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The Limits to Certainty in Title Examination; Bright Lines and Sharp Corners vs. Holistic and Harmonizing, and Those Pesky Fact Questions

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I. Introduction.

A risk free title cannot be assured by title examination in any jurisdiction or under any form of recording act. Inevitably, the risks posed by determinative fact questions, by problematic instruments and by legal issues that have not been conclusively resolved by the courts will create uncertainty pending a clarifying agreement by the potential claimants or a judicial determination. In the broadest strokes, the "limits to certainty" come in the form of fact questions and legal questions, however, it is worthwhile to further name and sort the components within these broad threats and to attempt an assessment of their respective effects on titles in Texas.

Title examiners are not helpful in resolving fact questions in any jurisdiction. However, ownership of real property in Texas depends on the resolution of more fact questions than in most (maybe any) jurisdictions. The legal questions are the province of title examiners, but the inability of Texas title examiners to conclusively address legal questions regarding the proper construction of title instruments or chains of title brings an additional (and surprising to some clients) limitation to the certainty attainable through title examination in Texas. Obviously, the identification of unresolved legal issues by an examiner is better than missing or ignoring them, but the mere identification of unresolved threats to title is not always fully appreciated by the client.

The decisions made by Texas legislators and courts that put Texas at or near the top of the "uncertainty list[1]" are addressed below.

II. Fact Questions- The Usual Suspects.

The traditional exclusions and limitations that appear at the end of most oil and gas title opinions enumerate a series of "fact question" risks that an examination of record title cannot negate. This list is static, presumably applicable to all jurisdictions, and includes fraud; forgery; duress; undue influence; incapacity or incompetency of parties due to mental condition, minority, or marital status; delivery; recorded but not delivered; altered after delivery; and unrecorded instruments, such as mechanic's and materialman's liens, that are valid without a filing.[2]

The "rights of parties in possession" are usually referenced in the same list of exclusions at the end of a title opinion, and the notice imparted by possession is discussed below in the "recording act" discussion. However, previous but discontinued (and thus, not currently visible) possession can pose a greater risk than the unrecorded interests of parties currently in possession. The rights of a previous possessor may actually be vested ownership rather than an in-progress adverse possession claim. A perfected limitation title, which is as full as can be held under any other

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[1] The author briefly considered an empirical approach to confirming the position of Texas at the top of the list, but issues regarding whether we should measure litigation by the gross number of title cases, the cases per capita, cases per acre, appellate cases only, etc., stymied a simple poll. The title insurance companies would have some relevant claims data, but because so many of the relevant cases arise in the oil and gas context, the data supplied by title insurers would be incomplete and would certainly under-report the Texas uncertainty. Thus, rather than counting the cases, this article will attempt to measure the limits mentioned in the title.

[2] *See* the list in the Comment following Texas Title Examination Standard 1.20 (April, 2018).

character of title, may exist without a recorded instrument and without current possession by the new owner. *Republic Nat. Bank of Dallas v. Stetson*, 390 S.W.2d 257, 259 (Tex. 1965) (once title by adverse possession vests, it is a good title without a recording and cannot be abandoned). Title examiners ordinarily report the title as it appears from the record, but even if claims of adverse possession are apparent, title examination cannot confirm (or negate) the perfection of a limitation title against the record title ownership because the perfection of a limitation title depends on the determination of the factual elements specified by the applicable limitation statute. *See* the Caution under Texas Title Examination Standard 2.10 (April, 2018). For this reason, title by limitation, though as good as any other title, is not a marketable title without the judicial confirmation regarding the accrual of the requisite facts. *Id.*

Statutes can limit or increase the factual determinations that bring uncertainty to title examination. A good example is the treatment of intestate succession. In most states a judicial determination of heirship is required. *See* eg., North Dakota Title Standard 12-01. Essentially, as in the old baseball joke,[3] there are no heirs until the court determines heirship. This approach may impose a hardship for small estates, but it is a plus for certainty in title. In Texas, the title passes to the heirs and the identity of the heirs will require a factual determination. The courts are certainly available for a determination of heirship, but Texas title examiners see a lot more Affidavits of Heirship aimed at intestate succession than they do judicial determinations of entitlement to inheritance. Affidavits are simply one person's view of the facts,[4] at least until the added benefits of "ancient document"[5] status accrue and experienced title examiners all have anecdotes about Affidavits of Heirship that excluded heirs.

The most common fact question on which an oil and gas title depends is the current effect of an unreleased oil and gas lease. The nature of the secondary term under an oil and gas lease ("for so long thereafter…") generates a steady volume of "paying quantities" litigation. In the absence of a recorded release, the perpetuation or termination of an oil and gas lease requires a factual determination. *See* the Caution under Texas Title Examination Standard 2.10 (April, 2018). Some states (not Texas) have enacted statutes requiring lessees to file releases of terminated leases and the penalties that are imposed by these statutes[6] will increase the likelihood that releases will be filed, but the penalties do not include the termination or forfeiture of the lease and thus, these statutes do not actually clear the title.[7]

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[3] One umpire says "I call them like I see them." Another says "I call them like they are," and the third says "They ain't nothing until I call them."

[4] However, a purchaser can rely on an Affidavit of Heirship to acquire "good title" from the heirs named in the affidavit so long as the only child of the decedent omitted from the affidavit is not a presumed child of the decedent or, at the time of the contract for sale, not named in a final decree to be entitled to treatment as a child, and the purchaser is without knowledge of the claim of the omitted child. Tex. Estates Code § 201.053 (2019).

[5] *See* discussion of the ''ancient document'' rule in the Comment following Texas Title Examination Standard 13.40 (April, 2018).

[6] *See* eg., 41 Okl.St.Ann. § 40, which allows maximum of $100 fine.

[7] The North Dakota statute, NDCC §47-16-36, sets up a procedure under which the lessor files a notice asserting lease termination and the lessee has 20 days to inform the county's Register of Deeds that the lease did not terminate. In *Ridl v. EP Operating LTD. Partnership*, 553 N.W.2d 784 (N.D. 1996), the lessee's failure to respond did not result in lease termination.

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