumers ever ask for the standard exceptions to be deleted.[60]

If the title company agrees to provide extended or enhanced coverage through deleting one or more of the standard exceptions, the title company will typically create an additional list of special exceptions (i.e., those exceptions that are unique to the specific property being insured) reflecting the specific risks observed by the title company for the insured property. This new list is usually generated by reviewing the survey for potential title claims, such as a variation in a fence line. For instance, if the survey shows that the fence is actually three feet inside the property line, then the title company will typically create a new special exception in the title commitment that reads something like this: "Any rights, easements, interests or claims that may exist by reason of or reflected by the following facts shown on the survey dated __________, by [name of surveyor]. Encroachment on the land by fence on the [compass direction] of the subject property."

By the addition of this language to the commitment, the buyer is once more in the position of not having title insurance coverage for a *Riddle* situation. However, by reading the commitment, which the law requires to be furnished to the buyer before closing,[61] the buyer should be alerted to the possible risk by the title company's special exception for the fence line variation. Ideally, prior to closing, the buyer and seller should discuss this fact and determine how to address the risk of a boundary by acquiescence claim. Unfortunately, this may not happen, and the parties will be left with the remedies created by the language of the warranty deed. The question then becomes, what does the deed say about this issue?

It is the authors' experience that many sophisticated sellers (or their counsel) will insist on deed language that either makes general exceptions to certain categories of potential title defects or lists specific known title defects as exceptions to the covenants of title. Starting first with the latter, it is relatively common practice for sophisticated sellers to negotiate for a warranty deed that incorporates all matters listed as exceptions to the title policy. This list of exceptions is often referred to as the Schedule B-II exceptions, owing to the heading of the section of the title commitment where the list of exceptions is found.[62] Thus, it was a significant "disconnect" that not a single deed in the deed study incorporated the exceptions from the title policy into the deed as exceptions to the covenants of title.[63]

The other method of creating exceptions to the covenants of title is to make general exceptions to title, such as making the conveyance "subject to restrictions of record" to except any restrictions appearing in the public records. The deed study found that 211 of the deeds (67.8%) contained some express exception to the covenants of title. The most common express exception was some derivation of "subject to easements, restrictions, or encumbrances, which may appear of record." This "of record" phrase appeared in 204 of the deeds (65.6% of the total deeds and 96.7% of the deeds that contained some express exception to the covenants of title).

However, simply limiting the exceptions to the covenants of title to matters "of record" does not help in a *Riddle* situation because the existence of a fence line variation is unlikely to appear in the real property records.[64] Therefore, there needs to be some sort of exception to potentially unrecorded claims to avoid a *Riddle* scenario.

In addition to the "of record" exceptions, eight of the deeds (2.6% of the total deeds and 3.8% of the deeds that contained some express exception to the covenants of title) were excepted for "prescriptive rights of ingress and egress" (or a similar phrase referring to prescriptive easements). However, boundary by acquiescence is not an easement, it is a claim of fee title to the disputed land.[65] Thus, this exception would not address the *Riddle* situation.

Three deeds (1.0% of the total deeds and 1.4% of the deeds, which contained some express exception to the covenants of title) included an exception for "easements physically in place" (or a similar phrase referring to actual easements). However, this phrase faces the same problem as the "prescriptive rights of ingress and egress" phrase because boundary by acquiescence is a claim of fee title to the land in question, not an easement interest.[66]

Only one deed (0.32% of the total deeds and 0.47% of the deeds, which contained some express exception to the covenants of title) included an exception for "any encroachments." This language may protect the grantor from a *Riddle*-type claim because the fence line would be an encroachment on the property. However, a question may exist about whether the boundary by acquiescence claim is really an "encroachment" when the fence was intentionally off-set from the boundary by the grantor (or his predecessor-in-title) as a fence of convenience.[67] Is the ripening of a boundary by acquiescence claim really an "encroachment" by the claiming party? This is a debatable point that does not appear to be addressed in Arkansas law.

Only thirteen of the deeds (4.2% of the total deeds and 6.2% of the deeds, which contained some express exception to the covenants of title) contained language that may effectively protect the grantor from a *Riddle*-type scenario. Thirteen of the deeds contained an exception for "matters that an accurate survey of the property would reveal" (or a similar phrase regarding the issues a survey would reveal). A fence line variation would presumably be a matter that an accurate survey would reveal, thus creating the argument that the grantor's covenants of title do not extend to the boundary by acquiescence claim. However, even this phrase may not be sufficient to overcome the *Riddle* problem. A grantee may still argue that the mere existence of a fence not situated exactly on the property line does not mean that there is a possible boundary by acquiescence claim. A grantee may also argue that merely noting that a fence line is located off the border does not overcome a general warranty of title to "defend title to the [property] against all claims whatsoever."[68]

This ties into the question of whether a special warranty of title protects the grantor from a *Riddle*-type claim. Thirty-two of the deeds, which contained exceptions to the covenants of title, were special warranty deeds (50% of all special warranty deeds and 15.2% of the deeds which contained express exceptions to the covenants of title). Twelve of these thirty-two deeds (37.5%) contained the exception for matters that an accurate survey of the property would reveal. The other twenty deeds did not include language that would potentially protect against the *Riddle* problem. While a general warranty deed promises to "defend title to the [property] against all claims whatsoever," a special warranty deed limits that general promise to claims "by, through, or under it [grantor], but not otherwise."[69]

So, the question is whether a boundary by acquiescence claim is a claim "by, through, or under" the grantor. The answer would probably depend on whether the boundary by acquiescence claim ripened into a successful claim during the grantor's ownership. For instance, if the fence giving rise to the claim was built in 1930, and the neighbors regarded the fence as the boundary line ever since, but the grantor did not take title until 2002, then, the grantor would possibly be protected from a *Riddle*-type claim because the boundary by acquiescence ripened decades before the grantor took title. However, if it is assumed that the grantor took title in 1990 and promptly built a fence three feet inside the true boundary line—and the neighbors treated the fence as the true boundary such that a boundary by acquiescence claim ripened—then the special warranty of title would probably not protect the grantor because the fence leading to the claim was built "by" the grantor. The more difficult scenario is one where the grantor's predecessor in interest built the same fence in 1995. The grantor then acquired title in 1996, and the boundary by acquiescence claim subsequently ripened. Though the grantor did not build the fence, the ripening boundary claim existed during the grantor's time of ownership and was suffered by the grantor to become a ripened claim. This is a more difficult question to answer.

B. The Covenant of the Right to Convey

The covenant of the right to convey is self explanatory: the grantor has the legal right to convey the estate purportedly being conveyed.[70] This covenant is usually coequal with the covenant of seisin; however, there may be rare occasions in which the grantor has one but not the other.[71] For example, a grantor who owned land subject to a valid restraint on alienation would have seisin, but no right to convey.[72] Conversely, a grantor who did not own land but was acting under a power of appointment or a power of attorney would not have seisin but would have the right to convey.[73] One state has held that a personal representative who conveyed, by warranty deed, real property that was not in fact owned by the estate, did not breach the covenant of the right to convey, having been authorized by the court to convey the property.[74] In those states where mere possession fulfills the covenant of seisin, as opposed to both possession and title, a tortiously possessing grantor would fulfill the covenant of seisin, but would also breach the covenant of the right to convey.[75]

The covenant of the right to convey is discussed in detail in only one Arkansas decision, *Logan v. Moulder*,[76] concerning the sale of a "Lovely claim."[77] The court stated that if Logan did not have title to the claim, but yet conveyed it by warranty deed, then he breached the covenant of the right to convey.[78] The court also held that the covenant of seisin had been breached, and that damages were the amount of consideration plus interest. This holding reversed the trial court's jury instruction, that the measure should be the value of a Lovely claim at the time of the creation of the covenant.[79]

C. The Covenant Against Encumbrances

Having been at issue in approximately forty-five cases, the covenant against encumbrances has been the subject of more litigation than the previously discussed covenants. In this covenant, the grantor promises that there is no right or interest in a third party that diminishes the value of the title but yet does not prohibit the passing of fee simple absolute.[80] Arkansas courts define an encumbrance as "any right to an interest in land which may subsist in third persons, to the diminution of the value of the land, not inconsistent with the passing of title."[81] Knowledge of an encumbrance does not generally bar an action for breach of the covenant against encumbrances.[82]

Encumbrances can generally be classified into three types: liens, servitudes (easements, profits, restrictive covenants), and estates.[83] Types of encumbrances recognized in Arkansas in the context of deed covenants include mortgages,[84] vendors' liens,[85] judgment liens,[86] leases,[87] dower or curtesy,[88] timber deeds,[89] levee taxes,[90] ad valorem property taxes,[91] special assessments,[92] and improvement district assessments.[93] Notable interests held to be encumbrances in other jurisdictions include restrictive covenants that run with the land,[94] and physical encroachments onto or by the property.[95]

Easements are encumbrances, but the law as to whether they are encumbrances that will cause a breach of the covenant against encumbrances is more complicated. A permanent easement on the land, visible to the purchaser, has been held not to be an encumbrance that would breach a purchase contract covenanting to sell land free of encumbrances.[96] In the context of deeds, the court stated in *Kahn v. Cherry* that where an easement affects only the physical condition and not the title of the property sold, and where the grantee knows of its existence, or where it is so visible and obvious that the grantee should have known, such an easement does not breach the covenant against encumbrances, although the easement is an encumbrance.[97] In this case, the easement consisted of joists of a neighbor's building that rested on the wall of a building on the grantee's land. The case was remanded to determine whether the grantee knew of the easement's existence at the time of the conveyance.[98] Similarly, in another case where the grantee not only knew about the existence of the easement (in this case a railway switch track), but it was also an inducement to the purchase, the easement did not breach the covenant against encumbrances.[99]

The case of *Cherry v. Brizzolara* also involved a wall located on property conveyed to the grantee.[100] The grantor argued that he had an easement implied from prior use[101] in the wall (there was no reservation of an easement in the deed, which contained a covenant against encumbrances).[102] The court stated that "[t]he right of an easement in the wall located on the property would work an incumbrance thereon," but since it held that there was no easement, there was no encumbrance.[103]

In the absence of fraud or mutual mistake, parol evidence is not admissible to show that a covenant against encumbrances was not intended by the parties to apply to a particular encumbrance.[104] Further, the grantor may not successfully argue that he mistakenly did not except the encumbrance from the covenant.[105] However, if mutual mistake by both grantor and grantee can be proved, then a court will allow an exception to be inserted as a reformation to the deed.[106] Even without mutual mistake, if equity warrants, then the court will allow reformation. For example, in *Scott v. Altom*, the grantee sued because the warranty deed did not contain an exception for an outstanding lease.[107] However, the grantors proved that they had provided the information about the lease to the grantee's lawyer, who had prepared the deed, and who failed to include an exception.[108] The court found sufficient evidence to warrant reformation of the deed.[109]

In another example of compelling equitable considerations, the Supreme Court has held that evidence was admissible to show that the grantee had actual notice from the grantor of an unexpired lease, that the grantee agreed, and that this encumbrance was a factor in fixing the consideration.[110]

Parol evidence may also be admissible to clarify the "identity of the debt."[111] In *Sheffield v. Maxwell*, it was held that the trial court erred when it refused to permit testimony that would prove the amount of a mortgage debt, and that did not contradict the terms of the original contract or the deed.[112]

The covenant against encumbrances is not breached under the following circumstances: (1) if the encumbrance is barred by passage of a statute of limitations (for example, a judgment lien after ten years has passed and there has been no revival); (2) if the encumbrance is paid off by one other than the grantee (for example, a mechanic's lien is satisfied after closing by the grantor); (3) the encumbrance is unenforceable because its holder has not complied with a requirement necessary for its validity (for example, a holder of a mechanic's lien failed to give the requisite statutory notice); and (4) if the grantee was successful in a suit against the grantee to enforce the encumbrance.[113] In *Johnson v.Polk*, the grantor paid off the mortgage debt.[114] The grantee was neither evicted nor required to pay off the encumbrance.[115] The court held that the covenant against encumbrances was not breached.[116]

Typically today, few tracts of real estate are completely free of encumbrances. Therefore, deed preparers should (and commonly do) insert exceptions and reservations in deeds that are excluded from the covenants of title. The deed study found that 211 (67.8%) of the deeds contained some exception to the covenants of title. The most commonly used phrases to create the exceptions to the covenants of title were the following, which are in order of decreasing popularity:

• "Subject to existing assessments, building lines, easements, mineral reservations and/or conveyances, and restrictions of record, if any." Seventy-four deeds (23.8% of all deeds).

• "Subject to covenants, conditions, easements, exceptions, reservations, restrictions, rights and rights-of-way of record." Thirty-five deeds (11.3% of all deeds).

• "Subject to existing easements, building lines, restrictions, and assessments of record, if any." Thirty-four deeds (10.9% of all deeds).

• "Subject to any rights-of-way, dedications, easements or mineral reservations of record. . . . Said conveyance is made subject to all covenants, easements, restrictions, conditions, and rights appearing of record against the above described property; also subject to any state of fact [sic] which an accurate survey of said property would show." Twelve deeds (3.9% of all deeds).

• "Subject to existing easements, building lines, restrictions and easements of record, if any." Nine deeds (2.9% of all deeds).

• "Except easements and restrictions of record." Eight deeds (2.6% of all deeds).

• "Subject to right of way/easements [sic] and restrictions, if any. . . except easements, restrictions and encumbrances of record, and prescriptive rights of third parties for ingress and egress to said property, if any." Seven deeds (2.3% of all deeds).

The variance among these deeds as to what is excepted and what is not is interesting. Only a few except the encroachment defect present in *Riddle* and only a few except mineral rights. It can be argued that mineral rights are not much of an issue in Pulaski County, however stranger things have happened than some type of mineral being discovered underneath Pulaski County. For instance, just 10–15 years ago, there was virtually no gas production from the Fayetteville Shale, which was considered "just sort of a geologic oddity," before technological breakthroughs created avenues for production from the shale.[117]

D. The Covenants of Quiet Enjoyment and General Warranty

The covenants of quiet enjoyment and general warranty are two sides of the same coin and will be discussed together, as a breach of one is automatically a breach of the other, and it is impracticable to separate discussion of them. The covenant of quiet enjoyment, also implied in Arkansas leases,[118] promises that no one with superior rights will interfere with the grantee's possession in the future.[119] The covenant of general warranty promises that if such an interference does take place, then the grantor will forever defend the grantee, at any point in the future.[120] This covenant is a promise of indemnification, not only for defects caused by any acts of the grantor, but also any defects caused by any predecessors in title of the grantor.[121]

This covenant has traditionally been the most important of the six, and is the source of the term "warranty deed."[122] The interference can take the form of either paramount title or an encumbrance.[123] Thus, the same defects in title or encumbrances that breach the covenants of seisin, right to convey and against encumbrances will also breach the covenants of quiet enjoyment and general warranty.

There are two important differences, however. First, to breach the covenants of quiet enjoyment and general warranty, there must be an eviction, either actual or constructive.[124] A grantee who is paying on a contract for deed or by another method of owner financing, and who received a warranty deed and entered into possession may not stay in possession, question the title or the grantor, and refuse to pay the purchase price.[125]

Although the mere existence of an encumbrance does not breach these covenants, they may be breached if the third party takes steps to enforce the encumbrance that causes an eviction.[126] Second, the statute of limitations for the covenants of quiet enjoyment and general warranty runs from the time of eviction,[127] which may occur years, or even decades, after the time of conveyance.

Just as knowledge of an encumbrance does not impair the right of recovery for breach of the covenant against encumbrances, neither does knowledge of encumbrance or paramount title impair the right of recovery for breach of the covenant of general warranty.[128]

What constitutes eviction, and when it occurs to start the statute of limitations running, has been the source of significant litigation. The *Riddle* court defined "eviction" by reference to *Black's Law Dictionary*: "Eviction occurs when a person is dispossessed by process of law."[129] Constructive eviction, on the other hand, occurs when the grantee cannot obtain possession due to paramount title[130] or yields to the positive assertion of legal title.[131]

Eviction of the grantee has been held or stated to exist where: (1) a tenant was in possession;[132] (2) there was a building on the property erected by a third party;[133] and (3) title was in the sovereign.[134] In *Lilley v. Copeland*, the grantor had dedicated an easement of substantial size and "title was in the sovereign" at the time of the conveyance.[135] In *Wood v. Setliff,* a portion of the property conveyed was a public street.[136] When title is in the sovereign, eviction occurs at the time of the conveyance[137] because wrongful possession by the grantee will never be able to ripen into anything more—one cannot adversely possess against the sovereign.[138] This is an exception to the general rule that the mere existence of paramount title, without more, does not constitute eviction or a breach of the future covenants.[139]

Arkansas courts have ruled the following to constitute constructive eviction: (1) the existence of physical, visible encroachments on the grantee's property, such as shrubbery on the land beyond a fence or fences belonging to a third party;[140] (2) land that a county was using as a highway;[141]

and (3) a court's decree depriving a grantee of title.[142] With respect to the latter situation, decisions have variously held that a decree of quiet title respecting mineral rights,[143] a life tenancy held by the grantor rather than a fee simple absolute,[144] and a decree of foreclosure against the grantee will constitute constructive eviction.[145]

Some decisions of the Arkansas courts, however, indicate that a court decree causes an eviction, not a constructive eviction, under much the same circumstances: when the court enters a judgment of adverse possession by a third party against the grantee;[146] when a temporary restraining order is issued against a grantee at the outset of an ejectment suit by a third party;[147] when a court decree awards "paramount title" to a third party;[148] and when a court decree cancels a warranty deed as a result of a quiet title suit.[149] Another type of constructive eviction occurs when the grantee settles an adverse and superior claim prior to eviction.[150] The grantee may then successfully pursue a breach of warranty claim against the grantor.[151]

Proving eviction may present a problem when the land in question is wild and unimproved. In this situation, proving actual eviction is not necessary. Possession "follows the legal title, and a paramount title carries possession with it amounting to a constructive eviction."[152] Payment of taxes under color of title on wild and unimproved property for more than seven years vests title in the adverse possessor, such that when the adverse possessor conveyed real estate to a grantee, the covenant of quiet enjoyment was not breached, although the covenant was breached eight years later when a court ruled in favor of the true owner.[153] Collusive eviction will not avail in a suit for breach of covenant of title because a grantee cannot commit fraud or collude so as to cause her own eviction and entitle her to sue.[154]

If the grantee is disturbed by a third party who does not have paramount title, the covenants of title are not breached. In *Hoppes v. Cheek*, the grantee was disturbed in possession of a portion of the land conveyed by a third party who was a "mere intruder," in mistaken possession of the land, without even color of title.[155] The court stated that this did not constitute a breach of the covenant of quiet enjoyment.[156]

In *Hamilton v. Farmer*, a grantee purchased land, aware that a third party held a remainder interest.[157] During the life of the life tenant, the grantee sued to quiet title. After the court decreed that the third party held a remainder interest in one-twelfth of the property, the grantee compensated the third party for his interest. The grantee then sued the grantor for breach of the covenant of warranty. On appeal, the court ruled that the grantee could not recover from the grantor because there had been no eviction when a court entered a decree that a third party was a remainderman; the life tenant was still alive and the remainderman enjoyed no possessory rights.[158] The mere existence of paramount title, without more, did not constitute an eviction.

An interesting question is whether constructive eviction would occur if a seller is unable to sell to a buyer because a title insurer is unwilling to insure a particular defect in title and the buyer is unwilling to buy without title insurance. In the authors' opinion, with respect to the buyer, the answer of course would be no, because the buyer has not purchased yet, and so the buyer cannot avail herself of covenants of title. With respect to the seller, the seller is in possession, and so there has been no eviction, but constructive eviction will occur if the seller will have to "pay off" the defect in title. This could constitute a serious problem for the seller. If the seller received a warranty deed at the time of his purchase, he would have rights against his grantor.

A similar fact situation occurred in *Dennis v. Long*, but the doctrine of covenants of title did not provide the solution.[159] In this case, the grantor represented to the grantee that he was seised of a fee simple absolute.[160] The conveyance took place in 1903, and the grantee received a warranty deed.[161] Around 1916, the grantee sued to cancel the deed, alleging that the grantor had recently informed him that by virtue of the will devising the interest to him, he only had a life estate, and his son had a vested remainder, resulting in the grantee only owning a life estate.[162] The grantee offered to reconvey the property to the grantor, with an accounting for rent, in return for payment of the purchase price and improvements, but the grantor refused the offer.[163] The grantee did not prove fraud.[164] Curiously, the court did not discuss the fact that by conveying a warranty deed the grantor covenanted that he owned a fee simple, which would have caused a breach of the covenant of seisin at the time of the conveyance. However, since more than five years had passed, this result would not have availed the grantee. The court did note that breach of the covenant of warranty would not occur until the death of the grantor; there could be no eviction until then.[165] The court noted that "[h]e has no remedy at law, unless it be a remote, uncertain remedy. His title is clouded by a reversionary interest, and rendered of little or no value, and almost unsalable."[166] The court concluded that equity would apply, and that on remand the contract should be rescinded.[167]

The issue of what constitutes "defense" in a general warranty, which promises to "defend" the buyer against all claims, arose in *Murchie v. Hinton*.[168] The grantee was sued in ejectment by a third party.[169] The grantors had conveyed the property in question under a deed containing a covenant of general warranty.[170] They appeared in court and testified on the grantee's behalf, but refused to pay the grantee's litigation expenses.[171] The grantee filed a third-party complaint against them and, on appeal, was granted her costs and fees against the third party by the Court of Appeals.[172] Simply appearing as witnesses in court did not fulfill the promise of the covenant.

E. The Covenant of Further Assurances

The sixth and last covenant promises that the grantor will perform any necessary future actions, including executing any documents, necessary to perfect title.[173] This covenant is used infrequently in the United States.[174] Arkansas recognizes the covenant, but only two appellate decisions have mentioned it, one in passing as the covenant appeared in a warranty deed,[175] and the second with approval as one of the six covenants of title.[176] It is not one of the covenants included by statute in the term "grant, bargain and sell," but unlike the other such covenants, the covenant of general warranty, which was expressly inserted in all of the general warranty deeds in the sample,[177] the covenant of further assurances appeared in only one of the deeds the authors examined. Interestingly, the only deed containing an express covenant of further assurances was prepared by a real estate agency and showed no sign of being approved by an Arkansas attorney.[178]

G. Confusing Terminology

As alluded to above,[179] this area of the law is full of confusing terminology. First, the term "covenant of title" refers to the group of covenants; no single covenant goes by that name, except that plaintiffs in at least one recent decision sued for breach of a "covenant of title" and *another* covenant.[180] Another example of misnomers occurred in *Riddle*, where the plaintiffs sued under "breach of warranty of title, breach of quiet enjoyment and breach of warranty to defend title."[181] There is no such specific warranty as a "warranty of title." The accepted name of the fifth covenant is the "covenant of warranty."[182] It is true that Arkansas courts often refer to it as the "covenant of warranty of title,"[183] but that is the same covenant as the covenant to defend title. Thus in *Riddle*, the plaintiff alleged breach of three covenants, but two were the same. This confusing terminology is perhaps one of the causes for the rather high reversal rate for deed covenant cases; of one hundred appellate decisions examined, fifty-seven (57%) reversed the decision of the lower court with regard to a deed-covenant issue.

Some decisions contain erroneous statements. For example, the Arkansas Supreme Court in *Bosnick v. Hill* stated that Arkansas's statute implied a covenant of general warranty in a deed containing the words "grant, bargain and sell;"[184] however, it does not do so. The court cited *Dillahunty v. Railway Co.* for this proposition, but *Dillahunty* concerned a deed that did *not* contain the words "grant, bargain and sell," (and thus the statute did not apply) but *did* contain an express covenant of general warranty.[185]

H. Defects That Do Not Breach Covenants of Title

Not all defects are defects of title and thus do not breach covenants of title. For example, although the existence of a restrictive covenant breaches the covenant against encumbrances (and therefore, these are usually expressly excepted in the deed), no covenant is breached by the existence of a zoning ordinance or building code, and the majority rule is that violations of such ordinances and codes do not breach any covenants of title.[186] Arkansas recognizes that a physical defect in a tenement, such as a defective foundation, may breach the implied warranty of workmanlike construction,[187] but this warranty is not one of the six covenants of title. It would be present even if the seller conveyed a quitclaim deed at closing. Lack of legal or physical access to the property is also not a breach of any of the covenants of title; however, legal access is routinely covered by title insurance, and physical access is covered by many residential title insurance policies.[188]

III. PRESENT VS. FUTURE COVENANTS

The covenants are classified as either present or future. This classification affects first, the time at which they are breached, if at all, and thus when the statute of limitations begins to run; and second, who may be sued for breach, since the future covenants run with the land, but the present covenants do not. The covenants of seisin, right to convey, and against encumbrances are present covenants. The promises inherent in them must be met at the time of conveyance. Eviction need not be present or be proved to successfully recover for breach of these covenants, although eviction may have occurred.[189] The three future covenants are the covenants of quiet enjoyment, warranty, and further assurances. To sue for breach of a future covenant, there must have been an actual or constructive eviction. Furthermore, there may be an eviction at the time of the conveyance, or it may occur later.

A. The Time of Breach

Breach of a present covenant occurs at the time of the delivery of the deed, which is the time of conveyance.[190] Did the grantor lack seisin or the right to convey with respect to any portion of the property at the time of the conveyance? Were there any encumbrances at the time of the conveyance? If the answer to any of these questions is yes, the relevant covenant has been breached.[191] The statute of limitations begins at the time of conveyance.[192]

On the other hand, the future covenants are breached at the time of "eviction," either actual or constructive, and that is when the statute of limitations begins to run.[193]

B. Personal vs. Real Covenants

The three present covenants are personal in nature, and pertain only to the attributes and actions of the grantor. Thus, they do not run with the land, and remote grantors may not be sued under the personal covenants.[194] In other words, they are covenants "in gross" and are not assignable.[195] This is one area where the old common law rule—that a "chose in action" (a right to sue) is not assignable—has survived.[196]

On the other hand, the three future covenants run with the land to the benefit of future owners, heirs and assigns.[197] Thus remote grantors may be sued if during their ownership the title became defective or encumbered, and they conveyed with a suitable covenant in their deed.[198] In *Doak v. Smith*, the grantee sued a remote grantor, however, the court held that the covenant of warranty made the deed a special warranty deed,[199] and the defect in title preceded the grantor's ownership.[200] In *Wade v. Texarkana Bldg. & Loan Ass'n*, the mortgagee of the grantee was able to recover from the grantor, whom the court characterized as a "remote grantor."[201]

IV. WHO OTHER THAN GRANTORS MAY BE DEFENDANTS

Breached covenants may be enforced not only against the grantor but also the grantor's heirs. In *Smiley v. Thomas*, Brice Williams conveyed a warranty deed with no exceptions to a Mr. and Mrs. Thomas in 1929, but Williams did not own one-half of the mineral interests.[202] Williams died in 1936.[203] In 1950, the Thomases sued a third party unsuccessfully to quiet title to the mineral rights in themselves. After losing the quiet title action, the Thomases sued Jodie Smiley, the sole heir of Brice Williams. She argued in defense the statute of limitations, laches, and the statute of non-claims.[204] The court held these arguments were without merit, without citing any authority as to how recovery could be had as against an heir of the decedent fourteen years after his death.[205] It held that eviction had occurred when the decree in the 1950 quiet title suit was rendered.[206] The court did discuss the nature of covenants running with the land, which was not relevant because the Thomases bought from Williams and not from a predecessor in title to Williams.

The *Smiley* case is not unique. In *Scoggin v. Hudgins*, Scoggins conveyed a tract of land to Hudgins in 1892 by a warranty deed.[207] At the time of the conveyance, Southern Building & Loan Association ("Southern") held a mortgage on the land.[208] Scoggins died intestate in 1892 or 1893; his widow became his administrator.[209] Scoggins's probate estate closed prior to 1900; the two-year period for claims ended in April 1895.[210] In 1900, Southern sued to foreclose.[211] Although Hudgins requested Scoggins's widow to defend the suit, she refused.[212] Accordingly, Southern was granted a foreclosure decree.[213] Hudgins paid off the mortgage and accompanying costs.[214]

The court noted that his cause of action accrued in 1900.[215] Hudgins sued the heirs of the grantor, the widow, and a bona fide purchaser who had purchased a portion of the estate's land.[216] The court stated that land of a deceased grantor that had descended to the heirs (and one would assume, was distributed to any devisees) might in equity be subject to such suits, even after the estate has been closed.[217] However, bona fide purchasers from the estate or its heirs or devisees are not bound by any covenants.[218]

More discussion of this rule may be found in *Jones v. Franklin*, where the court explained that the original doctrine stemmed from similar covenants in medieval England.[219] If the covenants were broken, the court would issue a writ of *warrantia chartae*, requiring the covenantor to yield other land of similar value to those lands the covenantee had lost by eviction.[220] An heir of the covenantor was bound only if the heir had land of equal value acquired by descent.[221] There is similar precedent in other states.[222]

In *Hamilton v. Farmer*, the grantee sued both the personal representative of his grantor, alleging that the estate of the grantor was insolvent, and the heir of the person who had sold the real estate to the grantor.[223] However, in this case the court ruled that there was no breach of the covenant of general warranty.[224]

In *Hendricks v. Keesee*, the decedent grantor conveyed the real property in 1856 and died in 1864.[225] Over ten years later, long after the estate had closed, a homesteader evicted the grantee.[226] Title had been in the United States when the decedent grantor had conveyed the real estate in question to the grantee.[227] The court held that the covenant of seisin was breached at the time of conveyance, and thus the statute of limitations had run.[228] The court clarified that the heirs of the grantor could not be held liable at law on any contract, but only in equity, and only if the cause of action arose *after* the estate was closed.[229]

On the other hand, heirs were not held liable in *Meyer v. McDill*, because the chancellor found that there was not sufficient evidence that real estate passed to the heirs of the grantor.[230] The rule of law that would have applied was simply that if there was a breach of covenants of title, the grantees would have been entitled to a lien against the real estate for the amount of damages.[231]

Could such liability be enforced today against heirs of a decedent grantor? If the nonclaim statute is not a factor, as has been ruled, then the answer would seem to be yes. If only land that once belonged to the deceased grantor can be attached, then this remedy might not be available very often, as today, estates are often liquidated and the proceeds distributed to the heirs and/or devisees.

IV. SPECIAL ISSUES INVOLVING MINERAL RIGHTS

Assume these hypothetical facts. *A* owns 400 acres in Faulkner County. *A* sells to *B*. The contract was silent as to the mineral rights. *B* recalls a conversation with *A*, that *A* does not recall, promising *B* the full mineral rights. The deed makes no exception for mineral rights. The natural gas company comes knocking at *B*'*s* door three years after the sale in order to lease B's interest in the mineral rights, and informs *B* that *B* owns only half of the mineral rights, because the other half was reserved by *A*'s predecessor in title, long before the deed to *B*. Again, *B*'s title insurance policy expressly excepts mineral rights. If *B* received a warranty deed from *A*, *B* can successfully sue *A* on the covenants of title for the consideration paid for the mineral rights. On the other hand, if *A* tried to reserve half of the mineral rights to himself at the time of the conveyance, but half was already reserved in a predecessor to *A*, depending on the wording of a warranty deed, *A* may well have conveyed away the rights he thought he was reserving. How do the deed covenants cause these results?

Since the development of the Fayetteville Shale Play located in northern Arkansas, legal issues involving mineral rights have represented an ever-increasing percentage of appellate decisions. Mineral rights involve issues that real estate lawyers need to be cognizant of in the preparation of deeds. For one thing, a warranty deed that does not except mineral rights covenants that the grantor has, and is, conveying all mineral rights. If they were severed previously, the grantor is in breach of the warranty of seisin.[232] Moreover, if the grantee is evicted, the grantor is also in breach of the covenants of quiet enjoyment and general warranty.[233]

Second, if a warranty deed is drafted carelessly or in ignorance of the *Duhig* Rule, the grantor may lose mineral rights she intended to reserve. The *Duhig* Rule essentially allows covenants of title in a deed to trump words of reservation in the deed.[234] It operates when a grantor purports to reserve a mineral interest in a conveyance by warranty deed (this usually happens as part of the conveyance of surface rights as well) and when there has been a partial reservation of mineral rights by someone up the chain of title from the grantor. To illustrate, assume that Grantor only owns one-half of the mineral rights to Blackacre; Railroad originally reserved the other half at some point during the nineteenth century. Grantor now wishes to reserve half of the mineral rights for himself, as he conveys Blackacre to Grantee. The deed states "subject to a reservation of one-half of the mineral rights in Grantor, his heirs and assigns." However, the deed is also a warranty deed, and there is no exception of mineral rights from the warranty. Under the *Duhig* Rule, the deed first reserves half of the minerals in Grantor, leaving none to be conveyed to Grantee, but the warranty deed operates to convey them to Grantee, so that Grantor will not breach the covenants of title.[235]

Another pitfall with respect to mineral rights may occur with respect to whether the conveyance, the covenants of title, or both are being limited by the deed, and not in a way that one or more of the parties intended. This issue arose in 2011 in *Barger v. Ferrucci*.[236] The Ferruccis conveyed real estate to the Bargers by warranty deed.[237] The deed also stated "subject to reservation of all oil, gas and other minerals."[238] Approximately half of the mineral rights had been reserved by owners prior to the Ferruccis.[239] They argued that they were reserving the remaining mineral rights in their deed.[240] The Bargers argued that the "subject to" wording limited the covenants of title, and did not reserve any mineral rights.[241] Both the trial court and the Court of Appeals agreed with the Ferruccis, applying the rules of construction of deeds.[242]

Interestingly, none of the deeds in the deed study reserved mineral rights in favor of the grantor. However, ninety-six of the deeds (30.87%) contained an express exception for prior mineral reservations. Some of the other deeds may also indirectly except for prior mineral reservations using language such as "subject to reservations of record."[243] Arguably, a special warranty deed may also achieve the same result provided the mineral rights were severed by an owner prior to the grantor.

An example of a limitation on a general warranty can be found in *Gibson v. Pickett*: "And we hereby covenant with said Oce S. Griffin that we will forever warrant and defend the title to said lands against all claims whatever, except Mineral Rights."[244]

The authors recommend the following reservation of mineral rights, to be located immediately following the legal description that ends the granting clause: "Grantor hereby expressly reserves out of the grant hereby made, unto itself, its heirs and assigns forever, all metals, ores and minerals, including but not limited to quartz, brine, coal, lignite, oil and gas, including coal seam gas, and all geothermal steam and heat."

Also recommended, as a way to limit the warranty if mineral rights are reserved, is the following wording of the covenant of general warranty: "Grantor will defend the Property conveyed hereby against all lawful claims of third parties claiming any interest in such Property; provided, Grantor does not convey or warrant to Grantee any rights to any metals, ores or minerals, including but not limited to quartz, brine, coal, lignite, oil and gas, including coal seam gas, and all geothermal steam and heat." Alternatively, a grantor may want to include a separate paragraph stating something like:

Notwithstanding anything contained herein to the contrary, Grantor makes no warranties or representations whatsoever regarding any mineral rights associated with the Property. To the extent Grantor owns any mineral rights associated with the Property, the same are conveyed to Grantee by quitclaim and without any warranty of title. The Property is expressly subject to any prior or existing mineral rights or reservations owned or enjoyed by third parties.

V. REMEDIES

Damages are the only remedy for a breach of five of the covenants of title. This is one important difference between the contract for sale and the warranty deed; the buyer suing on the contract may ask for such remedies as rescission or specific performance, whereas the grantee suing on the deed is entitled only to damages.[245] The one covenant that is the exception is the one not used in Arkansas, the covenant of future assurances, which, since it promises that the grantor will take actions, allows for a remedy of specific performance.[246]

Damages may be nominal under certain circumstances. For example, ordinarily a grantee may not recover damages for breach of the covenant against encumbrances based on the mere existence of an encumbrance. The grantee may only recover after either paying off the encumbrance or suffering eviction because of it.[247] In *Proffitt v. Isley*, the grantees purchased property subject to an outstanding mortgage.[248] When the grantees discovered the existence of the mortgage, they sued remote grantors, however, at the time of the suit, the grantee had neither paid off the mortgage nor been evicted. Thus the breach of the covenant of quiet enjoyment was "technical" only, and the grantees received no award of damages.[249] In *Security Bank v. Davis*, the grantor conveyed a warranty deed to the grantee but owned only a life estate.[250] The court held that the covenant of general warranty had been breached, but because the grantee failed to prove any damages, damages would be nominal.[251] In *Bass v. Starnes*, where it was clear from evidence at trial that the grantee knew about an unexpired lease, and the amount of consideration was based on the lease, nominal damages were appropriate.[252]

The general rules regarding the measure of damages are as follows: if a grantee is evicted from the entire tract, the purchase price is the measure of damages. If the eviction is from only part of the tract, the prorated purchase price is the measure. If the breach is caused by an encumbrance, the cost of paying off the encumbrance, if it can be paid off, is the measure of damages, so long as it does not exceed the purchase price. In all cases, interest should be awarded from the date of the breach (typically either the date of conveyance or the date of eviction). Attorney's fees may be recovered, and are discussed in the next section.

Where a grantee was evicted from the entire tract by someone with superior title to the grantor, the court noted that the general measure of damages for breach of the covenant of seisin in this circumstance is the purchase price plus interest, but if there was fraud on the part of the grantor, the grantee may also recover for valuable improvements.[253] If the grantee must purchase property from a third party with superior title to perfect her title, the damages for breach of the covenant of seisin will be the cost of the purchase, but the value of the land must be proven.[254] Further, the grantee may simply decide to remain on the land until her title ripens under adverse possession,[255] but in that case, she will be entitled to no more than nominal damages.[256] Even if the land has appreciated after the sale, the measure of damages is the consideration paid, and not the present value.[257] This can result in a great injustice to the grantee if many years have passed between the conveyance and the breach.

In general, the measure of damages for breach of the covenant of the right to convey is the same as that for breach of the covenant of seisin.[258]

If the property is burdened with an encumbrance, the measure of damages is typically the cost of paying off the encumbrance, unless it is greater than the consideration paid for the property,[259] with interest from the date of the extinguishment of the encumbrance.[260] In general, the covenant against encumbrances is a "covenant of indemnity."[261] In *Van Bibber v. Hardy*, the grantee won reimbursement for paying the tenant not to exercise his right of renewal.[262] If the encumbrance is an unexpired lease, the general rule is that "the measure of damages will be the fair rental value of the land to the expiration of the term."[263] If, however, the lessee defaults and a court determines that the lease has terminated, such damages will be allowed only up to the time of the decree.[264] If the encumbrance is a mortgage and the grantee has been evicted from the premises by a foreclosure decree, she should recover the amount paid to date on the purchase price, and attorney's fees, and court costs for her expenses in the foreclosure suit, with interest from the date of the eviction.[265]

In *Mayo & Robinson v. Maxwell & Moore*, the court considered the issue of the amount of damages for a breach of a covenant against encumbrances.[266] The grantors had originally sold the land to a third party and retained a vendor's lien. The third party also conveyed a mortgage. The third party defaulted, whereupon the grantors foreclosed, but failed to make the mortgagee a party. The grantors then conveyed the property to the grantees, who made improvements such that its value was greatly enhanced by the time the grantees paid off the encumbrance, which was a mortgage that a predecessor in title to the grantors had conveyed to a third party.[267] The grantors argued that they should only be liable for the purchase price, which amounted to less than the value of encumbrance.[268] The grantees argued that because of the many improvements made on the property its value had increased since the time of purchase, and that they should be reimbursed for paying off the mortgage.[269] The court sided with the grantees. It stated that the grantees should not be penalized for making improvements.[270] In addition, the court reasoned that the grantors could have joined the mortgagee when they originally foreclosed against the previous owner.[271]

There is no requirement that a grantee satisfy an incumbrance before bringing an action to recover for breach.[272] If the grantee is later evicted (for example, if a mortgage is foreclosed), the measure of damages will change from that for breach of the covenant against encumbrances (paying off the encumbrance) to that for breach of the covenant of warranty (the value of the consideration paid).[273]

If the possession of the grantee has been disturbed by one with paramount title to part of the tract, and the grantee loses a lawsuit over the title, the grantee can recover from the grantor the amount of the consideration for that portion, plus the interest from the date of eviction, and the grantee's litigation costs.[274] Similarly, if title to a portion of the tract is in the sovereign at the time of the conveyance, causing automatic eviction, the grantee is entitled to the amount of consideration for that portion.[275] However, the amount of interest may be limited. In *Wood v. Setliff*, the grantees had possession of the sovereign's property at all times.[276] They did not have to pay the sovereign for their use of the property, and the amount of damages was unliquidated prior to the decree.[277] Citing these reasons, the Supreme Court upheld an award of interest only from the date of the decree, rather than from the date of the eviction.[278]

Typically, no damages for the value of improvements made by the grantee are recoverable in the absence of fraud.[279] In *Wood v. Setliff*, there was a drive-in building located on the tract purchased by the grantees.[280] They won the suit for breach of the covenant of general warranty because a portion of their tract was owned by the City of El Dorado; but, they were unsuccessful in recovering damages for the cost of moving the building.[281] Although the grantees were on constructive notice of the city's claim, they had moved the building onto the city's property and had to remove it later.[282] On appeal, the Supreme Court reversed the award of damages.[283] For breach of the covenant of quiet enjoyment, the grantee was entitled to the cost to extinguish the adverse title, including incidental expenses, not to exceed the purchase price and interest.[284]

The biggest disadvantage to the measure of damages for breach of covenants of title is no allowance for appreciation or for improvements. In this, however, they are similar to the proceeds of title insurance, which are limited in the amount of recovery by the face amount of the title policy. For instance, if a person buys a residential lot for $50,000 and purchases title insurance, the buyer will have $50,000 in coverage for title claims (assuming the buyer does not purchase additional insurance coverage, which is occasionally available). If the person then builds a house on the lot for the cost of $300,000, the person has $350,000 invested in the property. However, if the person then suffers a total failure of title, recovery will be capped at $50,000. Even if a $350,000 title insurance policy can be purchased, the typical owner policy in use today in Arkansas (the 2006 ALTA policy) will not appreciate in value as the property appreciates in value over time.[285]

Another risk when suing under covenants of title is that if the grantee sues for breach of the covenant against encumbrances, the covenant of quiet enjoyment or the covenant of warranty, and the grantee has neither been disturbed in possession nor has had to pay off an encumbrance, only nominal damages will be recovered.[286] Further, res judicata may prevent the grantee from recovering any damages in a later suit, unless the court retained some type of continuing jurisdiction for future claims.

VI. COSTS AND ATTORNEY'S FEES

The general rule at common law is that under a covenant of warranty, whereby the grantor promises to defend the grantee, the grantor is liable only for costs and attorney's fees if the grantee loses to a third party with paramount title; there is no liability on the part of the grantor if the grantee is successful in litigation over title.[287] This rule follows from the purpose of covenants of title, to provide redress for defects in title that result in the grantee getting less than what she paid for. If the grantee wins in a title action, she has not lost value. However, Arkansas has awarded attorney's fees to the grantee even if the grantee is successful in her defense.

In *Murchie v. Hinton*, the grantee was sued by her neighbors, who alleged encroachment.[288] The court issued a temporary restraining order, which the Court of Appeals labeled as an eviction.[289] She notified her grantors of the suit and requested the grantors to defend, filing a third-party complaint against them for attorney's fees.[290] They appeared and participated in the trial but took no other action to defend title.[291] The grantee was successful in her defense.[292] The court awarded her attorney's fees based on Arkansas Code Annotated § 18-12-102,[293] without any discussion of why this statute would justify attorney's fees, and on the basis of the covenant of warranty, which stated that the grantors would "defend the title . . . against all claims whatever."[294] The court then went one step further and awarded the grantee her costs and attorney's fees in the suit against the grantor under the authority of the then-new amendment to Arkansas Code Annotated § 16-22-308.[295] The court acknowledged a long line of precedent reaching the opposite result,[296] but noted that it was pre-statute. The court stated that a warranty deed should be considered a contract for purposes of this statute.[297]

The *Murchie* court also cited *Bosnick v. Hill*[298] as authority for an award of attorney's fees for successful litigation against a third party. The facts in *Bosnick* present a more compelling argument for costs and attorney's fees. In *Bosnick v. Hill*, the grantees sued both a third party, who was adversely possessing the disputed property at the time of conveyance, and the grantors, after they refused to prosecute the suit on behalf of the grantees.[299] The grantees won, but the chancellor followed the general rule and denied them costs and attorney's fees because they were successful.[300] The Supreme Court reversed.[301] The grantees contended that at the time of conveyance the covenant of seisin was breached, necessitating a lawsuit against the third party in wrongful possession.[302] The court agreed with this argument, quoting *American Jurisprudence* 2d, which states, "where third persons are in possession of the land conveyed and the grantee is forced to resort to legal proceedings, such as an ejectment suit, to gain possession, he may recover the expenses of such suit when he sues for breach of covenant, *if such outstanding possession was in fact a breach of a covenant of the deed*."[303]

Under the Arkansas rule, when a grantee sues, or is sued, by a third party in a suit to defend or assert title, the costs and necessary expenses incurred in a bona fide action may be recoverable from the grantor, including reasonable attorney's fees.[304] However, if the grantee offers no evidence as to the amount of reasonable attorney's fees, the claim may be denied.[305] Also, the grantee may not recover attorney's fees if the grantee has not notified the grantor of the grantor's duty to defend the title in advance of the suit.[306]

It can be dangerous to plead a breach of a covenant. Even if it is not an issue, if the pleading party loses, the other side can recover attorney's fees. In *Lawrence v. Barnes*, the plaintiffs, who claimed they were entitled to mineral rights, sued to void the correction deed that the defendants had recorded, after the minerals were conveyed due to a scrivener's error.[307] The plaintiffs also sued to quiet title, and mentioned "breach of contract" in their complaint.[308] Even though breach of contract was not a legal theory that was tried or appealed, the Court of Appeals awarded attorney's fees to the defendants, citing *Murchie v. Hinton*'s rationale that a warranty deed is a contract for purposes of the attorney fee statute.[309]

In *Mayo & Robinson v. Maxwell & Moore*, the grantor sold real estate to the grantee after the grantor foreclosed on the previous buyer.[310] The previous buyer mortgaged an interest in the land to a third party, who was not made a party to the foreclosure, and the third party sued both grantor and grantee. Although the grantee was able to recover the amount of the encumbrance from the grantor, the court denied attorney's fees, because whether there was an encumbrance was not the issue before the court; in other words, no issues were "litigated or decided" against the third party.[311]

The issue of attorney's fees also deserves contrast with title insurance policies. In covenant of title cases, attorney's fees are awarded in addition to the damages, be they the consideration for the property or the cost of paying off the encumbrance, and interest. On the other hand, if a title insurance company defends a title suit, the title company has two options. Under Condition 7 of the 2006 ALTA Title Policy Form, the title insurance company has the option to tender the total amount of the insurance policy to the insured, which automatically terminates any further liability or defense obligations of the title company. Alternatively, under Condition 5 of the 2006 ALTA Title Policy Form, if the title company believes it can defend the case for less than the amount of the insurance policy, the title insurer may defend the claim, but the defense costs do not reduce the amount of the insurance policy. However, at any time during the defense, the title insurer can opt to cease the defense, exercise its option under Condition 7 to pay the face amount of the insurance to the insured, and cut off future liability or defense costs. If the title insurer elects to defend title, at its expense, but is unsuccessful in doing so, the amount of the insurance policy automatically increases by ten percent pursuant to Condition 8 of the 2006 ALTA Title Policy Form.

VII. SPECIAL WARRANTY DEEDS

Special or limited warranty deeds warrant title only against defects arising by or through acts of the grantor.[312] Thus, if a grantor conveys by special warranty deed land subject to an encumbrance, but the encumbrance was created by the grantor's predecessor in title, the grantor will not be liable for breach of the covenant against encumbrances. It is possible for some covenants of title to be general and others to be limited in the same deed; in fact, the Arkansas statutory covenants of title convey a special, and not a general, covenant against encumbrances, as discussed below. Thus, every Arkansas deed labeled as a "general warranty deed" that states "grant, bargain and sell" has one special warranty in it. The typical special warranty clause used in the deeds examined is: "Grantor covenants with Grantee that Grantor will forever warrant and defend the title to said lands against all claims and encumbrances done or suffered by it, but against none other." This clause has the effect of limiting liability under the covenants of seisin, right to convey, and quiet enjoyment to defects in title caused by the grantor only, and not any of his predecessors in title.[313] Of course, a grantee is free to sue a predecessor in title, if that party conveyed with a warranty deed that will be enforceable under the circumstances.

Of the deeds in the sample, sixty-four (20.6%) of the total were special warranty deeds. A large number seemed to be associated with conveyances to or from HUD, Fannie Mae, or Freddie Mac. Twenty-four (37.5%) of the special warranty deeds were title company forms prepared by an Arkansas attorney; one (1.6%) was drafted by a corporation; three (4.7%) were drafted by the grantor; thirty (46.9%) were drafted by an Arkansas lawyer; one (1.6%) was drafted by an out-of-state title company; and five (7.8%) were drafted by out-of-state lawyers.

One of the most striking findings of the study were the many deficient special warranty deeds, which arguably only conveyed a covenant of special warranty, and none of the others, because the words "grant, bargain and sell" were not used. (See the discussion below at text accompanying notes 336-338). Nineteen (29.7%) of the special warranty deeds failed to contain the words "grant, bargain and sell,"[314] and thus failed to convey any of the present covenants. This contrasts with only three (1.2%) general warranty deeds that failed to contain the "grant, bargain and sell" phrase.

VIII. QUITCLAIM DEEDS

A quitclaim deed is a deed barren of any covenants of title. The grantor merely conveys whatever interests the grantor has. If the grantor owns a fee simple absolute, a quitclaim deed is sufficient to convey the full "right, title, interest, claim and estate" of the grantor;[315] however, it makes no promises with respect to the title. Thus, a quitclaim deed will not transfer after-acquired title.[316] The words "bargain, sell and quitclaim," without any express covenants, create a quitclaim deed.[317] In a similar case, a deed stated "have sold and released and quitclaimed," but also contained an express covenant of general warranty, promising that the grantors would "forever defend the title aforesaid against all parties who hold under or through the said grantors."[318] The Supreme Court held that "have sold and released and quitclaimed" conveyed no warranties, and the wording of the covenant of warranty was not enough to convey after-acquired title.[319]

On the other hand, in *Jernigan v. Daughtry*, a grantee who owned only a remainder interest in real estate, subject to his mother's life estate, joined her in executing a mortgage to a bank.[320] The bank foreclosed, and after his mother's death, Daughtry claimed title to the real estate.[321] However, the mortgage contained express covenants that the mortgagors had perfect title and possession, and that the property was free from encumbrances.[322] In view of the fact that Daughtry promised good title, the court held that the after-acquired statute applied, as it covers not only fees simple absolute but also "any less estate."[323]

In an unusual case, the Arkansas Supreme Court held that a quitclaim deed, in effect, conveyed warranties. In *Brawley v. Copelin*, the grantor conveyed two tracts by warranty deed.[324] The legal description of one deed was incorrect, so a quitclaim correction deed that referred to the warranty deed was issued.[325] The grantee was later evicted from the tract conveyed by quitclaim.[326] The court ruled that the grantee could recover from the grantor for breach of covenants of title because the two deeds together constituted one contract, and the covenants applied to both tracts.[327]

Since a quitclaim deed contains no covenants of title, a grantee who receives a quitclaim deed may not avoid payments of purchase money to the grantor unless the grantor committed fraud.[328]

IX. ARKANSAS WARRANTIES

Statutory warranties in Arkansas trace their history back to Arkansas's origins as part of the District of Louisiana, formed from the newly acquired Louisiana Purchase in 1804.[329] The new district was placed under the jurisdiction "of the governor and judges of the Indiana Territory."[330] These officials enacted sixteen statutes establishing the basic framework of common law to supersede the previously existing civil law regime.[331] One of these statutes provided that a deed that "bargained and sold" real property would contain the covenants of seisin, against encumbrances, and quiet enjoyment.[332] This law continued on into the law of the Missouri Territory, which included what is today Arkansas,[333] and into the first codification of Arkansas statutes, the *Revised Statutes of Arkansas*, which was adopted in 1837.[334] The Arkansas Supreme Court has stated that Arkansas's covenants of title statute originally came from Pennsylvania,[335] which is still in force.[336]

The Arkansas statute creating covenants in deeds reads as follows:

(a) All lands, tenements, and hereditaments may be aliened and possession thereof transferred by deed without livery of seizin.

(b) The words, "grant, bargain and sell" shall be an express covenant to the grantee, his or her heirs, and assigns that the grantor is seized of an indefeasible estate in fee simple, free from encumbrance done or suffered from the grantor, except rents or services that may be expressly reserved by the deed, as also for the quiet enjoyment thereof against the grantor, his or her heirs, and assigns and from the claim and demand of all other persons whatever, unless limited by express words in the deed.[337]

The Arkansas statute also expressly exempts taxes and assessments of improvement districts from the classification of encumbrances.[338]

After translating the archaic wording of the statute, it can be seen that there are three covenants promised by use of "grant, bargain and sell:" first, the covenant of seisin; second, the covenant of freedom from encumbrances; and third, the covenant of quiet enjoyment. The Arkansas Supreme Court has added a fourth covenant in its interpretation of the statute, the covenant of the power to convey.[339] The court has also confirmed what the statute says: that the covenant of freedom from encumbrances is a "special" and not a "general" covenant in that it only promises a remedy for an encumbrance if the encumbrance occurred during the grantor's ownership of the property.[340] Thus, the phrase "general warranty deed" is a slight misnomer if applied to an Arkansas deed that states "grant, bargain and sell" and no more, for the covenant against encumbrances is a special warranty or covenant, and the covenants of warranty and further assurances are not included. Of course, it is possible for a deed to contain express warranties—instead of the "grant, bargain and sell" phrase—that could either contain the same warranties, or more, or fewer. The authors have provided model general and special warranty deeds in Appendix A, with the caution that there is no one way to draft a deed that accomplishes what the parties intend.

The Arkansas Supreme Court has also recognized the similarity of the covenant of quiet enjoyment with the covenant of general warranty. In *Gibbons v. Moore*, the court construed Arkansas Code Annotated § 18-12-102 to also include a covenant of general warranty, stating that, in effect, the two covenants are the same.[341] However, subsequent cases interpreting the statute do not include a covenant of general warranty. Nonetheless, it is customary today in Arkansas to include an express covenant of either special or general warranty in a warranty deed, as the authors' empirical study demonstrates, since literally 99.7% of the 311 deeds did so, and the one exception was the "Limited Warranty Deed" that was really just a quitclaim deed.[342]

Some Arkansas decisions do not refer to the statute when discussing the warranties in a deed, but merely make the general statement that "[t]he usual covenants of title in a general warranty deed are the covenants of seisin, good right to convey, against encumbrances, for quiet enjoyment and general warranty."[343] The authors find this statement misleading because a deed contains no implied covenants. Calling a deed a "general warranty deed" or a "special warranty deed" without including covenants will render the deed a quitclaim deed. Covenants must be express, or the Arkansas words that imply warranties—grant, bargain and sell—must be used. Indeed, if words such as "quitclaim" or any words other than "grant, bargain and sell" that are inconsistent with the phrase appear in the granting clause, then such words will "take the conveyance out of the statute."[344] In *Chavis v. Hill*, the granting clause contained the words "grant, bargain, sell, convey, and quitclaim."[345] The deed did not contain an express covenant of warranty, and the court held that it was a quitclaim deed. In *Dillahunty v. Little Rock & Ft. Smith Ry. Co.*, a deed that stated "grant, sell and convey," rather than "grant, bargain and sell," was held not to contain any of the warranties conferred by Arkansas Code Annotated § 18-12-102.[346] This has relevance to a significant number of the special warranty deeds in the study, discussed above. In fact, thirteen of the special warranty deeds (20.3% of the special warranty deeds) used the exact phrase "grant, sell and convey" which was held in *Dillahunty* to not convey covenants of title.

Under the rules of construction of deeds, all parts of the deed are read together in an attempt to give effect to every word if possible.[347] The granting clause is the most important part of the deed when construing what interest is being conveyed.[348] The covenants implied by "grant, bargain and sell" may be expanded or limited by other wording in the deed. The exceptions to title or warranty contained in the deeds in the study appeared in a number of different places—sometimes after the legal description, sometimes in a separate recital, but most often at the end of the statement giving a general covenant of warranty.

In *Doak v. Smith*, Creel, the original owner, forfeited the real estate in question for nonpayment of taxes.[349] Doak purchased at the sale and conveyed by warranty deed.[350] By mesne conveyances, Smith became the owner of the tract.[351] Creel sued to cancel the deed, and all the parties were made defendants.[352] Smith in turn sued Doak on the warranty deed that Doak had conveyed to Smith's predecessor in title.[353] The deed contained the words "grant, bargain and sell," which would make it what Arkansas case law calls a "general warranty" deed.[354] However, there was an additional covenant of warranty, which stated that Doak would "warrant and defend . . . against all lawful claims whatever done or suffered by us or those under whom we claim."[355] The court held that these words limited the "grant, bargain and sell" covenants and converted the deed from a general to a special warranty deed.[356] Since Doak did not claim "under" Creel—Doak took title from the State, Creel having forfeited his title—Smith was unsuccessful in his claim against Doak.[357]

With respect to the general warranty deeds in the sample, all but three contained the words "grant, bargain and sell" (though most included other words of conveyance as well, such as "grant, bargain, sell and convey"). All contained an express covenant of general warranty, but there were several variations in the phrasing. For example:

• Instrument No. 2011033941: "And we, William W. Ciesielka and Tess Ciesielka, husband and wife, hereby covenant with said Charles Burns, a married man, that we will forever warrant and defend the title to said land against all lawful claims whatever."

• Instrument No. 2011033945: "And we hereby covenant with Grantee(s) that we will forever warrant and defend the title to said lands against all lawful claims whatever."

• Instrument No. 2011033726: "[G]rantor warrants and will defend the title to said premises against the lawful claims of all persons whosoever."

X. CONCLUSION

First, the term "general warranty deed" is somewhat of a misnomer in Arkansas. Labeling a deed a "general warranty deed" does not make it so; covenants or warranties of title must either be express or those implied by using the wording "grant, bargain and sell." All general warranty deeds the authors examined contained an express general or special warranty clause, containing a covenant of general warranty. Virtually all the deeds labeled "general warranty" contained the words "grant, bargain and sell." These words, by statute, convey the general covenants of seisin, right to convey, and quiet enjoyment. However, the covenant against encumbrances is a "special" covenant, limited to only those encumbrances that are "done or suffered by" the grantor are warranted.

Second, in general, the deeds in the sample conveyed what they said they conveyed. Of the exceptions to this statement, one deed was labeled a "limited warranty deed," but was actually a quitclaim deed. It was prepared by a corporation.[358] Three deeds were labeled "general warranty deed" but were not because they failed to contain the "grant, bargain and sell" wording and did not contain express present covenants.[359] These deeds were prepared for residential transactions. All were title company forms prepared by Arkansas attorneys.[360] About one-fifth of the deeds labeled "special warranty" did not contain the present covenants. The authors theorize that perhaps some attorneys do not understand that only the wording of the covenant of warranty need be changed in the typical special warranty deed. The "grant, bargain and sell" language should still be inserted.

Not a single deed excluded the covenants from covering those matters specifically excepted in title insurance policies. This marks a divergence between commercial sales involving sophisticated parties and Arkansas residential sales, where typically no attorneys are involved. In the authors' experience, excluding the standard title commitment exceptions to provide enhanced coverage is commonplace in complex commercial transactions. Most of the deeds studied left the grantor exposed to several common legal problems, including issues related to previously conveyed mineral rights, encumbrances, and boundary line disputes.

In the authors' opinions, this is one of the drawbacks of the lack of involvement of attorneys in residential real estate transactions. Real estate agents and title agents, the professionals who typically supply the contract and the deed respectively, are not permitted to give legal advice for good reasons, and the authors do not advocate that this standard should change. Yet the signing of a purchase agreement and the delivery of a deed legally obligate the seller and buyer in what for many Arkansans is the biggest (and most emotionally freighted) investment they will ever make—the sale and purchase of a home—and arguably few sellers and buyers are aware of the promises inherent in the general warranty deed.

Should title agents be obligated to furnish deeds that include the same exceptions to the warranties as the exceptions in the title policy? Should more special warranties be used in deeds? These are good questions with no simple answers; they must be considered in connection with the current contract used by most Arkansas real estate agents, as the deed must convey and warrant at least what the contract has promised.

Litigation in this area will increase because of recently enacted statutes that require inclusion of all encumbrances within the last thirty years in title commitments,[361] and because more disputes over mineral rights will reach the courts. It is the hope of the authors that they have provided some illumination of this dark and dusty corner of the law—covenants of title—so that they may be used more effectively.

APPENDIX A

Model General Warranty and Special Warranty Deeds

THIS INSTRUMENT PREPARED BY:
[Arkansas Licensed Attorney Name]
[Address of Arkansas Licensed Attorney]
[Address of Arkansas Licensed Attorney]
[Phone Number of Arkansas Licensed Attorney]

GENERAL WARRANTY DEED

____________________, a/an ____________ [or state marital status if an individual] ("Grantor"), for and in consideration of the sum of $10.00 and other good and valuable consideration, in hand paid by ____________________, a/an ____________ [or state marital status if an individual] ("Grantee"), the receipt and sufficiency of which is hereby acknowledged, does hereby grant, bargain and sell unto Grantee, and unto Grantee's successors and assigns forever, the real property situated in __________ County, Arkansas, described as follows (the "Property"):

[Legal Description of the Property]

TO HAVE AND TO HOLD said property unto Grantee and unto its successors and assigns forever, with all appurtenances thereunto belonging. And Grantor hereby covenants with Grantee as follows:

1. Grantor is now seized in fee simple absolute of the Property;

2. Grantor has full power to convey the Property;

3. The Property is free from all encumbrances [except as set forth on Exhibit 1, which is a copy of the Schedule B-II Exceptions]~or~[except for matters appearing in the real property records of the county where the Property is located]~or/and~[except for such matters as would be disclosed by an accurate survey of the Property as of the date of this deed, including without limitation the rights of third-parties to ingress, egress or possession (whether by prescription or claim of fee title) on or over the Property on account of driveways, fences or other structures on the Property capable of serving adjoining property owned by third parties];

4. Grantee shall enjoy quiet title to the Property without any lawful disturbance;

5. Grantor will defend the Property against all lawful claims of third parties claiming any interest in the Property except to the extent excepted above; and

6. Grantor will, on demand and at Grantor's expense, perform any necessary future actions, including executing and delivering any documents, necessary to perfect title to the Property in Grantee.

Notwithstanding anything contained herein to the contrary, Grantor makes no warranties or representations whatsoever regarding any mineral rights associated with the Property. To the extent Grantor owns any mineral rights associated with the Property, the same are conveyed to Grantee by quitclaim and without any warranty of title. The Property is expressly subject to any prior or existing mineral rights or reservations owned or enjoyed by third parties.

Notwithstanding anything contained herein to the contrary, Grantor makes no warranties or representations regarding claims of adverse possession, boundary by acquiescence, boundary by agreement or otherwise by third parties that may exist as a result in any variation or deviation of any existing fences or other boundary markers that may not be located precisely on the boundary line of the Property. Furthermore, Grantor makes no warranties or representations regarding the rights of third-parties to assert easements of necessity to any portion of the Property.

EXECUTED this _____ day of ________, 20___.

GRANTOR:

[CORPORATION SIGNATURE BLOCK]

___________________________________,
a/an ______________

By:_____________________________
Name:___________________________
Title:____________________________

INDIVIDUAL SIGNATURE BLOCK

____
[GRANTOR NAME], [A MARRIED PERSON~OR~AN UNMARRIED PERSON]

I certify under penalty of false swearing that the legally correct amount of documentary stamps have been placed on this instrument. Exempt or no consideration paid if none shown.

GRANTEE OR AGENT:__________________________
GRANTEE'S ADDRESS:_________________________
____
____
GRANTEE'S SIGNATURE

[CORPORATE ACKNOWLEDGMENT]

STATE OF _________)
)   ACKNOWLEDGMENT
COUNTY OF ______)

On this day, before me, a Notary Public, duly commissioned, qualified and acting, with and for said County and State, appeared in person the within named ______________, to me well known, who stated and acknowledged that he/she was the _____________ of _________________, a/an________________, and had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of ____________, 20___.

____
Notary Public

My Commission Expires:
____
(S E A L)

[INDIVIDUAL ACKNOWLEDGMENT]

STATE OF _________)
)   ACKNOWLEDGMENT
COUNTY OF ______)

On this day, before me, a Notary Public, duly commissioned, qualified and acting, with and for said County and State, appeared in person the within named ______________, to me well known, who stated and acknowledged that he/she had signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of ____________, 20___.

Notary Public

My Commission Expires:

(S E A L)

THIS INSTRUMENT PREPARED BY:
[Arkansas Licensed Attorney Name]
[Address of Arkansas Licensed Attorney]
[Address of Arkansas Licensed Attorney]
[Phone Number of Arkansas Licensed Attorney]

SPECIAL WARRANTY DEED

____________________, a/an ____________ [or state marital status if an individual] ("Grantor"), for and in consideration of the sum of $10.00 and other good and valuable consideration, in hand paid by ____________________, a/an ____________ [or state marital status if an individual] ("Grantee"), the receipt and sufficiency of which is hereby acknowledged, does hereby grant, bargain and sell unto Grantee, and unto Grantee's successors and assigns forever, the real property situated in __________ County, Arkansas, described as follows (the "Property"):

[LEGAL DESCRIPTION OF THE PROPERTY]

TO HAVE AND TO HOLD said property unto Grantee and unto its successors and assigns forever, with all appurtenances thereunto belonging.

And Grantor hereby covenants with Grantee as follows:

1. Grantor is now seized in fee simple absolute of the Property;

2. Grantor has full power to convey the Property;

3. The Property is free from all encumbrances created by Grantor [except as set forth on Exhibit 1, which is a copy of the Schedule B-II Exceptions]~or~[except for matters appearing in the real property records of the county where the Property is located]~or/and~[except for such matters as would be disclosed by an accurate survey of the Property as of the date of this deed, including without limitation the rights of third-parties to ingress, egress or possession (whether by prescription or claim of fee title) on or over the Property on account of driveways, fences or other structures on the Property capable of serving adjoining property owned by third-parties];

4. Grantee shall enjoy quiet title to the Property without any lawful disturbance by any party claiming by or through Grantor, but none other;

5. Grantor will defend the Property against all lawful claims of third parties claiming any interest in the Property by or through Grantor, but none other, and except to the extent excepted above; and

6. Grantor will, on demand and at Grantor's expense, perform any necessary future actions, including executing and delivering any documents, necessary to perfect title to the Property in Grantee subject to the limitations of special warranty provided in this deed.

Notwithstanding anything contained herein to the contrary, Grantor makes no warranties or representations whatsoever regarding any mineral rights associated with the Property. To the extent Grantor owns any mineral rights associated with the Property, the same are conveyed to Grantee by quitclaim and without any warranty of title. The Property is expressly subject to any prior or existing mineral rights or reservations owned or enjoyed by third-parties.

Notwithstanding anything contained herein to the contrary, Grantor makes no warranties or representations regarding claims of adverse possession, boundary by acquiescence, boundary by agreement or otherwise by third-parties that may exist as a result in any variation or deviation of any existing fences or other boundary markers that may not be located precisely on the boundary line of the Property. Furthermore, Grantor makes no warranties or representations regarding the rights of third-parties to assert easements of necessity to any portion of the Property.

EXECUTED this _____ day of ________, 20___.

GRANTOR:
[CORPORATION SIGNATURE BLOCK]
____________________________,
a/an ______________
By:_____________________________
Name:___________________________
Title:____________________________

[INDIVIDUAL SIGNATURE BLOCK]
____
[GRANTOR NAME], [A MARRIED PERSON~OR~AN UNMARRIED PERSON]

I certify under penalty of false swearing that the legally correct amount of documentary stamps have been placed on this instrument. Exempt or no consideration paid if none shown.

GRANTEE OR AGENT:_________________________
GRANTEE'S ADDRESS:_________________________
____

____
GRANTEE'S SIGNATURE

[CORPORATE ACKNOWLEDGMENT]

STATE OF ______________)
) ACKNOWLEDGMENT
COUNTY OF ____________)

On this day, before me, a Notary Public, duly commissioned, qualified and acting, with and for said County and State, appeared in person the within named ______________, to me well known, who stated and acknowledged that he/she was the _____________ of _________________, a/an________________, and had so signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of ____________, 20___.

____

Notary Public
My Commission Expires:

____

(S E A L)

[INDIVIDUAL ACKNOWLEDGMENT]

STATE OF ______________)
)   ACKNOWLEDGMENT
COUNTY OF ____________)

On this day, before me, a Notary Public, duly commissioned, qualified and acting, with and for said County and State, appeared in person the within named ______________, to me well known, who stated and acknowledged that he/she had signed, executed and delivered said foregoing instrument for the consideration, uses and purposes therein mentioned and set forth.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal this _____ day of ____________, 20___.

____
Notary Public
My Commission Expires:

____
(S E A L)

34 U. ARK. LITTLE ROCK L. REV. 53 (2011).

APPENDIX B:

Instrument Numbers of the Deeds in the Sample

The following general and special warranty deeds were filed in Pulaski County, Arkansas during a two-week period ranging from June 6 through June 17, 2011. They can be found online at *Real Estate*, PULASKI CIRCUIT/COUNTY CLERK, http://www.pulaskiclerk.com/real.htm (last visited October 12, 2011). Copies of the deeds are also on file with the authors.

2011032730	2011032967	2011033279
2011032732	2011033005	2011033280
2011032755	2011033014	2011033284
2011032759	2011033021	2011033286
2011032765	2011033022	2011033293
2011032770	2011033026	2011033295
2011032771	2011033031	2011033299
2011032785	2011033079	2011033301
2011032799	2011033150	2011033305
2011032800	2011033153	2011033307
2011032813	2011033157	2011033309
2011032815	2011033159	2011033311
2011032817	2011033162	2011033316
2011032819	2011033167	2011033321
2011032820	2011033170	2011033322
2011032835	2011033172	2011033331
2011032838	2011033174	2011033333
2011032840	2011033193	2011033335
2011032844	2011033194	2011033336
2011032846	2011033196	2011033338
2011032875	2011033210	2011033381
2011032894	2011033244	2011033383
2011032896	2011033246	2011033392
2011032897	2011033248	2011033394
2011032900	2011033249	2011033408
2011032902	2011033251	2011033410
2011032907	2011033253	2011033412
2011032910	2011033258	2011033415
2011032912	2011033264	2011033445
2011032913	2011033265	2011033513
2011032918	2011033274	2011033525
2011032932	2011033276	2011033530
2011032955	2011033278	2011033538

2011033540	2011033905	2011034276
2011033541	2011033908	2011034310
2011033542	2011033910	2011034322
2011033548	2011033916	2011034323
2011033561	2011033920	2011034325
2011033562	2011033922	2011034330
2011033574	2011033928	2011034334
2011033579	2011033939	2011034359
2011033581	2011033941	2011034374
2011033584	2011033945	2011034387
2011033586	2011033955	2011034389
2011033604	2011033957	2011034392
2011033606	2011033960	2011034405
2011033609	2011033962	2011034441
2011033612	2011033966	2011034443
2011033614	2011033998	2011034457
2011033617	2011034000	2011034460
2011033621	2011034003	2011034471
2011033623	2011034005	2011034472
2011033624	2011034014	2011034477
2011033638	2011034047	2011034485
2011033640	2011034049	2011034498
2011033671	2011034078	2011034502
2011033678	2011034080	2011034530
2011033726	2011034104	2011034532
2011033730	2011034116	2011034558
2011033814	2011034136	2011034564
2011033816	2011034171	2011034591
2011033824	2011034173	2011034596
2011033825	2011034180	2011034604
2011033829	2011034183	2011034607
2011033835	2011034186	2011034608
2011033840	2011034194	2011034610
2011033842	2011034199	2011034613
2011033843	2011034205	2011034614
2011033846	2011034207	2011034622
2011033852	2011034239	2011034624
2011033854	2011034249	2011034627
2011033855	2011034250	2011034633
2011033858	2011034261	2011034635
2011033860	2011034263	2011034644
2011033871	2011034264	2011034647
2011033872	2011034265	2011034661
2011033873	2011034267	2011034667

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2011034669	2011034955	2011035220
2011034677	2011034966	2011035221
2011034678	2011034968	2011035222
2011034680	2011034974	2011035238
2011034682	2011034978	2011035241
2011034709	2011035000	2011035246
2011034724	2011035015	2011035251
2011034726	2011035017	2011035255
2011034727	2011035025	2011035332
2011034730	2011035031	2011035361
2011034732	2011035033	2011035369
2011034736	2011035037	2011035370
2011034752	2011035060	2011035373
2011034754	2011035062	2011035375
2011034758	2011035064	2011035382
2011034760	2011035069	2011035383
2011034866	2011035070	2011035386
2011034867	2011035072	2011035426
2011034884	2011035108	2011035434
2011034886	2011035131	2011035436
2011034901	2011035166	2011035438
2011034905	2011035175	2011035451
2011034908	2011035183	2011035505
2011034909	2011035185	2011035507
2011034916	2011035191	2011035515
2011034932	2011035197	2011035522
2011034937	2011035216	

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1. In Arkansas, closing services are typically provided by an independent title agent. The title policy is actually provided by an out-of-state title insurance company, or title insurer, such as Chicago Title Insurance Company or First American Title Insurance Company. The local title agent merely serves as a broker for the title insurance company and does not actually insure the title.

2. The typical title commitment used by most title insurers generally excludes coverage for "rights or claims of parties in possession not shown by the public records" and "any discrepancies, conflicts, encroachments, servitudes, shortages in area and boundaries or other facts which a correct survey would show." Even if *B* had obtained a certified survey before her purchase, the title insurer would probably have specifically excepted the boundary encroachment. See the discussion of title insurance exceptions *infra* at text accompanying notes 56–64.

3. The doctrine of boundary by acquiescence operates to make legal a boundary that has been in place for a "long time," and to which the property owners on both sides have acquiesced. For more on the boundary of acquiescence and its relation to adverse possession, see Lynn Foster & J. Cliff McKinney, II, *Adverse Possession and Boundary by Acquiescence in Arkansas: Some Suggestions for Reform*, 33 U. ARK. LITTLE ROCK L. REV. 199 (2011).

4. Murchie v. Hinton, 41 Ark. App. 84, 88–89, 848 S.W.2d 436, 438–39 (1993).

5. 371 Ark. 452, 267 S.W.3d 586 (2007).

6. *Id.* at 461–62, 267 S.W.3d at 592.

7. Every contract for the sale of land, unless expressly stated otherwise, contains the implied covenant that the seller will furnish marketable title. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 10.12, at 775 (3d ed. 2000). In a growing number of jurisdictions (but not Arkansas), a contract for sale also contains an implied covenant that the seller will disclose latent material physical defects. *See generally* Florrie Young Roberts, *Let the Seller Beware: Disclosures, Disclaimers and "As Is" Clauses*, 31 REAL EST. L.J. 303 (2003).

8. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 907–10.

9. The current 2011 Real Estate Contract (Residential), copyrighted and used by the Arkansas REALTORS® Association, affords four choices to the parties: (1) Seller will furnish a complete abstract of title reflecting merchantable title; (2) Seller will furnish an owner's policy of title insurance in the amount of the purchase price; (3) Seller and Buyer will split the cost of a combination owner's and lender's policy; and (4) another option agreed to by both parties. However, not all parties use real estate agents, who are the providers of this contract.

10. At the time of delivery of the deed, the covenants in the contract respecting title merge with the covenants, if any, in the deed. Thus, after closing, a grantee may not sue for breach of the covenant in the contract to provide marketable title. The grantee is restricted to suing on the title covenants, if any, in the deed. Croswhite v. Rystrom, 256 Ark. 156, 162, 506 S.W.2d 830, 833 (1974); STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 906.

11. Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 17 S.W.3d 467 (2000) (granting recovery from grantee for breach of deed covenants of title to title company that paid claim of grantee). Also, Condition 13 of the 2006 ALTA Title Policy Form gives the title insurer the express right of subrogation. A copy of the 2006 ALTA title policy form can be found on the website of the American Land Title Association, though some content is

restricted to subscribers. *Policy Forms Online*, AMERICAN LAND TITLE ASSOCIATION, http://www.alta.org/forms/index.cfm?archive=0 (last visited Oct. 12, 2011).

12. If a grantor is sued for breach of the deed covenants, the grantor may be able to avail himself of the title insurance policy issued at the time the grantor acquired title (assuming one was issued) since the mere passage of time does not invalidate a title policy.

13. The instrument numbers of the deeds used in the study are listed in Appendix B and can be found online. *Real Estate*, PULASKI CIRCUIT/COUNTY CLERK, http://www.pulaskiclerk.com/real.htm (last visited October 12, 2011). Copies of the deeds are also on file with the authors.

14. One of the deeds in the study purported to be a "Limited Warranty Deed" but actually is a quitclaim deed. This deed was left in the study because the title implies an intent to grant warranties of some sort.

15. The authors were surprised by the low number of commercial deeds. The authors also examined lease filings during the date range, theorizing that some commercial transactions might have been structured as leaseholds. However, only nine leases were recorded during the date range. Of these nine, four were leases to a billboard company and one was a lease to a cell tower company. The remaining four may have been more traditional leasehold conveyances of commercial property. The recorded leases do not significantly increase the number of commercial transactions and there appear to be only three explanations for the low number of transactions: (i) a significant portion of the thirty-six unidentified deeds are really commercial transactions; (ii) many commercial transactions are in the form of traditional leases that do not get recorded in the real estate records; or (iii) there is naturally a relatively low volume of commercial transactions compared to residential transactions. It is also possible that the low number of commercial transactions may be attributable to the relatively poor economic conditions the country is currently experiencing.

16. One of the deeds did not identify the preparer.

17. ARK. CODE ANN. § 26-60-107 (LEXIS Repl. 2008). Unless an instrument is on its face clearly exempt from transfer taxes, the instrument must be accompanied by either (i) three copies of an officially prepared affidavit available in the recorder's office; or (ii) a statement on the instrument itself, stating, "I certify under penalty of false swearing that the legally correct amount of documentary stamps have been placed on this instrument." *Id.* § 26-60-110.

18. In this context, "warranty" and "covenant" are synonymous. However, since one of the covenants is the covenant of general warranty, and the authors believe it is too confusing to call it the "warranty of general warranty," they have used the term "covenant" in most places throughout.

19. RICHARD R. POWELL, 14 POWELL ON REAL PROPERTY § 81A.03[1][b], at 27 (Michael Allan Wolf ed., 2006).

20. HERBERT T. TIFFANY & BASIL JONES, 4 TIFFANY REAL PROPERTY § 1000 (2010), available at Westlaw TIFFANY-RP.

21. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 908; TIFFANY & JONES, *supra* note 20, § 1000.

22. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 908; TIFFANY & JONES, *supra* note 20, § 1000.

23. TIFFANY & JONES, *supra* note 20, § 1000.

24. STOEBUCK & WHITMAN, *supra* note 7, § 11.13 n.15, at 908; TIFFANY & JONES, *supra* note 20, § 1000.

25. Bosnick v. Hill, 292 Ark. 505, 507, 731 S.W.2d 204, 206 (1987); Seldon v. Dudley E. Jones Co., 74 Ark. 348, 348, 85 S.W. 778, 778–79 (1905); Benton Cnty. v. Rutherford, 33 Ark. 640, 643 (1878); Pate v. Mitchell, 23 Ark. 590, 591 (1861).

26. *Rutherford*, 33 Ark. at 643.

27. Cannon v. Foster, 141 Ark. 363, 368, 216 S.W. 698, 699 (1919).

28. *Id.*
29. *Id.*
30. *Bosnick*, 295 Ark. at 508–09, 731 S.W.2d at 206–07.
31. *Id*. at 509, 731 S.W.2d at 207.
32. 371 Ark. 452, 459, 267 S.W.3d 586, 592 n.4 (2007).
33. *Id.*
34. POWELL, *supra* note 19, vol. 14, § 81A.06[2], at 115.
35. *Id.* at vol. 14, § 81A.06[2], at 115–16.
36. *Rutherford*, 33 Ark. at 643.
37. *Bosnick*, 292 Ark. at 507, 731 S.W.2d at 205.
38. *Id.* at 506, 731 S.W.2d at 205.
39. *Id.* at 508–09, 731 S.W.2d at 206–07.
40. 26 Ark. App. 22, 24, 759 S.W.2d 37, 38 (1988).
41. *Id.* at 24, 759 S.W.2d at 38.
42. *Id.*
43. *Id.*
44. *Id.* at 25, 759 S.W.2d at 38.
45. *Id.* at 30–31, 759 S.W.2d at 41–42.
46. *Turner*, 26 Ark. App. at 26, 759 S.W.2d at 39.
47. 240 Ark. 514, 400 S.W.2d 485 (1966).
48. *Id.* at 518, 400 S.W.2d at 487.
49. *Id*.
50. *Id.*
51. *Id.*
52. 121 Ark. 479, 181 S.W. 297 (1915).
53. *Id.* at 482, 181 S.W. at 298.
54. Beauchamp v. Bertig, 90 Ark. 351, 360–61, 119 S.W. 75, 79 (1909).
55. *Id.* For more on the right of disaffirmation on reaching the age of majority, see also Bagley v. Fletcher, 44 Ark. 153 (1884).
56. For more about title insurance, see Bernard Bittner, *Title Insurance: What Lenders Should Know*, THE RMA JOURNAL (2003), available at http://findarticles.com/p/articles/mi_m0ITW/is_3_86/ai_n14897411/; *Title Insurance*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Title_insurance_in_the_United_States (last visited Sept. 28, 2011); *Types of Policies*, WASHINGTON TITLE CO., http://www.washtitleco.com/policyTypes.html (last visited Oct. 12, 2011); *What is Title Insurance*, MYTITLEINS.COM, http://www.mytitleins.com/education/what_is_title_insurance.php (last visited Oct. 12, 2011).
57. To the authors' knowledge, all title insurers in Arkansas use a 2006 American Land Title Association (ALTA) form of a title policy. The title insurance process begins with a title commitment issued by a title insurance agent. The title commitment has three basic parts: Schedule A, which lists critical information such as the amount of the insurance policy, the names of the insured parties, and the legal description of the insured property; Schedule B-I, which lists the requirements that must be met before the title insurance policy will be issued; and Schedule B-II, which lists the exceptions to the proposed title insurance policy. When the requirements are satisfied, the 2006 ALTA title policy is issued. The title policy includes a policy jacket that contains additional exclusions to coverage as well as the terms and conditions of the policy. Title insurance policy forms are widely available within the real estate industry. A copy of the 2006 ALTA title policy form can be found on the website of the American Land Title Association, though some content is restricted to subscribers. *Policy Forms Online*, AMERICAN LAND TITLE ASSOCIATION, http://www.alta.org/forms/index.cfm?archive=0 (last visited Oct. 12, 2011). For a thorough discussion of the 2006 ALTA title policy, see Paul L. Hammann, *2006 ALTA Policy and*

Endorsement Forms, FIRST AMERICAN TITLE INSURANCE COMPANY, available at http://title.firstam.com/assets/title/uploads/asset-upload-file71-9263.pdf; *see also* James L. Gosdin, *The 2006 ALTA Forms*, STEWART TITLE COMPANY, available at http://public.stewart.com/vu/ALTANewForms2006Webinar.pdf. Mr. Gosdin's article contains copies of many of the forms.

58. The wording and order of these exceptions vary somewhat between states and various title companies, but are all essentially the same. *See, e.g.*, *Title Commitment*, POSITIVELYMINNESOTA.COM, http://www.positivelyminnesota.com/Government/Shovel_Ready_Site_Certification/PDFs/Supporting_Documents/Title_Commitment.pdf (last visited Oct. 12, 2011) (a slightly different wording in a form used in Minnesota); *Title Commitment*, FURROW.COM, http://www.furrow.com/Green_Bank_Nashville_120908/Glessner%20Drive%20Title%20Commitment.pdf (last visited Oct. 12, 2011) (a form used in Tennessee). The 2006 ALTA Policy form available at ALTA's website (for the URL, see *supra* note 57) does not include this list of exceptions. However, the form says:

> NOTE: There should be set forth in paragraph numbered II of Schedule B all matters that would be shown in Schedule B of an Owner's Policy issued on the effective date of the Commitment, including those general exceptions such as rights of parties in possession, survey matters, etc., which in many instances are printed as part of Schedule B of the Policy.

59. In Florida, title insurers may be obligated to delete the standard exceptions, if the appropriate conditions (recent survey and owner affidavit) are met. FLA. STAT. § 627.7842 (2011).

60. The Arizona Association of REALTORS® has a general discussion about the importance of deleting exceptions to title commitment coverage on its website. *Title Insurance*, AARONLINE.COM, http://www.aaronline.com/documents/TitleIns.aspx (last visited Oct. 12, 2011). This theme is repeated in websites (some non-profit and some for-profit) giving consumer advice in many states, including (just to show a few examples): Arkansas— *Title Insurance*, KEECHLAWFIRM.COM, http://keechlawfirm.com/index.php/resources/ti-article/ (last visited Oct. 12, 2011). Colorado—*Tips for Reading Title Commitments*, LTGC.COM, http://www.ltgc.com/files/technicalbulletins_customers/TipsForReadingTitleCommitment_Jul08.pdf (last visited Oct. 12, 2011). Ohio—*Exception, Conditioning, and Quid Pro Quo*, REAL EST. L. BLOG http://www.ohiorelaw.com/2009/12/exceptions-provisos-quid-pro-quos-of.html (Oct. 12, 2011). Michigan—Michael A. Luberto, *Title Insurance for the General Practitioner: Some Insider Tips*, MICHIGAN BAR JOURNAL 28–31 (2007), available at http://www.michbar.org/journal/pdf/pdf4article1243.pdf. Pennsylvania—*Title Insurance*, LIBERTYBELLAGENCY.COM, http://www.libertybellagency.com/insurance/commitment.aspx (last visited Oct. 12, 2011).

61. "When a title insurance report includes an offer to issue an owner's title insurance policy covering the resale of owner-occupied residential property, the title insurance report shall be furnished to the purchaser or mortgagor or to the representative of the purchaser-mortgagor as soon as reasonably possible before closing." ARK. CODE ANN. § 23-103-413(a)(1) (LEXIS Supp. 2009).

62. *See, e.g.*, Alan Wayte, *Sample First Deed of Trust, Assignment of Leases and Rents, Security Agreement, and Fixture Filing Statement*, SS047 A.L.I.-A.B.A. 53 (2011); ALVIN L. ARNOLD & MYRON KOVE, MODERN REAL ESTATE PRACTICE FORMS § 8:52 (2010), *available at* Westlaw.

63. The authors' experience is that sophisticated sellers often demand to incorporate the list of exceptions, found in the title policy, to limit the warranties given in the deed. The best explanation for this appears to be the general lack of commercial deeds in the study. Generally, commercial transactions typically have more sophisticated parties or parties who can afford attorneys experienced in real estate matters to assist. With only five known commer-

cial deeds in the study, it is not as surprising that this practice did not appear in the study. In the case of residential sellers, it would seem this is an area where the absence of attorneys from the process disadvantages sellers.

64. The only scenarios where the existence of a potential boundary by acquiescence claim may appear of record would be if a lawsuit has been filed over the claim, a survey showing the discrepancy has been recorded, or a previous deed noted the fence line variation as an exception to the covenants of title.

65. Foster & McKinney, *supra* note 3, at 200, 230.

66. *Id.* at 200, 230.

67. *See, e.g.*, Boyster v. Shoemake, 101 Ark. App. 148, 152, 272 S.W.3d 139, 143 (2008); s*ee also* Camp v. Liberatore, 1 Ark. App. 300, 302, 615 S.W.2d 401, 403 (1981); Foster & McKinney, *supra* note 3, at 232–35.

68. *See, e.g.*, Instrument No. 2011033410.

69. *See, e.g.*, Instrument No. 2011034661.

70. POWELL, *supra* note 19, at 28.

71. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 908; TIFFANY & JONES, *supra* note 20, § 1001.

72. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 908.

73. *Id.*; TIFFANY & JONES, *supra* note 20, § 1001.

74. Ihde v. Kempkes, 422 N.W.2d 788, 790 (Neb. 1988).

75. POWELL, *supra* note 19, § 81A.06[2], at 117.

76. 1 Ark. 313 (1839).

77. Lovely claims originated as a result of the Cherokee Treaty of 1828. C.J. Miller, *Lovely County*, THE ENCYCLOPEDIA OF ARKANSAS HISTORY AND CULTURE (last updated May 27, 2008), http://encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=2940. The treaty forced the removal of both whites and native Americans on either side of what is today the Arkansas-Oklahoma boundary. *Id.* Whites had to move to the east of the line and native Americans to the west. *Id*. Each household of whites displaced by the move was allowed to claim 320 acres of land in the Arkansas Territory east of the line. *Id.*

78. *Logan*, 1 Ark. at 313, 321–22.

79. *Id.* at 323–24.

80. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 908; TIFFANY & JONES, *supra* note 20, § 1002.

81. Proffitt v. Isley, 13 Ark. App. 281, 283, 683 S.W.2d 243, 244 (1985) (citing PAUL JONES, JR., THE ARKANSAS LAW OF TITLE TO REAL PROPERTY §§ 383, 386 (1935)).

82. *See* Gude v. Wright, 232 Ark. 310, 313, 335 S.W.2d 727, 729 (1960); Thackston v. Farm Bureau Lumber Corp., 212 Ark. 47, 50, 204 S.W.2d 897, 899 (1947); Texas Co. v. Snow, 172 Ark. 1128, 1134, 291 S.W. 826, 828 (1927).

83. *See* POWELL, *supra* note 19, vol. 14, § 81A.06, at 118.

84. *E.g*. *Proffitt*, 13 Ark. App. at 283, 683 S.W.2d at 244; *see also* Manning v. Davis, 179 Ark. 609, 610, 17 S.W.2d 313, 314 (1929); Fox v. Pinson, 172 Ark. 449, 450, 289 S.W. 329, 330 (1926); Sheffield v. Maxwell, 163 Ark. 448, 450–51, 260 S.W. 399, 399 (1924); Mayo & Robinson v. Maxwell & Moore, 140 Ark. 84, 87–88, 215 S.W. 678, 679 (1919); Scoggin v. Hudgins, 78 Ark. 531, 533, 94 S.W. 684, 685 (1906).

85. *E.g.* Collier v. Cowger, 52 Ark. 322, 325, 12 S.W. 702, 702 (1889).

86. *E.g.* Commonwealth Bldg. & Loan Ass'n v. Martin, 185 Ark. 858, 861, 49 S.W.2d 1046, 1047 (1932).

87. *E.g.*, Scott v. Altom, 240 Ark. 710, 714, 401 S.W.2d 734, 737 (1966); Magee v. Robinson, 218 Ark. 54, 55, 234 S.W.2d 27, 27 (1950); Ark. Trust Co. v. Bates, 187 Ark. 331, 333, 59 S.W.2d 1025, 1026 (1933); Bass v. Starnes, 108 Ark. 357, 359, 158 S.W. 136, 137 (1913); Crawford v. McDonald, 84 Ark. 415, 420, 106 S.W. 206, 208 (1907).

88. *E.g.* Allen-West Comm'n Co. v. Harshaw, 123 Ark. 55, 58, 184 S.W. 436, 437 (1916); Seldon v. Dudley E. Jones Co., 74 Ark. 348, 351, 85 S.W. 778, 779 (1905).

89. *E.g.* Thackston v. Farm Bureau Lumber Corp., 212 Ark. 47, 50, 204 S.W.2d 897, 899 (1947); Jerome Hardwood Lumber Co. v. Munsell, 169 Ark. 201, 209, 275 S.W. 709, 712 (1925). In *Jerome*, the court stated that a timber deed is a profit, not an estate in land, and yet held that to convey property subject to a timber deed was a breach of the covenant of seisin. *Id.* This is not correct under the Arkansas Supreme Court's own definition of encumbrance. However, the court also stated that the covenant against encumbrances was breached, which would be correct.

90. *E.g.* Smith v. Thomas, 169 Ark. 1110, 1111–13, 278 S.W. 39, 40 (1925). This case involved a timber deed conveyed with covenants of title, which contradicts the law in *Jerome Hardwood Lumber Co. v. Munsell*, discussed in the previous footnote, stating that a timber deed is a profit a prendre, and thus not the conveyance of an estate in land. It would not be possible to warrant the "title" of a profit. However, the court did not discuss this point.

91. *E.g.* Richards v. Billingslea, 170 Ark. 1100, 1103, 282 S.W. 985, 987 (1926); Hardage v. Durrett, 110 Ark. 63, 64, 160 S.W. 883, 884 (1913); William Farrell Lumber Co. v. Deshon, 65 Ark. 103, 105, 44 S.W. 1036, 1037 (1898); Crowell v. Packard, 35 Ark. 348, 351 (1880).

92. *E.g.* Ezell v. Humphrey & Simonson, 90 Ark. 24, 25, 117 S.W. 758, 759 (1909).

93. *E.g.* Sanders v. Brown, 65 Ark. 498, 502, 47 S.W. 461, 462–63 (1898).

94. TIFFANY & JONES, *supra* note 20, § 1005. Typically today the conveyance is made subject to covenants of record.

95. *Id.*, § 1007, at 270; STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 908 n.22.

96. Suter v. Mason, 147 Ark. 505, 510, 227 S.W. 782, 783 (1921).

97. 131 Ark. 49, 57–58, 198 S.W. 266, 268 (1917).

98. *Id*. at 59, 198 S.W. at 268.

99. Geren v. Caldarera, 99 Ark. 260, 263, 138 S.W. 335, 336 (1911) (also applying the doctrine of equitable estoppel).

100. 89 Ark. 309, 310–11, 116 S.W. 668, 669 (1909).

101. An easement implied from prior use arises where a grantor conveys part of one tract that originally contained a "quasi-easement," thus creating after severance a dominant tenement and a servient tenement, and where the use is apparent, continuous and necessary. In this case, decided in 1909, the court applied the traditional, strict rule and stated that where such a conveyance occurs with no express grant and with covenants of title, absolute necessity must be shown by the grantor. The burden of proof was not met. *Id.* at 316, 116 S.W. at 671.

102. *Id.* at 316, 116 S.W. at 671.

103. *Id.* at 319, 116 S.W. at 672.

104. *E.g.* Scott v. Altom, 240 Ark. 710, 715, 401 S.W.2d 734, 737 (1966); Magee v. Robinson, 218 Ark. 54, 57, 234 S.W.2d 27, 28 (1950); Thackston v. Farm Bureau Lumber Corp., 212 Ark. 47, 50–51, 204 S.W.2d 897, 899 (1947); Ark. Trust Co. v. Bates, 187 Ark. 331, 333, 59 S.W.2d 1025, 1026 (1933).

105. *See* Ezell v. Humphrey & Simonson, 90 Ark. 24, 29, 117 S.W. 758, 760 (1909).

106. *See id.*; TIFFANY & JONES, *supra* note 20, § 1009.

107. 240 Ark. 710, 714, 401 S.W.2d 734, 737 (1966).

108. *Id.* at 715, 401 S.W.2d at 738.

109. *Id.*

110. Magee v. Robinson, 218 Ark. 54, 57, 234 S.W.2d 27, 28 (1950); Ark. Trust Co. v. Bates, 187 Ark. 331, 333, 59 S.W.2d 1025, 1026 (1933).

111. Sheffield v. Maxwell, 163 Ark. 448, 452, 260 S.W. 399, 400 (1924).

112. *Id.* at 452, 260 S.W. at 400.

113. POWELL, *supra* note 19, § 81A.06[2][c][v], at 120–21.

114. 168 Ark. 201, 204, 269 S.W. 571, 572 (1925).

115. *Id.* at 204, 269 S.W. at 572.

116. *Id.* at 204, 269 S.W. at 572.

117. *Fayetteville Shale*, CLEBURNE COUNTY OFFICE OF ECONOMIC DEVELOPMENT, http://cleburnecountyarkansas.com/id10.html (last visited Oct. 12, 2011) (quoting Ed Ratchford of the Arkansas Geologic Commission in an Associated Press article reproduced on the Cleburne County website).

118. *E.g.* Wallin v. Donnahoe, 175 Ark. 791, 799, 300 S.W. 428, 431 (1927); Fletcher v. Joseph Pfeifer Clothing Co., 103 Ark. 318, 324, 146 S.W. 864, 865 (1912).

119. POWELL, *supra* note 19, § 81A.03, at 28.

120. *Id.*

121. *Id.*, § 81A.06[2][c][i], at 117. A covenant of special warranty restricts liability to such acts only of the grantor. See the discussion of special warranty deeds *infra*, at Part VII.

122. *Id.*, § 81A.03[b][i], at 28.

123. *Id.* § 81A.06[2][c], at 125.

124. For more on eviction, see the discussion of present versus future covenants *infra*, at Part III.

125. Ward v. Forrest, 208 Ark. 598, 600, 186 S.W.2d 951, 952 (1945) (quoting Bramble v. Beidler, 38 Ark. 200, 202 (1881)).

126. *E.g.* Proffitt v. Isley, 13 Ark. App. 281, 284, 683 S.W.2d 243, 244 (1985).

127. *E.g.* Riddle v. Udouj, 371 Ark. 452, 457, 267 S.W.3d 586, 590 (2007). The Riddle court first stated that "a cause of action for breach of a warranty accrues . . . only when the grantee is evicted or constructively evicted . . . ." The court then quoted the rule from *Thompson v. Dildy*, 227 Ark. 648, 651, 300 S.W.2d 270, 272 (1957) that "[w]ith some exceptions, the rule is that an action for damages on a covenant of warranty cannot be maintained where there has been no eviction." For more discussion of the statute of limitations, see *infra* Part III.

128. *E.g.* Smiley v. Thomas, 220 Ark. 116, 122, 246 S.W.2d 419, 422 (1952).

129. *Riddle*, 371 Ark. at 458, 267 S.W.3d at 590 (citing BLACK'S LAW DICTIONARY 594 (8th ed. 2004)).

130. *Id.* at 458, 267 S.W.3d at 590.

131. POWELL, *supra* note 19, § 81A.06[2][d][iv], at 124.

132. *E.g.* Van Bibber v. Hardy, 215 Ark. 111, 118, 219 S.W.2d 435, 439 (1949).

133. *E.g.* Fels v. Ezell, 183 Ark. 229, 231, 35 S.W.2d 359, 360 (1931).

134. *E.g.* Lilley v. Copeland, 240 Ark. 385, 388, 399 S.W.2d 496, 498 (1966); Wood v. Setliff, 229 Ark. 1007, 1010, 320 S.W.2d 655, 657 (1959).

135. *Lilley*, 240 Ark. at 388, 399 S.W.2d at 498.

136. *Wood*, 229 Ark. at 1010, 320 S.W.2d at 657.

137. *Id.* at 1010, 320 S.W.2d at 657.

138. Dillahunty v. Little Rock & Fort Smith Ry. Co., 59 Ark. 629, 634, 27 S.W. 1002, 1003–04 (1894).

139. *Riddle*, 371 Ark. at 459, 267 S.W.3d at 590; Hamilton v. Farmer, 173 Ark. 341, 344, 292 S.W. 683, 684 (1927).

140. *Riddle*, 371 Ark. at 459–60, 267 S.W.3d at 591–92; Timmons v. City of Morrilton, 227 Ark. 421, 422, 299 S.W.2d 647, 648 (1957).

141. Maurice v. Schmidt, 214 Ark. 725, 728, 218 S.W.2d 356, 358 (1949).

142. Smiley v. Thomas, 220 Ark. 116, 121, 246 S.W.2d 419, 421 (1952); Sec. Bank v. Davis, 215 Ark. 874, 878, 224 S.W.2d 25, 27 (1949).

143. *Smiley*, 220 Ark. at 121, 246 S.W.2d at 421.

144. *Sec. Bank*, 215 Ark. at 878, 224 S.W.2d at 27.

145. Fox v. Pinson, 182 Ark. 940–41, 34 S.W.2d 459, 460–61 (1930).

146. Turner v. Eubanks, 26 Ark. App. 22, 26, 759 S.W.2d 37, 39 (1988).

147. Murchie v. Hinton, 41 Ark. App. 84, 87, 848 S.W.2d 436, 438 (1993).

148. Smith v. Boynton Land & Lumber Co., 131 Ark. 22, 25–26, 198 S.W. 107, 108 (1917).

149. Cox v. Bradford, 101 Ark. 302, 306, 142 S.W. 170, 172 (1911).

150. Van Bibber v. Hardy, 215 Ark. 111, 117–18, 219 S.W.2d 435, 439 (1949).

151. *Id.* at 118, 219 S.W.2d at 439.

152. Jerome Hardwood Lumber Co. v. Munsell, 169 Ark. 201, 208, 275 S.W. 709, 711 (1925).

153. *Smith*, 131 Ark. at 26, 198 S.W. at 108–09.

154. Hamilton v. Farmer, 173 Ark. 341, 345, 292 S.W. 683, 684–85 (1927).

155. Hoppes v. Cheek, 21 Ark. 585, 590 (1860).

156. *Id.*

157. *Hamilton*, 173 Ark. at 342, 292 S.W. at 683–84.

158. *Id.* at 344, 292 S.W. at 684–85.

159. 128 Ark. 420, 194 S.W. 237 (1917).

160. *Id*. at 422, 194 S.W. at 237.

161. *Id.* at 421–22, 194 S.W. at 237.

162. *Id.* at 422, 194 S.W. at 237.

163. *Id.* at 422, 194 S.W. at 237.

164. *Id.* at 423, 194 S.W. at 238.

165. *Dennis*, 128 Ark. at 425, 194 S.W. at 238.

166. *Id.*

167. *Id.*

168. 41 Ark. App. 84, 848 S.W.2d 436 (1993).

169. *Id.* at 86, 848 S.W.2d at 437.

170. *Id.* at 86, 848 S.W.2d at 437.

171. *Id.* at 86, 848 S.W.2d at 437.

172. *Id.* at 88, 848 S.W.2d at 438.

173. POWELL, *supra* note 19, § 81A.06[2][f], at 126.

174. *Id.* A Westlaw search for “covenant /s “further assurances”” in the ALLSTATES data base conducted on August 6, 2011, produced 170 cases, forty-five of which were decided by Maryland courts. Unlike Arkansas and most states, Maryland includes the covenant of further assurances as a covenant implied from statutory words.

175. Trapnall v. Hill, 31 Ark. 345, 348 (1876).

176. Davis v. Tarwater, 15 Ark. 286, 288–89 (1854).

177. A common example of the express recitation of the covenant of general warranty in a general warranty deed is, “And the Grantor hereby covenants with the Grantee(s) that it will forever warrant and defend the title to the above described lands against all claims whatsoever.” Instrument No. 2011033415. A common example of the express recitation of the covenant of special warranty in a special warranty deed is, “Grantor covenants with Grantee that Grantor will forever warrant and defend the title to said lands against all claims and encumbrances done or suffered by it, but against none other.” Instrument No. 2011033276.

178. Instrument No. 2011034104. In general, the preparation of deeds by someone not an attorney for another is the unauthorized practice of law. *E.g.* Campbell v. Asbury Auto., Inc., 2011 Ark. 157, at 38, ___ S.W.3d ___, ___; Pope Cnty. Bar Ass’n, Inc. v. Suggs, 274 Ark. 250, 257, 624 S.W.2d 828, 831–32 (1981). However, there is a narrow exception for real estate brokers, providing a number of conditions are met, including the approval of the deed by an attorney before delivery. *Pope Cnty. Bar Ass’n, Inc.*, 274 Ark. at 252–53, 624 S.W.2d at 832. Arkansas statutes require the name and address of the “person” preparing a deed to be stated on the face of the deed. ARK. CODE ANN. § 14-15-403 (LEXIS Repl. 1998). “Person” is not defined. Several of the form deeds used by title agencies listed an incorporated law firm as the preparer rather than a specific attorney.

179. *See supra* note 18.

180. *See, e.g.*, Jackson v. Smith, 2010 Ark. App. 681, at 2–3, ___ S.W.3d ___, ___ (grantee suing for breach of covenant of title *and* quiet enjoyment) (emphasis added).

181. *Riddle*, 371 Ark. at 455, 267 S.W.3d at 588.

182. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 910; POWELL, *supra* note 19, § 81.03[1][b][i] TIFFANY & JONES, *supra* note 20, § 1010.

183. *See, e.g.*, *Riddle*, 371 Ark. at 455, 267 S.W.3d at 588; Welch Foods, Inc. v. Chicago Title Ins. Co., 341 Ark. 515, 517, 17 S.W.3d 467, 469 (2000); Follett v. Fitzsimmons, 100 Ark. App. 347, 350, 268 S.W.3d 902, 905 (2007).

184. 292 Ark. 505, 506–07, 731 S.W.2d 204, 205 (1987).

185. Dillahunty v. Little Rock & Ft. Smith Ry. Co., 59 Ark. 629, 633, 27 S.W. 1002, 1002–03 (1894), *aff'd on reh'g*, 59 Ark. 629, 28 S.W. 657 (1894).

186. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 909.

187. This warranty arises when a builder-vendor sells property that contains a material latent structural defect. *See, e.g.*, Graham Constr. Co. v. Earl, 362 Ark. 220, 226, 208 S.W.3d 106, 109–10 (2005); Crumpacker v. Gary Reed Constr., Inc., 2010 Ark. App. 179, ___ S.W.3d ___.

188. It is covered risk number four in the June 17, 2006 ATLA Owner's Policy form.

189. POWELL, *supra* note 19, § 81A.06[2][a][iv], at 116–21.

190. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 910; *see also* Seldon v. Dudley E. Jones Co., 74 Ark. 348, 350–51, 85 S.W. 778, 778–79 (1905).

191. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 910.

192. *Id.* at 910–11; *see also* Timmons v. City of Morrilton, 227 Ark. 421, 423, 299 S.W.2d 647, 649 (1957) ("When the land conveyed is at that time in possession of a stranger, the covenant is broken the date the deed is made . . . .").

193. For a discussion of what constitutes eviction, see *supra* Part II.D and notes therein.

194. Jerome Hardwood Lumber Co. v. Munsell, 169 Ark. 201, 208–09, 275 S.W. 709, 711–12 (1925) (denying grantee the right to sue remote grantor for breach of covenant of seisin); Proffitt v. Isley, 13 Ark. App. 281, 283–84, 683 S.W.2d 243, 244–45 (1985) (denying grantee the right to sue remote grantor for breach of covenant against encumbrances).

195. *Proffitt*, 13 Ark. App. at 283, 683 S.W.2d at 244; Ross v. Turner, 7 Ark. 132, 144, 145 (1846).

196. *Ross*, 7 Ark. at 144; STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 911.

197. "The covenants of warranty, and of quiet enjoyment, are in the nature of a real covenant, and run with the land, and descend to the heirs, and are made transferable to the assignees." *Proffitt*, 13 Ark. App. at 283–84, 683 S.W.2d at 244. The covenant of future assurances, the third future covenant, is almost completely absent from Arkansas law but it, too, runs with the land. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 911.

198. *Id.* at 284., 683 S.W.2d at 244; Wade v. Texarkana Bldg. & Loan Ass'n, 150 Ark. 99, 109, 233 S.W. 937, 941 (1921); Logan v. Moulder, 1 Ark. 313, 320 (1839).

199. Doak v. Smith, 137 Ark. 509, 514, 208 S.W. 795, 797 (1919). A special warranty covenants only against defects in title caused by the grantor, and not by anyone else. See discussion, *infra* Part VII.

200. *Id.* at 514, 208 S.W. at 797.

201. *Wade*, 150 Ark. at 109, 233 S.W. at 941.

202. 220 Ark. 116, 118, 246 S.W.2d 419, 420 (1952).

203. *Id.* at 118, 246 S.W.2d at 420.

204. *Id.* at 118, 121, 246 S.W.2d at 421.

205. *Id.* at 121, 246 S.W.2d at 421.

206. *Id.*

207. 78 Ark. 531, 533, 94 S.W. 684, 685 (1906).

208. *Id.*

209. *Id.*
210. *Id.* at 534, 94 S.W. at 685.
211. *Id.* at 533, 94 S.W. at 685.
212. *Id.* at 534, 94 S.W. at 685.
213. *Scoggin*, 78 Ark. at 534, 94 S.W. at 685.
214. *Id.*
215. *Id.* at 535, 94 S.W. at 685.
216. *Id.* at 533–34, 94 S.W. at 685.
217. *Id.* at 534, 94 S.W. at 685.
218. *Id.* at 534, (citing Benton v. Anderson, 56 Ark. 470, 47, 20 S.W. 250 (1892)).
219. 30 Ark. 631, 637–38 (1875).
220. *Id.* at 637.
221. *Id.* at 638.
222. *See, e.g.*, McClure v. Dee, 88 N.W. 1093 (Iowa 1902) (extending liability to devisees as well); Rohrbaugh v. Hamblin, 46 P. 705 (Kan. 1896); Isaacs v. Maupin, 231 S.W. 49 (Ky. 1921); Farnsworth v. Kimball, 91 A. 954 (Me. 1914); Cook v. Daniels, 306 S.W.2d 573, 576–77 (Mo. 1957) (interpreting MO. ANN. STAT. § 442.500 (1949) which codifies the common law rule).
223. 173 Ark. 341, 342–43, 292 S.W. 683, 683–84 (1927).
224. *Id.* at 346–47, 292 S.W. at 685.
225. 32 Ark. 714, 715 (1878).
226. *Id.* at 715–16.
227. *Id.* at 716.
228. *Id.* at 717.
229. *Id.*
230. 110 Ark. 149, 152, 160 S.W. 1088, 1089 (1913).
231. *Id.* at 150–51, 160 S.W. at 1089.
232. TIFFANY & JONES, *supra* note 20, § 1000.
233. Smiley v. Thomas, 220 Ark. 116, 121, 246 S.W.2d 419, 421–22 (1952).
234. The rule was first formulated in *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880–81 (Tex. 1940). Arkansas subsequently adopted it in *Peterson v. Simpson*, 286 Ark. 177, 181, 690 S.W.2d 720, 723 (1985). For more on the rule, and mineral rights in general, see Thomas A. Daily & W. Christopher Barrier, *Well, Now, Ain't That Just Fugacious!: A Basic Primer on Arkansas Oil and Gas Law*, 29 U. ARK. LITTLE ROCK L. REV. 211 (2007).
235. *E.g. Peterson*, 286 Ark. at 179, 690 S.W.2d at 722; *see also* Willis H. Ellis, *Rethinking the Duhig Doctrine*, 28 ROCKY MTN. MIN. L. INST. 947 (1982).
236. 2011 Ark. App. 105, 2011 WL 514662 (unpublished).
237. *Id.* at 1, 2011 WL at *1.
238. *Id.* at 3, 2011 WL at *1.
239. *Id.*
240. *Id.* at 2, 2011 WL at *2.
241. *Id.* at 5, 2011 WL at *2.
242. *Barger*, 2011 Ark. App. at 7, 2011 WL at *3. The court cited no Arkansas authority for this holding, although in *Abbott v. Pearson*, 257 Ark. 694, 703–04, 520 S.W.2d 204, 210 (1975) (Fogelman, J., dissenting) the dissent raised this same issue, arguing that a limitation in a deed was a limitation on a warranty and not a reservation of an interest. It is also interesting to note that although *Barger* is a decision that cites no earlier Arkansas precedent. West Publishing has decided, for whatever reason, not to publish it in the *South Western Reporter*.
243. Instrument No. 2011033816.
244. Gibson v. Pickett, 256 Ark. 1035, 1039, 512 S.W.2d 532, 535 (1974) (quoting excerpt from warranty deed).

245. STOEBUCK & WHITMAN, *supra* note 7, § 11.13, at 906–07.

246. TIFFANY & JONES, *supra* note 20, § 1015.

247. Smith v. Thomas, 169 Ark. 1110, 1113–14, 278 S.W. 39, 40 (1925); Johnson v. Polk, 168 Ark. 201, 203–04, 269 S.W. 571, 572 (1925).

248. 13 Ark. App. 281, 284, 683 S.W.2d 243, 245 (1985).

249. *Id*. at 284, 683 S.W.2d at 245. This would be a breach of the covenant against encumbrances, and eviction would not be required to successfully sue, but apparently, there were no covenants of title in the deed from the Isleys' immediate grantor, and they could not sue a remote grantor under this covenant.

250. 215 Ark. 874, 224 S.W.2d 25 (1949).

251. *Id.* at 878–79, 224 S.W.2d at 27–28.

252. 108 Ark. 357, 361, 158 S.W. 136, 137–38 (1913).

253. Carvill v. Jacks, 43 Ark. 454, 463 (1884).

254. Pate v. Mitchell, 23 Ark. 590, 591 (1861).

255. The deed would constitute color of title. Under today's statutes she would also have to pay the property taxes, and the true owner would have to have not paid any taxes for seven years. ARK. CODE ANN. § 18-11-106 (LEXIS Supp. 2009). *See generally* Foster & McKinney, *supra* note 3, for more on Arkansas's adverse possession statute.

256. *Pate*, 23 Ark. at 591.

257. *See* Bridwell v. Gruner, 212 Ark. 992, 994, 209 S.W.2d 441, 442 (1948) (awarding the grantee the "value" of a parcel the grantor[?]did not own, but citing no authority and not elaborating on the definition of "value").

258. TIFFANY & JONES, *supra* note 20, § 1016.

259. Van Bibber v. Hardy, 215 Ark. 111, 119, 219 S.W.2d 435, 439 (1949); Smith v. Thomas, 169 Ark. 1110, 1113, 278 S.W. 39, 40–41 (1925).

260. Mayo & Robinson v. Maxwell & Moore, 140 Ark. 84, 89, 215 S.W. 678, 679 (1919); Boyd v. Whitfield, 19 Ark. 447, 455–56 (1858).

261. William Farrell Lumber Co. v. Deshon, 65 Ark. 103, 105, 44 S.W. 1036, 1036 (1898).

262. 215 Ark. 111, 119, 219 S.W.2d 435, 439.

263. Ark. Trust Co. v. Bates, 187 Ark. 331, 336, 59 S.W.2d 1025, 1027 (1933) (quoting Bass v. Starnes, 108 Ark. 357, 361, 158 S.W.136, 137 (1913)).

264. *Ark. Trust Co.*, 187 Ark. at 336, 59 S.W.2d at 1027.

265. Fox v. Pinson, 182 Ark. 936, 940, 34 S.W.2d 459, 460–61 (1930).

266. Mayo & Robinson v. Maxwell & Moore, 140 Ark. 84, 215 S.W. 678 (1919).

267. *Id.* at 88–89, 215 S.W. at 679.

268. *Id.* at 87–88, 215 S.W. at 679.

269. *Id.* at 89, 215 S.W. at 679.

270. *Id.* at 90, 215 S.W. at 680.

271. *Mayo & Robinson*, 140 Ark. at 90, 215 S.W. at 680.

272. *E.g.* Alexander v. Bridgford, 59 Ark. 195, 211, 27 S.W. 69, 73 (1894).

273. *Id.* at 211, 27 S.W. at 73.

274. *E.g.* Turner v. Eubanks, 26 Ark. App. 22, 30, 759 S.W.2d 37, 41–42 (1988).

275. *E.g.* Wood v. Setliff, 229 Ark. 1007, 1010, 320 S.W.2d 655, 658 (1959).

276. *Id.* at 1012, 320 S.W.2d at 658.

277. *Id.* at 1012, 320 S.W.2d at 658.

278. *Id.* at 1012, 320 S.W.2d at 659.

279. Carvill v. Jacks, 43 Ark. 454, 462 (1884).

280. *Wood*, 229 Ark. at 1010, 320 S.W.2d at 658.

281. *Id.* at 1011, 320 S.W.2d at 658.

282. *Id.*

283. *Id.*

284. *E.g.* Smith v. Boynton Land & Lumber Co., 131 Ark. 22, 27, 198 S.W. 107, 109 (1917).

285. Though not often purchased due to the increased cost and lack of buyer awareness of it, there is a ALTA Homeowner's Policy that includes some limited appreciation in the amount of the title insurance. Condition 9 of the Homeowner's Policy provides: "The Policy Amount then in force will increase by ten percent (10%) of the Policy Amount shown in Schedule A each year for the first five years following the Policy Date shown in Schedule A, up to one hundred fifty percent (150%) of the Policy Amount shown in Schedule A. The increase each year will happen on the anniversary of the Policy Date shown in Schedule A."

286. *E.g.* William Farrell Lumber Co. v. Deshon, 65 Ark. 103, 104–05, 44 S.W. 1036, 1036 (1898).

287. 9 THOMPSON ON REAL PROPERTY § 82.10(c)(4), at 658 (David A. Thomas ed., 3d ed. 2011); STOEBUCK & WHITMAN, *supra* note 7, at § 11.13, at 913.

288. 41 Ark. App. 84, 86, 848 S.W.2d 436, 437 (1993).

289. *Id.* at 86–87, 848 S.W.2d at 437–38.

290. *Id.* at 86, 848 S.W.2d at 437.

291. *Id.* at 88, 848 S.W.2d at 438.

292. *Id.* at 86, 848 S.W.2d at 437.

293. See the discussion of ARK. CODE ANN. § 18-12-102 (LEXIS Supp. 2009) *infra* at Part IX.

294. *Murchie*, 41 Ark. App. at 86, 848 S.W.2d at 437.

295. "In any civil action to recover on an open account, statement of account, account stated, promissory note, bill, negotiable instrument, or contract relating to the purchase or sale of goods, wares, or merchandise, or for labor or services, or breach of contract, unless otherwise provided by law or the contract which is the subject matter of the action, the prevailing party may be allowed a reasonable attorney's fee to be assessed by the court and collected as costs." ARK. CODE ANN. § 16-22-308 (Michie Repl. 1994).

296. *Murchie*, 41 Ark. App. at 88, 848 S.W.2d at 438 (citing O'bar v. Hight, 169 Ark. 1008, 277 S.W. 533 (1925); Ark. Trust Co. v. Bates, 187 Ark. 331, 336–37, 59 S.W.2d 1025, 1027 (1933)); *see also* Wood v. Setliff, 229 Ark. 1007, 1011, 320 S.W.2d 655, 658 (1959).

297. *Murchie*, 41 Ark. App. at 88, 848 S.W.2d at 438 (citing Schnitt v. McKellar, 244 Ark. 377, 382, 427 S.W.2d 202, 206 (1968); Black v. Been, 230 Ark. 526, 528, 323 S.W.2d 545, 547 (1959); Davis v. Collins, 219 Ark. 948, 951, 245 S.W.2d 571, 572 (1952); Jackson v. Lady, 140 Ark. 512, 523, 216 S.W. 505, 508 (1919)).

298. 292 Ark. 505, 508, 731 S.W.2d 204, 206 (1987).

299. *Id.* at 506, 731 S.W.2d at 205.

300. *Id.*

301. *Id.* at 509, 731 S.W.2d at 207.

302. *Id.* at 507, 731 S.W.2d at 206.

303. *Id.* (quoting 20 AM. JUR. 2D *Covenants* § 153 (1965) (emphasis added in opinion)). The volume has been rewritten since the decision was published; this topic is now addressed in sections 140–42.

304. Smiley v. Thomas, 220 Ark. 116, 123, 246 S.W.2d 419, 422 (1952); Ark. Trust Co. v. Bates, 187 Ark. 331, 336, 59 S.W.2d 1025, 1027 (1933); Beach v. Nordman, 90 Ark. 59, 64, 117 S.W.785, 787 (1909).

305. *Smiley*, 220 Ark. at 123, 246 S.W.2d 419 at 422.

306. Smith v. Boynton Land & Lumber Co., 131 Ark. 22, 27–28, 198 S.W. 107, 109 (1917).

307. 2010 Ark. App. 231, at 2–5, ___ S.W.3d ___, ___.

308. *Id.* at 12, ___ S.W.3d at ___.

309. *Id.* at 11–12, ___ S.W.3d at ___.

310. 140 Ark. 84, 87, 215 S.W. 678, 678 (1919).

311. Id. at 90–91, 215 S.W. at 680.

312. POWELL, *supra* note 19, § 81A.03[1][b][iii], at 28; 20 AM. JUR. 2D *Covenants* § 62 (2005).

313. Is it possible to convey a special warranty with respect to the covenant of seisin? The effect would be that the grantor is saying: "I promise I have title to and possess all of Blackacre. If it turns out that I don't, I make no promises with respect to acts by anyone other than me who might have lost part of it, and can't be held liable for them." There is no Arkansas law on point, but decisions in several other states have answered "yes" to this question. *E.g.* Harris v. Sklarew, 166 So.2d 164, 166 (Fla. Ct. App. 1964) (holding that a deed containing statutory covenants but in addition to a special warranty limited the covenant of seisin); Ellis v. Jordan, 1990 WL 93233, at *1 (Tex. App. 1990) (holding that where grantor did not own lots he sold to grantee, and, thus, covenant of seisin was breached, grantee could not recover because grantor conveyed with a special warranty deed); Mason v. Loveless, 24 P.3d 997, 1004 (Utah Ct. App. 2001) (holding that grantees could not recover for successful boundary by acquiescence claim by third parties, where grantor conveyed by special warranty deed and the boundary by acquiescence had ripened into a fee simple before the grantor's ownership). To err on the safe side, even though the practice is simply to limit the wording in the covenant of warranty, it is safest to limit the wording in all of the covenants, if that is the intent.

314. Among the special warranty deeds that failed to use "grant, bargain and sell," one said "bargained and sold" (5.3% of these deeds); five simply said "convey" (26.3% of these deeds); and thirteen said "grant, sell and convey" (68.4% of these deeds).

315. Bagley v. Fletcher, 44 Ark. 153, 160 (1884).

316. *E.g.* Holmes v. Countiss, 195 Ark. 1014, 1019, 115 S.W.2d 553, 555 (1938).

317. *Id.* at 1021, 115 S.W.2d at 556.

318. Wells v. Chase, 76 Ark. 417, 419, 88 S.W. 1030, 1030–31 (1905).

319. *Id.* at 419–20, 88 S.W. 1030.

320. 194 Ark. 623, 624, 109 S.W.2d 126, 126–27 (1937).

321. *Id.* at 625, 109 S.W.2d at 127.

322. *Id.* at 631, 109 S.W.2d at 130.

323. *Id.* at 631, 109 S.W.2d at 129–30 (internal quotation marks omitted). The same wording applies today. ARK. CODE ANN. 18-12-601 (LEXIS Repl. 2003).

324. 106 Ark. 256, 260–61, 153 S.W. 101, 103 (1913).

325. *Id.* at 261, 153 S.W. at 103.

326. *Id.*

327. *Id.* at 262, 153 S.W. at 103.

328. *E.g.* Crowell v. Packard, 35 Ark. 348, 351 (1880).

329. The District of Louisiana covered, misleadingly, all of the Louisiana Purchase except for the present state of Louisiana. POWELL, *supra* note 19, § 4.47, at 174.

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 175.

334. ARK. REV. STAT., ch. XXXI, § 1 (1837).

335. Winston v. Vaughan, 22 Ark. 72, 74 (1860).

336. 21 PA. CONS. STAT. ANN. § 8 (2001). In addition to Arkansas and Pennsylvania, Alabama, Illinois, and Mississippi have similar statutory language that implies the same covenants. ALA. CODE § 35-4-271 (1991); 765 ILL. COMP. STAT. 5 / 8 (2001); MISS. CODE ANN. § 89-1-41 (1999).

337. ARK. CODE ANN. § 18-12-102(a)–(b) (LEXIS Repl. 2003).

338. *Id.* § 18-12-102(d); *see also* Blakemore v. Covey, 173 Ark. 722, 724, 293 S.W. 39, 40 (1927) (holding that the levy for the preliminary expenses of an abandoned improvement

district fell under the statute and since the lien did not attach until after the deed was conveyed, was not a breach of any covenant of title).

339. Gibbons v. Moore, 98 Ark. 501, 503, 136 S.W. 937, 937 (1911); Davis v. Tarwater, 15 Ark. 286, 288–89 (1854).

340. Abbott v. Pearson, 257 Ark. 694, 704, 520 S.W.2d 204, 211 (1975) (Fogleman, J., dissenting); Seldon v. Dudley E. Jones Co., 74 Ark. 348, 350, 85 S.W. 778, 778 (1905); Winston v. Vaughan, 22 Ark. 72, 73–74 (1860).

341. *Gibbons*, 98 Ark. at 504, 136 S.W. at 938.

342. The "Limited Warranty Deed" was Instrument Number 2011034607.

343. *E.g.* Proffitt v. Isley, 13 Ark. App. 281, 283, 683 S.W.2d 243, 244 (1985); Turner v. Eubanks, 26 Ark. App. 22, 26, 759 S.W.2d 37, 39 (1988).

344. Chavis v. Hill, 216 Ark. 136, 137, 224 S.W.2d 808, 809 (1949).

345. *Id.* at 137, 224 S.W.2d at 809.

346. 59 Ark. 629, 633, 27 S.W. 1002, 1003 (1894) (internal quotation marks omitted). The deed did contain an express warranty, thus, the covenant of general warranty was the only one contained in the deed.

347. Holmes v. Countiss, 195 Ark. 1014, 1016, 115 S.W.2d 553, 554 (1938).

348. *Id.* at 1017, 115 S.W.2d at 554; Jackson v. Lady, 140 Ark. 512, 523, 216 S.W. 505, 508 (1919).

349. 137 Ark. 509, 510, 208 S.W. 795, 795 (1919).

350. *Id.* at 510, 208 S.W. at 795.

351. *Id.* at 510, 208 S.W. at 795–96.

352. *Id.* at 510–11, 208 S.W. at 796.

353. *Id.* at 511, 208 S.W. at 796.

354. *Id.*

355. *Doak*, 137 Ark. at 511, 208 S.W. at 797.

356. *Id.* at 513–14, 208 S.W. at 797.

357. *Id.* at 514, 208 S.W. at 797.

358. Instrument No. 2011034607. Corporations are prohibited from practicing law. ARK. CODE ANN. § 16-22-211(a)–(c) (LEXIS Supp. 2011); *see also* Campbell v. Asbury Automotive, Inc., 2011 Ark. 157, at 38–40, ___ S.W.3d ___, ___ (Brown, J., dissenting).

359. Instrument Nos. 2011033194, 2011033196, and 2011034596.

360. A different attorney prepared each of the three deeds, but two were prepared for the same out-of-state title company.

361. ARK. CODE ANN. § 23-103-413 (LEXIS Supp. 2009).