

Welcome to today's webinar!

A Walk Through the Typical Objection Letter

Charles Craig

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- Log on to WebEx for at least 55 minutes.
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 - We welcome any other lawyers to listen, but cannot provide continuing education credit to you.



A Walk Through the Typical Objection Letter

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Nature of Title Insurance, Objection Letters

Unlike property casualty insurance, which can be reviewed periodically and its terms changed by the insurer, Title Insurance is a contract of indemnity that is usually final once issued.

Prior to policy issuance, the proposed insured Buyer or Lender may seek to maximize coverage under the policy to secure the value of the property / investment. This is done by:

- reviewing the commitment once issued
- making “objections” or “comments” to terms of the commitment, usually seeking to remove certain exceptions from coverage or seek affirmative coverage through endorsements

Texas Title Insurance is Regulated

- **Creature of Title XI of the Texas Insurance Code and Texas Dept of Insurance (“TDI”) Regulations**
- **Under Ins. Code, Section 2551.003, Basic Manual, including**
 - **Procedural Rules** on what can and cannot be done to insure
 - **Rate Rules** on premiums charged
 - **Promulgated Forms** for Commitment, Policy and Endorsement
- **Bulletins Issued by TDI on specific issues**

All regulate what accommodations can be made by the title company when a customer seeks to maximize coverage under a commitment and policy

The Commitment: Period of Review

Reviewing the Commitment

TDI Procedural Rule P-1 cc., the Commitment:

- **The form through which the Title Insurer *offers* to issue a title policy in the future *subject to* the terms and conditions of the commitment *and* the stated exclusions, exceptions and requirements.**
 - **applies to Owner's Policies, Lender's Policies, and Interim Construction Binders**
 - ***Good for up to 90 days or until the Title Policy is issued***
 - ***Does not provide coverage by itself***

During the period between the Commitment issuance and before the Policy is issued is when the Title Objection Letter surfaces, to negotiate the terms and conditions under which the Policy will be issued...

Typical Objection Letter

- Sent by Buyer's Legal Counsel on Owner's Policy; or,
- Sent by Lender's Legal Counsel on Loan Policy
- Typically addressed to the Seller/Borrower and the Title Company and/or Surveyor closing the matter
 - Not every objection is addressed to the Title Company. Some or most matters are to be handled by the Seller/Borrower only.
 - Our role is to identify what can be done *if possible within the regulatory limits* to issue the policy without the objected exception or to satisfy the requirement – but to not cure all matters. See P-1(f).
 - Our role is not to give legal advice, but describe in plain language what needs to be done to close the transaction and issue the policy.
 - The parties to the transaction are ultimately responsible for performing curative matters.

Not your Typical Objection...

“Please remove all exceptions from Schedule B and cure all conditions and requirements in Schedule C”

“Remove [all sch.B.10 exceptions] upon approval of survey”

- Not reasonable objections
 - Objections need to be made to specific matters/issues in the commitment
 - Find out which specific exception/condition is requested to be removed or satisfied
 - Our role is not to cure all matters, but give plain instructions on what the parties need to do to close the transaction and for us to issue the policy
 - The law vs. acceptable insurance risk

Schedule A Objections

The Proposed Insured: “Successors and/or Assigns”

- **Commitment involving a Loan Policy**
 - Mortgages are sold, assigned on secondary market; lenders will want to modify the policy to cover assignees/successors in interest of lender
- **Procedural Rule P-7:** requires promulgated language be used:
“..., and each successor in ownership of the indebtedness secured by the insured mortgage, except a successor who is an obligor under the provisions of Section 12(c) of the Conditions”
- **Some may ask for different variations of the promulgated language, but in Texas we must use only the promulgated language set out in P-7**

Who is Vested in Title

Recorded documents may show persons/entities in title that are different than the Seller listed on the contract.

- **Can be caused by many title issues:** non-probated estates of present/prior owners; transfers to trustees of owner-created trusts; transfers from individual owners to owned entities; divorces; purchases by one spouse only
- Usually tied a Schedule C condition on the issue as referenced in the Commitment
- May need additional examination to clarify and if possible, suggest requirements or options available to properly vest title

Legal Description

Legal Descriptions are to lots and blocks in subdivisions or to metes and bounds. Descriptions should be created by a surveyor.

- Description should include all land being insured, be correct, “close” and match the legal description on the survey and the legal description in the contract and in the deed or deed of trust
- Objection usually is because of new survey by Buyer.
- Typically the legal description may be revised upon receipt and review of an acceptable land title survey as long as it meets our requirements.
- Any items disclosed in the survey may appear as exceptions in any policy issued.

Typical Objections to Schedule B Exceptions

Promulgated Standard Exceptions 1- 9 of Schedule B

1. **restrictive covenants**
2. **boundaries, shortages in area, encroachments, protrusions, or overlapping of improvements**
3. **homestead and community property rights – Owner’s Policy**
4. **waterfront issues / water rights**
5. **tax assessments**
6. **documents creating the insured’s interest**
7. **construction issues on Homestead ICBs**
8. **subordinate liens and leases**
9. **informational Note on applying exceptions to the residential loan policy (T-2-R)**

Texas is a “promulgated state”, so these standard exceptions are not to be deleted unless a specific TDI Procedural Rule allows for deletion or modification

Schedule B-1: (Restrictive Covenants)

- **As per Procedural Rule P-4**, you must disclose restrictive covenants by specific reference to the volume and page where each appears of record. Only remove these items as allowed by rule.
- **Buyer may object to one or more specific Restrictions contained in recorded documents and the prohibited uses contained therein**
- **Reasons for deleting this exception under P-4:**
 - There are no Restrictions;
 - Restrictions have expired by their terms;
 - Restrictions have been released;
 - Restrictions are void and unenforceable by statute;
 - Restrictions cancelled by final court judgment affecting all property owners and lienholders.

Schedule B-2: Area and Boundary Amendment

B-2 excepts to discrepancies, conflicts, shortages in area or boundary lines, encroachments, protrusions, or overlapping of improvements.

- **Procedural Rule P-2** allows for deletion of all of B-2 *except “shortages in area”* (under Company guidelines) in both the Owner’s and Loan Policies, a.k.a. “Survey Deletion” coverage
- Guidelines: review an **“Acceptable Survey”**. Allows us to rely on older surveys, made for any party in the chain of title to consider amending the standard area and boundaries exception
- Use the **T-47 Affidavit** to verify no changes since the survey date or describing and showing new(er) improvements.
- Still can **except to specific matters** found on survey, matters of record
- On residential matters and commercial matters **up to \$10 million**

See STG Bulletins TX-00054 and TX-00062



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One Moment Please...

Password #1

Schedule B-5 Tax Assessments

“This policy does not insure against loss or damage . . . that arise by reason of . . . the following matters:

5. Standby fees, taxes and assessments by any taxing authority for the year _____ and subsequent years; and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership;...”

Current Year Taxes

Rule P-20 (A)(1)(a) : *Current-year taxes due and payable* must be shown as an exception under Schedule “B” in Owner’s Policies, Loan Policies and Interim Construction Binders *unless those taxes are **Paid or Collected at Closing.***

Seller: “I paid those taxes already....”

For insuring purposes, current-year taxes are considered ***paid*** if:

- 1) all taxes have been assessed AND:
- 2) the owner provides satisfactory evidence of prior payment*,
risky; better to rely on tax certificate!* **OR
- 3) if not paid, the title company collects all taxes at closing and pays those taxes *“in the ordinary course of business.”*

“Not Yet Due and Payable” Coverage

See Rule P-20 (C)(1)

- Available for **Loan Policies and Interim Construction Binders only**
 - *Not available for Owners Title Policies*

Review of Ad Valorem/Property Taxes

Tax Valuation Statements come out in April each year.

Tax Bills come out usually the first week of October/November.

- Until the Tax Bills are sent, Taxes are “not yet due and payable” (Jan/Sept)
- When Tax Bills are sent, the Taxes are “due and payable” from then through Jan. 31 of the next year.

Coverage Requested by Lender:

- **that taxes have been paid for all years except for the current year because those taxes are “not yet due and payable”.**

“Not Yet Due and Payable” Coverage

When every taxing unit's taxes for the current year **have not yet been billed** (Jan – Sept/Oct) you can add to your B-5 tax assessments exception the following:

“Company insures that standby fees, taxes and assessments by any taxing authority for the year [current year] are not yet due and payable.”

*When all current-year taxes **have been billed (Oct.-Jan)**, “not yet due and payable” coverage **IS NOT** available for the current year.*

Partial “Not Yet Due and Payable” Coverage

Partial coverage under Rule P-20(C)(2)

When **some (but not all)** taxing units' taxes for the stated year have been billed you can add the following to your tax exception:

“Company insures that standby fees, taxes and assessments by any taxing authority for the year __ (current year) __ are not yet due and payable, as to *[insert name(s) of applicable taxing authority/authorities]* only.

- again, only for Loan Policies and Interim Construction Binders

Rollback Tax Coverage

Exception B-5 ... “and subsequent taxes and assessments by any taxing authority for prior years due to change in land usage or ownership;...”

Review:

Special Use-designations that result in reduced **valuation** for tax-appraisal purposes under the Texas Tax Code:

§ 23.51(1): “Qualified open-space land” *(most common)*

§ 23.41 & 23.51(2): “Agricultural use” *(“Ag exempt”)*

§ 23.51(2) & (7): “Wildlife management” *(a form of Ag)*

§ 23.71: “Timber land”

§ 23.81: “Recreational, park, or scenic use”

§ 23.91: “Public access airport property”

Rollback Tax Coverage

See Rule P-20(B)(1)

What Produces the Rollback tax liability? *Change of Use or Ownership of the Land*

Why is it a big deal?

TAX CODE § 23.55(a): Land-use change results in additional tax ***for each of five years preceding*** the year when the ***change in use*** occurs; amount of tax is the difference between assessment at *special-use valuation* and assessment at *market value*.

For example, pasture developed into a shopping center; farm into an industrial park complex

§ 23.55(b): A ***Tax lien*** for the additional tax attaches on the date when ***change in use*** occurs

Rollback Tax Coverage

What does it mean when Lender asks for insurance against Rollback Taxes?

- **means deleting the phrase in B-5:** *“and subsequent taxes and assessments by any taxing authority for prior years due to change in land use or ownership”* ... from the Sch. B tax exception.

Deletion is allowed in the ***Loan Policy and the Interim Construction Binder***, but **not in the Owner’s Policy** (purchaser always assumes the risk of rollback taxes in the Owner’s Policy).

Rollback Tax Coverage

Rule P-20 (B)(2): Deletion of the rollback tax exception is allowed only when:

- 1) the title company has proof in its GF File that the property is ***NOT*** subject to either ***Open-Space or Agricultural**** tax valuation for the current tax year;

(* includes Wildlife Management designation.)

OR

- 2) rollback taxes for the current and/or prior years have been **assessed**, are **collected** at closing, and are **paid** ***“in the ordinary course of business.”***
- No “indemnities” accepted; no Owner’s Policies given the deletion

See, STG Bulletin TX2010009

Rollback Tax Coverage

Making the deletion once P-20 (B)(2) requirements are met in qualifying **Loan Policies or Interim Construction Binders** is done by:

- by **box check-off** (on the T-2 and T-2R Loan Policy forms),
- lining through** the phrase,
- by producing an electronic **form omitting the phrase**, OR
- by issuing the **T-30 Tax Deletion Endorsement**

Under R-19, can charge \$20 premium for P-20 amendments/deletions.



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And now a brief word from our sponsor....

Password #2

Schedule B-8: Subordinate Liens and Leases

Applies only to the Loan Policy (T-2).

Review: When a Loan Policy is issued to insure the validity and priority of a lien, the *title insurer is not usually required to itemize all subordinate liens and leases that affect the title, unless requested to do so in writing by the insured. Hence standard exception at Schedule B-8.*

Under P-11(b)(8) and P-64, Lender may object to using the standard exception B-8 **and request** that the title insurer itemize subordinate liens and leases on Schedule B of the policy and insure them as being subordinate to the insured lien. “Please delete B-8”...

The general B-8 exception may then be deleted, and the subordinate lien(s) and lease(s) are listed in Schedule B and the Company may insure that such lien(s) and lease(s) are subordinate.

Schedule B-8: Subordinate Liens and Leases

When insuring that a lien or lease is subordinate to the lien of the insured mortgage, the Company must also state after the specific exception(s):

"Company insures the insured against loss, if any, sustained by the insured under the terms of the Policy if this item is not subordinate to the lien of the insured mortgage."

- If any lien/lease is made subordinate by a Subordination Agreement, such as a Non-Disturbance Agreement, which is conditional, the Company prefers to add **"subject to the terms of the Subordination Agreement"** at the end of the insuring provision on priority OR to separately except to the Subordination Agreement.

Schedule B-10: Specific Exceptions

Matters found by the title company that **affect title to the specific property** are listed under this exception or as separately numbered exceptions.

If there are no additional matters affecting title, the title company must delete this exception... *Rare...!*

Typical Specific Exceptions that draw objections....

Parties in Possession Exception

Under Rule P-3: This exception may be removed:

- 1) upon ***inspection*** by a licensed escrow officer;
 - Company may charge a reasonable fee for the inspection.

OR,

- 2) the Proposed Insured can waive the inspection in writing and accept the exception in Schedule B;

OR,

- 3) check your underwriter; may review an acceptable affidavit or rent roll from the seller/borrower.

See Stewart Bulletin TX2012007 on Virtual Underwriter

Survey Matters

Commitment may except to specific *encroachments of building setback lines, easements (utilities) and boundaries* found on survey, or recorded of record.

- **“All visible and apparent easements/rights of way.”**
- **To consider removing each exception, review an “acceptable” survey, history of property and improvements; Look on Google Earth**
 - ***Review T-19 (Loan), T-19.1 (Owner) Checklists on Virtual Underwriter***
- **TREC Contract** - easements and restrictions common to a subdivision and recorded in the public record or shown on the subdivision plat are acceptable to the buyer and do not form the basis for objection.

Lenders may also ask for a “clean” T-19 endorsement

- ***Review: T-19 for Loan Policy; T-19.1 for Owner’s Policy*** insures against:
 - (1) violations of restrictions, including setback requirements**
 - (2) encroachments of easements, improvements to or from adjoining land, and**
 - (3) damages by reason of mineral development.**
- Usually review an acceptable as-built survey
- If no *Area/Boundary Amendment* is requested by Lender, and lot is platted within a subdivision in a municipality, no survey is usually needed for review
- ***T-19 Series Checklists***
- ***Minerals Guidelines: 5 acre well-unit RR Commission Rule***
 - but Rural area, ≥ 5 acres, in county with active mineral production, may need to delete paragraph 4(d) of the T-19 on Schedule B.
- May require specific exceptions, deletion of specific paragraphs of the endorsement
- ***See Stewart Bulletin TX 00074, Stewart T-19 Guidelines, T-19 Series Checklists all on Virtual Underwriter***

Minerals Surface Damage Endorsements T-19.2 and T-19.3

Lenders may ask for the T-19.2 or T-19.3

- Rate Rule R-29.1 – no charge on Loan Policy, \$50 on Owner's Policy
- T-19.2 insures against loss due to damage to present or future *“improvements (excluding lawns, shrubbery, or trees)”* resulting from mineral exploration or production;

Applies to:

- Real property of **one acre or less** improved or intended to be improved **for one-to-four family residential use, and**
- Real property improved or intended to be improved for **office, industrial, retail, retail/residential, or multifamily purposes**

Minerals Surface Damage Endorsements T-19.2 and T-19.3

- T-19.3 insures against loss due to damage to present or future “**permanent structures**” resulting from mineral exploration or production;
- **Applies to “other” real property**; could include farm and ranch land, access easements, conservation easements, and similar rights.

T-19.2 and T-19.3 are for both an Owner's or Loan Policy

- **Rule P-50.1:** Only issued *upon request* of the Insured, AND when the policy includes the *General Mineral Exception* under Rule P-5.1
- **Note:** If it does not qualify for T-19/T-19.1 coverage as to minerals, it also does not qualify under T-19.2 or T-19.3 either

General Minerals Exception

Procedural Rule P-5.1 provides that the Company may take an exception for minerals using the following language:

On Schedule A:

"Subject to and the Company does not insure title to, and excepts from the description of the Land, coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto"; **OR**

On Schedule B:

"All leases, grants, exceptions or reservations of coal, lignite, oil, gas and other minerals, together with all rights, privileges, and immunities relating thereto, appearing in the Public Records whether listed in Schedule B or not. There may be leases, grants, exceptions or reservations of mineral interest that are not listed."

Lenders/Buyers may ask for the general minerals exception to be deleted...

General Minerals Exception

Our Guidelines:

- Unless you have already fully searched the mineral title in the past, you will need to search **back to the land patent** or otherwise be satisfied that either the patent is pre- 9/1/1895 or that you have verified whether 100% minerals were reserved.
- A 60 year search or whatever time period is appropriate in your county is not enough and ignore possibility of state ownership of some minerals or royalty interest.

To delete the exception, you must secure Underwriter approval

See Stewart Bulletin TX2012006

Specific Minerals Exceptions

- Always include in Schedule B any specific grant, reservation, or lease of minerals or other substances (such as caliche, gravel, rock, coal, lignite, uranium etc.) that your search reflects.

- You should also add the following at the end of any such specific exception (although the policy does not insure the title to any interest that is excepted):

"The Company makes no representation as to the present ownership of any such interests. There may be leases, grants, exceptions or reservations of interests that are not listed."



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One more time...

Password #3

P-8 Construction Exceptions

“Please provide Mechanic’s Lien Coverage by removing the following exceptions”...

When Policy is issued in an amount to **include the cost of immediately contemplated improvements**, under Rule P-8 the Company **must** include in Schedule B:

Mechanic’s Liens Exception – *excepts to MMLs recorded upon the Land; but does insure MLs filed prior to date of policy if not excepted in Sch. B;*

and

Pending Disbursements paragraph - *limits coverage amount to amounts actually disbursed on loan (LTP) or spent to build the contemplated improvements (OTP)*

P-8 Construction Exceptions

When can these exceptions be deleted?

P-8 a.2. (Owners Policy) and P-8 b.2. (Loan Policy):

Upon the **completion of the improvements** on said property, **the owner's acceptance thereof**, and satisfactory evidence to the Company (affidavit) that **all bills for labor and materials have been paid in full**

- the ML exception plus the pending disbursement paragraph then may be deleted from the policy; and
- mechanic's and materialmen's lien coverage may be amended by issuing of the **T-3 Endorsement form under (T-3) Instructions** containing the applicable promulgated language covering the elimination and amendment.

See Stewart Bulletin 2010008

Schedule C Matters

Common Conditions requested to be removed:

- **Unreleased Liens:** What type of lien? Age of Lien? Proof of Payment of underlying debt?
 - Can you proceed under P-11 (proof of payment, time-barred) or
 - Master Indemnity Agreement with prior insurer? Deeds of trust, over \$500,000 not covered; Mechanic's Lien Affidavit and AJs not covered, as not a consensual lien
- **Liens against Ex-Spouse**
 - Characterization of property (community or separate)?
 - Recording date of lien and priority?
 - Homestead? Property Code §52.0012, **debtor** 30-day homestead notice and affidavit procedure

Schedule C Matters

- **Joinder of Borrower's Spouse on DOT**
 - ***Skelton v Wash. Mut. Bank case*** – Husband buys homestead alone under his sole management, not relying on wife's credit for the loan. *Held*: creates a valid purchase money lien (including deed of trust lien) upon the property without the participation of the wife
- **Joinder of Seller's spouse to sell/convey**
 - Characterization of property (community or separate)?
 - Spouse's Homestead interest?
 - **Divorced Spouses**: Was the decree (certified copy) recorded using a *valid legal description* or was a deed obtained from divested spouse?
- **Probate matters** - *a whole webinar by itself!*

Pro Formas

Lender/Buyer may request a **Pro Forma Policy**

- Pro Forma is not a valid commitment nor an active policy
- Shows what the title policy will look like with the agreed exceptions in Schedule B and all Conditions of Schedule C are satisfied
- Includes the proposed insured in Schedule A
- May include proposed endorsements also in Pro Forma format
- **Rule P-52:** Allowed only on **NON-Residential Real Property** and the proposed amount of insurance is **\$500,000.00 or more**
- Must include ***promulgated disclaimer*** on Schedules A & B showing that it is not a commitment nor a valid policy
- *Put disclaimer on endorsements as well*

Stewart Texas Underwriting Manual

Texas Underwriting Manual Direct Address

https://www.vuwriter.com/en/underwriting_manuals.html?state=TX&docType=manuals

Pathway to Texas Bulletins

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December 19, 2019

Search and Exam

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