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# 2012 Developments in Business Entity Law

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- **H.B. 331** – General Updates to Kentucky Business Entity Law
- **H.B. 331** – The Kentucky Uniform Statutory Trust Act
- **H.B. 441** – The Kentucky Uniform Limited Cooperative Association Act



## Effective Date

- July 12, 2012
- Ky. A.G. Op. 12-006



## H.B. 331

- Sponsored by Representatives Crenshaw, Kerr & Tilley



- Chairman Jensen



## Responding to the Court of Appeals

- The effect of reinstatement after administrative dissolution
- The capacity to enter into agreements during the winding up phase
- Piercing the veil and single member LLCs, single shareholder corporations
- Dissociation of LLC members
- Jurisdiction over directors, officers and managers

## ***Martin v. Pack's Inc.* is No Longer Good Law**

- Holding = a contract entered into during the winding up phase is outside activities proper to the winding up and termination
- Ergo, the shareholders are personally liable on that contract

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**Effect of *Martin* = It is virtually impossible to effect a complete winding up and liquidation**

- Resolution of claims of unknown creditors
- Settlement agreements





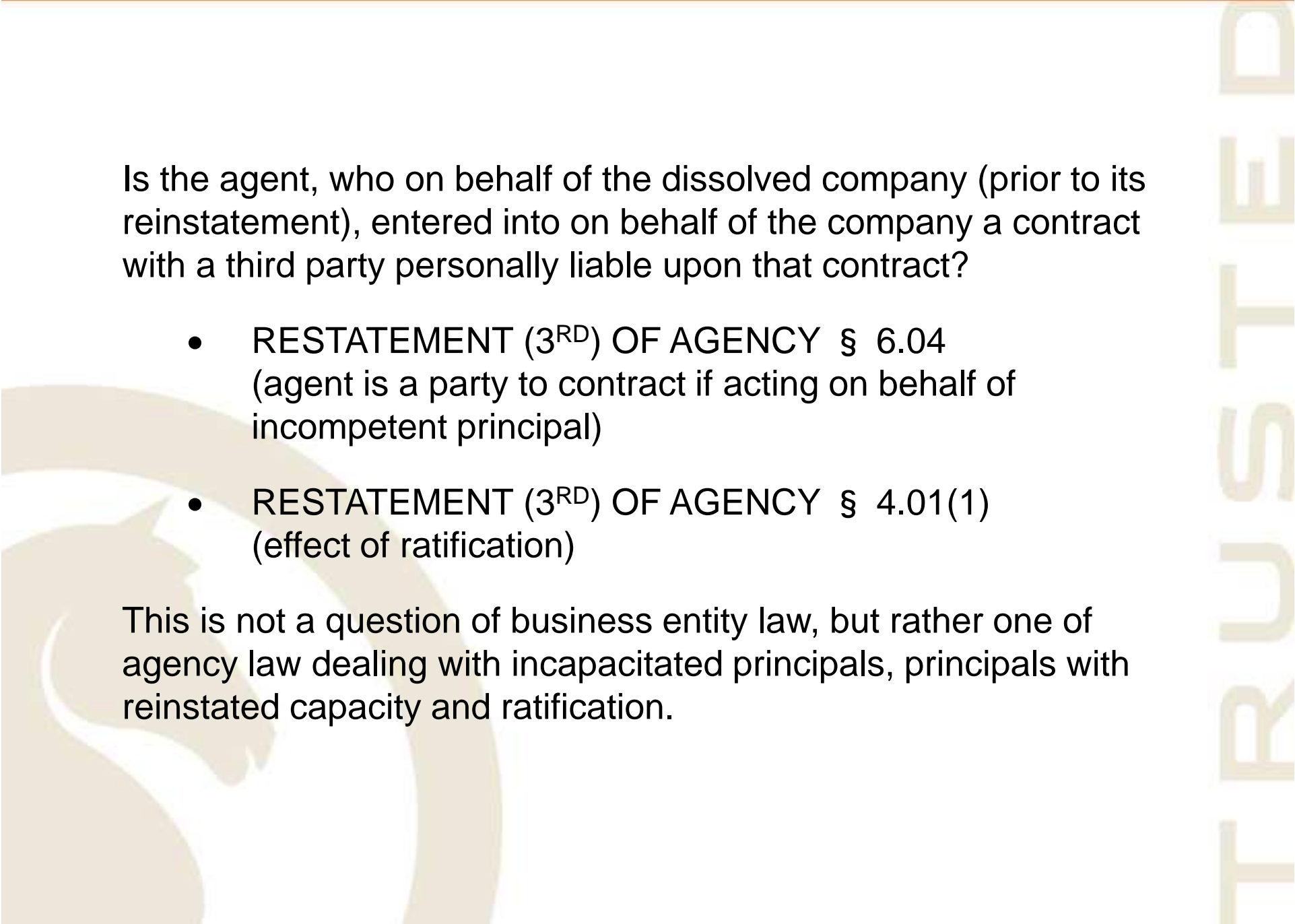

- Amendment = Specific authority for entering into agreements
- Fact question as to whether contract is appropriate to wind up and terminate

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## ***Forleo v. American Products*** **is No Longer Good Law**

- The effect of reinstatement after administrative dissolution –  
Are agents liable on contracts entered into after dissolution and before reinstatement?

- A company may be administratively dissolved, typically for failure to file the annual report
- The company may be reinstated with the reinstatement “relat[ing] back” to the dissolution



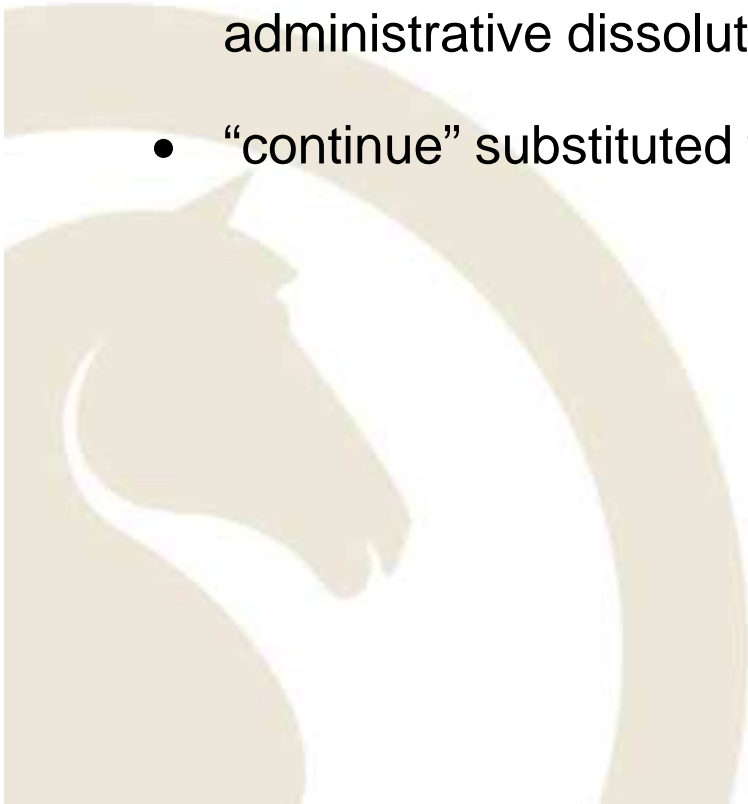
Is the agent, who on behalf of the dissolved company (prior to its reinstatement), entered into on behalf of the company a contract with a third party personally liable upon that contract?

- RESTATEMENT (3<sup>RD</sup>) OF AGENCY § 6.04  
(agent is a party to contract if acting on behalf of incompetent principal)
- RESTATEMENT (3<sup>RD</sup>) OF AGENCY § 4.01(1)  
(effect of ratification)

This is not a question of business entity law, but rather one of agency law dealing with incapacitated principals, principals with reinstated capacity and ratification.

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- *Esselman v. Irvine*
  - *Fairbanks Arctic Blind Co. v. Prater & Assoc.*
  - *Forleo v. American Products*
  - *Pannell v. Shannon Interiors*
  - *eServices LLC v. Energy Purchasing, Inc.*

- KRS § 14A.7-030(3) created
- “The liability of any agent shall be determined as if the administrative dissolution or revocation had never occurred.”
- “continue” substituted for “resume”




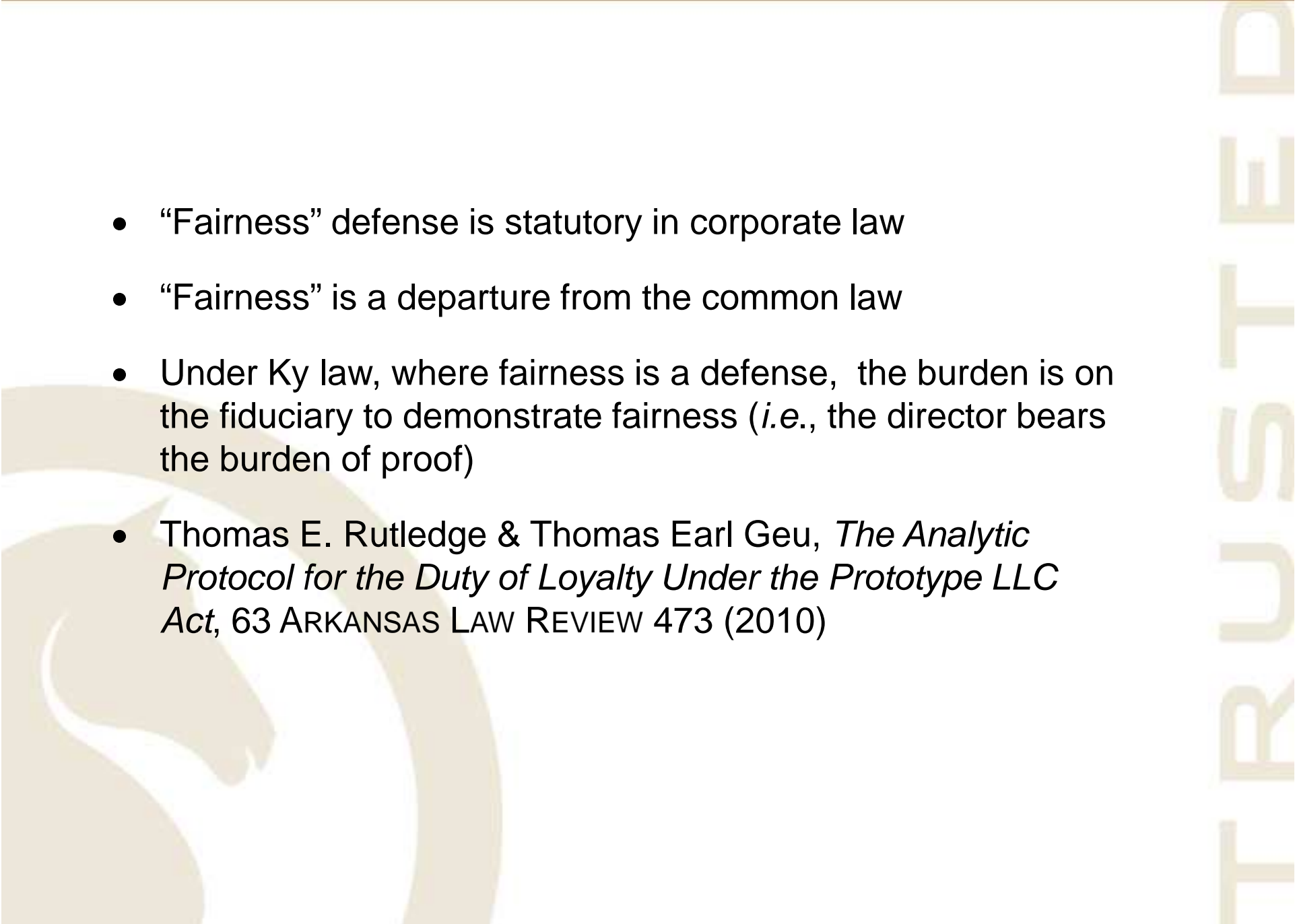
## **Ergo:**

- Company dissolved on Monday, agent on behalf of company signs contract on Wednesday, and company is reinstated on Friday
- The following Tuesday the company defaults on the contract
- Agent is not liable on the contract

## ***Patmon v. Hobbs* is No Longer Good Law**

- Holding = appropriation of a company opportunity from an LLC subject to a “fairness” defense
- Holding = imposed upon the plaintiff the obligation to prove lack of fairness



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- “Fairness” defense is statutory in corporate law
  - “Fairness” is a departure from the common law
  - Under Ky law, where fairness is a defense, the burden is on the fiduciary to demonstrate fairness (*i.e.*, the director bears the burden of proof)
  - Thomas E. Rutledge & Thomas Earl Geu, *The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act*, 63 ARKANSAS LAW REVIEW 473 (2010)

- Amendment = “Fairness” is not a defense to the appropriation of an opportunity
  - As “fairness” is not a defense, no need to allocate burden of proof
  - No alternation of corporate law



## Preserving Limited Liability in LLPs and LLLPs

- Responding to *Evanston Ins. Co. v. Dillard Department Stores, Inc.*
- Law firm on date W infringed Dillard's trademark. On day X Dillard's sued the firm for infringement. On date Y the firm dissolved. On day Z firm was found guilty of infringement.
- As firm's registration as an LLP expired prior to the date of judgment, no limited liability for the partners

- Partnership LLP and Limited Partnership LLLP statutes amended
- Amendment = Whether partners have limited liability determined as of the time of the act

## Partial Codification of Piercing the Veil


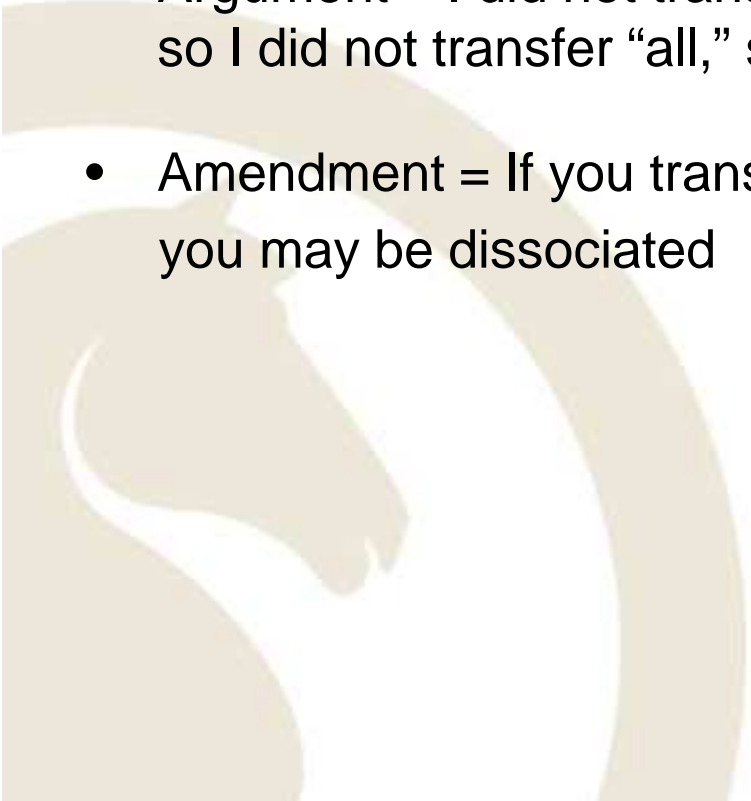
- *Rednour Properties LLC v. Spangler Roof Services LLC*
- LLC pierced based upon:
  - single member
  - set up for tax purposes
  - set up for liability shield reasons
- *Inter-Tel Technologies, Inc. v. Linn Station Properties, LLC*
- KRS § 271B.6-220; KRS § 275.150
- Amendment = Being a single shareholder corporation or a single member LLC is not a basis for piercing the veil

## **Kentucky Jurisdiction over Directors, Officers and Managers**

- Recent decisions as to personal jurisdiction, Long Arm Statute v. Due Process
- Question as to reach
- Amendment = Being a director, officer or manager is consent to jurisdiction of Kentucky courts

## Dissociation of LLC Members

- Member may unilaterally transfer economic rights
- Member may not transfer right to participate in management
- A member who has assigned “all” of his interest in the LLC may be dissociated by the other members –  
KRS § 275.280(1)(c)2

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- Argument – I did not transfer my right to participate in management, so I did not transfer “all,” so you can’t dissociate me
  - Amendment = If you transfer all that you may unilaterally transfer, you may be dissociated



## Effective Date of Judicial Dissolution

- Court decrees dissolution, and court clerk to send decree to Secretary of State for filing
- What happens if decree not sent to the Secretary of State?
- What is the date of dissolution, that of the decree or the date of filing?

- Various statutes amended
- Amendment = Dissolution effective upon latter of filing with Secretary of State or date set forth in the decree
- Ergo - Judicial dissolution not effective absent Secretary of State filing

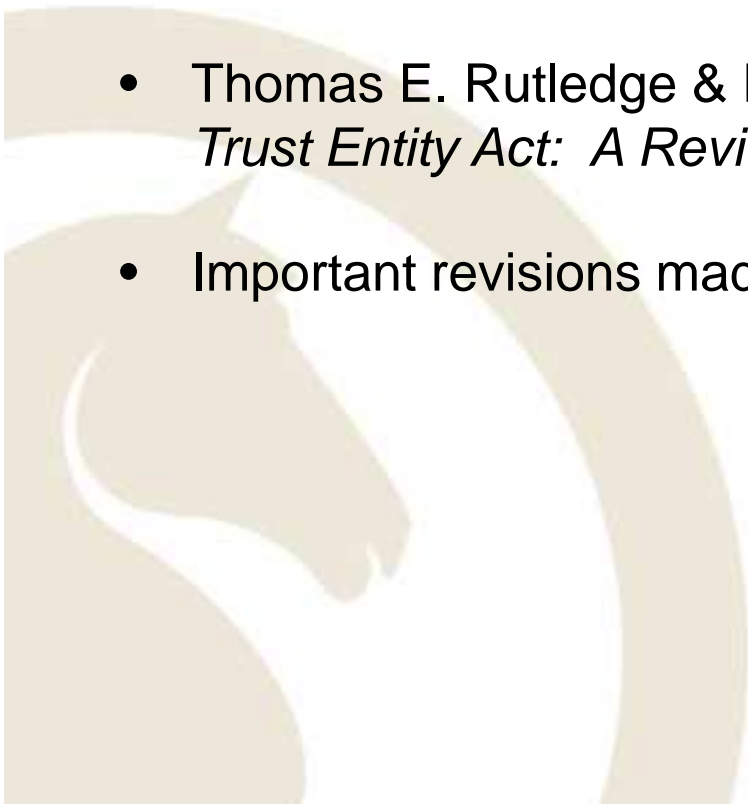
## Qualification of Foreign Entities Seeking State Contracts

- Reform 2011 S.B. 39
- Amendment = Receiving state contract requires qualification
- Special rules for foreign partnerships that are not LLPs



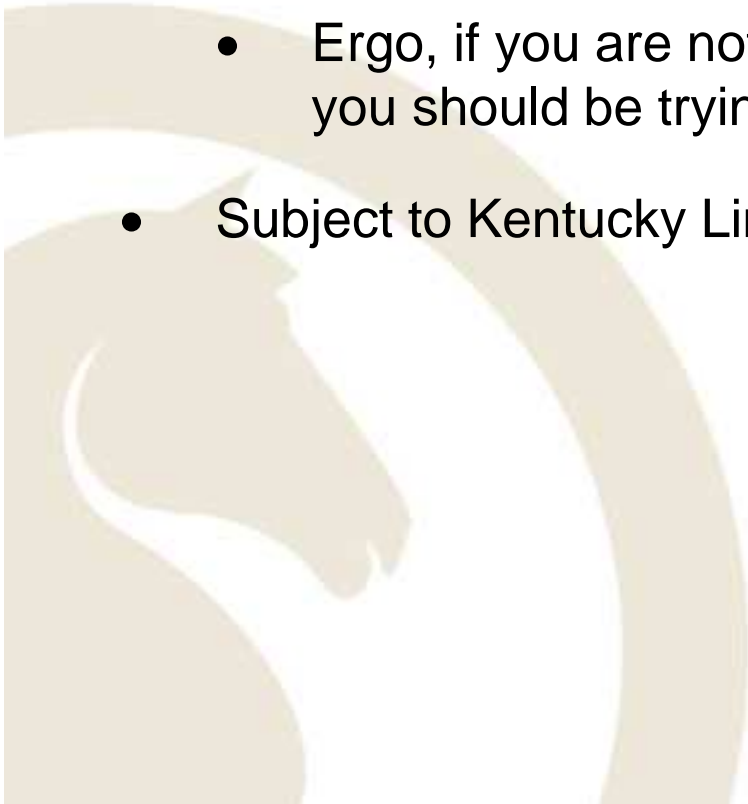
## Kentucky Uniform Statutory Trust Act

- Uniform Statutory Trust Entity Act - 6B U.L.A. (2011 supp.) 66
- ★ Kentucky = First State Adoption (D.C. does not count)
- Thomas E. Rutledge & Ellisa O. Habbart, *The Uniform Statutory Trust Entity Act: A Review*, 65 BUSINESS LAWYER 1055 (Aug. 2010)
- Important revisions made in Kentucky adoption



## KyUSTA

- KRS ch. 386A
- Business organization that defaults to trust law is gap filler
  - Ergo, if you are not familiar with trust law, this is not something you should be trying to do
- Subject to Kentucky Limited Liability Entity Tax



## KyUSTA

- Managed by Trustees
- Owned by Beneficial Owners
- Created by filing Certificate of Trust
- Governed by Governing Instrument
- Significant but not complete flexibility for private ordering



## KyUSTA

- Subtitle 4 – Series
- New innovation in Kentucky law
- Danger Will Robinson





## **KyUSTA Series Inter-Series Liability Shield**

- Authorized in Certificate of Trust
- Provided for in Governing Instrument
- Maintain books and records
- No guarantee will work outside Kentucky or other state (e.g., Connecticut, Wyoming, Virginia or Delaware) with series trusts



## **Kentucky Uniform Limited Cooperative Association Act**

- Uniform Limited Cooperative Association Act, 6A U.L.A. 155 (2008)
- Relatively fewer revisions made in Kentucky adoption as compared with other recent uniform acts
- Kentucky = 8<sup>th</sup> adoption

## KyULCAA

- KRS ch. 272A
- Unincorporated
  - not “linked” to business or nonprofit corporation act
- Does not supplant existing cooperative association act

## KyULCAA

- Created by Secretary of State filing
- Up to date internal governance rules
- Broader permitted purposes

## KyULCAA

- Board of Directors
- Patron Members
- ★ Investor Members
- Marketing Contracts

