

CORPORATIONS AND LIMITED LIABILITY COMPANIES- DISSOLUTION AND SUSPENSION

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1. General Comments and Summary

There are several statutes pertaining to corporate and limited liability company dissolution and suspension. Chapters 55 and 55A pertain to dissolution of corporations and dissolution of non-profit corporations respectively. Chapter 57C applies to dissolution of LLC's. Chapter 105 pertains to suspension for failure to comply with certain state tax law requirements. These issues are important when the corporation or LLC is making a conveyance to be insured.

The following is a summary of the major points of what is discussed below.

- The status of a corporation or limited liability company (hereafter both referred to as "entity") should be checked with the Secretary of State's office. See 7 below.
- If the entity is voluntarily or administratively dissolved and the purchaser from the entity (or the purchaser's agent or attorney) knows of the dissolution, this does not prohibit the entity from conveying to the purchaser in order to wind up the business. It is helpful that the deed recites that it is for the purpose of winding up. A deed of trust given by the entity to obtain funds to pay entity debts to wind up the business could qualify as a permitted act of winding up. Recital in the deed of trust would be helpful. If the entity is reinstated, a conveyance or deed of trust occurring between the dissolution and reinstatement would be valid even if it is not for the purpose of winding up the business.
- If the entity is suspended under Chapter 105 of the General Statutes and a purchaser from the entity (or agent or attorney of the purchaser) knows of the suspension, the conveyance to the purchaser will be of no effect. If a purchaser (and purchaser's agent or attorney) does not know of the suspension, the conveyance to the purchaser will be effective. A reinstatement relates back to the suspension and probably validates what otherwise would have been invalid.

2. Corporate Voluntary Dissolution; Revocation of Dissolution- Detailed Discussion

A voluntary dissolution is accomplished by (1) the incorporators or directors or (2) the board of directors and shareholders. G.S. 55-14-01; G.S. 55-14-02; G.S. 55A-14-01; G.S. 55A-14-02. This type of voluntary dissolution is effective upon the effective date in the articles of dissolution filed with the Secretary of State. G.S. 55-14-01(b); G.S. 55-14-03(b); G.S. 55A-14-01(b); G.S. 55A-14-03(b).

The effect of dissolution is set out in G.S. 55-14-05. The corporation continues to exist, but cannot continue business except to wind up and liquidate its business and affairs. G.S. 55-14-05(a). This can include disposing of property to shareholders or disposing of property that will not be distributed to shareholders. This includes the giving of a deed or deed of trust necessary to wind up the business. Dissolution does not transfer title. G.S. 55-14-05(b)(1). Dissolution does not prevent commencement or continuation of legal actions by or against corporations. G.S. 55-14-05(b)(5) and (6). After the end of the tax year in which the dissolution occurs, the corporation is not subject to annual franchise tax unless it engages in business activities not appropriate to winding up and liquidation of its business and affairs. G.S. 55-14-05(c).

G.S. 55-14-04 provides that dissolution can be revoked by delivering articles of revocation to the Secretary of State. G.S. 55-14-04(c). The revocation must occur within 120 days after the effective date of the dissolution. G.S. 55-14-04(a). Revocation is effective upon the effective date of the articles of revocation. G.S. 55-14-04(d). The revocation relates back to and takes effect as of the effective date of the dissolution. G.S. 55-14-04(e). The corporation: "resumes carrying on its business as if dissolution had never occurred, subject to the rights of any person who reasonably relied to his prejudice upon the filing of the articles of dissolution." G.S. 55-14-04(e).

EXAMPLE: The effective date of a dissolution is January 3, 2007. The corporation gives a deed on January 10, 2007 which is recorded that day. The effective date of the revocation is February 8, 2007. The revocation relates back to January 3, 2007 pursuant to G.S. 55-14-04(e). The conveyance is valid.

For non-profit corporations, see virtually identical rules in G.S. 55A-14-01 through G.S. 55A-14-05.

3. Corporate Administrative Dissolution; Reinstatement- Detailed Discussion

This type of dissolution may be commenced by the Secretary of State. The grounds for dissolution include being delinquent in delivering its annual report, expiration of the corporation's period of duration and failure to pay fees, etc., due under Chapter 55. G.S. 55-14-20. This dissolution takes place by the Secretary of State signing a certificate of dissolution setting forth the grounds and the effective date and the Secretary of State must then file and mail a copy of it to the corporation. G.S. 55-14-21(b). G.S. 55-14-05 (effect of dissolution) applies. See G.S. 55-14-21(c). G.S. 55-14-05 is discussed in 2 above.

For comparable provisions pertaining to non-profit corporations, see G.S. 55A-14-20 and G.S. 55A-14-21.

G.S. 55-14-22 applies to reinstatement following administrative dissolution. Prior to July 1, 1998, the corporation could apply for this within 2 years after the effective date of the dissolution because either the grounds for dissolution did not exist or they had been removed. For reinstatement on or after July 1, 1998 and before December 1, 1999, the application must occur not later than 5 years after the effective date of the dissolution. G.S. 55-14-22 was amended again on August 26, 2001, eliminating the 5 year period for applications for reinstatement made on or after December 1, 1999.

(Note: See Robinson, *Robinson on North Carolina Corporate Law*, 28-7 which discusses this point. In 1996, the legislature extended the effective date of the two-year limit from July 1, 1995 to July 1, 1997. In 1997, the legislature increased the period from two to five years within which application for reinstatement can be submitted. N.C. Sess Laws 1997, c. 485 §1, effective July 1, 1998, amending G.S. 55-14-22(a). G.S. 55A-14-22(a) and G.S. 57C-6-03(c), the latter pertaining to LLC's were similarly amended, but effective July 1, 1997. See §2 and §3 of C. 485.) The Secretary of State can cancel the certificate of dissolution, file an original certificate of reinstatement containing the effective date of reinstatement and mail the corporation a copy. G.S. 55-14-22(b). If the Secretary of State denies an application for reinstatement, G.S. 55-14-23 sets forth an appeals procedure. The reinstatement relates back to and takes effect as of the effective date of the dissolution with the same effect or result as set forth in G.S. 55-14-04(e), discussed and quoted in 2 above. G.S. 55-14-22(c).

For non-profit corporations, see G.S. 55A-14-22 and G.S. 55A-14-23.

4. Corporate Judicial Dissolution- Detailed Discussion

This type of dissolution involves a court action. The procedure is outlined in G.S. 55-14-31. Venue is the county where the principal office is or was last located. G.S. 55-14-31(a). A receiver for the corporation can be appointed. G.S. 55-14-31(c); G.S. 55-14-32. The court order must describe the receiver's powers. G.S. 55-14-31(c); G.S. 55-14-32(c). These powers can include the power to dispose of corporate assets at public or private sale and to exercise all corporate powers to the extent necessary to manage the corporation. If a grounds for dissolution are found to exist, the court may enter a decree of dissolution specifying the effective date of dissolution and the clerk shall deliver a certified copy to the Secretary of State who shall file it. G.S. 55-14-33(a). Winding up under G.S. 55-14-05, discussed in 2 above, is permitted. G.S. 55-14-33(b). Upon liquidation of a corporation, the portion of the assets distributable to a creditor or shareholder who is unknown or cannot be found shall be disposed of in accordance with Chapter 116B. G.S. 55-14-40. (Pursuant to G.S. 116B-1 real estate vests in the Escheat Fund. Also, see G.S. 116B-2.) There are no statutory procedures for reinstatement for judicial dissolution.

For non-profit corporations, see G.S. 55A-14-30 through G.S. 55A-14-33.

5. Limited Liability Company Dissolution- Detailed Discussion

G.S. 57C-6-01 deals with limited liability company dissolution. Judicial dissolution procedures are set forth in G.S. 57C-6-02.1 and a receiver can be appointed. The receiver can be authorized by the court to dispose of assets and can exercise all powers of the LLC through or in the place of the LLC's managers to the extent necessary to manage the affairs of the LLC. G.S. 57C-6-02.2(c). A decree of dissolution will be filed with the Secretary of State. G.S. 57C-6-02.3.

Administrative dissolution is outlined in G.S. 57C-6-03, with a certificate of dissolution being filed with the Secretary of State. G.S. 57C-6-03(a) is very similar to G.S. 55-15-20 and G.S. 55A-14-20, noted in 3 above. G.S. 57C-6-03(b) is very similar to G.S. 55-14-21 and G.S. 55A-14-21, discussed above. At one time, the LLC could apply for reinstatement within 5 years after the effective date of administrative dissolution. Effective August 26, 2001, for reinstatements applied for on or after December 1, 1999, the 5 year limit was removed. (As was the case for corporations, for a short period, the 5 year period was previously 2 years. See discussion in parenthetical note in 3 above.) Procedure is governed by G.S. 55-14-22, 23 and 24 mentioned above. G.S. 57C-6-03(c).

G.S. 57C-6-04 deals with winding up. The managers are to wind up the business. If there are none, the legal representative or successor to the member whose event of withdrawal resulted in the dissolution can wind up. The court may wind up or appoint a representative to do so. It would seem that the same comments relative to corporations regarding the types of wind up activities that can be engaged in apply here. Dissolution does not transfer title. G.S. 57C-6-04(c).

6. Suspension under G.S. Chapter 105- Detailed Discussion

G.S. 105-230 applies to corporations and limited liability companies. G.S. 105-230 deals with suspension of the entity's articles of incorporation, articles of organization or certificate of authority, as appropriate. The reasons for suspension are failure to file any report or return or to pay any tax or fee required by Subchapter 1, of Chapter 105. The entity's powers conferred by the suspended document "terminate upon suspension." The Secretary of State is required to notify the entity.

The statute sets forth the penalty in the form of a fine for exercising functions after suspension. Further, G.S. 105-230(b) provides: "Any act performed or attempted to be performed during the period of suspension is invalid and of no effect, unless the Secretary of State reinstates the [entity] pursuant to G.S. 105-232." The "unless" provision was added effective January 1, 2002.

The case of *Parker v. Life Homes, Inc.*, 22 NC App. 297, 206 SE2d 344 (1974), dealt with the following facts: Life Homes had its charter suspended in 1969 under G.S. 105-230 and G.S. 105-231. (It was not reinstated until Nov. 1971.) On 8-23-71, Life Homes bought land. Two days later, Life Homes sold it to University. There was no evidence that University or its officers or agents knew of the suspension. The court upheld the two title transactions.

The case seems to indicate that if a purchaser for value or lender for value (and such a party's agent or attorney) is unaware of the suspension, the purchaser or lender will take its interest free of the seemingly clear results of that portion of G.S. 105-230(b) quoted above. Therefore, if a suspension occurs on January 3, 2007 and the closing attorney or purchaser finds out about the suspension, G.S. 105-230(b) would invalidate any subsequent deed, deed of trust or other transfer by the suspended corporation.

G.S. 105-232, amended effective January 1, 2002, sets forth lengthy provisions pertaining to restoration of rights, receivership and liquidation.

Pursuant to G.S. 105-232(a), if the entity complies with all requirements of the Subchapter and pays all taxes, fees or penalties due it and pays the fee to the Secretary of Revenue to cover costs of reinstatement, the entity will be entitled to exercise its powers. The reinstatement is made upon the records of the Secretary of State and the Secretary notifies the entity. Since January 1, 2002, the reinstatement relates back to and takes effect as of the date of the suspension and the entity resumes carrying on its business as if the suspension had never occurred, subject to the rights of any person who reasonably relied, to that person's prejudice, upon the suspension. This provision, in conjunction with G.S. 105-230(b), also amended January 1, 2002, provides that reinstatement relates back, no act of the suspended entity intervening between suspension and reinstatement is invalidated, but the rights of the party reasonably relying upon the suspension prior to the entity's reinstatement shall not be prejudiced. Prior to January 1, 2002, there was no such relation back concept in Chapter 105. S.L. 2001-387, §175(b) provides that this change was intended to be retroactive. So, any act performed or attempted to be performed during the suspension period prior to January 1, 2002 shall not be deemed to be invalid and of no effect under G.S. 105-230, subject to the rights of any person who reasonably relied on the suspension.

It is important to note that, absent such reinstatement, it is the opinion of the author that the January 1, 2002 changes to G.S. 105-230(b) and G.S. 105-232 do *not* change the rules of *Parker v. Life Homes, Inc.*, discussed above.

G.S. 105-232(b) deals with a G.S. 105-230 suspension where the entity "has ceased to operate as a going concern." In such a case, if there remains an interest in property held in the name of the entity, "any interested party" may apply to the superior court for appointment of a receiver. All stockholders, members or their representatives or next of kin shall be made parties. If someone's whereabouts are unknown, service can be effected by publication. Infants or incompetents will have a guardian ad litem appointed for them. The receiver may (1) sell the property interest upon the terms ordered by the court; (2) apply the proceeds to debts and (3) distribute the balance to the appropriate parties. The receiver's deed should be indexed under the name of the entity. G.S. 161-22.1.

Prior to the law's change (effective July 12, 1991), there was a five-year limit on reinstatement. There is no such limit today.

7. Contact- web site

Status of an entity can also be obtained by consulting the Secretary of State's Website at <http://www.secretary.state.nc.us/corporations/filings>.