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**Death and Resurrection of LLCs and LPs:
Managing and Mismanaging Voluntary and Involuntary
Terminations and Reinstatements**

**Carmen Flores
Elizabeth S. Miller**

Author contact information:
Carmen Flores
Office of the Secretary of State
Austin, Texas

Elizabeth S. Miller
Baylor Law School
Waco, Texas

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Death and Resurrection of LLCs and LPs: Managing (and Mismanaging) Voluntary and Involuntary Terminations and Reinstatements

Introduction

Do any of these sound familiar?

From your client:

I'm no longer doing business, but I still keep getting notices from the Comptroller's office to file my franchise tax report. I just want this thing dead. I have heard that if I simply ignore the notices and don't do anything that the state will dissolve my company for me. I called the Secretary of State's office and they said I need to file documents with the Comptroller and Secretary of State. Why should I go to all that trouble when the state will just forfeit the entity for me anyway?

I own 50% of an LLC and the other 50% partner cannot be found/is in jail/refuses to agree on anything. I just want to get rid of this thing/wash my hands of everything. I heard that I can resign as the registered agent and the state will involuntarily terminate the existence of the entity. Is that true?

From your associate or partner:

Our client came to me and told me he wants to terminate his entity. I checked the Secretary of State's records and found that the entity is in a "forfeited existence" status. What do I need to do to file a voluntary termination? Once the answer is provided, the first question is then followed by: Why should the client make an application for reinstatement, pay additional fees, and file a voluntary termination, when the client doesn't have any assets or any existing claims by or against the company? In short, I don't think that there are any risks to my client that would outweigh the effort/cost.

Our client's existence was forfeited for failure to pay franchise taxes in 2006, but the company has continued to operate since and has a substantial amount of real and personal property, including intangible property such as receivables. This situation came to my attention when we filed suit for the company to collect on a promissory note executed in favor of the company in 2005 that became due in 2011. The maker of the note is arguing that the company cannot sue on the note and that the claim is barred because it was not brought within three years after the company's existence was forfeited. Now that the company's "forfeited existence" has come to my attention, the client and I have many questions. Can the company collect on the note? Where does the company stand with respect to its assets, rights, and liabilities? Does anyone in the company have any personal liability for liabilities incurred in the

business? Can the company reinstate even though it is beyond the three-year post-termination survival period? What effect will a reinstatement have?

The Secretary of State's records show that our client, a limited partnership, was involuntary terminated on April 16, 2010, for failure to file a periodic report. It was reinstated on May 9, 2012. Was its reinstatement retroactive? In other words, did the entity legally exist between April 16, 2010 and May 9, 2012? How does this affect any actions/contracts/agreements that occurred during the time the entity was involuntarily terminated?

Types of Terminations of Filing Entities

Voluntary Termination: A filing entity files a certificate of termination with the Secretary of State (typically following a winding up resulting from a vote by the governing persons and/or owners to wind up or other event requiring winding up). BOC §§ 11.101-11.102.

Involuntary Termination by Secretary of State under BOC: The Secretary of State involuntarily terminates a filing entity for failure to maintain a registered office or registered agent or failure to timely file a required report (e.g., annual report of professional association), pay a fee or penalty, or cure the nonpayment or dishonor of a filing fee in connection with the filing of a certificate of formation. BOC §§ 11.251-11.252.

Forfeiture Under Tax Code: The Secretary of State forfeits a taxable entity's charter or certificate if the Comptroller has forfeited the entity's privileges for failure to file a required report or pay franchise tax or penalty and has notified the Secretary of State that the entity has not revived its privileges within 120 days after the forfeiture of its privileges. Tax Code §§ 171.251, 171.2515, 171.309-171.311, 171.3125.

Specific Effects Under Tax Code:

Sec. 171.252. EFFECTS OF FORFEITURE. If the corporate privileges of a corporation are forfeited under this subchapter:

(1) the corporation shall be denied the right to sue or defend in a court of this state; and

(2) each director or officer of the corporation is liable for a debt of the corporation as provided by Section 171.255 of this code.

Sec. 171.253. SUIT ON CAUSE OF ACTION ARISING BEFORE FORFEITURE. In a suit against a corporation on a cause of action arising before the forfeiture of the corporate privileges of the corporation, affirmative relief may not be granted to the corporation unless its corporate privileges are revived under this chapter.

Sec. 171.255. LIABILITY OF DIRECTOR AND OFFICERS. (a) If the corporate privileges of a corporation are forfeited for the failure to file a report or pay a tax or

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