



Whose Boundary Is It Anyway? Litigating the Policy's Survey Exception

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When an insured is served with a lawsuit from their neighbor alleging a dispute over the common boundary line between the two properties, the last thing the insured wants to see in their title policy is an exception for coverage for discrepancies, conflicts, or shortages in area or boundary lines.

That was just the situation in which an insured found itself in the *Zarkasha*¹ case. Zarkasha Enterprise, Inc. purchased their 3.9 acre tract of land on the Waller County side of the Waller County/Montgomery County border in 2009. In 2017, Zarkasha's neighbor purchased their 18 acre tract of land on the Montgomery County side of the Waller County/Montgomery County border.

A dispute arose between Zarkasha and its neighbors, so in 2018, the neighbors filed suit against Zarkasha to quiet title alleging that Zarkasha was claiming an interest in the neighbors' land in Montgomery County. The neighbor's petition alleged that both properties at issue were described in their deeds as being entirely in one county (Zarkasha in Waller and the neighbor in Montgomery) and that both legal descriptions referenced that the county line was the boundary for their respective properties.

Zarkasha then made a claim on its owner's title policy and sued its title insurer, demanding a defense to the neighbors' claims. The insurer denied Zarkasha's policy claim and its claims in the suit, arguing that there was no duty to defend Zarkasha because the allegations concerned only a boundary dispute and Zarkasha did not purchase area and boundary coverage to limit

¹*Zarkasha Enter. v. Old Republic Title Ins. Co.*, No. 09-20-00057-CV, 2021 Tex. App. LEXIS 7106, 2021 WL 3774710 (Tex. App.—Beaumont Aug. 26, 2021, no pet.).

promulgated exception B.2 to “shortages in area.” Therefore, the policy did not cover the neighbor’s claims against Zarkasha and the insurer had no duty to defend it. The trial court agreed with the insurer’s position, granting summary judgment in its favor and dismissing the insurer from the lawsuit.

Zarkasha appealed the trial court’s decision to the Court of Appeals for the Ninth District in Beaumont. The appellate court correctly analyzed this case under the “eight-corners” rule whereby an insurer’s duty to defend is determined by the allegations asserted in the underlying petition and the provisions of the insurance policy. Because the title insurer had established that an exception to coverage for the defense of the lawsuit under the policy, the burden to refute that the exception applied shifted back to Zarkasha.

In response, Zarkasha asserted that the B.2 survey exception was ambiguous and the essence of the neighbors’ claim was a conflict in acreage and the alleged misfiling of deeds conveying ownership to Zarkasha in Waller County – not a boundary line dispute. The appellate court rejected these arguments, finding that based on the pleadings filed by the neighbors, the sole issue was the physical location of the boundary line and all of the legal descriptions in dispute described the Montgomery/Waller County line as the boundary between the properties. Consequently, the insurer met its burden to show the B.2 boundary line exception applied and thus it had no duty to defend Zarkasha.

There are a few lessons that can be learned from the *Zarkasha* case. First, it is essential to understand and be able to explain to customers what the area and boundary coverage provides and how it can protect those customers. The B.2 survey exception is very broad, and as *Zarkasha* demonstrates, even if a cause of action is creatively pleaded to circumvent the survey exception, a court will still review the substance of the petition to determine if the claims are within the policy’s coverage and the insurer owes a duty to defend. *Zarkasha* also includes a good primer on the difference between an insurer’s duty to defend and its duty to indemnify. The duties are independent of one another, and “[w]hile the duty to defend typically arises during litigation, resulting in the applicability of the eight-corners rule for resolving duty-to-defend disputes, the duty to indemnify is generally determined based on actual facts establishing liability based on proven, adjudicated facts.” Finally, it never hurts for the title company to document in the file that it offered the insured the option to purchase additional coverage under the title policy and the insured declined.

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