

LIMITED LIABILITY COMPANIES IN KENTUCKY
(UKCLE 2011)

2014-1 Cumulative Supplement to Chapter 9

Dissolution of a Limited Liability Company

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2014-1 Cumulative Supplement

- (1) Page 171, footnote 41. Replace the footnote to read as follows:

KY. REV. STAT. ANN. § 275.300(3)(a). *See also Potter v. Blue Flame Energy Corp.*, No. 2002-CA-001404-MR (Ky. App. Oct. 31, 2003) (Not to be Published) (corporate dissolution did not effect transfer of title of corporate owned real property to corporation's shareholders); *Pinkerton v. Pinkerton*, 548 So.2d 449 (Ala. 1989) (while descendants of a shareholder held the shares as tenants-in-common, those descendants were not, with other shareholders, tenants-in-common as to the property of the corporation); *Mukon v. Gollnick*, 151 Conn. App. 126, 92 A.3d 1052 (Conn. App. 2014) (dissolution of single-member LLC did not effect transfer of LLC's assets to sole member).

- (2) Page 171, footnote 44. Replace the footnote to read as follows:

KY. REV. STAT. ANN. § 275.300(3)(d); *see also Rutledge, The 2010 Amendments to Kentucky's Business Entity Laws*, 38 N. KY. L. REV. 383, 391-92 (2011).

- (3) Page 172, Section [9.3]. Add the following new paragraph to the end of Section [9.3].

There is no separate filing made to indicate that the winding up has been completed.

- (4) Pages 172-73. Replace the entirety of Section [9.4.1] to read as follows:

[9.4.1] Agency Power of Members or Managers After Dissolution

During the winding up phase, a member or manager of the LLC may bind the LLC in the course of transactions appropriate to the winding up of its affairs and for such other purposes as

are authorized by the members or managers.¹ With respect to third parties without knowledge of the dissolution, a member or manager may bind the LLC with respect to matters outside those appropriate to winding up.² At the same time, the filing of articles of dissolution, the entry of decree of dissolution or the filing of a certificate of dissolution shall be presumed to constitute notice of the LLC's dissolution.³ Consequent to that deemed notice it is open to debate whether there can be a third-party without notice. At the same time it is open to question whether the General Assembly intended that every party doing business with an LLC is obligated to investigate its status as to dissolution. The agent on behalf of a dissolved LLC bears the risk of personal liability on contracts entered into after dissolution.⁴

(5) Pages 176-82. Replace the entirety of Section [9.5] to read as follows:

[9.5] The Effect of Reinstatement After Administrative Dissolution

An LLC, having been administratively dissolved and assuming it has not acted to notify its creditors and otherwise wind up and liquidate its business and affairs,⁵ may apply for reinstatement. Assuming reinstatement is granted:

[I]t shall relate back to and take effect as of the effective date of the administrative dissolution and the entity shall resume carrying on its business as if the administrative dissolution or revocation had never occurred.⁶

A frequently litigated point is the contractual or tort liability of those who acted on behalf of the administratively dissolved LLC during the period between the dissolution and the

¹ KY. REV. STAT. ANN. § 275.305(1)(a); *id.* § 275.305(3).

² KY. REV. STAT. ANN. § 275.305(1)(b).

³ KY. REV. STAT. ANN. § 275.305(2).

⁴ *But see* section [9.5.1] *infra*.

⁵ KY. REV. STAT. ANN. § 14A.7-030(4).

⁶ KY. REV. STAT. ANN. § 14A.7-030(3). Prior to January 1, 2011, this rule was set forth at KRS § 275.295(3)(c).

subsequent reinstatement.⁷ Essentially, the plaintiff argues that during the period of dissolution the LLC lacked the capacity to undertake acts not appropriate to its winding up and liquidation,⁸ and thus the persons purporting to act on the LLC's behalf were actually acting as principals and are therefore personally liable on the contract. The defendant argues that because reinstatement relates back to the initial administrative dissolution,⁹ the dissolution is of no legal effect and the rules governing the personal liability of the agents should be applied as if the dissolution never occurred.

The position of the defendant is correct, a conclusion confirmed by a 2012 amendment to the statute and the Kentucky Supreme Court's decision in *Pannell v. Shannon*.¹⁰

Initially, it is important in analyzing questions of this nature to be exceptionally careful in relying upon court decisions. Many are dated and of no utility. For example, in *Steele v. Stanley*,¹¹ the Court held that the shareholders of a corporation are liable for all debts and obligations undertaken after dissolution. At the time of that ruling, a corporation's dissolution

⁷ See, e.g., *Forleo v. American Products of Kentucky, Inc.*, 2006 WL 2788429 (Ky. App. 2006); *Fairbanks Arctic Blind Co. v. Prather & Associates, Inc.*, 198 S.W.3d 143 (Ky. App. 2005); *Esselman v. Irvine*, No. 1997-CA-001155-MR (Ky. App. Jan. 8, 1999); *Pannell v. Shannon*, 425 S.W.3d 58 (Ky. 2014). *Messing v. Paul*, 147 Fed. Appx. 437 (6th Cir. 2005), is not on point; it involved liability absent reinstatement. Another decision not involving reinstatement is *Pelsor v. Petoria, Inc.*, 2011 WL 1434641 (W.D. Ky. 2011). The *Pelsor* case is interesting. The corporation at issue was administratively dissolved and was not reinstated, so the effect of the reinstatement statute is actually not at issue. The interesting point is that the plaintiff is a shareholder in the defendant corporation; he is, in effect, asserting that his co-shareholders are infringing on his IP. The plaintiff has used his voting position in the corporation to preclude it from reinstating.

⁸ See KY. REV. STAT. ANN. § 14A.7-020(3) ("An entity administratively dissolved continues its existence but shall not carry on any business except that necessary to wind up and liquidate its business and affairs."); *id.* § 275.300(2) ("A dissolved [LLC] shall continue its existence but shall not carry on any business except that appropriate to wind up its business and affairs."); *accord id.* § 271B.14-050(1) ("A dissolved corporation shall continue its corporate existence but may not carry on any business except that appropriate to wind up and liquidate its business and affairs."); see also *Stearns Coal & Lumber Co. v. Douglas*, 185 S.W.2d 385 (Ky. 1944) (a dissolved corporation continues to exist for the purpose of settling its affairs and paying its creditors).

⁹ KY. REV. STAT. ANN. § 14A.7-030(3) ("as if the administrative dissolution or revocation had never occurred.").

¹⁰ 425 S.W.3d 58 (Ky. 2014).

¹¹ 35 S.W.2d 867 (Ky. 1931).

terminated its legal existence.¹² Further, in this era there was neither administrative dissolution nor, crucially for these purposes, reinstatement after dissolution with retroactive effect.¹³ Under the modern system, a dissolved entity continues to exist and retains the power and authority to wind up and liquidate its affairs.¹⁴ After the filing of the articles of dissolution (or administrative dissolution) the entity is restricted to activities appropriate for its winding up and liquidation even as it continues to exist.¹⁵ Ergo, the *Steele* decision (and others of its milieu) fails to account for the statutory developments that give rise to this question. Even in more modern decisions from other jurisdictions,¹⁶ the outcome often hinges on the specific statutory language, and these differences between the states' formulae may preclude reliance on the analysis employed and the conclusions reached.

[9.5.1] Irrespective of Reinstatement, an LLC Affords Its Members Limited Liability Even After Dissolution

In the case of an LLC, it must be initially recognized that the limited liability provision of the LLC Act is broader than is the limited liability provision of the Business Corporation Act. In

¹² See, e.g., 16A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8113. Of course a plaintiff relying upon this reasoning could well find themselves hoist upon their own petard. Under the law of that era, a corporation's dissolution extinguished its debts. See, e.g., II STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 516 (1794) ("The effect of the dissolution of a corporation is, that all its lands revert to the donor; its privileges and franchises are extinguished; and the members can neither recover debts which were due to the corporation, nor be charged with debts contracted by it, in their natural capacities."); JAMES GRANT, A PRACTICAL TREATISE ON THE LAW OF CORPORATIONS IN GENERAL AS WELL AGGREGATE AS SOLE 314 (T. & J.W. Johnson 1854) (upon dissolution "The corporation is wholly gone, and with it are also lost and avoided all its claims, debts, and liabilities of all kinds.")

¹³ The "relates back" language came into Kentucky law with the 1988 adoption of KRS § 271B.14-220. The prior statute (KRS § 271A.615) was silent as to whether reinstatement related back or was only prospective.

¹⁴ See KY. REV. STAT. ANN. § 14A.7-020(3); see also *Greene v. Stevenson*, 175 S.W.2d 519, 523-24 (Ky. 1943) (the purpose of statutes for the extension of corporate existence after dissolution "is to abrogate the common law rules relative to the reversion of corporate real estate, escheat of its personal property, and extinguishment of the debts owed by and to it").

¹⁵ See KY. REV. STAT. ANN. § 14A.7-020(3). It may be said that upon dissolution, whether voluntary, judicial or administrative, that the purpose of the LLC is to wind up and liquidate its business and affairs.

¹⁶ See generally Annotation, *Reinstatement of Repealed, Forfeited, Expired, or Suspended Corporate Charter as Validating Interim Acts of Corporation*, 42 A.L.R. 4th 392.

the latter statute, it is provided that shareholders enjoy limited liability from the debts and obligations of the corporation.¹⁷ The statute is silent as to the limited liability that is enjoyed by both the directors and the officers.¹⁸ In contrast, the LLC Act, in addition to providing that the members enjoy limited liability from the LLC's debts and obligations, goes on to extend that protection to the managers, employees and agents of the LLC.¹⁹ As such, the grant of limited liability by the LLC Act extends significantly further than does that afforded by the corporate law.

An LLC continues to exist as an LLC after dissolution.²⁰ The dissolution of an LLC does not cause any of the members, managers, employees or agents of the LLC to cease being in those roles. If, after dissolution, an LLC remains an LLC (and the statute says that is the case) and an LLC affords each of its members, managers, employees and agents limited liability from its debts and obligations (and the statute says that is the case), it necessarily follows that even after dissolution the LLC continues to afford the members, managers, agents and employees of the LLC limited liability from its debts and obligations.

[9.5.2] Upon Reinstatement After Administrative Dissolution, There is Limited Liability for Actions Undertaken After Dissolution and Before Reinstatement

A dissolved LLC continues to exist as an LLC.²¹ From the administrative dissolution, the LLC is restricted to activities appropriate for its winding up and liquidation.²² Upon

¹⁷ KY. REV. STAT. ANN. § 271B.6-220(2).

¹⁸ The limited liability enjoyed by the officers of a corporation is derived not from the law of corporations, but rather the law of agency. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006); RESTATEMENT (SECOND) OF THE LAW OF AGENCY § 320 (1958). While it is unquestioned that directors enjoy limited liability, the analytic underpinnings for that determination are open to debate.

¹⁹ KY. REV. STAT. ANN § 275.150(1).

²⁰ KY. REV. STAT. ANN § 275.300(2) (“A dissolved [LLC] shall continue its existence....”); *id.* § 14A.7-020(3) (“An entity administratively dissolved continues its existence....”). Simply put, the “dissolution” of an LLC does not terminate its existence.

²¹ *See* KY. REV. STAT. ANN. § 14A.7-020(3).

reinstatement, it is as if the administrative dissolution had never taken place;²³ the existence of the LLC continues without interruption. In that an effect of reinstatement is that the LLC's existence has not been interrupted, then the limited liability enjoyed by its agents is likewise uninterrupted.²⁴

This rule is consistent with the Restatement (Third) of Agency (the "Restatement"). Putting the issue in agency terms, Agent A, on behalf of Principal P, has both actual and apparent agency authority conferred at a time when P was fully competent. At some later time, P becomes incapacitated. During P's incapacity, in the ordinary course of what would otherwise be P's line of business and having fully disclosed P's identity as the principal, A enters into a contract with third-party ("TP"). At some point thereafter, P regains competency and expressly ratifies A having during the period of incapacity entered into the agreement with TP on P's behalf. Thereafter, P defaults on the agreement with TP.

Initially, even if A was not aware of P's incapacity, by entering into the contract with TP while P was incapacitated, A violated his warranty of authority²⁵ and is potentially liable to TP on the obligation.²⁶ Still, by ratification²⁷ after the incapacity was lifted, P agreed to be bound on the contract with TP. The question is whether P's ratification of A's conduct during the period

²² *See id.*

²³ KY. REV. STAT. ANN. § 14A.7-030(3) ("as if the administrative dissolution or revocation had never occurred.").

²⁴ *See also* KY. REV. STAT. ANN. § 275.003(1) ("Unless displaced by particular provisions of this chapter, the principals of law and equity shall supplement this chapter.").

²⁵ *See* RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006); *see also* 3 AM.JUR.2d Agency § 295 (2008) ("Generally, one who contracts as an agent in the name of a non-existent or fictitious principal, or a principal without legal status or existence, is personally liable on a contract so made.").

²⁶ *See* RESTATEMENT (THIRD) OF AGENCY § 6.04 (2006) ("Unless the third party agrees otherwise, a person who makes a contract with a third party purportedly as an agent on behalf of a principal becomes a party to the contract if the purported agent knows or has reason to know that the purported principal does not exist or lacks capacity to be a party to a contract.").

²⁷ *See* RESTATEMENT (THIRD) OF AGENCY § 4.02 (2006).

of incapacity cures A's breach of the warranty of authority such that TP does not have recourse against A upon P's default. The answer is that TP has no recourse against A.

The clearest authority for the proposition that the agent would not, on these facts, be personally liable for P's obligations on the agreement is the Restatement (Third) of Agency section 4.02, which addresses the "Effect of Ratification." Presuming that the LLC ratifies the agent's actions undertaken during the period of incapacity (administrative dissolution), section 4.02(1) provides:

Subject to the exceptions stated in subsection (2), ratification retroactively creates the effects of actual authority.

It is important to consider as well section 4.01(1) of the Restatement, defining "ratification," it providing:

Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.²⁸

Official comment (b) to section 4.02 of the Restatement provides in part:

Ratification has an immediate effect on legal relations between the principal and agent, the principal and the third party, and the agent and the third party. Ratification recasts those legal relations as they would have been had the agent acted with actual authority. Legal consequences thus "relate back" to the time the agent acted.²⁹

²⁸ See also RESTATEMENT (THIRD) OF AGENCY § 4.03 (2006) ("A person may ratify an act if the actor acted or purported to act as an agent on the person's behalf.").

²⁹ This proposition is consistent with that has been Kentucky's law on ratification. See, e.g., *A & Equip. Co. v. Carroll*, 377 S.W.2d 895, 897 (Ky. 1964) (citing 2 FLETCHER CYCLOPEDIA CORPS. (Permanent Ed.) § 752, pp. 1057-58):

If the officers of the agents of a corporation assume to act for the corporation without any authority at all, or if they exceed their authority or act irregularly, and the act is one which could have been authorized in the first instance by the stockholders, board of directors or subordinate officers, as the case may be, it may be expressly or impliedly ratified by them, thus be rendered just as binding except as to intervening rights of third persons, as if it had been authorized when done, or done regularly.

Ergo, even if during the period of administrative dissolution the entity could not authorize an agent to undertake an act not relating to its winding up and liquidation,³⁰ upon reinstatement the entity's ratification of such actions causes the agent to have been vested with actual authority.³¹ Having actual authority to act on the principal's behalf (and assuming identification of the principal), the agent is not personally obligated on the agreement.³²

This analysis is consistent with recent Kentucky decisions with the exception of the unsound *Forleo* decision. In that unpublished decision, in partial reliance upon *Steele v. Stanley*,³³ the Court held that the corporation's reinstatement after administrative dissolution³⁴ did not impact upon the personal liability of the shareholders and officers for debts incurred after dissolution and prior to reinstatement. Further, the Court relied upon the "resume" language in

³⁰ See, e.g., KY. REV. STAT. ANN. § 14A.7-020(4); RESTATEMENT (THIRD) OF AGENCY § 3.04(2) (2006).

³¹ See RESTATEMENT (THIRD) OF AGENCY, Ch. 4, Introductory Note (2006); *id.* § 4.01, comment b ("That is, when a person ratifies another's act, the legal consequence is that the person's legal relations are affected as they would have been had the actor been an agent acting with actual authority at the time of the act.").

³² See RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006). This rule as to the effect of ratification and the consequent release of the agent from personal liability on the contract is in no manner a recent innovation in the law. See, e.g., ERNEST W. HUFFCUT, THE LAW OF AGENCY INCLUDING THE LAW OF PRINCIPAL AND AGENT AND THE LAW OF MASTER AND SERVANT at § 49 (p. 61) (Little, Brown & Co., 1901) ("An agent after ratification of his unauthorized act by his principal is in the same relation to the third party as if the acts had been previously authorized. The principal alone is generally liable on the contract he has ratified,").

³³ *Forleo*, 2006 WL 2788427, *1.

³⁴ Prior to January 1, 2011 and the Kentucky Business Entity Filing Act, the language employed in the LLC Act as to the effect of reinstatement and that employed in the Business Corporation Act were essentially identical. Compare KY. REV. STAT. ANN. § 271B.14-220(3) (prior to repeal by 2010 Ky. Acts, ch. 151, § 151) ("When the reinstatement is effective, it shall relate back to and take effect as of the effective date of the administrative dissolution or revocation and the corporation shall resume carrying on its business as if the administrative dissolution or revocation had never occurred.") and KY. REV. STAT. ANN. § 271B.14-040(5) ("When revocation of dissolution is effective, it shall relate back to and take effect as of the effective date of the dissolution and the corporation shall resume carrying on its business as if the dissolution never occurred.") with KY. REV. STAT. ANN. § 275.295(3)(c) (prior to repeal by 2010 Ky. Acts, ch. 151, § 151) ("When the reinstatement is effective, the reinstatement shall relate back to and take effect as of the effective date of the administrative dissolution, and the [LLC] shall resume carrying on business as if the administrative dissolution had never occurred.").

KRS § 271B.14-040(5) for the proposition “The ‘shall resume’ language necessarily implies that the corporation ceased doing business as required by KRS 271B.14-210(3).”³⁵

As will be reviewed below, the *Forleo* decision conflicts with prior law and is an aberrational decision.

*Esselman v. Irvine*³⁶ should have been the definitive ruling on the matter, but unfortunately it was unpublished. Squarely addressing the effect of reinstatement upon the personal liability of an agent for an agreement entered into during the period of administrative dissolution and prior to reinstatement, the Court of Appeals affirmed the trial court’s conclusion that reinstatement “‘absolved [Irvine] of the personal liability that might have attached had his corporation remained dissolved.’”³⁷ Further, *Esselman* considered and rejected the notion that “‘resume” limited the effect of “shall relate back.’”³⁸

The next consideration of the issue by the Court of Appeals was *Fairbanks Arctic Blind Co. v. Prather & Associates, Inc.*,³⁹ wherein it addressed an effort to dismiss a suit seeking

³⁵ *Forleo*, 2006 WL 2788429, *2.

³⁶ No. 1997-CA-001155-MR (Ky. App. 1999).

³⁷ *Id.*, Slip op. at 5; *see also id.* at 8 (“By allowing a corporation to be reinstated at “any time” after an administrative dissolution has taken place and by specifically stating that such a reinstatement shall relate back to the date of the administrative dissolution and shall operate as if the administrative dissolution has never occurred the clear intent of the statute is unambiguous. As such the finding of the trial court in this matter – that the reinstatement of ICM absolves Irvine of personal liability – is not clearly erroneous.”) (emphasis in original).

³⁸ *Id.* at 8.

³⁹ 198 S.W.3d 143 (Ky. App. 2005).

enforcement of an agreement entered into while the corporation was administratively dissolved.⁴⁰

The Court of Appeals⁴¹ held that:

When the General Assembly stated in KRS 271B.14-220(3) that reinstatement shall relate back to and take effect as of the effective date of the administrative dissolution ... and the corporation shall resume carrying on its business as if the administrative dissolution ... had never occurred[.]

We conclude, applying the rationale of *J.B. Wolfe* and *Joseph A. Holpuch* that it [the General Assembly] intended for reinstatement to restore a corporation to the same position it would have occupied had it not been dissolved and that reinstatement validates any action taken by a corporation between the time it was administratively dissolved and the date of its reinstatement. Simply put, the General Assembly meant what is said, that upon reinstatement, it is “as if the administrative dissolution ... had never occurred.”⁴²

At this juncture the *Esselman* and *Fairbanks* opinions consistently state the view that upon reinstatement the agent is not liable upon agreements entered into on behalf of the entity after administrative dissolution and before reinstatement. It should be recognized that this rule is consistent with that described as being accepted by most jurisdictions:

In most jurisdictions, the reinstatement of a corporation following dissolution by administrative action of the court relates back to the effective date of dissolution, and directors or officers are not personally

⁴⁰ *Id.* at 144 (“On January 30, 2004, Prather, pursuant to Kentucky Rules of Civil Procedure (CR) 12, moved to dismiss Fairbanks’ claim on the ground that, according to Kentucky Revised Statutes (KRS) 271B.14-210, a corporation that has been administratively dissolved is prohibited from carrying on any business except that which is necessary to wind up and liquidate its business. Since Fairbanks had been administratively dissolved in 1991, Prather argued, it was prohibited from entering into the 1993 contract and thus the contract was null and void.”).

⁴¹ Apparently unaware of its prior decision in *Esselman*, the *Fairbanks* Court thought “Since this is an issue of first impression in the Commonwealth, ...” *Id.* at 145.

⁴² *Id.* at 146 (citation omitted). The Court of Appeals rejected an effort to apply the statutory “resume” to limit the effect of the statute. “Prather urges us to focus solely on the word ‘resume’ found in KRS 271B.14-220(3) and construe the statute to disavow interim corporate activities. This would effectively redact the statute to read, ‘When the reinstatement is effective ... the corporation shall resume carrying on its business[.]’ However, as noted above, we may not subtract language from a statute nor may we render any of its language meaningless, if we can avoid doing so. Since Prater’s interpretation would do so, we decline to adopt it.” This determination was obviously consistent with that in *Esselman*.

liable for actions taken during the period of dissolution or suspension. Such matters become the exclusive liability of the corporation.⁴³

The *Forleo* decision was rendered in September, 2006, eleven months after the October, 2005 decision rendered in *Fairbanks*; how was it decided notwithstanding the *Fairbanks* decision? Likely we will never have a clear answer to the question. What is clear is that *Fairbanks* was not cited in the briefs submitted to the Court of Appeals panel considering the *Forleo* appeal,⁴⁴ and it must be assumed that the Court's own research did not reveal the prior published law on the topic.

In *Eve v. Cosmo's LLC*,⁴⁵ the Court considered an argument based upon the "resume" language of the statute; of course, this was the same argument that had been considered and rejected in *Esselman v. Irvine*⁴⁶ to the effect that there should not be limited liability for actions undertaken during the period of administrative dissolution and prior to restatement. Rejecting that argument, the Court held:

By including the language that reinstatement relates back to the date of the administrative dissolution, the Court believes that the legislature meant what it said, to wit, that a § 275.295 reinstatement cures the dissolution, and that cure is effective as of the date of dissolution.... The situation herein is similar [to that in *Fairbanks*], where the alleged tortious conduct occurred while the LLC was administratively dissolved but then reinstated later. If contracts that were entered into on behalf of the dissolved corporation in *Fairbanks* were deemed valid by the Kentucky Court of Appeals, the Court believes Kentucky courts would similarly conclude when asked to interpret the LLC statute. As a result, Cosmo's LLC and its members will be able to take advantage of the limited liability that K.R.S. § 275.150(1) provides.

⁴³ 16A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8117.

⁴⁴ See Brief for Appellants Dean Forleo and John Tandy dated September 6, 2005 and Brief for Appellees dated November 2, 2006.

⁴⁵ Case No. 06-188-DLB, Memorandum Order (E.D. Ky. Mar. 27, 2008).

⁴⁶ See *infra* notes 35 through 37 and accompanying text.

In *Pannell v. Shannon*,⁴⁷ the Court of Appeals rejected an effort to hold an individual liable on a lease entered into at the time her LLC was administratively dissolved.⁴⁸ Relying upon *Fairbanks*, the Court wrote:

[R]einstatement restores a corporation to the same position it would have occupied had it not been dissolved and that reinstatement validates any action taken by a corporation between the time it was administratively dissolved and the date of its reinstatement. Simply put, the General Assembly meant what it said, that upon reinstatement, it is “as if the administrative dissolution ... had never occurred.” *Fairbanks Arctic Blind Co.*, 198 S.W.3d at 146. As reinstatement of a limited liability company relates back to the effective date of dissolution and operates as if dissolution never occurred, it naturally follows that members of such company are not individually liable for actions undertaken on behalf of the company during dissolution. See *Fairbanks Arctic Blind Co.*, 198 S.W.3d 143. Hence, the subsequent reinstatement of Elegant Interiors as a limited liability company “related back” to date of its dissolution, and Shannon cannot be held individually liable for any actions undertaken on behalf of Elegant Interiors while it was administratively dissolved.⁴⁹

Further, the Court chastised the plaintiff for citing the *Forleo* decision in its brief, noting that CR 76.28(4)(c) permits the citation of unpublished authority only when there is a “complete lack of published authority upon an issue.”⁵⁰ Clearly, at least this panel of the Court of Appeals accepted that *Fairbanks* is the final authority on this point.

Thereafter, the question was considered by Judge Coffman in *eServices, LLC v. Energy Purchasing, Inc.*⁵¹ When Energy Purchasing defaulted on a contract with eServices, the contract having been entered into while Energy Purchasing was administratively dissolved, it sought to hold Buchart, its agent, personally liable thereon. Energy Purchasing defended on the ground

⁴⁷ 2011 WL 3793415 (Ky. Ct. App. 2011).

⁴⁸ *Id.* at *3 (“Alternatively, Pannell argues that Shannon is individually liable because Elegant Interiors was administratively dissolved as a limited liability company at the time of execution of the March 2006 lease.”).

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*, note 22.

⁵¹ 2012 WL 404957 (E.D. Ky. Feb. 6, 2012).

that it had been reinstated, thereby relieving Buchart of any personal liability. Judge Coffman agreed:

Because Energy Purchasing was reinstated after Buchart signed the contracts, the corporation is treated as having been in existence when the contracts were signed...⁵²

eServices had pinned its hopes on the *Forleo* decision. Judge Coffman dissected and discarded any application of *Forleo*, finding its reasoning unpersuasive, that it conflicted with the operation of the express statutory language and as well conflicted with the published *Fairbanks* decision.⁵³

In *Harshman Construction & Electric, Inc. v. Witte*,⁵⁴ the plaintiffs sought to hold certain of the defendant's representatives personally liable on their claim on the basis that the defendant corporation was administratively dissolved while performing on the subject contract; it was subsequently reinstated. Reversing the determination that the individuals were personally liable, the Court of Appeals parsed KRS § 271B.14-220(3), the predecessor to now applicable KRS § 14A.7-030, both of which provide that upon the reinstatement of a dissolved entity, the reinstatement shall "relate back to and take effect as of the effective date of the administrative dissolution or revocation" and the organization shall proceed forward as if the administrative dissolution "had never occurred." Noting that the statute does not impose a time limitation for seeking reinstatement after administrative dissolution, and in reliance upon the 2005 ruling of the Court of Appeals in *Fairbanks*, the *Harshman* Court writing that: As reinstatement of a corporation relates back to the effective date of dissolution and operates as if dissolution never occurred, it naturally follows that the shareholders and officers of such corporation are not individually liable for actions undertaken on behalf of the corporation during its dissolution.⁵⁵

⁵² 2012 WL 404957,*2.

⁵³ 2012 WL 404957, *2-3.

⁵⁴ 2012 WL 2471445 (Ky. App. June 29, 2012) (Not To Be Published).

⁵⁵ Slip Op. at 6.

In an effort to reduce to statute the rules consistently set forth in *Esselman*, *Fairbanks*, *Pannell* and *eServices* (as well anticipating the holding in *Harshman*)⁵⁶ and to reject the aberrational *Forleo* decision, the 2012 General Assembly enacted two statutory amendments to KRS § 14A.7-030. First, but of smaller importance, “resume” was deleted and “continue” was substituted in place thereof.⁵⁷ Second and of greater import, a new subsection (3)(c) was added to the statute, it defining one effect of reinstatement as:

The liability of any agent shall be determined as if the administrative dissolution or revocation had never occurred.⁵⁸

The Kentucky Supreme Court brought this debate to a clear conclusion in *Pannell v. Shannon*.⁵⁹

The dispute arose out of a defaulted lease. Shannon’s LLC was the tenant – that LLC was during the term of the lease administratively dissolved. A replacement lease was entered into in the period between the administrative dissolution and the LLC’s reinstatement. When the LLC ultimately defaulted the landlord sought to hold Shannon liable on the obligation.

The real crux of the decision is the impact of administrative dissolution and subsequent reinstatement upon each of (i) a member’s limited liability and (ii) the liability of an agent on a contract entered into after dissolution and before reinstatement.⁶⁰ The Court recognized that these are distinct questions based upon distinct legal principles:

[T]he liability of a director, officer, employee or agent of a limited liability entity during a period of administrative dissolution is technically a separate question from the liability of the owners of the entity.⁶¹

The Court could not have been more express about the continuity of a member’s limited liability after dissolution:

⁵⁶ See also *Moore v. Stills*, 307 S.W.3d 71, 81 (Ky. 2010) (giving retroactive effect to statutes “that clarify existing law or that codify judicial precedent.”).

⁵⁷ See KY. REV. STAT. ANN. § 14A.7-030(3)(b) as amended by 2012 Ky. Acts, ch. 81, § 83.

⁵⁸ See KY. REV. STAT. ANN. § 14A.7-030(3)(c) as created by 2012 Ky. Acts, ch. 81, § 83; see also Rutledge, *The 2012 Amendments to Kentucky’s Business Entity Statutes*, 101 KY. L.J. ONLINE 1, 11 (2012-13).

⁵⁹ 425 S.W.3d 58 (Ky. 2014).

⁶⁰ 425 S.W.3d at 68.

⁶¹ 425 S.W.3d at 77.

This Court concludes that a member of an [LLC] enjoys statutory immunity from liability under KRS 275.150 for actions taken during a period of administrative dissolution so long as the company is reinstated before a final judgment is rendered against the member.⁶²

Distancing LLCs from the common law of corporations, the Court looked to the statutes addressing a member's limited liability (KRS § 275.150) and the retroactive effect of reinstatement (KRS § 275.295(3)(c); now KRS § 14A.7-030(3)) and determined that reinstatement wiped the slate clean.

The plain meaning of the relate-back language is that the company is deemed viable on reinstatement from the point of administrative dissolution onward, which necessarily includes the time of suspension between the date of administrative dissolution and reinstatement.

Reinstatement under the statute literally undoes the dissolution. This is why the Secretary of State was required to “cancel” the certificate of dissolution and issue a certificate of existence. *See* KRS 275.295(3)(a). And that certificate of existence took effect, by statute, retroactively on the date of dissolution.⁶³

Pannell's argument that a member's limited liability is suspended during the period between administrative dissolution and reinstatement was rejected.

Turning to the question of Shannon's liability as an agent for the LLC's obligation undertaken while the LLC was administratively dissolved, the Court noted that the question divides into a pair of inquiries, namely:

First, can Shannon under the circumstances of this case be personally liable by reason of her merely being an agent? Second, can she be personally liable because she acted as an agent without authority?

In response to the first question, the Court referred to KRS § 275.150(1) and noted that its rule of limited liability extends to the LLC's agent. As the LLC's existence had been reinstated and:

reinstatement is retroactive to the date of dissolution, and it is as if the dissolution never occurred, giving the company a seamless existence. The

⁶² 425 S.W.3d at 67. It is this aspect of the decision that is most unsettling. Essentially, the balance of the decision supports and applies the statutory rules that (i) dissolution of an LLC does not terminate its existence as an LLC and (ii) dissolution does not terminate the rule of limited liability. The “so long as the company is reinstated” language cuts against the statute by in affect conditioning continuing limited liability upon reinstatement. This language may have been intended by the Court as a means of supporting the *Forleo* decision, but it is out of step with and adds ambiguity to what is otherwise a clear application of unambiguous statutory law.

⁶³ 425 S.W.3d at 68.

limitation on the agent's liability simply for being an agent is likewise seamless.⁶⁴

In that the LLC in question was subsequently reinstated, the Court found there to be no opportunity for imposing liability on an agent. Rather, as the LLC Act protects agents from liability on the LLC's debts (KRS § 275.150(1)), then:

To the extent that any liability is claimed solely because Shannon was a manager or agent of the LLC, the analysis above for why she cannot be liable as a member applies. The reinstatement is retroactive to the date of dissolution, and it is as if the dissolution never occurred, giving the company a seamless existence. The limitation on the agent's liability simply for being an agent is likewise seamless.⁶⁵

Providing an appropriate critical eye to the question before it, the Court observed:

The immunity provided by KRS 275.150 extends only to liability *by reason* of her being an agent. By alleging that Shannon acted without authority, Pannell is not claiming she is liable solely because of her status as an agent, but because she had no authority to act as an agent.⁶⁶

In reliance upon the statutory statement that a dissolved LLC continues to exist after its dissolution, the Court found that when combined with reinstatement, Shannon never lost the capacity of being the LLC's agent.

In response to the argument that giving such a broad affect to the effect of reinstatement is improper, the Court observed:

The simple fact is that Kentucky's corporation law and other business entity laws differ from those in other states The existence of a majority rule can only be persuasive if the rule is based on statutes like those in Kentucky.⁶⁷

⁶⁴ 425 S.W.3d at 78.

⁶⁵ 425 S.W.3d at 78.

⁶⁶ 425 S.W.3d at 81.

⁶⁷ 425 S.W.3d at 79, 80.