

Signing Authority and Entity Capacity

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Claims? What Claims?

- Why do we get claims on signing authority and entity capacity?
- What do the claims look like?
- What are the consequences?
- How can we stop this?

Types of entities

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Montana Code Annotated 2017

TITLE 35. CORPORATIONS, PARTNERSHIPS, AND ASSOCIATIONS

CHAPTER 1. BUSINESS CORPORATIONS
CHAPTER 2. NONPROFIT CORPORATIONS
CHAPTER 3. RELIGIOUS CORPORATIONS
CHAPTER 4. MONTANA PROFESSIONAL CORPORATION ACT
CHAPTER 5. BUSINESS TRUSTS
CHAPTER 6. VOLUNTARY CORPORATE DISSOLUTION
CHAPTER 7. MONTANA LIMITED LIABILITY COMPANY ACT
CHAPTER 8. MONTANA LIMITED LIABILITY PARTNERSHIP ACT
CHAPTER 9. PARTNERSHIPS IN GENERAL
CHAPTER 10. PARTNERSHIP - USE OF FICTITIOUS NAME
CHAPTER 11. LIMITED PARTNERSHIPS
CHAPTER 12. GENERAL PARTNERSHIPS
CHAPTER 13. COOPERATIVE ASSOCIATIONS
CHAPTER 14. COOPERATIVE ASSOCIATIONS
CHAPTER 15. AGRICULTURAL ASSOCIATIONS
CHAPTER 16. COOPERATIVE AGRICULTURAL MARKETING
CHAPTER 17. RURAL COOPERATIVE UTILITIES
CHAPTER 18. ELECTRICITY BY RURAL COOPERATIVE ACT PROGRAM
CHAPTER 19. COOPERATIVE ASSOCIATIONS
CHAPTER 20. MOUNTAIN AND COLUMBIAN AUTHORITIES

General Requirements

- Good Standing
- Capacity
- Ordinary Course



Watch out for transactions involving:

- Self Dealing
- Foreign Executions
- Use of a Power of Attorney
- Bankruptcy

Good Standing

Check the Montana Secretary of State's Website:



Good Standing

If the selling entity no longer has good standing, is that a deal breaker?

No - the entity may still be able to conduct limited transactions as part of its winding up process. Consult underwriting for a final determination.

If the purchasing / borrowing entity no longer has good standing is that a deal breaker?

Yes, but, the entity can often be reinstated by payment of a fee and filing of forms.

Good Standing - Foreign Entities

Foreign entities (corporations and LLCs) must have a certificate of authority from the Montana Secretary of State in order to own real property unless the property was acquired through a collection of debt and it is disposed of within 5 years.

Capacity - Signature Blocks

Document signatures must properly reflect all entities and the signer's authority or capacity:

Profiteer LLC, a Montana limited liability company

By: The Opportunist Corporation, a Delaware corporation

Its: Manager

By:

Jane Smith, Vice President

The Notary acknowledgement blocks must also properly reflect signer's capacity and all entity names:

Jane Smith as Vice President of The Opportunist Corporation, a Delaware corporation, manager of Profiteer LLC a Montana limited liability company.

Capacity - Documentation

Corporations

- Articles of Incorporation
- By-Laws
- Resolutions or written consents
- Amendments
- Non-Profit Corporations may have additional requirements

Limited Liability Companies

- Articles of Organization
- Operating Agreement
- Amendments

Limited Partnership

- Certificate of Limited Partnership
- Partnership Agreement
- Amendments

Trusts

- Trust Agreement
- Amendments

Ordinary Course of Business

Managers, partners, officers, directors are agents of their entities with authority to carry on their ordinary course of business.

Actions outside of ordinary business do not bind the entity unless authorized by all appropriate parties unless.

We can proceed IF the transaction is approved by 100% of directors, members (not just managers), general and limited partners of a partnership, trustors and beneficiaries of a trust (all equity holders).

Avoid Self-Dealing

The transaction should only benefit the entity or beneficiaries as appropriate.

A mortgage should only benefit the owner of the land unless all directors / shareholders, members, partners, trustors and beneficiaries approve.

Third party verification - long time accountant or attorney for the entity.

Foreign Executions

Signatures on any documentation, including corporate resolutions must be acknowledged pursuant to your underwriter's foreign notarial guidelines.

This might include getting your signer to the consulate, or acceptance of a local notary with Hague Convention Apostille.

We have accepted signatures before a notary in accordance with that country's notary guidelines.



Watch out for transactions where the land to be insured is unoccupied!

Use of a Power of Attorney

Parties signing in a fiduciary capacity should not grant a POA.

Members or Partners signing only on their own behalf can grant a POA. i.e. single member LLCs

Some Trust Agreements specifically allow the Trustee to grant a power of attorney to a third party.

Bankruptcy of an individual (not the entity)

Questions to consider:

- Does the bankruptcy impact the ability of the entity to transact business without a court order.
- Was the property or the entity interest listed in the Schedules of assets and liabilities? How that interest was disclosed?

If the court is attempting to convey property of the entity without the joinder by all other principals, the court will not acquire jurisdiction over the entity and other principals without an Adversary Action being filed against those parties.

Corporations (profit)

Corporate Resolution by Directors

- Certified by Secretary or other Officer
- Are transaction details spelled out? (sales price or loan amount, relevant terms, etc.)
- determine who is authorized to sign

If shareholder consent is required, review it:

- Were they notified of transaction details?



State or federal law may require additional conditions for specific entities including public corporations, railroads, and Indian tribes or tribal entities.

Corporations (non-profit)

Non-profits vary greatly from each other and serve many purposes.

Request the Articles of Incorporation and the Bylaws

Corporations (non-profit)

In reviewing the Articles of Incorporation be on the lookout for:

- Existence or lack of members
- Any duties owed to a national, regional or affiliated entity
- Any reversion of title upon dissolution
- Any reversion of title upon severing affiliation with a national, regional or other entity
- Prohibitions on certain types of transactions

Corporations (non-profit)

In reviewing the ByLaws be on the lookout for:

- Types of officers and their duties
- Different types of governing boards, possibly more than one
- Membership and rights of members
- Steps involved to create binding authority for a transaction

Corporations (non-profit)

Common steps needed for binding decisions:

- Did they hold all necessary meetings?
- Was adequate notice given?
- Was there a quorum?
- Was there a formal resolution?
- Who are the appropriate signers to bind the corporation?
Directors, trustees, officers, pastor?

Corporation Sole

- Created in reliance upon rules or discipline of any religious denomination, society, or church.
- Registered with the Secretary of State
- Request the Articles of Incorporation and Bylaws



Fraudulent persons attempt to use Corporation Sole as a format for avoiding taxes and conducting other frauds.

General Partnerships

Convey or mortgage in the same style or manner in which title was acquired.
All partners must join in the execution of the instrument, or specific authority from other partners must be secured.
Search for liens/judgments against all partners - insufficient proof that a partnership entity existed

Limited Partnerships

General Partner is the agent of the partnership for purposes of carrying on the ordinary business of the partnership.
Limited partners normally do not have any authority to bind a limited partnership.

Limited Liability Companies

Member managed – either:
- unanimous, agreement of all members, or
- percentage identified in Operating Agreement
Managers (might not be members) – either:
- like a general partner of a limited partnership, or
- always subject to consent of members, or
- subject to member consent for certain types of transactions
Officers and/or Boards of Directors – either:
- like a corporation, or
- always subject to member consent, or
- subject to member consent for certain types of transactions.



Main management section of an Operating Agreement may grant a manager authority but a later section may give non-managers a right to consent or deny consent.

Always review the entire operating agreement!

Limited Liability Companies

Statutes do not require an Operating Agreement.

- LLC with a single member generally okay.
- LLC with multiple members - review Certificate of Formation to determine original members. If dealing with an LLC with more than one member, consult your underwriter.

Land Trusts

How do we know we are dealing with a Land Trust?

- Transferable beneficiary interests
- Equity owners hidden from public record

Why? Fraud in an attempt to avoid transfer taxes (where applicable), judgments, and liens against the individual equity holders.

Estate Planning Trusts

- Trust Agreement
 - Intent to create a valid Trust
 - Acceptance by Trustee
 - Parties: Trustee and Beneficiary are identifiable
 - Competency of Settlers and Trustees
 - Duties of Trustee contemplate your transaction (purchase, sale, mortgage)
- Is it a Revocable Trust?
 - If so, run a search on the Settlor(s) name(s) to look for liens, judgments, etc.
- Deed of Property into the Trust

Custodian for an IRA Account

- Individual using IRA funds to purchase land.
- Custodian must hold title for federal tax reasons.
- Individual investor makes all decisions and directs the custodian to act.
- Judgments and liens against the investor will attach to title.

Profit Sharing and Pension/Retirement Plans

- Individual using tax exempt account to purchase land.
- Trustee of the Plan holds title.
- Usually individual investor makes all decisions & directs the trustee to act. Review the agreement between the investor and the trustee.
- Judgments and liens against the investor will attach to title.

Dissolved Entities

Laws of state of formation control

In Montana: A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs.

Administrative / Involuntary Dissolution

Entity continues its existence with powers limited to winding up its affairs

Reinstatement allowed within 5 years – Effect as if never dissolved

If not properly reinstated, the right to regain use of name may be lost



A common response to dissolution when reinstatement is no longer possible is "oh, we will just form a new corporation with the same name"...

Red Flags

- A recent change in the state filings of the entity that adds or deletes parties with authority.
- Recent amendments to the entity documents adding or deleting individuals.
- Variation in name, no matter how minor, in the chain of title or the entity documentation.
- Corporate resolution appointing an “authorized signer” who is not a normal officer.

Red Flags

- A recent conveyance without corresponding financing and title insurance.
- Any transaction that involves a shareholder, member, partner, etc. in their individual capacity.
- When signing parties are located outside the U.S. or the owners reside outside the U.S.

“Real Life” Entity Authority Problem




