PRESENTATION TO THE
DALLAS BAR ASSOCIATION
REAL PROPERTY SECTION
November 10, 2014

THE FIFTH CIRCUIT'S LODESTAR FOR ALLOCATING TITLE AND SURVEY RISKS AND MAXIMIZING TITLE-INSURANCE COVERAGE

J. EDWIN MARTIN
State Bar No. 13086200
3308 Oak Grove Avenue
Dallas, Texas 75204

Telephone: (214) 747-6222
Facsimile: (214) 747-6232
Email: jedwinmartin@yahoo.com

ATTORNEY FOR DOUBLETREE PARTNERS, L.P.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Legal Precepts

Rule

Statute

Other Authorities

THE FIFTH CIRCUIT'S LODESTAR FOR ALLOCATING TITLE AND SURVEY RISKS AND MAXIMIZING TITLE-INSURANCE COVERAGE

By J. Edwin Martin

I.
An Admittedly-Odd Analogy to *Palsgraf*

Who remembers Palsgraf?[1] It is the *hidden-firecrackers* case *(not the hairy hand case, the monkey trial, or the trees-have-standing case)*.

Anywho, there is, admittedly, an odd analogy between that landmark case and the recently-decided *Doubletree*.[2]

Palsgraf is best described as a torts exam for the legendary New York Court of Appeals, and the opinion sets forth a lodestar for torts analysis.

Doubletree is best described as a title-insurance exam for the Fifth Circuit, and the opinion sets forth a lodestar for:

A. negotiating and drafting contracts of sale and closing documents;

B. scrutinizing title commitments, exception documents, surveys, and title policies;

C. lodging title and survey objections; and

D. purchasing Endorsement Form T-19.1.

Indeed, the *Doubletree* lodestar is a judge-proscribed instruction manual for lawyering real-estate deals to:

1. properly allocate title and surveys risks; and

2. maximize title-insurance coverage.

Thus, the opinion should have a dynamic impact upon the practice of real-estate law in Texas.

---

[1]*Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).

[2]*Lawyers Title Insurance v. Doubletree Partners, LP*, 739 F.3d 848 (5th Cir. 2014).

II.
Factual Narrative

A.
Doubletree Ranch

Decades ago, a family owned a dairy farm spanning more than 600 acres. Over time, the family sold various and sundry parcels of land. The final "puzzle piece" of the old dairy farm *(being a 36.379-acre tract of land in Highland Village, Denton County, Texas)* featured a roadway entrance which had old-growth trees on each side of the road, forming a natural canopy, and giving rise to the name "Doubletree Ranch".

Doubletree Ranch served as a special events center for weddings, anniversaries, graduation parties, bar mitzvahs, and the like. The family sold this property to Doubletree Partners, L.P. ("Doubletree"), a special-purpose entity.

B.
Conditions for Survey Coverage Met

In connection with the purchase, Doubletree sought survey coverage *(as a part of its title insurance coverage)*. Accordingly, before the closing of Doubletree's purchase, a survey was prepared and submitted for review by Doubletree and Lawyers Title Insurance Corporation ("Lawyers").

As shown on the survey, the flowage easement, which was owned by the federal government for flood-control purposes, appeared to generally run along the eastern and southern boundaries of Doubletree Ranch. Because Doubletree intended to use that portion of the property for landscaping *(green space)*, the flowage easement, as depicted on the survey, did not encroach any of the intended locations of the residential buildings, nor otherwise negatively affect the development of Doubletree Ranch.

Lawyers accepted and approved the survey, and, at the closing, Doubletree paid the additional 15% survey coverage premium. Thus, Doubletree met the requirements for survey coverage.

C.
Doubletree's Purchase of Doubletree Ranch and Title Insurance with Survey Coverage

Doubletree closed its purchase of Doubletree Ranch, intending to develop it as a residential community. In the vesting deed, Doubletree took title "subject to" the flowage easement "shown on survey". Lawyers issued its title insurance policy with a modified survey exception and a tailored flowage easement exception *(which matched the exception in the vesting deed)*.

D.
Doubletree's Partial-Title Loss Caused by the Failure of the Survey to Properly Show the Flowage Easement and the No-Building Zone

Doubletree commenced the development of Doubletree Ranch as a senior living residential community, with eighteen residential buildings spread across the property. During this process, Doubletree discovered that the survey was grossly inaccurate. Most particularly, the survey failed to show that the flowage easement and its no-building zone encroached upon and encumbered a giant swath of Doubletree Ranch *(covering a multitude of acres)*. That portion of Doubletree Ranch encumbered by the no-building zone included the intended locations of five of the eighteen residential buildings; this area was rendered unusable for residential development, and, in fact, unusable for any development without the express written consent of the federal government.

E.
Doubletree's Title-Loss Claim, Lawyers's Denial of the Title-Loss Claim, and Lawyers's Suit Against Doubletree

Doubletree provided Lawyers with its concomitant title-loss claim. Lawyers denied the title-loss claim and sued Doubletree for declaratory relief.

F.
Doubletree's Full-Title Loss Upon the Foreclosure of Doubletree Ranch

Because of the flowage easement and its no-building zone, Doubletree was unable to develop Doubletree Ranch as intended. Efforts to proceed with alternative development plans failed as well. Thus, Doubletree was unable to service its debt or further refinance the development of Doubletree Ranch. Fifteen months after Doubletree made the title-loss claim, Doubletree's lender foreclosed on Doubletree Ranch. Consequently, Doubletree's partial-title loss became a full-title loss.[3]

III.
Survey-Coverage Focus

Approximately two years after the suit was filed, and about a year after the foreclosure, the author became an attorney of record for the insured, and focused much of the case on survey coverage.

---

[3]For a full Statement of the Facts, see Exhibit 1 attached to this outline.

IV.
So Many Claims, So Little Law

The Texas Department of Insurance compiles its survey coverage claims using the American Land Title Association survey coverage claims codes.[4] As compiled, Texas survey coverage claims commonly constitute 3% to 7% of the annual claims.[5]

Survey coverage is vaguely described in the Texas Department of Insurance's *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* under Procedural Rules P-2, P-8a(2), P-8b(2), and Rate Rule R-16. The rules explain the survey-coverage procurement process, but they fail to meaningfully explain what is being procured. Whatever survey coverage is, it must be important: the legislature prohibits an insurer from using an indemnity from the insured to reallocate survey-coverage risk of loss.[6]

Before *Doubletree*, Texas survey-coverage law was scant *(mainly, passim references in cases, rules, and statutes)*. Because of this legal void, when older lawyers told younger lawyers about survey coverage, it sounded like a jurisprudential campfire story.

All told, pre-*Doubletree*, perhaps the best summary of Texas survey coverage law was an obscure quote appearing in an old *Amarillo Globe News* article, wherein the Deputy Commissioner of Title Insurance for the Texas Department of Insurance observed:

> A standard title insurance policy excludes property *boundaries such as sidewalks and easements*. If a current survey is provided to the title company, *the entire property can be covered.*[7]

Consequently, in briefing the Fifth Circuit, the author treated the *Amarillo Globe News* quote as The Rosetta Stone of Texas survey-coverage *Black-Letter Law*.

Why have there been so many claims, yet so little law? The author's educated guess is most survey-coverage claims are small, and they are paid by the underwriter.

---

[4]Karl V. Hunter, *Top Ten Title Claims* (28th Annual Advanced Real Estate Law Course, 2006).

[5]*Id.*

[6]Tex. Ins. Code § 2704.104.

[7]Jennifer Lutz, *Money at Stake in Deed Survey Ruling*, Amarillo Globe News, Dec. 2, 2001 (available at amarillo.com/stories/2001/12/02/new_moneyat.shtml); citing Rob Carter, the Deputy Commissioner of Title Insurance for the Texas Department of Insurance.

V.
Case of First Impression

For the Fifth Circuit, this case was one of first impression. If bad facts make bad law, then the opposite should be true: *Doubletree* has good facts to make good law.

The opinion presents the most in-depth analysis of title insurance in the history of Texas jurisprudence; for that reason alone, it is a landmark case.

VI.
Trial Court's Analysis of Doubletree's Title Insurance Coverage

The trial court held that:

A. Texas law does not allow for survey coverage in the same way that it is allowed in other states;

B. the *Acts-of-the-Insured Exclusion* applied; and

C. the flowage easement exception applied.[8]

VII.
The Fifth Circuit Held that Survey Coverage Is Allowed Under Texas Law

In the trial court, Lawyers successfully argued that Texas law does not allow for survey coverage because the Texas Land Title Association forms promulgated by the Texas Department of Insurance differ from the American Land Title Association forms used in other states. In other words, Lawyers argued that survey coverage was indeed a campfire story, and Lawyers convinced the trial court to disbelieve it.

The Fifth Circuit disagreed, however, pointing to the Texas Department of Insurance's allowance of the modification of the survey exception as the green light for-*and the gateway to*-survey coverage.[9] Thus, the Fifth Circuit believed the generations-old campfire story.

---

[8] *Doubletree* at 855.

[9] *Id.* at 859-860.

VIII.
The Fifth Circuit Held that the Modification of the Survey Exception Resulted in Survey Coverage for the Location of Flowage Easement

The Fifth Circuit commences its survey-coverage analysis with the modification of the survey exception.[10]

In the trial court, Lawyers successfully argued that Texas survey coverage insures only the *outer* boundary of Doubletree Ranch *(i.e., the "picture frame", but not the "picture", of Doubletree Ranch, or its "box", but not its "contents")*. In other words, according to Lawyers's *Perimeter Only Premise*, Texas survey coverage covers *only* edges of the property surveyed by the surveyor-*not* the entire property. As argued, amending the survey exception provided *only* property-border insurance, protecting Doubletree *only* against property-boundary disputes with adjoining land owners.[11]

The Fifth Circuit disagreed with Lawyers's *Perimeter Only Premise*, noting that the flowage easement is an "encroachment", and pointing to the title commitment cover letter, which said that only "specific matters [like the flowage easement] disclosed on the survey" would be not be covered under a "more complete title insurance policy" containing survey coverage.[12] Thus, even though the flowage easement did not affect the property-boundary lines of Doubletree Ranch, the surveyor's error-*improperly identifying the location of the flowage easement*-was a risk allocated to the insurer unless an exception *(other than the survey exception)* or an exclusion applied.[13]

So how did the Amarillo Globe News quote fare as The Rosetta Stone of Texas survey-coverage Black-Letter Law? The Fifth Circuit:

A. disagreed with the *Amarillo Globe News* by holding that an easement boundary line was not a "boundary line" covered by the modification of the survey exception; but

B. agreed with the *Amarillo Globe News* by holding that:

---

[10]*Id.* at 860-864.

[11]One can imagine a border patrol officer who fishes illegal aliens out of the Rio Grande River, but refuses to chase them once they reach land.

[12]*Doubletree* at 862-864.

[13]*Id.*

1. an easement is an "encroachment" covered by the modification of the survey exception; and

2. the entire property is covered by the modification of the survey exception, not just the edges of the property.[14]

Based upon the foregoing, the surveyor's error-*improperly identifying the location of the flowage easement*-was a risk allocated to the insurer unless an exception-*other than the survey exception*-or an exclusion applied.

IX.
The Fifth Circuit Held that the Modification of the Flowage Easement Exception Resulted in Survey Coverage for the Location of the Flowage Easement

After scrutinizing the modification of the survey exception, the Fifth Circuit turned to any potentially-applicable exceptions.[15]

The flowage easement exception in the title policy, the vesting deed and other documents reads:

> Flowage easement...recorded..., and shown on survey dated March 22, 2006 by Mark Paine, RPLS #5078.

In the trial court, Lawyers successfully argued that the added survey language either increased the scope of the exception *(by construing "and" to mean "or")*, thus decreasing coverage, or the survey lingo is meaningless because the exception was set forth in the recorded instrument, and the added text merely further identified that exception.

The Fifth Circuit disagreed, noting that the added language should be given substantive effect, increasing-*rather than decreasing*-coverage.[16] *Therefore, the added text narrowed the scope of the flowage easement exception in the title policy, so that the exception did not apply to the surveyor's error in failing to properly identify the location of the flowage easement.*[17] **By implication, if the survey exception had been modified, but not the flowage easement exception, then the scope**

---

[14]*Id.* at 860-864.

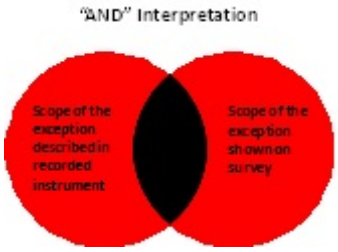
[15]*Id.*

[16]*Id.* at 864-866.

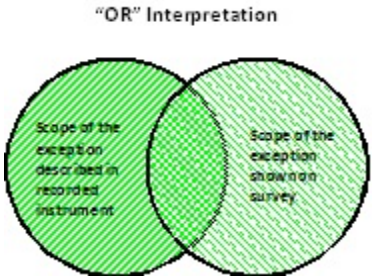
[17]*Id.*

of the flowage easement exception would not have been narrowed, and the flowage easement exception would apply.

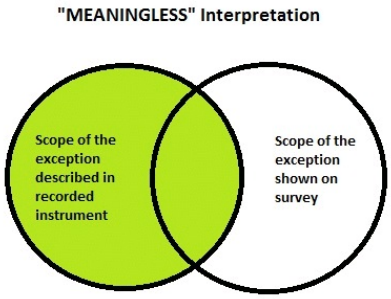
A Venn diagram provides a valuable visual aid to understanding the foregoing. If two intersecting circles are drawn, and one circle is designated "the scope of the exception described in the recorded instrument", and the other circle is designated "the scope of the exception shown on the survey", "and" means "and", then the intersection of the two circles, and ***only*** the intersection of the two circles, represents the scope of the exception:



In contrast, if "and" means "or", then the two circles, in their totality, represent the scope of the exception:



Finally, if the survey lingo is meaningless because the exception was set forth in the recorded instrument, and the added text merely further identifies that exception, then the circle is designated "the scope of the exception described in the recorded instrument", in its totality, represents the scope of the exception:



The Fifth Circuit found that the survey lingo was ambigous, and it is reasonable to interpret the lingo as meaningless, but, under the *Contra-Insurer Rule*, the reasonable interpretation propounded by the insured prevails *(the tie goes to the insured)*.[18] Therefore, according to the Fifth Circuit, the survey lingo has meaning, and "and" means "and", so the intersection of the two circles, and ***only*** the intersection of the two circles, represents the scope of the exception.[19]

Based upon the foregoing, because the flowage easement does not apply, the surveyor's error-*improperly identifying the location of the flowage easement*-was a risk allocated to the insurer unless an exclusion applied.

X.
The Fifth Circuit Held that the *Acts-of-the-Insured Exclusion* Did Not Exclude Coverage for the Location of the Flowage Easement

After scrutinizing the modification of the survey exception and any potentially-applicable exceptions, the Fifth Circuit turned to any potentially-applicable exclusions.[20]

The *Acts-of-the-Insured Exclusion* excludes from coverage defects, liens, encumbrances, adverse claims, and other title matters "created, suffered, assumed or agreed to by" Doubletree.

In the trial court, Lawyers successfully argued that the flowage easement exception in the vesting deed and other documents triggered the application of the *Acts-of-the-Insured Exclusion* because Doubletree knew about the flowage easement, and Doubletree took the property "subject to" that exception.

The Fifth Circuit held that there must be more than mere knowledge of a title defect to trigger the application of the *Acts-of-the-Insured Exclusion*. Instead, there must be knowledge of the *scope and extent* of the defect, coupled with a *purposeful intent* to acquire the property with that defect, *to that known scope and extent*.[21] The Fifth Circuit quoted the Eighth Circuit:

> The insurer can escape liability only if it is established that the defect, lien, or encumbrance resulted from some intentional misconduct or inequitable dealings by the insured or the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property involved. *The*

---

[18] *Id.*

[19] *Id.*

[20] *Id.* at 866-868.

[21] *Id.*

> *courts have not permitted the insurer to avoid liability if the insured was innocent of any conduct causing the loss or was simply negligent in bringing about the loss.*[22]

Guided by the Eighth Circuit, the Fifth Circuit forged a *mens rea* test for the application of the *Acts-of-the-Insured Exclusion*.

The Fifth Circuit found that:

A. Doubletree *did not have knowledge of the full scope and extent* of the easement, precluding the application of the *Acts-of-the-Insured Exclusion*;[23]

B. the survey language in the flowage easement exception in the closing documents limited the *scope and extent* of the title defect encumbering the property that Doubletree *intended to acquire*;[24]

C. because Doubletree lacked the requisite intent to acquire the property with the easement in that location, the application of the *Acts-of-the-Insured Exclusion* was never triggered;[25] and

D. to hold otherwise would "completely nullify" survey coverage.[26]

Because the exclusion does not apply, the surveyor's error-*improperly identifying the location of the flowage easement*-was a risk allocated to the insurer.

---

[22]*Id.* at 867 (emphasis added); quoting *Brown v. St. Paul Title Ins. Co.*, 634 F. 2d 1103, 1107-08 n. 8 (8th Cir. 1980).

[23]*Doubletree* at 868.

[24]*Id.* at 867.

[25]*Id.* In contrast, in a case citing *Doublebletree*, the Dallas Court of Appeals found that an insured had knowledge of the full scope and extent of the alleged title defect, so the *Acts-of-the-Insured Exclusion* applied. *McDonagle v. Stewart Title Guaranty Co.*, No. 05-13-00036-CV (Tex.App.–Dallas May 1, 2014).

[26]*Doubletree* at 868.

XI.
The Fifth Circuit Passed on the Opportunity to Clarify the Application of *Acts-of-the-Insured Exclusion* to "Subject to" Conveyances

The trial court construed the vesting deed's "subject to" language to trigger the *Acts-of-the-Insured Exclusion*, finding that, under the deed, Doubletree "suffered" and "assumed" the Flowage Easement. The insured strongly disagreed with this finding, and the issue was heavily briefed on appeal. In doing so, the insured cited decades-old *Texas Black-Letter Law*, which says that:

A. by accepting a "subject to" deed, the grantee does not become personally liable for the encumbrance *(because a "subject to" conveyance is distinct from an assumption, which imposes personal liability upon the grantee)*;[27]

B. "subject to" are words of limitation and qualification *(such as "limited by")*, not words of contract;[28]

C. "[t]here is nothing in the use of the words...which would even hint at the creation of affirmative rights;"[29] and

D. taking "subject to" gives notice, which is acknowledged by the grantee; it does not operate as an acknowledgement of validity, and the grantee is free to challenge the subject defect.[30]

Thus, the insured argued that a grantee taking title "subject to" an encumbrance cannot self-inflict a title wound nor otherwise trigger the *Acts-of-the-Insured Exclusion*.

Lawyers cited a non-precedential, unpublished opinion wherein the president of a corporation executed a deed of trust forming the basis of the title complaint, a case which, in the opinion of the

---

[27] *Tex.Jur.3d* Deeds of Trust and Mortgages § 106 and Real Estate Sales § 248.

[28] See, e.g., *Kokernot v. Caldwell*, 231 S.W.2d 528, 531 (Tex.Civ.App.–Dallas 1950, writ ref'd); *Stout v. Rhodes*, 373 S.W.2d 94, 95 (Tex.Civ.App.–San Antonio 1963, writ ref'd n.r.e.); *Averyt v. Grande, Inc.*, 686 S.W.2d 632, 634 (Tex.App.–Texarkana 1985), aff'd, 717 S.W.2d 891 (Tex. 1986); and *Tex.Jur.3d* Words & Phrases ("subject to"). Accord, *Am.Jur.* Words & Phrases ("subject to") *("subject to" is a term of qualification and does not create new interests)*.

[29] *Kokernot* at 531.

[30] *Stout* at 95 and *Tex.Jur.*3d Covenants, Conditions & Restrictions § 129.

author, hands down the right result, but with the poorly-worded *Acts-of-the-Insured Exclusion*, knowledge, and "subject to" reasoning.[31] The court should have reasoned that it would disregard the corporate fiction to apply the *Acts-of-the-Insured Exclusion*. Instead, the court created very bad "subject to" law. **In theory, this case is not precedential. But both the trial court and the Fifth Circuit cited it.**[32] As the great Yogi Berra mused:

In theory, there is no difference
between theory and practice.
In practice, there is.[33]

To the author, *Duncan* represents a bad *Erie* guess by a federal trial court that failed to follow decades-old, well-settled *Texas Black-Letter Law*.[34]

A favorite saw of Joe McKnight, a distinguished professor at the SMU Dedman School of Law, is "old law is the best law". The author agrees; however, the old "subject to" law is written is *Beowulf* Old English, and it is difficult to quote. The old law sounds old, like Jim Crow laws, Prohibition, and voting-rights law before women's suffrage. It is the Fat Elvis.

To the insurer, *Duncan* represents a *sea change* in Texas "subject to" law; it is the hip, cool law; it is the Skinny Elvis.

To clarify the application of the *Acts-of-the-Insured Exclusion* to "subject to" conveyances, the briefing battle lines were drawn: Fat Elvis versus Skinny Elvis; however, the Fifth Circuit decided *Doubletree* without the two kings kung fu fighting.

Doubletree is significant for its *silence*; for transactional lawyers, the silence is **deafening**. "Subject to" appears to be a two-word idiom spoken in an obscure dialect understood by Texas real-estate lawyers, but not by the courts that construe their work product. Yet practitioners draft documents as if this phrase the phrase sparkles with pixie dust; to them, it is magical, just like "abracadabra", "hocus pocus", and "shazam".

---

[31]*Duncan v. First Am. Title Ins. Co.*, No. C14-93-171-CV, 1994 Tex. App. LEXIS 20 at *12 (Tex.App.–Houston [14th Dist.] Jan 6, 1994, no writ) (not designated for publication). **This pre-2003 unpublished opinion is non-precedential.** Tex. R. App. P. 47.7(b).

[32]*Doubletree* at 868.

[33]Yogi Berra (citation unknown). For a compilation of the Shoehorned Witticisms, see Exhibit 2 attached to this outline.

[34]*Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938).

XII.
Document-Drafting Practice Pointers:
The *Doubletree* Lodestar for Negotiating and Drafting Contracts of Sale and Closing Documents

A.
The *Doubletree* Lodestar for Designating an Underwriter in Contracts of Sale

It is very common for a real-estate practitioner to designate, in a contract of sale, a title-insurance agency to serve as the escrow agent for the real-estate transaction. Concurrently designating a title-insurance underwriter is much less common. This practice is shortsighted. If there is a title loss, then the claim will be handled by the underwiter; the agency will have little or no input.

When choosing an underwriter, choose one that is trusted *(if any)*. Also, consider whether a federal court or state court forum is preferred; *there is an opportunity to tilt the choice of forum in the contract of sale*. For example, if the insured is a Texas entity, and a state-court forum is preferred, then, *ipso facto*, there is a preference to designate an underwriter that is incorporated in Texas or maintains its principal place of business in Texas. By doing so, the insured can sue in a Texas state court, and removal to federal court will be precluded by a lack of diversity of citizenship. On the other hand, if the insured is a Texas entity, and a federal-court forum is preferred, then, *ipso facto*, there is a preference to designate an underwriter that is not incorporated in Texas and does not maintain its principal place of business in Texas. By doing so, even though the insured must sue in a Texas state court *(because Texas is its home state)*, it is quite likely that the case will be removed to federal court because of the diversity of citizenship. Finally, consider waiving the choice of an undesirable forum.

Practice Pointer Number 1:
In the contract of sale, designate a trusted underwriter (if any). Tilt the choice of forum for a claim dispute by designating into or out of diversity of citizenship.[35]

Practice Pointer Number 2:
Procure a waiver of an undesirable forum from the underwriter.

[35]For a compilation of the Extracted Practice Pointers, see Exhibit 3 attached to this outline.

B.
The *Doubletree* Lodestar for Disclaiming the Application of the *Acts-of-the-Insured Exclusion* in Contracts of Sale and Closing Documents

The phrase "subject to" is inherently ambiguous; it has two constructions under Texas law: the traditional construction and the *Duncan* construction. Choose the traditional construction, and explain its meaning.

Practice Pointer Number 3:
Disclaim *the application of the* ***Acts-of-the-Insured Exclusion*** *at every opportunity, particularly with regard to* ***"subject to"*** *conveyances.*
Amplify *the phrase* ***"subject to"****, akin to the way the "as is, where is" clause was amplified after the Texas Supreme Court decided the Prudential case.*[36]

The *Texas Real Estate Forms Manual* deed does not amplify the phrase "subject to",[37] so the form is subject to two different interpretations; the use of this ambiguous form is not the best practice.

The *Big Idea* is to draft **away** from the *Acts-of-the-Insured Exclusion*, not **toward** or **into** it. When describing an exception, the term "permitted" sounds like a synonym of "allowed" and "suffered", two words which commonly appear in the *Acts-of-the-Insured Exclusion*.

Practice Pointer Number 4:
Never *call the title exceptions* ***"permitted"****. Instead, use no descriptor whatsoever or describe the exceptions as "without warranty" or "with reservation of rights by Grantee".*

The *Texas Real Estate Forms Manual* deed does not use the term "Permitted Exceptions". Instead, the manual refers to "Exceptions to Conveyance and Warranty" *(which are cumulative of, and distinct from, "Reservations from Conveyance")*.[38] This is a better practice than using the term "Permitted Exceptions", but it is not the best practice. *Why?* Again, it creates ambiguity.

---

[36] *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995). For sample language and related commentary, see Exhibit 4 attached to this outline. For a sample deed, see Exhibit 5 attached to this outline.

[37] *Texas Real Estate Forms Manual* (2d Ed. 2013) Form 12-1.

[38] *Id.*

If an exception is invalid, then do the property rights-those in the proverbial bundle of sticks-revert to the grantor-because those rights were excepted from of the conveyance-or do those rights pass to the grantee-by operation of law under the After-Acquired-Title Doctrine? Are those rights future or springing interests? Which rules of construction apply? Why rely upon rarely-reported common-law doctrines which have not been scrutinized since that dreaded bar-exam cram?

Practice Pointer Number 5
(Corollary to Practice Pointer Number 4):
In the deed, ***disclaim*** *any* ***reversion of rights***, ***adopt*** *the* ***After-Acquired-Title Doctrine***, ***designate*** *the title exceptions as* ***warranty exceptions only*** *(rather than exceptions to conveyance and warranty), and* ***quitclaim*** *and* ***Mother Hubbard*** *any* ***rights to those exceptions***.[39]

The *Texas Real Estate Forms Manual* deed does not contain any rules of construction or further conveyance provisions.[40] The use of this form is not the best practice. *Why?* Again, it may give rise to ambiguity.

How about a quick war story? Currently, a dispute exists between a buyer and a seller regarding a series of buildings that straddle the property line between the property retained by the seller and the property sold by the seller. The buyer's vesting deed contains an exception to the conveyance which reads like a standard survey exception. The buyer claims ownership of the entirety of the buildings because most of their footprints are situated on his property, and, according to the buyer, the parties intended to convey the buildings with the property. The seller claims ownership of the entirety of the buildings because the encroachments on the property conveyed were exceptions to the conveyance, and, according to the seller, the parties did not intend to convey the buildings with the property. By following the *Doubletree* lodestar, this controversy could have been avoided.

C.
The *Doubletree* Lodestar for Referencing the Survey in Contracts of Sale and Closing Documents

Practice Pointer Number 6:
To avoid making any warranties or representations regarding the survey's accuracy, when representing a ***seller,***

---

[39]For sample language and related commentary, see Exhibit 4 attached to this outline. For a sample deed, see Exhibit 5 attached to this outline.

[40]*Texas Real Estate Forms Manual* (2d Ed. 2013) Form 12-1.

include survey matters *in the laundry list of matters disclaimed in the amped-up* ***"as is, where is"*** *clause.*

Practice Pointer Number 7:
To avoid warranting the survey's accuracy, when representing a ***seller****, in the* ***deed****, do not reference the survey unless each survey-identified exception is modified to read* ***"regardless of its depiction on the survey"****.*

Practice Pointer Number 8
(Corollary to Practice Pointer Number 7):
To avoid warranting the survey's accuracy, when representing a ***buyer****, in the* ***deed of trust****, do not reference the survey unless each survey-identified exception is modified to read* ***"regardless of its depiction on the survey"****.*

Practice Pointer Number 9:
To buttress the disclaimer of the application of the Acts-of-the-Insured Exclusion, when representing a ***buyer****, in the* ***deed****, reference the survey using the qualifier* ***", but only to the extent shown on survey"****. This lingo will* ***increase*** *the scope of the* ***seller's warranty****, and it will* ***add gravitas*** *to the* ***disclaimer*** *of the application of the* ***Acts-of-the-Insured Exclusion****.*

If the seller has survey coverage, then that coverage will continue as warranty coverage, and the language should be acceptable. Otherwise, the seller may push back.

Caveat to Practice Pointer Number 9:
When representing a buyer, referencing the survey in the deed runs the risk of clouding the chain of title (because the survey is an unrecorded document referenced in the buyer's chain of title).

How about a quick war story? Years ago, the author represented the purchaser of a building with a chain of title containing a reference to an unrecorded, makeshift building line appearing in the minutes of a developer's presentation to the planning-and-zoning governing body. The author pursued a paper chase, and eventually found the unrecorded document to ensure that the building was constructed in compliance with the makeshift building line.

Admittedly, Practice Pointer Number 9 is debatable. To the author, strengthening title-insurance coverage trumps the title cloud, which can be overcome through due diligence.

XIII.
Due-Diligence Practice Pointers:
The *Doubletree* Lodestar for Scrutinizing and Lodging Objections to Title Commitments, Exception Documents, and Surveys

Real estate lawyers know that title-and-survey review is mission-critical to the acquisition of real estate.

By scrutinizing the title commitment, the exception documents, the survey, and the title policy, and then writing an in-depth opinion, the Fifth Circuit implicitly agreed, and gave practitioners some due-diligence guidance.

For example, the attorneys handling the purchase accepted a survey showing the "approximate" location of the flowage easement, without procuring and scrutinizing a meets-and-bounds description of that easement, which led to many years of litigation. *What to do?*

Practice Pointer Number 10:

When it comes to title-and-survey review, never settle for any survey designation as ***"approximate"****; that word is a* ***giant red flag****.*

Practice Pointer Number 11:

If an easement is material to the development or intended use of the property, then procuring and scrutinizing a ***meets-and-bounds description of that easement****-to determine its exact location and magnitude- is integral to the title-and-survey review.*

Surprisingly, the Fifth Circuit found that the phrase ", and shown on survey" is ambiguous, and it is reasonable to interpret that added language as having no substantive impact upon coverage.[41] That same logic applies to the phrase ", as shown on survey". *What to do?*

Practice Pointer Number 12:

For survey coverage, in addition to modifying the survey exception, have each survey-identified exception modified to read ***", but only to the extent shown on survey"****, and describe the* ***location*** *of the exception, as it appears on the survey, including a* ***metes-and-bounds*** *description of the exception, if appropriate.*[42]

---

[41] *Doubletree* at 864-866.

[42] For sample language and related commentary, see Exhibit 6 attached to this outline.

In its analysis, the Fifth Circuit did not address the impact of Endorsement Form T-19.1, which modifies the policy with respect to certain losses arising from encroachments and the like. The endorsement is somewhat limited. *What to do?*

Practice Pointer Number 13:
To avoid any conflicts between Endorsement Form T-19.1 and the body of the title policy, follow the Fifth Circuit's lodestar regarding survey coverage and purchase the endorsement.

XIV.
Post-Closing Practice Pointer:
The *Doubletree* Lodestar for Scrutinizing Title Policies

In *Doubletree*, the attorneys handling the purchase accepted a title policy which was significantly different than the one expected under the title commitment *(albeit a better policy for the insured)*.

Practice Pointer Number 14:
Scrutinize the title policy. Any delta between the title commitment and the policy gives rise to concern. If the policy appears "too good to be true", then it is; notify the insurer.

XV.
Significance of the Fifth Circuit's *Doubletree* Opinion in Choosing an Underwriter, Negotiating Coverage, and Presenting and Prosecuting a Claim

Lawyers is a member of the Fidelity National Title Group, the nation's largest group of title companies and title insurance underwriters.[43] So are Alamo Title Insurance, Chicago Title Insurance Company,[44] Commonwealth Land Title Insurance Company, Fidelity National Title Insurance

[43] Albeit, Lawyers no longer underwrites title insurance policies.

[44] *How about a historical nugget?* In 1871, Mrs. O'Leary's legendary cow allegedly kicked over a lantern, giving rise to The Great Chicago Fire *(an allegation vehemently denied by the cow)*. That big, bad blaze "cooked the books" at the recorder's office of Cook County, Illinois *(where the Windy City is situated)*. Predecessors of Chicago Title saved their records. The following year, the state legislature passed the Burnt Records Act, and those saved records became the *de facto* official records of Cook County, admissable into evidence as though they came from the deed records. *How about another historical nugget?* Legend has it that Stewart Title was a like-kind beneficiary of the 1900 Galveston flood, with the Galveston County records being likewise

Company, and National Title Insurance of New York, Inc., among others. This group controls 40%-50% of the country's title insurance market.

The title-insurance underwriting market is consolidating, making it more challenging to select an underwriter, negotiate coverage, and present and prosecute a claim. There is a very real tendency for underwriters to mimic each other, especially those within the same control group. "Sound underwriting practices" is a *Dilbert* euphemism for "monkey-see-monkey-do". Practitioners must be diligent at each phase of procuring insurance and, if necessary, claim proceeds.

As *Doubletree* demonstrates, the members of the Fidelity National Title Group employ the following litigation tactics:

A. blurring the lines between the *Acts-of-the-Insured Exclusion* and the *Knowledge Exclusion* by contending that knowledge is synonymous with agreeance;[45]

B. blurring the lines between assumption and "subject to" conveyances to contort the *Acts-of-the-Insured Exclusion*;

C. confusing a *floodplain*-which is not a title defect-with a *flowage easement*-which is a title defect-in a disingenuous attempt to escape liability;

D. leveraging the title insurance industry's *omerta (i.e., code of silence)* by asserting that only title-insurance underwriters and claims representatives can opine regarding title insurance coverage and claims;

E. arguing that title-insurance coverage expires upon a foreclosure caused by the very loss of title forming the basis of the pre-foreclosure title-loss claim;[46]

---

destroyed.

[45]Using this logic, a title objection would be meaningless because the insured must have knowledge of the defect to object to it, and that very knowledge would trigger the application of the *Acts-of-the-Insured Exclusion*.

[46]Traditional notions of fair play and substantial justice dictate that a murderer cannot collect life-insurance proceeds for the loss of the life of the victim, and, by its own wrongdoing, a title insurance company cannot cause a foreclosure, then claim that the insured no longer has an

F. arguing that the *No-Loss Exclusion* applies to a catastrophic title loss; and

G. arguing that the a title-insurance claim that points out a title defect with particularity-*which claim the underwriter expressly adopted as its basis for filing a declaratory relief action*-was insufficient to give notice of that claim.

In *Doubletree*, Lawyers issued a six-page denial-*in a word, gibberish*-then sued its own insured, bled-out the insured until it lost the property to foreclosure, sought sanctions against counsel for the insured, and-*after more than six years of paper-by-the-pound litigation*-continues to fight coverage for a catasrophic title loss.

To the author:

1. the Fidelity National Title Group companies are underwriters of last resort;

2. their title commitments read like Nigerian emails; and

3. their title policies generate the same confidence as a fistful of lottery tickets;

if, and only if, no other underwriter is available, one of these underwriters is an appropriate choice.

Practice Pointer Number 15:
Expect multiple-year, scorched-earth, paper-by-the-pound, form-over-substance, and procedure-over-merits litigation tactics from ***Alamo*** *Title Insurance,* ***Chicago*** *Title Insurance Company,* ***Commonwealth*** *Land Title Insurance Company,* ***Fidelity*** *National Title Insurance Company, and* ***National*** *Title Insurance of New York, Inc.*

Sitting at the closing table, giving no due regard to the designation of your client's underwriter, perhaps one should consider the astute observation of the poker-playing protagonist in *Rounders*:

If you can't spot the sucker in your first half hour

---

insurable title interest. See *Spellings v. Lawyers Title Ins. Corp.*, 644 S.W.2d 804, 807 (Tex.App.–Corpus Christi 1982, writ ref'd n.r.e.).

at the table, then
you are the sucker.

<u>Practice Pointer Number 16</u>
<u>(Corollary to Practice Pointer Number 15):</u>
Whether representing a buyer, a seller, or
a lender, exercise great care when choosing an underwriter,
negotiating coverage, and presenting and prosecuting a claim.

XVI.
<u>A Hypothetical Pickle</u>

You are an equity partner at a tall-building, white-shoes law firm, charging boocoo bucks just to pick up the phone.

In 2015, you close a $20,000,000.00 commercial real-estate deal for an institutional buyer:

A. using a deed that:

1. has no rules of construction for the seemingly-magical phrase "subject to"; and

2. designates the warranty exceptions as "Permitted Exceptions to Conveyance and Warranty";

B. allowing the survey-identified exceptions in the vesting deed and the survey-coverage title-insurance policy to read "shown on survey"; and

C. giving no due regard to the designation of your client's underwriter.

A year later, your client suffers a catastrophic survey-error title loss.

Litigation ensues for many years, and your client spends over $1,000,000.00 in attorney's fees and related expenses.

Ultimately, the court prefers Skinny Elvis, and follows *Duncan*, holding that "subject to" is synonymous with assumption, particularly when your client granted "permission" for the title defect. Also, the court finds that the "shown on survey" lingo is meaningless, a reasonable construction under *Doubletree*. Consequently, according to the court, your client agreed to the defect, regardless of its depiction on the survey, and the *Acts of the Insured Exclusion* applies, as does the survey-identified exception.

Your client has no coverage, and you wait for the other shoe to drop.

XVII.
An Existential Observation Regarding the Significance of the Fifth Circuit's *Doubletree* Opinion

If the Fifth Circuit climbed a mountain overlooking Shangri-La, seeking guidance from a proverbial wise man, and queried about the nature of title insurance, the guru might observe:

A title insurance policy is
a receipt for a premium paid
and a disclaimer of all liability.

This saying is a decades-old joke among Dallas real estate lawyers. The citation is being omitted in accordance with the *Bob Hope Rule of Citation (a/k/a The Rule of Evaporating Attribution)*.

As Bob Hope explained the eponymous rule, if he stole a joke from Red Skelton, the first time, Bob would start the joke by noting "As Red Skelton once said...." The second time, Bob would observe "As someone once said....". The third time, Bob would smile "As I always say...."

The author first heard the title-policy joke sometime around 1984, when Jim Wallenstein, an adjunct professor at SMU School of Law *(now SMU Dedman School of Law)*, told the witticism to his Real Estate Transactions class, where the author was Jim's star pupil *(according to the author, not Jim)*. But the author has told the joke often enough to claim it as his own. And Jim vaguely remembers it being told to him by a long-forgotten senior lawyer early in his legal career. The longer the author practices law, the funnier he finds this joke.

If one reads a title policy cover-to-cover, this expression rings true: the *Insuring Provision* is very short, and the proverbial fine print is very long. And if one reads case after case on title insurance law, the most common denominator seems to be the title insurance company *(almost)* always wins. Indeed, when an appellate court finds coverage, it's news; when it doesn't, it's not. This phenomenon reminds the author of another joke:

When the preacher runs away
with the choir director's wife,
it's news. When he doesn't, it's not.[47]

What if the Fifth Circuit asked a Texas appellate court instead of a swami? One such court declared:

---

[47] *Bob Hope Rule of Citation (a/k/a The Rule of Evaporating Attribution)*.

> Unquestionably, the principal purpose of a policy of title insurance is to insure and guarantee good title. The very name of such insurance indicates its purpose. A purchaser of such insurance seeks to avoid the necessity and responsibility of checking, examining and analyzing complex public records to determine the condition of title to land, to be assured of the existence of such good title and to be indemnified against loss through defects in title.[48]

The issue before that appellate court was coverage for a water line easement that traversed the property *(being an unscheduled defect)*. The court held that the defect was covered, reasoning:

> To hold otherwise would, in effect, require [the insureds], who have purchased title insurance, to be their own insurer in so far as their title to the land, in the respect here under consideration, is concerned. Such a result would not be in keeping with the principal purpose of the policy....[49]

In other words, title insurance is not self-insurance.[50]

As mandated by the *Erie* doctrine,[51] in *Doubletree*, the Fifth Circuit, sitting in diversity, skipped the high-altitude sojourn, and applied Texas law.[52] Subject to further proceedings on other coverage issues, the appellate court found title-insurance coverage. This is news. Even more importantly, the Fifth Circuit peppered its opinion with practice pointers, giving rise to a lodestar for maximizing title-insurance coverage. This is even better news.

J. Edwin Martin flies solo in Dallas, Texas. He aspires to become the world's first celebrity title-insurance litigator, the acoutrements of which would include:

I. an eponymous line of courtroom shoes;

II. a motley entourage of law clerks, jury consultants, local counsel, paralegals, and secretaries (but no drug rehab, Kardashians, or reality-television shows); and

---

[48]*San Jacinto Title Guar. Co. v. Lemmon*, 417 S.W.2d 429, 432 (Tex.Civ.App.–Eastland 1967, no writ) (a case cited in *Doubletree* at 859).

[49]*Id.* (emphasis added).

[50]*Id.*

[51]*Erie R.R. Co. v. Tompkins*.

[52]See, generally, *Doubletree*.

III. the leading role of David St. Defeasance in a Rob Reiner mockumentary entitled "This Is Title Trap" (admittedly, a cleaner version of the working title).

He may be reached at jedwinmartin@yahoo.com.

Exhibit 1

Statement of the Facts[53]

A.
Doubletree Ranch

1. Decades ago, a family owned a dairy farm spanning more than 600 acres. Over time, the family sold various and sundry parcels of land. The final "puzzle piece" of the old dairy farm *(being a 36.379-acre tract of land in Highland Village, Denton County, Texas)* featured a roadway entrance which had old-growth trees on each side of the road, forming a natural canopy, and giving rise to the name "Doubletree Ranch".[54]

2. Doubletree Ranch served as a special events center for weddings, anniversaries, graduation parties, bar mitzvahs, and the like. The family sold this property to Doubletree for $3,450,000.00.

B.
Creation of the Flowage Easement and the No-Building Zone Encroaching and Encumbering Doubletree Ranch

1. Doubletree Ranch is encumbered by a flowage easement created by the recordation, in 1956, of a certified copy of a final judgment for eminent domain.[55]

2. The flowage easement-*which is owned by the federal government for flood-control purposes*-has these key features:

    i. a grant to the United States of America of a perpetual right and easement to overflow, flood, and submerge the entirety of the area encumbered by the flowage easement; and

---

[53]The Appendix resides on the website of the Real Property Section of the Dallas Bar Association.

[54]See Exhibits D and I of the Appendix.

[55]See Exhibit A of the Appendix.

ii. in that portion of the area encumbered by the flowage easement lying below an elevation of 537 feet above sea level *(the no-building zone)*, a prohibition against:

a. the construction or maintenance of any structures intended for human habitation; and

b. the erection or construction of any other structure or appurtenance without the written consent of the U.S. government.[56]

C.
Conditions for Survey Coverage Met

1. Doubletree sought so-called survey coverage as a part of its title-insurance coverage.[57] Accordingly, before the closing of Doubletree's purchase, Lawyers *(acting through its agent)* sent Schedules A and B of the then-effective title commitment to the surveyor.[58] Thereafter, the surveyor prepared and submitted the survey.[59]

2. As shown on the survey, the flowage easement appeared to generally run along the eastern and southern boundaries of Doubletree Ranch.[60] Because Doubletree intended to use that portion of the property for landscaping *(green space)*, the flowage easement, as depicted on the survey, did not encroach any of the intended locations of the residential buildings, nor otherwise negatively affect the development of Doubletree Ranch.[61]

3. The surveyor's statement in the survey declares:

---

[56] *Id.*

[57] See, e.g., Exhibit B of the Appendix.

[58] See Exhibit C of the Appendix.

[59] See Exhibit D of the Appendix.

[60] *Id.*

[61] See Exhibit H of the Appendix.

> *This plat shows the location of all* visible easements and rights-of-way and other *matters of record of which I have been advised by virtue of [the title commitment]*..., whether or not of record, affecting the subject property.[62] *(emphasis added)*

4. Lawyers accepted and approved the survey, and, at the closing, Doubletree paid the additional 15% survey coverage premium.[63] Thus, Doubletree met the requirements for survey coverage.

D.
Doubletree's Purchase of Doubletree Ranch, the Survey, and Survey Coverage

1. Doubletree closed its purchase of Doubletree Ranch, intending to develop it as a residential community.[64] In the deed vesting title to Doubletree Ranch in Doubletree, Doubletree took title **subject to** the flowage easement "shown on survey".[65]

2. In connection with the closing, Lawyers and its affiliates received premiums for the basic owner's coverage and survey coverage. Further, Doubletree paid for the survey.

E.
Lawyers's Issuance of the Title-Insurance Policy

Lawyers issued its title-insurance policy.

F.
Doubletree's Intended Development of Doubletree Ranch, as Surveyed

The survey incorrectly showed the flowage easement running along the eastern and southern boundaries of Doubletree Ranch.[66] Doubletree designated that portion of the property for

---

[62] See Exhibit D of the Appendix.

[63] See Exhibits D, E, and F of the Appendix.

[64] See Exhibits G and H of the Appendix.

[65] See Exhibit G of the Appendix.

[66] See Exhibit D of the Appendix.

landscaping *(green space)*.[67] Thus, as depicted on the survey, the flowage easement did not encroach any of the intended locations of the residential buildings, nor otherwise adversely affect the development of Doubletree Ranch.[68]

G.
Doubletree's Partial-Title Loss Caused by the Failure of the Survey to Properly Show the Flowage Easement and the No-Building Zone

Doubletree commenced the development of Doubletree Ranch as a senior living residential community.[69] During this process, Doubletree discovered that the survey was grossly inaccurate.[70] Most particularly, the survey failed to show that the flowage easement and the no-building zone encroached upon and encumbered a giant swath of Doubletree Ranch *(covering a multitude of acres)*.[71] That portion of Doubletree Ranch encumbered by the no-building zone included the intended locations of five of the eighteen residential buildings; this area was rendered unusable for residential development, and, in fact, unusable for any development without the express written consent of the federal government.[72]

H.
Doubletree's Notice of the Claim

Doubletree provided Lawyers with notice of its concomitant claim.

I.
Lawyers's Denial of the Claim

Lawyers denied the claim.[73]

---

[67] See Exhibit H of the Appendix.

[68] *Id.*

[69] *Id.*

[70] See Exhibits D and I of the Appendix.

[71] *Id.*

[72] See Exhibits A and H of the Appendix.

[73] See Exhibit J of the Appendix.

J.
Doubletree's Supplemental Notice of the Claim

Doubletree provided a supplemental notice of its claim to Lawyers.

K.
Lawyers's Unilateral Modification of the Title-Insurance Policy

Lawyers unilaterally re-issued its title-insurance policy, with modifications.[74]

L.
Lawyers's Suit Against Doubletree

After denying the claim, Lawyers promptly sued Doubletree, its own insured.

M.
Doubletree's Inability to Develop
Doubletree Ranch

Because of the flowage easement and the no-building zone, Doubletree was unable to develop Doubletree Ranch as intended. Efforts to proceed with alternative development plans failed as well. Thus, Doubletree was unable to service its debt or further refinance the development of Doubletree Ranch. The floodplain did not adversely affect Doubletree's development plans; the flowage easement and its no-building zone did.

N.
Lawyers's Payment of the Claim Would Have
Prevented the Foreclosure of Doubletree Ranch

Thirteen months after Doubletree gave notice of its claim to Lawyers, and two months before the foreclosure, Doubletree could have cured the default by paying the lender $52,425.00 *(a small fraction of the claim)*. Thus, Lawyers's payment of the claim would have prevented the foreclosure because Doubletree would have had ample funds to service the debt while it revamped its development plans.

[74] See Exhibit K of the Appendix.

O.
Doubletree's Full-Title Loss Upon the Foreclosure of Doubletree Ranch

Fifteen months after Doubletree made the title-loss claim, while Lawyers stood by idly, Doubletree's lender foreclosed on Doubletree Ranch. Consequently, Doubletree's partial-title loss became a full-title loss.

Exhibit 2

Shoehorned Witticisms

In theory, there is no difference
between theory and practice.
In practice, there is.[75]

If you can't spot the sucker
in your first half hour
at the table, then
you are the sucker.[76]

A title insurance policy is
a receipt for a premium paid
and a disclaimer of all liability.[77]

When the preacher runs away
with the choir director's wife,
it's news. When he doesn't, it's not.[78]

---

[75]Yogi Berra (citation unknown).

[76]*Rounders*.

[77]*Bob Hope Rule of Citation (a/k/a The Rule of Evaporating Attribution)*.

[78]*Id.*

Exhibit 3

Extracted Practice Pointers

Practice Pointer Number 1:
In the contract of sale, designate a trusted underwriter (if any). Tilt the choice of forum for a claim dispute by designating into or out of diversity of citizenship.

Practice Pointer Number 2:
Procure a waiver of an undesirable forum from the underwriter.

Practice Pointer Number 3:
Disclaim *the application of the* ***Acts-of-the-Insured Exclusion*** *at every opportunity, particularly with regard to* ***"subject to"*** *conveyances.* ***Amplify*** *the phrase* ***"subject to"****, akin to the way the "as is, where is" clause was amplified after the Texas Supreme Court decided the Prudential case.*[79]

Practice Pointer Number 4:
Never *call the title exceptions* ***"permitted"****. Instead, use no descriptor whatsoever or describe the exceptions as "without warranty" or "with reservation of rights by Grantee".*

Practice Pointer Number 5
(Corollary to Practice Pointer Number 4):
In the deed, ***disclaim*** *any* ***reversion of rights****,* ***adopt*** *the* ***After-Acquired-Title Doctrine****,* ***designate*** *the title exceptions as* ***warranty exceptions only*** *(rather than exceptions to conveyance and warranty), and* ***quitclaim*** *and* ***Mother Hubbard*** *any* ***rights to those exceptions****.*[80]

Practice Pointer Number 6:
To avoid making any warranties or representations regarding the survey's accuracy, when representing a ***seller****,* ***include survey matters*** *in the laudry list of matters disclaimed in the amped-up* ***"as is, where is"*** *clause.*

---

[79] *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995).

[80] For a sample deed, see Exhibit 5 attached to this outline.

Practice Pointer Number 7:

*To avoid warranting the survey's accuracy, when representing a **seller**, in the **deed**, do not reference the survey unless each survey-identified exception is modified to read **"regardless of its depiction on the survey"**.*

Practice Pointer Number 8
(Corollary to Practice Pointer Number 7):

*To avoid warranting the survey's accuracy, when representing a **buyer**, in the **deed of trust**, do not reference the survey unless each survey-identified exception is modified to read **"regardless of its depiction on the survey"**.*

Practice Pointer Number 9:

*To buttress the disclaimer of the application of the Acts-of-the-Insured Exclusion, when representing a **buyer**, in the **deed**, reference the survey using the qualifier **", but only to the extent shown on survey"**. This lingo will **increase** the scope of the **seller's warranty**, and it will **add gravitas** to the **disclaimer** of the application of the **Acts-of-the-Insured Exclusion**.*

Caveat to Practice Pointer Number 9:

When representing a buyer, referencing the survey in the deed runs the risk of clouding the chain of title (because the survey is an unrecorded document referenced in the buyer's chain of title).

Practice Pointer Number 10:

*When it comes to title-and-survey review, never settle for any survey designation as **"approximate"**; that word is a **giant red flag**.*

Practice Pointer Number 11:

*If an easement is material to the development or intended use of the property, then procuring and scrutinizing a **meets-and-bounds description of that easement**-to determine its exact location and magnitude- is integral to the title-and-survey review.*

Practice Pointer Number 12:

For survey coverage, in addition to modifying the survey exception, have each survey-identified exception modified to read ***", but only to the extent shown on survey"****, and describe the* ***location*** *of the exception, as it appears on the survey, including a* ***metes-and-bounds*** *description of the exception, if appropriate.*[81]

Practice Pointer Number 13:

To avoid any conflicts between Endorsement Form T-19.1 and the body of the title policy, follow the Fifth Circuit's lodestar regarding survey coverage and purchase the endorsement.

Practice Pointer Number 14:

Scrutinize the title policy. Any delta between the title commitment and the policy gives rise to concern. If the policy appears "too good to be true", then it is; notify the insurer.

Practice Pointer Number 15:

Expect multiple-year, scorched-earth, paper-by-the-pound, form-over-substance, and procedure-over-merits litigation tactics from ***Alamo*** *Title Insurance,* ***Chicago*** *Title Insurance Company,* ***Commonwealth*** *Land Title Insurance Company,* ***Fidelity*** *National Title Insurance Company, and* ***National*** *Title Insurance of New York, Inc.*

Practice Pointer Number 16
(Corollary to Practice Pointer Number 15):

Whether representing a buyer, a seller, or a lender, exercise great care when choosing an underwriter, negotiating coverage, and presenting and prosecuting a claim.

[81] For sample language and related commentary, see Exhibit 6 attached to this outline.

Exhibit 4

Sample Language and Commentary for Drafting Away from the *Acts-of-the-Insured Exclusion*

Using the *Doubletree* lodestar, in the contract of sale, include the following text in the title-review section:

> Nothing contained in this Contract of Sale or any Closing Document will be construed to create, suffer, assume, permit, allow, or agree to any title defect unless Buyer expressly creates the title defect by signing a separate title-exception document *(such as a purchase money financing document)*, or signs a separate express written consent or joinder to a previously-created title-exception document.

Likewise, in the deed, include the following language in reference to the title exceptions:

> Nothing contained in this Deed will be construed to create, suffer, assume, permit, allow, or agree to any title defect unless Grantee expressly creates that title defect by signing a separate title-exception document *(such as a purchase money financing document)*, or Grantee signs a separate express written consent or joinder to a previously-created title-exception document.
>
> By accepting this Deed, Grantee does not agree to become personally liable for any Exception to Warranty *(because this "subject to" conveyance is distinct from an assumption)*.
>
> As used in this Deed, the words "subject to" are intended to be words of limitation and qualification *(such as "limited by")*, not words of contract.
>
> Further, the words "subject to" are not intended to be contractual, are not intended to create rights that do not otherwise exist, and are not intended to create any affirmative rights whatsoever.
>
> By using the phrase "subject to", Grantor and Grantee are merely expressing that Grantor has given notice of a potential title defect, which is acknowledged by Grantee; this conveyance does not operate as an acknowledgement of the validity of any such potential defect.
>
> Regarding third parties, Grantee is free to challenge the subject defect, but Grantor does not warrant the results of any such challenge, nor any other aspect of the Exceptions to Warranty.

Grantor hereby disclaims and disavows any reversion of rights regarding the Exceptions to Warranty.

Grantor and Grantee hereby adopt the *After-Acquired-Title Doctrine*, so that any rights to the Property which may accrue after the execution of this Deed will vest in Grantee, not Grantor.

The Exceptions to Warranty are warranty exceptions only; they are not exceptions to conveyance.

Grantor quitclaims to Grantee all of Grantor's rights, titles, and interests in and to the Exceptions to Warranty, to have and to hold, to Grantee and Grantee's successors and assigns forever. Neither Grantor nor Grantor's successors or assigns will have, claim, or demand any right, title, or interest in or to the Exceptions to Warranty or any part of them.

Except for the Reservations from Conveyance, this Deed divests Grantor of any and all right, title, and interest in or to the Property *(including improvements)* whatsoever.

Similar language may be appropriate in other closing documents referencing exceptions.

Exhibit 5

Sample *Doubletree* Lodestar Deed for Drafting Away from the *Acts-of-the-Insured Exclusion*

GENERAL WARRANTY DEED

NOTICE OF CONFIDENTIALITY RIGHTS:

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

EFFECTIVE DATE: _____

GRANTOR: _____
_____
_____
_____
(Dallas County, Texas)

GRANTEE: _____
_____
_____
_____
(Dallas County, Texas)

CONSIDERATION:

1. One Thousand and No/100 Dollars ($1,000.00).

2. Other good and valuable consideration.

Grantor hereby acknowledges the receipt and sufficiency of the foregoing.

PROPERTY *(Including All Improvements)*:

See Exhibit A attached to this Deed and incorporated by this reference.

RESERVATIONS FROM CONVEYANCE:

[E.g., a mineral reservation.]

EXCEPTIONS TO WARRANTY:

See Exhibit B attached to this Deed and incorporated by this reference.

CONVEYANCE AND WARRANTY:

Grantor, for the consideration and subject to the Reservations from Conveyance and Exceptions to Warranty, does hereby GRANT, SELL, CONVEY, ASSIGN, and DELIVER to Grantee the Property, together with all and singular the rights and appurtenances thereto, including any right, title, and interest of Grantor in and to:

A. adjacent streets, alleys, waterways, and rights of way; and

B. authorizations, licenses, permits, possessory rights, and rights of use;

pertaining in any way to the Property *(including improvements)* or any portion thereof.

To have and to hold the Property, together with all and singular the rights and appurtenances thereto, unto Grantee, its successors and assigns, forever, and Grantor does hereby bind Grantor and Grantor's heirs and assigns to warrant and forever defend all and singular the Property unto Grantee, its successors and assigns against every person whomsoever lawfully claiming, or to claim, the same or any part thereof; subject, however, to the Reservations from Conveyance and Exceptions to Warranty set forth in this Deed.

RULES OF CONSTRUCTION:

Nothing contained in this Deed will be construed to create, suffer, assume, permit, allow, or agree to any title defect unless Grantee expressly creates that title defect by signing a separate title-exception document *(such as a purchase money financing document)*, or Grantee signs a separate express written consent or joinder to a previously-created title-exception document.

By accepting this Deed, Grantee does not agree to become personally liable for any Exception to Warranty *(because this "subject to" conveyance is distinct from an assumption)*.

As used in this Deed, the words "subject to" are intended to be words of limitation and qualification *(such as "limited by")*, not words of contract.

Further, the words "subject to" are not intended to be contractual, are not intended to create rights that do not otherwise exist, and are not intended to create any affirmative rights whatsoever.

By using the phrase "subject to", Grantor and Grantee are merely expressing that Grantor has given notice of a potential title defect, which is acknowledged by Grantee; this conveyance does not operate as an acknowledgment of the validity of any such potential defect.

Regarding third parties, Grantee is free to challenge the subject defect, but Grantor does not warrant the results of any such challenge, nor any other aspect of the Exceptions to Warranty.

Grantor hereby disclaims and disavows any reversion of rights regarding the Exceptions to Warranty.

Grantor and Grantee hereby adopt the *After-Acquired-Title Doctrine*, so that any rights to the Property which may accrue after the execution of this Deed will vest in Grantee, not Grantor.

The Exceptions to Warranty are warranty exceptions only; they are not exceptions to conveyance.

FURTHER CONVEYANCE:

Grantor quitclaims to Grantee all of Grantor's rights, titles, and interests in and to the Exceptions to Warranty, to have and to hold, to Grantee and Grantee's successors and assigns forever. Neither Grantor nor Grantor's successors or assigns will have, claim, or demand any right, title, or interest in or to the Exceptions to Warranty or any part of them.

Except for the Reservations from Conveyance, this Deed divests Grantor of any and all right, title, and interest in or to the Property *(including improvements)* whatsoever.

EXECUTED on this ____ day of _____, 2014, to be effective as of the Effective Date.

GRANTOR:

_____

By: _____
_____

STATE OF TEXAS §
§
COUNTY OF DALLAS §

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND OFFICIAL SEAL OF OFFICE on this _____ day of _____, 2014.

_____
Notary Public, State of Texas

Printed Name:
_____

AFTER RECORDING, RETURN TO:

J. EDWIN MARTIN
3308 Oak Grove Avenue
Dallas, Texas 75204
(Dallas County, Texas)

Exhibit 6

Sample Language and Commentary for Lodging an Objection to a Survey-Identified Exception

Suppose one has a title commitment with the following survey-dentified exception:

> Flowage easement...recorded..., and shown on survey dated March 22, 2006 by Mark Paine, RPLS #5078.

Using the *Doubletree* lodestar, one would lodge the following objection:

> Purchaser objects to the foregoing exception because the phrase ", and shown on survey"-*describing the survey-identified exception*-is ambiguous. Such language could be construed as inconsequential, merely further identifying the exception appearing in the recorded instrument, rather than narrowing the exception to the title defect actually appearing on the survey, which is the very purpose of procuring survey coverage. Therefore, the exception must read:
>
> > Flowage easement...recorded..., but only to the extent shown on survey, dated March 22, 2006, by Mark Paine, RPLS #5078, running along the eastern and southern boundaries of the property.

The same logic applies to a title commitment exception reading ", and shown on survey"; a similar objection should be lodged.

J. Edwin Martin
3308 Oak Grove Avenue
Dallas, Texas 75204
Telephone: 214.747.6222
Virtual Office: 469.223.5624
Facsimile: 214.747.6232
jedwinmartin@yahoo.com
www.jedwinmartin.com

FIRM PROFILE

The Firm Negotiates, Documents, Closes, Arbitrates, and Litigates Deals, With a Client Spectrum Spanning Multinational Companies to Aspiring Enterprises Smaller Than His Own.

A Remarkable Number of the Firm's Clients Are Home Grown; That Is, the Firm Represented Them When They Were Young and Impressionable and, Like a Bird Dog, a Boomerang, or a Homing Pigeon, They Keep Coming Back.

The Man in the Mirror Is the Sole Member of the Firm. The Only Way to Downsize Is for Him to Lose Weight.

NATURE OF PRACTICE

Arbitration, Litigation, and Transactions Involving Real Estate, Business, Technology, Tax, Trademark, Construction, and Employment Matters

- Representation of Emerging Growth Companies, Entrepreneurs, Individuals, Professional Firms, and Real Estate Ventures in Dispute Resolution, Arbitration, Mediation, and Litigation Matters

- Representation of Emerging Growth Companies and Real Estate Ventures in Real Estate Acquisition, Development, Disposition, Financing, and Leasing Matters

- Representation of Emerging Growth Companies and Entrepreneurs in Business, Corporate, Limited Liability Company, Partnership, Employment, Financing, Tax Planning, Technology, and Trademark Matters

ACADEMICS

Southern Methodist University

School of Law

Juris Doctor *(May 1985)*

Edwin L. Cox School of Business

Master of Business Administration *(May 1985)*
Passed All Parts of the CPA Exam

The University of Texas at Austin

Bachelor of Business Administration in Finance *(May 1981)*
Graduated *Cum Laude* in 3 Years

PROFESSIONAL HONORS

Special Recognition Award from the Dallas Bar Association as Chair, Sports and Entertainment Law Section[82] *(1993)*

Special Recognition Award from the Dallas Bar Association as Chair, Entertainment Committee[83] *(1998)*

College of the State Bar of Texas[84] *(1991-Present)*

Fellow,[85] College of the State Bar of Texas *(2002-Present)*

Pro Bono College of the State Bar of Texas *(1994, 2002)*

Fellow, Texas Bar Foundation[86] *(2000-Present)*

Life Fellow, Texas Bar Foundation *(2008-Present)*

---

[82] *The Section of the Year Award*

[83] *For Creative Writing*

[84] *Honorary Continuing Legal Education Society*

[85] *Special Designation for Maintaining Membership for More Than Ten (10) Consecutive Years*

[86] *Honorary Society Dedicated to Fostering Dignity and Integrity Within the Legal Profession*

PROFESSIONAL ACTIVITIES

Cox MBA Alumni Association[87]

President *(1995-1998)*
Executive Vice President *(1994-1995)*
Vice President of Business Development *(1993-1994)*
Treasurer *(1992-1993)*

Dallas Bar Association

Chair

Entertainment Committee *(1998)*
Pro Bono Golf Classic *(1994)*
Sports and Entertainment Law Section *(1993-1994)*
Sports Law Committee *(1992-1993)*

Vice Chair

Entertainment Committee *(1997)*
Pro Bono Golf Classic *(1993)*
Sports Law Committee *(1991-1992)*

Council Member

Sports and Entertainment Law Section *(1993-1994)*
Ex Officio *(1995-Present)*

Sections and Discussion Groups

Business Litigation Section
Computer Law Section
Construction Law Section
Labor and Employment Law Section
Mergers and Acquisitions Law Section
Real Estate Lawyers Discussion Group
Real Property Section
Solo and Small Firm Section
Sports and Entertainment Law Section

---

[87] *Formerly Known as SMU MBA Association and Edwin L. Cox School of Business Alumni Association, Dallas-Fort Worth Chapter*

Committees

Entertainment Committee *(1997-2006; 2011-Present)*
Judiciary Committee *(1994-1997, 1999-2000)*
Pro Bono Golf Tournament Committee *(1993-Present)*
Publications Committee *(1996-1997, 1999-2000)*
Sports Law Committee *(1990-1993)*
Strategic Planning Committee *(1993-1995)*

Houston Bar Association

Continuing Legal Education Distinguished Faculty Member *(2014)*

State Bar of Texas

Chair

Entertainment and Sports Law Section *(2001-2002)*

Secretary

Entertainment and Sports Law Section *(2000-2001)*

Council Member

Entertainment and Sports Law Section *(1997-2000)*
Ex Officio *(2000-Present)*

OTHER ACTIVITIES

Mercer Square Condominium Association, Inc.

President *(2009-2011)*

Board Member *(2008-2011)*

PROFESSIONAL LICENSES AND CERTIFICATIONS

Admitted to Practice Before the Supreme Court of the United States of America, the United States Court of Appeals for the Fifth Circuit, the United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas, the Supreme Court of Texas, and All Other Texas State Courts

Certified in Trademark Law and Practice by the University of Houston Law Center

J. Edwin Martin
3308 Oak Grove Avenue
Dallas, Texas 75204
Telephone: 214.747.6222
Virtual Office: 469.223.5624
Facsimile: 214.747.6232
jedwinmartin@yahoo.com
www.jedwinmartin.com

BIBLIOGRAPHY

The Fifth Circuit's Lodestar
for Allocating Title and Survey Risks
and Maximizing Title-Insurance Coverage
Dallas Bar Association
Real Property Section
November 10, 2014

The Fifth Circuit's Lodestar
for Allocating Title and Survey Risks
and Maximizing Title-Insurance Coverage
Houston Bar Association
September 26, 2014

The Fifth Circuit's Lodestar
for Allocating Title and Survey Risks
and Maximizing Title-Insurance Coverage,
SMU Dedman School of Law
Real Estate Transactions Class
September 2, 2014

Following the Fifth Circuit's Lodestar to
Maximize Title-Insurance Coverage
Dallas Bar Association Headnotes
August, 2014

The Fifth Circuit's Interpretation of
Texas Title-Insurance Survey-Coverage Law
and Its Real-World Implications
Dallas Bar Association Friday Clinic
June 13, 2014

Doubletree's Real-World Lessons,
Dallas Area Lawyers Real Estate
Discussion Group
April 9, 2014

Just Lettin' It Roll: Flying Solo with a 'Tude,
Dallas Bar Association Headnotes,
October, 1996