

What Promises of Title are Given by a Foreclosure Sale or Bank Sale?

Published July 24, 2009 09:14 AM by Dwight Bickel on his blog at ActiveRain
<https://activerain.com/blogs/titleadvisor>

Should you accept a Quitclaim Deed after a foreclosure sale?

Many purchasers these days are receiving title by a quitclaim deed. Some purchasers *think* they are getting warranties of the condition of title because the deed forms have a different name. However, most of these people are usually not getting the warranties that they expect.

Many people are purchasing at foreclosure sales, where the deed is always without warranties. Other people are purchasing from the lender after its foreclosure. The lender's deeds usually give no warranties of title.

What value is provided by warranties of title? What are the purchasers missing?

There are many different types of warranties

A warranty of title is simply a legally enforceable promise of the seller to the purchaser. If the status of title turns out to be different, the purchaser may sue the seller for monetary damages.

We have to start by discussing the different types of warranties that are possible. Then we will be able to discuss deeds that give one type of promise, but not other promises.

The warranties of title automatically given by a Washington **Statutory Warranty Deed** are stated by RCW [64.04.030](#). Since the statute says that there are warranties, even though the deed form itself does not recite any warranties, all deeds using the name "Warranty Deed" automatically promise to the purchaser:

1. That this Grantor is lawfully seized of an indefeasible estate in fee simple, in and to the premises therein described,
2. That this Grantor has good right and full power to convey the land;
3. That the land is free from all encumbrances that existed before this Grantor acquired that land;
4. That the land is free from all encumbrances created since this Grantor acquired that land;
5. That the Grantor warrants to the grantee and to heirs and assigns, the quiet and peaceable possession of such premises, and
6. That the Grantor will defend the title to the land against all persons who may lawfully claim the same.

What is a Quitclaim Deed?

A **Quitclaim Deed** is a common form that is defined by Washington statute. That means that any deed with that name will automatically provide no promises about the title given by the deed. RCW [64.04.050](#) provides:

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his heirs and assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described, but shall not extend to the after acquired title unless words are added expressing such intention.

A Quitclaim Deed given by a lender after foreclosure does not promise about liens that may exist, does not promise that the Grantor owns any interest in the land to convey, and does not even promise that the deed itself is valid to transfer any interest in the land.

What title warranties are given after a foreclosure sale?

A **Trustee's Deed** is the name of the form usually given after a Deed of Trust foreclosure sale. That is NOT a statutory deed form. That means there is no statute that automatically gives warranties even though the form does not show them.

It probably will surprise most people that the Trustee's Deed given to the purchaser at a foreclosure:

- Does NOT warrant that the sale was conducted properly.
- Does NOT warrant that all persons who might claim an interest in the land have been extinguished by the sale.
- Does NOT warrant that there are no other liens or interests that were created before the foreclosure sale.
- Does NOT warrant that the monetary liens that might appear junior were given notice of the sale.

The Trustee's Deed does not even promise that the lien that was foreclosed was valid. By RCW [61.24.050](#), the only title given by a Trustee's Deed is *whatever the borrower's title was, if any*:

"... the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, ..."

In the fine print of the Notice of Trustee's Sale, you will find the following disclosure that is provided by RCW [61.24.040](#):

"The sale will be made without warranty, express or implied, regarding title, possession, or encumbrances"

Therefore a Trustee's Deed provides no promises to the purchaser at the foreclosure sale. It is no better than a Quitclaim Deed.

What warranties are being given by the bank reselling after foreclosure?

If the lender that caused that foreclosure acquires at its own sale, the deeds given by that lender to the new purchaser are usually called a **Bargain and Sale Deed** or a **Special Warranty Deed**.

In my discussions with real estate brokers, I've learned that many people think that these forms promise that the sale was conducted properly and that the junior liens are all extinguished by the sale. Unfortunately, none of these deed forms provide a warranty promise to the purchaser that any liens created before the foreclosure sale have been eliminated. *Really!*

The usual forms of **Bargain and Sale Deed** and **Special Warranty Deed** do give some warranties, but not all the warranties described by a Warranty Deed.

The warranties of those deed forms are usually limited to *matters created by that Grantor*. That means that the Bank as seller is only promising that the Bank did not create a Deed of Trust to a new lender *after the foreclosure*. That promise also protects against an involuntary lien that might attach to the property by a judgment or tax lien against the Bank itself.

However, those deed forms do not give warranties about liens that may still be affecting the property that were created by the prior owner *before* the foreclosure sale. They also do not promise that the prior foreclosure eliminated any other liens created by the foreclosed prior owner voluntarily (like a Deed of Trust) or involuntarily (like tax liens or judgments).

So, just like the Trustee's Deed, the Bank that was the lender, and is now the seller:

- Does NOT warrant that all persons who might claim an interest in the land have been extinguished by the sale
- Does NOT warrant that there are no other liens or interests that were created before the foreclosure sale.
- Does NOT warrant that the monetary liens that might appear junior were given notice of the sale.

If the foreclosure sale did not give notice to those liens, by mistake or intentionally, those liens are still valid against the new purchaser. The selling Bank is not liable to the new purchaser if those liens later start a foreclosure of their own.

What specific title warranties are given by a Bargain and Sale Deed?

The [Bargain and Sale Deed](#) is another statutory form, so it will automatically give only the narrow warranty promises listed. RCW [64.04.040](#) provides:

Every deed in substance in the above form when otherwise duly executed, shall convey to the grantee, his heirs or assigns an estate of inheritance in fee simple, and shall be adjudged an express covenant to the grantee, his heirs or assigns, to wit: That the grantor was seized of an indefeasible estate in fee simple, free from encumbrances, done or suffered from the grantor, except the rents and services that may be reserved, and also for quiet enjoyment against the grantor, his heirs and assigns, unless limited by express words contained in such deed; and the grantee, his heirs, executors, administrators and assigns may recover in any action for breaches as if such covenants were expressly inserted."

This deed is much better than the Quitclaim Deed and the Special Warranty Deed for the purchaser following a foreclosure sale. Because the statute provides that it promises that the Grantor owned the property ["was seized of an indefeasible estate in fee simple"]. So a Bargain and Sale Deed does promise that the prior foreclosure sale was effective to transfer ownership to lender.

The Bargain and Sale Deed still does not promise that the sale eliminated any liens on the property, except liens or interests created by the lender after the foreclosure. The legalese of the statute can be stated more simply, that the Grantor warrants that the Grantor has not given any interests to the land and has not created any liens. *Other than those two narrow promises, this is a quitclaim deed.*

What specific title warranties are given by a Special Warranty Deed?

[January 2010 update: A new Special Warranty Deed LPB form was added. See Jan. 22 article to update.]**

There is no statute describing a Special Warranty Deed. ** So, there are no warranties of title automatically given to the Purchaser. A deed with that title could state any warranty language that the Grantor chooses. However, there is a common form by this name. The typical warranty language of a Special Warranty Deed in Washington states:

"The Grantor(s) for himself/herself/themselves and for his/her/their successors in interest do(es) by these presents expressly limit the covenants of the deed to those herein expressed, and exclude all covenants arising or to arise by statutory or other implication, and do(es) hereby covenant that against all persons whomsoever lawfully claiming or to claim by, through or under said Grantor(s) and not otherwise, he/she/they will forever warrant and defend the said described real estate."

That cumbersome legalese could be simplified: *The Grantor warrants that the Grantor has not given any interests to the land and has not created any liens. Other than that one narrow promise, this is a quitclaim deed.*

Some Limited Practice Officers and escrow companies are not comfortable preparing a Special Warranty Deed. If a Purchase and Sale Agreement provides for a Special Warranty Deed, the escrow officer may suggest changing to a Bargain and Sale Deed. Otherwise, the parties will be expected to deliver their customized deed to the closing.

If you acquire without title warranties, how will you convey when you sell?

Someday, the Grantee in today's deed will be selling or giving a mortgage. Almost all purchasers in the future will expect a Warranty Deed. Even a mortgage requires a warranty of the condition of title. Before you or a client accept a Quitclaim Deed, you should know how you will plan to defend against a future warranty claim against you.

If the present owner received title without a full Warranty Deed, it is very risky to give warranties to the next purchaser. Either you need a warranty claim to the prior owner, or you need a title policy for yourself at this time. Without either, the seller should only give a quitclaim deed.

The preprinted language of the Purchase and Sale Agreement will require the seller to give a Statutory Warranty Deed. The preprinted language of mortgages and Deeds of Trust include a promise of the borrower to protect the status of title and lien priority given to the lender.

The Grantor giving a Warranty Deed is giving a legally enforceable promise to pay damages if the title is defective and if there are any prior monetary encumbrances. The Grantor is NOT protected by the title report or the title insurance policy issued to the new purchaser.

All title insurance policies allow the new title company to pursue the prior seller for breach of the warranties given by the deed. How would that work?

An example of purchasing after a foreclosure without warranties of title will show the risk.

Assume purchasers at a trustee sale choose not to purchase title insurance. *Crazy as that sounds to me, plenty of "investors" go cheap.* Later, they convey the property with a warranty deed. They often foolishly think that the Trustee is promising that the sale eliminated liens. They also often mistakenly believe they are protected by the title condition shown in the prior Trustee's Guarantee used by the Trustee for the sale.

Next assume there was a prior Home Equity Line of Credit secured by a Deed of Trust that was NOT eliminated by the prior foreclosure sale, because the Trustee Sale Guarantee missed it and the Trustee gave no notice of the sale to that lender.

Also, assume there was a prior Federal tax lien against the foreclosed owner recorded after the Notice of Trustee Sale, but more than 30 days before the foreclosure sale. It was not eliminated by the foreclosure because the Trustee did not ask for an updated search and did not give the notice required by [26 USC 7425 \(b\)](#).

The new title company will be obligated to pay that Deed of Trust and that tax lien to protect the new purchaser from loss. **However, that title company will be entitled to collect from the Sellers.** Remember, the Sellers chose not to purchase title insurance. A title policy issued to the investors would have given protection against the prior Deed of Trust and tax lien. A title policy issued to the investors would automatically continue in force after their sale to protect against warranties of title given by the resale.

The investor purchasers, now sellers, in this example would find:

- they have no title insurance policy to pay for the old Deed of Trust or tax lien that were not eliminated by the sale
- they have no title insurance policy to defend their warranties of title given to the resale purchaser
- they have no recovery against the Trustee for the missed Deed of Trust that was not known to the Trustee
- they have no recovery against the Trustee for the Federal tax lien that was not eliminated due to the Trustee's failure to discover it and give special notice
- they have no recovery against the title company that missed the encumbrances on the Guarantee used for that Trustee sale.
- they have no recovery against the title company that provided the title report used for the resale and the new title policy to the resale purchasers.

What title insurance coverage should be obtained by a purchaser after a foreclosure sale?

The prior example is not so hypothetical, because in my experience there have been legal actions by subsequent title insurance companies against the purchasers at a prior foreclosure sale. You aren't surprised that my conclusion is that a purchaser should always purchase title insurance protection.

What title insurance coverage should be requested? Trustees don't pay for title insurance for a purchaser. Bank sales either pay for the bare minimum standard coverage basic policy, or sometimes don't pay for any title insurance. The least costly standard coverage basic policy will insure the purchaser that the prior sale was valid and the deed form passes title to the purchaser. Any policy will insure the purchaser that there are no prior Deeds of Trust or liens that remain after the foreclosure.

However, since the purchaser does not get a warranty deed, the purchaser may want more title insurance protection than the minimum. A Warranty Deed includes promises of a seller that in some ways are more than the title risks covered by the minimum title insurance policy. The seller in a Warranty Deed is promising to protect against some off-record claims of title, such as encroachments by a neighbor, unrecorded conveyances, and prescriptive rights to use the property acquired from off-record use over time.

If a seller will not provide a Warranty Deed, then the purchaser might ask the seller to pay the extra premium for either the Homeowner's Policy or the extended coverage policy. Even if the seller declines, the purchaser may want to invest the extra premium to cover the gap missing without warranties of the condition of title.

In the residential market in Washington, the usual title insurance policy is the ALTA Homeowner's Policy. For a small, approximately 10% increase, that policy provides some protection about matters that are beyond the public records. Particularly as to boundary improvements, its encroachment coverage due to off-record matters is quite limited. [See my prior blog post describing that policy form.]

The extended coverage policy that is common for commercial ownership provides protection against the described off-record uses, encroachments, survey questions, and unrecorded mechanic's liens. That premium increase is approximately 35% above the minimum policy coverage. Usually, the expense of a survey is also required.

The average Bank as seller is unlikely to agree to pay the increased premium for the extended coverage to more adequately protect the purchaser for the risks that are not protected by the missing Warranty Deed. The Purchaser should be aware that purchasing without a Warranty Deed exposes to more risks, and that title insurance protection is available to reduce those risks.

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