

Fixing a seller name problem on its vesting deed

This is the third in a series of a dozen or so articles that come from some years of experience using the Colorado Real Estate Commission-approved Contracts for Purchase and Sale of Real Estate for commercial real estate transactions. The first article dealt with the name of the buyer and the second, the seller's name. We now turn to some solutions if the seller has not changed its name, but the seller's name on its vesting deed (the "grantee name") is not the seller's true name.

In the previous article, we pointed out that, for an entity seller, the name of the seller should be its true name. An entity seller needs to exist, and the only way to determine its existence is to match up the seller with organic documents (e.g., the articles of organization and operating agreement for a limited liability company) for an entity with the seller's name. **Tip:** Once you determine the grantee name for the seller, you should check it against the records of the Secretary of State. That is easy to do at any time, day or night, at <http://www.sos.state.co.us/biz/BusinessEntityCriteriaExt.do>.

A title insurance company will insure title only if it is reasonably certain that the seller's name is that of the entity shown in the Secretary of State records, albeit with a minor variation or discrepancy. **Trap:** If the discrepancy between the seller's name and the name shown in the Secretary of State's records is too great, some remedial work will be required to satisfy the title insurance company.



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Trap: The remedial work for a name variation or discrepancy might not be easy. Title Standard 9.1.2, citing C.R.S. § 38-35-107, provides the good news that a recital in a deed (in the body or the signature) showing that the two names refer to the same person will render title marketable notwithstanding the name variance. The bad news is that the deed has to be on the record for 20 years or more. That delay in effectiveness is not helpful for someone who needs to fix a name problem now in order to get a deal closed.

Tip: The best, but not perfect, remedial work is a correction deed from the original grantor that names the grantee with its true name. Of course, the older the vesting deed, the harder it is to obtain a correction deed. And, to make it even harder, the title insurance company will need evidence that the person signing the correction deed has the authority to do so. That too might be difficult. If the correction deed is unilateral (that is, not signed by the original grantor), Title Standard 3.5.5 states that it cannot effectively "make a substantial change in the name of the grantee." **Trap:** A correction deed is not a perfect remedy. As Title Standard 3.5.7 points out, a correction deed is "not in the chain of title" of

the grantee name, nor in the chain of title of the party with the corrected name. The correction deed may be binding on the parties to it, but it does not provide constructive notice of its contents.

Tip: Another possible remedy for an entity name variation is to record a trade name affidavit under C.R.S. § 7-71-108. See Title Standard 5.3. The seller, using its true name, would adopt the grantee name as a trade name. Furthermore, if the seller is an entity, C.R.S. § 7-71-108 helpfully permits the trade name affidavit also to serve as a statement of authority for the entity pursuant to C.R.S. § 38-30-172. In order to serve as a statement of authority, the document must contain the name of the person authorized to execute instruments on behalf of the entity and any limitation on that person's authority. If the trade name affidavit will also serve as a statement of authority, it is a good idea to identify the document as both a trade name affidavit and a statement of authority. It is also important, in drafting the affidavit, to follow as closely as possible the language contained in the applicable statutes. A trade name affidavit does not always work, however, especially if there is a big time gap between the date the vesting deed was recorded and the date the trade name affidavit was recorded. A title insurance company needs to be comfortable that someone is not hijacking the name contained in the vesting deed (and, in effect, wrongfully claiming title to the property) by recording the trade name

affidavit. Many years ago, some unscrupulous people pretended to have title to mining claims that were titled in the name of dissolved entities. Because the names were available to be filed in the Secretary of State's records, they formed new entities using the names of the mining claim holders. **Trap:** Some people play name games to perpetrate a fraud.

Tip: Another solution to remedy an entity name discrepancy might be a scrivener's error affidavit executed and recorded under C.R.S. § 38-35-109(5). A title insurance company might accept a scrivener's error affidavit if the discrepancy looks like a typographical error, such as "Smith" spelled "Smiht." But placesnamed.com doesn't say there is no person named "Smiht"; it just says it is the 60,166th most popular last name with a 0.00 percent frequency in use. Since title insurance companies are in the insurance business, they take some calculated risks, and one may agree to accept a scrivener's error affidavit that "Smiht" meant "Smith." Ultimately, a scrivener's error affidavit is only as good as it is credible, based on the circumstances and who signs it (given that the person signs it under penalties of perjury). Although the affidavit does not solve the discrepancy, it at least may allow the sale to go forward.

Tip: The lesson that comes out of this discussion about names is simple and important: Get the seller's name right in the contract. Then get it right in the deed at closing. In both cases, you avoid later problems.▲