

Title Insurance Coverage Issues for Trusts in Missouri

David A. Townsend

President and CEO, Agents National Title Insurance

For years attorneys have inadvertently terminated their clients' title insurance coverage when transferring property to the clients' trusts because coverage was limited to the original purchaser of the property. The trustees or beneficiaries under a trust were required to obtain an endorsement to the 1992 Owner's Policy of Title Insurance to extend coverage past the original owner. Unfortunately, this was often overlooked in the estate planning process. The American Land Title Association (ALTA), www.alta.org, realized this was a problem and worked with estate planning attorneys to find a solution. In 2006, ALTA revised the standard Owner's Policy of Title Insurance and expanded coverage in regard to estate planning needs. A copy is available at:

www.alta.org/forms/index.cfm

(click on Basic Policies, ALTA® Owner's Policy (6-17-06))

Practitioners are often presented with the following scenario: Husband and wife contact the attorney to prepare a trust for estate planning purposes. The couple owns their property as husband and wife and wish to transfer it to their newly created trust. They provide the attorney with a copy of their legal description, but not a copy of their title insurance policy. The attorney prepares a quitclaim deed placing the property into the trust. Under this scenario, which happens frequently, the grantors of the real estate could have terminated their title insurance coverage.

Coverage under the Owner's Policy of Title insurance is based on a search of the real estate, court, and public records to determine what matters affect the property. All liens, judgments, easements, and other items attaching to the property are shown on the commitment to insure. Once closing occurs, only those matters that run with the land are shown as exceptions on the policy. The policy provides the assurance that there are no matters other than those listed that affect the property rights of the owner. If a claim arises, the underwriter will attempt to clear the matter from the title. If all attempts to clear the matter fail, the owner will be paid up to the policy limits for the loss. This coverage protects the owner even after the owner sells the property.

Unfortunately, the coverage provided under the 1992 version of the ALTA Owner's Policy did not automatically extend coverage to a trust when the property was transferred after purchase. This issue was addressed in the 2006 ALTA Owner's Policy by redefining the term "Insured." Under the 1992 Policy, the term "Insured" was defined as follows:

The insured named in Schedule A, and, subject to any rights or defenses the Company would have had against the named insured, those who succeed to the interest of the named insured by operation of law as distinguished from purchase including, but not limited to, heirs, distributees, devisees, survivors, personal representatives, next of kin, or corporate or fiduciary successors.

This language limited coverage to those who took title from the named insured as a result of a probate transfer or intestate succession. Trusts were exempt from the definition of insured because a transfer to a trust is not an operation of law, but instead a grant by deed. If the client has a 1992 or previous policy, most underwriters will provide an additional insured endorsement. Any policy before 2006 requires an endorsement to extend coverage to the trust. The underwriter may require that the Grantor transfer the property into the trust using a warranty deed as well. This will provide for proper warranties of title and preserve the chain in the event of a claim. Under the 1992 and

previous policies, a transfer by warranty deed to a trust could preserve coverage based on the following policy language:

The coverage of this policy shall continue in force as of Date of Policy in favor of an insured only so long as the insured retains an estate or interest in the land, or holds an indebtedness secured by a purchase money mortgage given by a purchaser from the insured, or only so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer or conveyance of the estate or interest. This policy shall not continue in force in favor of any purchaser from the insured of either (i) an estate or interest in the land, or (ii) an indebtedness secured by a purchase money mortgage given to the insured.

Based on this language, a Grantor that transfers the real estate to a trust using a warranty deed will have liability under the covenants of warranty made by the insured in the transfer. However, many attorneys use a quitclaim deed to transfer the property. This could result in liability to the attorney if a claim arises after the transfer and a claim is denied based on the above policy language.

The law in Missouri is unclear as to who would prevail in a dispute regarding a determination of coverage. But other jurisdictions have addressed the issue. An unpublished Wyoming case illustrates the issues. *Covalt v. First American Title Insurance Co.*, No. 96-8049, 1997 WL 4273 (10th Cir. Jan. 7, 1997), involved a husband that transferred his property to a trust with his wife as the beneficiary. After his death, a title claim was filed by the beneficiary. First American denied the claim because the trust was not a named insured and the trust was not an heir, devisee, or personal representative. If the wife had received the property via will or intestacy laws, she could have received coverage under the policy. The court determined that the insured had the opportunity to purchase a new policy because of the voluntary nature of the transfer. Under an involuntary transfer, no such option exists. This case was supported by *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Insurance Co.*, No. 07-3972, 2009 WL 1874060 (D.N.J. June 30, 2009). In *Carney-Dunphy*, the insured transferred her interest into her trust after the purchase of the real estate. The insured was listed personally on Schedule A of the policy. No endorsement was obtained adding the trust as an insured. Her daughter was the beneficiary under the trust. A claim arose involving riparian rights granted to the United States. The courts in *Covalt* and *Carney-Dunphy* cited numerous cases that addressed the voluntary nature of the transfer and how that terminated coverage because it was not by operation of law as required under the 1992 Policy. *Pioneer National Title Insurance Co. v. Child, Inc.*, 401 A.2d 68, 71 (Del. 1979), recognized that events caused by the voluntary action of the parties do not occur by operation of law. This is supported by *Kwok v. Transnation Title Insurance Co.*, 170 Cal. App. 4th 1562, 89 Cal. Rptr 3d 141, 148 (Cal. Ct. App. 2009), which held that the transfer of property by an insured into a family trust is a voluntary act and not one that arises by operation of law.

The voluntary nature of the transfer is the basis on which coverage is denied to the trust and its beneficiaries. The narrow definition of the insured under the 1992 and previous ALTA policies was clear and unambiguous when it came to extending coverage to trusts. This can be a major issue for practitioners who do not investigate the ramifications of transferring the property into a trust. In *Pioneer National Title Insurance*, 401 A.2d 68, the insureds were able to prosecute a malpractice claim against the attorney that transferred the property via voluntary transfer, and the statute of limitations did not accrue until the title claim was discovered, which, in this case, was three years after the transfer of the property into a charitable foundation and over seven months after the death of the attorney. Lawyers who do not properly review the title insurance policy open themselves to potential malpractice suits in the event of a denied title claim. To prevent malpractice liability, an endorsement to the policy should always be obtained for all policies issued in Missouri under a 1992 or previous ALTA policy form.

ALTA became aware of the issues facing estate and trust practitioners and made changes to the definition of insured. Under the 2006 ALTA Policy form, the definition of insured was changed to the following:

1. (d) "Insured": The Insured named in Schedule A.
 - (i) the term "Insured" also includes
 - (A) successors to the Title of the Insured by operation of law as distinguished from purchase, including heirs, devisees, survivors, personal representatives, or next of kin;
 - (B) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;
 - (C) successors to an Insured by its conversion to another kind of Entity;
 - (D) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title
 - (1) if the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,
 - (2) if the grantee wholly owns the named Insured,
 - (3) if the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity, or
 - (4) if the grantee is a trustee or beneficiary of a trust created by a written instrument established by the Insured named in Schedule A for estate planning purposes.
 - (ii) with regard to (A), (B), (C), and (D) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured.

Section 1(d)(i)(D)(4) clearly provides that trusts are an additional insured under the policy. This addition to the definition eliminates the need for an endorsement and automatically extends coverage to the trust, regardless of whether the property was transferred via warranty deed or quitclaim deed. The policy specifically reserves all rights and defenses against the Grantor placing the property in a trust. As a result, if the client has an ALTA 2006 Owner's Policy or newer form, counsel will not need to request an endorsement to insure coverage for the trust.

James Owen of Hosmer, King, and Royce in Springfield, Missouri, agrees that the new policy will make matters easier for practitioners and consumers. "One of the things I worry about as an estate planning practitioner," he notes, "is how the client will manage the trust once it's been executed and leaves our office. As a lawyer, I try to do everything I can to place assets with the trust agreement as they are when the clients hires us. But what happens when clients set up another bank account or buy another piece of property? What happens when they try to refinance another piece of property? Will they know how to handle that situation without seeking more legal representation? With this new policy, hopefully this will make things much easier for people with property in trusts so they will not have to navigate myriad paperwork and legal jargon simply to prove a piece of property they've always owned still remains in their name."

Attorneys should obtain a copy of their client's title insurance policy before any property is transferred. A thorough review of the policy is necessary to determine if the client's real property interests are protected by the client's policy. If the client does not have a 2006 policy form, an endorsement will most likely be required for coverage to extend to the trust. Protect the client and yourself by requiring a copy of the title insurance policy.