

CONTINUATION OF INSURANCE UNDER AN OWNER'S TITLE POLICY

Title company Counsel are often asked whether the transferee of an interest in real property situated in New York may succeed to the benefits afforded the Insured under the Owner's Policy of title insurance issued to its transferor. This question typically arises when the insured property interest is being transferred between family members as a gift, to the Trustee of an inter vivos trust for estate planning, or, when there is no change of beneficial interest, from an insured individual to an entity or from an insured entity to an individual or a different entity. Whether the transferee succeeds to the benefits of its transferor's Owner's Policy, as of its original date, depends on when the Policy was issued.

The Owner's Policy forms issued in New York since 1984 are the New York Board of Title Underwriters ("NYBTU") Form 100-D (the "NYBTU POLICY") issued until November 18, 1991, the American Land Title Association's ("ALTA") form of Policy, as revised by ALTA on April 6, 1990 and issued in New York between November 19, 1991 and December 31, 1993 ("ALTA 1990 Policy"), ALTA's form of Policy, as revised by ALTA on October 17, 1992 and issued in New York between February 23, 1993 and April 30, 2007 ("ALTA 1992 Policy"), and the current ALTA form adopted by ALTA on June 17, 2006 which has been issued in New York since May 1, 2007 ("ALTA 2006 Policy").

These ALTA Owner's Policies all provide for the continuation of coverage for the benefit of the Insured on its transfer of title "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," depending on the particular policy, "covenants of warranty made by the insured in any transfer or conveyance of the insured estate" or "by reason of warranties in any transfer or conveyance of the insured estate." This provision does not, however, by itself benefit a transferee related to the Insured, the trustee of an inter vivos trust established by the Insured for estate planning, or a transferee from an Insured when there is no change in beneficial interests.

Definition of insured

The definition of Insured in each of the above-referenced policies include those persons or entities succeeding to the insured's title to the property by operation of law, as distinguished from purchase, and includes the heirs, devisees, survivors, personal representatives, and next of kin of the Insured, and when applicable, its corporate successors. The ALTA 1990 Policy and the ALTA 1992 Policy also include within the definition of an Insured "fiduciary successors" succeeding to an Insured's title by operation of law.

Supplementing the NYBTU policy definition of an Insured for policies issued in New York, the NYBTU Rate Manual, which was effective October 1, 1984, included a section on the

continuation of Policy coverage to the assignee or grantee of an Insured, as of the original date of the Policy. It provided for the continuation of coverage when, among other situations:

“If an insured title is transferred from a parent company to a wholly-owned subsidiary, from a wholly owned subsidiary company to its parent company, or from one company to another, each of which are wholly-owned subsidiaries within one corporate group, or each of which have identical shareholders, or by a corporation to its stockholders pursuant to a plan of liquidation, or by an insured individual or individuals in exchange for all of the capital stock of a corporation and there is no real change in ownership as the result of such transfer of title.”

Additionally, the NYBTU Rate Manual provided for the continuation of Owner’s Policy coverage in New York to an assignee or grantee of title from an Insured, as of the original date of the policy, when “an insured conveys or assigns to a member of his immediate family as a gift or to a partnership of which the insured is a member, in either instance without valuable consideration.”

Accordingly, as to NYBTU Policies that were issued, coverage continues, as of the original date of the Policy, to benefit certain transferees who are related to the Insured and to benefit an entity in which the Insured retains all of the beneficial interests, so long as the transfer was for no consideration. However, as noted above, this Policy form has not been issued in New York since November 18, 1991.

The ALTA 1990 Policy and the ALTA 1992 Policy did not, and the ALTA 2006 Policy does not, include within their definition of an “Insured” the immediate family members of an Insured obtaining title without the payment of consideration.

This extension of coverage is set forth in Section 32 (“Continuation of Insurance”) of the Title Insurance Rate Association (“TIRSA”) Rate Manual, but it is effective only as to Owner’s Policies issued on and after January 28, 1999. Section 32 provides, in part, that the coverage of an ALTA Owner’s Policy continues, as of the Policy’s original date, for the benefit of a transferee who is “a member of the named insured’s immediate family as a gift for no consideration” or “a trust created by the named insured in which all of the beneficiaries, lifetime and remainder, are either the insured or members of the insured’s immediate family.” Section 32 limits the term “immediate family” to the insured named in the Policy’s “issue” (as defined in New York’s Estates, Powers and Trusts Law), parents, and brothers and sisters, not including the issue of the brothers and sisters of the named insured.

In determining whether there was consideration under Section 32, the value of any lien or encumbrance on the property is not to be taken into account. The amount of any mortgage on the property is included in consideration in computing transfer tax.

The definition of “Insured” in the ALTA 2006 Policy also includes:

“(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 named in Schedule A for estate planning purposes.”

Accordingly, for the 2006 ATLA Policy, coverage continues, as of the original policy date, for the benefit of certain transferees related to the Insured, for the benefit of the trustee of a Trust established by the Insured for estate planning, and for the benefit of a transferee from an insured individual or entity when there is no change in beneficial interests, so long as the transfer was for no consideration.

Section 32 of the TIRSA Rate Manual also provides for the continuation of coverage in the case of a no consideration transfer of title by an insured “from a parent company to a wholly-owned subsidiary company; from a wholly-owned subsidiary company to its parent company; from one company to another, each of which are wholly-owned subsidiaries within one corporate group, or each of which have identical stockholders, partners, or members in identical proportion; by a corporation to its stockholders pursuant to a plan of liquidation; by the named insured individual or individuals in exchange for all of the capital stock of a corporation; from a partnership to its partners upon the dissolution of the partnership; by the named insured individual or individuals to a partnership as part of the named insured’s capital contribution to the partnership; from a limited liability company to its members upon the dissolution of the limited liability company; by the named insured individual or individuals to a limited liability company as part of the named insured’s capital contribution to the limited liability company; by a principal to its nominee; or by a nominee to its principal; provided that as a result of any transfer described above there is no change in the beneficial ownership as the result of such transfer of title, and further provided that any transfer described above is made for no consideration.”

Company as used in this paragraph includes a corporation, partnership, and a limited liability company.

However, as noted above Section 32 is effective only as to an Owner’s Policy issued on and after January 28, 1999. The ALTA 1990 Policy and the ALTA 1992 Policy were issued in New York prior to April 30, 2007. Therefore, as to the ALTA 1990 Policy, and as to ALTA 1992 Policies issued before January 28, 1999, there is no provision for the continuation of policy coverage when the insured property interest is transferred as a gift between family members, to a Trustee of a trust for estate planning, or to or from an individual or entity when there is no change in beneficial interests.

Warranty of Title

An approach to consider when there is no continuation of coverage is to rely on the provision of the ALTA Owner’s Policies providing for the continuation of coverage for the benefit of an insured which has transferred title “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 insured estate.” If there is a defect in title, recourse may be sought under the warranty of title, with the named

insured submitting a claim under its policy. The statutory form of warranty of title¹ in a deed is that the grantor “will forever warrant the title”.

However, when a deed contains a warranty of title, the maker of the warranty may have exposure to persons other than his or her immediate transferee. Under common law in New York, the warranty may be held to benefit and be enforceable by later, remote owners of the same property.²

Practitioners have attempted to deal with this issue by expressly limiting the enforceability of the warranty to the immediate transferee and, more particularly, limiting liability under the warranty to either amounts actually recovered by the transferor under its title insurance Policy or to the loss due to a defect in title which is not recovered under that Policy. Whether these limitations will be upheld in an action brought by a later owner of the property to enforce a warranty of title is uncertain.

It is recommended that title counsel be consulted to determine if the coverage of an Owner’s policy will benefit a transferee for no consideration of a title insured interest. Notwithstanding the possibility of using a warranty of title, when there is no continuation of coverage issuing a new policy of title insurance for the benefit of the transferee, with Policy coverage to the date of the transfer, may be prudent.

The views and opinions expressed in this Article are solely those of the Authors, and do not necessarily reflect the views, opinions, or policies of the Author’s employer, First American Title Insurance Company.

1. Real Property Law, Section 253

2. 49 N.Y. Jur. 2d Deeds Section 96; *Mills v. City of New York*, 55 N.Y.S. 2d 538 (1st Dept. 1945), *aff’d* 295 N.Y. 879.

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Published in the New York Law Journal on April 6, 2012