

## RESOLUTION 01-06-2018

### DIGEST

#### Limited Liability Corporations: Certificate of Cancellation Does Not Abate Lawsuits

Amends Corporations Code section 17707.08 to clarify that a cancelled limited liability company retains the power to sue and be sued while winding up.

### STATEMENT OF REASONS

The Problem: Corporations Code section 17707.06 allows an LLC that has filed a certificate of cancellation to continue to exist for the purpose of winding up its affairs, including prosecuting and defending actions by or against it. However, Section 17707.08(c) provides that once the certificate of cancellation is filed, all of the LLC's powers, rights and privileges cease. Federal case law has interpreted Section 17707.08 to mean that an LLC cannot file suit after cancellation, but this conflicts with the clear language in Section 17707.06(a). There are no published state cases on point.

The Solution: This resolution provides an exception for the powers that are eliminated when an LLC files its certificate of cancellation, by referencing the statute which authorizes an LLC to continue its ability to sue and defend itself in court.

### TEXT OF RESOLUTION

**RESOLVED** that the Conference of California Bar Associations recommends that legislation be sponsored to amend Corporations Code section 17707.08 to read as follows:

- 1 § 17707.08  
2 (a) (1) The managers shall sign and cause to be filed in the office of, and on a form  
3 prescribed by, the Secretary of State, a certificate of dissolution upon the dissolution of the  
4 limited liability company pursuant to Article 7 (commencing with Section 17707.01), unless the  
5 event causing the dissolution is that specified in subdivision (c) of Section 17707.01, in which  
6 case the persons conducting the winding up of the limited liability company's affairs pursuant to  
7 Section 17707.04 shall have the obligation to sign and cause to be filed the certificate of  
8 dissolution.  
9 (2) The certificate of dissolution shall set forth all of the following:  
10 (A) The name of the limited liability company and the Secretary of State's file number.  
11 (B) Any other information the persons filing the certificate of dissolution determine to  
12 include.  
13 (C) The event listed in Section 17707.01 causing dissolution.  
14 (3) If a dissolution pursuant to subdivision (b) of Section 17707.01 is made by the vote of  
15 all of the members and a statement to that effect is added to the certificate of cancellation of  
16 articles of organization pursuant to subdivision (b), the separate filing of a certificate of  
17 dissolution pursuant to this subdivision is not required.  
18 (b) (1) The managers shall sign and cause to be filed in the office of, and on a form  
19 prescribed by, the Secretary of State, a certificate of cancellation of articles of organization upon  
20 the completion of the winding up of the affairs of the limited liability company pursuant to  
21 Section 17707.06, unless the event causing the dissolution is that specified in subdivision (c) of

22 Section 17707.01, in that case the persons conducting the winding up of the limited liability  
23 company's affairs pursuant to Section 17707.04 shall have the obligation to sign and cause to be  
24 filed the certificate of cancellation of articles of organization.

25 (2) The certificate of cancellation of articles of organization shall set forth all of the  
26 following:

27 (A) The name of the limited liability company and the Secretary of State's file number.

28 (B) That a final franchise tax return, as described by Section 23332 of the Revenue and  
29 Taxation Code, or a final annual tax return, as described by Section 17947 of the Revenue and  
30 Taxation Code, has been or will be filed with the Franchise Tax Board, as required under Part  
31 10.2 (commencing with Section 18401) of Division 2 of the Revenue and Taxation Code.

32 (C) That upon the filing of the certificate of cancellation, the limited liability company  
33 shall be canceled and its powers, rights, and privileges shall cease.

34 (D) Any other information the persons filing the certificate of cancellation of articles of  
35 organization determine to include.

36 (3) The Secretary of State shall notify the Franchise Tax Board of the filing.

37 (c) Except as provided in Section 17707.06, upon ~~Upon~~ filing a certificate of cancellation  
38 pursuant to subdivision (b), a limited liability company shall be canceled and its powers, rights,  
39 and privileges shall cease.

(Proposed new language underlined; language to be deleted stricken)

**PROPONENT:** Bar Association of Northern San Diego County

#### **IMPACT STATEMENT**

This resolution does not affect any other law, statute or rule other than those expressly identified.

#### **CURRENT OR RELATED LEGISLATION**

None known.

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#### **RESOLUTIONS COMMITTEE RECOMMENDATION**

APPROVE IN PRINCIPLE

#### History:

No similar resolutions found.

#### Reasons:

This resolution amends Corporation Code section 17707.08 to clarify that a cancelled limited liability company retains the power to sue and be sued while winding up. This resolution should be approved in principle because it would make clear a limited liability company still has the

power to sue and be sued notwithstanding the filing of a certificate of cancellation or proceedings for its wind-up and dissolution.

Subdivision (a) of Corporations Code section 17707.06 states that a limited liability Company (LLC) can continue to exist for the purpose of winding-up its affairs, prosecuting and defending actions to collect and discharge its obligations and to collect, dispose and divide-up its assets after the filing of a certificate of cancellation. Subdivision (b) further confirms that no action or proceeding to which an LLC is a party abates by reason of the filing of a certificate of cancellation or proceedings for winding up and dissolution. Further, subdivision (d) expressly provides that an LLC can wind up its affairs after cancellation.

However, subdivision (c) of section 17707.08 provides that once the certificate of cancellation is filed, the powers, rights and privileges of the LLC cease. With this language, California federal district courts have interpreted section 17707.08 to mean that an LLC cannot file or defend a lawsuit after cancellation. (See *Hullinger v. Anand* (C.D. Cal. Dec. 22, 2015) 2015 U.S. Dist. LEXIS 187188, 2015 WL 11072169, at \*9; *Mirshafiei v. Legal Recovery Law Offices, Inc.* (C.D. Cal. Oct. 5, 2016) 2016 U.S. Dist. LEXIS 143625, at \*20; *Best Tire & Serv. Ctrs., LLC v. Goodyear Tire & Rubber Co.* (C.D. Cal. Feb. 14, 2017) 2017 U.S. Dist. LEXIS 39743, 2017 WL 1017642, at \*8-9.) Since these federal decisions show that there is confusion over what powers and rights an LLC has while it is winding up, adding a cross-reference between Corporations Code sections 17707.08 and 17707.06 will eliminate any conflict or ambiguity, and will make clear that after cancellation, the LLC still retains power to sue and defend itself in court.