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Real Estate Investment Trusts and Tide Insurance

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REAL ESTATE INVESTMENT TRUSTS AND TITLE INSURANCE

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The enactment by Congress of legislation providing favorable tax treatment[1] for the income and distributions of certain qualified real estate investment trusts[2] has created a new market for title insurance. Because of the increased real estate activity generated under this new law, title insurance companies are being increasingly called upon to insure the acquisition, conveyances, leases and mortgages of such trusts.[3] This article will seek to point out the problems encountered in insuring these transactions and how the problems can best be solved, consistent with good underwriting practices. It will not be the purpose of this article to treat those problems concerning REITS which have no relation to the title insurance aspects, such as the attempted conversion of the beneficial owner's interest from realty to personalty, the transferability of shares of interest, the tort liability of the beneficial owners, the governmental regulation of business trusts, the taxation of such trusts,[4] and others.

THE REIT: FISH OR FOWL?

The true nature of a Massachusetts trust has always been a matter of concern to writers and courts. The Massachusetts trust was initiated

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[1]26 U.S.C. §§ 856-58 (Supp. II, 1959-61). This law was signed by President Eisenhower on September 14, 1960. 74 Stat. 1003. Under it, qualifying trusts are allowed conduit or pass-through treatment of income, provided 90 per cent distribution thereof is made to beneficial owners.

[2]A real estate investment trust will be hereinafter referred to a a REIT. The REIT is nothing more or less than the old Massachusetts trust, sometimes called a business or common law trust, drawn to qualify under the Federal tax provisions.

[3]The reason for the increased activity is that from 1935 until the present legislation trusts had been treated as "associations" taxable as corporations. See Coleman v. Gilbert Associates, 296 U.S. 369 (1935); Swanson v. Commissioner, 296 U.S. 362 (1935); Morrissey v. Commissioner, 296 U.S. 344 (1935). This had meant double taxation, both to the trust upon receipt of income and to the beneficial owner upon distribution to him. Under the new law, this double taxation will not be incurred if the trust distributes to the beneficial owners 90 per cent of its taxable income in the taxable year, 26 U.S.C. 857 (a) Supp. II, 1959-61).

[4]See generally 2 Bogert, Trusts and Trustees §§ 357-416 (1953); Annot., 156 A.L.R. 22 (1945); 12 C.J.S. Business Trusts §§ 1-36 (1938); Symposium, 48 Va. L. Rev. 1007-1148 (1962).

in that state because corporations were prohibited from acquiring and developing real property without a special act of the legislature. These trusts were created to fill this void and, because of the purpose they fulfilled, were closely akin to corporations in structure. When this vehicle was introduced into other states, it was met with varying degrees of enthusiasm. Some states felt that it was an impostor and an encroachment upon the domain of private corporations, whose rights and powers could only be obtained by compliance with applicable corporation statutes. Others felt that because of the close association among shareholder-beneficiaries and the power exerted over the actions and destiny of the trust by these shareholders, it was a partnership or joint stock association and that the provision for nonliability of certificate holders could not be given effect. And yet others recognized it as a true trust if certain conditions were satisfied, conditions which will be discussed later. Because of this varying approach, it became, and still is, popular to discuss these trusts in terms of their "validity" in any particular jurisdiction. This is an inaccurate term because most courts in discussing "validity," are usually addressing their attention to only one fine point, such as the liability or nonliability of shareholders, the taxation of the trust interests, etc. Whether the trust is "valid" or not depends upon the context in which the term is used and the nature of the problem confronted.[5] It could be a partnership as to third party creditors and still be a trust 'inter sese.' We shall be interested herein in isolating that situation in which, as far as title to real property is concerned, a true trust is created with legal title in the trustees for the benefit of the shareholders, as compared with those situations in which title may vest otherwise, perhaps in the beneficial owners as partners.

Corporation or Trust

The fact that in any particular jurisdiction a REIT may be considered to be a corporation does not seem to pose a serious title problem. It is submitted that in such a jurisdiction a deed to A, B and C, as Trustees of X Real Estate Investment Trust would create a valid title in A, B and C upon trust. That the X Real Estate Investment Trust is deemed a corporation under the state laws would not seem to affect the vesting of legal title in A, B and C, and they would hold in a fiduciary capacity for X regardless of its true nature—trust or corporation. The unlawful exercise or usurpation of corporation functions

[5]See 2 Bogert, op. cit. Supra note 4, at § 293; Annot., 156 A.L.R. at 52.

and attributes by X could only be challenged by the sovereign[6] in a 'quo warranto' or similar action. The beneficial owners, by virtue of their participation in the venture, would be estopped to attack the corporation or to claim rights as partners or tenants in common in the corpus of the estate.[7] And even if not estopped, they would be precluded from any action against the title insurer by the express language of Paragraph 2(d) of the Conditions and Stipulations of the policy wherein it is stated "This policy does not insure against loss or damage by reason of... defects, liens, encumbrances, adverse claims against the title as insured or other matters... created, suffered or agreed to by the Insured...."[8] One case has specifically held that even though the purported trust was a corporation and amenable to the state security laws, the trustees had power to hold and convey title to real estate.[9]

It is submitted that A, B and C would hold legal title and be able to convey the same, whether as trustees with power of sale or as officers of a corporation by estoppel, with power conferred by the corporate "articles." It would seem that the critical factor is that the rights of the shareholders in a corporation are almost identical to those of the beneficial owners of a REIT. In each instance they have no right to specific corporate or trust property. That right, including the power of disposition, is in the Board of Directors and the Trustees, respectively.

In many states there will be found statutes, such as Blue Sky Laws, which control or regulate the activities of REITs, even though expressly mentioning only corporations. And trusts may also be the subject of express regulation by the state.[10] But this writer has not found a statute which voids completely the actions of such trusts for a violation of the legislation. Usually, a monetary penalty is imposed.[11]

Partnership or Trust

By far the greater problem to title insurers has been that generated in those states which hold that a partnership or joint stock association is created, rather than a true trust, either because of the policy

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[6]Thomle v. Soundview Pulp Co., 181 Wash. 1, 42 P.2d 19 (1935); Hayes v. Central Business Property Co., 140 Wash. 596, 249 Pac. 1057 (1926). See generally 5 Fletcher, Cyclopedia of the Law of Private Corporations, § 2342 (1952).

[7]Fletcher, op. cit. supra note 6, § 3941.

[8]American Title Association Owner's Policy—Standard Form B—1960.

[9]Belt v. Griggs, 137 Kan. 429, 20 P.2d 570 (1933).

[10]See, e.g., Fla. Stat. Ann., ch. 609 (1927).

[11]Ibid.

of the state or because of the element of control granted to beneficial owners. In such jurisdictions it is not clear that A, B and C (in our typical example) hold legal title. It is possible, and probable, that the beneficial owners, as co-partners, have an interest in the corpus. In such an instance there is a real danger to a title insurer. Item 2 of Schedule A of the American Title Association Owner's Policy—Standard Form B—1960 (hereinafter called ATA Owner's Policy) states "Title to the estate or interest covered by this Policy at the date hereof is vested in the Insured." If the deed to A, B and C for the benefit of X creates a partnership, then the beneficial owners have an interest in the res along with, or exclusive of, A, B and C. It is not certain that a title insurer would be liable under this section, but there is a gray area here of potential liability. Of course, it could be argued that the insurer would be protected by the language of Paragraph 2(d) of the Conditions and Stipulations, set forth above, in that the defect was "created" by the Insured. It seems to this writer that an insurer is committed to a very definite position when it states in Item 2 of Schedule A that title is vested in A, B and C. It has a way out in the instance of a trust being held to be a corporation, because title is in A, B and C (though not in the fiduciary capacity exactly intended) but not so with a partnership. Here title is not in A, B and C, but in D, E, F et al, 'qua partners.'

Most states determine the question of whether a partnership is created by the degree of control granted to the beneficial owners.[12] The theory, of course, is that if the ultimate discretion on matters of trust policy lies with the beneficial owners, due to the sanctions they can enforce against the trustees, these owners become in fact the policy makers, thereby transforming the vehicle into a partnership or joint stock association.[13] Just what degree of control will effect this transformation varies from state to state. Certainly, the degree required is considerably less than would be required to cause an execution of a dry or passive trust under the Statute of Uses. The trustees can be granted considerable duties, and yet the trust will violate the control test, so we certainly cannot say that the doctrine is applied by any analogy to the Statute of Uses. One court has said "that . . . the power to fill vacancies among the trustees or to elect trustees at stated intervals, or even to alter or amend the trust agreement" does not, ipso facto, turn the trust

[12]See 2 Bogert, op. cit. supra note 4, § 297 and Annot., 156 A.L.R. at 42.

[13]Schumann-Heink v. Folsom, 328 Ill. 321, 159 N.E. 250 (1927); Frost v. Thompson, 219 Mass. 360, 106 N.E. 1009 (1914).

into a partnership.[14] Yet, another court has held that the mere power to amend the trust articles is enough to taint the transaction.[15] This writer will not attempt to set forth even a portion of the cases which decide the degree of control necessary in each state,[16] but a few generalizations can perhaps be made. Usually, the right to elect trustees periodically and fill vacancies will not create a partnership.[17] However, when shareholders are given the right to remove and replace trustees and the right to amend the trust instrument, or either of these rights, courts are inclined to say that a partnership does exist.[18]

The situation concerning partnership status has been further muddied by the statements of some courts that a partnership results from the fact that there is an "association" among shareholders.[19] It might be questioned whether, under such a rule, there could be a meeting of shareholders of any kind, regardless of the control they exerted. It is submitted that this language of "association" is broader than the courts really mean and refers only to those instances where the "association" of shareholders is of such a nature as to control the trustees. In other words, it incorporates nothing more or less than the 'control' test.

Some few states are distinctly hostile to business trusts, generally. In those states courts will usually impose partnership liability, regardless of the degree of control, on either of two theories: first, that limited liability should be obtained only in the manner provided by the legislature, viz. under the corporation or limited partnership acts, or, second, because of the provision for sharing of profits among beneficial owners (though this latter reason is given little modern support).[20] Two states have gone so far as to say that formation of a business trust is an unlawful usurpation of corporate powers and

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[14]Levy v. Nellsi, 284 Ill. App. 228, 1 N.E.2d 251 (1936).

[15]Goubeaux v. Krickenberger, 126 Ohio St. 302, 185 N.E. 201 (1933).

[16]The reader's attention is redirected on this point to note 12 supra.

[17]Gutelius v. Stanbon, 39 F.2d 621 (D.C. Mass. 1930); Levy v. Nellis, 284 Ill. App. 228, 1 N.E.2d 251 (1936); Hamilton v. Young, 116 Kan. 128, 225 Pac. 1045 (1924); Home Lumber Co. v. Hopkins, 107 Kan. 153, 190 Pac. 601 (1920).

[18]First Nat'l Bank of New Bedford v. Chartier, 305 Mass. 316, 25 N.E.2d 733 (1940); Frost v. Thompson, 219 Mass. 360, 106 N.E. 1009 (1914); Goubeaux v. Krickenberger, 126 Ohio St. 302, 185 N.E. 201 (1933); Liquid Carbonic Co. v. Sullivan, 103 Okla. 78, 229 Pac. 561 (1924).

[19]Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N.E. 355 (1913); Rhode Island Hospital Trust Co. v. Copeland, 39 R.I. 193, 98 Atl. 273 (1916).

[20]See generally, collection of cases in Bogert, op. cit. supra note 4, § 295 and in Annot., 156 A.L.R. at 39, n.91.

functions and makes the trust amemable to 'quo warranto' attack.[21].

It should be noted that the Rules and Regulations of the Internal Revenue Service governing REITs provide that, in the determination of whether the trustee has the required "exclusive authority over the management of the trust," the trust declaration will be satisfactory, even though the shareholders are granted the right to elect or remove trustees, to terminate the trust and to ratify amendments to the trust instrument proposed by the trustee.[22] This test is considerably looser than the 'control' test applied by many states, inasmuch as it authorizes even the right to remove and replace trustees, a right found distasteful, generally, under the 'control' test.

Because of this schism between Federal taxation requirements and the requirements of many state courts, some REITs have been established whose declarations of trust, relying heavily upon Federal Regulations, run afoul of many states' legal precedents. In those jurisdictions title insurance companies must, in such instances, make a broad exception in any policy insuring a trust's acquisitions, to any loss or damage arising from the legal determination that the trust is deemed to be a partnership or that the beneficial owners are deemed, collectively or individually, to be partners. This is because of the language contained in Item 2 of Schedule A of the ATA Owner's Policy and the coverage given therein, discussed earlier in this article.

While it is impossible to foresee all of the possible situations in which liability might arise on the policy, a few vulnerable areas can be set forth. For example, an individual creditor of a shareholder might attempt to reach the trust assets, a wife might assert dower against the trust res, a trustee in bankruptcy of a shareholder might attempt to reach the real property held by the trust, and so forth. Conceivably, even, dissident shareholders might assert individual interests in the trust assets or frustrate a proposed conveyance of trust property by the trustees by attempting to assert their rights directly against the res of the trust.

THE RULE AGAINST PERPETUITIES

Many REITs have a provision in their trust instruments granting to the trust perpetual duration. It has been stated by some writers and authorities that such a provision violates the rule against perpetuities and that all trusts must be limited in duration to a period not longer

[21]State ex rel. Range v. Hinkle, 126 Wash. 581, 219 Pac. 41 (1923); Ohio Op. Atty. Gen. No. 757, Aug. 19, 1919.

[22]Sec. 1.856-1(d) (i) Income Tax Regulations (26 C.F.R. Part 1).

than lives in being and 21 years thereafter. If this is so, it would not appear to be because of the strict application of the rule against perpetuities, since that rule strikes only at remoteness of vesting, and in the typical REIT all interests are vested immediately.[23] It is only the enjoyment that is postponed. Furthermore, it has been held that the common law rule against restraints on alienation is not violated by a business trust of unlimited duration.[24] Strictly speaking, in most business trusts there is no restraint upon the right of the trustee to sell the res of the trust (having been given the power of sale in the trust instrument), nor is there any legal impediment to the sale of the beneficial interest by the shareholder (such interest being freely transferable). Violation of the common law rule against accumulations seems moot as far as present day REITs are concerned, because the Real Estate Investment Trust Act of 1960[25] gives pass-through tax treatment only to those trusts which distribute 90 per cent of ordinary income to shareholders in any given year. Several authorities flatly state that a business trust can be of unlimited duration and that the rule against perpetuities and its cognate rules have no bearing upon such trusts.[26]

In spite of the above statements, there is considerable doubt as to the validity of a provision giving perpetual duration to a business trust. This probably springs from the doctrine of the case of *Claflin v. Claflin*[27] which established the principle of the "indestructible" trust. Prior to this case, it had been believed that a cestui, 'sui juris' and vested with all beneficial interests, could compel dissolution of the trust and take possession of the res free and clear. *Claflin* held that, if the settlor so intended, he could prohibit the cestui from so doing, thereby making the trust indestructible at the hands of the cestui. Many states have adoped this doctrine.[28] It has given concern to many authorities on the ground that there should be no restraint upon the possession and enjoyment of property by one owning the entire beneficial interest. It is probably for this reason that many courts have

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[23]Hart v. Seymour, 147 Ill. 598, 35 N.E. 246 (1893); Howe v. Morse 174 Mass. 491, 55 N.E. 213 (1899); Hodgkiss v. Northland Petroleum Consol. 104 Mont. 328, 67 P.2d 811 (1937).

[24]Liberty Nat'l Bank & Trust Co. v. New England Investors Shares, 25 F.2d 493 (D.C. Mass. 1928); Doty v. Mason 244 Fed. 587 (D.C. Fla. 1917).

[25]26 U.S.C. 856-58 (Supp. II, 1959-61).

[26]American Law of Property, § 24.67 (1952); 9 Am. Jur., Business Trusts § 300 (1937); 12 C.J.S., Business Trusts § 820 (1938).

[27]149 Mass. 19, 20 N.E. 454 (1889).

[28]For collection of cases on this point and annotations, see Annot., 37 A.L.R. 1420 (1925) and Annot., 169 A.L.R. 459 (1947).

struck down trusts of unlimited duration without apparent legal reason therefor. A forceful argument can be made that the ordinary REIT is not indestructible, because at any given time all, or a stated portion, of the shareholders can compel termination. But, more than one writer has suggested that it is, in fact, indestructible as to any one shareholder, because he alone cannot compel dissolution.[29]

Professor Simes[30] suggests that there is a rule which restricts the duration of private trusts, either as a varied application of the rule against perpetuities or as a separate rule applied by analogy. Whether it is a variation of the old rule or a completely new one seems unimportant. Simes points out that a trust may be an 'indirect' restraint on alienation—that it is true that the trustee can sell the res free of the trust, but he must have the power to do so or else he will violate the trust provisions. In any event, he is not completely unfettered in his ability to convey. The cestui can, likewise, assign his beneficial interest, but it may be of dubious market value (although this is less true of a business trust than a private trust). So, though there is no theoretical restraint, there may be a very practical one, one which will have the effect of tying up the property unreasonably. Because of this indirect or practical restraint, Simes says the rule as applied to trusts is as follows: "A private trust cannot be made indestructible, by the provisions of the creating instrument, for a longer period than a life or lives in being and 21 years."[31]

Apparently, many state legislatures feel that there may be a rule which restricts the duration of trusts. Many states have enacted statutes which exempt pension, profit-sharing and similar employee trusts from the operation of the rule against perpetuities or similar rules.[32]

Because of the unclear status of the law in this area, it is submitted that good title insurance practice dictates that no trust of perpetual duration be insured in its acquisitions without making suitable exception. It may very well be held that the trust is void 'ab initio,' for failure to comply with the rule. A very practical solution is for a trust to limit its duration to the life of a trustee and one or more of his children, plus 21 years thereafter. In effect this will give the trust sufficient permanency to satisfy ordinary demands and necessities.

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[29]See, Bogert, op. cit. supra § 304 at page 394.
[30]2 Simes, The Law of Future Interests §§ 553 and 557.
[31]Id. at 432.
[32]See, e.g., Va. Code Ann. § 55-13.1 (Repl. Vol. 1959).

MERGER

Ordinarily, one cannot be trustee for himself alone. Courts will say that there is a merger of legal and equitable titles and that the party concerned will own the property free from any trust obligations. Professor Scott states: "The sole beneficiary of a trust cannot be the sole trustee. Where property is transferred to a person for his sole benefit, he is absolute owner of the property and no trust is created. A person cannot owe duties to himself. Whatever he does with the property there is no one who can object to his doing it."[33] This is a logical and sensible rule of law and does not seem to be questioned by the authorities.[34] However, some confusion arises when there is only a partial identity between trustee and beneficiary, e.g., A as trustee for A & B, A & B as trustees for A & C, etc. Is there a 'pro tanto' merger of A's legal and equitable interests? Most authorities say there is not. And even in the instance where A & B are trustees for A & B, Professor Bogert suggests that there should be no merger, if for no other reason than that A & B hold legal title as joint tenants and equitable title as tenants in common.[35] The question of 'pro tanto' merger in business trusts has been faced on several occasions. It is not unusual that some of the trustees of such a trust also own shares of beneficial interest. The general rule is that there is no 'pro tanto' merger.[36] "The trust does not terminate by merger, either in whole or in part, where the sole beneficiary of the trust does not become the sole trustee. It will not terminate merely because one of several beneficiaries becomes the sole trustee, or the sole beneficiary is one of several trustees."[37]

In spite of the foregoing, at least two states have said that there will

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[33]3 Scott, Trusts § 341 (2d ed. 1956).

[34]See 2 Bogert, op. cit. supra, note 4, § 129 at 549-50 and cases cited therein.

[35]Id., § 129 at 554-55.

[36]Hammick v. Bryan, 21 F. Supp. 392 (D.C. Okla. 1937) vac. 106 F.2d 245, cert. denied 308 U.S. 615; Commercial Casualty Ins. Co. v. Pierce, 320 Ill. App. 221, 50 N.E.2d 434 (1934); Darling v. Buddy, 318 Mo. 748, 1 S.W.2d 163 (1927); Baker v. Stern, 194 Wis. 233, 216 N.W. 147 (1927).

In the Darling case, supra, the Court said "In the instant case managers were subscribers, but we can see no reason under the circumstances here existing why each did not incur the dual relation as beneficiary to the extent of his individual subscription and trustee as to all others. The beneficial interest of a manager to share in the profits as a subscriber to the fund was not commensurate with his interest as a trustee."

See generally, 9 Am. Jur., Business Trusts § 20 (1937); 12 C.J.S., Business Trusts § 19a (1938).

[37]3 Scott, op. cit. supra note 33, § 341.2. To same effect, see 2 Restatement (Second), Trusts § 341 c, f and h (1959).

be a merger of legal and equitable interests as to that portion owned by any trustee.[38] And yet another state has held that there will be a merger when all of the shareholders of a Massachusetts trust are also all of the trustees.[39] The latter situation would not seem to be a serious problem with present day REITs, because, to get the pass-through tax treatment, there must be 100 or more shareholders,[40] and it is not likely that a REIT will have 100 or more trustees. In states which subscribe to the doctrine of 'pro tanto' merger, a title insurer must state in its policy that the portion of the insured property represented in ownership by the shares held by any trustee, or trustees, is held by such trustee, or trustees, in fee simple, rather than upon trust.

RECORDATION OF DECLARATION OF TRUST

A purchaser of real estate is charged with notice of matters appearing in deeds in his chain of title and is, hence, charged with notice of the existence and terms of a trust instrument, reference to which is made in any of those deeds.[41] "Persons dealing with a trustee must take notice of the scope of his authority; and even a third person taking a title which comes through a trustee, and having notice of facts which should put him on inquiry whether the trustee was acting within the scope of his authority, is not protected"[42] Certainly, then, a purchaser from the trustees of a REIT would be charged with notice of any restrictions or conditions upon the power of sale,

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[38]Ware v. Busch, 108 Fla. 153, 146 So. 197 (1933); Huggins v. Whitaker, 100 Fla. 600, 129 So. 857 (1930); Walker v. Close, 98 Fla. 1103, 125 So. 521 (1929); Willey v. W. J. Hoggson Corp., 90 Fla. 343, 106 So. 408 (1925); Foster v. Glover, 46 S.C. 522, 24 S.E. 370 (1896). "If a person should grant land to A in fee in trust for A, could anyone doubt that the grantor intended that A should have the fee? Would it not be equally certain, if he should convey the land in fee to A in trust for A, B, C, D and E, that the grantor intended A to have an estate fee in one-fifth of the land?" Foster v.Glover, supra. The Florida cases, Willey v. W. J. Hoggson and Walker v. Close, supra, are interesting on another point. The former had stated with rather sweeping language, that an attempt to create a common-law trust was nothing more or less than an effort to avoid the liabilities of a partnership and to acquire the rights and privileges of a corporation without complying with Florida corporation laws and that only a partnership or joint stock association resulted with shareholders jointly and severally liable. Yet, the latter case recognized that a business trust could be created if done properly and distinguished Willey on the ground that a trustee was also a beneficiary.

[39]Enochs & Flowers v. Roell, 170 Miss. 44, 154 So. 299 (1934).

[40]26 U.S.C. 856(a)(5) (Supp. II, 1959-61).

[41]Page v. Natural Gas & Fuel Co., 35 F.2d 462 (8th Cir. 1929); accord, Simmons Creek Coal Co. v. Doran, 142 U.S. 417 (1892).

[42]8 Thompson, Commentaries on the Modern Law of Real Property § 4500 (1940).

provided, of course, that there is record notice of the trust in his chain of title and no recitation of the trustees' powers. Such a purchaser would, therefore, be within his rights in demanding examination of the trust instrument. Failure to place the instrument of record or to supply the purchaser with a copy thereof would render the title unmarketable.[43] The ATA Owner's Policy, mentioned earlier, insures "against loss or damage... which the insured shall sustain by reason of... unmarketability of... title." Because of this coverage a title insurance company must require that the declaration of trust be placed of record,[44] in order that there be no question of the marketability of title in the hands of a purchaser from the trust.

Another reason for requiring that the declaration of trust be placed of record is that property might come to the trustees by deed without reference to the trust and without designation of the grantees as trustees, making it appear of record that title is vested individually and not upon trust. As a protection against the subsequent conveyance to a bona fide purchaser, thereby rendering the property free of the trust in his hands, some record notice of the trustees' fiduciary status must be made.

TRUST AS AN ENTITY

It is fundamental in real property law that a deed must have a grantee capable of taking title. The question arises as to whether a REIT, as an unincorporated association, is an entity and whether it can take title in its own name, rather than in the name of the trustees.[45] One authority has shrewdly observed: "It may be said that if partnerships are creatures of contract and corporations of statute, unincorporated associations are creatures of the devil since only his satanic majesty knows what they are."[46] While some cases hold that a Massachusetts, or business, trust is an entity,[47] it is submitted that

[43]Resnick v. Goldman, 133 So. 2d 770 (Fla. Dist. Ct. App. 1961); Slomkowski v. Levitas, 9 N.J. Misc. 854, 156 Atl. 8 (Sup. Ct. 1931), aff'd, 109 N.J.L. 545, 162 Atl. 530 (Ct. Err. & App.).

[44]An alternative would be for the insurer to hold in its files a conformed or executed copy of the declaration of trust to show to prospective purchasers. This would not seem to be a satisfactory solution, however, because of the practical difficulties that may be involved in having the agreement readily accessible at any time or place.

[45]Federal Tax Regulations authorize this. Sec. 1 856 (d) (i) (26 C.F.R. Part 1).

[46]Thompson, op. cit. supra note 42, § 3012 at 407.

[47]Remington v. Krenn & Dato, Inc., 289 Ill. App. 548, 7 N.E.2d 618 (1937); Beikin v. Krenn & Dato, Inc., 350 Ill. 284, 183 N.E. 330 (1932); Hodgkiss v. Northland Petroleum Consol., 104 Mont. 328, 67 P.2d 811 (1937); Brown v. Bedell, 263 N.Y. 177, 188 N.E. 641 (1934).

most states would apply normal trust rules and say that the trust is not an entity and that title must be taken and held by the trustees and not in the name of the trust.[48] It has been held that when title is vested in the trustees, other officers of the trust cannot convey the property.[49]

Because of the very sparse authority holding a Masachusetts trust to be an entity, a title insurer must insist that the acquisitions and conveyances of a REIT be made in the names of the trustees, except in Montana and, possibly, Illinois.

USE OF A NOMINEE

The Federal Tax Regulations issued under the Real Estate Investment Trust Act authorize title to real property to be taken "in the name of a nominee for the exclusive benefit of the trust."[50] Many trust representatives have suggested that this procedure be followed in order that a title insurance policy may be issued free from exceptions or requirements based upon some or all of the title objections set out in this article. While it would be a desirable result, such a procedure does not present a solution to the problems or change the situation in any substantial manner. The trust can take title in the name of a nominee and the policy can show title in him, but the exceptions and requirements must remain as before. The nominee taking title will hold on a resulting trust in favor of the party who advanced the consideration[51]—the particular REIT concerned. The trustees could enforce this resulting trust in an equitable action, and, therefore, any defect assertable against the trust would also lie against the nominee. It could also be held that the nominee is a mere agent of the trust.[52] Whether resulting trustee or agent, the nominee's rights rise no higher than the real party in interest. There has been no "insulation" created or afforded by the act. If the title insurer is aware of the relationship between trust and nominee, it must show all title matters that affect the trust. Not only must it do this as good underwriting procedure, but also as a matter of information. Title insurance policies are often used to give information to prospective purchasers or mortgagees. It would be deceptive to show clear title in a nominee if such were not the case and the title insurance company were aware of the relationship. It has been satisfactory to some trusts to have

[48]See collection of cases in Thompson, op. cit supra note 42, § 3012 nn.83-86.

[49]Ward v. Davis, 3 Sandf. 502 (N.Y. Super. 1850); Willis v. Greiner, 26 S.W. 858 (Tex. 1894).

[50]Section 1. 856-1 (d) (i) (26 C.F.R. Part 1).

[51]Bogert, op. cit. supra note 4, §§454 and 461.

[52]Id. at § 15.

a single exception in the policy, excepting to loss or damage arising from the fact that the nominee holds title for the REIT and not in his own right, rather than one or more of the other exceptions set forth or indicated in this article. The feeling seems to be that such language is more saleable to prospective mortgagees, purchasers and shareholders.

Remedial Legislation

Many states have been quick to see the potentiality of the REIT and have enacted legislation that is most helpful in many instances to clear up some of the problems raised herein. The following states have enacted such legislation, as of the time of this writing: Alabama,[53] California,[54] Georgia,[55] Kansas,[56] Louisiana,[57] Mississippi,[58] Nebraska,[59] New York,[60] South Carolina,[61] Tennessee,[62] Texas,[63] Virginia,[64] and Washington.[65] Some statutes are better drawn than others, but all are helpful in resolving some or all of the problems raised herein. It is hoped that more states will follow the lead of these states, because the REIT can be an attractive and useful device. It can provide a means of investment not ordinarily available to the average investor, and it can be a source of concentrated investment capital not now existing.

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[53] Ala. Code tit. 58, §§ 29-(1) - (8) (Supp. 1961).
[54] Cal. Corp. Code §§ 2300 - 03.
[55] Ga. Code §§ 108-601 - 09 (Supp. 1961).
[56] Kans. Gen. Stat. Ann. §§ 17-2027 - 38 (Supp. 1961).
[57] La. Rev. Stat. tit. 12, ch. 4, pt. V (1950).
[58] Miss. Laws 1962, S.B. 1698.
[59] Neb. Rev. Stat. §§ 24-632 - 33 (Supp. 1961).
[60] N.Y. Laws 1961, chs. 341-45.
[61] S.C. Code §§ 52-201 - 05 (1962).
[62] Tenn. Code Ann. §§ 48-1801 - 04. (Supp. 1962).
[63] Tex. Rev. Civ. Stat. Ann. art. 6138A.
[64] Va. Code Ann. §§ 6-577 - 85 (Supp. 1962).
[65] Wash. Laws 1959, ch. 220.