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# **WAGNER V. CUTLER: NOVEL INTERPRETATION OF A WARRANTY DEED**

**Margaret C. Hesse\***

## I. INTRODUCTION

Property conveyancing through the centuries has established one function of warranty deeds: to warrant good, clear title to the property conveyed by the deed. Recently, however, the Montana Supreme Court, in *Wagner v. Cutler*,<sup>1</sup> capsized established property law when it decided that an out-of-state statutory special warranty deed warranted the good condition of the property. This casenote analyzes the portion of the Montana Supreme Court's opinion that discusses the interpretation of the special warranty deed given by the grantor.

After reviewing the court's holding, this casenote focuses on several points the court should have considered when determining what the special warranty deed warranted. First, the word "warrant," when used in a conveyancing context, refers to a promise that the title to the property is clear. Second, warranty deeds historically warrant only the title to the property. At no time have warranty deeds, in themselves, warranted the condition of the property itself. Third, a special warranty deed merely limits a general warranty deed to the acts of the conveyor. Fourth, the Utah statute from which the special warranty deed in *Wagner* was derived clearly elucidates the meaning of the deed. Last, warranty deeds usually do not imply covenants of title unless the covenants of title are statutorily defined.<sup>2</sup> After clarifying warranty deeds, this casenote considers the effects of the decision on conveyancing in Montana and provides guidelines for lawyers to follow to avoid the snares baited by *Wagner*.

## II. THE OPINION

### A. *The Facts and Procedure*

In 1973, Earl Cutler (Cutler), an employee of the Church of Jesus Christ of the Latter-Day Saints (LDS), hired several contrac-

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\* I would like to thank Professor Robert Natelson, School of Law, University of Montana, for his assistance in preparing this casenote. Any errors or omissions are my own.

1. 232 Mont. 332, 757 P.2d 779 (1988).

2. Common law warranties, such as the implied warranty of habitability, are *not* covenants of title.

tors to build a "Capp Home" on his large lot.<sup>3</sup> When Cutler moved into the house in 1975, he "experienced problems with the septic system, the lawn sprinkler system, and flooding in the basement."<sup>4</sup>

LDS transferred Cutler in 1980 and, a year later, purchased Cutler's home because he was unable to sell it.<sup>5</sup> After purchasing the property, LDS immediately listed the vacant property with a real estate agent. The listing agreement described the house as only four years old and "well-built," with no major defects.<sup>6</sup> LDS's real estate agent published the home in the local Multiple Listing Service (MLS) advertisement using similar language.<sup>7</sup>

Candace Wagner viewed the house several times with another agent and liked it.<sup>8</sup> Wagner's agent represented the house as "'well built' according to 'code'" and gave Wagner a document, claiming that it represented the county's approval of the septic system.<sup>9</sup> Wagner's agent also provided a copy of the MLS listing upon which Wagner relied for details about the house.<sup>10</sup> The MLS listing did not mention that the house was a Capp Home, and at no time did anyone tell Wagner that the house was a Capp Home.<sup>11</sup>

After agreeing upon the price, Wagner and LDS signed an earnest money receipt containing these two clauses: (1) "Purchaser agrees to accept property [and] appliances in 'as is' condition unless otherwise provided for . . ." and (2) "Purchaser enters into this agreement in full reliance upon his *independent investigation and judgment*."<sup>12</sup> The earnest money receipt also required LDS to furnish Wagner with a warranty deed. LDS, however, added the term "special" to the warranty deed requirement before signing the earnest money receipt.<sup>13</sup> When the sale closed, LDS furnished

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3. *Id.* at 334, 757 P.2d at 780. Capp Homes was a subsidiary of Evans Products Company, which marketed a finish-it-yourself concept in house building. Capp Homes provided the materials and a crew to frame the house on a foundation the owner provided. After framing the house, Capp Homes had no further obligations. The owner or the owner's subcontractors installed wiring and plumbing, shingled the roof, insulated the attic and walls, installed sheetrock, landscaped, etc. Advertisement, Capp Homes: Sharing Your Dreams for Tomorrow (Copy on file at the office of the MONTANA LAW REVIEW).

4. WAGNER, 232 Mont. at 334, 757 P.2d at 780.

5. *Id.*

6. *Id.* at 334, 757 P.2d at 780-81.

7. *Id.* at 334, 757 P.2d at 781.

8. *Id.*

9. *Id.*

10. Respondent's Brief at 3, Wagner v. Cutler, 232 Mont. 332, 757 P.2d 779 (1988)(No. 87-230).

11. Wagner, 232 Mont. at 335, 757 P.2d at 781.

12. *Id.*

13. Respondent's Brief at 8, Wagner (No. 87-230).

Wagner with the required special warranty deed for the property.<sup>14</sup>

Soon after the closing, Wagner experienced problems with the house, including a hazardous chimney, a broken sewage pump, an unfinished basement, and a broken lawn-sprinkler system.<sup>15</sup> These problems eventually caused Wagner to sue both Cutler and LDS to recover damages for misrepresentation and violation of the seller's (LDS's) duty to inspect and disclose defects.<sup>16</sup>

### B. *The Holding*

The Montana Supreme Court affirmed the district court's decision awarding Wagner \$15,203.19 in damages.<sup>17</sup> First, the court held that Wagner reasonably relied on LDS's representations as to the condition of the house. Furthermore, LDS did not use reasonable care in disclosing the true condition of the house to her.<sup>18</sup> The court reasoned that the "independent investigation" and "as is" clauses of the earnest money receipt did not prevent Wagner from justifiably relying on LDS's misrepresentations.<sup>19</sup> Thus, the court allowed Wagner to recover for latent defects. However, because she should have discovered several of the defects during her inspections of the house, the court did not allow recovery for any noticeable defects.<sup>20</sup> The court could have ended the opinion at that point and would have achieved the correct result. Instead, the court added a second line of reasoning; it interpreted the special warranty deed given by LDS to Wagner as a warranty of the condition of the property.<sup>21</sup> This analysis of the special warranty deed muddled centuries of property law and may subject conveyancing in Montana to volatility for years to come.

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14. *Wagner*, 232 Mont. at 337, 757 P.2d at 782.

15. *Id.* at 335-36, 757 P.2d at 781.

16. *Id.* at 335, 757 P.2d at 781. Wagner also sued on a breach of the implied warranty of habitability. The district court dismissed this cause and also dismissed Cutler from the case. *Id.* The court may have dismissed the breach of the implied warranty of habitability action because no single builder was *per se* responsible for the construction of the house. See *supra* note 3. Capp Homes had merely framed the house and provided the other building materials. Cutler, together with friends and subcontractors, had finished the home. Respondent's Brief at 1-2, *Wagner* (No. 87-230). Additionally, Capp Homes was no longer in business at the time of the 1986 trial in district court. Interview with Ron Ramsey, former employee of Capp Homes, in Missoula, MT (Oct. 19, 1989).

17. *Wagner*, 232 Mont. at 334, 757 P.2d at 781.

18. *Id.* at 336, 757 P.2d at 782-83.

19. *Id.* at 336, 757 P.2d at 782 (citing *Parkhill v. Fuselier*, \_\_\_ Mont. \_\_\_, \_\_\_, 632 P.2d 1132, 1135 (1981)).

20. *Id.* at 336-37, 757 P.2d at 782.

21. *Id.* at 337, 757 P.2d at 782.

## III. ANALYSIS OF THE DECISION

When construing the special warranty deed LDS gave to Wagner, the Montana Supreme Court applied contract-interpretation standards without considering a deed's significance as a conveyancing document. A Montana statute provides that "[a] voluntary transfer [of title to real property] is an executed contract subject to all rules of law concerning contracts in general, except that a consideration is not necessary to its validity."<sup>22</sup> This statute supports the contract interpretation of LDS's special warranty deed; however, the court failed to interpret the deed correctly because it misconstrued the word "warrant."

When reviewing the sale documents, the Montana Supreme Court noted that LDS had drafted them and stated, "In the plain language of the contractual clause,<sup>23</sup> LDS warranted the house. Having done so, LDS contractually bound itself to the veracity of the warrant."<sup>24</sup> The court supported its reasoning with two contract-interpretation statutes.<sup>25</sup> The first statute provides: "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity."<sup>26</sup> The other statute stipulates that any uncertainty in the language of a contract should be interpreted against the promisor.<sup>27</sup>

22. MONT. CODE ANN. § 70-1-502 (1989).

23. The special warranty deed LDS used to convey the property stated, in part, "Grantor, of Salt Lake County, State of Utah, hereby conveys and warrants, against all acts of itself, and none other, to all claiming by, through or under it to CANDACE A. WAGNER, Grantee, . . . the following parcel . . ." *Wagner*, 232 Mont. at 337, 757 P.2d at 782.

24. *Id.* (relying upon MONT. CODE ANN. § 28-3-206 (1987)).

25. *Id.* The court used contract-interpretation statutes selectively to interpret the special warranty deed. Apparently it did not consider MONTANA CODE ANNOTATED § 28-3-301 (1989) that states that the mutual intention of the parties "as it existed at the time of contracting" must be given full effect when interpreting a contract. In the earnest money receipt, LDS promised a "special" warranty deed to execute the agreement. Wagner sought a document evidencing the transaction, but nowhere in the briefs filed on appeal does it appear that Wagner intended the document to warrant the condition of the property. This intent is buttressed by her signing of the earnest money receipt with its "as is" and "independent investigation" clauses. Those clauses purported to provide that Wagner knew she was purchasing a used home with all its flaws.

Furthermore, if Wagner did not understand the significance of the warranty deed, she had a duty to inquire about its purpose. As one court stated, "Inexperience alone . . . does not excuse a landowner from the responsibility of reading an instrument before [she] signs it, and if [she] does not understand its provisions, making inquiry of the person who drafted the instrument or having it checked by [her] own counsel." *Superior Oil Co. v. Vanderhoof*, 297 F. Supp. 1086, 1093 (D. Mont. 1969).

26. MONT. CODE ANN. § 28-3-401 (1989).

27. MONT. CODE ANN. § 28-3-206 (1989):

In cases of uncertainty not removed by parts 1 through 5 of this chapter, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, ex-

Because the "language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity,"<sup>28</sup> the court looked at the plain language of the special warranty deed. However, the court did not consider the unique relationship of a deed to property conveyancing. Particular words in a deed have become operative words in the sense that they must be present in the deed to make it comply with established property law.<sup>29</sup> "Grant" and "warrant" are such operative words.<sup>30</sup> A contract interpretation of a deed is not always correct because such an interpretation may conflict with the operative words upon which conveyancing relies. Moreover, statutes exist in many states that import certain meanings into deeds from the presence of particular words.<sup>31</sup> A strict contract interpretation of a deed containing statutorily defined language, therefore, would also be incorrect. The deed actually means what the statute says it means; often this meaning is something other than what the plain language of the deed indicates.

In *Wagner*, the court's contract interpretation of the deed hinged on the significance of the term "warrant." In a *contract* context, warrant means to "promise that a certain fact or state of facts, in relation to the subject-matter, is, or shall be, as it is represented to be."<sup>32</sup> In a *conveyance* context, warrant means "to assure the title to property sold."<sup>33</sup> "Warrant," then, has two distinct meanings, depending upon the context in which the word is used. In *Wagner*, the court's interpretation of the deed centered on the definition of "warrant" as used in a contract setting. Because the deed used the word "warrant," the court interpreted the deed to mean that LDS assured the condition of the property. Specifically, the court determined that the seller certified the house to be in good condition.

The deed, however, was a document of conveyance; therefore, the court should have interpreted "warrant" in that context.<sup>34</sup> The court should have recognized that LDS promised that Wagner's title to the property was good and that her possession would be un-

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cept that in the case of a contract between a public officer or body, as such, and a private party, it is presumed that all uncertainty was caused by the private party.

28. MONT. CODE ANN. § 28-3-401 (1989).

29. 3 AMERICAN LAW OF PROPERTY § 12.44 (1952).

30. *Id.*

31. *See infra* notes 72-73 and accompanying text.

32. BLACK'S LAW DICTIONARY 1421 (5th ed. 1979).

33. *Id.*

34. *See supra* text accompanying note 31.

disturbed.<sup>36</sup> Had the court construed "warrant" in a conveyancing context, it would not have found that the special warranty deed warranted the condition of the property.

The court also relied on a second statute requiring that a court interpret any uncertainty in the language of a contract most strongly against the party causing such uncertainty.<sup>36</sup> In *Wagner*, because LDS was the promisor, the court stated, "Any uncertainty over 'what was warranted' in the deed should be interpreted most strongly against [LDS] . . . ."<sup>37</sup> In actuality, LDS's special warranty deed should not have created any uncertainty because a warranty deed, by definition, warrants only good, clear title to the property.<sup>38</sup> Thus, "warrant," as used by LDS, meant to assure only good, clear title, and the conclusion that the deed provided by LDS warranted the condition of the property was erroneous.

#### IV. FACTORS THE COURT SHOULD HAVE CONSIDERED

Instead of relying on only the two contract-interpretation statutes, the court should have considered the historical background of warranty deeds, the different types of warranty deeds, statutorily created deeds, and case law clarifying warranty deeds. If the court had done so, it would have reached a different conclusion regarding the special warranty deed.

##### A. History of Warranty Deeds

Warranty of title dates back to the days of feudal incidents in England.<sup>39</sup> If the title to a vassal's fee were disputed, the lord who originally presented that fee had a duty either to defend the vassal's fee or, if the vassal were evicted, to give the vassal a "feud" of comparable value.<sup>40</sup> This warranty of title was a natural incident of tenure; therefore, no express covenant was necessary.<sup>41</sup> English "covenants for title"<sup>42</sup> replaced the common law warranty during

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35. The court reached the proper result regarding the latent defects in its interpretation of the earnest money receipt. See *supra* notes 18-20 and accompanying text. If the court had correctly interpreted the special warranty deed as one which warranted the title to the property, the court would not have altered its result.

36. MONT. CODE ANN. § 28-3-206 (1989).

37. *Wagner v. Cutler*, 232 Mont. 332, 337, 757 P.2d 779, 782 (1988).

38. BLACK'S LAW DICTIONARY 1425 (5th ed. 1979).

39. W. RAWLE, A PRACTICAL TREATISE ON THE LAW OF COVENANTS FOR TITLE 2 (3d ed. 1860).

40. *Id.*

41. *Id.*

42. Six "covenants for title" are recognized: (1) covenant of seizin, (2) covenant of right to convey, (3) covenant of quiet enjoyment, (4) covenant against encumbrances, (5)

the latter half of the seventeenth century.<sup>43</sup> When the English settlers immigrated to America, they brought with them these covenants for title.<sup>44</sup> Eventually, the covenant of warranty became the most commonly used and relied upon covenant in the United States.<sup>45</sup> At present, a warranty deed typically contains a covenant of warranty, irrespective of whether it contains any other covenants of title.<sup>46</sup>

The covenant of warranty promises that the grantor will defend the grantee's title to the property against any other person claiming the same title.<sup>47</sup> The covenant of warranty "runs with the land," in that the original grantor's promise to defend the title also protects a remote grantee.<sup>48</sup> The grantee may sue the grantor under the covenant of title when actually or constructively evicted by a holder of paramount title.<sup>49</sup> Upon notice of the eviction, the grantor must defend the grantee's title and, failing that, must pay the grantee damages if the title is not as the seller represented such title in the deed.<sup>50</sup> Damages may include the cost of curing the title or the amount of reduction in value—limited by the original purchase price—of the property attributable to the defective title plus attorneys' fees and, in some cases, interest.<sup>51</sup>

Examples of claims against title which might give rise to an action include actions brought because an encumbrance or lien exists against the property,<sup>52</sup> an easement not specified in the deed exists,<sup>53</sup> or a paramount title to the property exists.<sup>54</sup> All actions are claims against the title to the property, not claims against the condition of the property itself. The historical development of warranty deeds demonstrates that the covenant of warranty protects

covenant for further assurance, and (6) covenant of warranty. *Id.* at 11-12.

43. *Id.* at 11.

44. *Id.* at 12.

45. *Id.*

46. *Id.* at 203.

47. *Id.* at 224.

48. *Id.* at 335. See also Natelson, *Running with the Land in Montana*, this volume parts III & IV.

49. W. RAWLE, *supra* note 39, at 216.

50. See generally, J. DUKEMINIER & J. KRIER, *PROPERTY* 648-49 (2d ed. 1988).

51. J. CRIBBET & C. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 302 (3d ed. 1989).

52. See, e.g., *Brewer v. Peatross*, 595 P.2d 866 (Utah 1979); *Mack-Welling Lumber and Supply Co. v. Bedore*, 191 Kan. 88, 379 P.2d 545 (1963); *Schuster v. Northern Co.*, 127 Mont. 39, 257 P.2d 249 (1953).

53. See, e.g., *Brown v. Baker*, 67 Or. App. 283, 677 P.2d 741 (1984); *Bank of Alaska v. Ashland*, 128 Wash. 572, 224 P. 7 (1924).

54. See, e.g., *Chaney v. Haeder*, 90 Or. App. 321, 752 P.2d 854 (1988); *St. Paul Title Ins. Corp. v. Owen*, 452 So. 2d 482 (Ala. 1984); *Foley v. Smith*, 14 Wash. App. 285, 539 P.2d 874 (1975); *Bernklau v. Stevens*, 150 Colo. 187, 371 P.2d 765 (1962).



the buyer of real property only from claims against the title to the property.

### B. General or Special Warranty Deeds

A warranty deed may be general or special.<sup>55</sup> In a general warranty deed, the grantor provides a general covenant of warranty that warrants the grantee's title against all persons.<sup>56</sup> In a special warranty deed, the grantor provides a special or limited covenant of warranty that warrants title only against claims held "by, through, or under" the grantor, or against encumbrances made by the grantor.<sup>57</sup> "A special warranty deed therefore protects the grantee against a claim under a title *from* [the grantor], but not against a claim under a title *against*, or superior to, [the grantor]."<sup>58</sup> A special warranty deed does not warrant title against all persons; it protects the grantee from claims resulting only from the grantor's acts.

LDS converted a Utah warranty deed into a special warranty deed by inserting the words "against all acts of itself, and none other."<sup>59</sup> When LDS converted a general warranty deed into a special warranty deed, the warranties in the conveyance remained warranties of title only. LDS's special warranty deed should have protected the buyer only from claims against her title resulting from acts of the seller.

### C. LDS's Special Warranty Deed

LDS, which is principally located in Utah, provided Wagner with a special warranty deed<sup>60</sup> derived from a Utah statutory short form warranty deed that reads:

Conveyances of land may be substantially in the following form:

#### WARRANTY DEED

\_\_\_\_\_ (hereby insert name), grantor, of  
\_\_\_\_\_ (insert place of residence), hereby conveys

55. J. DUKEMINIER & J. KRIER, PROPERTY 646 (2d ed. 1988); See also W. RAWLE, *supra* note 39, at 224-25.

56. See, e.g., W. Rawle, *supra* note 39, at 224-25.

57. BLACK'S LAW DICTIONARY 1425 (5th ed. 1979). The deed that LDS gave to Wagner was a special warranty deed.

58. Central Life Assurance Soc'y v. Impelmans, 13 Wash. 2d 632, 646, 126 P.2d 757, 763 (1942)(emphasis supplied by court)(Defendant purchased property from plaintiff and received a special warranty deed. Defendant discovered title defects that were not the plaintiff's fault. Plaintiff brought this action for forfeiture of the contract after the defendant defaulted on payments.)

59. Wagner v. Cutler, 232 Mont. 332, 337, 757 P.2d 779, 782 (1988).

60. See *supra* note 23.

and warrants to \_\_\_\_\_ (insert name), grantee, of \_\_\_\_\_ (insert place of residence), for the sum of \_\_\_\_\_ dollars, the following described tract \_\_\_\_\_ of land in \_\_\_\_\_ County, Utah, to wit: (here describe the premises).

Witness the hand of said grantor this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Such deed when executed as required by law shall have the effect of a conveyance in fee simple to the grantee, [the grantee's] heirs and assigns, of the premises therein named, together with all the appurtenances, rights and privileges thereunto belonging, with covenants from the grantor, [the grantor's] heirs and personal representatives, that [the grantor] is *lawfully seised of the premises*; that [the grantor] has *good right to convey* the same; that [the grantor] guarantees the grantee, [the grantee's] heirs and assigns in the *quiet possession* thereof; that the premises are *free from all encumbrances*; and that the grantor, [the grantor's] heirs and personal representatives will *forever warrant and defend the title thereof* in the grantee, [the grantee's] heirs and assigns against all lawful claims whatsoever. Any exceptions to such covenants may be briefly inserted in such deed following the description of the land.<sup>61</sup>

LDS used the Utah short-form deed as it appears in the statute with one change. LDS changed the general warranty deed into a special warranty deed by adding the words "against all acts of itself, and none other" after the word "warrants."<sup>62</sup>

In using this statutory short-form warranty deed, LDS expected certain results. LDS expected the special warranty deed to warrant only the title to the real property against claims arising from LDS's own acts. LDS's prior conduct and previous cases interpreting the statutorily defined deed support LDS's expectations.<sup>63</sup> LDS had used the statutory short-form deed in conveying property throughout the United States<sup>64</sup> and expected it to warrant only the title to the real property. In addition, the Supreme Court of Utah, when construing this statutory short-form deed, stated, "Warranties, other than the five embraced in a statutory warranty deed, should be stated in a deed with clarity."<sup>65</sup> Thus, if

61. UTAH CODE ANN. § 57-1-12 (1986)(emphasis added).

62. *Wagner*, 232 Mont. at 337, 757 P.2d at 782.

63. See *infra* notes 64-65 and accompanying text.

64. LDS used special warranty deeds like the one in *Wagner* to convey property all over the United States and was quite familiar with the form. Respondent's Brief at 20, *Wagner v. Cutler*, 232 Mont. 332, 757 P.2d 779 (1988)(No. 87-230).

65. *Ellis v. Hale*, 13 Utah 2d 279, 284, 373 P.2d 382, 386 (1962)(Plaintiffs bought lots in an unapproved subdivision, believing it was approved. The plaintiffs later could not resell

LDS had intended to warrant the condition of the property, LDS would have done so expressly.

Conveyancers throughout the country depend on the same certainty upon which LDS relied. To enforce such certainty, however, a deed must receive the same interpretation in one state as in another. Obviously, when one state chooses or is forced to interpret an out-of-state deed according to its own methods, conflicts may occur. An example illustrates the difficulties that may arise:

X, a resident of State A, conveys property in State A to Y, a resident of State B. Y, in turn, conveys the property to Z with a statutory form warranty deed from State B. If problems result with the property between Y and Z, State A has jurisdiction over the dispute, yet the deed from State B would still control the transaction.

Because citizens of the United States frequently move from state to state, predicaments similar to those posed in the example commonly arise. Under such circumstances, an out-of-state deed often may cause confusion when interpreted in another state. This problem occurs so frequently that the Restatement (Second) of Conflict of Laws addresses it.<sup>66</sup> Often these choice-of-law questions focus on whether a court should imply covenants of title from "special words in the deed [such] as 'grant, bargain, sell and convey.'"<sup>67</sup>

#### *D. Express or Implied Covenants of Title*

As the Utah statutory form deed demonstrated,<sup>68</sup> covenants of title in a deed may be either implied or express.<sup>69</sup> Historically

the property because potential buyers could not secure building permits. The plaintiffs sued the original grantors for recovery under the theory that, by using the word "lot," the defendants warranted that the properties were part of an approved subdivision.).

66. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 190 (1969) states:

The contractual duties imposed upon the parties to a deed of transfer of an interest in land are determined, in the absence of an effective choice of law by the parties, by the local law of the state where the land is situated unless, with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties, in which event the local law of the other state will be applied.

67. *Id.* at § 190 comment b.

68. See *supra* note 61 and accompanying text. The words "convey and warrant" in the Utah statutory form deed imply five covenants of title.

69. 3 AMERICAN LAW OF PROPERTY § 12.124 (1952). Note that this casenote refers only to implied covenants of title, not to implied warranties, such as the implied warranty of habitability. The Utah statutory warranty deed is a prime example of a deed with implied covenants of title. See *supra* Part IV, Section C for the text of the Utah statutory warranty deed.

there has been an aversion toward implied covenants of title.<sup>70</sup> However, many states have enacted statutes providing that particular words shall imply covenants of title in conveyances.<sup>71</sup> The two most common statutory phrases which imply covenants of title in a conveyance are “grant”<sup>72</sup> and “convey and warrant.”<sup>73</sup> Generally, when the word “grant” implies covenants of title, it implies only two covenants of title: the covenant of right to convey and the covenant against encumbrances.<sup>74</sup> Contrast that with the covenants of title implied by the word “warrant.” “Warrant” may imply all six covenants of title; however, the word “warrant” invariably implies the covenant of warranty.<sup>75</sup> The applicable statutes dictate the cor-

70. 3 AMERICAN LAW OF PROPERTY § 12.124 (1952). A number of states have enacted statutes stating that no covenants or warranties of title may be implied in a conveyance of real property. See GA. CODE ANN. § 44-5-61 (1982); MD. REAL PROP. CODE ANN. § 2-115 (1988); N.Y. REAL PROP. LAW § 251 (McKinney 1989); OR. REV. STAT. § 93.140 (1983)(no covenants implied except by other statutory provisions); V.I. CODE ANN. tit. 28, § 9 (1975); WIS. STAT. ANN. § 706.10(6)(West 1981).

71. 3 AMERICAN LAW OF PROPERTY § 12.124 (1952).

72. “Grant” may be used alone or in combination (such as “grant, bargain and sell”) depending on the statute enacted in the particular state. See ALA. CODE § 35-4-271 (1975)(grant, bargain, sell or any of them); ARIZ. REV. STAT. ANN. § 33-435 (1956)(grant or convey); ARK. STAT. ANN. § 18-12-102 (1987) (grant, bargain and sell); CAL. CIV. CODE § 1113 (West 1982) (grant); DEL. CODE ANN. tit. 25, § 121 (1974)(grant and convey); GUAM CIV. CODE § 1113 (1970) (grant); IDAHO CODE § 55-612 (1988)(grant); MISS. CODE ANN. § 89-1-41 (1972)(grant, bargain, sell); MO. ANN. STAT. § 442.420 (Vernon 1986)(grant, bargain, and sell); MONT. CODE ANN. § 70-20-304 (1989)(grant); NEV. REV. STAT. § 111.170 (1987)(grant, bargain and sell); N.D. CENT. CODE § 47-10-19 (1978)(grant); PA. STAT. ANN. tit. 21, §§ 4, 8 (Purdon 1955)(grant and convey, and grant, bargain, sell, respectively); S.D. CODIFIED LAWS ANN. § 43-25-10 (1983)(grant); TEX. PROP. CODE ANN. § 5.023 (Vernon 1984)(grant or convey).

Because in so many states “grant” implies covenants of title, other states have passed statutes which specifically state that the word “grant” does not imply covenants of title. See ME. REV. STAT. ANN. tit. 33, § 771 (1964); MASS. ANN. LAWS ch. 183, § 12 (Law. Co-op. 1987); N.H. REV. STAT. ANN. § 477:24 (1983); N.M. STAT. ANN. § 47-1-32 (1978); OHIO REV. CODE ANN. § 5302.03 (Anderson 1989); R.I. GEN. LAWS § 34-11-7 (1956).

73. Some states interpret the word “warrant” alone in the same manner as other states interpret “convey and warrant.” See ALASKA STAT. § 34.15.030 (1985)(conveys and warrants); COLO. REV. STAT. § 38-30-113 (1973)(and warrant(s) the title); CONN. GEN. STAT. § 47-36(e)(1989)(with warranty covenants); FLA. STAT. ANN. §§ 689.02 to .03 (West Supp. 1989)(fully warrant the title); ILL. ANN. STAT. ch. 30, para. 8 (Smith-Hurd 1969)(conveys and warrants); IND. CODE ANN. § 32-1-2-12 (Burns 1980)(conveys and warrants); KAN. STAT. ANN. § 58-2203 (1983)(conveys and warrants); KY. REV. STAT. ANN. § 382.030 (Baldwin 1979)(warrant); MICH. STAT. ANN. § 26.571 (Callaghan 1982)(conveys and warrants); MINN. STAT. ANN. § 507.07 (West 1947)(conveys and warrants); MISS. CODE ANN. § 89-1-33 (1972)(warrant); OR. REV. STAT. § 93.850 (1983)(conveys and warrants); PA. STAT. ANN. tit. 21, § 5 (Purdon 1955)(warrant generally); S.D. CODIFIED LAWS ANN. §§ 43-25-5 to -6 (1983) (conveys and warrants); UTAH CODE ANN. § 57-1-12 (1986)(conveys and warrants); VA. CODE ANN. §§ 55-67, -70 (1986)(covenants, with . . . warranty, respectively); WASH. REV. CODE ANN. § 64.04.030 (1966)(conveys and warrants); WYO. STAT. §§ 34-2-102 to -103 (1977)(conveys and warrants).

74. See statutes cited *supra* note 72.

75. See statutes cited *supra* note 73. See also *supra* note 46.

rect interpretation of the words.

In addition to enacting statutes implying covenants of title as a result of the use of a word, some states have enacted statutes providing a form for conveyancers to follow when conveying property by warranty deed.<sup>76</sup> These forms may or may not contain words which imply covenants of title. Many statutory form deeds contain the word "covenants,"<sup>77</sup> while others merely provide a general form.<sup>78</sup>

In *Wagner*, the court construed a statutory form deed that should have implied covenants of title from the words "convey and warrant." Because the parties did not refer to the Utah statute,<sup>79</sup> the court did not recognize that the deed implied specific covenants of title.<sup>80</sup> If, however, the deed had contained only the word "grant," the court would have recognized it as a Montana statutory grant deed. The Montana grant deed statutorily implies two covenants of title: the covenant of right to convey and the covenant against encumbrances.<sup>81</sup>

A Montana conveyancer using a Montana statutory grant deed expects certain results. Similarly, a Utah conveyancer expects certain results when using a Utah statutory warranty deed. For example, if *A* conveyed real property to *B* using a Montana statutory

76. See J. DUKEMINIER & J. KRIER, PROPERTY 648 (2d ed. 1988); see also statutes cited *infra* notes 77-78.

77. See CONN. GEN. STAT. §§ 47-36(c) to -36(d)(1989); ME. REV. STAT. ANN. tit. 33, § 775(1) (1964); MASS. ANN. LAWS ch. 183, § 10 (Law. Co-op. 1987)(referring to Act of Apr. 18, 1912, ch. 502 § 2, 1971 Mass. Acts 423, § 1, reprinted in MASS. ANN. LAWS ch. 183 app. at 144 (Law. Co-op. 1987)); N.H. REV. STAT. ANN. § 477.27 (1983); N.J. STAT. ANN. §§ 46:4-1 to -2 (West 1989); N.M. STAT. ANN. §§ 47-1-37, -38, -44 (1978); OHIO REV. CODE ANN. §§ 5302.05 to .08 (Anderson 1989); R.I. GEN. LAWS §§ 34-11-12, -15 (1956).

78. See ARIZ. REV. STAT. ANN. § 33-402 (1956); DEL. CODE ANN. tit. 25, § 121 (1974); FLA. STAT. ANN. § 689.02 (West Supp. 1989); ILL. ANN. STAT. ch. 30, para. 8 (Smith-Hurd 1969); IOWA CODE ANN. § 558.19 (West 1950); MICH. STAT. ANN. § 26.571 (Callaghan 1982); MINN. STAT. ANN. § 507.07 (West 1947); OKLA. STAT. ANN. tit. 16, § 40 (West 1986); OR. REV. STAT. § 93.850 (1983); S.C. CODE ANN. §§ 27-7-10, -20 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 43-25-5 (1983); TENN. CODE ANN. § 66-5-103 (1982); TEX. PROP. CODE ANN. § 5.022 (Vernon 1984); UTAH CODE ANN. § 57-1-12 (1986); WASH. REV. CODE ANN. § 64.02.030 (1966); WYO. STAT. § 34-2-102 (1977).

79. Surprisingly, neither of the briefs submitted upon appeal by either party mentioned that the special warranty deed was a Utah statutory form deed.

80. The counsel for LDS should have argued that Utah law governed the statutory form deed by referring to the statute as a special matter in LDS's pleadings. This reference would have forced the court to give credence to the Utah statute. MONT. R. CIV. P. 9(d).

81. MONT. CODE ANN. § 70-20-304 (1989). The first covenant promises that the grantor previously has not "conveyed the same estate or any right, title or interest" to it to any other person. The second covenant promises that the estate, at the time of conveyance, is free from encumbrances made "by the grantor or any person claiming under him." Because the Montana grant deed does not contain the covenant of warranty, it is not a warranty deed.

grant deed, A would be conveying the property and would also be giving B two covenants of title: the covenant of right to convey and the covenant against encumbrances. The expectations of A are merely to convey the property and to give the two covenants of title implied in the statute, not to warrant the condition of the property. Moreover, although the idea that a grant deed warrants the condition of the property may seem far-fetched, such a theory has been litigated.<sup>82</sup>

A California court held that a deed based on an identical "grant" statute<sup>83</sup> does not imply a warranty of the condition of the land, but implies only covenants of title.<sup>84</sup> Quoting Williston on Contracts, the court stated that "there can be no warranty of quality or condition implied in the sale of real estate . . ."<sup>85</sup> The Montana grant deed similarly should not warrant the condition of the property; it should convey the property and provide only the two covenants of title.<sup>86</sup>

### E. Interpretation of Warranty Deeds in Montana

The Montana Supreme Court defined a covenant of warranty in *Capital Hill Shopping Center, Associates v. Miles*.<sup>87</sup> The court stated, "A covenant of warranty is for the purpose of indemnifying the purchaser against a loss or injury [the purchaser] may sustain by reason of a defect in the vendor's title."<sup>88</sup> In that case, the court interpreted a conveyancing document which contained a section

82. See *infra* notes 84-85 and accompanying text.

83. CAL. CIV. CODE § 1113 (West 1982). Montana adopted California's statute verbatim. Presently, this provision is codified as MONT. CODE ANN. § 70-20-304 (1989).

84. *Gustafson v. Dunham, Inc.*, 204 Cal. App. 2d at \_\_\_, 22 Cal. Rptr. 161, 163 (1962)(Purchasers of a home located on a lot which contained uncompacted fill dirt sued for damages in a breach-of-warranty action after the fill dirt settled, damaging the home.).

85. *Gustafson* at \_\_\_, 22 Cal. Rptr. at 163 (quoting 4 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 926 (1936)).

86. When the legislators adopted much of the comprehensive codification of the Field Code in 1895, they adopted a provision for warranty of quality in sales of *personal* property. MONTANA CODE ANNOTATED § 30-11-215 (1989) provides that a general warranty extends to latent defects in personal property. This section positively shows that the legislators knew how to codify a provision to warrant latent defects in real property if they were so inclined; however, they failed to do so. As the maxim *expressio unius est exclusio alterius* suggests, the express mention of warranty of quality of personal property would seem to exclude a similar warranty of quality of real property.

87. 174 Mont. 222, 570 P.2d 295 (1977)(Defendant sold a shopping center to plaintiff. Prior to the sale, defendant made an exclusive lease with Brown; however, defendant did not disclose the existence of the lease to plaintiff at the time of the sale. Plaintiff successfully sued defendant for violation of the warranty provisions of the sale agreement.).

88. *Id.* at 230, 570 P.2d at 298 (citing *Davis v. Andrews*, 361 S.W.2d 419 (Tex. Civ.

entitled "Warranties."<sup>89</sup>

The court construed a warranty deed that also contained the word "grant" in *Schuster v. Northern Co.*<sup>90</sup> The court decided that the two covenants of title implied from the word "grant" and the additional covenant of warranty expressed in the warranty deed were the only promises made to the buyer of the real property.<sup>91</sup>

Instead of relying on contract interpretation, the Montana Supreme Court should have relied on precedent case law to interpret LDS's special warranty deed. Moreover, if the court had followed *Schuster* and *Capital Hill Shopping Center, Associates*, the court would have arrived at the proper conclusion regarding LDS's special warranty deed. The court should have concluded that LDS warranted only the title to the property with its special warranty deed.

## V. EFFECTS OF THE DECISION ON CONVEYANCING IN MONTANA

### A. Economic Effects

As a result of the arbitrary interpretation of the warranty deed in *Wagner*, conveyancing in Montana may be affected in several ways. Primarily, because this decision may affect any deed that contains the word "warrant," conveyancers may be insecure in using a warranty deed. An increase in the use of quitclaim deeds in

89. *Id.* at 226, 570 P.2d at 296.

90. 127 Mont. 39, 257 P.2d 249 (1953)(Plaintiff conveyed property by a warranty deed which contained the word "grant." Defendant (buyer) counterclaimed against plaintiff (seller) because taxes were outstanding on the property, a violation of the covenant against encumbrances.)

91. Unfortunately, *Wagner* is not unique in Montana judicial history. The Montana Supreme Court incorrectly interpreted a title covenant statute in *Simonson v. McDonald*, 131 Mont. 494, 311 P.2d 982 (1957). In *Simonson*, plaintiffs brought an action to establish a right of way by necessity over the defendants' property. Plaintiffs contended the right of way was reserved by implication at the time of the original conveyance from the Northern Pacific Railroad Company. *Id.* at 495-96, 311 P.2d at 982-83. Because the REVISED CODES OF MONTANA § 67-1616 (1947)(currently codified at MONT. CODE ANN. § 70-20-304 (1989)) provided that from the use of the word "grant" in a conveyance of real property two covenants, and no others, on the part of the grantor were implied. The court held that the statute abolished all other implied covenants. Fortunately, the Montana Supreme Court, in *Thisted v. Country Club Tower Corp.*, 146 Mont. 87, 103, 405 P.2d 432, 440 (1965), expressly overruled *Simonson* and stated that "implied reservations or implied grants of easement by necessity" exist in Montana.

In *Simonson*, the court confused implied covenants of title with implied easements. In *Wagner*, the court confused implied covenants of title with implied warranties of fitness for a particular purpose or of merchantability. While implied easements and implied warranties of condition of the property are clearly different, neither is one of the six recognized covenants of title. See *supra* note 42. The *Simonson* court excluded implied easements because they were not statutorily identified covenants of title. In *Wagner*, the court invented a new covenant of title for inclusion in LDS's special warranty deed.

the conveyance of real property may issue. Quitclaim deeds, however, offer no title protection to a grantee;<sup>92</sup> therefore, their use could result in added expense. Grantors may receive a reduced price as a result of not providing title covenants. Grantees would have to provide their own defense if later required to defend their title to the property.

Another alternative for conveyancers may be the use of individually drafted warranty deeds. Although buyers and sellers of real property should retain counsel, a lawyer's drafting of an individual deed may raise the cost of a property conveyance substantially. For example, an attorney seeking to embody the parties' intent may be forced to draft an excessively lengthy and complex deed. These individually drafted deeds may be advantageous if litigation results because there would be no question as to the parties' intent. However, such deeds would lack the simplicity of form deeds. Moreover, the general public may find these lengthy deeds even more confusing than the presently used form deeds. Therefore, widespread use of complex, individually drafted warranty deeds would be undesirable, both economically and practically.

### B. *Previously Executed Deeds*

*Wagner* also raises a question about the interpretation of deeds containing the word "warrant" that have already been executed. Does this decision signify that grantors warranted the condition of properties conveyed in the past with such deeds? If so, for what length of time does the warranty extend? Currently, these questions cannot be answered. However, if the answers are affirmative, *Wagner* will have produced property law chaos.

### C. *Attorney Guidelines to Avoid a Similar Result*

*Wagner* should alert lawyers practicing in Montana to several details when preparing documents of conveyance. First, society is increasingly mobile. Many transactions occur between residents of different states. Clients should not use or accept out-of-state statutory form warranty deeds in property conveyances within the state of Montana. Next, if litigation occurs because of a deed, attorneys should check the origin of the deed. If the deed originated from outside the state, the statute of that state should be pleaded according to Montana Rule of Civil Procedure 9(d). Finally, while *Wagner* remains good law in Montana, attorneys should use the

92. "A quitclaim deed contains no warranties of any kind." J. DUKEMINIER & J. KRIER,



word "warrant" in a deed cautiously. Through careful drafting, an attorney should be able to warrant only the title to the property. A phrase such as "warrant only the title to the property" in a deed may state clearly the intentions of the conveyor. Imprecise drafting of a warranty deed, however, may lead to undesirable results. For example, a grantor may intend to provide a warranty of title, but instead may warrant the condition of the property. Attorneys also should survey carefully the wording in the common form books in Montana. "Warrant" should be used only in conjunction with "the title" before using the published form. Paying extra attention to details should allow the Montana conveyancer to avoid the pitfalls the court created with its novel interpretation of "warrant" in *Wagner*.

## VI. CONCLUSION

Historically, warranty deeds have not warranted the condition of real property. In *Wagner*, however, the Montana Supreme Court compromised centuries of black-letter law by interpreting a special warranty deed as warranting the condition of real property. This holding is unfortunate because it introduces uncertainty into warranty deeds which, until now, purported to warrant only the title to the property.

While a deed transferring real property is a contract subject to contract-interpretation statutes, the correct interpretation of a deed often depends upon the use of appropriate definitions of conveyancing terms, such as "warrant." Furthermore, because of statutory provisions governing deeds, strict contract analysis may also fail. In *Wagner*, the document was a statutory short-form warranty deed with a precise meaning in the State of Utah. The court should have interpreted the deed first as a conveyancing document, and then as a Utah statutory short-form deed. If the court had interpreted the special warranty deed as merely a conveyancing document, it would have construed the deed as one in which the grantor warranted only good, clear title. Then, recognizing the deed as a Utah statutory form warranty deed, the court should have determined that the Utah statute provided all the covenants of title contained in the deed.

This novel interpretation of the LDS special warranty deed should concern lawyers practicing in Montana today. Attorneys should take care that any warranty deeds used to convey property specifically express what is warranted by the deed; otherwise, unwitting conveyors may warrant more than they intend to warrant.