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The State of South Carolina

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November 7, 1989

The Honorable Robert L. Helmly
Senator, Berkeley County
Senatorial District No. 37
Drawer 1194
Moncks Corner, South Carolina 29461

Dear Senator Helmly:

You have asked the opinion of this Office upon the following. A non-profit corporation was dissolved by administrative action of the Secretary of State pursuant to Section 33-21-110, South Carolina Code, 1976, on April 21, 1986, for failure to pay its annual license or franchise fee. This non-profit corporation has now removed this default and is current with regard to all fees and taxes as certified by the South Carolina Tax Commission and is otherwise qualified for reinstatement of its charter. The non-profit corporation now seeks reinstatement of its corporate charter from the Secretary of State and the question has arisen whether the two-year limitation period for application of reinstatement prescribed in Section 33-14-220 (a), South Carolina Code, 1976 (1988 Cum. Supp.),[1] precludes reinstatement by the Secretary of State. I advise that the two-year limitation period prescribed in Section 33-14-220 (a) of 1988 Act 544 does not govern the application for reinstatement; and, instead, the application for reinstatement is governed by the five-year limitation period prescribed in former Section 33-21-120 of the 1976 Code.

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1. Section 33-14-220 (a) is part of the South Carolina Business Corporations Act of 1988 [hereinafter 1988 Act 444]. This Act substantially revised the various statutes in the 1976 Code relating to business and professional corporations. For the purpose of this discussion, I will assume that the portions of the South Carolina Business Corporations Act of 1988 that are relevant to the conclusion are applicable to non-profit corporations. See Section 33-20-103 of 1988 Act 444.

Section 33-21-120 of the 1976 Code, the reinstatement remedy that was extant in April 1986, the operative date of the administrative dissolution, provides in pertinent part:

> At any time within five (5) years after the date of the declaration of dissolution by forfeiture, one or more persons who were directors of the corporation as of that date may execute, verify, and deliver for filing as provided by §§ 33-1-40 to 33-1-60 an application for reinstatement of the corporation. The Secretary of State shall file the application after the corporation has removed the default which was the ground for its dissolution, paid all fees and taxes which would have been payable during the period between dissolution and reinstatement, paid any outstanding judgments, and paid to the Secretary of State a reinstatement fee.

Section 33-14-220 of 1988 Act 444 provides in pertinent part that "[a] corporation dissolved administratively under Section 33-14-210 may apply to the Secretary of State for reinstatement within two years after the effective date of dissolution."

1988 Act 444, Section 4, expressly repealed Section 33-21-120 of the 1976 Code; however, most significantly, the General Assembly, in the enactment of the South Carolina Business Corporations Act of 1988, provided an expansive savings provision located at Section 33-20-105 of the Act, which provides, inter alia:

> Except as provided in subsection (b), the repeal of a statute by Chapters 1 thru 20 of this title does not affect: ...
>
> (2) any ratification, right, remedy, privilege, obligation, or liability acquired, accrued, or incurred under the statute before its repeal, including, without limitation, any right acquired pursuant to Sections 33-11-220 and 33-21-130 in Section 2 of Act 146 of 1981; ....

This savings clause expressly preserves any remedy that may have been acquired, accrued or incurred prior to the enactment of the

1988 Act 444.[2] The question thus becomes whether the five-year reinstatement provision, that was applicable to an administrative dissolution effective on April 1986, is a remedy preserved by the savings statute. If it is, then the subject non-profit corporation may avail itself of this five-year statutory period for seeking reinstatement and is not barred by the subsequently enacted two-year provision.

"Remedy" as used in this context is appropriately defined as a measure or means employed to enforce a right or redress an injury. Grammer v. Roman, 174 S.2d 443 (Fla. 1965); Kee v. Redlin, 203 N.W.2d 423 (N.D. 1972); Long Leaf Lumber, Inc. v. Svolos, 258 S.2d 121 (La. 1972); see also, 36 A Words and Phrases "Remedy;" cf., White v. Livingston, 234 S.C. 74, 106 S.E.2d 892 (1959). Moreover, our Court has consistently held that a limitations period is an aspect of the remedy. Hercules Incorporated v. South Carolina Tax Commission, 274 S.C. 137, 262 S.E.2d 45 (1980); Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956).

The Texas Court construed a similar savings clause in Robinson v. Buckner Park, Inc., 547 S.W.2d 60 (Tex. 1977). The statutory savings clause therein was enacted as part of comprehensive amendments to the Texas workers' compensation law. The Court recognized that the savings clause before it, with language similar to that chosen by our General Assembly in Section 33-20-105 of 1988 Act 544, expressly preserved both "rights" and "remedies" that existed in the law prior to the comprehensive amendments. The precise question before the Texas Court was whether the earlier, more liberal statute of limitations governed the claim that arose prior to the amendments but was not filed until after the effective date of the amendments or whether the shorter limitations period prescribed in the amendments govern. The Court first concluded that the statute of limitations was a part of the remedy and, thus, ordinarily would not be considered to be a vested right. Accordingly, the Court

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2. Decisional law in this State instructs that ordinarily in the absence of a savings clause the repeal of a statute operates retrospectively and has the effect of blotting the statute out completely. Taylor v. Murphy, 293 S.C. 316, 360 S.E.2d 314 (1987). This is particularly true where the repealed statute is not regarded as creating a right but only as providing a remedy. 360 S.E.2d, at 316. Accordingly, in the absence of this savings clause, the repeal of any pre-existing remedy would likely have retroactive effect.

recognized that in the absence of the savings clause the amended limitations period would probably govern the claim; nonetheless, the Court construed the savings clause as preserving matters of procedure as well as substantive rights. Thus, the Court held that, pursuant to the savings clause, the limitations period extant at the time the claim arose governed the remedy.

The Robinson decision is, of course, closely analogous to our question. I reiterate that the South Carolina courts would probably conclude that in the absence of an express savings clause, amended legislation that suspends or shortens a statute of limitations affects only the remedy and not the underlying right and, thus, ordinarily, such amendatory legislation would apply retroactively to claims arising prior to the enactment of the amendments. [See fn. 2.] Nonetheless, Section 33-20-105, much like the Texas provision, expressly preserves those remedies that existed prior to the enactment of the South Carolina Business Corporations Act of 1988; thus, those procedural remedies continue to exist and govern the procedures for reinstatement of those corporate charters dissolved prior to the effective date of 1988 Act 444. Further, since the limitations period must be considered part of the reinstatement remedy found at Section 33-21-120, the limitation period prescribed therein is likewise preserved by the savings clause.

In conclusion, with regard to a non-profit corporation whose charter was dissolved by administrative action of the Secretary of State pursuant to Section 33-21-110 in April 1986, I advise that Section 33-20-105 (a) expressly preserves the reinstatement remedy then extant. This remedy, found at Section 33-21-120 of the 1976 Code, prescribes a five-year period in which to apply for reinstatement of a corporate charter dissolved by administrative action on April 1986. Accordingly, this five-year provision governs[3] an application for reinstatement of the subject corporation.

Very truly yours,

Edwin E. Evans
Chief Deputy Attorney General

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(SEE FOOTNOTE 3 ON PAGE 5)

REVIEWED AND APPROVED:

Robert D. Cook

ROBERT D. COOK
Executive Assistant for Opinions

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3. This Office, in its opinion, 1964 Op. Atty. Gen. No. 1672, concluded that a savings clause enacted as a part of the 1963 amendments to South Carolina Corporation Code did not operate to preserve the pre-existing reinstatement remedy and, thus, the amendatory reinstatement provision governed even though a corporate charter had been dissolved prior to the effective date of the 1963 amendments. Unlike Section 39-20-105 of 1988 Act 444, the language of the savings clause scrutinized in the 1964 opinion did not provide that remedies acquired prior to the amendments were preserved. Interestingly as well, the corporation whose charter was dissolved in 1963 was aided by the amended reinstatement provision; whereas here, the non-profit corporation whose charter was dissolved in April of 1986 would be completely barred from applying for reinstatement of its charter if the 1988 reinstatement provisions govern. Although our opinion today does not rely upon this point of equity since we do not conclude that the non-profit corporation had any vested right of reinstatement pursuant to Section 33-21-120 of the 1976 Code, it does appear that the 1964 opinion was guided somewhat by the equities that played in favor of the dissolved corporation.