

BUSINESS ASPECTS OF
CURING TITLE IN THE 1990s

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Biographical Sketch

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BUSINESS ASPECTS OF CURING TITLE IN THE 1990'S

1. Introduction

Curing title involves analyzing title defects and the documents or other steps that would be required to resolve the title problem. The cost of curing the title problem must be weighed against the harm which could occur if the title defect is not cured.

This paper will discuss the liability a company could incur if a title defect is not cured. It will address several common title defects and the methods of curing them. The requirements for proper execution of curative instruments by individuals and various entities will be set forth.

Many of the matters discussed in this paper have previously been addressed in an excellent paper regarding title problems and curative measures.¹

2. Analysis of Title Defects

A. Evaluating the Risk

Curing title is problem solving. The first step in solving the problem is to understand the risk created by the title defect. "Risk" in this paper refers to the likelihood that a loss will occur and to the amount of the possible loss. In evaluating the risk created by a title defect, it is useful to estimate the amount of money which would be lost if the title defect results in title failure. It is also necessary in some circumstances to evaluate the likelihood that a title defect will lead to title failure.

B. How Much Production is Affected by the Title Defect?

An important factor in evaluating the risk created by a title defect is whether the interest affected is a mineral, oil and gas leasehold, royalty or overriding royalty interest. Title opinions are often organized to list first the defects affecting mineral ownership, then those defects affecting leasehold, royalty or overriding royalty ownership. One reason to organize an opinion in this way is that defects affecting mineral interests tend to involve greater exposure.

In a drilling title opinion, an important determination is whether there is 100% oil and gas leasehold coverage. If there is a title defect affecting mineral ownership, there is usually a risk that there is an unleased mineral interest. An unleased mineral

¹See Harris, "Analyzing and Curing Title Requirements in Oil and Gas Title Opinions," 31 Rocky Mt. Min. L. Inst. 20-1 (1986).

interest is one of the most severe types of title defects, because it could result in the true owners being able to recover damages equal to the value of oil and gas produced from a well, without having to bear any of the costs or risk of drilling the well.

Title defects regarding royalty and overriding royalty ownership generally carry a lesser degree of financial risk than title defects relating to oil and gas leasehold coverage. This is because only the landowner's royalty (for example 1/8) or the overriding royalty (for example 5%) share of the production is at risk. If a royalty or overriding royalty interest owner sues an oil and gas company for improper payments on the interest, the plaintiff will only be entitled to damages based on the 1/8 or other percentage share of his interest. Thus, the relative risk is less than the risk of a title defect affecting 100% of the minerals.

Another important factor in evaluating the risk raised by a title defect is the total amount of production that is involved in the transaction. In a drilling or division order project, this would be the anticipated total production from the well, and in an acquisition it would be the total value of the reserves for the well or prospects affected by a particular title defect. A drilling title defect affecting 10% of the production is a greater risk in a well expected to produce \$10,000,000 worth of production than it would be in a well estimated to produce \$1,000,000. This information can be useful to a title attorney, because it helps the attorney work with the client to evaluate on a very practical basis the severity of a title defect.

C. What Damages are Recoverable in a Trespass or Accounting Action?

If a company drills a well on an unleased parcel, the company is a trespasser. Trespass is the unauthorized entry upon lands. It does not require evil intent, and even an innocent entry under what is believed to be a valid oil and gas lease is actually a trespass if the oil and gas lease is not from the true owner of the lands.

If a company drills on an unleased parcel, obtains production and is sued for trespass, the question will arise whether the company is a bad faith trespasser or a good faith trespasser. A bad faith trespasser is liable for damages equal to the value of the minerals produced, plus interest.² A bad faith trespasser does not receive credit or a setoff for the costs of drilling and operating the well. Thus, if a well is drilled by a bad faith trespasser on a 100% unleased parcel, and the well produced

²1 H. Williams and C. Meyers, Oil and Gas Law, § 226.1 (Matthew Bender 1993).

\$10,000,000 worth of oil and gas, the true owner is entitled to recover the full \$10,000,000, plus interest. The company has drilled a free well for the mineral owner.

A good faith trespasser is liable to the true mineral owner for the value of minerals "in place."³ Generally, this means that the company is entitled to deduct the reasonable cost of extraction of the minerals. If the well which produced \$10,000,000 worth of oil or gas cost \$2,000,000 to drill, the mineral owner in a suit against a good faith trespasser would receive damages equal to \$8,000,000, plus interest. There have been a substantial number of cases regarding what are "reasonable costs" which may be deducted from the value of gross production, including cases arguing whether bonuses, royalties and income taxes are "reasonable costs."⁴

The distinction between a bad faith trespasser and a good faith trespasser in our example turns on whether the trespasser had knowledge that the mineral interest was unleased. A court has held that a trespasser was a good faith trespasser where there was an ambiguous instrument in the chain of title and the trespasser in good faith misconstrued the instrument.⁵ Good faith trespass has also been found where title failed because of adverse possession.⁶

If the unleased mineral interest is an undivided interest, a different legal analysis applies but in most states the end result is the same as in the case of a good faith trespasser. Owners of undivided mineral interests are cotenants with one another. Any one cotenant has the right to develop the land for oil and gas.⁷ The other cotenants, however, have the right to receive a share of the net profits if the drilling is successful. If the drilling is unsuccessful, the developing cotenant is not entitled to recover any of his costs from his cotenants. Thus, the developing cotenant bears all the financial risk of the drilling but would have to share the financial rewards if the drilling is successful and his cotenant sues for an accounting. In such a suit, the developing

³Id., at § 226.2.

⁴Id.

⁵Id., at § 226.3, citing inter alia, Delta Drilling Co. v. Arnett, 186 F.2d 481 (6th Cir. 1950), cert. denied, 340 U.S. 954 (1951), rehearing denied, 341 U.S. 917 (1951). The court in Delta also noted that the company had relied upon the advice of reputable counsel.

⁶McMurrey Corp. v. Shell Oil Co., 173 S.W.2d 354 (Tex. Civ. App. 1943, error ref'd).

⁷However, in some states development of oil, gas and minerals by one cotenant is waste and can be prohibited by a court injunction. See, 2 H. Williams and C. Meyers, Oil and Gas Law, § 502 (Matthew Bender 1993).

cotenant, like the good faith trespasser, is entitled to a credit or setoff for reasonable expenses incurred in developing the oil and gas. Here too there are many reported cases because there is much room to argue about whether a particular development expense is reasonable.⁸

An oil and gas lessee who hold a lease from the owner of an undivided mineral interest steps into the mineral owner's shoes with respect to rights as among the cotenants. If a company has a lease from the owner of an undivided one-half mineral interest, and drills a well resulting in production without force pooling the unleased interest, the lessee can be sued by the owner of the unleased one-half mineral owner for damages equal to one-half of the production less one-half of the reasonable expenses of drilling and completion of the well.

D. What is the Likelihood that Title Will Fail?

Another important factor in evaluating the risk of a title defect is the likelihood that the defect will result in title failure. In a few instances, there is 100% certainty that a title defect will cause title failure if the defect is not cured. For example, if a surface inspection and other factual investigation shows that lands have been adversely possessed for longer than the statutory period, resulting in surface and mineral ownership in the adverse possessor, an oil and gas lease from the former record owner will not be valid.

In most instances, a title defect involves the possibility or probability that there will be title failure. For example, a title defect might involve an ambiguous mineral deed which could be interpreted to reserve no minerals to the grantor or to reserve a 1/4 mineral interest to the grantor. If the mineral deed was executed many years ago and subsequent conveyancing suggests that the grantee interpreted the deed not to reserve any minerals to the grantor, the question may arise whether to "let sleeping dogs lie." Generally, a title examiner will require a quitclaim deed from the original grantor, since the ambiguous mineral deed could be construed to reserve a 1/4 mineral interest to the grantor. A landman reviewing the title opinion may question whether it is better to raise the issue with the original grantor and possibly alert him to rights he would not otherwise claim, or to take a business risk and waive the title requirement. To evaluate the risk of this title defect, you must weigh the chances, if a court were ever asked to rule on the effect of the deed, that the ambiguous deed would be found to reserve the mineral interest to the original grantor. Then, you must also weigh the chances that the original grantor or a sharp landman will discover the ambiguity

⁸ H. Williams and C. Meyers, Oil and Gas Law, § 504.1 (Matthew Bender 1993).

and pursue the issue. This latter evaluation is usually based on the reviewing landman's experience. Another important factor is the company's willingness to take the chance that the title failure may occur: each company has its own level of what is an acceptable business risk.

It can be very difficult to predict the likelihood that the holder of a possible claim will discover and raise that claim. Some individuals are known in a community to be litigious and likely to sue on any claim they do discover. Absent such information about the possible claimant, the evaluation of whether the sleeping dog will awake on its own is often hit and miss.

Once all the information discussed above is gathered, a landman can make an informed estimate of the risk caused by a title defect. You can assess the amount of money at risk, the likelihood that money will actually be lost, and the amount of title risk that your employer is willing to take. You can then decide whether the cost to cure the title defect is worth the benefit received from curing the defect.

3. Common Title Defects and Methods of Curing Them

This section analyzes several common title defects and assesses different ways to cure the defects. It also addresses some relatively recent developments that make it easier to cure certain title defects.

A. Defective Conveyances Resulting in a Prior Owner Retaining an Interest in the Lands

A defective conveyance which fails to assign all of a prior owner's mineral interest in the lands may appear in the chain of title. In some instances, the title examiner or landman can infer that the person intended to assign all of his or her interest, but simply failed to do so. An improperly executed deed, a deed with an incorrect legal description, or a deed executed before the party took title are examples of ways a conveyance could be defective and not convey the intended interest. There are various curative documents which are often required or prepared to cure this kind of title defect.

An effective way to cure title in this situation, if the prior owner or his successors or assigns can be located, is a quitclaim deed to the present owners. A quitclaim deed contains words of grant and is effective to assign any interest the grantor owns, but does not warrant title. Thus, the prior owner should be willing to execute the quitclaim deed if he does not claim an interest.

Another effective way to cure this type of title problem may be a correction deed. If the prior owner or his successors or assigns can be located, these parties can join with the present

owner in a correction deed which corrects the defect in the original deed. Like a quitclaim deed, a correction deed is effective because it contains words of grant. In most instances, both the original grantor and grantee, or their successors or assigns, should sign a correction deed.

Disclaimers are often suggested as a means to cure a title defect arising from a prior owner inadvertently retaining an interest in the lands. Disclaimers should be avoided unless they contain words of grant. The trouble and expense of drafting a disclaimer and locating the party to sign the disclaimer is usually the same as the cost and expense of obtaining a quitclaim deed. However, with the disclaimer, the signing party never conveys his interest and the document does not solve the title problem. The disclaimer could be offered as evidence in a court proceeding regarding the parties' intent, but the disclaimer alone does not cure the title defect. Recently, parties have been preparing disclaimers which contain words of grant. If the words of grant are included in the disclaimer, the disclaimer is in effect a deed and the title problem is cured.

Affidavits are not effective to correct a title defect resulting from a prior defective conveyance resulting in a prior owner retaining an interest in the lands. If the prior owner still owns an interest, an affidavit cannot be effective to transfer the interest and thereby solve the problem. Like a disclaimer without words of grant, an affidavit could later be offered into evidence in a court action regarding the effect of the deed. However, most companies are not willing to run the risk of having to go to court to establish the effect of instruments in the chain of title.

Quiet title actions can be used to terminate the prior owner's retained interest in the lands. The quiet title action requires that all parties who own or may claim an interest in the lands be named as parties and served with legal process. This can be fairly expensive, and attempting to cut corners to save costs can be perilous. To the extent that parties are served by publication or other than by personal service, it is possible they could challenge the quiet title decree. Therefore, a quiet title action is most appropriate when a serious title defect exists involving substantial risk and there is no other means of curing the defect.

In some instances, title can be proved through adverse possession. For example, under Colorado law, if a person adversely possesses land for eighteen years he or she becomes the absolute owner of the land.⁹ If, due to a defective conveyance, a prior owner inadvertently retained title to the lands, the title defect could be cured by adverse possession if more than eighteen years have passed. However, there cannot be adverse possession of

⁹§ 38-41-101(1), C.R.S.

severed minerals (except by actually extracting the severed minerals from the lands), nor can there be adverse possession against co-tenants or governmental entities.

B. Individuals in the Chain of Title Who Cannot Be Located

A title requirement may call for execution of a document by an individual in the chain of title who cannot be located. In this situation, there may be an alternative way to cure the title defect. Adverse possession may extinguish the interest of the person who cannot be located. There are also statutes in some states which provide an alternative method to cure certain types of title defects.

Adverse possession has been discussed briefly above. All states have some type of adverse possession statute providing that adverse possession for a period of time, generally 18 to 21 years, gives the adverse possessor a superior title over the title of the record owner against whom the land is adversely possessed. Most states also have other specific statutes under which the period of possession is shorter. For example, in Colorado, a person in actual of possession of land for seven years, under color of title, and who pays the taxes "shall be held and adjudged to be the legal owner of said lands or tenements to the extent and according to the purport of his paper title."¹⁰

As noted earlier in this paper, adverse possession usually does not extinguish the record owner's severed mineral interests. Adverse possession also does not run against the federal, state or other governments. Thus, there are many title defects that cannot be cured by adverse possession and which may involve persons who cannot be located.

Wyoming has a statute which may prove helpful where it is necessary to obtain an oil and gas lease or other document from an owner who cannot be located. The Wyoming statute provides a method to have a conservator appointed for an absentee owner. The statute provides that any person may file a petition for the appointment of a conservator of the property of an absent owner when: (a) the person owns property in Wyoming, and his location is unknown and no provision for care, control and supervision of the property has been made, and (b) the property is likely to be lost or damaged because of the absence of the owner.¹¹ For example, if an absent and unlocatable owner held a mineral interest in a spacing unit in Wyoming and drainage would occur if the mineral interest were not leased, this statute should apply and a lease of the absent owner's mineral interest could be obtained. The statute provides that a

¹⁰§ 38-41-108, C.R.S.

¹¹§ 3-3-201, W.S.A. 1977

conservator appointed for the absentee owner has the power to grant an oil and gas lease upon order of the court after notice and hearing as prescribed by the court.¹²

North Dakota has a statute which provides a procedure for extinguishing an encumbrance where the creditor under the encumbrance cannot be located.¹³ However, the procedure essentially results in paying the entire debt plus interest either to the creditor or to the common schools trust fund of the state of North Dakota. Therefore, as a practical matter this statute does not provide an appealing alternative to assuming the risk of having to pay off such an encumbrance in order to avoid foreclosure.

Colorado has a law which allows a court to appoint a trustee who has the power to execute an oil and gas lease covering a mineral interest which is subject to a contingent future interest.¹⁴ This statute only applies to lands or interests which are subject to contingent future interests, including interests arising by way of remainder, reversion, possibility of reverter, executory devise, or condition subsequent. The statute provides a procedure for the court to appoint a trustee who can execute an oil and gas lease covering the interest. For example, imagine that a mineral interest in Colorado is owned by A for life and then to A's heirs at law. If A is still alive, he is a life tenant and does not have the right to lease the land for oil and gas without the joinder of the heirs at law who will acquire title on A's death. However, those heirs cannot be identified until A dies. The Colorado statute described above provides a solution to this problem as the court can appoint a trustee to execute an oil and gas lease covering the future heirs' interest in the lands.

A title requirement may call for a quitclaim deed from a person who cannot be located. A quiet title action could be used to establish that the unlocatable person owns no interest in the lands. A quiet title action would not be effective if the unlocatable person owns a mineral interest which needs to be leased.

A person's absence from a state for many years may lead to a presumption of death.¹⁵ However, this presumption is not binding

¹²§ 3-3-607, W.S.A. 1977

¹³§ 9-12-29, N.D.C.C.

¹⁴§ 38-43-101, C.R.S., et seq.

¹⁵See, e.g., § 15-10-107(1)(c), C.R.S.

if in fact the person is alive.¹⁶ An action for appointment of a conservator or receiver should be used rather than a proceeding for determination of heirship if the person is absent.¹⁷

C. Death and Passage of Record Title

On death, the real property and personal property owned by the decedent passes to the decedent's heirs or devisees. Many of the Rocky Mountain states have statutes providing that the property of the decedent vests in his or her heirs or devisees on death, subject to homestead and similar allowances, rights of creditors, elective share of the surviving spouse, and to administration.¹⁸ The heirs' or devisees' interests can be divested during administration of the estate. For example, the property may need to be sold to satisfy creditors.

Many of the Rocky Mountain states have adopted the Uniform Probate Code.¹⁹ In these states, title to real property owned by the decedent should be conveyed by the personal representative in a personal representative's deed to the appropriate heirs or devisees. The personal representative's deed and the letters appointing the personal representative should be recorded in the county records. These documents, together with a release of any applicable tax liens, will vest the decedent's interest in his or her heirs or devisees.

The question is often raised whether it is safe to rely upon an affidavit of heirship. An affidavit of heirship can often be obtained inexpensively. However, the affidavit is not effective to transfer title to real property. The affidavit is of no value if the facts stated in the affidavit are incorrect. For example, if the affiant chooses to omit one heir, that does not terminate the heir's interest.

¹⁶Patton, 2 Patton on Land Titles, 2nd Ed., § 476, n. 65 (West Publishing Co. 1957).

¹⁷Id., at § 476, n. 63, 64.

¹⁸See, § 3-101, Uniform Probate Code, which has been adopted in Colorado, Idaho, Montana, Nebraska, New Mexico, North Dakota and Utah.

¹⁹The states that have adopted the Uniform Probate Code include Colorado (§ 15-10-1 thru 15-17-101, C.R.S.); Idaho (§ 15-1-101 thru 15-7-401, Idaho Code); Montana (§ 72-1-101, et seq., M.C.A.); Nebraska (§ 30-2201, et seq., N.R.S.); New Mexico (§ 45-1-101, et seq., N.M.S.A.); North Dakota (§ 30.1-01.01, et seq., N.D.C.C.); and Utah (§ 75-8-101 thru 75-8-107, U.C.A.). For a complete list of states adopting the Uniform Probate Code, see Vol. 8, "Uniform Laws Annotated," (1983). The Uniform Probate Code is discussed in Livingston, "The Uniform Probate Code as a Benefit to the Landman," 27 Rocky Mt. Min. L. Inst. 1693 (1982).

If a company obtained oil and gas leases from the parties named in an affidavit of heirship, but it was later determined that some heirs were omitted from the affidavit of heirship, the omitted heirs would still own an interest in the real property. The omitted heirs' interests would be unleased. If the company drilled a well without having leases covering the omitted heirs' interests, the company would be liable to the omitted heirs for at least the net profits attributable to the omitted heirs' interests. The company would have drilled a well for the benefit of the unleased heirs. Thus, relying on an affidavit of heirship can be perilous.

Colorado law includes a procedure that is somewhat like an affidavit of heirship because it is based upon information from a person with knowledge of the relevant facts, but which gives much more protection than an affidavit of heirship.²⁰ The determination of heirship proceeding can be brought if no action has been brought for probate of an estate within one year after the death of a decedent. A petition must be filed with the court, notice is given to interested persons, and a decree of heirship is issued by the court. The decree shall be entered forthwith if all interested persons have joined in the execution of the petition or in a request that its prayer be granted. The statute provides that the decree of heirship shall transfer title to both real and personal property and that the recording of a death certificate, a decree of heirship, and the release of any tax lien "shall be sufficient to transfer title of record to the persons named in the decree." The statute further provides that if the decree was based on false statements as to the decedent's heirs, title to property which passes as the result of the decree of heirship shall not be adversely affected.²¹

D. Ancillary Probate Issues

When a person dies a resident of one state, but owns property in another state, "ancillary probate" issues may arise. "Ancillary probate" is used in this paper to refer to probate and estate proceedings (whether or not there is a will) in a state other than the decedent's residence but where the decedent owned real property. Even if the decedent's estate is properly probated or administered in the state where he or she resided, ancillary probate will be required. The state where the estate is probated only has jurisdiction to affect real property lying within that same state.²² Probate proceedings are required in the state where the property is located in order to pass title.

²⁰§ 15-12-1302, C.R.S.

²¹§ 15-12-1303(4), C.R.S.

²²Patton, 2 Patton on Land Titles, 2nd Ed., § 477 (West Publishing Co. 1957).

In analyzing a title requirement regarding ancillary probate, the first question is what type of interest is affected. If the mineral interest in land which the company seeks to lease is affected, the title requirement must be taken very seriously. Ancillary probate proceedings are required to vest the mineral interest in the heirs or devisees and in order for the company to take a valid lease. In Wyoming, which has not adopted the Uniform Probate Code, an estate should be opened and the court must enter an order authorizing an executor or administrator to lease the mineral interest.²³ In states which have adopted the Uniform Probate Code, a simple procedure will work if the estate has been probated in the state where the decedent resided and there has not been an appointment of a personal representative in the state where the property is located (some states also require that the state where the decedent resided has adopted the Uniform Probate Code). In these circumstances, authenticated copies of the letters appointing the personal representative should be filed in a court in one of the counties in the state where the decedent owned property, and thereafter the personal representative can execute a lease (unless the lands are devised specifically in the will).²⁴ Evidence that the letters were filed in a court in the state where the property is located, and the lease from the personal representative, should be recorded in the county in which the leased lands are located.

In some instances, an ancillary probate requirement will be made which does not affect validity of the oil and gas lease, but does affect payments of proceeds of production. These division order requirements generally relate to a lesser risk than requirements regarding leasehold coverage. If an oil and gas lease has been obtained from the then record mineral owner, and that mineral owner thereafter dies, the question of succession will relate only to payment of 1/8 (or the other royalty share) of proceeds, rather than the full revenue stream from the well. The same risk analysis discussed above must be done. First, determine the amount of the interest affected and the projected total amount of revenue that will be produced by the well. Second, determine the cost to cure properly the title defect. After weighing the possible total liability against the cost of curing the defect, look at additional but less thorough curative measures if necessary.

In the area of division order payments, the question arises whether a company can rely on the parties' execution of division orders. The general rule is that a division order is binding until

²³Section 2-3-503, W.S.A.

²⁴See, e.g., §15-13-204, 15-13-205 and 15-1-804(g) (II) C.R.S. In Colorado, a court order would be necessary to obtain a lease of property subject to a specific devise. §15-1-804(g) (II), 15-1-805, C.R.S.

it is revoked. If a company has division orders executed by all parties who may own an interest in production from the subject well, the company receives some protection when it relies on the division orders. For example, if there is a question as to the proportional ownership of the royalty as between three people, if all three people agree to a distribution and sign division orders, the company receives quite a lot of protection when it relies on those division orders. If one of the three people sues the company alleging improper payment, reliance on the division orders is a defense. The plaintiff then must sue whichever co-owner received an overpayment in order to recover.

Another general rule is that division orders do not solve or cure title problems. They may provide some protection to the company relying on the division order, but they do not operate as conveyances which resolve the underlying title defect.²⁵

There are several exceptions to the general rule that a company can receive some protection when it relies on division orders. Obviously, if the person who is claiming an interest never signed a division order, the company is not protected. Thus, if either A or B owns the royalty interest and the company decides to pay A on a signed division order, there is no defense based on the division order if B sues the company, because B never signed a division order. A second exception is that a company should never rely on a division order to improve its own net revenue interest. If an overriding royalty owner owns either a 5% or 10% overriding royalty interest, and the balance goes to the company who operates the well, the company is taking a risk if it pays the lesser amount based on a signed division order from the overriding royalty owner. If the overriding royalty owner or a successor later claims entitlement to the full 10%, that claim will be decided on its merits. At least under Texas law, the execution of the division order does not preclude the claimant from claiming the higher amount since the benefit of the higher amount went to the company who operated the well.²⁶

E. Federal Tax Liens

A federal tax lien can arise for unpaid income or estate taxes. The lien arises when the tax is assessed, and it attaches

²⁵Lear, "Division Order Issues in the 1990s: State Policing of an Unresponsive Industry," Oil & Gas Royalties on Non-Federal Lands, Paper No. 6, Page Nos. 1, 11 (Rocky Mt. Min. L. Fdn., 1993).

²⁶See, Gavenda v. Strata Energy, Inc., 705 S.W.2d 690 (Tex. 1986).

to real and personal property.²⁷ The lien is not valid against a third party until a notice of federal tax lien is filed or recorded as required by state law. In most states, the county recorder's office is specified as the place to file liens against real property and the office of the Secretary of State is the place to file liens against personal property.

If a federal tax lien is recorded against an owner before the owner executes an oil and gas lease, generally the oil and gas lease is subject to termination if the federal tax lien is foreclosed. Thus, some curative action will be required if the federal tax lien is prior to the oil and gas lease.

If a notice of federal tax lien is filed erroneously, a certificate of release of lien may be obtained which states that the lien filing was erroneous.²⁸ This is applicable only in certain limited circumstances, including that the tax has already been paid, the tax is barred by the bankruptcy code, or the statute of limitations on collection has run. A certificate of non-attachment of lien can be obtained if there may be injury to a person by the appearance that the lien refers to him, but he is not the person against whom the tax was assessed.²⁹ This certificate of non-attachment of lien would be appropriate if two parties with similar or identical names exist, and the tax lien is not in fact against the person in your chain of title. The certificate of non-attachment of lien would state that the tax lien does not attach to the property of the innocent person.

A certificate of release of lien may be obtained if the tax has been satisfied or the taxpayer gives and the Internal Revenue Service accepts a bond.³⁰ A certificate of discharge can be obtained in certain limited circumstances, including where the proceeds of a sale are substituted for the property. However, the Internal Revenue Service does not usually grant a certificate of discharge in these cases.³¹ A subordination of the federal tax lien can be obtained if the Internal Revenue Service is convinced

²⁷See, Lear, "First Purchaser's Suspense Accounts," 33 Rocky Mt. Min. L. Inst. 17-32 (1987).

²⁸26 U.S.C. 6326; Mather and Weisman, "Federal Tax Collection Procedure," BNA Tax Management Portfolios, 404-2nd T.M., A-42, (1991), hereinafter, "Mather and Weisman."

²⁹26 U.S.C. 6325(e); Mather and Weisman at A-42.

³⁰26 U.S.C. 6325(a); Mather and Weisman, A-43.

³¹26 U.S.C. 6325(b), Mather and Weisman, at A-44, 45.

that the amount it ultimately realizes from the property will be increased by issuance of a certificate of subordination.³²

4. Execution of Curative Instruments

Once the decision is made to obtain a curative instrument, it is important to have it executed properly, in order to solve the problem once and for all.

A. Individuals

An individual who is an adult and competent can execute the document on his or her own behalf. The name as shown in the document and in the signature should be identical to the name in which title is held. If a power of attorney, letters of guardianship or other document is needed to authorize execution of a document, this document should also be recorded.

B. Corporations

A document executed on behalf of a corporation may generally be executed by the president or vice president, and in some states, by any officer.³³ As a general rule, the president or vice president's signature should be attested by the secretary or assistant secretary of the corporation and the corporate seal affixed.³⁴ If there is no corporate seal, this should be noted. In some states, by statute or because of title standards, a corporate seal and attestation are not required.³⁵ Also, title examiners vary in their opinions of whether corporate seals and attestations are necessary. However, the common law rule was that a corporate seal was required for the validity of a corporate instrument,³⁶ so requirements that a corporate seal be affixed may still be made if the state does not have a statute making the seal unnecessary.

³²26 U.S.C. 6325(d), Mather and Weisman, at A-46.

³³See, e.g., §38-30-144, C.R.S. stating that an instrument signed by the president or vice president or other head officer is deemed to be executed with proper authority, and §47-10-05.1, N.D.C.C. providing that any officer is presumed to have the authority to execute documents affecting real property on behalf of a corporation.

³⁴See, Harris, supra note 1, at 20-18.

³⁵Bayse, Clearing Land Titles, Sec. 202 (West Publishing Co. 1970).

³⁶Id.

C. Defunct Corporations

A corporation is a creature of statute.³⁷ The corporation acquires its existence as a legal entity and its rights and powers under the statutes of the state in which it is incorporated. A corporation may be dissolved either voluntarily or involuntarily. Voluntary dissolution entails filing articles of dissolution with the Secretary of State in the state of incorporation. Involuntary dissolution can occur under various scenarios, including when a corporation fails to maintain a registered agent with the Secretary of State in its state of incorporation. There has been a comprehensive article written which addresses this issue.³⁸

Upon dissolution, a corporation does not have the power to execute a conveyance. A conveyance by the dissolved corporation is void and of no effect, unless there is a contrary statute granting the power to convey.³⁹ Certain Rocky Mountain states have passed statutes specifying how a dissolved corporation can transfer assets remaining in the corporation.

Often a corporation is incorporated in one state and holds title to property in another state. In this situation, the law of the state of incorporation is most likely the applicable law for determining whether the dissolved corporation has the power to convey its real property.⁴⁰

Under Colorado law, after a corporation is dissolved, title to any corporate property not distributed or disposed of in the dissolution remains in the corporation. The majority of the surviving members of the last acting board of directors as named in the files of the Secretary of State have the authority to convey such corporate property.⁴¹

Once the surviving members of the last acting board of directors are identified from the files of the Secretary of State, these parties must be located. If it is determined that all of the members of the last acting board of directors are deceased, Colorado law provides that any remaining property shall be disposed

³⁷Brend v. Dome Development, Ltd., 418 N.W.2d 610, 611 (N.D. 1988).

³⁸Knutson, "Defunct Companies That Hold Record Title to Mining Properties: Problems and Solutions," 24 Rocky Mt. Min. L. Inst. 377 (1978); hereinafter, "Knutson."

³⁹Id., Patton, Patton on Titles, §405 (1938); 16A W. Fletcher, Cyclopedia Corporations, § 8137 (1979) (hereinafter, "Fletcher").

⁴⁰Knutson, supra note 38, at 385, 390.

⁴¹§ 7-8-122(2), C.R.S.

of in the manner provided by §38-34-104, C.R.S., as if the last surviving director were the last surviving trustee of an express trust. That statute provides that title does not pass to the heirs of the deceased director nor to his personal representative, but instead vests "in the public trustee and his successors in office in the county wherein the real estate is situated."⁴² If the public trustee is unwilling to act, the public trustee can propose a successor trustee on behalf of the defunct corporation.⁴³

In North Dakota, title to any assets remaining in the corporation after dissolution may be transferred by a North Dakota state court.⁴⁴ In Brend v. Dome Development, Ltd., the North Dakota Supreme Court applied this statute. The Brends had purchased land on a contract for deed from Dome Development, Ltd. in 1975. In 1980, the North Dakota Secretary of State issued a certificate of dissolution, which terminated Dome's corporate existence. In 1980, the Vollers obtained a warranty deed from Dome Development, Ltd., which on its face showed that it was executed by the president and secretary of Dome. The Vollers recorded their deed before the Brends recorded their contract for deed. The court held that the Brends owned the land and quieted title in the Brends. The basis for the ruling was that the warranty deed to the Vollers was void as a matter of law, because the corporation had been dissolved.⁴⁵

In North Dakota, there is another statute applicable to confirmatory deeds, assignments or similar interests. This statute provides as follows:

Confirmatory deeds, assignments or similar instruments to evidence a sale, lease, transfer, or other disposition may be signed and delivered at any time in the name of the transferor by its current officers, or if the corporation no longer exists, by its last officers.⁴⁶

In Brend v. Dome Development, Ltd., the court found this statute was not applicable because there was no evidence that the warranty deed to the Vollers "involved a confirmatory deed to effectuate a prior transaction."⁴⁷

⁴²§ 38-34-104, C.R.S.

⁴³Id.

⁴⁴§ 10-19.1-126, N.D.C.C.

⁴⁵Brend v. Dome Development, Ltd., 418 N.W.2d 610 (N.D. 1988).

⁴⁶§ 10-19.1-104(3), N.D.C.C.

⁴⁷Id., at 613.

Wyoming law provides that under voluntary dissolution or administrative dissolution, the corporate existence continues but the corporation cannot carry on any business except to wind up and liquidate its affairs, including disposing of its properties.⁴⁸ Thus, the dissolved corporation should wind up its business and distribute its assets to the shareholders (assuming all liabilities have been paid). Then, the shareholders could execute an oil and gas lease or other curative document.

In a state that does not have a statute which grants authority to transfer property on behalf of a dissolved corporation, the courts may follow the rule that the legal title to land of a dissolved corporation passes to its shareholders as tenants in common.⁴⁹

D. Limited Liability Companies

Wyoming was the first state in the Rocky Mountain region to adopt a limited liability act. Under the act, a limited liability company is a new type of entity created by statute. In addition to Wyoming, limited liability acts have been adopted in Colorado, Kansas and Florida.⁵⁰ A limited liability company can be identified by the words "limited liability company" or "LLC" in the name of the company. A limited liability company has some characteristics of a corporation and some characteristics of a partnership.

A limited liability company shall hold title to its real property in the limited liability company name. Under Colorado's act, conveyances and mortgages are valid and binding upon the limited liability company if they are executed by one or more managers of the limited liability company. The managers are identified in the articles of organization, which are filed with the Secretary of State.⁵¹ A limited liability company does not have a secretary or seal, so there is no need for an attestation of the executing manager's signature.

Wyoming's act provides that management of the limited liability company shall be vested in its members; however, the articles of organization may provide for management of the company in a manager or managers.⁵² Instruments providing for the

⁴⁸§ 17-16-1405(a), § 17-16-1421(c), W.S.A. 1977.

⁴⁹Fletcher, § 8134.

⁵⁰§ 17-15-101, W.S.A.; § 7-80-101, C.R.S.

⁵¹§ 7-80-402, C.R.S.

⁵²§ 17-15-116, W.S.A., 1977.

acquisition, mortgage or disposition of property shall be executed by one or more managers if the limited liability company has provided for management by managers, or by one or more members in a company which has retained management in the members.⁵³ Thus, it would be necessary to examine a copy of the articles of organization of a Wyoming limited liability company to determine who is authorized to execute conveyances of real property.

E. Partnerships

Any one partner of a general partnership may execute a conveyance on behalf of the partnership.⁵⁴ A limited partnership has at least one general partner and one or more limited partners. Only a general partner of the limited partnership may execute conveyances on behalf of the limited partnership.

5. Conclusion

The business aspects of curing title involve analyzing title defects and weighing the costs and benefits of curing the title defects. This paper has highlighted the factors to be considered to evaluate the risk arising from a particular title defect. It has discussed various methods that can be used to cure certain common title defects. Finally, the mechanics of obtaining signatures on curative documents have been reviewed.

⁵³§ 17-15-118, W.S.A., 1977.

⁵⁴§ 7-60-110(1), C.R.S.