

# TAX FORFEITURE



## *COUNSEL'S CORNER*

In 1995 Urban Retreat leased space in a retail center from BPMT, LLC, to operate its day spa business. Urban continued to lease the property for more than 10 years, executing renewals and lease extensions. The most recent extension was signed in 2006, and extended the lease to April 30, 2011.

Francie Willis signed the lease extension solely in her capacity as an officer of Urban. Evidently there were no personal guarantees.

Urban's corporate charter was forfeited by the Secretary of the State of Texas on July 30, 2010. Urban made no further rental payments from August 2010 until the end of the lease on April 30, 2011. The total rental owing in that nine-month period was \$112,735. Some of the rental was composed of base rent; other obligations pertained to payment of triple net charges.

BPMT sued Urban Retreat for delinquent rent. Because Urban's corporate privileges were forfeited for failure to pay franchise taxes, BPMT also sued Francie Willis, Urban's President.

The theory of liability pursued by BPMT against Willis was that since Urban's corporate privileges were forfeited, Willis became liable for the entity's debts. See Texas Tax Code 171.255(a): <http://www.statutes.legis.state.tx.us/Docs/TX/htm/TX.171.htm>.

The trial court ruled for BPMT and held Willis liable for \$38,327, being a portion of the rent owed by Urban Retreat between 2010 and 2011, and conditionally, \$45,000 in attorney's fees.

Willis appealed, claiming that the tax laws did not have the effect of imposing personal liability on her in this situation involving base rental with CAM reimbursements and triple net annual adjustments.

The tax statute imposes liability on a corporation's officers for ". . . each debt of the corporation created or incurred in this state after the date on which the report, tax or

penalty is due . . . [emphasis added]” Willis argued that the lease agreement provided for a debt that was “created or incurred” in 2006 – four years before corporate privileges were forfeited.

BPMT advanced the position that the debt in this situation was uncertain due to the application of triple net charges, and consequently, was not known until after forfeiture. And as a consequence, Willis is personally liable.

The appellate Court evaluated the meaning of “debt” in Texas law by reviewing not only previous Texas cases but also citing both Black’s Law Dictionary (debt is liability on a claim) as well as Merriam Webster Collegiate Dictionary (debt is an obligation or something owed).

Ultimately the Court concluded that a “debt” is created at the time a lease agreement is signed, even if the amount of the debt is uncertain. Accordingly Urban Retreat’s debt was created in 2006 – well before the corporate forfeiture of privileges in 2010.

Willis is not liable under the tax code for Urban Retreat’s leasing debts created in 2006 and subsequent forfeiture of corporate privileges in 2010. Willis wins; BPMT loses. See *Francie Willis v. BPMT, LLC*; Cause No. 01-14-00537-XC; Texas Court of Appeals 1<sup>st</sup> District; July 23, 2015.

Lessons learned:

1. Practice Point: Don’t put yourself in this position and don’t allow your principals to do so either. It’s easy enough to check the standing of Texas business entities: <https://mycpa.cpa.state.tx.us/coa/Index.html>.
2. Practice Point: Want to go above and beyond for your clients? Mark your calendars to check their standing with the Texas Comptroller annually, maybe on the anniversary of the closing or lease execution. Send them annual updates that all is well, or maybe something fell through the cracks. Be proactive!
3. NTCAR Expo: I sure enjoyed visiting with many of you at the Expo on September 2. Thanks for stopping by!

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