

PRESENTED AT

48th Annual Ernest E. Smith Oil, Gas & Mineral Law Institute

April 22, 2022
Houston, TX

**The Role of Warranties in Oil and Gas Transactions
and Disputes**

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THE ROLE OF WARRANTIES IN OIL AND GAS TRANSACTIONS AND DISPUTES

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I. INTRODUCTION

Warranties are attached to nearly every transaction involving oil-and-gas properties. In the aftermath of a transaction, if reality doesn't match expectations, the enforceability of warranties can loom large over the dispute. Accordingly, the warranty is an important legal construct for deal lawyers and litigators alike. But despite its centrality to oil-and-gas law—and perhaps because its conceptual foundations reside in arcane writings and old case law—the warranty is often misunderstood.

This paper first explores how warranties, alongside representations and indemnities, are integrated into oil-and-gas transactional documents. We then turn our attention to warranties of title, examining the nature and effect of various warranty forms and the relationship between warranties and title-related provisions found in many purchase-and-sale agreements. Next, we address the significance of title warranties that accompany the ubiquitous “all right, title, and interest” granting clause in oil-and-gas assignments. The paper concludes by discussing various practical issues relating to a warranty's enforceability.

II. REPRESENTATIONS, WARRANTIES, AND INDEMNITIES WITHIN A TRANSACTIONAL FRAMEWORK

A warranty is, in essence, an indemnity obligation. When a seller is a warrantor, a warranty is “for the indemnity of the purchaser against the loss or injury he may sustain” if the assurance guaranteed by the warranty fails.¹ A warranty “amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue.”²

An attorney drafting a purchase-and-sale agreement (“PSA”) or other transactional document will often include a list of representations and warranties that form part of the basis and understanding for the parties' bargain. Generally, a *representation* is a statement regarding some past or present fact, while a *warranty* is a promise and guarantee that a representation is true.³ Unlike the breach of a warranty, the breach of a representation may give rise to a variety of remedies, including common-law causes of action such as fraudulent or negligent misrepresentation, and may give rise to equitable remedies of rescission or cancellation.⁴ However, because most detailed PSAs expressly preclude the award of special, punitive, exemplary, and consequential damages, the relief available for breach of representation will resemble that available for breach of warranty.

¹ *Chicago Title Ins. Co. v. Cochran Invs., Inc.*, 602 S.W.3d 895 at 903 (Tex. 2020).

² W. Marc Dingler, IV and Monika Ehrman, *The Use of Warranties in Oil and Gas Property Purchase and Sale Agreements*, State Bar of Texas 29th Annual Oil, Gas & Energy Resources Law Course 1 (2011) (citing 17A Am. Jur. 2d Contracts § 401 (2004)).

³ *Id.* at 11.

⁴ *Id.*

In most PSAs, a standalone indemnity from the seller secures liabilities retained by a seller (while an accompanying indemnity obligation from the buyer secures liabilities assumed by the buyer). The seller's retained liabilities typically cover breach of the seller's representations, warranties, and other covenants under the agreement, together with responsibility for various aspects of ownership and operation of the assets prior to the sale.

Indemnifiable representations usually address the parties' legal organizational status, their authority to conduct the transaction, and the enforceability of the acts undertaken in connection with the transaction, as well as statements that the transaction and its consummation are not (and will not be) subject to or threatened by any litigation, proceedings, or bankruptcy. Beyond these fundamental representations, buyers often negotiate for a range of representations from the seller relating to the status or condition of the assets (including regarding the existence or absence of certain encumbrances and burdens), along with covenants regarding the operation and maintenance of the assets through closing. Sellers, of course, tend to push back against these requested representations and warranties, and if they acquiesce, they may attempt to water them down with knowledge and materiality qualifiers.

Occasionally, representations may address title to the property. While all transactions are a function of bargaining power, in arms-length purchase-and-sale transactions between sophisticated parties, title representations are rare; title is instead governed by the agreement's defect provisions and a special warranty of title delivered at closing. Within the context of a PSA, it is common to hear reference to a certain quantum of title as having been "represented by seller." What the parties likely mean that the seller is *assumed* to own a certain quantum of title. This assumed quantum of interest is typically expressed in title schedules incorporated into the PSA and establishes the threshold against which a buyer may claim a title defect under the defect mechanism in the agreement. A reference to a quantum of interest "represented by the seller" is likely loose talk and rarely means that the seller has actually given a representation that it holds or will be conveying such title. In fact, careful sellers will disclaim representations and warranties of title, as discussed below.

In other transactional environments, however, title representations are commonplace. Unlike a seller in an arms-length PSA, a party seeking a loan secured by assets can often expect to grant robust title representations and general warranties in favor of its counterparty. Parties wishing to monetize a portion of an asset through alternative structures—for example, by selling a volumetric production payment, or by financing development under farmout or drillco agreements—can expect similar terms.

Representations and warranties in a PSA will survive closing only if the agreement documents so provide; unless they are designed to survive (for example, by their terms or as a result of a separate survival clause), representations and warranties will merge with and into the conveyance documents delivered at closing.⁵ When parties intend for representations to survive closing, they should ensure that the agreement says so or requires the parties to deliver certificates or other documents containing such representations as closing items.

⁵ *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988) (holding that where "the terms of the deed...vary from those contained in the contract," courts must look to the deed "alone to determine the rights of the parties").

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First appeared as part of the conference materials for the
48th Annual Ernest E. Smith Oil, Gas and Mineral Law Institute session
"The Role of Warranties in Oil and Gas Transactions and Disputes"