

ARTICLES

## The 2007 Amendments to the Kentucky Business Entity Statutes

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All things are in motion and nothing is at rest. . . . You cannot go into the same [river] twice.—Heraclitus, as recounted by Plato in CRATYLUS

THE 2007 amendments to Kentucky's various business entity statutes reflect not a great step forward in innovation, but rather an effort to step back, to assess Kentucky's position, and to lay the framework for future innovation and development. By and large the amendments relate not to grand topics, such as enabling new or recasting old forms of business organizations, but rather ensure that the laws are effective and eliminate and reconcile meaningless inconsistencies between statutes.

### I. THE 2007 AMENDMENTS

The 2007 amendments to the business entity laws were submitted to the 2007 General Assembly in House Bill 334, introduced on February 7, 2007, by Representative Scott W. Brinkman.<sup>2</sup> On February 12 the bill was referred to the House Judiciary Committee, which held a hearing on the bill on February 21. The bill was voted out of the committee on a unanimous vote. The House unanimously passed the bill on March 2.<sup>3</sup> The bill was heard by the Senate Judiciary Committee on March 12, and was passed out by an unanimous vote. On March 26 the bill was recommitted to and amended by the Senate Appropriations and Revenue Committee by appending to it what had been House Bill 181, whereupon the bill

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<sup>2</sup> Representative Brinkman was as well the sponsor of H.R. 234, 2006 Gen. Assem., Reg. Sess. (Ky. 2006), which contained the Kentucky Revised Uniform Partnership Act and the Kentucky Uniform Limited Partnership Act.

<sup>3</sup> Ninety-five votes in favor, none against, none abstained, five not voting.

received unanimous Senate approval.<sup>4</sup> As so amended, the bill was again unanimously approved by the House.<sup>5</sup> The bill was signed by Governor Fletcher on April 5, 2007. The effective date of the provisions of H.B. 334 was June 26, 2007.<sup>6</sup>

## II. RELEVANT AFFECTED STATUTES

### A. *The Contingency of the 2002 Amendments to the Business Corporation Act*

In anticipation of the deletion of thirteen sections of the Kentucky Constitution (190, 191, 192, 193, 194, 195, 198, 200, 202, 203, 205, 207, and 208), amendments to title 271B, sections 6–210, 6–230, 7–040, 7–280, and 8–080 of the Kentucky Revised Statutes were approved by the 2002 General Assembly, each contingent upon the amendment of the Kentucky Constitution. Unfortunately, these provisions became trapped in something of a time warp. Senate Bill 121, containing the 2002 Kentucky Business Corporation Act (2002 KyBCA) amendments, stated that these provisions would be effective if that series of *thirteen* provisions of the Kentucky Constitution was deleted by the voters.<sup>7</sup> This bill was approved by both houses of the General Assembly and signed by Governor Patton on March 28, 2002. However, it was not until later in the session that the two chambers reached agreement on the proposed amendments to the Kentucky Constitution.<sup>8</sup> By that time, the proposal had been modified, and the voters were not asked to delete sections 195 or 205 of the Kentucky Constitution, two sections that had been listed in section 22 of Senate Bill 121. In the end, the voters did approve the amendment of the Kentucky Constitution through the deletion of the *eleven* provisions. In response to this discrepancy, the Reviser of the Statutes determined there existed a “contingency” with respect to whether these statutory provisions had been amended, and as a consequence the statute books contain the following note:

Legislative Research Commission Note.(11/15/2002). 2002 Ky. Acts ch. 102, sec. 22, provides that this section “shall take effect November 15, 2002, if a constitutional amendment proposing to amend Sections 190, 191, 192, 193, 194, 195, 198, 200, 202, 203, 205, 207 and 208 of the Constitution of Kentucky relating to corporations is enacted by the General Assembly and approved by the voters in the November, 2002 general election.” Otherwise, [this section] shall be void.

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4 Thirty-three votes in favor, none opposed, one “pass,” and five senators not voting.

5 Ninety-eight in favor, none opposed, two representatives not voting.

6 07 Ky. Op. Att’y Gen. 002 (2007).

7 S. 121, 2002 Gen. Assem., Reg. Sess. (Ky. 2002); 2002 Ky. Acts 496-97.

8 S. 120, 2002 Gen. Assem., Reg. Sess. (Ky. 2002); 2002 Ky. Acts 1256.

A constitutional amendment proposing to amend 11 of those 13 sections of the Constitution was enacted by the General Assembly and approved by the voters. During the 2002 Regular Session, the General Assembly enacted 2002 Ky. Acts ch. 341, which proposed to amend Sections 190, 191, 192, 193, 194, 198, 200, 202, 203, 207, and 208 of the Constitution of Kentucky. The voters approved that amendment in the November, 2002 general elections.

Compiler's Notes. For this section as effective until contingency is met, see the preceding section also numbered KRS 271B.\_\_\_\_\_.

For this section as effective until November 15, 2002, upon contingency, see the bound volume.<sup>9</sup>

A new and non-codified section provides that the amendments to title 271B, sections 6–210, 6–230, 7–040, 7–280, and 8–080 of the Kentucky Revised Statutes were effective as of the amendment of the Kentucky Constitution by the voters in 2002.<sup>10</sup>

### *B. Names of Business Entities*

The single largest group of amendments made in 2007 dealt with business entity names. There existed inconsistent requirements as to name distinguishability, incomplete treatment of names in certain acts, and a variety of other issues. The 2007 amendments ought to rationalize these common issues.

One significant problem has been with respect to name distinguishability. While the various statutes generally require distinguishability, they have been inconsistent as to distinguishable from what. For example, neither the KyBCA<sup>11</sup> nor the Kentucky Revised Uniform Limited Partnership Act<sup>12</sup> (KyRULPA) required that the name of a business corporation or a limited partnership be distinguishable from the name of a limited liability

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<sup>9</sup> See also Cynthia W. Young, *Modernizing Kentucky's Corporate Laws*, 67 BENCH AND BAR, 12 (2003).

<sup>10</sup> 2007 Ky. Acts 805 provides: "The General Assembly finds and declares that the amendment of KRS 271B.6–210, 271B.6–230, 271B.7–040, 271B.7–280, and 271B.8–080, as provided for in 2002 Ky. Acts, ch. 102, secs. 10, 11, 15, 18, and 19 respectively, are and were effective as of November 15, 2002."

With the passage of this confirmation of the 2002 amendments, counsel no longer need to concern themselves with the proper interpretation of the gap between S. 121 and S. 120. Until now, in interpreting this issue, counsel have had to rely upon Ky. REV. STAT. ANN. § 446.080(1) (West 2006) as well as cases such as *Fidelity & Columbia Trust Co. v. Meek*, 171 S.W.2d 41 (Ky. 1943), *Goodpastor v. Kenton & Campbell Benevolent Burial Ass'n*, 129 S.W.2d 1033 (Ky. 1939), *Ross v. Board of Educ.*, 244 S.W. 793 (Ky. 1922), *Neutzel v. Ryans*, 211 S.W. 852 (Ky. 1919), for comfort on the effectiveness of these 2002 amendments to the KyBCA.

<sup>11</sup> Ky. REV. STAT. ANN. ch. 271B (West 2007).

<sup>12</sup> *Id.* §§ 362.401–.525.

company.<sup>13</sup> Meanwhile, the Kentucky Limited Liability Company Act<sup>14</sup> (KyLLCA) required that names of a limited liability company (LLC) be distinguishable from “any name on record with the Secretary of State.”<sup>15</sup> The various acts have been made consistent by adding to each act a defined term “name of record with the Secretary of State,”<sup>16</sup> being a real,<sup>17</sup> fictitious, reserved, registered or assumed name of an entity,<sup>18</sup> and requiring that distinguishability be determined against each “name of record with the Secretary of State.”<sup>19</sup> Reserved names have been made renewable for additional periods of 120 days,<sup>20</sup> and a registered name may be cancelled prior to its expiration.<sup>21</sup>

Statements in the KyBCA, the KyLLCA, the Kentucky Nonprofit Corporation Act,<sup>22</sup> and elsewhere to the effect that the chapters in question do not govern “fictitious” names<sup>23</sup> have been revised for the simple reason

13 *See id.* § 271B.4-010(2); *id.* § 362.403(3) (each as prior to amendment).

14 *Id.* § 275.

15 *Id.* § 275.100(2). This was not, however, a defined term.

16 *See id.* § 271B.1-400(16); *id.* § 272.010(1); *id.* § 273.161(14); *id.* § 275.015(17); *id.* § 279.310(15); *id.* § 362.401(9); *id.* § 386.370(3). The definition already appeared in KyRUPA and KyULPA at, respectively, *id.* §§ 362.1-101(9), .2-102(15).

17 “Real name” is a new defined term and is determined by reference to the assumed name statute. *See id.* § 271B.1-400(21); *id.* § 272.010(1)(i); *id.* § 273.161(15); *id.* § 275.015(20); *id.* § 279.310(16); *id.* § 362.401(14); and *id.* § 386.370(3). The newly defined term “real name” has been incorporated into Ky. REV. STAT. ANN. § 275.400(1)(a), as amended by 2007 Ky. Acts 778. The real name of a foreign entity that is qualified to transact business in Kentucky under a fictitious name is not itself a “name of record with the Secretary of State,” and neither are trademarks and service marks registered with that office.

18 The acts use both “entity” and “business entity” as a defined term (*compare* Ky. REV. STAT. ANN. § 271B.1-400(10) (West 2007) (“Entity”) and *id.* § 362.1-101(6) (“Entity”) *with id.* § 275.015(2) (“Business Entity”) and *id.* § 386.370(2) (“Business Entity”)), but the terms are largely equivalent and the various definitions have been at least substantially reconciled. *See, e.g., id.* § 273.161(12), *amended by* 2007 Ky. Acts 754.

19 *See* KY. REV. STAT. ANN. §§ 271B.4-010(2), .4-030(1), .15-060(2) (West 2007); *id.* §§ 272.010(h), .131(4), .390(2); *id.* §§ 273.161(14), .177(2), .179(1), .364(2); *id.* §§ 275.100(2), .410(2); *id.* § 279.340(2); *id.* § 362.403(3); and *id.* § 386.382(1). This standard already appeared in the Kentucky Revised Uniform Partnership Act (2006) (KyRUPA) and the Kentucky Uniform Limited Partnership Act (2006) (KyULPA). *See id.* §§ 362.1-114(1), .2-108(4). Although limited partnerships may no longer be formed under KyRULPA, its name distinguishability rules in the Ky. Rev. Stat. § 362.403 have been modified in order to impose consistent rules on existing KyRULPA limited partnerships that desire to alter their names.

20 *See id.* § 271B.4-020(1); *id.* § 273.178(1); *id.* § 275.105(1); *id.* §§ 362.1-115(1), .2-109(1), .405(2). Previously reserved names were not renewable. The Secretary of State has been directed to promulgate a form for renewal of a reserved name. *See id.* § 271B.4-020(1); *id.* § 275.050(1)(i); *id.* § 362.2-119(1)(f).

21 *See id.* §§ 362.1-115(3), .2-109(3); *id.* § 271B.4-020(3); *id.* § 273.178(3); *id.* § 275.105(3); *id.* § 362.405(3).

22 *Id.* §§ 273.010-.991 (KyNPCA).

23 *See id.* § 271B.4-010(5); *id.* § 273.177(5); *id.* § 275.100(6) (each as prior to amendment by, respectively, 2007 Ky. Acts 743, 754-55, and 766-67).

that these statements are false. In fact these chapters do govern “fictitious” names.<sup>24</sup> The proper referral is to “assumed” names,<sup>25</sup> which are in fact not governed by any of these chapters. The acts have been revised to state that they do not govern assumed names.<sup>26</sup>

A provision in the Professional Service Corporation (PSC) Act permitting a PSC to use a name containing the name of a shareholder even if that name is not distinguishable has been deleted.<sup>27</sup> Consequently, aside from the required use of “professional service corporation” or “PSC” identifiers and requiring compliance with the rules of professional regulatory boards,<sup>28</sup> PSCs are governed by the same name requirements applicable to business corporations.<sup>29</sup> The limitation on the use of “cooperative” in a business entity name has been clarified by the deletion of “association or company” and by the inclusion of “partnership, limited partnership, limited liability company,” as well as any other “entity.”<sup>30</sup> Similar additions have been made with respect to the use of “rural electric cooperative” in a business entity name.<sup>31</sup>

*C. The Kentucky Revised Uniform Partnership Act (2006)  
and the Kentucky Uniform Limited Partnership Act (2006)*

In addition to minor typographical and de minimus revisions,<sup>32</sup> the changes made dealt with the continued application of the prior acts. As

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<sup>24</sup> See KY. REV. STAT. ANN. § 271B.15–060(1)(b) (West 2007); *id.* § 273.364(1)(b); *id.* § 275.410(1)(b).

<sup>25</sup> See *id.* § 365.015; see also Maryellen B. Allen & Thomas E. Rutledge, *The 2006 Amendments to the Assumed Name Statute: The Ongoing Task of Modernization and Clarification*, 70 BENCH AND BAR, at 62 (2006).

<sup>26</sup> See KY. REV. STAT. ANN. § 272.131(7) (West 2007); *id.* § 272.390(5); *id.* § 362.1–114(4); *id.* § 362.2–108(6); see *id.* § 271B.4–010(5); *id.* § 273.177(5); *id.* § 275.100(5); *id.* §§ 279.030(5), .340(6).

<sup>27</sup> See KY. REV. STAT. ANN. § 274.077(3) (West 2006) (before deletion by 2007 Ky. Acts 759).

<sup>28</sup> See KY. REV. STAT. ANN. §§ 274.077(1), (4) (West 2007). See, e.g., *id.* § 322.060(6) (“The Secretary of State shall not issue a certificate of incorporation or a certificate of registration as a foreign corporation authorized to do business in this state to a firm which includes in its name or, among objects for which it is established, any of the words, ‘engineer,’ ‘engineering,’ ‘surveyor,’ ‘surveying,’ ‘land surveying,’ or any modification or derivation thereof, unless the application for incorporation or registration with the Secretary of State includes a certificate or letter from the board.”). *Id.* §§ 325.301, .380(7); 201 KY. ADMIN. REGS. 1:081 (2007).

<sup>29</sup> See KY. REV. STAT. ANN. § 274.077(3) (West 2007).

<sup>30</sup> *Id.* § 272.050; see also *id.* § 272.010(1)(g) (new defined term for “entity”).

<sup>31</sup> *Id.* § 279.060.

<sup>32</sup> See, e.g., *id.* § 362.1–109(1)(k) (adding maximum fee of \$1,000 for registered agent’s statement of change of address; see also *id.* § 271B.1–220(1)(h); *id.* § 275.055(1)(h); *id.* § 362.2–906(4) (incorrect references to a foreign “corporation” corrected to the accurate foreign “limited partnership”). Two additional typographical points were addressed by the

originally proposed to the 2006 General Assembly, effective January 1, 2008, the old general and limited partnership acts were to have been repealed, and partnerships and limited partnerships formed under the Kentucky Uniform Partnership Act<sup>33</sup> (KyUPA) and the Kentucky Revised Uniform Limited Partnership Act<sup>34</sup> would have been made subject to, respectively, the Kentucky Revised Uniform Partnership Act (2006)<sup>35</sup> (KyRUPA) and the Kentucky Uniform Limited Partnership Act (2006)<sup>36</sup> (KyULPA).

To that end the 2006 act containing KyRUPA and KyULPA, as submitted to the General Assembly, provided that the old acts would, effective January 1, 2008, be repealed.<sup>37</sup> The legislative proposal was modified in the House with the effect that KyRUPA and KyULPA would apply only prospectively,<sup>38</sup> and the laws under which partnerships and limited partnerships had been previously organized would continue to govern those organizations. However, the provision repealing the old laws was not deleted from the draft legislation. Consequently, KyUPA and KyRULPA have been labeled “effective until January 1, 2008,” by the Statute Reviser, even though they will continue to govern those partnerships and limited partnerships preexisting the effective dates of KyRUPA and KyULPA.<sup>39</sup>

In response, the repeal of Kentucky’s old partnership and limited partnership acts has itself been repealed,<sup>40</sup> and those old laws will mostly

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Reviser of the Statutes in the codification of H.R. 234. In the first, the amendment to Ky. REV. STAT. ANN. § 142.050(7)(h), a comma was included between “limited partnership” and “corporation.” Further, in the codification of Ky. REV. STAT. ANN. § 362.1-1204(2), the incorrect use of “section” was replaced with the correct reference to the “subchapter.”

33 *Id.* §§ 362.150-360 (KyUPA).

34 *Id.* §§ 362.401-525 (KyRULPA).

35 *Id.* §§ 362.1-101 to -1205 (KyRUPA).

36 *Id.* §§ 362.2-102 to -1207 (KyULPA).

37 *See* 2006 Ky. Acts 443-46.

38 *See* Ky. REV. STAT. ANN. §§ 362.1-1204, .2-1205 (West 2007).

39 *See* Allan W. Vestal & Thomas E. Rutledge, *Modern Partnership Law Comes to Kentucky: Comparing the Kentucky Revised Uniform Partnership Act and the Uniform Act from Which It Was Derived*, 95 Ky L.J. 715, 717-19 (2007); Allan W. Vestal & Thomas E. Rutledge, *The Uniform Limited Partnership Act (2001) Comes to Kentucky: An Owner’s Manual*, 34 N. KY L. REV. 411, 414-16 (2007).

40 *See* 2007 Ky. Acts 805. *See also* Ky. REV. STAT. ANN. § 446.010(2) (West 2007). The mere fact that the particular statute has been repealed does not indicate that it does not continue to govern certain business organizations. For example, in 1970 Kentucky adopted the Uniform Limited Partnership Act (1916), and it governed all limited partnerships formed after its effective date, July 15, 1970. In 1988 Kentucky adopted KyRULPA, whereupon the adoption of the 1916 Act was repealed but with the proviso that “[t]he repeal of any statutory provision by 1988 Acts Ch. 284, Sec. 65, shall not impair, or otherwise affect, the organization or the continued existence of a limited partnership existing on July 15, 1988, nor does the repeal impair any contact or affect any right accrued before July 15, 1988.” Ky. REV. STAT. ANN. § 362.525 (West 2007), and further that “[a] limited partnership formed under any statute of this state prior to the adoption of [KyRULPA], until or unless it becomes a limited partnership under [KyRULPA], shall continue to be governed by the provisions of the statute

remain on the books. Those provisions of KyRULPA addressing the qualification of foreign limited partnerships to transact business<sup>41</sup> have been repealed,<sup>42</sup> and the provisions of the limited liability partnership (LLP) amendments to KyUPA allowing foreign LLPs to qualify<sup>43</sup> have been likewise repealed.<sup>44</sup> From January 1, 2008, all foreign limited partnerships seeking to qualify to transact business in Kentucky must comply with the requirements of KyULPA,<sup>45</sup> and foreign LLPs seeking to qualify to transact business must comply with the requirements of KyRUPA;<sup>46</sup> there is no “grandfather clause” by which qualifications under KyRULPA or KyUPA will remain effective.<sup>47</sup> The effect of this change is that every foreign limited liability partnership qualified under the LLP provisions of KyUPA, and every limited partnership qualified under KyRULPA or predecessor law, must requalify under KyRUPA or KyULPA.<sup>48</sup> The recitations of activities that do or do not constitute “transacting business” have been revised to provide greater consistency with the KyBCA and the KyLLCA.<sup>49</sup>

The LLP election provision for KyUPA has been revised to make express that limited partnerships may not elect LLP status.<sup>50</sup> KyULPA has been supplemented to impose a perjury attestation upon the execution of

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under which it was formed.” Ky. REV. STAT. ANN. § 362.525 (West 2007).

Consequently, limited partnerships formed prior to July 15, 1988 remain governed by statutes that have been repealed.

41 Ky. REV. STAT. ANN. §§ 362.495–.509 (West 2007).

42 See 1988 Ky. Acts 708-09.

43 See Ky. REV. STAT. ANN. § 362.585 (West 2007); *id.* § 362.595(4).

44 See 2007 Ky. Acts 805-06 (repealing Ky. REV. STAT. ANN. § 362.585 (West 2006)); 2007 Ky. Acts 805-06 (repealing Ky. REV. STAT. ANN. § 362.595(4) (West 2006)).

45 See Ky. REV. STAT. ANN. §§ 362.2–901 to .2–910 (West 2007).

46 See *id.* §§ 362.1–1101 to .1–1105.

47 *But see id.* § 271B.17–020.

48 As to any argument that a foreign limited partnership or LLP has a vested right in its qualification that is not subject to cancellation, such is likely invalid under section 3 of the Kentucky Constitution, which provides in part that “every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment.” Ky. CONST. § 3. A foreign limited partnership or LLP could qualify under KyULPA or KyRUPA prior to January 1, 2008, and it was not necessary that the entity first withdraw before requalifying.

49 Ky. REV. STAT. ANN. §§ 362.1–1104, .2–903 (West 2007). *Accord id.* § 271B.15–010; *id.* § 275.385.

50 *Id.* § 362.555(1). A KyULPA limited partnership may elect to be a limited liability limited partnership (LLLLP). See *id.* §§ 362.2–201(2), .2–404(3). A partnership organized under and governed by KyUPA, even after the effective date of KyRUPA, may elect LLP status under *id.* § 362.555 and remain governed by KyUPA.

documents to be filed with the Secretary of State<sup>51</sup> and further defining the appropriate penalty for a false filing.<sup>52</sup>

#### *D. The Business Trust Act*

To suggest that the Kentucky Business Trust Act has been neglected would overstate the amount of attention it has received; through the most recent series of amendments it referred to the Internal Revenue Code of 1954. An extensive series of amendments have been made to the Act. However, none of these revisions go to the substance of what is and how does one organize and operate a business trust. Rather, the revisions address matters of the interface of business trusts and the Office of the Secretary of State.<sup>53</sup>

Under the predecessor statute, while each foreign business trust qualified to transact business in Kentucky was required to appoint a registered office and agent,<sup>54</sup> there existed no requirement for the appointment of a registered office and an agent for service of process for a domestic business trust. Under the revised act, each foreign and domestic business trust is obligated to continuously maintain in Kentucky both a registered office and a registered agent.<sup>55</sup> That registered agent must either sign or otherwise accept the appointment.<sup>56</sup> Either or both of the registered office and agent may be changed by the business trust, and the registered agent may resign or discontinue as the registered office.<sup>57</sup> During the pendency of the appointment of the registered agent, it is the business trust's agent who is available for any service of process, notice or demand required or permitted to be served on the business trust.<sup>58</sup> If there is no registered agent appointed, or if the registered agent cannot with reasonable diligence be served, the business trust may be served by registered or certified mail

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<sup>51</sup> *Id.* § 362.2-121(8).

<sup>52</sup> *Id.* § 362.2-121(9); *accord id.* § 271B.1-290(2) (as amended by H.R. 334, § 50; 2007 Ky. Acts 740); Ky. REV. STAT. ANN. § 275.090(2) (West 2007) (as amended by H.R. 334, § 168; 2007 Ky. Acts 801).

<sup>53</sup> As of this writing the National Conference of Commissioners of Uniform State Laws is drafting a Uniform Statutory Trust Act, and that product, after its completion (now scheduled for 2009) and review, may be presented to the Kentucky General Assembly for adoption as a comprehensive business trust act.

<sup>54</sup> *See* Ky. REV. STAT. ANN. § 386.440(2) (West 2006).

<sup>55</sup> *Id.* §§ 386.384(1), .4434; *accord id.* § 271B.5-010(1); *id.* § 275.115; *id.* § 362.2-114(1), (2); *id.* § 362.1-117(1).

<sup>56</sup> *Id.* § 386.384(2); *accord id.* § 271B.5-010(2); *id.* § 275.115; *id.* §§ 362.407(2), .1-117(2), .2-114(4).

<sup>57</sup> *Id.* §§ 386.386, .388; *accord id.* §§ 271B.5-020, .5-030; *id.* §§ 275.120, .125; *id.* § 362.2-115; *id.* § 362.2-116.

<sup>58</sup> *Id.* § 386.441(1); *accord id.* § 271B.5-040(1); *id.* § 275.130(1); *id.* § 362.2-117(1).

at its principal office address.<sup>59</sup> The name of each business trust must be distinguishable on the records of the Kentucky Secretary of State, which limitation applies as well to each foreign business trust qualifying to transact business in Kentucky.<sup>60</sup>

Under a new series of requirements, each domestic and foreign business trust will be obligated to deliver an annual report to the Secretary of State setting forth its name, its jurisdiction of organization, the name and address of the registered agent and office, the address of its principal office, and the names and business addresses of the trustees.<sup>61</sup> For business trusts existing or qualified to transact business on June 26, 2007, the first annual report is due between January 1, 2008, and June 30, 2008.<sup>62</sup> The information in an annual report may be amended by delivering an amended annual report to the Secretary of State.<sup>63</sup> A domestic business trust is subject to administrative dissolution if it does not deliver its annual report, if it fails to maintain a registered office or agent, or if it does not properly notify the Secretary of State of a change of its registered office or agent.<sup>64</sup> A business trust administratively dissolved may be reinstated.<sup>65</sup> In the case of a foreign business trust qualified to transact business in Kentucky, its Certificate of Authority is subject to revocation.<sup>66</sup>

A foreign business trust may not transact business in Kentucky until it has obtained a Certificate of Authority.<sup>67</sup> What constitutes “transacting business” has been defined in a nonexclusive negative manner in the same way as is done in the other business organization acts.<sup>68</sup> A foreign business trust that is transacting business without the authority to do so is precluded from maintaining an action until such time as it obtains a Certificate of

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<sup>59</sup> *Id.* § 386.441(2); *accord id.* § 275.130(2).

<sup>60</sup> *Id.* § 386.382(1). To that end, defined terms for “business entity” and “name of record with the Secretary of State” have been added to the Business Trust Act. *See id.* § 386.370(2), (3). *See also supra* notes 11–19 and accompanying text.

<sup>61</sup> *Id.* § 386.392(1).

<sup>62</sup> *Id.* § 386.392.

<sup>63</sup> *Id.* § 386.392(5); *accord id.* § 271B.16–220(5); *id.* § 275.190; *id.* §§ 362.1–121(5), .2–210(5). Unlike most business organizations, a business trust, whether foreign or domestic, may amend its principal place of business address on the annual report or by amendment. *But see id.* § 271B.5–025; *id.* § 275.040.

<sup>64</sup> *Id.* § 386.432(1); *accord id.* § 271B.14–200; *id.* § 273.318; *id.* § 275.290(1); *id.* § 362.2–809(1).

<sup>65</sup> *Id.* § 386.432(3).

<sup>66</sup> *Id.* § 386.4444.

<sup>67</sup> *Id.* § 386.4422(1). Foreign business trusts qualified on June 26, 2007 are required to re-register as a foreign business trust as mandated by the new statute. *Contrast id.* § 271B.17–020.

<sup>68</sup> *Compare id.* § 386.4422(2) *with id.* § 271B.15–010(2) (regarding corporations), *id.* § 275.385(2) (regarding foreign LLCs), *and id.* § 362.2–903(1) (regarding foreign LPs).

Authority,<sup>69</sup> but notwithstanding the absence of a Certificate of Authority a foreign business trust may defend an action in Kentucky.<sup>70</sup> In the event a suit is initiated by a foreign business trust that is transacting business without having procured a Certificate of Authority to do so, the suit may be stayed until the appropriate Certificate of Authority is procured.<sup>71</sup>

The laws of the jurisdiction of organization of a foreign business trust govern its organization and internal affairs, including the liability of the trustees and beneficiaries for the debts and obligations of the business trust<sup>72</sup> and the inspection of records.<sup>73</sup> At the same time, a foreign business trust may not exercise any power or engage in any activity that is forbidden a domestic business trust.<sup>74</sup>

### *E. Inspection Rights*

Notwithstanding having received a certificate of authority, the law of the jurisdiction of incorporation governs the “internal affairs” of a foreign corporation.<sup>75</sup> Still, in *Sostarich v. Zirmed.com, Inc.*, a Kentucky court ordered inspection, in accordance with the KyBCA, of the records of a Delaware corporation.<sup>76</sup> Language has been added to several acts to make

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69 *Id.* § 386.4424(1); *accord id.* § 271B.15-020(1); *id.* § 275.390(1).

70 *Id.* § 386.4424(5); *accord id.* § 271B.15-020(5); *id.* § 275.390(5).

71 *Id.* § 386.4424(3); *accord id.* § 271B.15-020(3); *id.* § 275.390(3).

72 *Id.* § 386.4420(1)(a); *accord id.* § 271B.15-050(3); *id.* § 275.380(1); *id.* § 362.1-1101(1); *id.* § 362.2-901(1).

73 *Id.* § 386.4420(1)(a); *see also* footnotes 74 through 76 and accompanying text.

74 *Id.* § 386.4420(2); *accord id.* § 271B.15-050(2); *id.* § 273.3612(2); *id.* § 275.380(2); *id.* § 362.1-1101(3); *id.* § 362.2-901(2).

75 *Id.* § 271B.15-050(3); *see also id.* § 275.405(3); KY. REV. STAT. ANN. § 362.495 (1988) (repealed 2006); KY. REV. STAT. ANN. § 362.2-901 (West 2007); KY. REV. STAT. ANN. § 386.4420(1)(a) (West 2007). The RESTATEMENT (SECOND) OF CONFLICTS, § 302, cmt. a (1971), references “shareholders’ rights to examine corporate records” as encompassed within “internal affairs.” *See also* Corrigan v. United States Steel Corp., 78 F.3d 718 (6th Cir. 2007) (in diversity action in which relief sought is based upon state law, state law governs claim for piercing the corporate veil).

76 *Sostarich v. Zirmed.com Inc.*, No. 03-CI-00498 (Jefferson Cir. Ct., Div. 8 Mar. 26, 2003). KY. REV. STAT. ANN. § 271B.15-050(2) (West 2007) specifies that a foreign corporation with a valid certificate of authority shall have the same rights and privileges as a domestic corporation of like character and, except as otherwise provided in Kentucky Revised Statutes Chapter 271B, shall be subject to the same duties, restrictions, penalties, and liabilities imposed on a domestic corporation of like character. “While subsection (3) of KY. REV. STAT. ANN. § 271B.15-050 prevents the state of Kentucky from regulating the organization or internal affairs of a foreign corporation authorized to transact business in the state, the Court finds that inspection of corporate records would not qualify as *regulating* the organization or internal affairs of . . . ZirMed.” *Sostarich*, No. 03-CI-00498, at 3 (emphasis in original). It should be noted that Kentucky has *not* adopted MBCA § 16.02(e)(2), which provides that the provisions addressing shareholder record inspections do not affect “the power of a court, independently of this Act, to compel the production of corporate records for examination.”

express that the right of inspection of books, records, and documents of a foreign business entity will be determined by reference to the laws of the jurisdiction of organization of that foreign business entity.<sup>77</sup>

While this capacity likely existed prior to this amendment, the LLC Act now expressly permits a written operating agreement to impose reasonable limitations upon a member's use of the records and information of the LLC.<sup>78</sup> If the restrictions are in a written operating agreement to which the member assented, the limitations are as to that member deemed reasonable. As to limitations not assented to by the member in question, the LLC bears the burden of showing them to be reasonable.

#### *F. Preserving Limited Liability Subsequent to Dissolution*

In *Forleo v. American Products of Kentucky, Inc.*,<sup>79</sup> the Kentucky Court of Appeals held that corporate shareholders may be personally liable for debts and obligations of a corporation incurred after administrative dissolution. As the language of the statute in question is nearly identical to the language in the LLC Act, this ruling is in all likelihood equally applicable to LLCs.

A corporation may be “administratively dissolved” by the Secretary of State for a variety of reasons, the most common being the failure to file an annual report.<sup>80</sup> Once administratively dissolved, the corporation or LLC is restricted to doing only those activities which are necessary and appropriate to its winding up and termination.<sup>81</sup> Administrative dissolution may be “cured” by correcting whatever basis originally existed for the administrative dissolution as well as paying the necessary reinstatement penalty.<sup>82</sup> The statute provides that, when administrative dissolution is cured, that cure relates back to and takes effect as of the date of the original

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77 KY. REV. STAT. ANN. § 271B.15–050(3) (West 2207); KY. REV. STAT. ANN. § 275.380(1)(a) (West 2007); KY. REV. STAT. ANN. § 362.495 (1988) (repealed 2006); KY. REV. STAT. ANN. § 362.2–901(1).

78 KY. REV. STAT. ANN. § 275.185(5) (West 2007); *see also* KY. REV. STAT. ANN. § 362.2–110(2)(d) (West 2006); KY. REV. STAT. ANN. § 362.2–304(7) (West 2006). KY. REV. STAT. ANN. § 271B.16–040(4) (West 2006) allows a court, in the course of ordering inspection of corporate records, to impose reasonable restrictions on the use or distribution of that information.

79 *Forleo v. Am. Products of Ky. Inc.*, No. 2005–CA–000196–MR, 2006 WL 2788429 (Ky. Ct. App. 2006).

80 *See* KY. REV. STAT. ANN. § 271B.14–200 (2007); *accord id.* § 275.295(1); *see also id.* § 362.1–122; *id.* § 362.2–809 (addressing, respectively, the administrative dissolution of a Statement of Qualification and a limited partnership).

81 *Id.* § 271B.14–210(3); *id.* § 275.300(2); *see also id.* §§ 362.2–809(4), 2–803(1). The same limitation applies subsequent to a voluntary or a judicial dissolution.

82 *Id.* § 271B.14–220, .14–220(1)(g); *see also id.* § 275.295(3)(c); *id.* § 362.1–122(5); *id.* § 362.2–810(1).

dissolution as if the dissolution had not taken place.<sup>83</sup> It is this statute that was interpreted by the Court of Appeals in *Forleo*.

In *Forleo*, a corporation was administratively dissolved. However, notwithstanding that dissolution, the shareholders, who were also the officers and directors of the corporation, continued to carry on an active business. Certain suppliers were not paid, and those suppliers brought suit against the corporation and its shareholders seeking payment. The Court held that the shareholders were personally liable on the debt to the supplier. Thereafter, the administrative dissolution of the corporation was cured and the corporation was reinstated. On the basis that the cure related back to the original administrative dissolution, the shareholders sought to have set aside the judgment against them. The Court of Appeals, while acknowledging that the cure of the administrative dissolution did relate back to the original dissolution, still held that the actions undertaken during the period of administrative dissolution, because they were outside the scope of those necessary or appropriate for the winding up and termination of the corporation, were not protected by the limited liability shield. Rather, because the corporation had acted outside of its legal authorization, the shareholders would be liable upon those debts.

This ruling is subject to a number of criticisms. First, while observing that the reinstatement statute does not address shareholder liability,<sup>84</sup> the Court did not take account of Kentucky Revised Statute (Ky. Rev. Stat.) Section 271B.14–050, which addresses the effect of dissolution and does *not* provide that the limited liability enjoyed by shareholders<sup>85</sup> is in any manner waived or suspended by dissolution. Second, while permitting an administrative dissolution to occur may indicate a lack of attention to corporate formalities and to that extent support an argument for piercing the corporate veil, the opinion does not indicate that the other requirements for piercing were present.<sup>86</sup> Third, the opinion appears to equate actions after administration dissolution and prior to reinstatement that are beyond those necessary or appropriate to winding-up and liquidation as *ultra vires* and to

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83 *Id.* § 271B.14–220(3); *see also id.* § 275.295(3)(a); *id.* § 362.1–122(6); KY. REV. STAT. ANN. § 362.2–810(3) (West 2006).

84 The *Forleo* court wrote: “First, the provision [KY. REV. STAT. ANN. § 271B.14–220(3)] is silent as to the issue of personal liability.” *Forleo*, 2006 WL 2788429, at \*2.

85 *See* KY. REV. STAT. ANN. § 271B.6–220(2) (West 2007); *see also* KY. REV. STAT. ANN. § 273.187(2) (West 1968); KY. REV. STAT. ANN. § 275.150(1) (West 2007); *id.* § 362.1–306(3); *id.* § 362.2–303; *id.* § 362.2–404(3).

86 *See, e.g.*, *White v. Winchester Land Dev. Co.*, 584 S.W.2d 56 (Ky. Ct. App. 1979); Rutheford B. Campbell, Jr., *Limited Liability for Corporate Shareholders: Myth or Matter-of-Fact*, 63 Ky. L.J. 36 (1975); STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* §2.18 (West 2004 & Supp. 2007). *See also* *Morgan v. O’Neil*, 652 S.W.2d 83, 85 (Ky. 1983) (“It is fundamental corporate law that a shareholder is not liable for a debt of the corporation unless extraordinary circumstances exist to impose liability.”).

then hold the shareholders are liable personally on ultra vires obligations.<sup>87</sup> Fourth, the opinion deprives the shareholders of any apparent benefit of the relation-back rule.<sup>88</sup> Fifth, it conflicts with the clear implication of *Fairbanks Arctic Blind Co. v. Prather & Associates, Inc.*<sup>89</sup> and with a direct statement made in *Esselman v. Irvine*.<sup>90</sup> Sixth, it conflated the role of the shareholder, who lacks the authority to act on behalf of or to bind the corporation,<sup>91</sup> with the roles of a director and an officer which, respectively, has the authority to direct the management of the corporation<sup>92</sup> and the authority to bind the corporation to third parties.<sup>93</sup> Seventh, as to the

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87 This analysis as well ignores Ky. REV. STAT. ANN. § 271B.3–040 (West 2007), which precludes a creditor from attacking a corporate act as ultra vires.

88 Ky. REV. STAT. ANN. § 271B.14–220(3) provides: “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.”

The Court of Appeals’ reliance upon *Steele v. Stanley*, 35 S.W.2d 867 (Ky. 1931), for the proposition that shareholders are personally liable for corporate debts incurred after dissolution is questionable. The Kentucky corporate act in effect at the time of that decision lacked the concept of administrative dissolution and as well lacked the concept of reinstatement following administrative dissolution.

89 *Blind Co. v. Prather & Assoc. Inc.*, 198 S.W.3d 143, 146 (Ky. Ct. App. 2005) (“[W]e concluded . . . that [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 the corporation between the time it was administratively dissolved and the date of its reinstatement.”). In *Dolphin Offshore Partners, L.P. v. Industrial Resource Corporation*, 499 F. Supp.2d 1025 (E.D. Tenn. 2007), the *Fairbanks* and *Forleo* decisions were distinguished on the basis that in the former it was the plaintiff who was administratively dissolved, while in the latter it was the defendant who was administratively dissolved. The Tennessee court went on to apply *Forleo* and granted the plaintiff summary judgment on the exposure of the dissolved corporation’s president on the contract at issue. The amendments made in response to the *Forleo* decision (*see infra* note 98 and accompanying text) had not been identified by the *Dolphin Offshore Partners*’ court.

90 *Esselman v. Irvine*, No. 1997–CA–001155–MR (Ky. Ct. App. Jan. 8, 1999), apps. kycourts.net/supreme/sc\_opinions\_shtm (search “Esselman and Irvine”) (“KRS 271B.14–220 was amended in 1990 to extend the period within which one may apply for reinstatement from two (2) years to ‘anytime’ after the effective date of dissolution or revocation. This extension of the timeframe would further indicate a legislative intent favoring corporate accountable (sic) over individual liability in cases where the corporation has failed to comply with the strict administrative regulations. By allowing a corporation to be reinstated at ‘anytime’ 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).

91 *See* 1 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 30 (1918); 5 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2098 (perm ed, rev. vol. 2000).

92 Ky. REV. STAT. ANN. § 271B.8–210(2) (West 2007).

93 *See* RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. e(1), e(3)–(4) (2006). The *Steele* case,

shareholders of the corporation in question, it applies a greater penalty on the shareholders of a domestic corporation administratively dissolved than it does on the shareholders of a foreign corporation whose certificate of authority to transact business is revoked for failure to file an annual report.<sup>94</sup>

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cited for a rule of personal liability being imposed on the “shareholders,” is then followed by a reference to a majority rule imposing liability upon the “officers” for those liabilities. That majority rule, if at all, imposes liability upon the officers and directors for post-dissolution obligations. *See* 16A FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8117 n. 9 (perm ed, rev. vol. 2000); *see also id.* n. 13 (reinstatement of corporation absolves directors and officers of personal liability for actions undertaken during period of dissolution).

<sup>94</sup> *See* KY. REV. STAT. ANN. § 271B.15–300 (West 2007); *id.* § 271B.15–050(3); *see also* RESTATEMENT (SECOND) OF CONFLICTS § 307; *Virginia Partners, Ltd. v. Day*, 738 S.W.2d 837 (Ky. Ct. App. 1987) (limited liability enjoyed by limited partners in foreign limited partnership that failed to qualify to transact business not lost by reason of that failure); RESTATEMENT (SECOND) OF CONFLICTS § 307 (1971).

In response to this ruling, amendments have been made to the KyBCA as well as other acts of preclude this result in the future.<sup>95</sup>

*G. Professional Regulation and Business Entity Law*

The LLC Act lists dentistry as a professional service that may be rendered through a professional LLC.<sup>96</sup> Ky. Rev. Stat. § 313.240 permitted dentists to practice through professional service corporations, but did not address professional LLCs. The amendment of Ky. Rev. Stat. § 313.240 addresses this inconsistency and expressly permits dentists to practice

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<sup>95</sup> See KY. REV. STAT. ANN. § 271B.14–050(2)(i) (West 2007); *id.* § 275.300(3)(i); *id.* § 362.1–802(3); and KY. REV. STAT. ANN. § 362.2–803(5). No similar provision was added to the Not-for-Profit Corporation Act only because it lacks an “effect of dissolution” section; it is not intended that those organizations be governed by a different rule than are those other entities or that *Forleo* be good law in the not-for-profit context, one in which there are not shareholders. At the time of submission of H.R. 334, there was pending before the Kentucky Supreme Court a Petition for Discretionary Review in the *Forleo* case. Discretionary Review was denied on Mar. 14, 2007. In his Feb. 21, 2007 testimony before the House Judiciary Committee, Dean Allan Vestal stated that this amendment of the KyBCA would not apply to affect the merits of the *Forleo* case; see also *id.* § 446.080(3) (“No statute shall be construed to be retroactive, unless expressly so declared.”). It should be noted that even had these amendments appeared in the KyBCA prior to the *Forleo* decision, it is not a foregone conclusion that the individuals in question would not have been held personally liable on the trade debt. To the extent that, consequent to administrative dissolution, the corporation lacked authority to engage in any transactions other than those necessary and appropriate for its winding up and termination (KY. REV. STAT. ANN. § 271B.14–050(1)), it lacked the capacity to appoint an agent to engage in activities other than for that limited scope. Alternatively, to the extent that the agents sought to bind the principal on a transaction upon which the principal could not at law be bound, those same agents will have exceeded the scope of the delegated authority and may as well have violated their warranty of authority. 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.”); § 6.10; RESTATEMENT (SECOND) OF AGENCY § 330 (1958); 3 AM. JUR.2D *Agency* § 295 (2008) (“Generally, one who contracts as an agent in the name of a nonexistent or fictitious principal, or a principal without legal status or existence, is personally liable on the contract so made.”) (emphasis added). In any of these situations, the officers qua officers (and not the shareholders qua shareholders) could properly have been bound on the third party obligations. A determination of this nature would be consistent with that in *Messing v. Paul*, 147 Fed. Appx. 437 (6th Cir. 2005), and the authorities cited therein. While, in this instance, the officers were as well the shareholders, holding them liable as officers or agents, and not in their individual capacities as shareholders, would likely have been appropriate while not doing violence to the application of the limited liability shield enjoyed by shareholders. See also KY. REV. STAT. ANN. § 271B.2–040 (West 2007); *In re Young*, No. 02–30342, 2004 U.S. Bankr. LEXIS 736 (Bankr. E.D. Ky. 2004).

<sup>96</sup> KY. REV. STAT. ANN. § 275.015(25) (West 2007).

through professional LLCs and for the first time expressly authorizes dentists to practice through partnerships.

Rules of the Board of Licensure for Professional Engineers and Land Surveyors have been revised to both expressly address the broader range of forms of organization for these firms as well as to revise language to better track the actual filings and processes of the Secretary of State.<sup>97</sup>

While not strictly professional regulation, requirements regarding foreign business organizations seeking a certificate of eligibility from the Department of Transportation have been revised to address a broader range of business organizations and to properly address certificates of existence and certificates of qualification.<sup>98</sup>

#### *H. The Notice Effect of the Articles of Organization*

As originally enacted, the KyLLCA did not address the notice effect of the Articles of Organization.<sup>99</sup> The notice effect of the member-managed or manager-managed election in the articles of organization,<sup>100</sup> however, is implied.<sup>101</sup> Under the amended act, the articles of organization are notice of the formation of the LLC and of the information set forth in response to the mandatory requirements of Ky. Rev. Stat. § 275.025(1), including whether it is member-managed or manager-managed, whether it is a professional LLC, and whether it is a non-profit LLC.<sup>102</sup> Other statements made in the articles do not, merely by filing, give notice. Still, one acting as an agent for an LLC must properly identify the principal in order to avoid personal liability on the obligations undertaken on its behalf.<sup>103</sup>

#### *I. Modification of Rules for Dissolution of LLCs, Succession in Single Member LLCs*

The modification of Ky. Rev. Stat. § 275.285(2) serves to (a) require that the departure from the default rule be in a written operating agreement

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<sup>97</sup> *Id.* § 322.010; *id.* § 322.060.

<sup>98</sup> *Id.* § 176.150(4).

<sup>99</sup> *But see id.* § 271B.18-050; *see also id.* § 362.429; *id.* § 362.2-103.

<sup>100</sup> *Id.* § 275.135.

<sup>101</sup> *Id.* § 275.135, *Id.* § 275.145; *see also* Thomas E. Rutledge, *The Lost Distinction Between Agency and Decisional Authority: Unfortunate Consequences of the Member-Managed Versus Manager-Managed Distinction in the Limited Liability Company*, 93 Ky L.J. 737, 744 (2004).

<sup>102</sup> KY. REV. STAT. ANN. § 275.025(7) (West 2007). *See also infra* notes 129-130 and accompanying text.

<sup>103</sup> In *Perry v. Ernest R. Hamilton Assocs., Inc.*, 485 S.W.2d 505 (Ky. 1972), an individual retained an engineering firm to layout a proposed subdivision but did not disclose that the proposed subdivision was owned by a corporation. When that engineering firm sued to collect on the fees, and the individual cited the existence of the corporation as a defense to personal liability, the court held the individual was personally liable for the fees as he had failed to

and (b) provide a default rule of unanimous (as contrasted with majority-in-interest) approval of the members to voluntarily dissolve an LLC. The requirement that the departure from the default rule be in writing has obvious evidentiary benefits and conforms this provision to many provisions in the LLC Act which provide that certain departures from the default rule be in a written operating agreement.<sup>104</sup> Requiring unanimity among the members to voluntarily dissolve the LLC (unless they have elected a lower threshold in the operating agreement) has benefits when determining appropriate discounts for federal estate and gift taxation.<sup>105</sup>

An LLC must have at least one member.<sup>106</sup> Prior to the 2007 amendments, the KyLLCA was silent as to what occurs when a single member LLC ceases to have a member; such as upon the death of an individual member or the termination of an entity member.<sup>107</sup> The addition of subsection (4) to KRS § 275.285 addresses this situation.<sup>108</sup> Generally speaking, the LLC

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disclose the existence of the corporation or to put the engineering firm on notice that it was dealing with a corporation. *See also* *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997 (Colo. 1998); *Hopkins Adver. & Pub. Relations, Inc. v. Morris*, No. 541071, 1997 WL 306653 (Conn. Super. Ct. May 29, 1997) (individual held personally liable on obligation when he signed agreement without noticing that he did so as agent for an LLC and did not disclose the existence of the LLC principal); *Hosale v. Warren*, No. 01A01-9810-CV-00523, 1999 WL 548538 (Tenn. App. July 29, 1999); *Baumstein v. Myklebust*, 635 N.W.2d 28 (Wis. Ct. App. 2001); RESTATEMENT (THIRD) OF AGENCY §§ 6.01, 6.02, and 6.03 (2006); Thomas E. Rutledge, *Make Sure They Know You Are An LLC: Member Personally Liable When Acting on Behalf of an Undisclosed LLC*, LLC ADVISOR, July 1998.

104 *See, e.g.*, KY. REV. STAT. ANN. §§ 275.175(1), .180, .205 (West 2007).

105 The KyLLCA originally provided a default rule of unanimous approval for the voluntary dissolution of an LLC. *See* 1994 Ky. Acts 389; codified at KY. REV. STAT. ANN. § 275.285(3) (West 2007). In 1998 this default rule was reduced to majority-in-interest. *See* 1998 Ky. Acts 341; *see also* KY. REV. STAT. ANN. § 362.2-801(2) (West 2007) (requiring unanimous consent of general and limited partners to voluntarily dissolve a limited partnership).

106 KY. REV. STAT. ANN. § 275.015(11) (West 2007). *But see* VA. CODE ANN. § 13.1-1038.1(A)(3) (2007) (permitting the formation of an LLC that does not have a member). The Revised Uniform Limited Liability Company Act (RULLCA) permits the formation of an LLC without a member (a so-called “shelf LLC”) with provisions to address the status of the organization until such time as a member is admitted and the mechanism by which notice is given that the LLC has a member and is no longer “on the shelf.” RULLCA § 201, 6A U.L.A. 386 (Supp. 2007). These provisions have received significant criticism. *See, e.g.*, Larry E. Ribstein, *An Analysis of the Revised Uniform Limited Liability Company Act (2006)*, 3 VA. L. & BUS. REV. 35, 40–42 (2008). In the two states that have adopted RULLCA, the “Shelf LLC” provisions were not adopted. *See* 2008 Idaho Sess. Law 176; 2007 Iowa Acts 1162.

107 This provision is not limited to what were originally conceptualized as single member LLCs. For example, assume that an LLC was organized with members A and B, both natural persons. A dies, and while her estate becomes an assignee of her membership interest, the estate is not admitted by B as a member. KY. REV. STAT. ANN. § 275.280(1)(f)(1) (West 2007). The LLC now has a single member, namely B, and new section 275.285(3) may apply upon her dissociation. *Id.* at 275.285(3).

108 A further revision to the introductory language of this provision clarifies the two-step process of dissolution and winding up. *Id.* § 275.285.

will not be dissolved if: (1) a succession mechanism set forth in a written operating agreement is satisfied; or (2) the successor-in-interest of the last remaining member determines to continue the LLC.

Prior to these amendments, the successor to the last member would be an assignee of the member, but would be unable to cause their own admission as a member.<sup>109</sup> While an operating agreement may provide for the admission of a successor member, most do not. The consequences of having neither a member nor a provision allowing, *sua sponte*, the admission of a member, can be troubling. Consider a small LLC, member-managed, with a single piece of realty. The LLC is preparing to sell the realty when the sole member dies intestate. No person now has actual agency authority on behalf of the LLC, and nobody is vested with apparent authority to execute the deed and cause the transfer of the realty.<sup>110</sup> Court intervention is necessary to authorize the estate or its representative to execute and deliver the deed as the agent for the LLC. With this new provision, the successor of the last member will have the right to elect themselves to membership and continue the operation of the LLC.<sup>111</sup> Alternatively, and controlling if existing, the operating agreement may provide for the processes to be followed, or the operating agreement could eliminate the right of the successor to the last member to continue the LLC.<sup>112</sup>

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<sup>109</sup> *Id.* § 275.265(1); *see also* MATTHEW ARNOLD, STANZAS FROM THE GRAND CHARTREUSE 151 (LIONEL TRILLING ED. PENGUIN BOOKS 1949) (“Wandering between two worlds, one dead, the other powerless to be born.”).

<sup>110</sup> KY. REV. STAT. ANN. §§ 275.135(1), .245(1), .255(1)(c) (West 2007).

<sup>111</sup> It should be recognized that the successor-in-interest need not be only one person. For example, an individual may provide in her will that her membership interests in the LLC will, upon her death, go to her two children. The member in question dies, and the operating agreement does not address the question of what happens upon the LLC no longer having a member. Each of the children, being a successor-in-interest of the last remaining member, may elect to continue the LLC and to his or her individual admission as a member, and neither requires the consent of the other to his or her admission as a member.

<sup>112</sup> The 2007 amendments do not contain any “grandfather” provisions. Consequently, there does exist some question as to whether new provisions, such as new section § 275.285(4), apply to LLCs formed prior to its effective date. KY. REV. STAT. ANN. § 275.285(4) (West 2007). *See, e.g.*, Sage v. Radiology and Diagnostic Services, L.L.C., 831 So.2d 1053 (La. Ct. App. 2002) (notwithstanding subsequent amendment of the governing LLC Act, member of the LLC entitled to redemption upon withdrawal, as provided for in LLC Act at time of the LLC’s formation); LJM Corp. v. Maysville Hotel Group, LLC, No. 2004-CA-000120-MR (Ky. Ct. App. 2005) (“[A]ll existing laws, statutes and ordinances that are applicable are presumed to become part of the contract at the time and place of its making.” (citing 17A AM.JUR.2d Contracts § 371 (West 2004))); KY. REV. STAT. ANN. § 446.080(3) (West 2007). While the General Assembly retains the power to amend the LLC Act, the act itself limits the degree to which existing contracts may be altered by those amendments. KY. CONST. § 3. *See id.* § 275.003 (An amendment of the LLC Act “shall not be construed to impair the obligations of any contract existing” when the amendment becomes effective.); *see also id.* §§ 362.1-104(3), .1-107, .2-107(3).

*J. Durational Limits of Corporation and LLCs*

A corporation, upon reaching a maximum duration set forth in its articles of incorporation, is treated as having been administratively dissolved.<sup>113</sup> Under the amended KyBCA, the Secretary of State will notify the corporation of the administrative dissolution,<sup>114</sup> and the corporation is afforded a sixty-day window within which to amend its articles of incorporation to extend or delete the statutory period of duration.<sup>115</sup> The extension or deletion of the period of duration will relate back and will cure the administrative dissolution. After the sixty day period the corporation may not amend its articles of incorporation and must proceed to wind-up and dissolve.

LLCs formed between the initial effective date of the LLC Act in 1994 and the effective date of the 1998 amendments to the Act were expressly permitted to specify in the articles of organization “the latest date on which the [LLC] is to dissolve.”<sup>116</sup> Often a date certain was included in an effort to avoid “continuity of life” as applied by the then applicable test for tax classification.<sup>117</sup> While such dates are no longer required in the articles of organization, they remain permitted.<sup>118</sup> The KyLLCA did not, however, address any mechanism for cure of the consequences of having reached that date.<sup>119</sup> Under the revised act, reaching the end of an LLC’s duration is treated as an administrative dissolution.<sup>120</sup> When that date is reached, the Secretary of State notifies the LLC at its principal office address<sup>121</sup> that it has passed its date of duration, and the LLC may cure the dissolution

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113 KY. REV. STAT. ANN. § 271B.14–200(4) (West 2007). Based upon information provided by the Secretary of State’s office on May 4, 2007, of the approximately 77,750 Kentucky corporations in good standing, 380 have definite dates of termination in their articles of incorporation.

114 *Id.* § 271B.14–210.

115 *Id.* § 271B.14–220(5).

116 *Id.* § 275.025(1)(f) (adopting 1994 Ky. Acts 1089-90, and repealing 1998 Ky. Acts 1174).

117 See Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky’s New Organizational Option*, 83 Ky L.J. 1, 73–74 (1995).

118 See KY. REV. STAT. ANN. § 275.025(2) (West 2007). See also *id.* § 271B.3–020(1).

119 Section 275.285 recites that, upon reaching that date, the LLC “shall be dissolved and its affairs wound up.” *id.* § 275.285. Based upon information provided by the Secretary of State’s office on May 4, 2007, of the approximately 63,839 Kentucky LLCs in good standing, 3487 have definite dates of termination in their articles of organization.

120 *Id.* § 275.295(1)(d); accord *id.* § 271B.14–200(4).

121 Previously, the administrative dissolution provision of the LLC Act, while calling upon the Secretary of State to notify the LLC of its administrative dissolution, did not specify to what address that notice should be sent. This amendment specified that the notice go to the LLC at its principal office address. *Id.* § 275.295; accord *id.* § 271B.14–210 (as amended by 2007 Ky. Acts 748-49).

within sixty days of the notice. After sixty days, the LLC's dissolution is conclusive, and the LLC cannot be revived.

While these provisions are less permissive than the far greater opportunity for cure of an administrative dissolution for failure to file an annual report,<sup>122</sup> they do protect the integrity of the public record as to the end of the existence of a corporation or an LLC.

### *K. Dissenters' Rights in LLC*

Dissenters' rights did not exist at common law.<sup>123</sup> Several states provide for corporate-style dissenters' rights in their LLC acts;<sup>124</sup> Kentucky does not. Amendments to the KyLLCA expressly provide that dissenters' rights may be provided for in the articles of organization, in a written operating agreement, in an agreement of merger or from a decision to sell substantially all assets of the LLC. Absent such a provision, members have no dissenters' rights.<sup>125</sup>

#### *L. Requirement that Departure from Default Rule in Ky. Rev. Stat. § 275.170 Be In a Written Operating Agreement and Clarification of Disinterestedness Requirement*

Generally, the KyLLCA provides a series of default rules that apply absent a contrary provision in an operating agreement, and with respect

<sup>122</sup> See KY. REV. STAT. ANN. §§ 271B.14–220(1), 273.3182(1), 275.295(3)(a) (West 2007) (allowing application for reinstatement “at any time”).

<sup>123</sup> See, e.g., 12B WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5906.10 (perm. ed., rev. vol. 2000) (“The appraisal remedy is entirely the product of statute.”).

<sup>124</sup> See, e.g., CAL. CORP. CODE §§ 17600–17613 (West 2008); FLA. STAT. ANN. § 608.4384 (West 2008); N.H. CODE § 304–C:22 (West 2008); OHIO REV. CODE ANN. § 1705.40 (West 2008); WIS. STAT. ANN. § 183.1206 (West 2008).

<sup>125</sup> See KY. REV. STAT. ANN. §§ 275.030(6), .175(4), .345(3), .350(4), .247(2) (West 2007). Accord KY. REV. STAT. ANN. § 362.1–904(3) (West 2006) (no right in RUPA partnership to dissent from a conversion); KY. REV. STAT. ANN. § 362.1–906(6) (West 2007) (no right in RUPA to dissent from a merger); KY. REV. STAT. ANN. § 362.2–1103(3) (West 2007) (no right in KyULPA limited partnership to dissent from a conversion); KY. REV. STAT. ANN. § 362.2–1107(4) (West 2007) (no right in KyULPA limited partnership to dissent from a merger). See also Vestal & Rutledge, *Modern Partnership Law Comes to Kentucky*, *supra* note 39, at 739; Vestal & Rutledge, *ULPA Comes to Kentucky*, *supra* note 39, at 479–80. A newly defined term, “dissent” has been added at section 275.015(6) KY. REV. STAT. ANN. § 275.015(6) (West 2007). There exists a significant drafting challenge in incorporating dissenters' rights into these documents. The model set forth in the KyBCA contains procedural and expense requirements that may not be appropriate in an LLC. Another model appears in the Agricultural Cooperative Associations Act. See KY. REV. STAT. ANN. § 272.321. This paradigm of providing that dissenters' rights exists only if provided in the organic documents of the LLC is utilized in certain other states, including Delaware and Iowa. See DEL. CODE ANN. tit. 6, § 18–210 (2007); IOWA CODE § 490A.711 (West 1997).

to certain provisions a Statute of Frauds applies to a contrary agreement. Ky. Rev. Stat. § 275.170, which addresses the standard of culpability applicable to members and managers of an LLC, did not require that such modification be in a written operating agreement. The amendment requires that departures from the default rules of Ky. Rev. Stat. § 275.170 be in a written operating agreement.<sup>126</sup> This statute is further revised to expressly require that the approval of a transaction that may conflict with a manager's obligations be approved by only the disinterested members. Prior to this amendment, it was not clear whether a member or manager could vote on the approval or disapproval of a proposed conflict transaction.<sup>127</sup>

### *M. Pledges of LLC Interest*

An addition to the KyLLCA serves to preempt Ky. Rev. Stat. §§ 355.9–406 and 355.9–408, which may be interpreted to preempt limitations upon pledges of LLC membership interests contained in a written operating agreement.<sup>128</sup>

### *N. Not-for-Profit LLCs*

An entirely new series of provisions applies to non-profit LLCs, defined as those formed for a non-profit purpose, and that definition coming from the non-profit corporation act. Although, in the course of its initial drafting, it was not contemplated that an LLC could be formed for a non-profit purpose, the KyLLCA does not contain an express requirement of a for-profit purpose.<sup>129</sup> In *Mercy Regional Emergency Medical System, LLC v. John Y.*

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<sup>126</sup> See KY. REV. STAT. ANN. § 275.170 (West 2007) (as amended by 2007 Ky. Acts 137).

<sup>127</sup> See KY. REV. STAT. ANN. § 275.170(2) (as amended by 2007 Ky. Acts 137); see also *Perretta v. Prometheus Development Co., Inc.*, 520 F.3d 1039 (9th Cir. 2008) (holding that it is “manifestly unreasonable” for a general partner to vote, as a limited partner, regarding the approval of a related party transaction involving the general partner based on the court’s interpretation of a California statute), *withdrawn by* 527 F.3d 853 (9th Cir. 2008) (rehearing granted on the applicability of the statute considered in previous decision), *complete disposition on other grounds* 287 Fed.Appx. 620 (9th Cir. Aug. 12, 2008).

<sup>128</sup> KY. REV. STAT. ANN. § 275.255(4) (West 2007); *accord id.* §§ 362.1–503(7), .2–702(8). Similar carve-outs from UCC §§ 9–406 and 9–408 appear in Delaware, Virginia, and Colorado. See COLO. REV. STAT. ANN. § 7–90–408 (LLC, partnership and limited partnership); DEL. CODE ANN. tit. 6 §§ 18–1101(e) (2004) (LLC), 15–104(c) (2002) (partnership), § 17–1101(e) (2004) (limited partnership); VA. CODE §§ 8.9A–406(k) (West 2003), 8.9–408(g) (2001) (LLCs and partnerships), 13.1–1001.1.B (2003) (LLC), 50–73.84.C (2007) (partnership and limited partnerships); COLO. CODE § 7–90–408 (LLC, partnership and limited partnership); see also ROBERT R. KEATINGE AND ANN E. CONAWAY, KEATINGE & CONAWAY ON CHOICE OF BUSINESS ENTITY § 7:31 (Thomson West 2006).

<sup>129</sup> See KY. REV. STAT. ANN. § 275.005 (West 2007); *accord id.* § 362.2–104(2). *But see id.* § 362.1–201(1).

*Brown, III*, the court held that an LLC need not have a for-profit purpose.<sup>130</sup> Still, a non-profit LLC was not subject to the substantive limitations imposed upon non-profit corporations. With these additions, a non-profit LLC will be subject to a variety of limitations equivalent to those to which non-profit corporations are subject. Under these provisions, a non-profit LLC may not do the following: (1) issue membership interests;<sup>131</sup> (2) issue dividends or distribute its income to its members or managers;<sup>132</sup> (3) make loans to its members or managers;<sup>133</sup> (4) merge other than with a domestic non-profit LLC;<sup>134</sup> or (5) distribute its assets other than as provided by statute.<sup>135</sup>

These amendments acknowledge that LLCs may be organized for non-profit purposes, while requiring that such non-profit LLCs be subject to special requirements. In addition, these amendments add definitions of a “nonprofit limited liability company”<sup>136</sup> and “nonprofit purpose”<sup>137</sup> to the table of definitions used in the KyLLCA, which definitions have been adopted from the KyNPCA. Also, non-profit LLCs are required to set forth their non-profit purpose in the articles of organization and limit subsequent deletion of that statement of purpose.<sup>138</sup> Finally, the amendments recite the limitations upon distributions by non-profit LLCs.<sup>139</sup>

### O. Conversions

New provisions permit a business corporation to convert into a LLC. The approval of a conversion requires the consent of a majority of the board of directors and a majority of the shareholders and, if there is class voting, a majority of each class.<sup>140</sup> Dissenter rights will apply in the event of a conversion of a corporation into an LLC.<sup>141</sup> No provision permits an LLC

<sup>130</sup> Civ. Action No. 98-CI-01357 (Franklin Circuit Ct. Feb. 16, 1999).

<sup>131</sup> KY. REV. STAT. ANN. § 273.237 (West 2007); *see id.* § 275.520(1). *See also id.* § 275.195(3).

<sup>132</sup> *See id.* § 275.520; *id.* § 273.237.

<sup>133</sup> *See id.* § 275.525; *id.* § 273.241.

<sup>134</sup> *See id.* § 273.277; *id.* § 275.345(4); *see also id.* § 273.161(1).

<sup>135</sup> *See id.* § 273.303; *id.* § 275.530.

<sup>136</sup> *Id.* § 275.015(18); *accord id.* § 273.161(1).

<sup>137</sup> *Id.* § 275.015(19); *accord id.* § 273.167.

<sup>138</sup> *Id.* § 275.025(7).

<sup>139</sup> *Id.* § 275.530; *accord id.* § 273.237.

<sup>140</sup> *Id.* § 275.376(2). This provision is patterned upon KY. REV. STAT. ANN. § 271B.11-030, the voting mechanism for the approval of a merger. *See also id.* § 271B.12-030(1). There exists a typographical error in KY. REV. STAT. ANN. § 275.376(11)(d); the last “and” should be “or,” otherwise the “either” that appears earlier in the provision is without meaning. *Id.*

<sup>141</sup> *Id.* § 271B.13-020(1)(d). Under the doctrine of independent legal significance (*see, e.g.,* *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963), stating that “action taken in accordance with different sections of that law are acts of independent legal significance even though the

to convert into a corporation, and this provision allowing the conversion into an LLC is limited to businesses, and does not include non-profit, corporations.<sup>142</sup> The LLC resulting from the conversion is the same entity that existed before the conversion.<sup>143</sup> With this addition, the following conversion transactions are permitted in Kentucky:

General partnership into limited partnership	362.1–902; 362.2–1102(1)
Limited partnership into general partnership	362.1–903; 362.2–1102(2)
General partnership into LLC	275.370
Limited partnership into LLC	362.2–1102(3); 275.372
LLC into limited partnership	362.2–1102(4)
Corporation into LLC	271B.12–030; 275.376
Corporation into not-for-profit corporation	271B.10–010(3); 273.382

Technical amendments have been made to the statute to add greater specificity to the effect of a conversion of a general or limited partnership into an LLC.<sup>144</sup> The provision on the effective date of the articles of organization filed in connection with a conversion has been simplified and rationalized.<sup>145</sup> The provision addressing the conversion of either a general or a limited partnership into an LLC has been simplified by providing for the automatic cancellation of LLP elections and certificates of limited partnership as part of the conversion.<sup>146</sup> The prior requirement that a limited partnership cancel its certificate of limited partnership in order to convert into an LLC was at best problematic as a conversion is meant to be a seamless transaction in which the surviving entity is the predecessor entity;<sup>147</sup> it is difficult to reconcile the cancellation of the predecessor entity with its continuation in another form. Certificates of assumed name of the predecessor entity need not be cancelled as they may now become

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end result may be the same under different sections.”), absent listing a conversion as giving rise to dissenter rights, such would not exist even though the effect of a conversion could be indistinguishable from a merger.

<sup>142</sup> Consequently, the conversion of a cooperative association with shares (*see* Ky. Rev. Stat. Ann. § 272.042 (West 2007)) into an LLC should be permitted. In that instance the shareholders in the cooperative association should have the dissenter rights provided for in the cooperative corporation act. *See id.* § 272.321.

<sup>143</sup> *Id.* § 275.377(1); *accord id.* § 275.375(1); *id.* §§ 362.1–904(1), .2–1105(1).

<sup>144</sup> *Id.* § 275.375(2).

<sup>145</sup> *Id.* § 275.020(2), (3).

<sup>146</sup> *Id.* § 275.370(3)(d).

<sup>147</sup> *Id.* § 275.375(1).

assumed names of the successor LLC.<sup>148</sup> The effect of a conversion has been made more specific,<sup>149</sup> and it is specified that upon the conversion a written operating agreement becomes binding upon each member in the new LLC.<sup>150</sup>

KyULPA provides that a LLC may convert into a limited partnership.<sup>151</sup> The statute has been revised to delete a confusing reference to an effective date of conversion,<sup>152</sup> with that date now determined exclusively from the effective date of the certificate of limited partnership.<sup>153</sup> The LLC Act has been supplemented by expressly addressing the voting threshold required to approve a conversion into a limited partnership, requiring the unanimous approval of all members.<sup>154</sup>

### *P. Charging Orders*

The charging order provisions under KyRUPA, KyULPA and the KyLLCA have been amended to increase parallelism, especially as relates to the KyLLCA against KyRUPA and KyULPA.<sup>155</sup> The deletion of interest

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148 *Id.* § 365.015(8).

149 *Id.* §§ 275.375(2)(a)–(c).

150 *Id.* § 275.375(2)(d).

151 *Id.* §§ 362.2–1102 to .2–1105.

152 KY. REV. STAT. ANN. § 362.2–1104(1)(c) (West 2006), repealed by 2007 Ky. Acts 798. KY. REV. STAT. ANN. § 362.2–1104 has been supplemented to make more clear that it applies only to an LLC into an LP conversion.

153 KY. REV. STAT. ANN. § 362.2–1104(2) (West 2007); *see also id.* § 362.2–120(1).

154 *Id.* § 275.372(2); *see also id.* § 362.2–1102(4)(c).

155 *Id.* § 275.260; *id.* § 362.1–504; *id.* § 362.2–703. The charging order provisions of KyUPA (*id.* § 362.285) and KyRULPA (*id.* § 362.481) have not been revised. With respect to the charging order in general, *see* Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, 8 BUS. ENTITIES, Sept./Oct. 2006, at 28; Thomas E. Rutledge, *Charging Orders: Some of What You Ought to Know (Part I)*, 9 J. PASSTHROUGH ENTITIES, Mar./Apr. 2006, at 19; *Charging Orders: Some of What You Ought to Know (Part II)*, 9 J. PASSTHROUGH ENTITIES, Jul./Aug. 2006, at 25. The decision in *Hubbard v. Talbott Tavern, Inc.*, No. 2003–CA–001468–MR, 2006 WL 2089308 (Ky. Ct. App. July 28, 2006), as it relates to charging orders, is not a correct application of the law. The Court of Appeals upheld a trial court order that “assigned” to the judgment creditor the judgment debtor’s membership interest in each of three LLCs and further directed that the judgment debtor be dissociated and cease to be a member of each of the LLCs. It said as well that the assignments of the membership interests would continue until the judgment was satisfied. The Court justified the order of dissociation on the basis of KY. REV. STAT. § 275.280(1) (West 2008), which provides that a member is dissociated when they “make an assignment for the benefit of creditors.” *Id.* The charging order statute, KY. REV. STAT. ANN. § 275.260, does not use the word or otherwise authorize an assignment. In 2007, the title of KY. REV. STAT. ANN. § 275.260 (West 2007) was changed from “Judicial assignment of member’s company interest” to “Member’s transferable interest subject to charging order,” while the title of KY. REV. STAT. ANN. § 362.2–703 (West 2007) was changed from “Rights of creditor of partner or transferee” to “Partner’s transferable interest subject to charging order.” *Id.* With these changes the titles of all three modern charging order provisions are consistent, and the prior (inaccurate) suggestion under the LLC Act that a charging order constitutes an

on the judgment from each of the KyLLCA and KyULPA is not a signal that the charging order may not be used to satisfy interest accruing on a judgment.<sup>156</sup> Rather, the judgment will determine whether and how interest will accrue, and the issuance of a charging order does not of itself indicate that interest will accrue. It is made express that a charging order is a lien on and a right to receive distributions as made by the entity<sup>157</sup> that it does not afford the holder any right to participate in management<sup>158</sup> and does not afford the holder the right to move for the dissolution of the entity.<sup>159</sup> A charging order is the exclusive remedy of the judgment debtor of a partner, or of a member, or of a transferee of either.<sup>160</sup> The foreclosure and redemption of a charging order against an LLC member is newly provided,<sup>161</sup> and the application of exemption laws to charging orders is recognized.<sup>162</sup>

*Q. The “Filing” of Annual Reports and Certificates of Existence and Qualification; Amendments to Annual Reports*

Language has been added to the annual report sections under the KyBCA and the KyLLCA to specify the effect of filing an incorrect annual report vis-a-vis the issuance of a Certificate of Existence or a Certificate of Authorization. In a Certificate of Existence or Certificate of Authorization, the Secretary of State certifies that, with respect to the corporation or LLC at issue: “That its most recent annual report required by [Ky. Rev. Stat. § 271B.16–220 or 275.190] has been delivered to the Secretary of State.”<sup>163</sup>

Under the KyBCA and the KyLLCA, an annual report that is incorrect<sup>164</sup> is returned to the filing corporation or LLC for correction and resubmission. However, even where the annual report has been so returned, the document has been “delivered” to the Secretary of State—annual reports

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assignment is removed.

156 KY. REV. STAT. ANN. § 275.260(1) (West 2007); *id.* § 362.2–504(1).

157 *Id.* § 275.260(2); *id.* § 362.1–504(3).

158 *Id.* § 275.260(1); *id.* § 362.2–504; *accord id.* § 362.1–504(1).

159 *Id.* § 275.260(1); *id.* § 362.2–504(1); *accord id.* § 362.1–504(1). *See generally* Thomas E. Rutledge, Carter G. Bishop, & Thomas Earl Geu, *Foreclosure and Dissolution Rights of a Member’s Creditors: No Cause for Alarm*, 21 PROBATE & PROPERTY, May/June, 2007, at 35.

160 KY. REV. STAT. ANN. § 275.260(5) (West 2007); *accord id.* § 362.1–504(5).

161 *Id.* § 275.260(4); *accord id.* §§ 362.1–504(2), (3).

162 *Id.* § 275.260(5); *accord id.* § 362.1–504(4), *id.* § 362.2–504(4).

163 *Id.* § 271B.1–280(2)(d); *id.* § 275.085(2)(e).

164 Although the language recites “incorrect,” the Secretary of State’s office does not review the accuracy of the information submitted. Rather, they determine whether the annual report is complete, i.e., that all required information fields are completed. *See also id.* § 271B.1–250(4). As such, the statutory language of “incorrect” should properly be read as “incomplete.”

are “delivered for filing.”<sup>165</sup> In the context of the issuance of the Certificate of Existence or the Certificate of Qualification to a corporation or an LLC, the Secretary of State is certifying as to the “delivery,” and not the “filing,” of the annual report. With the understanding that the Secretary of State is not going to issue a Certificate of Existence or a Certificate of Foreign Qualification to a corporation or LLC that has not delivered a complete annual report, there exists a disconnect between the wording of the statute and the actual processes employed, once again leading to the situation in which the statute does not mean what it says. While there was consideration given to modifying the language employed with respect to the Certificate of Existence and the Certificate of Foreign Qualification, changing it from that the annual report has been “delivered” to that the annual report has been “filed” or “filed and delivered,” the election was made not to modify in this manner the model language of the MBCA. Rather, language has been added to each of the annual report provisions stating that an annual report that has been returned to the filing corporation or LLC for completion shall not be deemed to have been delivered for purposes of the issuance of either a Certificate of Existence or a Certificate of Foreign Qualification.<sup>166</sup> As such, the corporation or LLC in question may only receive a Certificate of Existence or Certificate of Foreign Qualification after the annual report has been not only delivered, but also accepted and filed by the Office of the Secretary of State.<sup>167</sup>

Annual reports speak as of the point in time at which they are filed, and while they may be corrected as to factual errors contained therein at the time of filing, there has not been a mechanism for their amendment. Various of the annual report provisions have now been amended to expressly allow the amendment of the information set forth in the last filed annual report.<sup>168</sup> In so doing a corporation will be able to keep current the listing

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<sup>165</sup> *Id.* § 271B.16–220(1); *id.* § 275.190(1).

<sup>166</sup> *See id.* § 271B.16–220(4); *id.* § 273.3671(4); *id.* § 275.190(4). Following the suggestion of this author, MBCA § 1.28(b)(4) is being amended to recite that the annual report has been filed, and not merely delivered.

<sup>167</sup> No similar language changes have been made in the recently adopted partnership or limited partnership acts. Under the KyRUPA, neither Certificates of Existence nor Certificates of Foreign Qualification are issued (the Secretary of State will issue a certified copy of a statement of foreign qualification; *see id.* §§ 362.1–113, .1–1102). Under the KyULPA, specifically Ky. REV. STAT. ANN. §§ 362.2–209(2)(d) and .2–209(3)(d) (West 2007), addressing, respectively, a Certificate of Existence and a Certificate of Authorization, the Secretary of State certifies that the most recent annual report required has been “filed by the Secretary of State.”

<sup>168</sup> *See id.* § 271B.16–220(5); *id.* § 273.3671(5); *id.* § 275.190(5); *id.* § 362.1–121(5); Ky. REV. STAT. ANN. § 362.2–210(5) (West 2007). The Secretary of State has been directed to promulgate a form for amending the annual report. *See id.* § 271B.16–220(5); *id.* § 273.2521(1)(i); *id.* § 275.050(1)(g). There is a \$10.00 filing fee to amend an annual report. *Id.* § 271B.1–220(1)(v); *id.* § 275.055(1)(w); *accord id.* § 362.1–109(1)(r); *id.* § 362.2–122(1)(u). In the case of a nonprofit corporation, the filing fee for an amended report will be \$8.00. *Id.* § 273.368(1)(j).

of its directors and officers, and a LLC will be able to keep current its list of managers. By correcting the last filed annual report listing of officers or managers, the corporation or LLC will remove its manifestation of that person as its agent and assist itself in arguing that a now dismissed officer or manager did not have apparent agency authority to bind the corporation or LLC.<sup>169</sup> Similar provisions for the amendment of annual reports appear in the new partnership and limited partnership acts adopted in 2006<sup>170</sup> and in the annual report requirement newly added for business trusts.<sup>171</sup> Still, a corporation's, limited partnership's or LLC's principal office address and the registered office or agent may be changed only in the filings required for those changes<sup>172</sup> and may not be made by amending the annual report.

#### *R. Other Changes to the Business Corporation Act*

Articles of incorporation are the foundational document of a corporation. A question asked is whether the articles must be self-contained. For example, in defining the terms of a class of preferred stock, may the articles provide that the rate of return will be the prime rate of interest as of a future date? Amendments to Ky. Rev. Stat. § 271B.1–200 expressly allow the reference to facts extrinsic to the articles of incorporation, and this flexibility extends to various plans and articles of merger.<sup>173</sup>

In most circumstances shares of stock owned by a corporate subsidiary are not voted; this provision has been expanded beyond corporate subsidiaries to any entity controlled by the corporation.<sup>174</sup> In the adoption, modification or deletion of a super quorum or voting requirement, it must be approved by the higher of the existing or the proposed requirements.<sup>175</sup>

A technical addition has been made to the derivative action statute making clear that where a derivative action is brought on behalf of a foreign corporation, it is the law of the jurisdiction of incorporation that governs the suit.<sup>176</sup> Adopting the principle set forth in Model Bus. Corp. Act § 7.47, this rule, already implicit in Ky. Rev. Stat. § 271B.15–050(3), precludes a

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169 *See id.* § 275.135(2); RESTATEMENT (SECOND) OF AGENCY §§ 27, 135, 136(3) (1958); RESTATEMENT (THIRD) OF AGENCY §§ 3.03, 3.11(2006).

170 *See* KY. REV. STAT. ANN. § 362.1–121(5) (West 2007); *id.* § 362.2–210(5).

171 *See id.* § 386.392(5).

172 *See id.* § 271B.5–020(1); *id.* § 275.040; *id.* § 275.120; *id.* § 362.2–115.

173 *Id.* §§ 271B.1–200(2), .6–010(4). Similar revisions have not been made in the LLC and limited partnership acts in that there has been no call for similar additions to the various model and uniform acts and because in that contractual realm there likely already exists the flexibility to so reference extrinsic facts.

174 *Id.* § 271B.7–210(2); *see also id.* § 271B.1–400(10) (definition of “entity”).

175 *Id.* § 271B.7–270(2).

176 *Id.* § 271B.7–400(b).

shareholder from utilizing Kentucky law to avoid different and perhaps more onerous rules of a foreign jurisdiction governing derivative actions.<sup>177</sup>

A corporation may be administratively dissolved for failure to maintain a registered agent or a registered office.<sup>178</sup> The KyBCA called for the Secretary of State to mail notice of administration dissolution to the registered agent at the registered office address. In effect, the Secretary of State was providing notice to an address that, being invalid, was the precipitating reason for the notice. The Secretary of State will now send notice of administrative dissolution to the principal place of business address.<sup>179</sup>

A corporation, having been administratively dissolved, will be required to submit with its application for reinstatement a certificate from the Division of Unemployment Insurance “reciting that all employee contributions, interest, penalties, and service capacity upgrade fund assessments have been paid.”<sup>180</sup>

It has been made express that the list of activities that do not constitute “transacting business” does not determine whether a foreign corporation is subject to service of process, taxation or other regulation.<sup>181</sup> A new section directs that corporations notify the Secretary of State of changes of the principle office address by means of a distinct filing and not by means of

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177 See also RESTATEMENT (SECOND) OF CONFLICTS § 302 cmt. e (1969), (“Uniform treatment of directors, officers and shareholders is an important objective which can only be obtained by having the rights and liabilities of those persons with respect to the corporation governed by a single law. To the extent that they think about the matter, these persons would usually expect that their rights and duties with respect to the corporation would be determined by the local law of the state of incorporation.”); MODEL BUS. CORP. ACT § 15.05(c) official comment (which has been adopted in Kentucky at KY. REV. STAT. ANN. § 271B.15-050(3) (“Section 15.05(c) preserves the judicially developed doctrine that internal corporate affairs are governed by the state of incorporation even when the corporation’s business and assets are located primarily in other states.”)); 13 WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5993.20 (1984 rev. vol. 2004) (“A common issue in derivative litigation is the court’s choice of applicable law. . . . [I]f the litigation concerns the corporation’s “internal affairs”—that is the relationship among the corporation and its officers, directors and shareholders—most states apply the law of the state of incorporation.”); *Kamen v. Kemper Fin. Svcs. Inc.*, 500 U.S. 90, 108-09 (1991) (federal courts to apply demand futility requirement of the law of the state of incorporation); *White v. Lunsford*, No. 2005-CA-001775-MR (Ky. Ct. App. Sept. 29, 2006), <http://opinions.kycourts.net/coa/2005-CA-001775.pdf> (Kentucky court applied Delaware law to require specific showing of impropriety, as required by Delaware law, in derivative action brought on behalf of Delaware corporation).

178 KY. REV. STAT. ANN. § 271B.14-200(2) (West 2007).

179 *Id.* § 271B.14-210.

180 *Id.* § 271B.14-220(1)(c). This provision has a delayed effective date of July 1, 2008. No similar revision was made in the other business entity acts. *But see id.* § 275.295(3)(a); *id.* § 362.1-122(5); *id.* § 362.2-810(1). Note that this revision was not contained in H.R. 334. *See supra* note 1 and accompanying text.

181 *Id.* § 271B.15-010(4); *accord id.* § 275.385(3); *id.* § 362.2-903(2) (as amended by 2007 Acts ch. 797); KY. REV. STAT. ANN. § 386.4422(3) (West 2007).

amending either the articles of incorporation or the annual report;<sup>182</sup> the Secretary of State has been directed to promulgate a form for this filing.<sup>183</sup> This amendment conforms the rule under the KyBCA to the practices under the KyLLCA and KyULPA.<sup>184</sup> Ky. Rev. Stat. § 271B.8–570 has been revised to include LLC managers, to utilize the defined term “entity,” and to render the language gender neutral.<sup>185</sup> The Secretary of State has been directed to promulgate two other new forms.<sup>186</sup> The filing fee schedule has been revised to address certain newly authorized filings and minimum fee of \$5.00 has been set for all copy requests.<sup>187</sup> It gives direction on how to proceed should an electronically filed document be rejected.<sup>188</sup> Clarity and consistency has been added as to the address at which notice may be given a corporation.<sup>189</sup> Other purely grammatical revisions have been made as well.<sup>190</sup>

### *S. Other Changes to the Limited Liability Company Act*

A new subsection has been added to Ky. Rev. Stat. § 275.100 to confirm that an LLC is a legal entity.<sup>191</sup> Language has been added to address in greater detail the time of formation of a LLC and the conclusiveness of the filing of the articles of organization.<sup>192</sup> Amendments to the KyLLCA authorize a LLC to engage in a share exchange with a corporation pursuant to which the LLC acquires the shares of the corporation.<sup>193</sup> Note that there

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182 KY. REV. STAT. ANN. § 271B.5–025 (West 2007). There is a \$10.00 fee for this filing. *Id.* § 271B.1–220(1)(i). A similar change has been made with respect to nonprofit corporations. *Id.* § 273.1842; *see also id.* § 273.2521(1)(e); *id.* § 275.040; *id.* § 362.2–115.

183 *Id.* § 271B.1–210(1)(g).

184 *See id.* § 275.040; *id.* § 362.2–115(1).

185 The ABA Committee on Corporate Laws has determined to similarly modify MBCA § 8.57.

186 KY. REV. STAT. ANN. § 271B.1–210(1), (f), (h) (West 2007).

187 *Id.* § 271B.1–220.

188 *Id.* § 271B.1–250(3).

189 *Id.* § 271B.1–410(4).

190 *See e.g., id.* §§ 271B.2–050, .2–070, .3–010, .2–030, .6–270(2), .8–220(2).

191 *Id.* § 275.010(2); *accord id.* §§ 362.1–201(a), .2–104(1). This amendment confirms the ruling in *Baker v. Erpenbeck*, No. 02–21835, 2004 Bankr. LEXIS 739 (Bankr. E.D. Ky. Apr. 1, 2004). *See also* Jessie v. Dewitt, No. 2005–CA–001961–MR (Ky. Ct. App. Dec. 8, 2006), <http://opinions.kycourts.net/coa/2005-ca-001961.pdf> (“[A]n LLC . . . is considered a separate legal entity from its members or managers.”). What is encompassed within the designation of a LLC as an “entity” is not, however, resolved. *See* Thomas E. Rutledge, *External Entities and Internal Aggregates: A Deconstructionist Conundrum*, SUFFOLK U. L. REV. (forthcoming 2009).

192 KY. REV. STAT. ANN. §§ 275.020(2), (3) (West 2007); *accord id.* § 271B.2–030(1),(2). While counsel, in issuing opinions on the formation of LLCs, will find comfort in these new provisions, attention needs to be paid to other aspects of the KyLLCA, such as the definition of an LLC (*id.* § 275.015(11)) and its requirement that an LLC have at least one member.

193 *See id.* §§ 275.500, .505, .510, .515.

is no provision enabling an interest exchange in which the corporation acquires the interests in the LLC. While such a transaction is permissible, it will be done by private agreement and not pursuant to a statutory mechanism.

A provision newly added to the KyLLCA directs that a sale of all or substantially all of the assets of the LLC may be done on the terms and conditions approved by a majority-in-interest of the members.<sup>194</sup> Previously the statute did not address the voting threshold for such a transaction.<sup>195</sup>

Under the KyBCA, in the approval of a self-interested transaction between the corporation and a director, the shares under the control of the director who is subject to the conflict of interest do not vote.<sup>196</sup> No similar provision existed in the KyLLCA even as it permitted approval of conflicted transactions by a majority-in-interest of the members.<sup>197</sup> A new provision directs that membership interests under the control of the manager subject to the conflict of interest do not vote on the approval of the transaction.<sup>198</sup> At the same time the rather ambiguous language allowing the approval of a conflicted transaction by one-half of the number of "other persons participating in the business or affairs of the [LLC]" has been deleted.<sup>199</sup>

The provision addressing how managers vote has been amended to make clear that, except as provided in the articles of organization or in a written operating agreement, managers vote on a per-capita basis and decisions are made by a simple majority.<sup>200</sup> Prior to this amendment the provision did not mean what it said in that managers vote by a majority-in-interest, a defined term based upon capital contributions.<sup>201</sup> As such it was unclear, on a default basis, as to how managers vote and what was the threshold for action.

An interest in an LLC has previously been issued by an LLC upon the making or undertaking of an obligation to make a contribution to the

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194 *Id.* § 275.247(1); *accord id.* § 275.350(1) (requiring majority-in-interest approval for a merger).

195 *But see id.* § 271B.12-020(5).

196 *Id.* § 271B.8-310(4). In *Perretta v. Prometheus Development*, 287 Fed.Appx. 620, 621-22 (9th Cir. Aug. 12, 2008), it was held that in the absence of an express provision in an agreement of limited partnership to the effect that the general partner could not, with respect to limited partnership units, vote them with respect to its proposed conflict of interest transaction, there existed no generally applicable rule requiring that the approval of a conflict of interest transaction be by only the disinterested limited partners.

197 *Id.* § 275.170(2).

198 *Id.* § 275.170(3).

199 *See Id.* § 275.170(2), as amended by 2007 Ky. Acts 768-69.

200 KY. REV. STAT. ANN. § 275.175(1) (West 2007).

201 *See id.* § 275.015(11); *id.* § 275.175(3). While the defined term is "majority-in-interest of the members," there was and is no defined term for "majority-in-interest of the managers."

LLC.<sup>202</sup> New provisions now allow the issuance of a membership interest without requiring a contribution or an obligation to make a contribution<sup>203</sup> and permit a member who does not have a membership interest.<sup>204</sup> These provisions are useful in certain structured finance and bankruptcy remote transactions.

An important new subsection has been added to the provision setting forth limitations on distributions.<sup>205</sup> Prior to this provision, the limitations upon “distributions” were applicable to compensatory payments made by the LLC to its members.<sup>206</sup> This result has been altered by excluding from the definition of a “distribution” compensatory payments made for services rendered to or on behalf of the LLC or as part of a retirement or other benefits program. The issue that arises is that while corporate officers and employees will typically receive salaries that are not construed as “distributions,” payments to members for services rendered are treated as “distributions” under both state and tax law. This can give rise to a fundamentally unfair distinction in treatment. Imagine two entities ABC, Inc. and XYZ, LLC. Mary is a shareholder and an employee of ABC, Inc. and is a member of XYZ, LLC for which she performs services. ABC, Inc. pays Mary \$1,000 in salary when the corporation is insolvent as determined under Ky. Rev. Stat. § 271B.6–400(3). XYZ, LLC makes a \$1,000 “distribution” to Mary for services rendered when the LLC is insolvent. Absent this new provision, the \$1,000 paid Mary by ABC, Inc. is not subject to recovery as a wrongful distribution, while the \$1,000 paid Mary by XYZ, LLC may be subject to recovery as a wrongful distribution.<sup>207</sup> The provision precludes this inequitable result.<sup>208</sup>

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202 Ky. Rev. Stat. Ann. § 275.195 (West 2006) (current version Ky. Rev. Stat. Ann. § 275.195(1) (West 2007)).

203 Ky. Rev. Stat. Ann. § 275.195(2) (West 2007).

204 *Id.* § 275.195(3).

205 *Id.* § 275.225(7).

206 *Id.* § 362.2–508(8). On Feb. 2, 2007, the Jefferson Circuit Court, Division 3, in *Steiner v. Coffee*, No. 06–CI–08253, held that distributions that had been made to a member of an LLC as “salary” fell within the scope of “distributions” subject to the limitations of Ky. Rev. Stat. Ann. § 275.225 (West 2007). Having determined, based upon the balance sheet prepared by the LLC’s accountant, that the company was in fact balance–sheet insolvent, in that its liabilities exceeded its assets, *id.* § 275.225(1)(b), the Court enjoined the further payment of “salary” to the member in question.

207 A broader review of this issue appears in Marshall Paul, Stuart Levine & Joyce Kuhns, *Righting the Wrong Approach to Wrongful Distributions in Limited Liability Entities*, 3 J. LIMITED LIABILITY COMPANIES 164 (Spring 1997). See also Allan G. Donn, *Limited Liability Entities for Law Firms—10 Years Later*, 7 PASSTHROUGH ENTITIES, Aug. 2004, at 19, 23. Similar provisions exempting a compensatory payment from the characterization as a “distribution” appear in the LLC acts of Virginia (VA. CODE ANN. § 13.1–1035(e) (2008)), Delaware (DEL. CODE ANN. tit. 6 § 18–607(a) (2008)), and Colorado (COLO. CODE § 7–80–606 (2007)).

208 Ky. Rev. Stat. Ann. § 362.2–508(8) (West 2007) already contains a similar carve out. See also COLO. CODE § 7–64–1004 (2007) (if LP is an LLLP). In that neither general partnership

The text that had been codified at Ky. Rev. Stat. § 275.135(5) has been moved from that place without modification, so that it now appears at Ky. Rev. Stat. § 275.165(3). While there were no problems with the language of this provision, its placement was incorrect. Ky. Rev. Stat. § 275.135 deals with the statutory apparent agency authority of members or managers in an LLC and limitations upon that agency authority. Conversely, Ky. Rev. Stat. § 275.165 deals with the management (decisional authority) in an LLC.<sup>209</sup> The text that has been moved deals with the authority to make decisions on behalf of the LLC, and does not deal with statutory apparent agency authority. Hence the drafters moved the language.

Language that appeared previously in the definition of “operating agreement”<sup>210</sup> has been recodified as a free-standing provision but without modification of the language.<sup>211</sup>

Confirming the common law of agency, the act has been revised to note that one who acts on behalf of an LLC without actual authority to do so, even within their apparent agency authority,<sup>212</sup> shall be liable on all liabilities so created.<sup>213</sup>

Language has been amended in Ky. Rev. Stat. § 275.285 to remove any implication that a dissolution consequent to any of the events recited therein will of itself constitute the winding up of the affairs of the LLC.<sup>214</sup>

Language has been added to facilitate electronic filings when that capacity becomes otherwise available with the Secretary of State’s office.<sup>215</sup>

The KyLLCA was revised to delete the classification of the offense of filing a false document with the Secretary of State as a Class B misdemeanor.<sup>216</sup> Grammatical and wording revisions have been made in a number of

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act contains a provision limiting distributions, even in the case of those partnerships that have elected to be an LLP, no equivalent provision appears in KyUPA or KyRUPA. Although KyRULPA does contain a limitation upon distributions (Ky. REV. STAT. ANN. § 362.473 (West 2007)), consequent to the control rule (*id.* § 362.437(2)), compensatory payouts to partners will in almost all cases be to general partners who are liable for the debts and obligations of the partnership, and for that reason no similar amendment was made to KyRULPA.

209 Rutledge, *supra* note 101, at 739–42.

210 KY. REV. STAT. ANN. § 275.015(14) (West 2007).

211 *Id.* § 275.177.

212 *See id.* § 275.135.

213 *Id.* § 275.095; *accord* RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006); DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS, AND LLCs, § 4.2 (2nd ed.)

214 KY. REV. STAT. ANN. § 275.285 (West 2007), *amended by* 2007 Ky. Acts 773.

215 KY. REV. STAT. ANN. §§ 275.045(4), .045(11), .015(7), .065(1)(c), .070(2), .080. (West 2007); *accord id.* §§ 271B.1–200(4), .1–400(8), .1–200(10), .1–240(1)(c), .1–250(2), .1–270; *see also id.* § 275.060; *id.* § 271B.1–230(1)(a).

216 *See id.* § 275.090, *amended by* 2007 Ky. Acts 801; *see also* KY. REV. STAT. ANN. § 362.1–105(8) (West 2007), *amended by* 2007 Ky. Acts 801–02; KY. REV. STAT. ANN. § 271B.1–290 (West 2007). KyULPA lacks an equivalent provision.

provisions.<sup>217</sup> The revision made in Ky. Rev. Stat. § 275.395(1)(g) conforms the use of “organization” to that used in Ky. Rev. Stat. §§ 275.395(1)(b) and 275.395(1)(a). The addition to Ky. Rev. Stat. § 275.395(2) is non-substantive and relates to the fact that the LLC files an “application for” a certificate of authority; it is the Secretary of State that reviews and if it approves the application issues a certificate of authority. As regards the amendment of Ky. Rev. Stat. § 275.400(1)(a), note that “real name” is now a defined term in Ky. Rev. Stat. § 275.015(26), itself referencing Ky. Rev. Stat. § 365.015, the assumed name statute. This technical revision of Ky. Rev. Stat. § 275.345(1) eliminates a redundancy in the requirement that the provision of the operating agreement be in writing.

#### *T. Other Changes in the Professional Service Corporation Act*

Ky. Rev. Stat. § 274.087, addressing the merger of a professional service corporation, has been repealed.<sup>218</sup> The merger of a PSC will be governed by the merger provisions of the KyBCA,<sup>219</sup> and if a corporation surviving a merger is rendering a professional service it must comply with the PSC Act. With this amendment a PSC may also merge with an LLC<sup>220</sup> and otherwise partake in organic transactions as can any business corporation.

The deletion from the listing of “qualified persons” of a “registered limited liability partnership” does not mean that an LLP may not be a shareholder in a PSC.<sup>221</sup> Rather the deletion was to eliminate a redundancy. As every LLP is a partnership,<sup>222</sup> there is no need to separately list that sub-category.

Grammatical and wording revisions have been made in a number of provisions.<sup>223</sup>

#### *U. Other Changes*

Ky. Rev. Stat. § 14.105, which addresses the ability of the Secretary of State’s office to accept electronic signatures, has been expanded as to the acts for which electronic signatures may be accepted.<sup>224</sup> Cross-references in the

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<sup>217</sup> See, e.g., KY. REV. STAT. ANN. § 275.200 (West 2007), amended by 2007 Ky. Acts 771; KY. REV. STAT. ANN. § 275.345 (West 2007); *id.* § 275.255.

<sup>218</sup> See 2007 Ky. Acts 805-06.

<sup>219</sup> See KY. REV. STAT. ANN. § 274.015(2) (West 2007).

<sup>220</sup> See *id.* § 271B.11-080; *id.* § 275.345.

<sup>221</sup> *Id.* § 274.005(4).

<sup>222</sup> See *id.* § 362.555(1); *id.* § 362.1-201(2).

<sup>223</sup> See *id.* § 274.015(2); *id.* §§ 274.017(1)(b), .017(1)(c); *id.* § 274.019; *id.* § 274.065; *id.* § 274.077(4).

<sup>224</sup> *Id.* § 14.105(1).

income tax code have been updated.<sup>225</sup> Redundant references to “registered limited liability partnership” have been eliminated.<sup>226</sup> A typographical error in the assumed name statute has been corrected.<sup>227</sup>

#### CONCLUSION

The 2007 amendments to the business entity acts in no way complete the task of rationalizing Kentucky’s various business entity laws. For example, there continue to exist nonsensical distinctions between what forms of business organizations may serve as a registered agent<sup>228</sup> and in filing fees,<sup>229</sup> and it is not at all clear that a foreign cooperative association may qualify to transact business in Kentucky using a name that includes “cooperative.”<sup>230</sup> There exist as well numerous distinctions and open questions regarding the application of non-business entity statutes to new forms of business entities.<sup>231</sup> Still, with the 2007 amendments to the various business entity acts, Kentucky law is more rational and consistent than it was.

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<sup>225</sup> *Id.* § 141.010.

<sup>226</sup> *See id.* § 154.22-010(12); *id.* § 154.23-010(8).

<sup>227</sup> *Id.* § 365.015(8), amended by 2007 Ky. Acts 799-801.

<sup>228</sup> Compare KY. REV. STAT. ANN. § 271B.5-010(1)(b)(5) (West 2007) (permitting a domestic or foreign limited partnership to serve as the registered agent for a corporation) *with id.* § 275.115(1)(b) (not permitting a limited partnership to serve as registered agent for an LLC) and *id.* § 362.2-114(3) (not permitting a limited partnership to serve as registered agent for a limited partnership).

<sup>229</sup> In some instances there is a scheduled fee for canceling a registered or reserved name (*see id.* § 271B.1-220(1)(d)) while in other places it will be an “any other filing” (*see, e.g., id.* § 275.055(1)(y)).

<sup>230</sup> KY. REV. STAT. ANN. § 272.335 (West 2007) directs that foreign cooperatives shall qualify to transact business in Kentucky by complying with KY. REV. STAT. ANN. § 271B.15-030 (West 2007). However, KY. REV. STAT. ANN. § 272.050 (West 2007) provides that no entity shall utilize “cooperative” in its name unless it is governed by KY. REV. STAT. ANN. §§ 272.020-050 (West 2007). KY. REV. STAT. ANN. § 272.020 sets forth certain requirements for the formation of a cooperative, which requirements would not have been satisfied by a foreign cooperative seeking to qualify to transact business. Ergo, a cooperative corporation formed outside of Kentucky may not, in Kentucky, utilize “cooperative” in its name. Certainly this is not the intended result.

<sup>231</sup> For example, does the “exclusivity” language of the Workers Compensation Act, which addresses the “employees, officers or directors” of an employer (KY. REV. STAT. ANN. § 342.690(1) (West 2007)) extend to the managers and members of an LLC? In *Jessie v. Dewitt*, No. 2005-CA-001961-MR (Ky. Ct. App. 2006), <http://opinions.kycourts.net/coal/2005-ca-001961.pdf>, the court said “yes,” but in an unpublished opinion. While there is a statute addressing personal responsibility for criminal acts carried out on behalf of a corporation (KY. REV. STAT. ANN. § 502.060), it does not address other forms of business entities.