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# WHEN THE LEFT HAND IS NOT THE SAME AS THE RIGHT

By: David L. Allen

It is commonplace for an owner of real estate to convey their property from one entity that they own or control to another that they also own or control. There are many reasons for such transfers, including, most commonly, the desire to hold a particular property in a "single purpose entity" in order to satisfy a lender's requirement, or to attempt to shield the asset from potential creditors of the transferring entity. While owners who engage in such transactions may give consideration to the effect that the transfer will have on an existing loan, or possible tax implications, it is likely that little, if any, thought is given to the potential impact of such a transfer on the title insurance coverage of the transferring entity.

It is common for the title insurance policy obtained by an owner of real estate to include language that the coverage afforded by such policy remains in effect only "so long as the insured retains an estate or interest in the property," or only "so long as the insured shall have liability by reason of covenants of warranty made by the insured in any transfer of the property." Whenever the insured owner transfers its property, even if from one entity that it owns to another, it runs the risk of its title insurer asserting that it "no longer owns an estate or interest in the property," and thus, the coverage afforded by the policy no longer is in effect. While the owner may argue that such a transfer is merely a transfer from the owner's proverbial "left hand" to its "right hand," various courts (there is no case directly on point in Arizona, yet) have rejected such an argument, and have held that regardless of the close relationship between the transferring entity and the entity to which the property was transferred, the coverage afforded by the policy no longer applies.

Absent an ongoing ownership interest in the property, another way for the transferring entity to assert that it still has coverage under its title insurance policy is to assert that it still has "liability" to the entity to which the property was transferred. While it is commonplace for transfers of this nature to be made by quitclaim deeds or special warranty deeds, if the transfer is made by a general warranty deed, which includes a warranty against title defects of the nature covered by the insurance policy, then the transferring entity will likely be able to successfully argue that it still has coverage for any subsequently discovered title defects based upon its ongoing liability under the warranties contained within the general warranty deed.

The title insurance obtained by a purchaser of real estate often offers the only recourse available to an innocent owner who discovers a title defect some time after acquiring its property. In order to avoid the unintentional loss of such valuable insurance coverage in the context of an "internal" transfer of property, before completing the transfer, the insured owner should contact its title insurance company, and inquire as to whether the proposed transfer will terminate the coverage. If the answer is "yes," then the insured owner should ask the insurance company to sell it an endorsement or amendment to the policy adding the transferee entity as a named insured, so as to avoid any possible dispute regarding the availability of coverage in the event of a future claim. If the answer is "no," then the insured owner should obtain the title company's affirmation in writing.

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