The Walking Dead: Forfeitures and Involuntary Terminations of Filing Entities

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Texas Commission on Environmental Quality
October 25, 2021

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I. Introduction

There are numerous statutory provisions pursuant to which the State of Texas may administratively forfeit or terminate the existence of a Texas business entity based on the entity's failure to comply with specified requirements of law (such as maintaining a registered agent, filing certain reports, or complying with franchise tax obligations). Sometimes an entity will choose to allow the state to administratively terminate the entity rather than following the procedure for a voluntary winding up and termination. On the other hand, it is often the case that a forfeited or involuntarily terminated entity is unaware of the forfeiture or involuntary termination, and the entity continues to carry on its business. Many questions arise in connection with these situations, and the answers vary depending upon the particular context in which the issues arise. As reflected below, there are numerous statutory provisions under which forfeiture or involuntary termination may occur. At times, the interplay between various statutory provisions is unclear, and amendments to the statutes over the years, including several amendments to Chapter 11 of the Texas Business Organizations Code in 2021, may impact the analysis in significant respects.

II. Types of Forfeitures and Involuntary Terminations of Filing Entities

A. Forfeiture of Taxable Entity 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.

B. Involuntary Termination of Filing Entity by Secretary of State Under Chapter 11 of Business Organizations Code

The Secretary of State involuntarily terminates the existence of a filing entity for failure to maintain a registered office or registered agent or failure to timely file a required report (note that forfeiture of a limited partnership or nonprofit corporation for failure to file its periodic report occurs under the more specific provisions of Chapter 153 or Chapter 22), 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.

In the past, there has often been confusion about whether a termination arising from failure to pay franchise taxes was effectuated under the Tax Code or Article 7.01 of the Texas Business Corporation Act (TBCA), the predecessor to Section 11.251 of the Business Organizations Code (BOC). Even though Article 7.01 of the TBCA provided that failure to pay franchise taxes was a ground for involuntary dissolution by the Secretary of State under Article 7.01, it has long been the practice of the Secretary of State to proceed against a corporation that failed to pay its franchise tax by forfeiting the corporation's charter as provided under the Tax Code (after notification by the

Comptroller that the corporation's privileges had been forfeited) rather than involuntarily dissolving the corporation under Article 7.01. There should be less confusion under current law in this regard since, unlike Article 7.01 of the TBCA, Section 11.251 of the BOC does not specify failure to pay franchise taxes as a ground for involuntary termination under the BOC.

C. Involuntary Termination of Limited Partnership by Secretary of State Under Chapter 153 of Business Organizations Code

The Secretary of State forfeits a limited partnership's right to transact business and ultimately terminates its certificate of formation if the limited partnership fails to file a periodic report required by Section 153.301 of the BOC. BOC §§ 153.307-153.311. Most limited partnerships are required to file an annual report in connection with the annual franchise tax filing, but are no longer required to file periodic reports under the BOC. A limited partnership that is not a taxable entity under the Tax Code (by virtue of being exempt from the franchise tax as a "passive entity") will still be subject to the periodic reporting requirements of the BOC. BOC § 153.301.

D. Involuntary Termination of Nonprofit Corporation by Secretary of State Under Chapter 22 of Business Organizations Code

The Secretary of State forfeits a nonprofit corporation's right to conduct affairs and ultimately involuntarily terminates the nonprofit corporation if the corporation fails to file its periodic report. BOC §§ 22.360-22.364.

E. Winding Up and Termination Pursuant to Judicial Proceedings

Statutory provisions that provide for winding up and/or termination of entities pursuant to judicial proceedings include the following: involuntary winding up and termination by judicial proceeding brought by Attorney General under BOC § 11.301; judicial decree of winding up on application of partner of partnership or member of limited liability company under BOC § 11.314; liquidating receivership and judicial decree of involuntary termination under BOC §§ 11.405, 11.412; suit by Attorney General under Tax Code § 171.303 to forfeit charter of taxable entity if ground exists for forfeiture. These judicial winding up and termination proceedings are beyond the scope of this paper.

F. Termination of LLP Registration as Distinguished from Winding Up and Termination of Underlying Partnership

The voluntary or involuntary termination of a partnership's registration as a limited liability partnership (LLP) does not terminate the partnership itself or require the winding up of the partnership. The liability protection provided to the partners by the LLP registration would cease upon termination of the LLP registration, but the underlying general partnership or limited partnership would continue to exist without the LLP feature. A general partnership, even a general partnership that has registered as an LLP, is not a "filing entity" under the BOC, and the involuntary termination provisions of the BOC that apply to "filing entities" thus do not apply to a general partnership. The forfeiture provisions of the Tax Code apply to "taxable entities," which include general partnerships that are LLPs or that have an owner that is not a natural person, but the manner

in which Section 171.309 of the Tax Code applies to a general partnership is not clear inasmuch as a general partnership does not file a charter or certificate with the Secretary of State.

G. Forfeiture and Involuntary Termination of Foreign Entity's Registration to Transact Business in Texas

Some of the provisions discussed in this paper apply to foreign entities registered to transact business in Texas and provide for forfeiture of privileges and termination of a foreign entity's registration to transact business in Texas. The focus of this paper is on forfeiture and involuntary termination provisions as they apply to domestic filing entities.

III. Effects of Forfeitures and Involuntary Terminations

A. Specific Effects of Forfeiture of Privileges and Charter of Taxable Entity 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 penalty, each director or officer of the corporation is liable for each debt of the corporation that is created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived. The liability includes liability for any tax or penalty imposed by this chapter on the corporation that becomes due and payable after the date of the forfeiture.
(b) The liability of a director or officer is in the same manner and to the same extent as if the director or officer were a partner and the corporation were a partnership.
(c) A director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred:
(1) over the director's objection; or
(2) without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the affairs of the corporation would not have revealed the intention to create the debt.
(d) If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived under this chapter, the liability under this section of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges.

> Sec. 171.2515. FORFEITURE OF RIGHT OF TAXABLE ENTITY TO TRANSACT BUSINESS IN THIS STATE.
> ...
> (b) The provisions of this subchapter, including Section 171.255, that apply to the forfeiture of corporate privileges apply to the forfeiture of a taxable entity's right to transact business in this state.
>
> Sec. 171.302. CERTIFICATION BY COMPTROLLER. After the 120th day after the date that the corporate privileges of a corporation are forfeited under this chapter, the comptroller shall certify the name of the corporation to the attorney general and the secretary of state.
>
> Sec. 171.309. FORFEITURE BY SECRETARY OF STATE. The secretary of state may forfeit the charter, certificate, or registration of a taxable entity if:
> (1) the secretary receives the comptroller's certification under Section 171.302; and
> (2) the taxable entity does not revive its forfeited privileges within 120 days after the date that the privileges were forfeited.

Notwithstanding the language in Section 171.252(1) that appears to preclude a corporation whose privileges have been forfeited from defending an action, there is case law interpreting the language to prohibit such a corporation from bringing cross actions but not from merely defending itself or appealing an adverse judgment. *See Zaidi v. Shah*, 502 S.W.3d 434 (Tex. App.—Houston [14th Dist.] 2016, pet. denied); *Cognata v. Down Hole Injection, Inc.*, 375 S.W.3d 370 (Tex. App.—Houston [14th Dist.] 2012, pet. denied); *Cruse v. O'Quinn*, 273 S.W.3d 766, 770 (Tex. App.—Houston [14th Dist.] 2008, pet. denied); *Mello v. A.M.F., Inc.*, 7 S.W.3d 329, 331 (Tex. App.—Beaumont 1999, pet. denied); *Midwest Mech. Contractors, Inc. v. Commonwealth Constr. Co.*, 801 F.2d 748, 752 (5th Cir. 1986); *Bryan v. Cleveland Sand & Gravel Co.*, 139 S.W.2d 612, 613 (Tex. Civ. App.—Beaumont 1940, writ ref'd); *but see Aetna Life Ins. Co. v. Warren Med. Imaging, LLC*, No. 4:13-CV-102, 2014 WL 12768837 (E.D. Tex. Aug. 22, 2014) (stating that defendant, which had forfeited its entity status in Texas, had no right to defend and that plaintiff was thus entitled to summary judgment and dismissing defendant's counterclaims with prejudice because defendant was not entitled to sue). Courts have interpreted Section 171.252 and its predecessor to preclude an entity only from filing suit after forfeiting its right to do business, not to prohibit it from continuing an action filed before its privileges were forfeited. *See Waterway Ranch, LLC v. City of Annetta*, 411 S.W.3d 667 (Tex. App.—Fort Worth 2013, no pet.); *Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397 (5th Cir. 2008); *Scogin v. Texas Eagle Ford Shale Magazine*, Civil No. 2:14-CV-478, 2016 WL 632031 (S.D. Tex. Feb. 17, 2016).

In *Sequel Group, Inc. v. Wilmington Savings Fund Society FSB*, No. 3:16-CV-02056-N (BF), 2017 WL 3704833 (N.D. Tex. June 6, 2017), the court pointed to a distinction between a federal court's application of Section 171.252 to deprive a forfeited corporation of capacity to sue in a case based on diversity jurisdiction and a case based on federal question jurisdiction because there is authority indicating that a federal court need not apply a forum state's restrictions on a corporation's ability to sue in a suit based on federal question jurisdiction. There was no discussion of this distinction in *RN'D Productions, Inc. v. Walt Disney Records Direct*, No. H-17-142, 2017 WL 4890022 (S.D. Tex. Oct. 30, 2017), a copyright infringement case in which the court stated that a

corporation's capacity to sue is determined by the law of its state of formation pursuant to Rule 17(b)(2) of the Federal Rules of Civil Procedure and that the plaintiff thus lacked capacity to sue under Section 171.252 due to its forfeited status.

A forfeiture of corporate privileges deprives a corporation of the capacity to sue but does not make a suit void, and the lack of capacity is waived unless challenged by a verified plea. *Cognata v. Down Hole Injection, Inc.*, 375 S.W.3d 370, 376 (Tex. App.–Houston [14th Dist.] 2012, pet. denied). If a forfeited corporation's capacity to sue is challenged, abatement rather than dismissal is favored, and the corporation is afforded the opportunity to cure the defect by paying the delinquent taxes or requesting that the forfeiture be set aside. *Id.; see also Acme Color Art Priming Co., Inc. v. Brown*, 488 S.W. 2d 507, 507 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.). The denial of the right to sue or defend applies by its plain terms only to the corporation and does not apply to directors and officers; the penalty applicable to an officer or director under the forfeiture provision is personal liability for corporate debts under Section 171.255. *Suntide Sandpit, Inc. v. H & H Sand and Gravel, Inc.*, No. 13-11-00323-CV, 2012 WL 2929605 (Tex. App.—Corpus Christi July 19, 2012, pet. denied).

In *Guardian Life Insurance Company of America v. Kinder*, Civil Action No. H-06-1745, 2008 WL 243707 (S.D. Tex. Jan. 29, 2008), the court held that the right of a corporation whose charter had been forfeited under the Tax Code to defend itself and bring counterclaims in a suit brought within the three-year period under TBCA Article 7.12 controlled over the denial of the forfeited corporation's right to sue or defend under the Tax Code. *See also In re Bros. Oil & Equip., Inc.,* No. 03-17-00349-CV, 2017 WL 3902617 (Tex. App.—Austin Aug. 22, 2017, no pet.) (holding that reinstatement of forfeited corporation enabled it to defend and assert counterclaims regardless of when claims arose, but noting that corporation terminated by forfeiture of its charter continues to exist after termination for limited purposes of prosecuting and defending legal actions so that corporation had right to defend itself and file counterclaims within three years after its termination under BOC Section 11.356 even if it had not been reinstated); *Donald v. Rhone*, 489 S.W.3d 584, 587 n. 5 (Tex. App.—Texarkana 2016, no pet.) (noting that trial court's holding that forfeited corporation was barred from asserting affirmative claims under Sections 171.252 and 171.253 failed to take into account BOC Section 11.356, which permits a terminated corporation to prosecute and defend legal actions after its termination). In another case discussing the interplay between the tax forfeiture provisions of the Tax Code and Article 7.12 of the TBCA, the court concluded that Section 171.251 of the Tax Code (barring a corporation from suing in a court of this state) rather than Article 7.12A of the TBCA (permitting a dissolved corporation to bring a suit during the three years following dissolution) controlled where a corporation filed suit after its privileges had been forfeited by the Comptroller and before its charter was forfeited by the Secretary of State. *Sun Packing, Inc. v. XenaCare Holdings, Inc.*, 924 F.Supp.2d 749 (S.D. Tex. 2012). It is not clear why the court in *Sun Packing* was applying Article 7.12 of the TBCA, which had expired at the time in question, but presumably the court would have reached the same result applying Section 11.356(a) of the BOC.

Whether a shareholder of a forfeited corporation may sue individually or derivatively on behalf of the corporation to enforce a right belonging to the corporation has been addressed in a number of cases over the years. The court in *Robinette v. Merrill Lynch, Pierce, Fenner & Smith*, Civil Action Nos. 3:96-CV-2923-D, 3:97-CV-0353-D, 2004 WL 6389547 (N.D. Tex. Nov. 23, 2004), discussed these cases at some length and concluded that the cases established the following principles: (1) forfeiture of a corporation's charter does not prohibit stockholders from obtaining

relief from fraudulent and oppressive acts of corporate directors or prevent stockholders from redressing wrongs that injure their right and interest in corporate assets; (2) suit can only be maintained by a stockholder for the benefit of a corporation where the cause of action is based on fraud, ultra vires acts, or negligence of the directors; (3) an incapacitated corporation cannot bring a cause of action that is an ordinary one that accrues to the corporation in the due course of business, and such a suit cannot be maintained for the corporation's benefit by an agent, assignee, or stockholder; (4) when a corporation has been denied the right to use the courts, property the corporation holds in trust for its stockholders is not subject to appropriation by third parties, and suit must be brought by the individual stockholders in their own right; and (5) forfeiture of a corporate charter does not destroy or forfeit the property of the corporation, and the stockholders, who are the beneficial owners of the property, are authorized to prosecute or defend such actions in court as are necessary to protect their property rights. The court did not discuss whether Article 7.12 of the TBCA (recodified in Sections 11.351-11.359 of the BOC) would alter the reasoning employed in the cases from which these principles were derived. *See Carter v. Harvey*, 525 S.W.3d 420 (Tex. App.—Fort Worth 2017, no pet.) (holding claim for equitable adjustment of forfeited corporation's real property was derivative rather than direct claim and could not be asserted by shareholder as successor to forfeited corporation after expiration of statutory three-year wind-up period, distinguishing between "ascertainable or previously asserted claims that have the character of a tangible property asset and that have devolved by law or have been assigned to the shareholders" and "an unasserted breach of contract claim," and characterizing equitable adjustment claim as "unfixed, unasserted, inchoate right" at time of corporation's dissolution). See further discussion in Section IV *infra* of the 1993 amendment to Article 7.12 of the TBCA that expanded the definition of a "dissolved corporation" under Article 7.12 to include a corporation whose charter has been forfeited under the Tax Code.

Note that once a taxable entity's privileges are forfeited (the first step in a forfeiture of the entity's charter or certificate of formation), Section 171.255 provides that the personal liability of officers and directors extends back to debts created or incurred after the report, tax, or penalty was due. In *Breakwater Advanced Manufacturing, LLC v. East Texas Machine Works, Inc.*, No. 12-19-00013-CV, 2020 WL 827139 (Tex. App.—Tyler Feb. 19, 2020, pet. denied), the court stated that there is a split of authority as to whether personal liability is imposed only for debts incurred after actual forfeiture of the entity's right to transact business or if liability is imposed for debts incurred between the date the tax, report, or penalty was due and the date of the actual forfeiture. The Tyler Court of Appeals in that case agreed with opinions by the Dallas Court of Appeals that the statute imposes liability for debts incurred before forfeiture and after the date the tax, report, or penalty was due but not filed or paid.

Reinstatement of the entity after the forfeiture of its privileges and charter does not extinguish the liability of a director or officer for debts created or incurred before the reinstatement. Tex. Tax Code § 171.255(d); *see also* BOC § 11.254(b). Although the provisions are expressed in corporate terms, they also apply to other taxable entities, such as limited partnerships and limited liability companies, pursuant to Section 171.2515(b). *See Bruce v. Freeman Decorating Servs., Inc.*, No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. denied) (rejecting argument that Section 171.255 only applies to corporations and applying provision to impose liability on individual listed as director of LLC in LLC's Public Information Reports); *Thompson v. Flintrock Feeders, Ltd.*, No. 2:09-CV-0010-J, 2010 WL 11561929 (N.D. Tex. May 10, 2010) (holding that an individual sole member of a member-managed LLC "was liable for the debts

during the time the [LLC's] charter was suspended"). The specific inclusion of liability for "any tax or penalty" imposed by Chapter 171 of the Tax Code after the forfeiture does not limit the scope of the debts for which directors and officers have personal liability under Section 171.255. The statute expressly provides that officers and directors are liable for "each debt" incurred under the specified circumstances, in addition to the liability for taxes and penalties. *See Bosch v. Cirro Group, Inc.*, No. 05-11-01625-CV, 2012 WL 5949481 (Tex. App.—Dallas Nov. 28, 2012, pet. denied).

In *MetroPCS v. Fiesta Cell Phone & Dish Network, Inc.*, No. H-16-3573, 2017 WL 3424990 (S.D. Tex. Aug. 9, 2017), the court concluded that the plaintiff was not entitled to summary judgment against an individual who was identified as an officer in a forfeited corporation's Public Information Report filed in April 2011 where there was no evidence that the individual was an officer in 2017 when the debt was created. *But see Bruce v. Freeman Decorating Servs., Inc.*, No. 14-10-00611-CV, 2011 WL 3585619 (Tex. App.—Houston [14th Dist.] Aug. 16, 2011, pet. denied) (holding individual who was listed as director of LLC in LLC's 2006 Public Information Report could reasonably be inferred to be director in 2007 at time debt at issue was created or incurred—only eight months after report was filed—and was thus personally liable for amounts owed for services provided to LLC after forfeiture).

Over the years, courts have wrestled with when a debt was created or incurred for purposes of Section 171.255 or its statutory predecessor. *See, e.g.*, *Schwab v. Schlumberger Well Surveying Corp.*, 154 Tex. 379, 198 S.W.2d 79 (1946) (holding debt was created or incurred when original promissory note was executed before forfeiture rather than when subsequent renewal notes were executed); *Cain v. State*, 882 S.W.2d 515 (Tex. App.—Austin 1994, no writ) (applying rule of strict construction and holding debt for amounts expended by State of Texas to plug wells was created or incurred when state expended funds, rather than date of prior authorization by state to expend funds to plug wells, because debt was unliquidated obligation prior to actual expenditure); *River Oaks Shopping Center v. Pagan*, 712 S.W.2d 190 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (holding post-forfeiture breach and damages related back to execution of lease so that debt was created or incurred on date of execution of lease); *Rogers v. Adler*, 697 S.W.2d 674 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (holding debt was created when contract was entered into prior to forfeiture rather than when judgment was entered after forfeiture); *Curry Auto Leasing, Inc. v. Byrd*, 683 S.W.2d 109 (Tex. App.—Dallas 1984, no writ) (holding corporate debts arising from failure to adhere to leasing contract related back to, and were created or incurred, when rental agreement was entered into rather than at the time defaults occurred).

Numerous recent cases have examined the issue of when a debt was created or incurred for purposes of liability of officers and directors under Section 171.255. In *Hovel v. Batzri*, 490 S.W.3d 132 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), homeowners who had contracted with an LLC to build their home sued the LLC homebuilder for breach of contract and DTPA violations, and the LLC's privileges were forfeited due to failure to pay franchise taxes. The forfeiture occurred after the suit was filed but before any determination of liability. The plaintiffs obtained a default judgment against the LLC and then sought to hold the sole manager of the LLC personally liable for the LLC's debt under Section 171.255 of the Texas Tax Code. The trial court granted the manager's motion for summary judgment, and the court of appeals affirmed because there was no dispute that the contract was executed pre-forfeiture, and the breach, tortious conduct, and injury occurred pre-forfeiture. The plaintiffs argued that a debt does not come into existence until it is liquidated, relying in part on a narrow definition of "debt" adopted by the legislature in 1987. According to the plaintiffs, their

damages remained unliquidated until they obtained the default judgment, and no debt was created or incurred until the default judgment issued during the forfeiture. Conversely, the LLC manager argued that the 1987 narrow definition of "debt" is no longer significant because the legislation enacting it has been repealed. The manager asserted a broad definition of "debt" that includes unliquidated obligations such that the LLC's debt was created or incurred before the forfeiture, when the acts or omissions that gave rise to the plaintiffs' claim occurred, and the default judgment related back to that time. Characterizing Section 171.255 as a penal statute such that any ambiguity must be "strictly construed" in favor of the party penalized by it, the court discussed numerous cases decided before the adoption of the definition of "debt" in 1987. The pre-1987 case law strictly construed the statute to treat debts as created or incurred at the time the relevant contractual obligations were incurred rather than at a later date when the obligations were breached or became due. Consistent with strict construction and this broad approach to "create or incur," the pre-1987 case law applied a "relation-back" doctrine. Next the court of appeals discussed the legislature's adoption and repeal of a narrow definition of "debt" and the subsequent case law in which the "relation-back" doctrine was applied inconsistently. The definition of "debt" adopted in the Tax Code in 1987 was "any legally enforceable obligation measured in a certain amount of money which must be performed or paid within an ascertainable period of time or on demand." This definition precluded corporations from deducting their contingent and unfixed losses from their taxable corporate surplus and thus increased revenue for the state. The definition also eliminated the ambiguity in "debt" and precluded courts from giving it a broad meaning. In 2008, the legislature repealed the definition of "debt" when it amended the Tax Code to adopt an entirely new method of calculating the franchise tax. After the repeal of the definition, the "relation-back" doctrine re-emerged, and courts again concluded that a judgment debt is created or incurred when the conduct or contract occurs, even if the obligation is unliquidated at that time. With the historical context above in mind, the court of appeals considered whether the trial court erred by concluding that the LLC's debt in this case was not a debt created or incurred during forfeiture and, as a result, the manager did not have individual liability under Section 171.255. Applying the rule of strict construction and relying on pre-1987 Texas Supreme Court case law defining the terms "created" and "incurred," the court of appeals in this case concluded that the debt evidenced by the default judgment obtained by the plaintiffs against the LLC was created or incurred pre-forfeiture at the time that the parties established their contractual and other obligations. Thus, the court held that the manager was not individually liable for the LLC's debt. The court identified public policy goals of Section 171.255 and concluded that its interpretation did not run afoul of these public policy considerations.

In a vigorous and lengthy dissenting opinion in *Hovel v. Batzri*, Justice Keyes disagreed with the majority as to how the principle of "strict construction" affects the interpretation of Section 171.255 as well as how to apply the case law defining "debt" for purposes of the statute. Justice Keyes would have held the manager personally liable in this case on the basis that this was a judgment debt for wrongful acts of the entity that occurred prior to forfeiture with knowledge of the manager although the debt was not reduced to a legally enforceable obligation until after forfeiture. In Justice Keyes' view, this is one of the types of debts for which officers and directors may be held personally liable under Section 171.255.

In *Taylor v. First Community Credit Union*, 316 S.W.3d 863 (Tex. App.—Houston [14th Dist.] 2010, no pet.), the court of appeals held an officer/director of a forfeited automobile dealership personally liable to a credit union for damages resulting from the corporation's breach of a dealership

agreement on the basis that the debt was created or incurred when the agreement was breached, which occurred after the dealership's franchise tax report was due, rather than when the dealership entered into the contract in 2003, before the franchise tax was due. The court discussed a number of other cases dealing with the timing of when a debt is created or incurred for purposes of Section 171.255, and the court found earlier cases in which courts had based the creation or incurrence on the execution of the original contract were either distinguishable on their facts or impacted by a definition of "debt" adopted by the legislature in 1987. This definition stated that a "debt" is "any legally enforceable obligation measured in a certain amount of money which must be performed or paid within an ascertainable period of time or on demand." A holding that the execution of the dealer agreement in this case created a debt under Section 171.255 when no breach had occurred and no money was owed at that time would have conflicted with the statutory definition, and the court therefore declined to follow case law pre-dating the definition that would have equated the creation of the debt with entering into the contract. As discussed in *Hovel v. Batzri*, the definition relied upon by the court in *Taylor* was repealed in 2008 when the new margin tax provisions took effect, and there is currently no statutory definition of "debt" in Chapter 171 of the Tax Code.

Other recent cases in which the timing of the creation or incurrence of a contractual debt for purposes of Section 171.255 has been addressed include: *Haynes v. Gay*, No. 05-17-00136-CV, 2018 WL 774334 (Tex. App.—Dallas Feb. 8, 2018, no pet.) (stating that debt arising out of performance of contract is created or incurred when contract is entered into and holding members of forfeited LLC were not personally liable for debt at issue because record established debt of forfeited LLC was created or incurred prior to forfeiture); *B Choice Ltd. v. Epicentre Dev. Ass'n LLC*, No. H-14-2096, 2017 WL 1227313 (S.D. Tex. Mar. 3, 2017), report and recommendation adopted, 2017 WL 1160512 (S.D. Tex. Mar. 29, 2017) (relying on *Hovel v. Batzri* and "relation back" doctrine and concluding that forfeited LLC's liability on promissory note was incurred before forfeiture of its privileges when it signed promissory note rather than at time of partial summary judgment after forfeiture); *Viajes Gerpa, S.A. v. Fazeli*, 522 S.W.3d 524 (Tex. App.—Houston [14th Dist.] 2016, pet. denied) (discussing "relation back" theory and effect of repeal of statutory definition of "debt" and concluding that debt under MSA was created or incurred before forfeiture even assuming without deciding that "relation back" theory did not apply because default existed before forfeiture); *Lindley v. Performance Food Grp. of Texas, L.P.*, No. 04-16-00219-CV, 2016 WL 6242835 (Tex. App.—San Antonio Oct. 26, 2016, no pet.) (relying on *Schwab v. Schlumberger* and distinguishing cases such as *Curry Auto Leasing* in which courts held that debts were incurred when initial contract or lease was signed; holding officer was personally liable for purchases of goods delivered when corporate charter was forfeited because debt on open account is incurred when goods or services are delivered or performed); *Super Ventures, Inc. v. Chaudry*, 501 S.W.3d 121 (Tex. App.—Fort Worth 2016, no pet.) (holding corporate officer personally liable under option provision of lease amendment because debt for breach of contract is created or incurred when contract in question is executed and lease amendment at issue was signed after corporation's franchise tax report was due and before corporation's privileges were reinstated); *Willis v. BPMT, LLC*, 471 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (relying on *Schwab* and discussing effect of repeal of definition of "debt" and holding that debts arising from obligations under lease agreement were created when lease agreement was entered into rather than later time when amount of money owed became certain); *Bon Amour Int'l, LLC v. Premier Place of Dallas, LLC*, No. 05-14-00816-CV, 2015 WL 4736784 (Tex. App.—Dallas Aug. 11, 2015, no pet.) (relying on *Beesley v. Hydrocarbon Separation* and holding officer of LLC was not personally liable for past due rent and other charges due in 2013 under lease executed in 2011 because LLC was in good standing when lease was entered

into); *Rossmann v. Bishop Colorado Retail Plaza, L.P.*, 455 S.W.3d 797 (Tex. App.—Dallas 2015, pet. denied) (holding debt for damages for breach of lease agreement, including costs of re-letting, was created or incurred when lease was entered into in 2010, not in 2012 after forfeiture of lessee); (*Beesley v. Hydrocarbon Separation, Inc.*, 358 S.W.3d 415, 423 (Tex. App.—Dallas 2012, no pet.) (discussing other cases in which debt was deemed to be created or incurred when underlying contract was originally entered into rather than when later breach, judgment, or renewal occurred and concluding debt was created when employment contract that required yearly payments was signed rather than when each payment became due); *Endsley Elec., Inc. v. Altech, Inc.*, 378 S.W.3d 15 (Tex. App.—Texarkana 2012, no pet.) (holding there was no evidence that liability was created or incurred after corporate forfeiture so as to hold officers of electrical subcontractor liable under Section 171.255 where contract between contractor and subcontractor was signed in October 2008 and completed in March or April 2010, suit was filed on April 14, 2010, subcontractor's charter was forfeited under Section 171.309 for failure to pay franchise taxes on January 28, 2011, and judgment was entered in August 2011).

In *Tryco Enterprises, Inc. v. Robinson*, 390 S.W.3d 497 (Tex. App.—Houston [1st Dist.] 2012, pet. dism'd), concurring and dissenting justices expressed differing views on whether James and Sharon Dixon, the owners and officers of a forfeited corporation, had personal liability under Section 171.255 of the Tax Code with respect to amounts owed by the corporation on a judgment stemming from violations of the Fair Labor Standards Act (FLSA). The corporation's charter was forfeited after the jury verdict and shortly before the judgment was entered. The majority found it unnecessary to reach the issue of the Dixons' liability under Section 171.255 because it concluded the record supported personal liability based on veil-piercing findings. The dissenting justice did not believe that the record supported personal liability on veil-piercing grounds and thus analyzed whether the Dixons had personal liability as officers under Section 171.255, i.e., whether the FLSA liability at issue was a debt "created or incurred in this state after the date on which the report, tax, or penalty is due and before the corporate privileges are revived." The dissenting justice concluded that the debt for unpaid overtime wages was created or incurred on the paydays for the pay periods in which the overtime labor was performed and that there was thus no liability for these amounts under Section 171.255 since the paydays preceded the event occasioning the forfeiture of corporate privileges. On the other hand, the dissent concluded that the Dixons did have personal liability under Section 171.255 for the statutory penalties and attorney's fees included in the judgment, reasoning that these amounts were not created or incurred until the trial court determined the amount of these awards in its judgment, which was entered after the forfeiture. In a lengthy analysis of the application of Section 171.255, the concurring justice concluded that the Dixons had personal liability for the entire amount of damages in the FLSA suit on the basis that the debt was not created until the judgment was entered after the corporation's forfeiture. The concurring justice reasoned that the damages were not the type of debt to which the relation-back doctrine applies and were not a sum certain (as required under the definition of "debt" in effect at the time) until the judgment in the FLSA lawsuit was entered.

In *Segarra v. Implemetrics Inc.*, Civil Action No. 4:13-CV-217, 2013 WL 5936602 (S.D. Tex. Nov. 5, 2013), the court held that the defendant corporation's "debt" to the plaintiff for violations of Title VII of the Civil Rights Act of 1964 and the Family and Medical Leave Act would arise if and when the court entered judgment on the claims. The plaintiff's allegations of discrimination spanned from August 2009 until September 2011. The corporation forfeited its privileges on February 8, 2008, and revived its privileges on October 24, 2011. The plaintiff thus

sought to hold two individuals who were directors and officers of the corporation liable under Section 171.255 for the corporation's discrimination. The court likened a judgment debt more to an administrative penalty than to a contract, and the court stated that administrative penalties have been found to be created or incurred when assessed, whereas contractual debts are incurred when the parties enter into the contract regardless of the date of eventual default or judgment. Thus, the court dismissed the claims against the individual officers and directors and stated that the plaintiff could sue them to hold them personally liable under Section 171.255 if he obtained a judgment against the corporation and the corporation's privileges were forfeited at that time. *See also Lucky Dawg Movers, Inc. v. Wee Haul, Inc.*, No. 05-10-00222-CV, 2011 WL 5009792 (Tex. App.—Dallas Oct. 21, 2011, no pet.) (addressing whether a judgment rendered after corporate privileges were reinstated based on conduct that occurred while the privileges were forfeited could constitute a "debt" (under the repealed definition of "debt" that was in effect at the time of the suit) for which a director could be personally liable and concluding that the damages sustained as a result of the corporation's deceptive acts were assessed only when the jury returned its verdict, not at the time of the acts).

In two cases involving penalties for violations of the Natural Resources Code and rules promulgated thereunder relating to failure to plug oil wells after cessation of drilling, the Austin Court of Appeals concluded that the debt was incurred when the corporations were ordered to pay for administrative violations rather than when the corporations actually violated the rule by failing to plug the wells. *See Serna v. State*, 877 S.W.2d 516 (Tex. App.—Austin 1994, writ denied); *Jonnet v. State*, 877 S.W.2d 520 (Tex. App.—Austin 1994, writ denied). In *Serna*, the court held an officer liable for the penalty assessed by the Commission in its administrative order and the additional penalties assessed by the court in a subsequent action after the forfeited corporation's continuing failure to plug the wells at issue. In *Jonnet*, the court likewise held corporate officers liable for penalties incurred for ongoing failure to plug abandoned oil wells after an administrative order was issued, but in *Jonnet*, there was both a lengthy concurring opinion and a dissenting opinion. The principal opinion in *Jonnet* distinguished the well-plugging violation penalties from a corporation's debt for unpaid unemployment compensation fund contributions that the court found in a previous case was created or incurred on the date that wages were paid to the employees. *See Wilburn v. State*, 824 S.W.2d 755 (Tex. App.—Austin 1992, no writ). In *Wilburn*, the court rejected arguments that the debt was created or incurred either on the date when the unemployment contributions were due or on a daily basis, holding that the debt was created or incurred each payday. *Wilburn*, 824 S.W.2d at 764. The court reached its conclusion based on the provision of the Texas Unemployment Compensation Act that makes employers liable only for wages actually paid. In contrast, the Natural Resources Code specifically provides that each day a violation continues may be considered a separate violation for purposes of penalty assessments.

In *Cain v. State*, 882 S.W.2d 515 (Tex. App.—Austin 1994, no writ), the State of Texas sought to recover expenditures incurred by the State in plugging oil wells. The court held that the debt to the State for expenses incurred by the State did not relate back to the date the Commission authorized the expenditure of the funds to plug the wells because the amount of the expenditures was unliquidated at that time. The concurring judge in *Cain* explained: "This is the third in a series of cases decided upon similar facts in which we conclude that a debt created under the well-plugging provisions of the Texas Natural Resources Code may be enforced against individual officers and directors of a defaulting corporation. *See Jonnet v. State*, 877 S.W.2d 520 (Tex.App.—Austin 1994, no writ h.); *Serna v. State*, 877 S.W.2d 516 (Tex.App.—Austin 1994, no writ h.). In both *Jonnet* and *Serna*, we held that pursuant to the statutory scheme provided for in the Code, the key question was

when the statutory liability was created. Since the Commission action in both *Jonnet* and *Serna* post-dated the franchise tax default, we concluded that individual liability under the Tax Code was proper. In the instant case, the statutory scheme under the Natural Resources Code provides that the Commission is empowered to plug wells through the use of state funds. Pursuant to Section 89.083, I would hold that a cause of action for reimbursement of the State is created when the well is actually plugged. Therefore, applying this interpretation to the facts of this case, since all fifty of the wells in question were plugged after the failure to pay franchise taxes, Cain, as an officer and director of Timber Creek, is personally liable for the reimbursement debt." *See also State v. Triax Oil & Gas, Inc.*, 966 S.W.2d 123 (Tex. App.—Austin 1998, no pet.).

In *Anderson Petro-Equipment, Inc. v. State*, No. 03-13-00176-CV, 2013 WL 5858010 (Tex. App.—Austin Oct. 22, 2013, pet. denied), the State of Texas sought to impose liability on a corporate officer for money spent by the state to plug a well drilled by the corporation. The corporation ceased production on the well in 2002, and the corporation became noncompliant with Texas law when it failed to plug the well within 12 months of ceasing production. The corporation's charter was forfeited for failure to pay its franchise taxes in 2005. In 2006, the Texas Railroad Commission sent notice to the corporation to plug the well, and the Commission spent state funds to plug the well in 2009. Later in 2009, the state sued the corporation and an individual officer to recover the money spent to plug the well. The state relied on Section 171.255 to impose liability on the officer. The officer argued that his liability was extinguished when the corporation forfeited its charter. (The court noted that the officer did not contend that Section 171.255 can never be used to impose individual liability for plugging costs, but limited his contention to whether his liability was extinguished when the corporation's charter was forfeited assuming such potential liability exists.) The officer conceded that, for purposes of Section 171.255, the debt was created or incurred long after the corporation's taxes were due and its privileges were forfeited, but the officer argued that his liability, if any, ceased to exist once the corporation's charter was forfeited. The court understood the officer's argument to be that because a corporation could not be liable for a post-dissolution claim under Article 7.12 of the TBCA, neither could an individual officer of the corporation. (The court of appeals concluded earlier in the opinion that the state's claim in this case, though not ripe at the time the corporation's charter was forfeited, was nevertheless an "existing claim" as defined in Article 7.12 at the time of the corporation's dissolution because the facts giving rise to the cause of action occurred before the charter was forfeited. See further discussion *infra* of the interaction between the provisions of the TBCA/BOC and the Tax Code.) The court stated that the officer's argument seemed to conflate the requirements for corporate liability contained in Article 7.12 of the TBCA, which addresses the corporation's liability for "existing claims," with the Tax Code requirements for an officer's individual liability for corporate "debts." The court pointed out that the Tax Code does not make any reference to forfeiture of the corporate charter, and the court found no language in the statute suggesting that an officer is liable only for debts incurred during the window of time after the corporation has failed to pay its franchise taxes but before it has forfeited its charter. The court stated that Section 171.255(a) clearly and unambiguously states that an officer is liable for debts incurred during the time period after the relevant tax was due (for which the privileges are later forfeited) and before the privileges are revived. Because the corporate debt for which the officer was liable in this case was created or incurred after the tax was due and the privileges were never revived, the officer was personally liable.

In *StoneCoat of Texas, LLC v. ProCal Stone Design, LLC*, No. 4:17CV303, 2019 WL 5395569 (E.D. Tex. Jul. 25, 2019), the court denied an LLC officer's motion for summary judgment

on claims asserted against the officer for violations of the Lanham Act. The court discussed the claimant's argument for imposing personal liability on the officer under Section 171.255 of the Tax Code. The claimant produced evidence that the privileges of the LLC were forfeited under the Tax Code and that the forfeited LLC had false statements on its website after its charter was forfeited. Even if the entity was later reinstated as asserted by the entity and its officer, the court stated that the officer would be personally liable for debts incurred during the time period after the tax was due and before the privileges were revived.

In *Vafaiyan v. State*, No. 13-18-00352-CV, 2019 WL 3820418 (Tex. App.—Corpus Christi Aug. 15, 2019, no pet.), a Texas corporation failed to timely file its 2002 franchise tax report and its privileges were forfeited in 2003. Before forfeiture, the corporation was investigated by the Texas Commission on Environmental Quality (TCEQ) for compliance issues with petroleum storage tanks, and four violations were found. The TCEQ issued a default order on June 3, 2003. The order became final, and the corporation failed to pay the penalty assessed in the order, prompting the TCEQ to request the Office of the Attorney General (OAG) to enforce the order. In 2007, the OAG filed suit on behalf of the State to collect the penalty under Tex. Gov. Code § 2001.202. The OAG sued the corporation and Vafaiyan, its registered agent, officer, and director. The trial court entered judgment in favor of the State, and Vafaiyan appealed. On appeal, Vafaiyan argued that he was not personally liable for the penalty imposed. The court of appeals concluded Vafaiyan was personally liable based on Section 171.255. The administrative order was issued on June 3, 2003, and the evidence showed that the corporate status was forfeited from February 14, 2003 until July 9, 2004. The court stated that Vafaiyan, as officer and director, was personally liable for debts incurred during that time, which include penalties.

A bankruptcy court has held that claims against directors and officers arising under Section 171.255 of the Tax Code based on forfeiture of corporate privileges are direct claims belonging to the holders of claims rather than derivative claims of the debtor. *In re University General Hosp. Sys., Inc.*, No. 15-31086-H3-11, 2016 WL 1620219 (Bankr. S.D. Tex. Apr. 20, 2016). Thus, the assertion of such claims did not violate the provision of a Chapter 11 bankruptcy plan that enjoined the assertion of "derivative claims, including claims of third parties asserting alter ego claims, fraudulent transfer claims, guaranty claims, or any type of successor liability based on acts or omissions of the Debtors."

Some courts have concluded that "debts" for which directors and officers may have personal liability under Section 171.255 do not include tort liability based on negligence. *Williams v. Adams*, 74 S.W.3d 437 (Tex. App.—Corpus Christi 2002, pet. denied); *Suntide Sandpit, Inc. v. H & H Sand and Gravel, Inc.*, No. 13-11-00323-CV, 2012 WL 2929605 (Tex. App.—Corpus Christi July 19, 2012, pet. denied). In *Nationwide Property & Casualty Insurance Company v. Revive Mfg., LLC*, No. 02–17–00148–CV, 2018 WL 2248667 (Tex. App.—Fort Worth May 17, 2018, no pet.), the court noted that "[o]nly a few courts have addressed whether section 171.255 applies to 'contractual strangers with only tort claims being asserted,'" characterizing the issue as a "seemingly complicated, unresolved statutory-construction issue." In *Benbow v. Al-Barnawi*, No. 13-20-00131-CV, 2021 WL 3556214 (Tex. App.—Corpus Christi Aug. 12, 2021, no pet. h.), the court acknowledged its prior holding that Section 171.255(a) does not create personal liability for "tort judgments predicated on negligence liability," but the court held that a corporate "debt" under Section 171.255 includes liability for fraud claims because fraud is an intentional tort. According to the court, "although a corporate director or officer may invoke and ultimately prevail under the

safe harbor provision [i.e., Section 171.255(c)], a plaintiff is not categorically excluded as a matter of law from pursuing personal liability against a director or officer for fraudulent conduct by the corporation or its employees under § 171.255(a)."

Under Section 171.255(c), a director or officer is not liable for a debt of the corporation if the director or officer shows that the debt was created or incurred over the director's objection or without the director's knowledge and that the exercise of reasonable diligence to become acquainted with the corporation's affairs would not have revealed the intention to create the debt. Courts have concluded that a director relying on an exception to liability under this provision has the burden of proof, i.e., that the exceptions are affirmative defenses. *See Priddy v. Rawson*, 282 S.W.3d 588 (Tex. App.—Houston [14th Dist.] 2009, pet. denied); *In re Trammell*, 246 S.W.3d 815 (Tex. App.—Dallas 2008, no pet.); *PACCAR Fin. Corp. v. Potter*, 239 S.W.3d 879 (Tex. App.—Dallas 2007, no pet.); *see also Surber v. Woy*, No. 02-12-00452-CV, 2014 WL 1704258 (Tex. App.—Fort Worth Apr. 30, 2014, no pet.).

B. Specific Effects of Involuntary Termination of Filing Entity Under Chapter 11 of Business Organizations Code

Sec. 11.252. CERTIFICATE OF TERMINATION. (a) If termination of a filing entity's existence is required, the secretary of state shall:
(1) issue a certificate of termination; and
(2) deliver a certificate of termination by regular or certified mail to the filing entity at its registered office or principal place of business.
(b) The certificate of termination must state:
(1) that the filing entity has been involuntarily terminated; and
(2) the date and cause of the termination.
(c) Except as otherwise provided by this chapter, the existence of a filing entity is terminated on the issuance of the certificate of termination by the secretary of state.

C. Specific Effects of Forfeiture and Involuntary Termination of Limited Partnership Under Chapter 153 of Business Organizations Code

Sec. 153.309. EFFECT OF FORFEITURE OF RIGHT TO TRANSACT BUSINESS.
(a) Unless the right of the limited partnership to transact business is revived in accordance with Section 153.310:
(1) the limited partnership may not maintain an action, suit, or proceeding in a court of this state; and
(2) a successor or assignee of the limited partnership may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the transaction of business by the limited partnership in this state.
(b) The forfeiture of the right to transact business in this state does not:
(1) impair the validity of a contract or act of the limited partnership; or
(2) prevent the limited partnership from defending an action, suit, or proceeding in a court of this state.
(c) This section and Sections 153.307 and 153.308 do not affect the liability of a limited partner.

Sec. 153.311. TERMINATION OF CERTIFICATE OR REVOCATION OF REGISTRATION AFTER FORFEITURE. (a) The secretary of state may terminate the certificate of formation of a domestic limited partnership, or revoke the registration of a foreign limited partnership, if the limited partnership:
(1) forfeits its right to transact business in this state under Section 153.307; and
(2) fails to revive that right under Section 153.310.
(b) Termination of the certificate or revocation of registration takes effect without judicial ascertainment.
(c) The secretary of state shall note the termination or revocation and the date on the record kept in the secretary's office relating to the limited partnership.
(d) On termination or revocation, the status of the limited partnership is changed to inactive according to the records of the secretary of state. The change to inactive status does not affect the liability of a limited partner.

In *Collin County v. Hixon Family Partnership, Ltd.*, 365 S.W.3d 860 (Tex. App.—Dallas 2012, pet. denied), the court of appeals held that the forfeiture of a limited partnership's right to transact business and cancellation of its certificate did not prevent it from litigating in a condemnation proceeding initiated by the county because the partnership was the defendant, and Section 153.309(b)(2) does not prevent a limited partnership from defending an action, suit, or proceeding in a Texas court. *See also RK Fin. Grp., L.P. v. Allstate Sec. Indus.*, No. 07-12-00063-CV, 2013 WL 2475561 (Tex. App.—Amarillo June 6, 2013, no pet.) (stating that forfeiture of a limited partnership's right to do business prevents the limited partnership from maintaining an action, suit, or proceeding in Texas but does not prevent the limited partnership from defending an action, suit, or proceeding, and rejecting the contention that the ability to defend applies only when the forfeiture is remedied within 120 days). In *In re Kilroy*, 357 B.R. 411 (Bankr. S.D. Tex. 2006), the court noted that limited partners would not be able to bring a derivative suit on behalf of a limited partnership whose right to transact business had been forfeited due to its failure to file its periodic report, but the court in *In re Immobiliere Jeuness Establissement*, 422 S.W.3d 909 (Tex. App.—Houston [14th Dist.] 2014, no pet.), concluded that Section 153.309 did not preclude a limited partner from maintaining a derivative suit on behalf of a limited partnership whose right to transact business had been forfeited.

In *Mandarino v. Sherwood Lane Investments, LLC*, No. 01-15-00192-CV, 2016 WL 4034568 (Tex. App.—Houston [1st Dist.] July 26, 2016, no pet.), the court held that the forfeiture of a limited partnership's right to transact business and the cancellation of its certificate of limited partnership did not prevent the partnership from entering into a valid contract. The court stated that the provisions of the Texas Revised Limited Partnership Act addressing the effect of a limited partnership's forfeiture of the right to transact business for failure to file a periodic report only prevented the partnership from maintaining an action, suit, or proceeding in the courts and "did not prevent the partnership from forming new, valid contracts."

D. Specific Effects of Forfeiture and Involuntary Termination of Nonprofit Corporation Under Chapter 22 of Business Organizations Code

Sec. 22.362. EFFECT OF FORFEITURE. (a) Unless the right of the corporation to conduct affairs in this state is revived under Section 22.363:

(1) the corporation may not maintain an action, suit, or proceeding in a court of this state; and
(2) a successor or assignee of the corporation may not maintain an action, suit, or proceeding in a court of this state on a right, claim, or demand arising from the conduct of affairs by the corporation in this state.
(b) This section does not affect the right of an assignee of the corporation as:
(1) the holder in due course of a negotiable promissory note, check, or bill of exchange; or
(2) the bona fide purchaser for value of a warehouse receipt, stock certificate, or other instrument negotiable by law.
(c) The forfeiture of the right to conduct affairs in this state does not:
(1) impair the validity of a contract or act of the corporation; or
(2) prevent the corporation from defending an action, suit, or proceeding in a court of this state.

Sec. 22.364. FAILURE TO REVIVE; TERMINATION OR REVOCATION. (a) The failure of a corporation that has forfeited its right to conduct affairs in this state to revive that right under Section 22.363 is grounds for:
(1) the involuntary termination of the domestic corporation; or
(2) the revocation of the foreign corporation's registration to transact business in this state.
(b) The termination or revocation takes effect, without judicial action, when the secretary of state enters on the record of the corporation filed in the office of the secretary of state the word "forfeited" and the date of forfeiture and cites this chapter as authority for that forfeiture.

In *Bahr v. Emerald Bay Property Owners Association, Inc.*, No. 09-16-00325-CV, 2018 WL 2341312 (Tex. App.—Beaumont May 24, 2018, no pet.), the court addressed the effect of a property owners association's involuntary dissolution and reinstatement as a nonprofit corporation. The court held that amended deed restrictions adopted by the association in 1999 were not impaired by the association's previous involuntary dissolution as a nonprofit corporation in 1995. The court stated that a corporation may not maintain an action, suit, or proceeding in court while under the effect of a forfeiture, but the association was reinstated as a corporation in 2014 prior to the commencement of the underlying lawsuit in the case.

IV. Some Significant Provisions of Chapter 11 of Business Organizations Code Applicable to "Terminated Filing Entities" (Including Post-Termination Survival and Extinguishment of Claims)

Sec. 11.001. DEFINITIONS. In this chapter:
(1) "Claim" means a right to payment, damages, or property, whether liquidated or unliquidated, accrued or contingent, matured or unmatured.
...
(3) "Existing claim" with respect to an entity means:
(A) a claim that existed before the entity's termination and is not barred by limitations; or

(B) a claim that exists after the entity's termination and before the third anniversary of the date of the entity's termination and is not barred by limitations, including a claim under a contractual or other obligation incurred after termination. *[Definition of "existing claim" as amended Sept. 1, 2021.]*
(4) "Terminated entity" means a domestic entity the existence of which has been:
(A) terminated in a manner authorized or required by this code, unless the entity has been reinstated in the manner provided by this code; or
(B) forfeited pursuant to the Tax Code, unless the forfeiture has been set aside.
(5) "Terminated filing entity" means a terminated entity that is a filing entity. ["Filing entity" includes a domestic corporation, limited partnership, limited liability company, and professional association. BOC § 1.002(22).]
...

Sec. 11.351. LIABILITY OF TERMINATED FILING ENTITY. A terminated filing entity is liable only for an existing claim.

Sec. 11.356. LIMITED SURVIVAL AFTER TERMINATION. (a) Notwithstanding the termination of a domestic filing entity under this chapter, the terminated filing entity continues in existence until the third anniversary of the effective date of the entity's termination only for purposes of:
(1) prosecuting or defending in the terminated filing entity's name an action or proceeding brought by or against the terminated entity;
(2) permitting the survival of an existing claim by or against the terminated filing entity;
(3) holding title to and liquidating property that remained with the terminated filing entity at the time of termination or property that is collected by the terminated filing entity after termination;
(4) applying or distributing property, or its proceeds, as provided by Section 11.053; and
(5) settling affairs not completed before termination.
(b) A terminated filing entity may not continue its existence for the purpose of continuing the business or affairs for which the terminated filing entity was formed unless the terminated filing entity is reinstated under Subchapter E.
(c) If an action on an existing claim by or against a terminated filing entity has been brought before the expiration of the three-year period after the date of the entity's termination and the claim was not extinguished under Section 11.359, the terminated filing entity continues to survive for purposes of:
(1) the action until all judgments, orders, and decrees have been fully executed; and
(2) the application or distribution of any property of the terminated filing entity as provided by Section 11.053 until the property has been applied or distributed.

Sec. 11.359. EXTINGUISHMENT OF EXISTING CLAIM. (a) Except as provided by Subsection (b), an existing claim by or against a terminated filing entity is extinguished unless an action or proceeding is brought on the claim not later than the third anniversary of the date of termination of the entity.
...

(c) Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if:
(1) the filing entity's termination is revoked with retroactive effect under Section 11.153;
(2) the terminated filing entity is reinstated with retroactive effect as provided by Section 11.206;
(3) the terminated filing entity is reinstated with retroactive effect as provided by Section 11.253(d); or
(4) the terminated filing entity's certificate of formation is reinstated under the Tax Code with retroactive effect as provided by Section 11.254. *[Subsection (c) as added by amendment effective Sept. 1, 2021.]*

The definition of an "existing claim" in Section 11.001(3) was amended to read as set forth above effective September 1, 2021. Before that date, the definition of an "existing claim" was: "(A) a claim that existed before the entity's termination and is not barred by limitations; or (B) a contractual obligation incurred after termination." Before the amendment, a terminated entity did not survive for purposes of a claim by or against the entity that did not exist prior to termination other than a claim based on a contract entered into after termination. The effect of the amendment is to expand the definition of an "existing claim" to include non-contractual claims, such as tort claims, that come into existence after the entity's termination and before the third anniversary of the entity's termination. Thus, a terminated entity may sue or be sued on any claim that existed prior to termination or that comes into existence after termination so long as the claim is not otherwise barred by limitations and suit is brought on the claim within the three-year post-termination survival period.

In *Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397, 404-05 (5th Cir. 2008), the court pointed out that a Texas corporation that was involuntarily dissolved under the TBCA for failure to maintain a registered agent in Texas had three years in which to bring a cause of action on an existing claim under Article 7.12 of the TBCA. The involuntarily dissolved corporation's claim arose two months before the corporation was dissolved, and an administrative action on the claim was initiated within three years after the dissolution. Thus, the dissolved corporation had the right to prosecute the proceedings to conclusion. *See also Reveille Tool & Supply, Inc. v. State*, 756 S.W.2d 102 (Tex. App.—Austin 1988, no writ) (holding administrative proceeding initiated within three-year survival period constituted "action or proceeding" for purposes of preserving dissolved corporation's liability although suit to enforce liability was not brought until after expiration of three-year period).

The relationship between the above provisions in Chapter 11 and provisions outside of Chapter 11 relating to involuntary terminations is not entirely clear. For example, references in Section 11.356 to "termination of a domestic filing entity under this chapter" and reinstatement "under Subchapter E" imply the provisions contemplate entities terminated or reinstated under those provisions, but other provisions that simply refer to a "terminated filing entity" along with the broad definition of "terminated entity" suggest application of these provisions to entities that have been involuntarily terminated and reinstated under provisions outside of Chapter 11. In *In re Two Wheels Properties, LLC*, 625 B.R. 869 (Bankr. S.D. Tex. 2020), the court relied on the reference in Section 11.356 to reinstatement under Subchapter E to conclude that an entity that is terminated as a result of a forfeiture under the Tax Code is not permitted to continue its business and affairs or reinstate. The court did not address the provisions of the Tax Code that allow an entity that has suffered a tax

forfeiture to reinstate, and amendments to the BOC effective September 1, 2021, would presumably impact the court's analysis. *See* BOC § 11.254.

As further discussed below, until recently, whether the reinstatement of an entity relates back or has any retroactive effect is a matter that was not addressed by statute in situations other than the reinstatement of a voluntarily or involuntarily terminated entity within three years of its termination under BOC Section 11.206 or 11.253(d). Effective September 1, 2021, Sections 11.153 (judicial revocation of fraudulent termination) and 11.254 (reinstatement under Tax Code after tax forfeiture) were amended to provide for retroactive effect. Prior to these amendments, provisos in the definition of a "terminated entity" (i.e., "unless the entity has been reinstated in the manner provided in this code" and "unless the forfeiture has been set aside") might be read to avoid the operation of some of the provisions applicable to a "terminated entity" in the case of an entity that has been reinstated. In *Hyde v. Hawk Eyeglasses*, No. 07-16-00357-CV, 2018 WL 3384870 (Tex. App.—Amarillo July 11, 2018, pet. denied), the court addressed the argument that the plaintiff's claims against a nonprofit corporation were barred by BOC § 11.356(a) because the nonprofit corporation had been involuntarily dissolved and the claims were not brought within three years of the corporation's termination. Documents attached to the parties' briefs—which generally are not considered part of the appellate record—showed that, although the nonprofit corporation was involuntarily dissolved for failure to file a required report in 2007, the corporation was reinstated a year later upon filing of the report. The court stated that the record did not show that the nonprofit corporation's existence was terminated and not reinstated within three years. In a footnote, the court pointed out that a "terminated corporation" is defined by BOC § 11.001(4) as a corporation that has been terminated as authorized or required by the BOC, "unless the entity has been reinstated." The court also cited BOC § 11.253 regarding the process and effect of reinstatement. Thus, even without considering the documents appended to the appellate briefs, the court held that the trial court did not abuse its discretion in overruling a motion for new trial on the judgment against the corporation. *See also Wallace Constr. & Dev. Co. v. Madison Plaza, LP*, No. 09-18-00364-CV, 2019 WL 4677508 (Tex. App.—Beaumont May 30, 2019, pet. denied) (concluding that reinstated corporation's claim was not extinguished, although corporation's claim was not asserted within three years after its existence was terminated pursuant to Tax Code, because there is no time limit on reinstatement under Tax Code and corporation was not "terminated entity" within meaning of BOC due to its reinstatement eight years after its tax forfeiture).

In 1993, the Texas Business Corporation Act (TBCA) was amended to include a corporation whose charter was forfeited pursuant to the Tax Code in the definition of a "dissolved corporation" for purposes of Article 7.12 of the TBCA. The provisions of Article 7.12 of the TBCA have been carried forward in Sections 11.001, 11.351, and 11.356-11.359 of the BOC and apply to all filing entities. Before 1993, a corporation whose charter was forfeited under the Tax Code was not considered a dissolved corporation, and TBCA Article 7.12 thus did not apply to a forfeited corporation. *Benham v. Benham*, 726 S.W.2d 618 (Tex. App.—Amarillo 1987, writ ref'd n.r.e.). Although a forfeited corporation was denied the right to do business and to sue in any court in Texas, its legal existence was not extinguished because it had a statutory right to be reinstated. *See Damico v. Mountain River Owners' Ass'n, Inc.*, No. 11-98-00044-CV, 1999 WL 33747845 (Tex. App.—Eastland July 29, 1999, no pet.) (not designated for publication) (holding amendment to TBCA Article 7.12 did not apply to 1978 forfeiture of corporation and 1984 assignment of forfeited corporation's rights because the events predated the amendment and discussing and applying pre-amendment law regarding forfeiture); *see also Texas Clinical Labs, Inc. v. Leavitt*, 535 F.3d 397,

405 n. 13 (5th Cir. 2008) (pointing out that before TBCA Article 7.12 was amended in 1993, a forfeited corporation was not considered to be a "dissolved corporation" and was not entitled to the benefit of the three-year survival statute).

With the amendment of the definition of a "dissolved corporation" in TBCA Article 7.12 in 1993, Article 7.12 became applicable to a corporation or LLC whose charter was forfeited under the Tax Code, unless the forfeiture was set aside. The amendment applied to LLCs by virtue of Article 8.12 of the Texas Limited Liability Company Act, which made TBCA Article 7.12 applicable to LLCs. The scope of the successor provisions in Chapter 11 of the BOC was further broadened to apply to all filing entities. *See* BOC §§ 11.001, 11.351, 11.356-11.359. Confusion regarding the interaction of the forfeiture provisions of the Tax Code (which provides for two steps: forfeiture of the entity's privileges followed by forfeiture of the charter) and the dissolution or termination provisions of the TBCA or BOC is understandably evident in some cases given this history. *See, e.g., Brown v. JNH Invs., Inc.*, No. 4:16-CV-00675-ALM-CAN, 2017 WL 3205716 (E.D. Tex. July 7, 2017) (holding that printout of Secretary of State's website showing entity forfeited its existence in 1995 pursuant to tax forfeiture was competent summary judgment evidence, but concluding such evidence did not establish entity should be dismissed as defendant since Section 171.252 merely precludes entity from suing and exposes entity's officers and directors to liability; stating that proof of forfeiture did not necessarily show proof of dissolution and that forfeiture of privileges in 1995 did not establish whether corporate existence was ever dissolved).

Since the 1993 amendments, courts in a number of cases have applied the rules in TBCA Article 7.12 or BOC Sections 11.351-11.359 regarding the corporate existence and viability of claims by and against corporations and LLCs whose charters have been forfeited under the Tax Code. *See, e.g.*, *Lord, Lewis & Coleman, LLC v. Bellaco, LLC,* No. 12-18-00126-CV, 2019 WL 1142451 (Tex. App.—Tyler Mar. 12, 2019, pet. denied), cert. denied, 141 S.Ct. 259 (2020) (claims by and against entity whose charter is forfeited under Texas Tax Code are extinguished after three years; therefore, forfeited LLC's claim that was not asserted until more than three years after forfeiture of its charter had been extinguished); *Boudreaux v. C J R Framing Inc.*, 744 F. App'x 208 (5th Cir. 2018) (claim based on accident that occurred almost two years after corporation's forfeiture under Texas Tax Code was not "existing claim" that could be asserted against corporation or, assuming plaintiff had existing claim, plaintiff's claim was extinguished because he did not sue within three years of corporation's dissolution); *Carter v. Harvey*, 525 S.W.3d 420 (Tex. App.–Fort Worth 2017, no pet.) (claim for equitable adjustment of forfeited corporation's real property was derivative rather than direct claim and could not be asserted by shareholder as successor to forfeited corporation after expiration of statutory three-year wind-up period, distinguishing between "ascertainable or previously asserted claims that have the character of a tangible property asset and that have devolved by law or have been assigned to the shareholders" and "an unasserted breach of contract claim," and characterizing equitable adjustment claim as "unfixed, unasserted, inchoate right" at time of corporation's dissolution); *Atcco Mortg., Inc. v. Beasley*, No. 11-14-00066-CV, 2016 WL 1274129 (Tex. App.—Eastland Mar. 31, 2016, no pet.) (corporation could not assert claim based on default judgment obtained by it before forfeiture because claim was extinguished under BOC Section 11.359 three years after forfeiture); *Cohen Acquisition Corp. v. EEPB, P.C.*, No. 14-14-00330-CV, 2015 WL 2404869 (Tex. App.—Houston [14th Dist.] May 19, 2015, pet. denied) (claim against forfeited corporation was extinguished under BOC Section 11.359 three years after forfeiture); *Anderson Petro- Equip., Inc. v. State*, No. 03-13-00176-CV, 2013 WL 5858010 (Tex. App.–Austin 2013, pet. denied) (state's claim to recover funds spent to plug well drilled by

corporation was "existing claim" under Article 7.12 of the TBCA even though claim was not ripe when corporation's charter was forfeited under Tax Code because actions giving rise to state's claim (failure to plug well within 12 months after ceasing production) occurred before corporation's dissolution); *Endsley Elec., Inc. v. Altech, Inc.*, 378 S.W.3d 15 (Tex. App.—Texarkana 2012, no pet.) (corporation whose charter was forfeited under Tax Code in January 2011 continued to exist under Section 11.356 of the BOC for purposes of defending suit brought against it in April 2010); *Anderson Petro-Equip., Inc. v. State*, 317 S.W.3d 812 (Tex. App.—Austin 2010, pet. denied) (state's claims against forfeited corporation to enforce orders issued after forfeiture and collect clean-up costs incurred in plugging wells after forfeiture were "existing claims," albeit in contingent and unmatured form, prior to forfeiture, and thus could be asserted within three years after forfeiture); *First Trust Corp. TTEE FBO v. Edwards*, 172 S.W.3d 230 (Tex. App.—Dallas 2005, pet. denied) (forfeited corporation continued to exist for three years for limited purposes under TBCA Article 7.12 and its assets remained vested in corporation so that corporate form could not be disregarded based only on forfeiture of corporate charter); *Emmett Props., Inc. v. Halliburton Energy Servs., Inc.*, 167 S.W.3d 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (corporation could not sue on claim that existed before forfeiture and was not asserted within three years after forfeiture because claim was barred by TBCA Article 7.12); *Landrum v. Thunderbird Speedway*, 97 S.W.3d 756 (Tex. App.—Dallas 2003, no pet.) (corporation could not be held liable on wrongful death claim based on accident occurring sixteen months after tax forfeiture of corporation because claim was not "existing claim" that could be asserted against dissolved corporation pursuant to TBCA Article 7.12); *Sun Packing, Inc. v. XenaCare Holdings, Inc.*, 924 F.Supp.2d 749 (S.D. Tex. 2012) (Section 171.251 of Tax Code (barring corporation from suing in court of this state) rather than TBCA Article 7.12A (permitting dissolved corporation to bring suit during three years following dissolution) controlled where corporation filed suit after its privileges had been forfeited by the Comptroller and before its charter was forfeited by the Secretary of State); *In re Am. Heartland Sagebrush Sec. Invs., Inc.*, 334 B.R.848 (Bankr. N.D. Tex. 2005) (corporation that had been forfeited under Tax Code more than ten years earlier could not file Chapter 7 bankruptcy because its existence as a dissolved corporation for winding up purposes only continued for three years following its dissolution); *In re ABZ Ins. Servs., Inc.*, 245 B.R. 255 (Bankr. N.D. Tex. 2000) (corporation that had been forfeited under Tax Code was eligible for bankruptcy relief under Chapter 7 where proceeding was filed within three years of dissolution because TBCA Article 7.12 provides that dissolved corporation continues its existence for three years following dissolution for limited purposes of liquidation and distribution of assets); *Construtodo, S.A. de C.V. v. Conficasa Holdings, Inc.*, Civil Action No. H-12-3026, 2014 WL 427114 (S.D. Tex. Jan. 31, 2014) (stating that defendants "correctly argue[d]" that Tax Code and three-year survival provision of BOC extinguish all claims by and against a dissolved corporation unless action or proceeding is brought within three years of dissolution, and dismissing Delaware corporation's suit without expressly concluding that Section 11.359 applied or discussing definition of "terminated entity," which includes only domestic entities); *Guardian Life Ins. Co. of Am. v. Kinder*, Civil Action No. H-06-1745, 2008 WL 243707 (S.D. Tex. Jan. 29, 2008) (forfeited corporation's right to defend itself and bring counterclaims in suit brought within three-year period under TBCA Article 7.12 controlled over denial of forfeited corporation's right to sue or defend under Tax Code). In most of these cases, the forfeited corporations had not been reinstated so that the question of the effect of a reinstatement did not arise.

As noted below, TBCA Article 7.12, as amended in 1993, and the successor provisions of the BOC have been applied to preclude a corporation that was reinstated under the Tax Code after the expiration of the three-year survival period from suing on pre-forfeiture claims that were not

brought within the three-year survival period, and pre-forfeiture claims against a reinstated entity have similarly been held to be barred where the reinstatement did not occur within three years after its forfeiture. (The outcome of these cases would be different under the current provisions of the BOC, which was amended effective September 1, 2021, to provide that reinstatement under the Tax Code has retroactive effect and nullifies extinguishment of claims. BOC §§ 11.254, 11.359(c)(4).) *Emmett Props., Inc. v. Halliburton Energy Servs., Inc.*, 167 S.W.3d 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied) (reinstated corporation could not sue on claim that existed before forfeiture and was not asserted within three years after forfeiture because claim was barred by TBCA Article 7.12); *Cohen Acquisition Corp. v. EEPB, P.C.*, No. 14-14-00330-CV, 2015 WL 2404869 (Tex. App.—Houston [14th Dist.] May 19, 2015, pet. denied)(claim against reinstated corporation had been extinguished under BOC Section 11.359 three years after forfeiture)*; Atcco Mortg., Inc. v. Beasley*, No. 11-14-00066-CV, 2016 WL 1274129 (Tex. App.—Eastland Mar. 31, 2016, no pet.) (reinstated corporation could not assert claim based on default judgment obtained by it before forfeiture because claim was extinguished under BOC Section 11.359 three years after forfeiture); *but see Wallace Constr. & Dev. Co. v. Madison Plaza, LP*, No. 09-18-00364-CV, 2019 WL 4677508 (Tex. App.—Beaumont May 30, 2019, pet. denied) (concluding that reinstated corporation's claim was not extinguished, although corporation's claim was not asserted within three years after its existence was terminated pursuant to Tax Code, because there is no time limit on reinstatement under Tax Code and corporation was not "terminated entity" within meaning of BOC due to its reinstatement eight years after its tax forfeiture).

V. Reinstatement After Involuntary Termination

A. Reinstatement of Taxable Entity After Forfeiture Under Tax Code

The BOC specifies that "a filing entity whose certificate of formation has been forfeited under the provisions of the Tax Code must follow the procedures of the Tax Code to reinstate the certificate of formation." BOC § 11.254. Thus, the reinstatement provisions of the Tax Code rather than the provisions of Chapter 11 of the BOC govern reinstatement after a tax forfeiture. *See* Tex. Att'y Gen. Op. M-600 (1970).

An entity whose certificate of formation has been forfeited under the Tax Code for failure to file a report or pay franchise tax may be reinstated upon request of a "stockholder, director, or officer of the corporation at the time of the forfeiture" (*see* SOS Form 801 for the equivalent persons in non-corporate taxable entities) if each delinquent report has been filed and any delinquent tax, penalty, and interest has been paid. Tax Code §§ 171.312-171.313. There is no deadline or time limit for a reinstatement under the Tax Code.

B. Specific Effects of Reinstatement of Taxable Entity Under Tax Code and Business Organizations Code

Sec. 171.255. LIABILITY OF DIRECTOR AND OFFICERS.

...

(d) If a corporation's charter or certificate of authority and its corporate privileges are forfeited and revived under this chapter, the liability under this section of a director or officer of the corporation is not affected by the revival of the charter or certificate and the corporate privileges.

Sec. 171.314. CORPORATE PRIVILEGES AFTER FORFEITURE BY SECRETARY OF STATE IS SET ASIDE. If the secretary of state sets aside under this chapter the forfeiture of a corporation's charter or certificate of authority, the comptroller shall revive the corporate privileges of the corporation.

Effective September 1, 2021, Section 11.254 of the BOC was amended to add the second sentence of Section 11.254(a) and new subsection (b) as set forth below:

Sec. 11.254. REINSTATEMENT OF CERTIFICATE OF FORMATION FOLLOWING TAX FORFEITURE. (a) A filing entity whose certificate of formation has been forfeited under the provisions of the Tax Code must follow the procedures in the Tax Code to reinstate its certificate of formation. A filing entity whose certificate of formation is reinstated under the provisions of the Tax Code is considered to have continued in existence without interruption from the date of forfeiture.

(b) The reinstatement of a filing entity's certificate of formation after its forfeiture has no effect on any issue of the personal liability of the governing persons, officers, or agents of the filing entity during the period between forfeiture and reinstatement of the certificate of formation.

Effective September 1, 2021, Section 11.359 of the BOC was amended to add a new subsection (c) addressing the effect of a reinstatement under the Tax Code as follows:

Sec. 11.359. EXTINGUISHMENT OF EXISTING CLAIM.
...
(c) Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if:
...
(4) the terminated filing entity's certificate of formation is reinstated under the Tax Code with retroactive effect as provided by Section 11.254.

A number of cases have held that reinstatement after forfeiture under the Tax Code "relates back" to the date of the forfeiture. *E.g.*, *Hinkle v. Adams*, 74 S.W.3d 189 (Tex. App.—Texarkana 2002, no pet.); *Mello v. A.M.F. Inc.*, 7 S.W.3d 329 (Tex. App.–Beaumont 1999, pet. denied); *G. Richard Goins Const. Co., Inc. v. S.B. McLaughlin Assocs., Inc.*, 930 S.W.2d 124 (Tex. App.—Tyler 1996, writ denied); *M & M Const. Co. v. Great Am. Ins. Co.*, 747 S.W.2d 552 (Tex. App.—Corpus Christi 1988, no writ); *Bluebonnet Farms, Inc. v. Gibraltar Savings Ass'n*, 618 S.W.2d 81 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

As discussed above, in 1993, Article 7.12F of the TBCA was amended to provide that the term "dissolved corporation" in Article 7.12 includes, in addition to corporations voluntarily or involuntarily dissolved under the TBCA, a corporation whose charter has been forfeited pursuant to the Tax Code, unless the forfeiture has been set aside. This approach has been carried forward in Section 11.001(4) of the BOC, which defines a "terminated entity" to include not only a domestic entity terminated under the BOC, but a domestic entity that has been forfeited pursuant to the Tax

Code, unless the forfeiture has been set aside. Article 7.12 of the TBCA provided for the survival of a dissolved corporation for a period of three years for purposes of taking various actions, including suing on and defending "existing claims" as that term was defined by the statute. The provisions of Article 7.12 of the TBCA have been carried forward in Sections 11.001, 11.351, and 11.356-11.359 of the BOC and apply to all filing entities.

In cases decided after the 1993 amendment and before the 2021 amendments to Sections BOC 11.254 and 11.359, courts generally continued to pronounce that reinstatement after forfeiture of a corporation's charter under the Tax Code relates back and operates retroactively without discussion of the 1993 amendment. *Thomas v. California Golden Coast, LLC,* No. 01-15-01046-CV, 2017 WL 2117540 (Tex. App.—Houston [1st Dist.] May 16, 2017, pet. denied); *Marshall Feature Recognition, LLC v. Pepsi-Cola Co.*, No. 6:12-cv-00956-JRG-RSP, 2015 WL 5912672 (E.D. Tex. Sep. 27, 2015); *Ocram, Inc. v. Bartosh,* No. 01-11-00793-CV, 2012 WL 4740859 (Tex. App.—Houston [1st Dist.] Oct. 4, 2012, no pet.); *Parker County's Squaw Creek Downs, L.P. v. Watson,* Nos. 2-08-255-CV, 2-08-354-CV, 2009 WL 885941 (Tex. App.—Fort Worth Apr. 2, 2009, pet. denied); *Phillips Staffing Servs., Inc. v. Spherion Atlantic Workforce, L.L.C.*, No. 4:05-CV-407, 2007 WL 922149 (E.D. Tex. March 23, 2007), aff'd, 268 F. App'x 308 (5th Cir. 2008); *Hinkle v. Adams*, 74 S.W.3d 189 (Tex. App.—Texarkana 2002, no pet.); *Mello v. A.M.F. Inc.*, 7 S.W.3d 329 (Tex. App.—Beaumont 1999, pet. denied); *see also Sun Packing, Inc. v. XenaCare Holdings, Inc.*, 924 F.Supp.2d 749 (S.D. Tex. 2012) (acknowledging that reinstatement and revival of corporate privileges related back for purposes of state law, but concluding diversity of citizenship must be analyzed as of date suit was filed without regard to post-filing reinstatement).

In *Emmett Properties, Inc. v. Halliburton Energy Services, Inc.*, 167 S.W.3d 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied), the court of appeals held that Article 7.12, as amended in 1993, precluded a corporation that was reinstated under the Tax Code four and one-half years after its forfeiture from suing on pre-forfeiture claims that were not brought within the three-year survival period. Thus, the court did not give the reinstatement retroactive effect in that respect. *See also Atcco Mortg., Inc. v. Beasley*, No. 11-14-00066-CV, 2016 WL 1274129 (Tex. App.—Eastland Mar. 31, 2016, no pet.) (holding default judgment obtained against individual in 1988 was "claim" within meaning of BOC Section 11.001(1); judgment was extinguished pursuant to BOC Section 11.359(a) in 2009, three years after forfeiture of judgment creditor's corporate charter in 2006; reinstatement of corporate charter in 2013, seven years after forfeiture, did not revive extinguished judgment; and trial court thus did not err in dismissing judgment creditor's claim against deceased judgment debtor's estate even though judgment creditor had reinstated its corporate charter in order to assert claim in probate proceeding); *Cohen Acquisition Corp. v. EEPB, P.C.*, No. 14-14-00330-CV, 2015 WL 2404869 (Tex. App.—Houston [14th Dist.] 2015, pet. denied) (relying on *Emmett Properties* and holding plaintiff's claims for malpractice and breach of contract brought against plaintiff's accounting firm in 2013 were extinguished in February of 2011 under BOC Section 11.359(a) because accounting firm's charter was forfeited in February of 2008 and reinstatement of accounting firm's charter in March of 2011 did not revive plaintiff's extinguished claims against firm). *Cf. Hourani v. Katzen*, 305 S.W.3d 239, 250-51 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (referring to retroactive nature of reinstatement, noting that forfeited corporation generally has three years from dissolution to cure its corporate status before it begins to lose certain rights, but concluding there was no need to determine effect of any retroactive reinstatement of property owners' association that was forfeited in 1989 and reinstated in 2006 because property owner who sought to construct driveway in 2004 could not have complied with

restriction that required written approval of association since association did not exist at time and Property Code provides that authority of property owners' association expires when it ceases to exist); *Cognata v. Down Hole Injection, Inc.*, 375 S.W.3d 370, 376 n. 1 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (discussing Tax Code forfeiture and reinstatement provisions and holding appellant waived issue of forfeited corporation's capacity to sue by failing to file plea in abatement and noting that appellant also waived its argument that claim brought by defunct corporation is extinguished unless it is brought within three years of dissolution because argument was not raised until reply brief on appeal).

Obviously, the 2021 amendments to Sections 11.254 and 11.359 of the BOC would significantly impact the analyses and results of the cases cited in the previous paragraph if those cases were governed by the current statutes.

C. Reinstatement of Filing Entity After Involuntary Termination by Secretary of State Under Chapter 11 of Business Organizations Code

An entity that has been involuntarily terminated by the Secretary of State under BOC Section 11.251 may reinstate by curing the circumstances that led to the involuntary termination (and any other existing circumstances identified in Section 11.251) and filing a certificate of reinstatement (and tax clearance letter unless the entity is a nonprofit corporation). There is no longer any deadline or time limit for reinstatement after an involuntary termination by the Secretary of State in these circumstances (in contrast to the predecessor provision in Article 7.01E of the TBCA, which required reinstatement to occur within 36 months after termination), but the relation-back effect is only explicitly provided for reinstatements that occur within three years of termination. BOC §§ 11.253(d).

As noted above in the discussion of involuntary termination under Chapter 11 of the BOC, there has in the past often been confusion about whether an entity's existence was terminated under the Tax Code or Article 7.01 of the TBCA. This confusion in turn led to confusion as to whether reinstatement of the entity was governed by the Tax Code or the TBCA. Even though Article 7.01 of the TBCA specified failure to pay franchise taxes as a ground for involuntary dissolution by the Secretary of State under that provision, it has long been the practice of the Secretary of State to proceed against a corporation that failed to pay its franchise tax by forfeiting the corporation's charter as provided under the Tax Code (after notification by the Comptroller that the corporation's privileges had been forfeited) rather than involuntarily dissolving the corporation under Article 7.01. *Graywest, LLC v. Neely*, No. 2-06-197-CV, 2007 WL 614036 (Tex. App.—Fort Worth Mar. 1, 2007, no pet.) is an example of a case reflecting the confusion in this area. In that case, Gray and Neely entered into a contract for the sale of Neely's homestead in June 2005. One month later Gray assigned his rights in the contract to Graywest, LLC, which the court referred to as a "limited liability corporation." Neely attempted to avoid the contract for sale, and the LLC filed suit to enforce it. Neely filed a motion to abate and alternatively to dismiss the suit arguing that the LLC did not have the capacity to sue because it had forfeited its corporate status by failing to pay franchise taxes. The parties agreed that the LLC had been involuntarily dissolved in March of 2001 for not paying its franchise taxes. The trial court ruled that the LLC lacked the capacity to file suit on the contract at issue because its charter had not been revived within the 36-month window for reinstatement allowed by Article 7.01E of the TBCA, and the three-year survival period under Article 7.12 of the TBCA had expired. Although TBCA Articles 7.01E and 7.12 were applicable to LLCs under Article

8.12 of the Texas Limited Liability Company Act, and Article 7.01B permitted the Secretary of State to involuntarily dissolve an LLC for failure to pay its franchise taxes, Article 7.01E was not applicable in this case because, consistent with its long-standing practice, the Secretary of State actually effectuated the tax forfeiture of the LLC in question under the Tax Code provisions, which have their own reinstatement provisions and do not contain a time limitation on reinstatement. *See also Sun Packing, Inc. v. XenaCare Holdings, Inc.*, 924 F.Supp.2d 749 (S.D. Tex. 2012) in which the court cited both Article 7.01 of the TBCA and Section 171.309 of the Tax Code in describing the action taken by the Secretary of State against a corporation whose privileges and charter were forfeited for failure to pay franchise taxes. There should be less confusion under current law in this regard since, unlike Article 7.01 of the TBCA, Section 11.251 of the BOC does not specify failure to pay franchise taxes as a ground for involuntary termination under the BOC. However, recent cases and anecdotal evidence suggest that confusion regarding the application of the various termination and reinstatement provisions of the Tax Code and BOC continues to exist. *See, e.g.*, *Vernon Feeders, LLC v. Cabaniss Dairy, LLC*, No. 7:13-cv-00069-O, 2013 WL 12137768 (N.D. Tex. July 9, 2013), in which the court relied on Section 11.253(d), which addresses the effect of reinstatement of an entity involuntarily terminated by the Secretary of State under that subchapter of the BOC, although the entity at issue was involuntarily forfeited for failure to pay taxes and would thus have been reinstated under the provisions of the Tax Code rather than the BOC. *See* BOC § 11.254.

D. Specific Effects of Reinstatement of Filing Entity After Involuntary Termination Under Chapter 11 of Business Organizations Code

> Sec. 11.253. REINSTATEMENT BY SECRETARY OF STATE AFTER INVOLUNTARY TERMINATION.
> ...
> (d) If a filing entity is reinstated before the third anniversary of the date of its involuntary termination, the entity is considered to have continued in existence without interruption from the date of termination. The reinstatement shall have no effect on any issue of personal liability of the governing persons, officers, or agents of the filing entity during the period between termination and reinstatement.
>
> *Effective September 1, 2021, Section 11.359 of the BOC was amended to add a new subsection (c) addressing the effect of a reinstatement under the Section 11.253 as follows:*
>
> Sec. 11.359. EXTINGUISHMENT OF EXISTING CLAIM.
> ...
> (c) Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if:
> ...
> (3) the terminated filing entity is reinstated with retroactive effect as provided by Section 11.253(d); ...

In *Vernon Feeders, LLC v. Cabaniss Dairy, LLC*, No. 7:13-cv-00069-O, 2013 WL 12137768 (N.D. Tex. July 9, 2013), the defendant contended that the plaintiff lacked capacity to maintain the action because the plaintiff forfeited its existence prior to filing the suit. The court took judicial notice of the public records of the Secretary of State, which indicated that the plaintiff's entity status

was involuntarily forfeited for failure to pay taxes in 2011 but was reinstated to active status in 2013 shortly after the defendant filed its motion to dismiss. Relying on Section 11.253 of the BOC, the court stated: "Because Plaintiff's entity status as a limited liability company was reinstated within three years of its involuntary termination, the Court finds that Plaintiff's existence is deemed to have continued uninterrupted from the date of termination." The court thus concluded that the plaintiff had the legal capacity to maintain the action. The court also cited 1972 and 1995 cases regarding the effect of reinstatement of a plaintiff's charter after a tax forfeiture. Because the reinstatement of the plaintiff was effectuated under the provisions of the Tax Code rather than the BOC (*see* BOC §§ 11.253, 11.254), Section 11.253 did not literally apply to the plaintiff's reinstatement, and this case illustrates that confusion continues to exist with regard to the various termination and reinstatement provisions of the BOC and Tax Code. Perhaps the 2021 amendments, which specifically provide for retroactive effect of reinstatement after a tax forfeiture, will help alleviate this confusion.

E. Reinstatement After Involuntary Termination of Limited Partnership for Failure to File Periodic Report Under Chapter 153 of Business Organizations Code

A limited partnership whose certificate of formation has been terminated for failure to file a periodic report may be reinstated by filing the report accompanied by the required filing fees and a tax clearance letter. BOC § 153.312. There is no deadline or time limit for a reinstatement under these provisions.

The statute does not address the effect of a reinstatement of a limited partnership after involuntary termination for failure to file a periodic report other than the change in status of the limited partnership to active, and there is a dearth of case law addressing the effect of a reinstatement with respect to the time period between forfeiture or termination and reinstatement. In one of the few reported cases addressing the forfeiture and reinstatement provisions of Chapter 153, the court of appeals analogized the statutes regarding forfeiture and revival of a limited partnership's right to transact business to the provisions of the Tax Code addressing forfeiture and revival of a corporation's privileges. *Manning v. Enbridge Pipelines (East Texas) L.P.*, 345 S.W.3d 718, 723 (Tex. App.—Beaumont 2011, pet. denied). The court of appeals stated that revival of a corporation's privileges under the Tax Code relates back to the point of delinquency "'as if the disability had never existed.'" *Id.* The court applied this principle to the limited partnership in this case, which had forfeited and revived its right to transact business during the pendency of a condemnation action filed by the limited partnership. Relying on case law in the tax forfeiture context, the court of appeals held that the limited partnership's temporary lack of capacity was moot because its right to transact business had been restored. *Id.*

F. Reinstatement After Involuntary Termination of Nonprofit Corporation for Failure to File Periodic Report Under Chapter 22 of Business Organizations Code

A nonprofit corporation that has been involuntarily terminated for failure to file a periodic report may be reinstated by filing the report accompanied by the filing fee (and tax clearance letter if the corporation is not exempt from franchise taxes). BOC § 22.365. There is no deadline or time limit for a reinstatement under these provisions. The statute does not specify the effect of reinstatement other than the cancellation of the nonprofit corporation's "forfeited" status, and there

is little case law addressing the effect of the reinstatement with respect to the period during which the corporation was forfeited.

In *Bahr v. Emerald Bay Property Owners Association, Inc.*, No. 09-16-00325-CV, 2018 WL 2341312 (Tex. App.—Beaumont May 24, 2018, no pet.), the court addressed the effect of a property owners association's involuntary dissolution and reinstatement as a nonprofit corporation. The court held that amended deed restrictions adopted by the association in 1999 were not impaired by the association's previous involuntary dissolution as a nonprofit corporation in 1995. The court stated that a corporation may not maintain an action, suit, or proceeding in court while under the effect of a forfeiture, but the association was reinstated as a corporation in 2014 prior to the commencement of the underlying lawsuit in the case. *See also Hyde v. Hawk Eyeglasses*, No. 07-16-00357-CV, 2018 WL 3384870 (Tex. App.—Amarillo July 11, 2018, pet. denied), in which the court relied on BOC §§ 11.001(4) and 11.253 and held that the plaintiff's claims against a nonprofit corporation were not barred by BOC § 11.356(a). Documents attached to the parties' briefs—which generally are not considered part of the appellate record—showed that, although the nonprofit corporation was involuntarily dissolved for failure to file a required report in 2007 (more than three years before the lawsuit was brought), the corporation was reinstated upon filing of the report a year after its involuntary dissolution. In a footnote, the court pointed out that a "terminated corporation" is defined by BOC § 11.001(4) as a corporation that has been terminated as authorized or required by the BOC, "unless the entity has been reinstated." The court also cited BOC § 11.253 regarding the process and effect of reinstatement. The court stated that the record did not show that the nonprofit corporation's existence was terminated and not reinstated within three years. Thus, the court held that the trial court did not abuse its discretion in overruling a motion for new trial on the judgment against the corporation.

G. Court Revocation of Fraudulent Termination

Sec. 11.153. COURT REVOCATION OF FRAUDULENT TERMINATION. (a) Notwithstanding any provision of this code to the contrary, a court may order the revocation of termination of an entity's existence that was terminated as a result of actual or constructive fraud. In an action under this section, any limitation period provided by law is tolled in accordance with the discovery rule. The secretary of state shall take any action necessary to implement an order under this section.

(b) If the termination of an entity's existence is revoked under Subsection (a):

(1) the revocation relates back to the effective date of the termination and takes effect as of that date; and

(2) the entity's status as an entity continues in effect as if the termination of the entity's existence had never occurred. *[Subsection (b) added by amendment effective Sept. 1, 2021.]*

Effective September 1, 2021, Section 11.359 of the BOC was amended to add a new subsection (c) addressing the effect of a court-ordered revocation of termination under Section 11.153 as follows:

Sec. 11.359. EXTINGUISHMENT OF EXISTING CLAIM.

...

(c) Notwithstanding Subsections (a) and (b), the extinguishment of an existing claim with respect to a terminated filing entity as provided by this section is nullified if:

(1) the filing entity's termination is revoked with retroactive effect under Section 11.153;

...

The BOC provision on court revocation of a fraudulent termination was derived from TBCA Article 6.08, which was added to the TBCA in 2003. There is little case law addressing this TBCA provision or its successor in the BOC. The court briefly referred to TBCA Article 6.08 in *Gomez v. Pasadena Health Care Management, Inc.*, 246 S.W.3d 306, 312 n. 4 (Tex. App.—Houston [14th Dist.] 2008, no pet.), a case in which a minor plaintiff sought to assert a medical malpractice claim against a hospital more than three years after the hospital's dissolution. The plaintiff's claim was based on injuries sustained by the plaintiff during prenatal care and delivery before the hospital's dissolution, and the plaintiff made numerous arguments in an attempt to avoid the effect of Article 7.12, under which the claim was extinguished when the three-year survival period elapsed. In response to the plaintiff's argument that application of Article 7.12 to bar the plaintiff's claim would allow healthcare corporations to avoid liability after negligently injuring minor patients by dissolving and disposing of all the corporation's assets before the minor reaches majority, the court countered that TBCA Article 6.08 provides a mechanism by which the court can order revocation of dissolution of a corporation upon a finding of actual or constructive fraud. The court commented that this provision (now found in Section 11.153 of the BOC) would allow a court to prevent healthcare corporations from taking fraudulent actions.

In *Pham v.Carrier*, No. 07-15-00031-CV, 2017 WL 1291660 (Tex. App.—Amarillo Apr. 3, 2017, no pet.), the court expressed no opinion on the defendants' contention that Section 11.153 establishes only a remedy and not a cause of action and concluded that the defendants were not entitled to summary judgment against the plaintiff on the plaintiff's claim for revocation of fraudulent termination of an LLC. The defendants' motion for summary judgment raised an argument about the ability of the plaintiff to assert a derivative claim belonging to the terminated LLC more than three years after the LLC's termination, but the defendants' motion did not address the impact, if any, that revocation of an entity's termination under Section 11.153 would have on the operation of Section 11.356 (the three-year survival statute).

In *Boudreaux v. C J R Framing Incorporated* , 744 F. App'x 208 (5th Cir. 2018), however, the Fifth Circuit Court of Appeals found "no authority to suggest Section 11.153 revives non-existent or extinguished claims" and stated that the court "cannot create a fraud exception where none exists in Sections 11.356 and 11.359." As reflected above, effective September 1, 2021, Section 11.153 was amended to expressly provide that a court-ordered revocation under that section has retroactive effect, and Section 11.359 was amended to provide that extinguished claims are revived pursuant to such a revocation.

Appendix A

Reinstatement Forms Available Online

Secretary of State Form 801 (Application for Reinstatement and Request to Set Aside Tax Forfeiture)

Secretary of State Form 802 (Periodic Report–Nonprofit Corporation Reinstatement)

Secretary of State Form 803 (Periodic Report–Professional Association Reinstatement)

Secretary of State Form 804 (Periodic Report–Limited Partnership Reinstatement)

Secretary of State Form 811 (Certificate of Reinstatement of Filing Entity Voluntarily or Involuntarily Terminated Under Chapter 11 of BOC)

Secretary of State Form 814 (Certificate of Reinstatement of Professional Association After Failure to File Annual Statement) (Annual Statement filing requirement was repealed effective 1/1/2016)

Comptroller Form 05-391 (Tax Clearance Letter Request for Reinstatement)