THE KENTUCKY UNIFORM STATUTORY TRUST ACT (2012):
A REVIEW

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As a further component of the continuing effort to insure that Kentucky has the most up-to-date business entity statutes, the 2012 General Assembly approved an enactment of the Uniform Statutory Trust Entity Act (USTA), a product of the National Conference of Commissioners of Uniform State Laws (NCCUSL) approved by that body in 2009.

With this enactment, Kentucky moves to the forefront of states having modern statutory trust laws, it being the first state to enact the USTA. Still, even as the overall structure of USTA has been adopted in Kentucky, significant departures from the Uniform Act have been incorporated into the Kentucky law (KyUSTA). These departures have been dictated by either the desire for greater specificity in the wording employed, by the need to conform to the Kentucky Business Entity Filing Act (KyBEFA) or, in several instances, substantive policy determinations at odds with those made by NCCUSL.

I. LEGISLATIVE HISTORY AND CODIFICATION

The Kentucky Uniform Statutory Trust Act was submitted to the 2012 General Assembly on January 30, 2012 as H.B. 341, co-sponsored by

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1. UNIF. STAT. TRUST ENTITY ACT, 6B U.L.A. 78 (2012 supp.). Subsequent to USTA’s finalization it was revised as part of NCCUSL’s “Entity Harmonization” project. By and large the Kentucky adoption of USTA is based upon the uniform act prior to its revision in the harmonization project. While the product of the Harmonization project was approved by NCCUSL in July, 2011, the drafting continued well thereafter, and the “final” product has not been released at the time of this writing, which is well after KyUSTA was drafted and submitted to the General Assembly. Still, drafts of Harmonized USTA were reviewed in the drafting of KyUSTA.


Representatives Tom Kerr, Jesse Crenshaw, and John Tilley. The bill was called before the House Judiciary Committee by Chairman John Tilley on February 22, 2012, from which it passed on a unanimous vote. The bill was passed by the House on February 24 on the consent calendar. After delivery to the Senate, it was assigned to the Judiciary Committee on February 29th. The bill was called before the Senate Judiciary Committee on March 22, from which it was approved by a unanimous vote. It passed out of the Senate, again by a unanimous vote via the consent calendar, on March 26. The bill was signed by Governor Beshear on April 11, 2012. Labeled 2012 Acts chapter 81, KyUSTA is codified in KRS Chapter 386A.

II. Effective Date and Retroactivity

KyUSTA has an initial effective date of July 12, 2012, that being the generally applicable date for legislation passed by the 2012 General Assembly that does not otherwise contain an accelerated or a delayed effective date. From that date, all statutory trusts organized in Kentucky are subject to the terms of KyUSTA. Business trusts organized under predecessor law are not automatically subject to the new act. Even while those pre-existing business

5. Representative Kerr was also the sponsor of the 2011 business entity updates embodied in 2011 H.B. 331, enacted as 2011 Ky. Acts, ch. 29.
8. Id.
9. Id.
10. See id. (reported favorably after a unanimous vote).
11. Id.
13. Id.
15. See KY. REV. STAT. ANN. § 386A.10-040(2). This practice of adopting new business organization statutes that, as of a particular date, are effective prospectively but without a mandate that pre-existing business organizations become subject to their terms has recently been employed with respect to the adoptions of the Kentucky Revised Uniform Partnership Act (2006) and the Kentucky Uniform Limited Partnership Act (2006). Id. § 362.1-1204, 362.2-1205; see also Allan W. Vestal and 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 at 717-18 (2007) [hereinafter Vestal and Rutledge on KyRUPA]; Allan W. Vestal and Thomas E. Rutledge, The Uniform Limited Partnership Act (2001) Comes to Kentucky: An Owner’s Manual, 34 N. Ky. L. Rev. 411 at 414-16 (2007) [hereinafter Vestal and Rutledge on KyULPA]; Thomas E. Rutledge and Allan W. Vestal, Rutledge & Vestal on Kentucky Partnerships and Limited Partnerships 8-9 [hereinafter Rutledge & Vestal on KY. PARTNERSHIPS AND LPS]. Conversely, when Kentucky adopted its modern business corporation act
trusts are not required to become subject to KyUSTA, they may elect to do so through the adoption of an amended and restated certificate of trust that recites, in addition to the otherwise required provisions, the date upon which the original certificate of trust was filed with the Secretary of State and affirmatively stating an election to be governed by KyUSTA. In addition, foreign business trusts may elect to be governed by KyUSTA. After July 12, 2012, it is no longer possible to organize a business trust under KRS chapter 386.

III. "STATUTORY" OR "BUSINESS" TRUST

The designation of the business organizations created under KyUSTA as a "statutory trust," in contrast with the traditional "business trust," was the result of a desire to conform to the practices currently employed in Connecticut and Delaware (they being considered the leading states for the organization of the organizations that have traditionally been referred to as the business trust, wherein the entity is designated as a statutory trust). KyUSTA also created a convenient differentiation of the modern statutory trust from the traditional business trust for purposes of referencing the controlling statute.

This explanation, however, begs the question of why the term "statutory trust" is used in place of "business trust." The change to "statutory trust" in 1988, it made that statute applicable to all pre-existing corporations. See KY. REV. STAT. ANN. § 271B.17-050(1). See also id. § 271A.675 (repealed by 1988 Ky. Acts. ch. 23, § 248) (applying that business corporation act to pre-existing corporations).

16. See KY. REV. STAT. ANN. § 386A.10-040(3). This mechanism is similar to that employed with respect to limited partnerships pre-existing the adoption of the Kentucky Uniform Limited Partnership Act (2006) that determine to be bound by the new law. See id. § 362.2-1205(1)(b); see also Vestal and Rutledge on KyULPA, supra note 15, at 415; RUTLEDGE & VESTAL ON KY. PARTNERSHIPS AND LPS, supra note 15, at 8.

17. See KY. REV. STAT. ANN. § 386A.10-040(6).

18. See id. § 386A.10-040(4)(a).

19. Delaware adopted a Business Trust Act in 1988, referring to an organization created thereunder as a "business trust." In 2001 the name of the act was changed to the Delaware Statutory Trust Act and the name of an organization created thereunder was changed to a "statutory trust." See DEL. CODE ANN. tit. 12, § 380(g) (2007). The amendment was not intended as a substantive change in Delaware law. Rather, it was made to address the concern of those who used these trusts in structured finance transactions that a "business trust" might be deemed a "person" and therefore a "debtor" under the Federal Bankruptcy Code. If so, the entity could be the subject of an involuntary bankruptcy, which would defeat the expectations of the parties in asset securitization transactions who rely upon a bankruptcy remote entity. See The Drafting Committee of the Uniform Statutory Trust Act, Preliminary Report-Uniform Statutory Trust Act (July 2005), available at http://www.uniformlaws.org/shared/docs/statutory%20trust%20entity/usta_am05_binder.pdf; see also Elissa O. Habbart and Thomas E. Rutledge, Sneak Preview: Will the Uniform Statutory Trust Act Be Next Summer's Blockbuster Hit?, DEL. BANKER 11 (Summer 2008). The Connecticut act, enacted in 1997, used the term "statutory trust" from the outset. See CONN. GEN. STAT. § 34-500. The label "statutory trust" is utilized as well in Wyoming. See WYO. STAT. § 17-23-202(g).
followed the decision rendered in *In re Secured Equipment Trust of The Eastern Airlines, Inc.*, which held that certain trusts utilized for securitizations were not "business trusts" as contemplated by the Bankruptcy Code. Given that business/statutory trusts are often utilized for financing structures where bankruptcy remoteness is desired, this relabeling, it may be argued, further removes a "statutory trust" from the ambit of organizations that may file for protection under the bankruptcy code. At the same time, this "a rose by any other name" issue has not been to date addressed in a published opinion.

IV. SERIES

In order to properly consider the series provisions of both USTA and KyUSTA, it is important to understand the history of the series concept. The series arose in the context of statutory trusts utilized for asset securitization and the organization of investment companies. In addition to Delaware, the series


26. See, e.g., Hartesel v. Vanguard Group, Inc., No. 5394-2011 WL 2421003, *1 (Del. Ch. July 15, 2011) ("[T]he purpose of the trust structure of Nominal Defendants is to serve as an ‘umbrella’ entity that registers as an investment company with the SEC so that each mutual fund within the trust can enjoy its trust's registration and avoid the costs and burdens of separately registering."); GORDON ALIMAN BUTOWSKY WEITZEN SHALOV & WEIN, A PRACTICAL GUIDE TO THE INVESTMENT COMPANY ACT 2-3 (1996) (“A series company or fund is an investment company
concept appears in the statutory/business trust acts of Connecticut, Virginia, Wyoming, and the District of Columbia. The context of mutual funds, a series is an administrative subunit of an investment company. Assuming that the investment company is organized as a statutory trust, only it, on behalf of the "fund family," will register with the SEC on, for example, Form N-1. Thereafter, the trust organizes a series for each of the various sponsored funds. The business trust has a single trustee, which is typically embodied in a board, overseeing all of the series even as, on behalf of each series-organized fund, distinct fund managers are retained. Further, typically all of the series organized by a single investment company operate under a single set of service documents executed with service providers such as transfer agents, custodians, principal underwriter(s), numerous broker-dealer firms, and so on. In the context of securitization, distinct series are organized for classes of securitized assets and securities are issued with respect to each series.

composed of separate portfolios of investments organized under the umbrella of a single corporate or trust entity. Each portfolio of a series company has distinct objectives and policies, and interests in each portfolio are represented by a separate class or series of shares. Shareholders of each series participate solely in the investment results of that series. In effect, each series operates as a separate investment company.


29. Id.
30. Id. (citing Humphreys, supra note 26, at § 1.04).
31. Id.
32. Id.
33. Id.
As of Kentucky’s enactment of the KyUSTA, “the series concept continues to be used for mutual funds and asset securitizations.” However, series concept has been used for other applications as well. For example, it has been suggested that it might be used as a mechanism by which an integrated oil company could organize liability shields between different oil fields and other assets, in real estate, and there is at least one instance where a series of an LLC was utilized to own a personal speedboat.

A series itself is somewhat difficult to explain in that there is an absence of analogues in business entity law. A series is an internal division of a statutory trust that, while not being a distinct business organization, holds certain assets and is responsible for certain obligations. A series enjoys limited liability; its assets are not subject to claims against either the statutory trust or another series. A series may be dissolved without causing the dissolution of the statutory trust or of any other series, but the dissolution of the statutory trust will compel the dissolution of each series thereof. As such, the series is in certain respects dependent upon the statutory trust while as to other aspects it is independent. Obviously the drafting of an agreement incorporating such an involved concept should not be taken lightly. Furthermore, the series gives rise to significant questions outside of organizational law that remain, at least as of this writing, unsettled. For example, there are questions as to how the series will be classified for purposes of federal and state income taxation, whether a series - as

34. Rutledge & Habbart, supra note 3, at 1071.
35. Id.
36. See, e.g., Terence F. Caff, Series LLCs and the Abolition of the Tax System, 2 BUS. ENTITIES 26, 42 (Jan.-Feb. 2000). It has been suggested as well that an organic farm that raises livestock, grows the grain fed to the livestock, and owns the real property on which the operations are conducted, might distribute its various business segments among separate series. See Dominick T. Gattuso, Series LLCs—Let’s Give the Frog a Little Love, 17 BUS. L. TODAY 33, 36 (July/Aug., 2008). See also James D. Blake, From the Offshore World of International Finance to Your Backyard: Structuring Series LLCs for Diverse Business Purposes, 9 DePAUL BUS. & COMM. L.J. 1, 20-27 (Fall 2010).
38. See GxG Management LLC v. Young Brothers and Co., Inc., 2007 WL 551761 at *1, 5-6 (D. Me. 2007).
39. In late 2010 the IRS proposed regulations addressing the federal tax classification of series. See Series LLCs and Cell Companies, 75 FR 55699-01, 2010-45 I.R.B. 626; 26 CFR Part 301. As of the date of this writing those regulations have not been finalized.
contrasted with the statutory trust as a whole - has the ability to file for bankruptcy, how a series may be identified as a debtor on a UCC-1 financing statement, and questions as to whether the series' liability shield will be respected in a non-series jurisdiction. Counsel who do not consider these issues and advise their clients of the uncertainties do so at their own risks; a fact that may and should reduce the immediate widespread adoption of the series format.


41. See, e.g., Norman M. Powell, Series LLCs, the UCC, and the Bankruptcy Code—A Series of Unfortunate Events?, 41 U.C.C. L.J. 103, 106 (2008). A petition for bankruptcy may be filed by or with respect to a “person” (11 U.S.C. § 109(a)), which is defined as including an individual, a partnership or a corporation (11 U.S.C. § 101(41)), but does not include an estate or a trust (other than a business trust). See 11 U.S.C. § 101(15) (“‘Entity’ includes person, estate, trust, governmental unit, and United States Trustee.”). Organizations other than those expressly enumerated may as well fall within the definition of a “person.” See, e.g., In re ICLNDS Notes Acquisition, LLC, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001) (holding that an LLC is eligible to file a petition in bankruptcy as it shares characteristics of the corporation and the partnership and therefore “is similar enough to those entities to be eligible”). Further, the definition of a “Corporation” may include an unincorporated organization organized under a law that makes only the capital subscribed to responsible for the debts and obligations of the association. 11 U.S.C. § 101(9)(A)(ii) (2012). See also S. Rep. No. 95-989. Conversely, a limited partnership is expressly excluded from the definition of a corporation (11 U.S.C. § 101(9)(B) (2012)), thereby precluding even a limited liability limited partnership from being classified as a corporation, rather than as a partnership, under the Bankruptcy Code. Still, it is not clear that a series may fall within the definition of a “person,” presumably as being akin to a “corporation,” able to file a petition in bankruptcy. As observed by a noted commentator in the law of unincorporated business organizations:

Unless and until bankruptcy law recognizes series as separate legal entities, bankruptcy of a single series might well jeopardize assets of the LLC and other series as well. If a bankruptcy court consolidates the assets and liabilities of the series, the anticipated benefits of limited liability between the series would disappear.


42. Powell, Series LLCs, the UCC, supra note 41, at 106. A series is not itself a “registered organization” as contemplated by UCC § 9-102(c)(70) and Ky. REV. STAT. ANN. § 355.9-102(1)(br) in that it comes into existence by private ordering and the Commonwealth does not “maintain a public record showing the organization to have been organized.”

V. THE PLACE OF THE STATUTORY TRUST IN THE CHOICE OF ENTITY ANALYSIS

The trust has long been utilized as a vehicle for the organization of business ventures.\(^{44}\) Traditionally, the statutory or business trust has been utilized as a means of avoiding substantive limitations upon the business corporation. In eras that imposed limitations upon maximum capitalization or that precluded corporate ownership of real estate,\(^{45}\) the trust format was utilized to avoid those limitations. In the modern milieu, these concerns are now behind us and today the statutory trust may be used for any of a variety of applications, although they are best known for use in the structuring of mutual funds,\(^{46}\) for real estate investment trusts, and in asset securitization.\(^{47}\)

A table is perhaps a helpful vehicle through which to identify where the statutory trust fits in the menu of organizational forms.\(^{48}\)

\(^{44}\) See, e.g., SYDNEY R. WRIGHTSINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND BUSINESS TRUSTS § 37 (2d ed. 1927) ("Trusts for large numbers of beneficiaries whose interests may or may not be represented by transferable certificates are but a natural outgrowth of simple express trusts . . . .").

\(^{45}\) See, e.g., 16A WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8232; Dodge v. Ford Motor Co., 170 N.W. 668, 680 (Mich. 1919) (discussing statutory limits on minimum and maximum capital); State Street Trust Co. v. Hall, 41 N.E.2d 30, 34 (Mass. 1942) (discussing limits on ownership of real property by corporations); 4A WILLIAM B. BARDEEN AND JAMES T. LOBB, KENTUCKY PRACTICE – METHODS OF PRACTICE § 51.21 (3d ed. 1991) ("The business trust was developed in Massachusetts from 1910 to 1925 to achieve limited liability and to avoid restrictions then existing there on a corporation’s acquiring and developing real estate . . . ."); ROBERT H. SIKOFF, TRUST AS "INCORPORATION": A RESEARCH AGENDA, 2005 U. ILL. L. REV. 31, 44 (noting the importance of escaping arbitrary limits placed by corporate codes); and Lima v. Houston, 255 Pac. 1105, 1107 (Kan. 1927) ("A common-law trust is or may be a very convenient device for the accumulation of sufficient assets to give commercial prestige in the conduct of business, and may be more elastic and adaptable to the business undertakings and projects of its creators than a limited partnership or ordinary corporation would be. So, too, it is less handicapped with ultra vires problems and the necessity of conforming to discordant state laws governing corporations and the payment of burdensome corporation taxes. But a common-law trust certainly has none of the attributes of limited liability or freedom from personal liability which attach to limited partnerships and ordinary corporate organizations. Freedom from personal responsibility for breach of their business contracts is not a matter which a group of men can confer upon themselves by the creation of a trust, without the sanction of a statute to that effect, or without the intelligent contractual consent of the parties with whom they deal.").

\(^{46}\) A "mutual fund" may be any of an open-end management investment company, a closed-end investment company, or a unit investment trust. See Investment Company Act of 1940 §§ 4-5, 15 U.S.C. §§ 80a-4 to -5 (2012). As a concession to the brevity of life this article will not address the numerous issues that arise in structuring a statutory trust that satisfies the requirements of the Investment Company Act.

\(^{47}\) With respect to the use of the business trust in the organization of investment companies, see generally Sheldon A. Jones, Laura M. Morin and James M. Sterry, The Massachusetts Business Trust and Registered Investment Companies, 13 DEL. J. CORP. L. 421, 446-58 (1988).

\(^{48}\) See also Vining v. Koerner, No. 2000-CA-001217-MR, slip op. at 6-7 (Ky. App. Nov. 9, 2001) ("The selection of the form of business (i.e., sole proprietorship, partnership or corporation) is a decision of utmost importance in establishing a business. That decision requires weighing numerous factors including tax laws and the consequences thereof, limitation of personal liability,
<table>
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<th>Characteristics</th>
<th>Statutory Trust</th>
<th>Shared With</th>
<th>Not Shared With</th>
</tr>
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<tr>
<td>Maximum Enforcement of Contract</td>
<td>Yes</td>
<td>Partnership, Limited Partnership, LLC</td>
<td>Corporation</td>
</tr>
<tr>
<td>Centralization of Control</td>
<td>Yes</td>
<td>Corporation, LP, some LLCs</td>
<td>Partnership, some LLCs</td>
</tr>
<tr>
<td>Free Transferability of Interest</td>
<td>Yes</td>
<td>Corporation</td>
<td>Partnership, Limited Partnership, LLC</td>
</tr>
<tr>
<td>Limited Liability</td>
<td>Yes</td>
<td>Corporation, LLC, LLP, LLLP</td>
<td>General Partnership, LPs that are not LLLPs</td>
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<tr>
<td>Continuity of Life</td>
<td>Yes</td>
<td>Corporation, LLC</td>
<td>UPA General Partnership</td>
</tr>
<tr>
<td>Capital Lock In</td>
<td>Yes</td>
<td>Corporation, LLC</td>
<td>General Partnership, RULPA LP</td>
</tr>
<tr>
<td>Modifiable Fiduciary Duties</td>
<td>No</td>
<td>Corporation</td>
<td>General Partnership, LLC, LP</td>
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Each statutory trust and foreign statutory trust will be subject to the Kentucky limited liability entity tax.\(^{49}\) Likewise, each series\(^{50}\) of a statutory trust or foreign statutory trust will be subject to the limited liability entity tax.\(^{51}\)

VI. THE KENTUCKY UNIFORM STATUTORY TRUST ACT: A REVIEW

This review of KyUSTA will proceed on a sequential section by section basis following the order of the provisions in the Act, as necessary drawing comparisons and contrasts both with the uniform act upon which KyUSTA is adopted and with other Kentucky business entity statutes. KyUSTA is itself divided into ten subtitles, and a discussion of each begins as follows:

Article 1 - General Provisions ............................................................................ 102
Article 2- Formation; Certificate of Trust and Other Filings; Process.................. 108
Article 3 - Governing Law; Authorization; Duration; Powers............................... 112
Article 4 - Series Trusts .................................................................................... 120

and spreading the amount of potential risk and profit among one or more principals to determine which form is best for a given individual, group or company.\(^{49}\) This language was apparently copied by the *Vinson* court, but without attribution from, Dahlenburg v. Young, No. 96-CA-00443-MR and No. 96-CA-0550-MR, 199 Ky. App. Unpub. LEXIS 1 slip op. at 3 (Ky. Ct. App. Mar. 20, 1998).


50. See infra notes 202-92 and accompanying text.

51. See KY. REV. STAT. ANN. § 386A.1-050(7) (referencing KY. REV. STAT. ANN. § 141.0401).
Article 1 - General Provisions

The name of this act as adopted in Kentucky, the “Kentucky Uniform Statutory Trust Act,” departs from the official name of the uniform act, that being the "Uniform Statutory Trust Entity Act." The word "Entity" was included in the uniform act in order to provide differentiation between the act and the Uniform Trust Code, and to augment the identification of business organizations created thereunder as being a legal "entity" with, it is asserted, certain characteristics such as the capacity to sue and be sued and to hold and convey property in its own name. For reasons considered elsewhere, "entity" has been deleted from the name of KyUSTA. The structure organized is a "statutory trust," and so the name of the act is the statutory trust act.

There are set forth a series of defined terms that are utilized throughout the Act. Generally speaking the defined terms conform to those utilized in USTA.

52. Id. § 386A.1-010.
54. See also Unif. Trust Code (2000) § 101, 7C U.L.A. 411 (2006) ("This [act] may be cited at the Uniform Trust Code."). As of this writing, the Uniform Trust Code has not been adopted in Kentucky.
56. See Rutledge & Habbar, supra note 3, at 1060 (recommending that states not include "entity").
except that, in conformity with the Kentucky Business Entity Filing Act, the term “authorized foreign statutory trust” is used in place of “qualified foreign statutory trust,” and “principal office” is utilized in place of a “designated office.” A defined term “appropriate court” has been added. Certain defined terms used only in connection with organic transactions are in USTA set forth exclusively in subtitle 7 thereof, they have in KyUSTA been moved to the primary table of defined terms. In addition, there has been added to the table of defined terms a definition for “professional services;” that definition having been adopted from the Kentucky Uniform Limited Partnership Act (KyULPA).

The definition of a “series trust” and “foreign series trust” as utilized in KyUSTA are intentionally different from that of a “series entity” utilized in the Business Entity Filing Act. The terms “series trust” and “foreign series trust” are utilized for the purposes of applying the limited liability entity tax to each series and applying those rules that are particular to statutory trusts with series. These terms focus upon the availability of negative asset partitioning by means of a series. The “series entity” definition utilized in KyBEFA is focused upon the ability of the series to claim certain property as its own. This definition is in turn utilized to exempt an individual series from the ability to receive a certificate of existence or certificate of authority and in the provision permitting (on behalf of a series entity) a certificate of assumed name for that utilized by a series.

The document governing a statutory trust is the “governing instrument,” which is comprised of the “certificate of trust” and the “trust instrument.”

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59. In the process of Harmonization, “designated office” was dropped from USTA with “principal office” substituted. Certain definitions utilized in subsection 7 dealing with conversions and mergers have been incorporated in the table of defined terms even through, in USTA, they are set forth in article 7 thereof. The definitions utilized in subchapter 7 of KyUSTA are non-uniform from those utilized in USTA.

60. See Ky. Rev. Stat. Ann. § 386A.1-020(1). The “appropriate court” is that in which certain actions by or against the statutory trust may be brought.


63. Id. § 386A.1-020(22); see also § 362.2-102(20).

64. Id. § 386A.1-020(29).

65. Id. § 386A.1-020(15).

66. See id. § 14A.1-070(34).


69. Id. § 386A.1-020(15) (definition of “governing instrument”).
act. defines the effect of the governing instrument, its permissible scope, the limitations beyond which the governing instrument may not modify the default rules of the act, and the default rules with respect to its amendment. Where the governing instrument is silent as to a particular matter, the applicable provisions of KyUSTA will govern.71 While KRS section 386A.1-030 catalogs issues that the governing instrument may address, it does not provide any substantive provisions with respect to the governing instrument.72 Perhaps the most beneficial aspect of this provision is that it provides a roadmap of issues that need to be considered in drafting a governing instrument. To the extent that the governing instrument does not address a subject matter referenced in this section and absent a provision in KyUSTA providing an applicable default rule, reference will need to be made to other law in order to fill the gap.73 The governing instrument need not be set forth in a single integrated document.74 In addition to the recitation of items that may be addressed in the governing instrument,75 certain rules are recited that are not subject to modification by

70. Certificate of trust and trust instrument are themselves defined terms. See id. §§ 386A.1-020(4) (definition of "certificate of trust"), 386A.1-020(32) (definition of "trust instrument"). 71. Id. §§ 386A.1-030(2), 386A.1-040(1). Accord § 275.003(8); Racing Investment Fund 2000, LLC v. Clay Ward Agency, 320 S.W.3d 654, 657 (Ky. 2010) (to the extent the operating agreement does not address a point, the LLC Act will provide the applicable rule); Spires v. Casterline, 778 N.Y.S.2d 259, 265-66 (N.Y. Sup. Ct. 2004) ("The statute clearly allows the members to enter into an Operating Agreement wherein the members can agree to certain terms, conduct, and provisions for operating the business. However, when there is no Operating Agreement, or such agreement does not address certain subjects, then the entity is bound by the minimum requirements set forth in the Limited Liability Company Law. In this situation, the entity is required to operate according to the statutory provisions. These statutory default provisions of the Limited Liability Company Law become the 'Operating Agreement' of the limited liability company."). 72. USTA departs in one particular aspect from the non-substantive nature of section 103, providing at subsection (d) the default rule for the amendment of the governing instrument. See UNIF. STAT. TRUST ENTITY ACT § 103(d), 6B U.L.A. 86 (2012 supp.). This provision was not incorporated in KyUSTA, it utilizing a non-uniform provision that centralizes the default rules for votes of the beneficial owners. See KY. REV. STAT. ANN. §§ 386A.6-020(1), (2); infra notes 378-82 and accompanying text. 73. KY. REV. STAT. ANN. § 386.1-050(3). 74. Id. § 386A.1-030(3). See also UNIF. STAT. TRUST ENTITY ACT § 103(c), 6B U.L.A. 86 (2012 supp.). The governing instrument may "refer to or incorporate any record." As such, the ability of a USTA governing instrument to incorporate by reference is substantially broader than the ability of articles of incorporation to incorporate by reference. Compare KY. REV. STAT. ANN. § 271B.1-200(2). 75. See KY. REV. STAT. ANN. § 386A.1-030(4). See also UNIF. STAT. TRUST ENTITY ACT § 103(e), 6B U.L.A. 86 (2012 supp.). Note that USTA § 103(c) is not an all encompassing list of the matters that may be addressed in a governing instrument. For example, USTA § 510 addresses provisions for directed trustees that may appear in the governing instrument even as USTA § 103(e) is silent as to directed trustees. In KyUSTA, an effort has been made to move these provisions to the provision equivalent to USTA § 103. See, e.g., KY. REV. STAT. ANN. § 386A.1-040(e) (setting forth the rule of UNIF. STAT. TRUST ENTITY ACT § 510(a), 6B U.L.A. 120 (2012 supp.).
private ordering. 76 Those particular limitations on modifiability of the rules set forth in KyUSTA will be addressed in concert with the discussion of the substantive rules. A recurring problem with these limitations should, however, now be considered. While in numerous instances the statutory provision may not be varied, in other instances limited modification or qualification is permitted so long as they are not “unreasonable” or “manifestly unreasonable”. A failure of USTA (a failure that continues the tradition of RUPA, ULPA, ULLCA and RULLCA) is that neither the text nor the official comments define what is either “unreasonable” or “manifestly unreasonable” as those terms are utilized.

In Southcentral Bell Telephone Co. v. Public Service Commission, 77 it was held that the decision of an administrative agency would be unreasonable “when it is determined that the evidence presented leaves no room for difference of opinion among reasonable minds.” 78 That same formulation was employed in Thurman v. Meridian Mutual Insurance, Co. 79 The courts do not appear to have rendered a decision yet on what constitutes a provision that is “manifestly unreasonable” as employed in RUPA section 103(b) and other uniform acts adopting its formula.

In Morgan Buildings and Spas, Inc. v. Turn-Key Leasing, Ltd., 80 the court looked to Black’s Law Dictionary with respect to the definition of “manifest” as utilized in “manifestly unreasonable” as defined in the UCC, determining that manifest constitutes that which is: “Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident.” 81 However, the Morgan court did not proceed to give a comprehensive definition of “manifestly unreasonable.”

The decision rendered in Newsome v. Bills, in which the court held that it was “manifestly unreasonable” to repair a structure where the costs of repair far exceeded the value of the structure after the repairs would be completed, is of little assistance in this context. 82 It is worth noting that “unreasonable,” understood here to refer to an agreement where either one or both of the parties


78. Id. at 451.


81. Id. at 880.

acted irrationally, is distinct from an agreement that is "unconscionable," that being one that is one-sided or oppressive.\textsuperscript{83} Ultimately the courts are going to need to address these ambiguities, and also address whether they will be assessed objectively or subjectively, \textit{i.e.}, whether the standard be absolute or more relaxed in the context of sophisticated parties? In the meantime, counsel should be cautious in drafting so as to avoid breaching the as of yet undetermined limits.

As a default rule, the law of common law trusts will supplement KyUSTA.\textsuperscript{84} This reference to trust law for guidance can be, at best, frustrating. For example, both the Restatements (Third) and (Second) of the Law of Trusts and leading trust law treatises exclude business trusts from their respective scopes.\textsuperscript{85} Further, many hallmarks of the trust form as it exists at common law are substantially altered in the statutory trust. For example, under USTA, and in opposition to the traditional rule, title to trust assets may be held by the trust as an entity,\textsuperscript{86} trustees enjoy limited liability from the debts and obligations of the trust,\textsuperscript{87} and the trust may sue or be sued in its own name.\textsuperscript{88} Consequently, reliance on both cases and


\textsuperscript{84} KY. REV. STAT. ANN. § 386A.1-050(1). See also UNIF. STAT. TRUST ENTITY ACT § 105, 6B U.L.A. 91 (2012 supp.). The statutory trust acts of Delaware and Connecticut refer to the law of common law trusts when the act is silent. See DEL. CODE ANN. tit. 12, § 3809; CONN. CODE § 34-519. See also WRIGHTINGTON, BUSINESS TRUSTS supra note 44, at § 37 ("[T]he rules of law applicable to [business trusts] are those which have been established with reference to all other trusts.").

\textsuperscript{85} See 1 RESTATEMENT (THIRD) OF TRUSTS at 4 ("The Restatement of Trusts does not deal with such devices as business trusts . . . ."). § 1, cmt. B; RESTATEMENT (SECOND) OF TRUSTS §§ 1, cmt. b; 1 AUSTIN W. SCOTT, WILLIAM F. FRATCHE & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 2.1.2 (5th ed. 2006) ("[T]he use of a trust as a substitute for incorporation, as in the case of the so-called business trust or Massachusetts trust, necessarily differs in important ways from the use of the trust as a gratuitous transfer, each of the Restatements of Trusts leaves these trusts for discussion along with other business organizations. So does this treatise.") (citations omitted); 1 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 2.2 (Little, Brown, and Company 1939). See also Sitkoff, Trust as "Uncorporation," supra note 45, at 33:

Readers familiar with the domestic law school curriculum might assume that, because trusts and estates is a separate course from business organizations, the business trust has become the purview of trusts and estates scholars. It has not. Trusts and estates is organized as a coherent field of gratuitous wealth transfer. Trusts and estate scholars have therefore focused on the trust as an instrument of gratuitous transfer, not as a mode of business organization.

\textsuperscript{86} See infra notes 148-51 and accompanying text.

\textsuperscript{87} See infra notes 137-62 and accompanying text.

\textsuperscript{88} See infra notes 172-75 and accompanying text. See also Sitkoff, Trust as "Uncorporation," supra note 45, at 36-37:

This raises the broader question of mismatch between traditional trust law, which evolved in the context of donative transfers, and the exigencies of enterprise organization. In addition to differences in fiduciary standards, under traditional trust law principles managerial action requires unanimity among the trustees; the trustee is to act impartially with respect to different classes of beneficiaries; and the Rule Against Perpetuities sets a limit (albeit indirect) on trust duration. Each of those principles is contrary to the analogous rule in
commentary addressing common law trusts in the interpretation of KyUSTA should, at minimum, be guarded.

The applicable common law may be modified or even superseded in the governing instrument; for example, the governing instrument could provide that corporate or partnership law will govern. Further, law and equity supplement the Act. KyUSTA expressly disclaims the common law rule that statutes in derogation of the common law are to be strictly construed. Every statutory trust, domestic or foreign, is subject to the Kentucky Business Entity Filing Act.

A series of non-uniform provisions set forth rules of construction applicable to governing instruments, each of which (with one exception) has an antecedent in prior Kentucky business organization law. This exception is subsection (3), which provides that each trustee is bound by the governing instrument. These rules of construction recite a public policy in favor of the maximum enforcement of governing instruments, provide that the statutory trust is itself bound by the governing instrument, adopt the rule of independent legal significance, the absence of vested rights in a governing instrument, the obligation of good faith and fair dealing under each governing instrument, and

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Corporate law. Managerial action almost never requires unanimity; residual equity claimants are usually preferred over debt and other equity claimants; and corporations have perpetual life.

89. KY. REV. STAT. ANN. § 386A.1-050(2). Other states incorporate other law as the first-order gap filler. See, e.g., ARIZ. CODE § 10-1879 (“Any business trust shall be subject to such applicable provisions of law from time to time in effect with respect to domestic and foreign corporations, respectively.”).

90. KY. REV. STAT. ANN. § 386A.1-050(3).

91. Id. § 386A.1-050(4). This provision is admittedly redundant of the generally applicable rule. See id. § 446.080(1) (“All statutes of this state shall be liberally construed with a view to promote their objects and carry out the intent of the legislature, and the rule that statutes in derogation of the common law are to be strictly construed shall not apply to the statutes of this state.”).

92. Id. § 386A.1-050(5).

93. Id. § 386A.1-060.

94. Id. § 386A.1-060(3). The prior law did not recite, for example, that a director is bound by the corporation’s articles and bylaws or that a non-member manager of an LLC is bound by the operating agreement. Language to this effect was in 2012 added to the LLC Act. See id. § 275.003(8).

95. Id. § 386A.1-060(1). Accord §§ 275.003(1), 362.1-104(3), 362.2-107(3).


98. Id. § 386A.1-060(5). Accord §§ 275.003(6), 362.1-103(6), 362.2-110(6).

99. Id. § 386A.1-060(6). Accord §§ 275.003(7), 362.1-404, 362.2-305(2), 386.2-408(4).
specific enforcement of limitations upon governing instrument amendment,\textsuperscript{100} and a Dartmouth College provision.\textsuperscript{101}

Article 2- Formation; Certificate of Trust and Other Filings; Process

A statutory trust is formed by the filing of a certificate of trust by the Secretary of State.\textsuperscript{102} The certificate of trust must set forth:

- the name of the statutory trust;\textsuperscript{103}
- the name and business address of each person who upon the trust’s formation will be a trustee;\textsuperscript{104}
- the mailing address of the trust’s principal office address;\textsuperscript{105}
- the name and address of the initial registered office and registered agent;\textsuperscript{106} and
- the name and business address of the organizer.\textsuperscript{107}

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\textsuperscript{100} Id. § 386A.1-060(7). Accord §§ 275.177, 362.2-110(3).

\textsuperscript{101} Id. § 386A.1-060(8). Accord §§ 362.1-107, 362.2-106(2). An express Dartmouth College provision is likely redundant of the Kentucky Constitution. See KY. CONST. § 3. This provision has its analogue in USTA § 1004. See UNIF. STAT. TRUST ENTITY ACT § 1004, 6B U.L.A. 153 (2012 supp.).

\textsuperscript{102} KY. REV. STAT. ANN. § 386A.2-010(1). Accord UNIF. STAT. TRUST ENTITY ACT § 201(d), 6B U.L.A. 93 (2012 supp.). This provision is consistent with the approach employed in other Kentucky business entity statutes. See, e.g., KY. REV. STAT. ANN. § 271B.2-030(1) (incorporation accomplished by Secretary of State filing articles of incorporation); id. § 275.020(2) (organization of LLC accomplished by Secretary of State filing articles of organization). Under Kentucky’s law governing business trusts, filing the declaration of trust with the Secretary of State was required (KY. REV. STAT. ANN. § 386.420(1)), but the statute did not address whether that filing was a precondition to the trust’s existence or otherwise address the impact of an absence of a filing. Since the statutory trust is formed by a filing with the state, it will constitute a ‘registered organization’ within the scope of UCC § 9-102(a)(70) and KY. REV. STAT. ANN. § 355.9-102(1)(b)(‘Registered organization’ means an organization organized solely under the law of a single state or the United States and as to which the state or the United States must maintain a public record showing the organization to have been organized.”).

\textsuperscript{103} KY. REV. STAT. ANN. § 386A.2-010(2)(a). The provisions of KyUSTA governing names are non-uniform. See infra notes 129-34 and accompanying text. But see UNIF. STAT. TRUST ENTITY ACT § 207, 6B U.L.A. 97 (2012 supp.) (provision of USTA addressing name of statutory trust).

\textsuperscript{104} KY. REV. STAT. ANN. § 386A.2-010(2)(b). This provision is non-uniform against USTA; it does not require that the certificate of trust name the initial trustees. See also infra notes 119-20 and accompanying text.

\textsuperscript{105} Id. § 386A.2-010(2)(c). Where KyUSTA utilizes the “principal office” address (defined in KY. REV. STAT. ANN. § 386A.1-070(24)), USTA utilizes a “designated office,” defined at UNIF. STAT. TRUST ENTITY ACT § 102(4), 6B U.L.A. 84 (2012 supp.). It is to this address that the Secretary of State will send notices and other communications. See KY. REV. STAT. ANN. § 14A.2-010(12). In the course of USTA’s “Harmonization” the “designated office” was dropped with the “principal office” substituted.

\textsuperscript{106} KY. REV. STAT. ANN. § 386A.2-010(2)(d). See also UNIF. STAT. TRUST ENTITY ACT § 201(a)(3), 6B U.L.A. 93 (2012 supp.).

\textsuperscript{107} See KY. REV. STAT. ANN. § 386A.2-020(2)(c).
In addition, if the statutory trust is to have the capacity to be a series trust, and a statement to that effect is required in the certificate of trust. The certificate of trust and all amendments to it must also be filed with the county clerk for the county in which the statutory trust has its registered office.

The certificate of trust may contain such additional information as is desired. A filed certificate of trust, as amended by a statement of change or qualification or by articles of merger or conversion, will control over an inconsistent term in a trust instrument. Amendment of the certificate of trust is required if there is a change in any information required to be set forth in the certificate. The requirements of the contents of the certificate of trust or any amendment or restatement are not subject to modification by private ordering. A certificate of trust may be amended and/or restated.

A change in the trustees necessitates an amendment to the certificate of trust, but the fact that one is not listed on the certificate of trust does not preclude that the person from being a trustee.

108. See also id. § 386A.1-020(26) (defining “series trust”).
109. Id. § 386A.2-010(3). This statement in the certificate of trust, standing alone, is not sufficient to effectively create a series that affords the (presumably) desired limited liability. Rather, the series must be structured in the governing instrument and maintained in the manner dictated by the statute. See infra notes 194-97, 212-15 and accompanying text.
110. See KY. REV. STAT. ANN. § 14A.2-040(1)(d); see also id. § 14A.2-070(3).
111. Id. § 386A.2-010(4). See also UNIF. STAT. TRUST ENTITY ACT § 201(c), 6B U.L.A. 93 (2012 supp.). The same rule is employed in other Kentucky business entity statutes. See, e.g., KY. REV. STAT. ANN. §§ 271B.2-020(2)(c), 275.025(4), 362.415(1)(f), 362.2-201(1)(e).
112. KY. REV. STAT. ANN. § 386A.2-010(5). See also UNIF. STAT. TRUST ENTITY ACT § 201(c), 6B U.L.A. 93 (2012 supp.). This provision sets forth a different rule than that in the Uniform Limited Partnership and the Revised Uniform LLC acts, which provide that as to third parties relying thereon the publically filed record will control, but as between the equity owners and their transferees the private ordering documents will control over the filed documents. See UNIF. LTD. PART. ACT § 201(d), 6A U.L.A. 392 (2008); KY. REV. STAT. ANN. § 362.2-201(4); and REV. UNIF. LTD. LIAB. CO. ACT § 112(d), 6B U.L.A. 450 (2008). The rule embodied in KyUSTA is consistent with that employed in the Kentucky Business Corporation Act, it providing that the bylaws may not be inconsistent with the articles of incorporation. See KY. REV. STAT. ANN. § 271B.2-060(2).
113. See KY. REV. STAT. ANN. § 386A.2-020(1). This provision is not uniform to USTLA.
114. See id. § 386A.1-040(2)(c). See also UNIF. STAT. TRUST ENTITY ACT § 104(1), 6B U.L.A. 88 (2012 supp.).
115. See KY. REV. STAT. ANN. §§ 386A.2-020(1), (7). See also KY. REV. STAT. ANN. § 386A.6-020(1)(a); UNIF. STAT. TRUST ENTITY ACT § 103(d), 6B U.L.A. 86 (2012 supp.) (default rule of unanimous consent of the beneficial owners in order to amend the governing instrument, which by definition includes the certificate of trust).
117. See KY. REV. STAT. ANN. §§ 386A.2-020(1), (4).
118. See id. § 386A.1-020(36). A similar rule applies in limited partnerships wherein not being named as a general partner in the certificate of limited partnership is not conclusive that the person is not a general partner. See Vestal and Rutledge on Ky.ULPs, supra note 15, at 438-39; Rutledge & VESTAL on KY. PARTNERSHIPS AND LPS, supra note 15, at 199-200.
The USTA contains something of a “chicken and egg” problem with respect to the execution of the original certificate of trust. A document delivered for filing on behalf of a statutory trust must be signed by or on behalf of one of the trustees.\(^{119}\) Given that the USTA applies this directive to the initial certificate of trust, a problem arises from the fact that the statutory trust and the authority of any trustee will come into existence only upon the filing of the certificate of trust. At the same time, until the trust comes into existence pursuant to the filing of the certificate of trust by the Secretary of State, there is not a “trustee” who may sign the document.\(^{120}\)

This point was not resolved within the mechanism provided by USTA. In order to address this problem, KyUSTA utilizes an “organizer” similar to those utilized in many business corporation and limited liability company acts.\(^{121}\) Following this model, the “organizer” is authorized to execute and deliver the certificate of trust to the Secretary of State, and upon the filing the trust comes into existence and the persons intended to be the trustees become its trustees.\(^{122}\) The person executing the initial certificate of trust as the organizer does not have to become a trustee upon the trust’s formation.\(^{123}\)

Documents filed with the Secretary of State may have a delayed effective time and date, provided that the delayed effective date cannot be more than ninety days after the document is filed.\(^{124}\) Absent a document setting forth a delayed effective time and/or date, the document is effective upon filing by the Secretary of State.\(^{125}\) A filed record may be corrected.\(^{126}\) The Secretary of State, provided that the necessary conditions are satisfied, may issue a certificate of existence to a statutory trust.\(^{127}\) While a statutory trust may be organized with one or more series, a certificate of good standing cannot be issued with respect to an individual series.\(^{128}\)

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120. See also Rutledge and Habbart, supra note 3, at 1063-64 (noting this inherent inconsistency in the USTA).
123. Id. § 386A.2-030(2). This provision is based upon Ky. Rev. Stat. Ann. § 275.020(1).
124. Id. § 14A.2-070(2).
125. See id. § 14A.2-070(1).
128. See [Ky. Rev. Stat. Ann. § 14A.2-130(4)(d)](https://www.uniformlaws.org/sites/default/files/2012/11/USTA-14A-2-130-4-d.pdf). As is reviewed below, while the capacity of a statutory trust to organize series is initially a matter of public record, thereafter whether any particular series is organized is a matter of private ordering for which no public filing is required.
There are no required identifiers for the name of a statutory trust, but its name may not include "incorporated," "corporation," "Inc.," "corp.," "partnership" or "cooperative." However, the name may include "Limited" or "Ltd." The name of a statutory trust must be distinguishable on the records of the Secretary of State. A statutory trust, if doing business under a name other than the name set forth in the certificate of trust, is obligated to file a certificate of assumed name. The fact that the name of a statutory trust is of record on the certificate of trust does not prevent the use of that name by others.

Every statutory trust is required to designate and maintain an agent for service of process, and the Business Entity Filing Act addresses matters such as the change of the agent for service of process and the resignation of the office or agent. The registered agent is the agent of the statutory trust for the receipt of any process, notice or demand, and is charged to forward same to the statutory trust. The registered agent is obligated to maintain contact information for a natural person who is authorized, on behalf of the statutory trust, to receive communications from the registered agent. Additionally, a statutory trust must change its principal office address by filing a statement of change.

Hence, there is no filing of record upon which the Secretary of State could certify existence. An exception to this approach is Illinois, which requires a public filing (a "certificate of designation") for each individual series. See 805 ILL. COMP. STAT. 130/37-40(4)(2007). Consequent thereto the Illinois Secretary of State will issue a certificate of existence for an individual series.

129. See KY. REV. STAT. ANN. § 14A.3-010(15). This treatment is consistent with the law in Delaware, which likewise has no required identifiers for a statutory trust. In contrast, Connecticut requires certain identifiers for a statutory trust. See CONN. STAT. § 34-506(c) (the name of a Connecticut statutory trust must include "Statutory Trust," "Limited Liability Trust," "Limited," "LLT," "L.L.T." or "Ltd."). See also VA. CODE § 13.1-1214.

130. KY. REV. STAT. ANN. § 14A.3-010(15).

131. See id. § 14A.3-010(1).

132. See id. §§ 365.015(1)(b)(5) (defining the "real name" of a statutory trust), 365.015(2)(c) (requirement to have a certificate of assumed name if doing business under other than the real name); see also id. § 14A.3-030(6).

133. See id. § 365.015(2)(a).

134. See id. § 14A.3-010(17).

135. See id. §§ 386A.2-010(2)(d), 386A.2-080; see also id. § 14A.4-010(1). Under the Delaware Statutory Trust Act there is no registered agent or office provided for or permitted unless the statutory trust is a registered investment company. See DEL. CODE ANN. tit. 12, § 3807(b).

136. See KY. REV. STAT. ANN. §§ 14A.4-020, 14A.4-030. See also id. § 386A.2-020(6).

137. Id. § 14A.4-040(1). See also FED. R. CIV. P. Rule 4(b)(1)(B); KY. RULE CIV. PROC. 4.04(3).

138. KY. REV. STAT. ANN. § 14A.4-050(1).

139. See id. §§ 14A.4-010(3), 14A.4-050(2); see also id. § 14A.1-040.

140. See id. §§ 386A.2-020(5), 14A.5-010.
Each statutory trust is obligated to file an annual report with the Secretary of State that sets forth the name and business address of each of the trustees. There exists no requirement to identify in the public record the beneficial owners. The annual report may not be used to update the trustees (adding to or deleting from those recited in the certificate of trust), the principal office or the registered office or agent. A statutory trust that fails to file its annual report is subject to administrative dissolution.

Article 3 - Governing Law; Authorization; Duration; Powers

The laws of Kentucky, that being the jurisdiction in which the certificate of trust is filed, will govern the internal affairs of the statutory trust and the liability of its beneficial owners and of its trustees for any debt or other obligation of either the statutory trust or a series, as well as the enforceability of a debt or similar liability of the trust or one of its series (if any) against the property of the trust or the property of any series (if any). While there is certainly ample authority for the proposition that the scope of “internal affairs” includes the responsibility of constituents of a business organization for its debts and obligations, the application is made express to avoid any confusion and to

141. See id. §§ 386A.2-090, 14A.6-010; see also Rutledge & Tzanos, supra note 2, at 442-43. It was not until 2007 that domestic and foreign business trusts became subject to the requirement to file an annual report with the Secretary of State. See Ky. Rev. Stat. Ann. § 386.392; see also Thomas E. Rutledge, The 2007 Amendments to the Kentucky Business Entity Statutes, 97 Ky. L.J. 229, 237 (2008-09) (hereinafter Rutledge, The 2007 Amendments).

142. See Ky. Rev. Stat. Ann. §14A.7-010(1)(a); see also Rutledge & Tzanos, supra note 2, at 444-45.


144. See, e.g., Whitley v. Moravec, 635 F.3d 308, 310 (7th Cir. 2011) (“The internal affairs doctrine designates a firm’s state of incorporation as the source of the rule about whether investors are liable for its debts.”) (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307); Fusion Capital Fund II, LLC v. Ham, 614 F.3d 698, 700 (7th Cir. 2010) (“Because Millennium is incorporated in Nevada, that state's law determines whether its investors are liable for its debts. (This is an aspect of the internal-affairs doctrine, a choice-of-law rule to which Illinois adheres. . . .)” (citation omitted). As observed in BAYLESS MANNING, A CONCISE TEXTBOOK ON LEGAL CAPITAL 6 (1981):

History aside, it is important to understand that modern corporation law does not “provide for” limited liability; what it does is provide that in the case of creditor claims against an enterprise in corporate form, the corporation is the debtor rather than those who hold claim to the proprietorship capital in the enterprise. Once that step is taken, the creditor law of the corporation exactly parallels the law of individual indebtedness and of creditors of individuals. (emphasis in original).

See also 1 WILLIAM MEADE FLETCHER, FLETCHER Cyclopedia of the Law of Private Corporations § 14 (2006) (“The fact that a statutory, constitutional or charter provision may impose liability on shareholders for the corporation's acts or debts does not alter the basic rule of non-liability.”). It needs to be recognized as well that, in addition to protecting the owners from exposure in excess of the amounts invested in the venture, the corollary of limited liability, namely
clearly differentiate the rule in KyUSTA from that under the predecessor law. The inclusion of the inspection of books and records in the internal affairs is consistent with the prior law and responds to a prior judicial decision to the effect that inspection of books and records is not an issue of internal affairs.

A statutory trust is an entity separate from its trustees and beneficial owners. The requirement that the statutory trust be treated as an entity is not listed as a mandatory provision; it is therefore conceivable that it could be subject to waiver. A statutory trust may hold and take title to property in its own name; alternatively, property may be held in the name of a trustee in an active, passive or custodial capacity. Permitting the trust to contract in its own name is a material alteration of the common law rule. At common law, a trust, including a business trust, was not a legal entity capable of contracting in its own name. Although it is anticipated that, consistent with the treatment of a

that the assets of the venture will not be available to satisfy claims against the owners in their individual capacities, assures a defined pool of assets available to satisfy venture creditor claims. Id. at § 38. This aspect of limited liability has been labeled “affirmative asset partitioning.” See Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 YALE L.J. 387, 394-95 (2000). Lynn Stout utilizes the term “capital lock-in.” See Lynn A. Stout, On the Nature of Corporations, 2005 U. I.L.L. REV. 253. See also Henry Hansmann, Reinier Kraakman and Richard Squire, The New Business Entities in Evolutionary Perspective, 2005 U. I.L.L. REV. 5 (arguing for a focus upon the mechanisms of asset partitioning and protection of creditor rights, as contrasted with contractual flexibility inter se the organization, as the perspective from which to consider developments in business entity law).

145. See, e.g., KY. REV. STAT. ANN. § 14A.9-050(2).

146. See also Rutledge, The 2007 Amendments, supra note 141, at 238-39.

147. See KY. REV. STAT. ANN. § 386A.3-020(1). Accord UNIF. STAT. TRUST ENTITY ACT § 302, 6B U.L.A. 104 (2012 supp.); DEL. CODE ANN. tit. 12, § 3810(b)(2) (2007) (“A statutory trust formed under this Chapter shall be a separate legal entity, the existence of which as separate legal entity shall continue until cancellation of the statutory trust’s certificate of trust.”); VA. CODE § 13.1-1208 (2006) (“A business trust established in accordance with the provisions of this chapter is a separate legal entity.”); KY. REV. STAT. ANN. §§ 275.010(2), 362.1-201(1), 362.2-104(1). Still, the mere identification of a statutory trust as an “entity” does little if anything to advance its analysis in that there exists no agreed upon consequences that flow from “entity” characterization. See Rutledge, External Entities and Internal Aggregates, supra note 55, at 656-57.

148. It being unclear which characteristics, if any, necessarily flow to a statutory trust from its identification as an entity, it is equally unclear as to what would be the consequences of electing rather to be treated as an aggregate. See also Del. Code Ann. tit. 6, §15-201(b) (permitting a Delaware partnership, otherwise classified as an entity, to elect in either a statement of partnership existence or a statement of qualification to be treated as an aggregate, but not detailing the effect thereof).

149. KY. REV. STAT. ANN. § 386A.3-020(2). In contrast, under Kentucky’s prior law governing business trusts, title to all trust property was vested in the trustee. See id. § 386.350.

150. Id. § 386A.3-020(2). See also UNIF. STAT. TRUST ENTITY ACT § 307, 6B U.L.A. 108 (2012 supp.).

151. See, e.g., GUY A. THOMPSON, BUSINESS TRUSTS AS SUBSTITUTES FOR BUSINESS CORPORATIONS § 13 (1920) (“The trustee is not an agent but, upon the contrary, he himself is the principal. He is the owner (in trust it is true) of the property, and the business he transacts is his
statutory trust as a legal entity, a statutory trust will hold property in its own name whenever possible, permitting title to be held by a trustee as a nominee provides flexibility, for example by allowing a statutory trust to operate in states that may not recognize the statutory trust and, as a result, require the trustee to hold title to property. The "property" of a statutory trust may be real, personal, tangible or intangible. Statutory trusts do not have a beneficial owner and are not subject to the property tax. The property of the statutory trust is exempt from KRS section 381.135(1)(a). 154

A statutory trust may have any lawful purpose, which may include a nonprofit purpose, provided it does not have a "predominantly" donative purpose. The restriction against a statutory trust with a primarily donative purpose exists to ensure that the statutory trust is not used to avoid the application of policy-based mandatory limitations imposed upon traditional

business, even though another is to receive the benefit or profits therefrom.


[A] corporation is a legal personality which may act through agents. A contract made by the authorized agent of a corporation is the corporation's contract. A trust ... can itself do no act. It cannot make a contract. It cannot even act to choose an agent. The trustee alone can act which affects the rights or property of the trust. He does not act as the agent of the trust or as its embodiment in dealing with its property and making contracts which affect its property. Such contracts when made are his contracts and he is personally liable upon them unless they include an agreement that he shall not be personally liable.


153. KY. REV. STAT. ANN. § 386A.3-020(2). See also id. § 386A.6-010(2). The second sentence of this provision is non-uniform and is based on the LLC Act. See id. § 375.240(1). The same rule is utilized in KyRUPA. See id. § 362.1-203. This provision adopts for the statutory trust the rule that has long existed for corporations. See, e.g., JAMES GRANT, A PRACTICAL TREATISE ON THE LAW OF CORPORATIONS IN GENERAL AS WELL AGGREGATE AS SOLE 14 (T & J.W. Johnson 1854) ("By the civil law, from which much of our law of corporations has been derived, the goods and rights of a corporation belong in such manner to the corporate body, that particular persons who are members of it have no manner of right or property in them, or can dispose of them").


155. KY. REV. STAT. ANN. § 386A.3-030(2)(a). See also UNIF. STAT. TRUST ENTITY ACT § 303, 6B U.L.A. 105 (2012 supp.). Certain other existing business trust acts do not expressly exclude a trust with a predominantly donative purpose. See, e.g., VA. CODE § 13.1-1209 (2012). Other states are ambiguous. See, e.g., ARIZ. REV. STAT. ANN. § 10-1373 (2012) ("A business trust is permitted as a recognized form of association for the conduct of business within this state."). In contrast, Delaware and Connecticut explicitly authorize the formation of a statutory trust for donative purposes. See DEL. CODE ANN. tit. 12, § 3801; CONN. STAT. § 34-502a (2005). The term "predominantly" is not defined in either KyUSTA or USTA. Under Kentucky's prior statute on business trusts, a statutory trust could have any lawful purpose. See KY. REV. STAT. ANN. § 386.380.
trusts such as those recited in section 105 of the Uniform Trust Code. In a non-uniform addition, a statutory trust organized under KyUSTA may not be utilized to render professional services.\textsuperscript{156} Limits on the use of the statutory trust form that exist in other states need to be considered. On a state-by-state basis, limitations on "business trusts" may be held applicable to KyUSTA statutory trusts desiring to do business in that jurisdiction. For example, the Oklahoma Constitution forbids the issuance of an alcoholic beverage package store or distributor license to a "business trust,"\textsuperscript{157} and under Indiana law, a business trust may not be utilized for the organization of a railroad.\textsuperscript{158}

The limited liability of the trust's constituents with respect to any debt or obligation of the trust or a series of it is stated both affirmatively (debt is that of the trust or the series) and negatively (no beneficial owner, trustee or any agent thereof is personally liable for a debtor obligation of the trust or of a series).\textsuperscript{159} This rule of limited liability is applicable, by statutory formula, to both the trustee and the beneficial owners. This treatment is consistent with the prior law in providing that the beneficial owners enjoyed limited liability.\textsuperscript{160} As to the trustee, affording limited liability is a departure from the prior common law.\textsuperscript{161} The application of the limited liability rule with respect to agents assumes that,

\textsuperscript{156} KY. REV. STAT. ANN. § 386A.3-030(2)(b). See also id. § 386A.1-020(25) (defining "professional service").

\textsuperscript{157} See OKLA. CONST. art. XXVIII, § 10.

\textsuperscript{158} See IND. CODE § 23-5-1-8 (2012).

\textsuperscript{159} KY. REV. STAT. ANN. § 386A.3-040. See also UNIF. STAT. TRUST ENTITY ACT § 304, 6B U.L.A. 106 (2012 supp.). Under traditional trust law, the trustee is liable for the debts and obligations of the trust with a corresponding right of contribution out of trust assets. See RESTATEMENT (SECOND) OF TRUSTS §§ 244, 261 (1959); see also WILLIAM C. DUNN, TRUSTS FOR BUSINESS PURPOSES § 115 (p. 197) (Callaghan and Co. 1922); HARRY G. HEINRICH, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 89 (2d ed. 1970); EDWARD H. WARRREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 858-60 (1929) (discussing rule that the trustee is liable, as the principal, for obligations undertaken). This rule was revised and indeed reversed in the Uniform Trust Code, if providing that a trustee is not personally liable for the debts, obligations and liabilities arising in the trustee's fiduciary capacity. See UNIFORM TRUST CODE § 1010 (2000), 7C U.L.A. 657 (2006). As of this writing, Kentucky has not adopted the Uniform Trust Code. Under the prior law governing Kentucky business trusts, the trustee did enjoy limited liability so long as his conduct did not involve fraud or bad faith. KY. REV. STAT. ANN. § 386.400. This provision is confusing in a number of ways. For example, must the fraud or bad faith be against the trust or against the third party? If the trustee's conduct does involve fraud or bad faith, is the trustee alone liable to the third party, or does the trustee stand liable along with the trust estate?

\textsuperscript{160} See KY. REV. STAT. ANN. § 386.400. See also WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at § 43 ("It is equally well settled that one who contracts with a trustee has no right of action against the beneficiaries personally.") (citation omitted).

\textsuperscript{161} See, e.g., WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at § 43 ("In the absence of some stipulation in the contract to the contrary, it is well settled that one who contracts with a trustee has a contract right at law against the trustee personally, since courts at law purport to ignore the existence of trusts and the trustee does not act as agent for his beneficiaries but is himself the principal.") (citation omitted).
in the discharge of the agent’s functions, there has been an appropriate identification of the principal on whose behalf they are acting. Additionally, no creditor of a trustee or of a beneficial owner may seek to collect a debt against any specific property of the statutory trust. Whether a foreign jurisdiction will look to and apply Kentucky law as to the limited liability of the trustees and beneficial owners of a KyUSTA statutory trust is open to debate, but the bulk of the decisional law to date indicates that they should.

As a default rule, modifiable in the governing instrument, a statutory trust has perpetual existence. This rule is directly opposite to the rule of limited

162. See Restatement (Third) of Agency § 6.03 (2000).


Sixth, appellants would urge that the summary judgment was improperly granted because Diversified, being a Massachusetts Trust, has no standing to sue in Texas courts. While Massachusetts Business Trusts are not recognized in this state it has been held that they are to be treated as a partnership or an unincorporated joint stock company. Thompson v. Schmitt, 115 Tex. 323, 274 S.W. 554 (1925); Means v. Limpia Royalties, 88 S.W.2d 1080 (Tex. Civ. App. El Paso 1935, writ dism’d).

See also Thomas E. Rutledge, To Boldly Go Where You Have Not Been Take You May Go: LLCs, LLPs, and LLLPs in Interstate Transactions, 58 Baylor L. Rev. 205, 209-11 (2006).

duration applied to common law trusts as mandated by the rule against perpetuities. By private ordering in the governing instrument, it may be agreed that the duration of the statutory trust is less than perpetual. Although a statutory trust or a series thereof may be terminated or revoked, it is further proved that such a termination or revocation may be accomplished only in accordance with the terms of the KyUSTA or governing instrument. This reference to the governing instrument eliminates the application of existing common law which seeks to balance, over time, between the desires of the settlor and the desires and expectations of the beneficiaries. Neither a statutory trust nor any series thereof shall be terminated consequent to the death, incapacity, expression may be allowed, individuality; property, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being.”; JAMES GRANT, A PRACTICAL TREATISE, supra note 153, at 16 (“A corporation is an institution calculated for and capable of duration as long as the world lasts, though it may be brought to a termination by certain accidents or by certain defaults of duty on the part of its members at any period; but however long its duration, the corporation continues the same; and the same rights, privileges, duties and liabilities attach to it as it had at the first moment of its creation; precisely as though it were an individual. Personae vices fungitar... This unbroken personality, this beautiful combination of the legal characters of the finite being with the essentials of infinity appears to have been the primary object of the invention of incorporations, an invention which, perhaps more than any other human device, has contributed to the civilization of Europe, and the freedom of its states.”).

167. The common law rule against perpetuities, which continues to be followed by a number of states, requires that all interests must vest no later than 21 years after the end of a life (or lives) in being at the creation of the trust. See, for example, Iowa (IOWA CODE § 558.68); New York (NY EST. POWERS & TRUST § 9-1.1 (2002)); and Texas (TEX. PROP. § 112.036). Thus, in those states that follow the common law rule, a trust has a limited life span. However, many states have repealed the common law rule entirely, at least as to personal property (see, e.g., Delaware (25 DEL. CODE ANN. tit. 25, § 503 (2009)); New Jersey (N.J. STAT. ANN. § 46:2F-9 (2003)); and South Dakota (S.D. CODIFIED LAWS § 43-5-8 (1997))); or have extended the allowed life of a trust by adopting, for example the Uniform Statutory Rule Against Perpetuities (“USRAP”) (see, e.g., Connecticut (CONN. GEN. STAT. § 45a-491 (2004)) and Florida (FLA. STAT. § 589.225)), which adopts both the common law rule as well as an alternative rule that all interests will be valid if they actually vest within ninety years. USRAP §§ 1(a), 8B U.L.A. 236 (2001). But for a limited exemption, Kentucky repealed the rule against perpetuities in 2010. See 2010 Ky. Acts, ch. 21, § 14 (repealing K.Y. REV. STAT. ANN. §§ 381.215 and 381.216); see also James E. Hargrove, 2010 Changes to the Kentucky Trust & Estate Practice, BENCH & BAR 12 (Sept. 2010).

168. See KY. REV. STAT. ANN. § 386A.3-010(2)(a); see also infra notes 469-70 and accompanying text.

169. KY. REV. STAT. ANN. § 386A.3-050(2). See also UNIF. STAT. TRUST ENTITY ACT § 306(b), 6B U.L.A. 107 (2012 supp.). Be aware, however, that this provision purports to say more than it actually does. Judicial and administrative dissolution remain possibilities irrespective of what is or is not in the governing instrument.

dissolution, termination or bankruptcy of either a beneficial owner or of a trustee.\textsuperscript{171} Overriding the “merger doctrine” that exists under the common law of trusts whereby legal and equitable title would otherwise merge and thereby bring about the trust’s termination,\textsuperscript{172} the Act provides that neither a trust nor a series thereof will terminate merely because the same person is both the only trustee and the only beneficial owner thereof.\textsuperscript{173}

In an alteration of the common law of trusts,\textsuperscript{174} a statutory trust may sue and be sued in its own name.\textsuperscript{175} This provision may be problematic should the statutory trust sue or be sued in federal court in a jurisdiction that does not, by local state law, afford a trust the right to sue or be sued in its own name.\textsuperscript{176} In such a foreign jurisdiction, absent the court applying to a statutory trust the internal affairs doctrine that is applied to corporations, the trust may not be


\textsuperscript{172} See RESTATEMENT (THIRD) OF TRUSTS § 69 (2003); RESTATEMENT (SECOND) OF TRUSTS §§ 99(5) (1959), cmt. c, 341 cmt. b; UNIFORM TRUST CODE § 402(a)(5), 7C U.L.A. 481 (2006); SCOTT ON TRUSTS, supra note 85, at § 99.3. See also RESTATEMENT (THIRD) OF TRUSTS § 2 (2003); WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at § 37.

\textsuperscript{173} KY. REV. STAT. ANN. §§ 386A.3-050(3), (4). See also UNIF. STAT. TRUST ENTITY ACT § 306(d), 6B U.L.A. 108 (2012 supp.). Note, however, that where the same person is the sole trustee and the sole beneficial owner, the assets of the statutory trust are available to satisfy the claims of that person’s creditors. See KY. REV. STAT. ANN. § 381.180(7)(a); see also In re Langley, 30 B.R. 595 (Bankr. N.D. Ind. 1988); Cunningham v. Bright, 117 N.E. 909, 910 (Mass. 1917); In re Medallion Realty Trust, 103 B.R. 8, 11-12 (Bankr. D. Mass. 1990).

\textsuperscript{174} See, e.g., Duvall v. Craig, 15 U.S. (2 Wheat.) 45, 56-57 (1817); Taylor v. Davis Adm’x, 110 U.S. 330, 335 (1884) (“When a trustee contracts as such, unless his is bound no one is bound, for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee.”). See also SYDNEY R. WRIGHTINGTON, THE LAW OF UNINCORPORATED ASSOCIATIONS AND SIMILAR RELATIONS § 43 (Little, Brown and Company 1916).

\textsuperscript{175} KY. REV. STAT. ANN. § 386A.3-060(1). See also UNIF. STAT. TRUST ENTITY ACT § 308, 6B U.L.A. 109 (2012 supp.). An express listing of the power to sue and be sued in the name of the venture is now a standard provision of business organization law. See, e.g., REV. UNIF. PART. ACT § 307(a), 6 U.L.A. 124 (2001); KY. REV. STAT. ANN. § 362.1-307(1); UNIF. LTD. PART. ACT 2001 § 105, 6A U.L.A. 367 (2008); KY. REV. STAT. ANN. § 362.2-105; UNIF. LTD. LIAB. CO. ACT § 106, 6A U.L.A. 169 (2008); REV. UNIF. LTD. LIAB. CO. ACT (2006) § 105, 6B U.L.A. 438 (2008); KY. REV. STAT. ANN. § 275.330; MODEL BUS. CORP. ACT § 3.02(1) (2006); KY. REV. STAT. ANN. § 271B.3-020(1)(a). Blackstone described one of the characteristics of a corporation, it being of that age the prototypical entity, as being the power to sue or be sued in the corporate name. WILLIAM BLACKSTONE, 1 COMMENTARIES *475. See also WILLIAM SHEPHERD, OF CORPORATIONS, FRATERNITIES, AND GUILDS 53 (1659, Law Book Exchange 2009) (“For this power to sue and be sued, [sic] is incident to every good Corporation, and yet it is not amiss to express it [in the charter].”); id. at 109 (“A Corporation is a Body only in consideration of Law . . . yet may it . . . sue, and be sued.”).

\textsuperscript{176} See FED. R. CIV. PROC. 17(b)(3) (stating that the capacity of a trust to sue or be sued is determined by the law of the state in which the court is located).
permitted to act in its own name. Presumably, this would require the trust to bring suit or defend the action in the name of the trustee(s).

For purposes of federal diversity jurisdiction and the citizenship of a statutory trust, it being an unincorporated organization, presumably it will be deemed to have the citizenship of the various beneficial owners. At the same time neither the jurisdiction of organization or jurisdiction of the principal place of business will be at issue. This rule is consistent with that adopted in *Riley v. Merrill Lynch Pierce Fenner & Smith, Inc.* It must be acknowledged, however, that it is in contrast with that set forth in *Navarro Savings Ass’n v. Lee,* where the Supreme Court held that, in a suit brought by the trustees of a Massachusetts business trust in their individual capacities as trustees, only the citizenship of the trustees (and not the citizenship of the beneficial owners) would be relevant to the diversity analysis. The *Navarro* decision is distinguishable on the basis that the suit was brought by the trustees *qua* trustees (rather than by or against the trust itself) and the fact that a KyUSTA statutory trust does not afford its trustees the characteristics that permitted them to individually pursue the suit at issue in *Navarro.* Although it appears the question has never been squarely addressed, the citizenship of a trustee who is not as well a beneficial owner should not be attributed to the statutory trust.

Where a beneficial owner is a corporation, there will be attributed to the trust the corporation’s citizenship in each of its jurisdictions of incorporation and the jurisdiction of its principal place of business as determined by utilizing the “nerve center” test. In contrast, where the beneficial owner is an unincorporated business organization, citizenship will be determined based upon

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177. *But see Restatement (Second) of Conflicts § 298, cmt. b. (capacity of a “corporation” to sue or be sued in its own name may in a foreign jurisdiction be conditioned upon compliance with that law).*


180. See, e.g., JMTR Enterprise, L.L.C. v. Duchin, 42 F. Supp.2d 87 (D. Mass. 1999); TPS Utilicon Serv., Inc. v. AT&T Corp., 223 F. Supp.2d 1089, 1102 (N.D. Cal. 2002) (“The place of organization of an L.L.C. is not relevant to its citizenship for diversity purposes.”).

181. See, e.g., Citizens Bank v. Plasticware, LLC, 830 F. Supp. 2d 321, 323 (E.D. Ky. 2011) (“Plasticware’s principal place of business, however, is not relevant to its citizenship determination.”).


184. *See id.* at 465 (The focus is upon the citizenship of the trustee and the court “need not consider the citizenship of the beneficiaries of the trust . . . .”).

185. For example, pursuant to the trust at issue in *Navarro*, title to trust assets was in the names of the trustees. Further, the agreement at issue was entered into between the third party and the trustees in their capacities as such. In contrast, a KyUSTA statutory trust holds property in its own name and as well contracts in its own name.

the citizenship of its ultimate constituent owners. The citizenship of an individual is that of the state in which they are domiciled.

Except to the extent property has been “associated” with a particular series, the property of a statutory trust, whether held in the name of the trust or in the name of a trustee, is subject to attachment and execution to satisfy a debt or other obligation of the trust. Property of or associated with a series is subject to attachment and execution to satisfy a debt or obligation of that series, but is not available to satisfy a debt or obligation of another series or of the statutory trust.

Article 4 - Series Trusts

The series, as employed in KyUSTA, differs from the USTA series in both language but more importantly in concept. The KyUSTA series is a more robust structure, being able to hold title to property, to grant a security interest and to sue and be sued in its own name. A series, under USTA, has none of these capabilities.

The authority for series is subject to a combination of public notice and private ordering. The certificate of trust, in addition to containing the information otherwise required, must provide notice that the statutory trust has the capacity to have one or more series. From there the governing instrument

188. See Vlandis v. Kline, 412 U.S. 441, 454 (1973); see also Smoot v. Mazda Motors of Am., Inc., 469 F.3d 675, 677-78 (7th Cir. 2006); Am.’s Best Inns, Inc. v. Best Inns of Abilene, L.P., 980 F.2d 1072, 1074 (7th Cir. 1992).
189. See infra notes 211-14 and accompanying text.
190. Ky. REV. STAT. ANN. § 386A.3-040(5).
191. See infra notes 211-14 and accompanying text.
192. See Ky. REV. STAT. ANN. § 386A.3-040(5).
193. id. § 386A.4-020(1)(a).
194. The deficiencies in the formula employed in USTA have been otherwise reviewed and will not be here repeated. See Rutledge and Habbart, supra note 3, at 1076-77.
195. See Ky. REV. STAT. ANN. § 386A.4-010(4).
196. See id. §§ 386.2-010(2)(a)-(e). See also UNIF. STAT. TRUST ENTITY ACT § 201(b), 6B U.L.A. 93 (2012 supp.).
197. KY. REV. STAT. ANN. § 386A.2-010(3). Accord UNIF. STAT. TRUST ENTITY ACT § 201(b)(4), 6B U.L.A. 93 (2012 supp.); KY. REV. STAT. ANN. § 386A.4-020(2)(c); UNIF. STAT. TRUST ENTITY ACT § 201(b)(4), 6B U.L.A. 93 (2012 supp.). The requirement of public notice of the existence or the capacity to organize series is universal across the various statutes providing for their formation. See, e.g., NEV. REV. STAT. § 86.161(1)(e) (2011) (requiring that the articles of organization of a series LLC set forth that it is a series LLC and either the “relative rights, powers and duties of the series” or that such are set forth in or established by the operating agreement); DEL. CODE ANN. tit. 6, § 18-215 (2012) (stating that certificate of formation must set forth that the LLC is a series LLC as a precondition to series limited liability); UTAH CODE § 48-2c-606(3)(d) (2012) (stating that articles of organization must set forth notice of series limited liability as a precondition thereto); DEL. CODE ANN. tit. 6, § 17-218(b) (2012) (stating that certificate of limited
may authorize one or more series. Assuming the requirements are satisfied, a
series may have separate rights as to certain properties, responsibility for certain
debts, and a separate purpose or objective from that of the statutory trust. The
separate purpose of a series must be within the scope of the purpose of the
statutory trust.

While USTA expressly provided that a series is not an entity separate from
the statutory trust, even while it failed to explain the consequences of being or
not being classified as an entity, KyUSTA provides that a series is a separate
entity to the degree of the entity characteristics it is afforded. Unless the
governing instrument sets forth a contrary rule, a series may in its own name:

- contract;
- hold title to assets;
- grant liens and security interests; and
- sue and be sued.

Partnership must set forth that limited partnership is a series limited partnership as a precondition
to series limited liability; Del. Code Ann. tit. 12, § 3804(a) (2012) (requiring that in order for
series to enjoy limited liability, notice of the limited liability of the series must be set forth in the
enjoy limited liability, notice of limited liability of the series must be set forth in the articles of
trust); Conn. Gen. Stat. § 34-302(b) (2012) (providing that, in order for series to enjoy limited
liability, "notice of the limitation on liabilities of series as referenced in this sentence is set forth in
the certificate of trust of the statutory trust."); Iowa Code Ann. § 489.1201(2)(d) (requiring as a
condition to inter-series limited liability that "[t]he notice of establishment of the series and the
limitation on liabilities of the series is set forth in the certificate of organization."); Kan. Stat.
Annot. § 17-76, 143(h) (2012) (requiring that as a precondition to limited liability that "notice of the
limitation on liabilities of a series as referenced in this subsection is set forth in the articles of
limited liability that "notice of the limitation on liabilities of a series as referenced in this
subsection is set forth in the certificate of trust of the statutory trust.").

6B U.L.A. 110 (2012 supp.).
200. Id. § 386A.4-010(3)(b). Ergo, by way of example, a series may not have as its purpose the
management of commercial real property when the purpose of the statutory trust is restricted to
management of a portfolio of marketable securities.
202. See also supra note 55.
series is treated as a separate entity to the extent set forth in the articles of organization; each series
with limited liability, may, in its own name, contract, hold title to assets, grant security interests,
sue and be sued and otherwise conduct business and exercise the powers of an LLC."); Iowa Code
§ 489.1201(3) (2012) ("A series meeting all of the conditions of Subsection II shall be treated as a
separate entity to the extent set forth in the certificate of organization."); see also Rutledge,
External Entities and Internal Aggregates, supra note 55, at 680–82.
205. See also id. § 386A.4-030.
206. Id. § 386A.4-010(4).
As noted above, the intent of affording an individual series these characteristics is to create a structure that, while not a distinct legal entity, is sufficiently robust to unilaterally act in the business environment. A series, as contrasted with a statutory trust on behalf of a series, will be able to engage with a third party. This more robust model for the series is seen in other states. 208

While a series may in its own name sue and be sued, neither a trustee nor a beneficial owner associated with the series is a proper party to the suit unless the claim is for a right against or liability to the series to that trustee or beneficial owner. 209 The registered agent for the statutory trust is the registered agent for each series thereof and suit is initiated by making service on the registered agent without the need to make service on the trustee associated with the series. 210

Each series will be under the control of one or more trustees. As a default rule, each trustee of the statutory trust is also a trustee “associated” with each series, but the governing instrument may provide that only certain trustees are associated with a particular series. 211 It is not possible to be a trustee associated with a series without also being a trustee of the statutory trust. If the governing instrument provides that there is at least one trustee obligated to consider the interests of the statutory trust itself and all of the series, the governing instrument may provide that other trustees of that series who may consider the needs of only the trusts or of one or more of the series. 212 While the phraseology employed may be less than clear, the capacity of a series to have, for example, a trustee


208. See, e.g., 805 ILCS § 180/37-40(b) ("each series with limited liability may, in its own name, contract, hold title to assets, grant security interests, sue and be sued and otherwise conduct business and conduct the powers of a limited liability company under this Act."); Utah Code Ann. § 48-2c-606(5) ("a series may contract on its own behalf and in its own name, including through a manager."); Del. Code Ann. tit. 6, § 17-218(e) ("unless otherwise provided in a partnership agreement, a series established in accordance with subsection (b) of this section shall have the power and capacity to, in its own name, contract, hold title to assets (including real, personal and intangible property), grant liens and security interests, and sue and be sued."); and Iowa Code Ann. § 489.1201(7), incorporating id. § 489.105(1) (power to sue and be sued in own name).


211. Id. § 386A.4-010(6).

212. Id. § 386A.5-010(2). See also Unif. Stat. Trust Entity Act § 403, 6B U.L.A. 112 (2012 supp.).
whose duties and obligations run exclusively to the assets and beneficial owners
associated with that series is contingent upon there being at least one trustee of
the statutory trust as a whole whose duties and obligations are not so limited. 213

In order for the series to provide and enjoy limited liability, the statutory
trust must maintain records accounting for the assets of or associated with the
series. 214 An asset will be "of" the series when titled in its name or, when that is
not possible under local law, is held by a trustee or other nominee on its
behalf. 215 In contrast, an asset will be "associated with" a series if on the records
of the statutory trust that asset has been associated with the series and can be
"reasonably" and "objectively" determined. 216 For example, a schedule listing
all assets of the statutory trust, whether real, personal or intangible, indexed to

213. See also KY. REV. STAT. ANN. § 386A.1-030(4)(c); UNIF. STAT. TRUST ENTITY ACT §§
214. KY. REV. STAT. ANN. § 386A.4-020(2)(a).
215. See also id. § 386A.3-020(2).
216. Id. § 386A.4-030(4). Accord UNIF. STAT. TRUST ENTITY ACT § 401(a)(1), 6B U.L.A. 110
(2012 supp.); DEL. CODE ANN. tit. 6, § 17-218(b) (requiring, as a precondition of series limited
liability, the maintenance of accounting records for the assets associated with each series as distinct
from those held otherwise by the limited partnership or any other series thereof); VA. CODE ANN.
§ 13.1-1231(D) (requiring, as a precondition of series limited liability, that there be maintained
records accounting for the assets associated with each series as distinct from those held otherwise
by the trust or any other series thereof); TENN. CODE ANN. § 48-249-309(b)(1)(B) (requiring, in
order for series limited liability to be available, that separate and distinct records be maintained for
each series reflecting the assets associated with each series, accounting for the separate and distinct
records the other assets of the LLC and the assets of any other series of the LLC); UTAH CODE ANN.
§§ 48-2c-606(3)(b), (c) (limited liability being conditioned upon the maintenance on behalf of the
series of separate and distinct records and that the assets associated with each series be held and
accounted for separately from the other assets of the LLC or of any other series thereof); 18 OKLA.
STAT. ANN. § 2054.4(B) (requiring, as a precondition to series limited liability, that "separate and
distinct records are maintained for any such series and that the assets associated with any such
series are held, directly or indirectly, including through a nominee or otherwise, and accounted for
separately from the other assets of the LLC, or any other series thereof"); 805 ILCS 180/37-40(b)
(providing as a precondition to series limited liability that "separate and distinct records are
maintained for any such series and that the assets associated with any such series are held, directly
or indirectly, including through a nominee or otherwise, and accounted for separately from the
other assets of the LLC, or any other series thereof"); KANSAS (KAN. STAT. ANN. § 17-76, 143(b)
(2012)); NEV. REV. STAT. § 86.296(3)(a) (providing as a precondition to series limited liability that
"separate and distinct records are maintained for any such series and that the assets associated with
any such series are held, directly or indirectly, including through a nominee or otherwise, and accounted for
separately from the other assets of the LLC, or any other series thereof"); IOWA CODE ANN.
§ 489.1201(2)(b) ("Separate and distinct records are maintained for the series and separate and
distinct records account for the assets associated with that series. The assets associated with a
series must be accounted for separately from the other assets of the limited liability company,
including another series."); TEXAS BUS. ORG. CODE §§ 101.602(b)(1), 101.603(b); and WYO. STAT.
ANN. §§ 17-23-106(b)(i), (ii).
the series to which each is associated and providing as well that all proceeds of each shall also be associated with the series, should satisfy the statutory requirements.\footnote{217} Property of a series trust that is not associated with a series is solely the property of the statutory trust.

The association of property of the statutory trust with a particular series thereof, the “dissociation”\footnote{218} or the reassociation of property within a statutory trust and between itself and any series thereof will be subject to state fraudulent conveyance laws.\footnote{219} By way of example, if an asset is dissociated from a series, it becomes an asset of the statutory trust (unless and until it is reassociated with another series) and is not available as an asset of the series to satisfy a claim against its assets. To the extent the dissociation poses a detriment to a creditor of the series, the dissociation would need to pass scrutiny under fraudulent conveyance laws.

Assuming the various requirements are satisfied, a series provides both affirmative and negative asset partitioning. Claims against the assets of or associated with a series are enforceable against only those assets; the creditor has no claim on assets of or associated with another series or of the statutory trust.\footnote{220} At the same time the trustees and beneficial owners enjoy limited liability from claims against the assets of or associated with the series.\footnote{221} Debts, obligations and liabilities of the statutory trust generally are not enforceable against the property of or associated with a particular series.\footnote{222}

A person who ceases to be a beneficial owner, and a trustee who ceases to be a trustee of the statutory trust, shall cease to be associated with any series thereof.\footnote{223} A beneficial owner has the right to resign from being associated with a series, and a trustee associated with a series has the right to resign from that position, only if resignation is provided for in the governing instrument.\footnote{224} There

\footnote{217} This record showing the association of property to a series is a private, and not a public, document.

\footnote{218} The meaning of “dissociation” as utilized in KyUSTA is different from that of the term as utilized in RUPA section 601 et seq. See Ky. Rev. Stat. Ann. § 362.1-601 et seq.


\footnote{222} Id. §§ 386A.3-040(5), 386A.4-020(1)(a). See also Unif. Stat. Trust Entity Act § 402(a), 6B U.L.A. 111 (2012 supp.).


\footnote{224} Id. § 386A.4-040(2). The case can well be made that this provision should have been incorporated in Ky. Rev. Stat. Ann. § 386A.1-030, if reciting the matters that may be addressed in the governing instrument but without, as to these matters, providing a substantive rule. See also
exists no default right to cease to be associated with the series. Upon being
dissociated from a series a beneficial owner has no further right to participate in
its management and no claim upon its assets save for distributions declared but
unpaid as of the termination of the association with the series. A beneficial
owner’s liability to a series, to the statutory trust or to another beneficial owner
is not discharged by being dissociated from a series. Dissociation of a
beneficial owner from a particular series does not compel dissociation from any
other series, and unless the dissociation was of the last beneficial owner
associated with the series, dissolution of a beneficial owner does not compel the
winding up of the series. Where, however, consequent to a beneficial owner’s
dissociation, the series is left with no members associated with it, the series must
proceed to wind up.

A series of a statutory trust will dissolve upon the first to occur of:

- the dissolution of the statutory trust;
- as provided in the governing instrument;
- the consent of all beneficial owners associated with the series;
- upon the passage of ninety days from the dissociation of the last
  beneficial owner associated with the series; or
- by judicial order upon a determination that it is not reasonably
  practicable to carry on the activities of the series in accordance with
  the governing instrument.

The statute goes on to specify, for each circumstance affecting a series’
dissolution, what the date of dissolution is. An individual series is not subject
to administrative dissolution.

The governing instrument may specify an event or events upon which the
series is to dissolve. Examples of such provisions include those requiring the
dissolution on a particular date or upon the meeting (or not) of defined financial

\textit{supra} note 72 and accompanying text. The decision was made for this placement in order to
highlight the need, in the governing instrument of a series trust, to address this issue.

\textit{225. KY. REV. STAT. ANN. § 386A.4-040(4).}
\textit{226. Id. § 386A.4-040(5).}
\textit{227. Id. § 386A.4-040(6).}
\textit{228. See id. § 386A.4-060(1)(d). The statute is silent as to who, in that circumstance, would be
the residual beneficiary of the series’ assets.}
\textit{229. Id. § 386A.4-060(1)(a).}
\textit{230. Id. § 386A.4-060(1)(b).}
\textit{231. KY. REV. STAT. ANN. § 386A.4-060(1)(c). See also id. § 386A.6-020(1)(f). This
unanimous threshold may be altered in the governing instrument. See id. §§ 386A.1-040(2)(f)
("Except as provided therein, vary the provisions . . . ."); 386A.4-060(1)(c) ("Except as otherwise
provided in the governing instrument . . . .").}
\textit{232. Id. § 386A.4-060(1)(d).}
\textit{233. Id. § 386A.4-060(1)(e).}
\textit{234. Id. § 386A.4-060(2). See also id. §§ 386A.4-090(4), 386A.4-100(3)(c).}
\textit{235. See id. § 386A.4-060. But see § 386A.8-010(1).}
thresholds. A series may also be dissolved with the approval of the beneficial owners associated with the series. As a default rule that vote of the beneficial owners will need to be unanimous.\textsuperscript{236} There exists no filing with the Secretary of State necessary to effect a series' dissolution.\textsuperscript{237}

In a departure from the uniform act, KyUSTA provides for the judicial dissolution of a series.\textsuperscript{238} The provision for judicial dissolution contemplates the use of the series in situations in which a business corporation or an LLC might otherwise have been utilized for objectives including asset segregation, alternative management or an alternative economic treatment. As any of those structures may be judicially dissolved, it seemed appropriate that that same remedy should be available in those circumstances where judicial dissolution might otherwise be available. To that end, a series may be dissolved upon a demonstration that it is not reasonably practical to operate the series in accordance with the governing instrument.\textsuperscript{239}

The "not reasonably practicable" standard has antecedents in other business organization laws.\textsuperscript{240} At some point, breach of fiduciary duty by the trustees associated with the series, either a single or multiple event, will justify judicial dissolution; the court will need to determine if the threshold has ever been met. Frustration of economic purpose, violations of the governing instrument not involving a breach of fiduciary duty, or any number of other circumstances may likewise justify dissolution. The decree judicially dissolving the series is not filed with the Secretary of State.

The dissolution of a series of a statutory trust does not precipitate the dissolution of the statutory trust.\textsuperscript{241} Dissolution of a series does not abate or suspend the rules of limited liability and asset segregation.\textsuperscript{242} After dissolution, the series survives and continues to exist as a series of a statutory trust regardless

\textsuperscript{236} See id. § 386A.6-020(1)(f).
\textsuperscript{237} But see KY. REV. STAT. ANN. §§ 14A.7-020(2) (certificate of dissolution filed by Secretary of State upon administrative dissolution), 386A.B-020(1) (articles of dissolution filed upon voluntary dissolution of statutory trust), and 386A.8-030(1) (court's decree of judicial dissolution of statutory trust filed with Secretary of State).
\textsuperscript{238} USTA did not provide for the judicial dissolution of a series or of a statutory trust as a whole.
\textsuperscript{239} KY. REV. STAT. ANN. § 386A.4-060(1)(e). See also id. § 386A.8-030(1)(a) (applying the same "not reasonably practicable" standard for the dissolution of the statutory trust as a whole).
\textsuperscript{240} See, e.g., id. §§ 275.290(1), 362.1-801(5)(e), 362.2-802. This standard is intentionally different from and imposes a more relaxed threshold than does the deadlock standard of the Business Corporation Act. See id. §§ 271B.14-300(2)(a), (c) (allowing judicial dissolution upon director or shareholder deadlock).
\textsuperscript{241} Id. § 386A.4-050(1).
\textsuperscript{242} Id. § 386A.4-050(2), (3). See also Rutledge, The 2007 Amendments, supra note 141, at 248-49.
of whether the dissolution was administrative, voluntary or judicial. A dissolved series is restricted to activities "appropriate to wind up and liquidate its business and affairs," with certain activities, listed on a non-exclusive basis, identified as being appropriate. It is expressly provided that a dissolved series may enter into agreements with creditors for the resolution of its liabilities. Dissolution of a series does not transfer the property of or associated with the series or "abate or suspend" the rules of limited liability and asset segregation.

Upon judicial dissolution, the dissolving court is charged to direct the series’ winding up and liquidation. In a non-judicial dissolution, the winding up and liquidation are undertaken by the trustees associated with the series. However, on a showing of good cause by a beneficial owner associated with the series, the court may take control of the process.

The provision by which a dissolving series gives known creditors notice of its dissolution is based upon prior law, but has been modified in KyUSTA. Where most organizations are simply permitted to utilize the statutory mechanism for notifying known creditors, it not being mandatory, the statutory notice procedure is mandatory for a series.

The notice of a series’ dissolution must set forth the name(s) under which the series has transacted business and also the name of the statutory trust. The notice must otherwise contain:

- the information to be set forth in a claim;
- the mailing address to which the claim should be sent.

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244. Id. § 386A.4-070(1). Accord §§ 271B.14-050(1), 275.300(2).
248. Id. § 386A.4-080(2)(b). See also § 386A.8-050(2).
249. Id. § 386A.4-080(1).
250. This provision will have no application where the series dissolution is consequent to the series having no beneficial owners associated with it. See id. § 386A.4-060(1)(e). A creditor does not, by means of this provision, have standing to apply for court supervision.
251. Id. § 386A.4-080(2)(a).
252. See id. §§ 271B.14-060, 275.320.
253. See also Bear Inc. v. Smith, 303 S.W.3d 137, 143-46 (Ky. Ct. App. 2010).
254. KY. REV. STAT. ANN. § 386A.4-090(1) ("Upon dissolution ... a series ... shall dispose of known claims ... by following the procedures described in this section.") (emphasis added), id. § 386A.4-090(2) ("The series shall notify ... ") (emphasis added).
255. Id. § 386A.4-090(2)(a).
the deadline of not less than 120 days after the date of the notice by which claims must be received; and
provide notice that the claim will be barred if not received by the deadline.

A claim will be barred if, having received notice, the claimant does not submit the claim within the required period. A claim will likewise be barred if the claimant whose claim has been submitted and rejected does not commence an action to enforce it within ninety days after the rejection. Assuming no newspaper publication, the statute is silent as to the treatment of a claim timely submitted upon which the series neither gives a rejection nor an acceptance. Claims that may be barred do not include those that are contingent or based upon events occurring after the date of dissolution.

As was the case on the procedures utilized to afford known creditors notice of dissolution, those for notice to unknown creditors are based upon predecessor law. Again, while generally giving notice through these procedures is optional, doing so is mandatory in the dissolution of a series. Notice is given by publication in a general circulation paper for the county in which the principal office in Kentucky, or if none the registered office, of the statutory trust is or was last located. The published notice must:

- recite the name(s) under which the series has conducted business and the name of the statutory trust;
- describe the information to be provided in a claim and the address to which it should be mailed; and
- state that the claim will be barred if a proceeding to enforce it is not brought within two years after publication of the notice.

The running of the two-year period will bar the claims of:

263. See generally id. §§ 271B.14-070, 275.325, 362.2-807.
264. Id. § 386A.4-100(1) ("A dissolved series shall publish . . . ") (emphasis added). Further, while most business forms may publish a notice of dissolution without having first given particular notice to known creditors, that option is not available to a series.
265. Id. § 386A.4-100(2). Accord §§ 271B.14-070(2)(a), 275.325(2)(a), 362.2-807(2)(a). Note that the appropriate jurisdiction is determined by reference to the statutory trust, not the individual series undergoing dissolution. A series has neither a principal office nor registered office/agent distinct from those of the statutory trust.
266. KY. REV. STAT. ANN. § 386A.4-100(2)(a).
• claimants who should but did not receive notice as known claimants; 269
• claimants who submitted a claim that was not acted upon; 270 and
• claimants whose claim is contingent or based on an event occurring after the effective date of dissolution. 271

Creditor claims may be enforced against assets in the following order:
• first, the assets still held by, whether of or associated with, the series; 272 and
• second, against the assets distributed in liquidation to the beneficial owners associated with the series and pro-rata among them. 273

An innovation in Kentucky's business entity laws permits a series, having given notice to known and unknown claimants, to apply to a court to determine the amount to be set aside to address creditor claims.274 The statutory trust must give notice of the proceeding to its known claimants within ten days of filing the application, 275 and a guardian ad litem may be appointed to represent the interests of the unknown claimants. 276 To the extent the court determines that assets be set aside to satisfy unknown or contingent claims or those based on events arising after the effective date of dissolution, they will be available for the statutory period for satisfaction of those obligations, and any further assets distributed in liquidation to the beneficial owners will not be subject to recovery. 277 After the two-year period has run, any assets not distributed in satisfaction of creditor claims will be distributed among the beneficial owners. 278

In the course of winding up, the assets of a statutory trust must be distributed first to its creditors, a class that may include beneficial owners who are creditors. 279 This first priority is not subject to alteration in the governing instrument. Second, assuming no contrary private ordering, assets may be

269. Id. § 386A.4-100(3)(a).
270. Id. § 386A.4-100(3)(b).
271. Id. § 386A.4-100(3)(c). The degree to which a provision of this nature is subject to characterization as an impermissible statute of repose has not been addressed by the Kentucky courts. See, e.g., Perkins v. Ne. Log Homes, 808 S.W.2d 809 (Ky. 1991).
272. KY. REV. STAT. ANN. § 386A.4-100(4)(a).
273. Id. § 386A.4-100(4)(b).
274. Id. § 386A.4-100(5).
275. Id. § 386A.4-100(6).
276. Id. § 386A.4-100(7).
277. Id. § 386A.4-100(8). See also § 386A.8-070(4)(b).
279. KY. REV. STAT. ANN. § 386A.4-110(1). For example, a beneficial owner who sold an asset to the statutory trust in a seller financed transaction would be paid under this provision.
distributed in satisfaction of declared but unpaid distributions. The next level of distributions, and again assuming no contrary private ordering, is to the beneficial owners in proportion to their right to receive distributions prior to dissolution. There exists no statutory requirement that the name under which a particular series does business be distinguishable from the name of either the statutory trust or the name of any other business entity.

The absence of a statutory requirement does not mean, however, that such is permissible. A series that, utilizing the name of the statutory trust, enters into a contract with a third party may have (perhaps without authority) bound the statutory trust, violated the warranty of authority, and bound the series’ agent to personal liability on the agreement. Consequently, the better practice is for each series to adopt its own unique name, for a certificate of assumed name to be filed, and for all those acting on behalf of a series to be scrupulous in both expressing and confirming that agreements are being made with a series and not the statutory trust itself.

Article 5 - Trustees and Trust Management

The business and affairs of a statutory trust are managed by its trustee(s). There is no requirement that a trustee be a beneficial owner or a natural person. A statutory trust that is without a trustee, absent compliance with a provision in the governing instrument for the designation of a new trustee, is subject to judicial dissolution. Given that KyUSTA does not restrict the modification of the provision vesting control in the trustees, the trust instrument could provide for governance of a statutory trust other than by a “trustee.” Doing so would, however, necessitate a complete reconceptualization of the statutory trust and its organizational structure.

280. Id. § 386A.4-110(2). See also § 275.310(2).
281. Id. § 386A.4-110(3). Unlike under the LLC Act, there is not, unless the governing instrument so provide, a penultimate stage at which a return in satisfaction of contributions is made. Compare id. § 275.310(5).
282. But see § 14A.3-010(1).
284. See id. § 6.04.
285. The assumed name statute was amended to address series entities, permitting them to on behalf of a series adopt an assumed name. See KY. REV. STAT. ANN. § 365.015(12).
286. Id. § 386A.5-010(1). Accord UNIF. STAT. TRUST ENTITY ACT § 501, 6B U.L.A. 114 (2012 supp.). See also KY. REV. STAT. ANN. § 386.390 (stating that the trustees “shall have . . . the control and management of the business and affairs of the business trust.”).
287. Accord KY. REV. STAT. ANN. §§ 271B.8-020 (unless required by the articles of organization or bylaws, a director need not be a shareholder in the corporation), 275.163(2)(b) (stating that a manager need not be a member of the LLC).
288. But see § 271B.8-030(1) (stating that a director must be a natural person).
289. Id. § 386A.8-030(1)(b). Curiously, USTA did not by its express terms mandate dissolution of a statutory trust lacking a trustee.
Each trustee, by agreeing to serve or actually performing in that role, is deemed to have consented to the jurisdiction of Kentucky's courts for action arising out of or in connection with that service. A non-uniform addition to the list of items that may not be modified in the governing instrument provides that this consequence is not subject to modification or waiver.

The trustees, in managing the business and affairs of the statutory trust, have such powers as are conferred by the governing instrument, such other powers (save as restricted by the governing instrument) as are necessary or convenient with respect to the management of the statutory trust and all other powers conferred by the Act. These powers may be restricted or limited in the governing instrument.

The initial trustee(s) will be named in the original certificate of trust. Changes in the trustee(s) will require that the certificate of trust be amended. It is crucial that the governing instrument address the mechanism by which additional or replacement trustees will be appointed, elected or otherwise designated; Kentucky does not have a default rule for doing so. Unless limited by the governing instrument, a trustee has the capacity to unilaterally resign.

290. Id. § 386A.5-020(2). While USTA provided that an agent of a trustee, in accepting the agency, consented to the jurisdiction of the courts of the statutory trust's jurisdiction of organization (Unif. Stat. Trust Entity Act § 511(e), 6B U.L.A. 122 (2012 supp.)), it imposed no similar rule upon the trustees. This non-uniform provision of KyUSTA should be interpreted as supplementing, and not supplanting, existing law on jurisdiction over trustees located out of Kentucky. See also Cummings v. Pitman, 239 S.W.3d 77, 86-90 (Ky. 2007) (noting that primary beneficiaries of trusts have personally availed themselves of the trust jurisdiction's laws). Equivalent provisions were added in 2012 to certain of Kentucky's corporation and the LLC acts. See Ky. Rev. Stat. Ann. §§ 271B.8-030(5), 271B.8-400(5), 272.171(8), 272.181, 273.211(3), 273.227(7), 275.335(2); see also Rutledge, The 2012 Amendments, supra note 6, at 7.


292. The term "governing instrument" is defined as being the "certificate of trust" and the "trust instrument." See Ky. Rev. Stat. Ann. § 386A.1-020(18). Essentially, the trust instrument must be in a record form, does not itself encompass the certificate of trust, and otherwise addresses the governance of the affairs of the statutory trust. The trust instrument may embody the trust agreement, a declaration of trust, and by-laws. See id. § 386A.1-020(35).

293. Id. §§ 386A.5-020(1)(a), (b). See also Unif. Stat. Trust Entity Act § 502, 6B U.L.A. 114 (2012 supp.). This provision is consistent with the rule for common law trusts. See Restatement (Third) of Trusts § 85 (2003); Restatement (Second) of Trusts § 186 (1959).

294. See Ky. Rev. Stat. Ann. § 386A.2-010(2)(b); see also supra notes 119-23 and accompanying text.


297. But see Restatement (Third) of Trusts § 36 (2003); Restatement (Second) of Trusts § 106 (1959).
There is no requirement that any trustee be resident in the Commonwealth of Kentucky. 298

Absent contrary private ordering in the governing instrument, the trustees act on a per capita basis with the majority controlling either at a meeting or when acting by written consent. 299 It is not required that trustees act by unanimous written consent when acting outside a meeting. 300 To the extent that any trustee does not vote in favor of the matter under consideration, they are entitled to notice of the action taken. 301 In a reversal of the policy decision made in USTA permitting proxy voting by trustees, 302 KyUSTA expressly precludes trustees voting by proxy. 303 In not permitting trustees to vote by proxy, KyUSTA preserves the traditional role employed in business trusts. 304

KyUSTA details certain protections available to third parties who deal with a statutory trust through one or more of its trustees. Initially, a person who in good faith assists a trustee as to an action to which they are unaware that the trustee is exceeding or improperly exercising their authority has no liability to the statutory trust for having done so; they are treated as having transacted with a trustee who is properly exercising their power. 305 The same rule applies with respect to a person who in good faith and for value deals with the trustee; 306 they are not obligated to inquire as to the extent of the trustee’s power or the propriety of the exercise thereof. 307 A person who in good faith delivers property to the trustee is not charged with an obligation to ensure to its proper

299. Ky. Rev. Stat. Ann. § 386A.5-030. See also Unif. Stat. Trust Entity Act § 503(1), 6B U.L.A. 114 (2012 supp.). Per capita voting applies as well to the directors of business and nonprofit corporations and as the default rule for managers of an LLC. See Ky. Rev. Stat. Ann. §§ 271B.8-240(3), 273.217, 275.175(1). But see Restatement (Third) of Trusts § 194 (1959) ("If there are two or more trusts, the powers conferred upon them can properly be exercised only by all the trustees, unless it is otherwise provided by the terms of the trust."). The more modern rule is that two trustees, except in an emergency, must act together, but three or more may act by the majority. See Restatement (Third) of Trusts § 39 (2003).
304. See, e.g., Wrightington, Business Trusts, supra note 44, at § 46 ("The trustee cannot delegate his authority, but, of course, may appoint agents to perform purely ministerial functions.") (citations omitted).
application thereafter. Finally, a person who is without knowledge that a purported trustee no longer serves in that capacity (i.e., is now a former trustee) and in good faith assists them, or in good faith and for value deals with them, is afforded the same protections from liability as if the former trustee were still a trustee. As the comment to USTA section 504 notes, this provision overrides the common law that a third party is charged with constructive notice of the trust instrument and its contents and thereby any limitations upon the trustee's power. There is, however, a non-uniform provision of KyUSTA that in part limits this override.

A trustee is required to act in good faith, on an informed basis, and in a manner the trustee reasonably believes to be in the best interests of the statutory trust. A trustee must discharge the duties imposed "[w]ith the care that a person in a similar position would reasonably believe appropriate under similar circumstances." There is also a non-uniform recitation of the duty of loyalty on the trustee's agent. These standards warrant careful parsing.

The standards applied to trustees are not subject to substantive modification in the governing instrument. KyUSTA only permits a governing instrument to define the standards by which good faith, the best interests of the statutory trust,


309. KY. REV. STAT. ANN. § 386A.5-040(4). See also Unif. Stat. Trust Entity Act § 504(d), 6B U.L.A. 115 (2012 supp.). It bears noting that the former trustee, who notwithstanding that status continues to hold himself or herself out as having the capacity to represent the statutory trust, will be exposed to liability for breach of the warranty of authority. See Restatement (Third) of Agency § 6.10 (2006). At some point the question will no doubt arise as to the degree to which a third-party will be deemed to be on notice of an amendment to the certificate of trust deleting the reference to the now former trustee.


311. KY. REV. STAT. ANN. § 386A.2-010(6)(b) (certificate of trust of record with the Secretary of State is notice of information required to be set forth in the certificate). See also § 275.025(7)(b).

312. KY. REV. STAT. ANN. § 386A.5-050. This standard is nearly identical to that applied in Kentucky's business and nonprofit corporation acts (see KY. REV. STAT. ANN. §§ 271B.8-300(1), 273.215(1)), save and except for the use of an objective "reasonably" in place of a subjective "honestly."

313. KY. REV. STAT. ANN. § 386A.5-050(1). Accord Unif. Stat. Trust Entity Act § 505, 6B U.L.A. 116 (2012 supp.). See also Restatement (Second) of Trusts § 174 (1959) ("The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property; and if the trustee has or procures his appointment as trustee by representing that he has greater skill then that of a man of ordinary prudence, he is under a duty to exercise such skill.").

314. KY. REV. STAT. ANN. § 386A.5-070(1)(a)-(c). This provision, modified only as to terminology, was sourced from the Kentucky Revised Uniform Partnership Act (2001). See id. § 362.1-004(2).

and the care of a person in a similar position are to be determined, subject to a requirement that such standards they are not manifestly unreasonable. To provide but one example, an effort to substitute in a governing instrument a subjective “honestly” for the objective “reasonably” would be invalid ab initio. It should be recognized that this admittedly paternalistic limitation on the degree to which the statutory standards may be modified is in contrast to the freedom available under Delaware’s statutory trust act and Kentucky’s LLC Act. 316

The recitation of “good faith” as a standard of conduct is interesting and constitutes a departure from other recent uniform acts. In each of RUPA, ULPA, and RULLCA, good faith is set forth as a free standing obligation, distinct from the recitations of the duty of care and the duty of loyalty. 317 In contrast, good faith is recited as a substantive component of a corporate director’s duties. 318 In those instances, the obligation of good faith, recited in the formula of “good faith and fair dealing,” is a modifier to the manner in which the duties and obligations under the act and the controlling agreement are exercised and/or discharged. 319

316. See Del. Code Ann. tit. 12, § 3806(c) (permitting the governing instrument of a Delaware statutory trust to eliminate all liability for breaches of duty, including a fiduciary duty, but not breach of the contractual covenant of good faith and fair dealing); Ky. Rev. Stat. Ann. §§ 275.170 (“Unless otherwise provided in a written operating agreement”, thereby enabling the modification or elimination of the fiduciary obligations), 275.180(1) (providing that a written operating agreement may eliminate liability for breach of a duty owed under Ky. Rev. Stat. Ann. § 275.170); see also Del. Code Ann. tit. 6, §§ 18-1101(c), (e) (allowing a limited liability company agreement to modify or entirely eliminate the fiduciary duties otherwise existing in limited liability companies).


319. As set forth in the official comment to RUPA section 404(d), “It is stated that the obligation of good faith and fair dealing is a contract concept, imposed on the partners because of the consensual nature of the partnership . . . . It is not characterized, in RUPA as a fiduciary duty arising out of the partners’ special relationship. Nor is it a separate and independent obligation.” Rev. Unif. Part. Act § 404(d), cmt., 6 U.L.A. 143 (2001). No such explanation is included in USTA. For expansive reviews of “good faith and fair dealing” under Delaware law, see Airborne Health, Inc. v. Squid Soup, L.P., 984 A.2d 126, 145-48 (Del. Ch. 2009) and Paul M. Altman and Srinivas M. Raju, Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law, 60 Bus. Law. 1469 (Aug. 2005). In Gresh v. Waste Serv. of Am., Inc., 738 F. Supp. 2d 702, 710-11 (E.D. Ky. 2010), the court set forth the effect of the obligation of good faith and fair dealing:

[Under Kentucky law, parties have a duty in carrying out a contract to act in good faith, sincerely and without deceit or fraud. Pearson v. W. Point Nat'l Bank, 887 S.W.2d 366, 368 n. 3 (Ky. Ct. App. 1994). This is generally observed as the covenant of good faith and fair dealing implied in every contract. Ranier v. Mount Sterling Nat'l Bank, 812 S.W.2d 154, 156 (Ky. 1991). A breach of the implied duty of good faith and fair dealing is an impossibility where a contract has not yet been formed. Quadrule Bus. Sys. v. Ky. Cattlemen's Assoc., Inc., 242 S.W.3d 359, 364 (Ky. Ct. App. 2007). “A contracting party impliedly obligates himself to cooperate in the performance
It is not clear whether, by departing from the formula employed in other recent uniform business entity acts, it was intended that there should exist an independent obligation of good faith under USTA that goes beyond the contractual concepts employed in RUPA and other acts of its form. As employed in KyUSTA, the “good faith” component of the trustee’s obligations is intended to be applied, as in Stone v. Ritter,\(^{320}\) as a component of the duty of loyalty.

The obligation of loyalty, as in part set forth as a requirement that the trustee act in what he or she “reasonably” believes to be in the best interest of the statutory trust, manifests an objective standard that is in accord with the Revised Model Business Corporation Act (RMBCA).\(^{321}\) This objective standard of reasonableness differs from the subjective “honestly” standard adopted under the corporate laws of Delaware and Kentucky.\(^{322}\) The obligation of the trustee to act “[w]ith the care that a person in a similar position would reasonably believe appropriate under similar circumstances,”\(^{323}\) is akin to the formula employed in other recent uniform acts\(^{324}\) and in the KyRUPA (2006).\(^{325}\) The phrase “in the best interests of the statutory trust”\(^{326}\) identifies the beneficiary of the trustee’s fiduciary duties.\(^{327}\)

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of this contract and the law will not permit him to take advantage of an obstacle to performance which he has created or which lies within his power to remove.” Ligon v. Parr, 471 S.W.2d 1, 3 (Ky. 1971) (quoting Gulf, Mobile & Ohio R.R. Co. v Ill. Cent. R.R. Co., 128 F. Supp. 311, 324 (N.D. Ala. 1954)).

320. 911 A.2d 362, 370 (Del. 2006).

321. The Revised Model Business Corporation Act section 8.30 is cited in the official comment to USTA section 505 as being the source for this provision. See UNIF. STAT. TRUST ENTITY ACT § 505, cmt., 6B U.L.A. 116 (2012 supp.).


323. KY. REV. STAT. ANN. § 386A.5-050(2). See also UNIF. STAT. TRUST ENTITY ACT § 505, 6B U.L.A. 116 (2012 supp.).

324. See, e.g., REV. UNIF. LTD. LIAB. CO. ACT § 409(c), 6B U.L.A. 489 (2008) (“[A]ct with the care that a person in a like position would reasonably exercise under similar circumstances . . . .”).

325. See KY. REV. STAT. ANN. § 362.1-404(3). See also RUTLEDGE & VESTAL ON KY. PARTNERSHIP AND LPs, supra note 15, at 97.

326. KY. REV. STAT. ANN. § 386A.5-050(1).


The phrase “best interests of the corporation” is key to an explication of a director’s duties. The term “corporation” is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. In determining the corporation’s “best interests,” the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits as well as in making judgments where the interests of various groups
Trustees and other representatives of a statutory trust are not liable to either it or its beneficial owners for the breach of any duty to the extent such resulted from reasonable reliance on the governing instrument, a record of the statutory trust, or a professional expert, opinion, report or statement. 328

USTA section 507, setting forth the terms and conditions upon which a "covered party" may do business with a statutory trust, has been significantly modified in KyUSTA. Under the formula employed in USTA, a "covered party" may engage in business transactions with the statutory trust, but such transactions are voidable by the statutory trust unless the interested party is able to demonstrate that the terms of the transaction are fair to the statutory trust. 329 This formula was rejected on the basis that after-the-fact assessments of transactions with a fiduciary are not cost effective. 330 Further, the opportunity is left open for a trustee to profit from the relationship with the statutory trust. 331

In its place, a formula describing certain conduct forbidden to a "covered party" has been adopted from KyRUPA (2006). 332 Initially, the concept of a "covered party" is retained, that being a "trustee, officer, employee, or manager of a statutory trust or a related person of a trustee, officer, employee or manager." 333 However, rather than defining that term in section 507, as does USTA, in KyUSTA the definition is moved to the primary table of defined

within the shareholder body or having other cognizable interests in the enterprise may differ.


331. For example, if a trustee were to be presented with a business opportunity in the line of activities of the statutory trust, but the trust be unable to utilize it due to a lack of financial capacity, the trustee could, arguably, personally utilize the opportunity and claim it as fair to do so as the trust could not. Under a traditional fiduciary analysis, this is not the correct outcome. See Thomas E. Rutledge and Thomas Earl Geu, The Analytic Protocol for the Duty of Loyalty Under the Prototype LLC Act, 63 ARK. L.REV. 473 (2010).

332. See KY. REV. STAT. ANN. § 362.1-404(2).

333. See id. § 368A.1-020(12).
While KyUSTA does not define the criteria that will be used in determining whether one is a “related person," who is thereby a “covered party," certain suppositions are possible. For example, we would assume that the single-member LLC wholly owned by a trustee would constitute a related person while, conversely, we would assume that a publicly traded corporation in which a trustee is a three percent owner, but is neither a director nor an officer, would not be a related person. Such conclusions, however, are simply conjuncture and will need to be developed through the courts.

Under the statutory formula employed in KyUSTA, a “covered party” is precluded from engaging in any of a variety of transactions that would generally fall within the scope of self-dealing or personnel appropriation. Where, for example, a trustee utilizes property of the statutory trust for a personnel transaction, the trustee will be obligated to remit any and all gains realized from it to the statutory trust. The fairness of the terms upon which the property was utilized will not be an aspect of the analysis.

This formula, as a default, preserves the traditional rule that a trustee may not utilize trust property for their own benefit, irrespective of the terms on which they act. The governing instrument may not alter the limitations of this section. It may, however, provide a mechanism by which, with disclosure, prior consent of either a committee of disinterested trustees or the beneficial owners may approve a proposed transaction between the statutory trust and a covered party to the effect that the transaction will be valid and binding upon all parties thereto. If the approval is to be made by the disinterested trustees, there must be at least two of them; a single disinterested trustee cannot approve what would otherwise be an impermissible transaction with a “covered party." Approval of the proposed transaction by the beneficial owners, absent private ordering to the contrary, requires the vote of the majority. Crucially, approval
of a transaction between a statutory trust and a “covered party” must take place prior to its consummation; there is, under KyUSTA, no concept of retroactive validation. This requirement is intended to be an in terrorem provision pursuant to which, in the instance of any question as to whether a transaction between a “covered party” and a statutory trust is legitimate, the covered party will insist upon prior approval as they should not be willing to accept the risk that all gain on the transaction will have to be surrendered. A burden of full disclosure of the terms of the proposed transaction will rest on the covered person seeking the opportunity to do business with the statutory trust. The requirement that any approval of what would otherwise be a conflict transaction be a priori rather than ex post facto is an intended limitation on the otherwise applicable rule permitting retroactive approval.  

A trustee’s duty of loyalty will be to the statutory trust. Where the statutory trust is a series trust, and there is at least one trustee obligated to discharge the duty of loyalty to the trust as a whole (including all of the series), the governing instrument may provide that another trustee’s duty of loyalty may be to consider the interest of the trust alone (absent certain or all series) or to the interests of only one or more of the series.  

A trustee has a right to receive information from both the statutory trust and the other trustees related to the discharge of the trustee’s duties; these rights may be enforced in an appropriate court. The right to information is not subject to restriction by the governing instrument, but it may prescribe standards on how to determine what constitutes “reasonably related,” provided such limitations are not manifestly unreasonable. With respect to a trustee with responsibilities limited to less than the entirety of the statutory trust and/or all of the series, unless the governing instrument provides otherwise, their inspection rights will be limited to those matters for which they have oversight.  

A statutory trust may provide indemnification to its trustees, although indemnification is not mandatory. Left unresolved by the statute is whether, in

347. Ky. Rev. Stat. Ann. § 386A.5-090(1); § 275.180 (stating that an LLC “may . . . provide for indemnification”); id. § 271B.8-510(1) (stating that “a corporation may indemnify”). But see
the absence of a provision in the governing instrument providing indemnification, common law rights of indemnification will be applicable.\textsuperscript{348} Irrespective of any private ordering making indemnification mandatory in favor of the trustee, indemnification may not be provided for actions described in KRS section 386A.1-040(2)(q).\textsuperscript{349} A statutory trust may advance expenses to a trustee subject to an undertaking to repay those amounts if it is determined that they would not be entitled to indemnification or advancement.\textsuperscript{350} Although there is no statutory requirement that the undertaking be secured, such a requirement may be set forth in the governing instrument or be imposed by the disinterested trustees. Under USTA there is no requirement that the undertaking be in writing;\textsuperscript{351} a non-uniform provision in KyUSTA requires that the undertaking be in a record.\textsuperscript{352}

Addressing a lacuna in USTA, KyUSTA addresses who makes the determination that indemnification or advancement will be made. Unless otherwise directed by the governing instrument, the determination will be made by a committee of at least two trustees not parties to the underlying action or a majority of the beneficial owners\textsuperscript{353} not including the votes of beneficial interests held or voted under the control of the trustees seeking indemnification.\textsuperscript{354}

The governing instrument of a statutory trust may authorize a person to provide binding instructions to a trustee or other person otherwise charged with management of the statutory trust.\textsuperscript{355} Such a directed trustee or other representative of the statutory trust is bound to follow those directions unless they are "manifestly contrary" to the terms of the governing instrument or where the trustee or other person\textsuperscript{356} knows or has reason to know that following those

\textsuperscript{348} See, e.g., \textit{Restateemnt (Second) of Trusts} §§ 244-48 (1959); \textit{Scott & Ascher on Trusts}, \textit{supra} note 85, at chapter 22. See also Ky. Rev. Stat. Ann. § 386A.1-050(1).

\textsuperscript{349} KY. REV. STAT. ANN. § 386A.1-040(2)(q).

\textsuperscript{350} See id. § 386A.5-090(1)(b).

\textsuperscript{351} But see \textit{Model Bus. Corp. Act} § 8.53(a)(2) (requiring that the undertaking be in writing); \textit{Ky. Rev. Stat. Ann.} § 271B.8-530(1)(b) (same).

\textsuperscript{352} See Ky. Rev. Stat. Ann. § 386A.5-090(1)(b) (stating that it "shall be in a record."). See also Rutledge & Habbert, supra note 3, at 1083 (noting that no writing or security is required).

\textsuperscript{353} See also KY. REV. STAT. ANN. § 386A.6-020(2).

\textsuperscript{354} Id. § 386A.5-090(2). This provision is based upon the prior law reflected in the Kentucky Business Corporation Act. See id. §§ 271B.8-530(2)(b), (d).

\textsuperscript{355} Id. § 386A.5-100(1). See also UNIF. STAT. TRUST ENTITY ACT § 510(a), 6B U.L.A. 120 (2012 supp.).

\textsuperscript{356} While USTA § 510 typically refers to a "trustee or other person," certain instances do not address an "other person" with respect to certain carve-outs from the requirement to follow the directions given. To provide consistency, the addition of "other person" has been made in parallel with all KyUSTA provisions based upon USTA § 510 references to "trustee." See also Rutledge & Habbert, supra note 3, at 1083.
directions would constitute a “breach” of fiduciary duty.\textsuperscript{357} In KyUSTA this provision is non-uniform. Under the uniform act, a trustee is not required to follow a direction if doing so would involve a “serious breach” of the trustee’s fiduciary obligations. What constitutes a “serious breach” of fiduciary duty, necessarily implying that there exists a category of actions that while constituting a breach of fiduciary duty are not in and of themselves “serious,” is not addressed. It is questionable whether it will be practicable to follow the advice of USTA’s comment to the effect that direction be sought from a court.\textsuperscript{358} Further, the comment to the effect that a “serious breach” of fiduciary duty is intended to exclude breaches that are themselves inconsequential, immaterial, or technical\textsuperscript{359} confuses the actuality of the breach with the determination of what damages might be owing consequent thereto. In effect, the uniform act would apply the rule \textit{de minimis non curat lex} with respect to a fiduciary in order to determine whether or not a breach has taken place. Under the non-uniform formula of KyUSTA, these issues are avoided, and the trustee is answerable for a breach of fiduciary duty, irrespective of its magnitude.\textsuperscript{360} The “manifestly contrary” standard of USTA has not in KyUSTA been modified. Note that the trustee, in assessing whether the instructions given are “manifestly contrary” to the governing instrument, is bound by not only fiduciary duties but also the


\textsuperscript{358} This comment provides:

\begin{quote}
In determining whether a direction is “manifestly contrary to the terms of the governing instrument: or “would constitute a serious breach of fiduciary duty by the trustee,” the trustee must comply with the standards of conduct stated in Section 505. The drafting committee contemplated that, in accord with conventional trust practice, a trustee could apply to the appropriate court for a determination of whether an instruction falls within the exclusion of subsection (c). \textit{See Restatement (Third) of Trusts} § 71 (2007).
\end{quote}

\textit{Unif. Stat. Trust Entity Act} § 510(c), cmt., 6B U.L.A. 120 (2012 supp.). While certainly consistent with prior law (\textit{see}, e.g., \textit{George Cleason Bogert and George Taylor Bogert, The Law of Trusts and Trustees} (Rev. 2d ed. 1993) § 543(V) at note 89; \textit{William C. Dunn, Trusts for Business Purposes} § 174 (p. 305) (Callaghan and Co. 1922)), the likelihood of a timely ruling is questionable and whether the assets of the statutory trust should be expended in such an action is an additional question. Furthermore, the fact that the trustee is not comfortable proceeding with the course of action absent judicial sanction may well be probative evidence that the action is not permissible. As the adage provides, “It’s not the answer that in indiscreet but the question.”


\textsuperscript{360} The deletion of “serious” in KyUSTA brings the provision more in line with the prior law. \textit{See, e.g., Restatement (Second) of Trusts} § 185 (1959).
obligation of good faith and fair dealing.\textsuperscript{361} Expert guidance in the form of a legal opinion may be warranted.\textsuperscript{362}

The governing instrument may provide that the person directing a trustee or other representative of the statutory trust is to be or is not to be treated as a trustee or one owing duties, including fiduciary duties, to the statutory trust or the beneficial owners thereof.\textsuperscript{363} The wording of this provision is important. It does not provide that the person giving direction to, for example, a directed trustee, is not to be treated as a trustee and automatically relieved of, for example, fiduciary obligations; at the same time it does not provide the contrary rule. Rather, KyUSTA provides that the governing instrument may address the situation. The statute does not provide a default, one way or the other, as to the proper characterization of the person or party providing the instructions to the directed trustee.\textsuperscript{364} This is a point of significant flexibility for which even a default rule may not be appropriate in light of the cost of recalling its existence and the necessary private ordering to modify its application. A comprehensive review of the point having been elsewhere set forth,\textsuperscript{365} it is incumbent upon a governing instrument’s drafter to consider that guidance and apply it to the nature of the directive power at issue.

Trustees may delegate duties\textsuperscript{366} provided the delegation is effected in accordance with the applicable standard of care.\textsuperscript{367} In KyUSTA the uniform language on the capacity to delegate, including to a co-trustee, has been simplified but without an intention to set forth a different rule.\textsuperscript{368} The trustee must determine the scope and terms of the delegation and periodically review the agent’s performance and compliance with the terms of the delegation.\textsuperscript{369} The

\textsuperscript{361} See KY. REV. STAT. ANN. § 386A.1-060(6).
\textsuperscript{362} See id. § 386A.5-000.
\textsuperscript{363} Id. § 386A.1-030(4)(a). See also UNIF. STAT. TRUST ENTITY ACT § 510(b), 6B U.L.A. 120 (2012 supp.).
\textsuperscript{364} The laws of certain states do define (something of) a default rule. See, e.g., CONN. CODE § 34-517(a) (2005) ("Except to the extent otherwise provided in the governing instrument of a statutory trust, neither the power to give direction to a trustee or other persons or the exercise thereof by any person, including a beneficial owner, shall cause such person to be a trustee.").
\textsuperscript{365} See RESTATEMENT (SECOND) OF TRUSTS § 185, cmt. c – e, h (1959).
\textsuperscript{366} Permitting delegation by trustees is a departure from the common law, wherein delegation is not permitted. See, e.g., RESTATEMENT (SECOND) OF TRUSTS § 171 (1959); WRIGHTINGTON, BUSINESS TRUSTS, supra note 44, at 247. The capacity of an individual trustee to delegate duties and powers to a co-trustee is separately referenced in USTA at section 511(b). See UNIF. STAT. TRUST ENTITY ACT § 511(b), 6B U.L.A. 121 (2012 supp.). Without intending to alter the applicable rule, KyUSTA simplifies the provision, combining in a single subsection the right of delegation, including to a co-trustee.
\textsuperscript{368} See also Rutledge & Habbert, supra note 3, at 1085, n.200.
\textsuperscript{369} KY. REV. STAT. ANN. §§ 386A.5-110(1)(b), (c). See also UNIF. STAT. TRUST ENTITY ACT § 511(a), 6B U.L.A. 121 (2012 supp.).
agent to whom a trustee has delegated authority owes a duty to comply with the
terms of the delegation and otherwise of ordinary care and diligence. 370 The
language in KyUSTA as to the delegating trustee’s responsibility for the agent’s
discharge of the function is non-uniform. Even where a trustee satisfies their
obligations in making a delegation, they are liable to either the statutory trust or
to beneficial owners for an agent’s failure with respect to a delegated function.371
This provision evidences a reversal of the policy election set forth in USTA to
the effect that the delegating trustee is not responsible for the agent’s discharge
of a delegated function.372 KyUSTA, in accordance with generally applicable
law on agency, will hold the delegating trustee liable for the sub-agent’s
performance.373 By accepting a delegation from a trustee, the agent submits to
the jurisdiction of the Kentucky courts.374

KyUSTA addresses who constitutes a disinterested trustee when the trust is
registered as an investment company.375 This provision precludes an argument
to the effect that, although a particular trustee was disinterested in accordance
with the terms of the Investment Company Act, such trustee may still be
interested under the KyUSTA.

While the Act is itself silent as to the standards to be employed in an action
to remove a trustee, it is inconceivable that a court does not have the power to do
so.376

Article 6—Beneficial Owners

A “beneficial owner” is one who owns a beneficial interest in a statutory
trust.377 Absent contrary private ordering in the governing instrument, a

6B U.L.A. 122 (2012 supp.). Any failure could be enforced, in addition to the trustees, by
the beneficial owners through a derivative action. USTA imposes a duty of “reasonable care” on
from agency law, KyUSTA requires that the agent “act with the care, competence, and diligence
normally exercised by agent in similar circumstances.” See also Restatement (Third) of Agency
§ 8.08 (2006).

6B U.L.A. 122 (2012 supp.). See also Rutledge & Habbert, supra note 3, at 1085, n.204.


373. See, e.g., Restatement (Third) of Agency § 3.15, cmt. d (“An appointing agent is
responsible to the principal for the subagent’s conduct.”), Restatement (Second) of Trusts §
225(2) (1957) (discussing liability of trustee for certain actions undertaken by the trustee’s agent).


U.L.A. 123 (2012 supp.).

376. See, e.g., Wrightington, Business Trusts, supra note 44, at § 47 (“A court of equity can
always remove a trustee for cause.”) (citation omitted). See also Ky. Rev. Stat. Ann. §§ 386A.1-
050(1), (3).
beneficial interest in a statutory trust is freely transferable.\textsuperscript{378} Only in instances in which the transferability is restricted will the charging order provision of KyUSTA be applicable.\textsuperscript{379} If the same person is both the sole trustee and sole beneficial owner, all transfer limitations in the governing instrument are void.\textsuperscript{380} This provision intentionally limits the ability to use the statutory trust for certain abusive asset protection structures.\textsuperscript{381} A beneficial interest is personal property, irrespective of the nature of the properties in turn held by the statutory trust,\textsuperscript{382} and the beneficial interest in the statutory trust itself does not create an interest in any of the properties owned by the statutory trust.\textsuperscript{383} A beneficial owner is not afforded a pre-emptive right with respect to any beneficial or other interests subsequently issued by the statutory trust.\textsuperscript{384}

In a departure from the uniform act, KyUSTA utilizes a provision that centralizes all of the rules with respect to voting thresholds required for action by the beneficial owners.\textsuperscript{385} Section 602 of USTA purported to recite a generally applicable rule that the beneficial owners act by a majority vote;\textsuperscript{386} this provision failed to address numerous other provisions of USTA that required a unanimous vote for action.\textsuperscript{387} As set forth in KyUSTA, a division is made between those

\begin{footnotes}
\footnote{377. \textit{K.Y. REV. STAT. ANN.} § 386A.1-020(3). \textit{Accord Unif. Stat. Trust Entity Act} § 102(1), 6B U.L.A. 83 (2012 supp.). This treatment is consistent with that seen in corporate law wherein, in order to be a stockholder, one must own shares. Conversely, under the Kentucky LLC Act, it is possible to hold a limited liability company interest without being a member just as it is possible to be a member without holding a limited liability company interest. \textit{See K.Y. REV. STAT. ANN.} §§ 275.195(2), (3); \textit{see also} Rutledge, \textit{The 2007 Amendments, supra} note 141, at 259.}
\footnote{379. \textit{K.Y. REV. STAT. ANN.} § 386A.6-060(1).}
\footnote{380. \textit{Id.} § 386A.6-010(4).}
\footnote{383. \textit{K.Y. REV. STAT. ANN.} § 386A.6-010(2). \textit{See also} §§ 275.240(1), 362.1-203, 362.1-501.}
\footnote{384. \textit{Id.} § 386A.6-010(5). This rule is consistent with that employed in Kentucky business corporations organized under the current Kentucky Business Corporation Act (\textit{see K.Y. REV. STAT. ANN.} § 271B.6-300(1)(a)), but is the contrary of the rule employed with respect to business corporations formed under the predecessor statute. \textit{See id.} §§ 271B.6-300(1)(b), 271B.6-300(4), 271A.130 (repealed 1988 Ky. Acts, ch. 23, § 248 effective Jan. 1, 1989).}
\footnote{385. \textit{K.Y. REV. STAT. ANN.} § 386A.6-020.}
\footnote{387. \textit{See, e.g., id.} §§ 707(a), 6B U.L.A. 136 (2012 supp.) (stating that approval of merger requires consent of all beneficial owners and all trustees), 801(2)(B), 6B U.L.A. 140 (2012 supp.) (stating that approval of all beneficial owners to dissolve statutory trust), 103(d), 6B U.L.A. 86 (2011 supp.) (stating that unanimous approval of the beneficial owners to amend governing instrument).}
\end{footnotes}
actions that require, as a default rule, the unanimous vote of the beneficial
owners, being those for amendments to the governing instrument, compromise of
a beneficial owner’s contribution obligation, extension of the term of the
statutory trust beyond a term set forth in the governing instrument, or the
conversion, merger or dissolution of the statutory trust, while setting forth a
default rule of a majority consent for other actions. These rules may be
modified in the governing instrument. Beneficial owners are afforded the
capacity to vote by proxy, but the proxy must be set forth in a record. There
has not been incorporated into KyUSTA the uniform language that appears at
USTA section 602(2) governing action by written consent. Rather, the
procedures that should apply with respect to an action by written consent of the
beneficial owners should be specified in the governing instrument pursuant to
the authorization to do so.

In consideration for the receipt of a beneficial interest, a beneficial owner
may contribute cash, property, or services rendered for a promissory note or
other obligation to make a contribution of cash or property in the future, or to
perform services in the future. The obligation to make a contribution, whether
in the form of cash, property, or services, is not enforceable unless set forth in a
writing signed by that beneficial owner; this statute of frauds requirement in
non-uniform and is based upon language in the Kentucky LLC Act. Beneficial
owners may by unanimous consent waive a beneficial owner’s obligation to
make a contribution to the statutory trust.

Unless a contrary rule is set forth in the governing instrument, a beneficial
owner will not be relieved of the obligation to make a contribution by reason of
death or disability; in the event of any failure to perform an obligation to
contribute either property or services, the statutory trust has the option of
demanding cash in lieu of the contribution. While an obligation to contribute
may be waived by the other beneficial owners, to the extent a creditor has
relied upon the contribution obligation the creditor may enforce it irrespective of

388. KY. REV. STAT. ANN. § 386A.6-020(1).
389. Id. § 386A.6-020(2).
390. Id. § 386A.6-020(3).
392. KY. REV. STAT. ANN. § 386A.1-030(4)(b).
393. Id. § 386A.6-030(2). Accord §§ 271B.6-210(2), 275.195(1).
394. See id. §§ 386A.6-030(3). See also § 275.200(1). By way of contrast, neither Kentucky
 RUPA nor Kentucky ULPA requires that a capital contribution obligation, even a capital
 contribution obligation of a limited partner, be set forth in writing in order to be enforceable.
395. Id. §§ 386A.6-020(1)(b), 386A.6-030(5). See also § 275.200(4).
397. Id. §§ 386A.6-030(5), 386A.6-020(1)(b). While these provisions carry forward the default
rule of USTA to the effect that the waiver of a contribution obligation requires the unanimous
consent of the other beneficial owners, the placement of the rule in KyUSTA is non-uniform.
its waiver. The governing instrument, either in substitution of or in addition to other statutory rules with respect to a default of a contribution obligation, may detail various consequences that follow therefrom, including forfeiture of the beneficial interest.

Upon the declaration of a distribution, whether interim or liquidating, a beneficial owner has with respect thereto the rights of a creditor of the statutory trust. A beneficial owner has no right to demand or receive a distribution other than in cash, but likewise may not be required to accept a distribution in kind that is disproportionate in value to the underlying property.

A beneficial interest in a statutory trust is subject to redemption on the terms detailed in the governing instrument. Absent the governing instrument providing for redemption, there is no statutory right to redemption.

The governing instrument may provide the means by which a beneficial ownership will be determined and evidenced, presumably including mechanisms such as the issuance of certificates and book entry.

The charging order provision of KyUSTA is applicable if and only if the governing instrument has modified the rule of free transferability of a beneficial interest to the effect that the transfer thereof is restricted such that a transferee would not succeed to all rights of a transferor. In those instances, the exclusive remedy of a beneficiary owner’s creditor will be a charging order pursuant to which any distributions that might otherwise be made to the beneficiary owner who is the judgment debtor will be transmitted by the statutory

398. KY. REV. STAT. ANN. § 386A.6-030(4). See also § 275.200(3), 362.2-502(3).
401. KY. REV. STAT. ANN. § 386A.6-040(3). The language in KyUSTA, as to these points, sets forth the same rule as does USTA, but in non-uniform language adopted from prior Kentucky law. Compare id. § 275.220(2).
402. Id. § 386A.6-050. The language “On the terms set forth in the governing instrument” is non-uniform.
403. Id. § 386A.1-030(4)(e). See also UNIF. STAT. TRUST ENTITY ACT § 103(e)(1), 6B U.L.A. 86 (2012 supp.).
404. Under Kentucky’s business trust act, a beneficial owner’s interest was required to be evidenced by a certificate. See KY. REV. STAT. ANN. §§ 286.370(1), 386.400.
405. The drafter of the governing instrument needs to consider as well the requirement for the statutory trust having notice of the transfer of a beneficial interest. See Baer v. Fidelity & Columbia Trust Co., 193 S.W.2d 1011 (Ky. 1946).
406. KY. REV. STAT. ANN. § 386A.6-060(1).
trust to the judgment creditor. The charging order provision of KyUSTA is significantly non-uniform, but is conformed to the charging order provisions that already exist in the Kentucky LLC Act and also the Kentucky Partnership and Limited Partnership Acts. The charging order constitutes a lien on the beneficial interest holder’s right to distributions from the statutory trust, entitled the holder thereof to receive the distributions when and as made.

A receiver may be appointed to receive the distributions and enforce the beneficial owner’s right to any distribution declared, and the court issuing the charging order may “make all other orders necessary to give effect to the charging order.” It bears noting that the capacity of the court to issue orders in connection with the enforcement of a charging order is limited to insuring that the judgment debtor receives distributions as declared by the statutory trust; it does not extend to the right to interfere in the internal management of the statutory trust such as by compelling a distribution or a redemption. A beneficial owner or a transferee of a beneficial interest is entitled to the benefit of any exemption laws applicable to the beneficial interests. The right of a judgment creditor to seek a charging order against a non-transferable beneficial interest is not subject to contrary private ordering, but presumably the governing instrument could provide additional provisions not impacting upon the rights of a third party, an example being a waiver of any right of the statutory trust for its beneficial owners to redeem the beneficial interests held by the judgment debtor.

407. See id. § 386A.6-060.
408. The lack of uniformity is two-fold. Initially, the charging order formula departs from that in USTAA. Compare UNIF. STAT. TRUST ENT'TY ACT § 206, 68 U.L.A. 127 (2012 supp.). Further, as part of the Entity Harmonization project (see supra note 1), the charging order was entirely deleted from USTAA.
410. Id. § 386A.6-060(3).
411. Id. § 386A.6-060(2).
412. Id.
413. See id.
414. Id. § 386A.6-060(5).
415. Id. § 386A.1-040(2)(p).
A beneficial owner may transact business with the statutory trust on the same terms as may any third party provided that the beneficial owner in question is not themselves a "covered person."\textsuperscript{416}

A pair of non-uniform provisions in KyUSTA provide limitations upon distributions that may be made and the consequences of an improperly made distribution.\textsuperscript{417} Initially, a distribution may be authorized by the trustees provided it is not either in violation of a restriction in the governing instrument or the statutory limitations.\textsuperscript{418} There is provided a default rule that, absent the determination of a different record date, it shall be the date the distribution is authorized.\textsuperscript{419} No distribution may be made if after taking its effect into account the statutory trust will not be able to pay its debts and obligations as they come due in the ordinary course, if its total assets would be less than its total liabilities, or if otherwise prohibited by the governing instrument.\textsuperscript{420} There are set forth a series of rules that address the mechanisms by which it may be determined that a distribution is or is not improper and how and when the effect of a distribution is to be measured.\textsuperscript{421} With respect to a distribution by a series of property of or associated with the series to the beneficial owners associated with the series, the limitations on distributions are applied at the series level.\textsuperscript{422}

A trustee who votes for or assents to a distribution that violates any of the limitations is personally liable to the statutory trust for the difference between the amount that could properly have been distributed and the amount actually declared if it can be shown that the trustee violated his duty of care.\textsuperscript{423} A trustee liable to the statutory trust for the amount of an improper distribution is entitled to contribution from each other trustee who would be liable therefrom and from each beneficial owner for the amount the beneficial owner received knowing it to have been improper.\textsuperscript{424} It bears noting that the potential exposure of a beneficial owner for the return of a distribution received is conditioned upon that beneficial owner knowing the distribution to have been improper. This is the same


\textsuperscript{418} Id. §§ 386A.6-080(1), (3).

\textsuperscript{419} Id. § 386A.6-080(2).

\textsuperscript{420} Id. §§ 386A.6-080(3). These limitations are not subject to contrary private ordering. See id. § 386A.1-040(2)(6).

\textsuperscript{421} Id. § 386A.6-080(6).

\textsuperscript{422} Id. § 386A.6-080(4).


\textsuperscript{424} Id. § 386A.6-090(2).
standard employed to the Kentucky Business Corporation Act\(^{425}\) and departs from the standard employed in both the Kentucky LLC Act\(^{426}\) and the Revised Uniform Partnership Act (2006),\(^{427}\) which do not have a "knowing" defense to the return of an improper distribution. A proceeding to seek recovery of an improper distribution must be commenced within two years from the date the effect of the distribution is measured,\(^{428}\) although the "doctrine of adverse domination" may apply to toll this period of limitation.\(^{429}\)

A beneficial owner has the right to receive information from the statutory trust or a trustee, as it relates to such affairs of the statutory trust as are reasonably related to the beneficial owner's interest therein.\(^{430}\) While the rules with respect to the availability of information are not subject to restriction the governing instrument, it may include standards as to how "reasonably related to the beneficial owner's ability to enforce its rights as a beneficial owner" will be determined, provided that those standards are not themselves "manifestly unreasonable."\(^{431}\) Tracking language from the LLC Act,\(^{432}\) the governing instrument may impose reasonable limitations upon the use of (as contrasted with access to) statutory trust records.\(^{433}\)

A beneficial owner may bring suit on their own behalf or on behalf of the statutory trust. In the case of a direct action, the beneficial owner may bring an action against the statutory trust or a trustee thereof to address injury sustained by or to enforce an obligation owed to that beneficial owner.\(^{434}\) The availability of such a direct action is contingent upon the beneficial owner being able to prevail without showing an injury or a breach of any obligation owed to the statutory trust itself.\(^{435}\) Alternatively, the beneficial owner may bring a derivative action on behalf of the statutory trust, in which instance any proceeds


\(^{426}\) Id. § 275.230(2)(b).

\(^{427}\) Id. § 362.1-1003(2).

\(^{428}\) Id. § 386A.6-090(3).


\(^{430}\) Ky. REV. STAT. ANN. § 386A.6-100(1).

\(^{431}\) Id. § 386A.1-040(2)(b).

\(^{432}\) See id. § 275.185(5).

\(^{433}\) Id. § 386A.6-100(2). The shift in the burden of demonstrating reasonableness will apply when the governing instrument may be amended by less than all the beneficial owners (contra Ky. REV. STAT. ANN. § 386A.6-020(1)(a)) and a limitation has been adopted by less than a unanimous vote, the beneficial owner seeking the information not having voted in favor of the amendment.

\(^{434}\) Id. § 386A.6-110(1).

\(^{435}\) Id. A similar rule appears in Kentucky's limited partnership law. See id. §§ 362.2-1001(1),(2).
or other benefits of the action belong to the trust and not to the beneficial owner
bringing the action on its behalf.\textsuperscript{436} Provided the derivative action is successful,
the plaintiff beneficial owner's reasonable expenses and attorneys' fees may be
recovered from the trust.\textsuperscript{437}

In order to initiate a derivative action the beneficial owner must have been a
beneficial owner when the conduct giving rise to the cause of action occurred
and also be an owner at the time the action has commenced.\textsuperscript{438} Further, the
beneficial owner must have made demand upon the trustees for an investigation
and redress, or demand must have been futile.\textsuperscript{439} The date and content of the
demand for action made or the reason for which the demand should be excused
as futile must be detailed in the complaint.\textsuperscript{440} The governing instrument may not
restrict the right of a beneficial owner to bring either a direct or a derivative
action.\textsuperscript{441} A beneficial owner associated with a series, assuming the series has
the capacity to sue and be sued in its own name, may bring on its behalf a
derivative action.\textsuperscript{442} By design, the special litigation committee was utilized in
Harmonized USTA,\textsuperscript{443} and the Business Corporation Act\textsuperscript{444} is not incorporated in
KyUSTA.

Article 7 - Mergers and Conversions

Article 7, addressing mergers and conversions involving a statutory trust, is
entirely non-uniform and, but for one exception, is based upon predecessor law
set forth in Kentucky's business corporation and LLC acts.

A statutory trust is permitted to merge with any other domestic entity if
permitted by the law of that domestic entity,\textsuperscript{445} and likewise may merge with any
foreign entity provided that the transaction is not prohibited by the foreign
law.\textsuperscript{446} There exist, however, exclusions for mergers with nonprofit corporations
and LLCs. The standards are intentionally different for a domestic versus a
foreign merger. With respect to a foreign merger, KyUSTA affords additional

\textsuperscript{437} Id. § 386A.6-110(9)(b). A similar rule appears in Kentucky's limited partnership law. See
Id. § 362.2-1005(2).
\textsuperscript{438} Id. §§ 386A.6-110(3). Accord §§ 271B.7-400(1), 362.513, 362.2-1003.
\textsuperscript{439} Id. § 386A.6-110(2).
\textsuperscript{440} Id. § 386A.6-110(4).
\textsuperscript{441} Id. § 386A.1-040(2)(v).
\textsuperscript{442} Ky. Rev. Stat. Ann. § 386A.6-110(8). This subsection has no counterpart in USTA.
\textsuperscript{443} Harmonization of Business Entity Acts, Uniform Law Commission,
\textsuperscript{446} Id. § 386A.7-010(2).
flexibility by which, in particular, a foreign business trust may merge into a Kentucky statutory trust for the purpose of thereafter being bound by KyUSTA.

In order to proceed with a merger, each constituent organization must adopt and approve a plan of merger setting forth: the name of each constituent organization and identifying the constituent organization that will survive the transaction; the terms and conditions of the merger, including a statement as to whether limited liability is retained by the surviving constituent organization; the manner and basis of converting the interest of the various constituent organizations into interest in the surviving entity or other property; any desired amendments to the organizational documents of the surviving constituent entity that will be affected by the merger; and such other terms as may be desired. With respect to each constituent organization that is a constituent statutory trust, the plan of merger must be approved by the beneficial owners, and absent contrary private ordering in the governing instrument, a merger must have the unanimous approval of the beneficial owners. Each constituent organization that is not a statutory trust must approve the transaction in accordance with its governing law.

Unless provided in the governing instrument, a beneficial owner of a statutory trust does not have a right to dissent with respect to a merger, and each organization has such rights to abandon the merger as are provided in either the plan of merger or the law otherwise governing that constituent organization. After approval of the plan of merger, the surviving constituent organization is to deliver to the Secretary of State articles of merger executed by each constituent organization setting forth the name and jurisdiction of organization of each constituent organization, the plan of merger, the name of the surviving constituent organization, a statement that the plan of merger was duly authorized by each constituent organization and, if the surviving constituent organization is not organized in Kentucky, a statement that it accepts liability for obligations of each Kentucky organized constituent organization accrued through the merger and appoints the Secretary of State as the agent for service of process.

447. See id. § 386A.1-020(6).
448. Id. § 386A.7-060.
449. "Constituent statutory trust" is a defined term. See id. § 286A.1-020(7).
450. Id. § 386A.7-020(1).
451. KY. REV. STAT. ANN. §§ 386A.7-020(1), (2).
452. Id. § 386A.7-020(3). Accord §§ 275.350(4), 362.1-906(6), 362.2-1107(4). In contrast, shareholders in a Kentucky business corporation or a Kentucky cooperative have the right to dissent upon a merger. See id. §§ 271B.13-020(1)(a), 272.321. See also Rutledge, The 2007 Amendments, supra note 141, at 248.
453. KY. REV. STAT. ANN. § 386A.7-020(4)
with respect thereto. The merger is effective upon the effective time and date of the articles of merger as determined under KRS section 14A.2-070.

Upon the effective time and date of the merger, the constituent organizations to the merger become a single entity, that being the surviving constituent organization, and each constituent organization except the surviving constituent organization ceases to exist; the surviving organization comes into possession of all the rights, privileges, immunities and also all restrictions and liabilities of each of the constituent organizations. All property of the constituent organization, whether real, personal, or mixed, become those of the surviving entity, and it also succeeds to its various contract rights. At the same time, the surviving constituent organization is liable for all debts and obligations of each constituent organization. Liens on the property of any constituent organization are not impacted by and survive the merger. The interest of each constituent organization are automatically converted as provided in the plan of merger, and all amendments to the governing instrument of the surviving constituent organization come into force and effect. If a non-surviving constituent organization is either a partnership or a limited partnership in which a partner has personal liability, their liability for pre-merger obligations will be determined under the applicable partnership or limited partnership law.

Domestic business entities, other than not-for-profit corporations or LLCs, may convert into the form of a statutory trust. Irrespective of any lower threshold defined in an organic document, the conversion to a statutory trust must be approved by all of the partners if the converting organization is a general or a limited partnership, by all of the members if the converting organization if a limited liability company, and by both the board of directors and all of the shareholders is the converting organization is a corporation. After approval of the conversion, the converting organization files a certificate of trust with the Secretary of State that, in addition to the requirements otherwise generally applicable, recites: that the statutory trust was created by means of a conversion;

454. Id. § 386A.7-040(1).
455. Id. § 386A.7-040(2).
456. "Constituent organization" is a defined term. See id. § 386A.1-020(6).
457. Id. § 386A.7-050(2).
458. Id. § 386A.7-050(3).
459. KY. REV. STAT. ANN. §§ 386A.7-050(4), (6).
460. Id. § 386A.7-050(7).
461. Id. § 386A.7-050(8).
462. Id. § 386A.7-050(9).
463. Id. § 386A.7-060(1). The equivalent transaction for a foreign entity is an election, pursuant to KY. REV. STAT. ANN. § 386A.10-040(6), to be governed by KyUSTA.
464. "Converting organization" is a defined term. See id. § 386A.1-020(10).
465. KY. REV. STAT. ANN. § 386A.7-060(2). Shareholders not approving the conversion may exercise dissenters rights. See KY. REV. STAT. ANN. § 271B.13-020(1)(d).
the name and form of organization of the converting organization; and a statement that the conversion was duly approved. A series of rules then addresses the consequences of the conversion to certain organic documents of the converting organization.

The converted statutory trust is for all purposes the same entity that existed before the transaction, having all of the property and contract rights as well as the liabilities of the converting organization. An action against the converting organization may be continued against the converted statutory trust. Upon the conversion becoming effective, the governing instrument of the converted statutory trust becomes binding upon each beneficial owner and trustee of that converted statutory trust.

Article 8 - Dissolution and Winding Up

The provisions of KyUSTA addressing the dissolution of a statutory trust, also encompassing the dissolution of a series, are substantially non-uniform as to USTA, embodying policies and procedures already extant in other Kentucky business organization statutes. The provisions of KyUSTA governing dissolution are mandatory; they are not subject to modification in the governing instrument. The dissolution of a statutory trust that is a series trust necessarily results in the dissolution of each of its series.

Dissolution of a statutory trust may come about consequent to its administrative dissolution, voluntarily upon such events as are specified in the governing instrument, voluntarily with the approval of the beneficial members, consequent to having no beneficial members or judicially.

Administrative dissolution of a statutory trust is governed by the applicable provisions of the Kentucky Business Entity Filing Act. Administrative dissolution will take place consequent to the statutory trust not having a registered office or agent for more than ninety days or for failure to make a timely filing of its annual report. In addition, a statutory trust may be administratively dissolved for failure to respond to interrogatories from the Kentucky Secretary of State. A statutory trust, having been administratively

466. Id. § 386A.7-060(3).
467. Id. §§ 386A.7-060(4)-(7).
469. Id. § 386A.7-070(2)(a).
470. Id. § 386A.7-080(2)(d).
471. KyUSTA subtitle 8.
473. KY. REV. STAT. ANN. § 386A.4-060(1)(a).
474. Id. § 386A.8-010.
475. Id. §§ 14A.7-010(1)(a)-(c).
476. See id. § 14A.1-050(1).
dissolved, may be reinstated with that reinstatement relating back to the date of the earlier dissolution.\textsuperscript{477} The governing instrument may specify an event or events upon which the statutory trust is to dissolve.\textsuperscript{478} Examples of such provisions would include those requiring the dissolution on a particular date or upon the meeting (or not) of defined financial thresholds.\textsuperscript{479} A statutory trust may also be dissolved with the approval of the beneficial owners.\textsuperscript{480} As a default rule that vote of the beneficial owners will need to be unanimous.\textsuperscript{481} A statutory trust will be dissolved if, for a period of ninety days or more, there are no beneficial owners.\textsuperscript{482}

In a departure from the uniform act, KyUSTA provides for the judicial dissolution of a statutory trust. The provision for judicial dissolution contemplates the use of the statutory trust in situations in which a business corporation, a partnership, or an LLC might otherwise have been utilized. As any of those structures may be judicially dissolved, it seemed appropriate that that same remedy should be available in those circumstances where judicial dissolution might otherwise be available. To that end, a statutory trust may be dissolved upon a demonstration that it is not reasonably practical to operate the statutory trust in accordance with the governing instrument.\textsuperscript{483} The "not reasonably practicable" standard has antecedents in other business organization laws.\textsuperscript{484} Breach of fiduciary duty by the trustees, either a single event or a repeated pattern, will justify judicial dissolution; the court will need to determine if the threshold has ever been met. Frustration of economic purpose, violations of the governing instrument not involving a breach of fiduciary duty or any number of other circumstances may likewise justify dissolution. Having determined that judicial dissolution is appropriate, the court must enter a decree to that effect and deliver the decree to the Secretary of State for filing; the dissolution is effective as of the latter of the Secretary of State’s filing of the

\textsuperscript{477} Id. §§ 14A.7-030(1), (3)(a).
\textsuperscript{478} USTA, in the process of harmonization, removed the provision permitting the governing instrument to provide for a time or event at which a statutory trust would dissolve (USTA § 801), added an express statement that limits on duration could be set forth in the certificate of trust (USTA § 801(2)(B)) and provided that these provisions could not be varied in the governing instrument. See USTA § 104(17). This policy change was in KyUSTA rejected in that it runs afoul of the modern trend in favor of private ordering in business ventures and limits a statutory trust is a manner foreign to the rules applied in corporations, LLCs and partnership, any of which may, by private ordering, define for themselves a term that is less than perpetual.
\textsuperscript{479} See KY. REV. STAT. ANN. § 386A.8-010(2)(a).
\textsuperscript{480} Id. § 386A.8-010(2)(b).
\textsuperscript{481} See id. § 386A.8-010(2)(c).
\textsuperscript{482} Id. § 386A.8-010(3).
\textsuperscript{483} Id. § 386A.8-030(1)(a).
\textsuperscript{484} See, e.g., id. §§ 275.290(1), 362.1-801(5)(c), 362.2-802(1). This standard is intentionally different from and imposes a more relaxed threshold than does the deadlock standard of the Business Corporation Act. See id. § 271B.14-300.
decree of dissolution or such later date as is specified therein. There exists no mechanism by which a decree of judicial dissolution, once filed with the Secretary of State and effective, may be withdrawn.

Regardless of whether the dissolution was administrative, voluntary, or judicial, the statutory trust survives and continues to exist as a statutory trust. A dissolved statutory trust is restricted to activities "appropriate to wind up and liquidate its business and affairs," with certain activities, listed on a non-exclusive basis, identified as being appropriate. It is expressly provided that a dissolved statutory trust may enter into agreements with creditors for the resolution of its liabilities. Dissolution of a statutory trust does not transfer its property or "abate or suspend" the rules of limited liability.

Upon judicial dissolution the dissolving court is charged to direct the winding up and liquidation. In a non-judicial dissolution the winding up and liquidation are undertaken by the trustees, but on a showing of good cause by a beneficial owner the court may take control of the process.

The provision by which a dissolving statutory trust gives known creditors notice of its dissolution is based upon prior law, but has been modified. Where most organizations, including a statutory trust that is not a series trust, are simply permitted to utilize the statutory mechanism for notifying known creditors, it not being mandatory, the statutory notice procedure is mandatory for a series trust. This requirement of notice will protect creditors who have dealt only with a particular series and in consequence may be unaware of the identity of the series trust.

The notice of dissolution must list the name of the statutory trust and if it is a series trust the name(s) under which each series has transacted business. The notice must also contain:

- the information to be set forth in a claim.

486. Id. § 386A.8-040(1).
487. Id § 386A.8-040(1). Accord §§ 271B.14-050(1), 275.300(2).
488. Id. § 386A.8-040(1)(c); see also Rutledge, The 2012 Amendments, supra note 6, at 9-11.
491. Id. § 386A.8-010(3). See also id. § 386A.8-050(1).
492. Id. § 386A.8-050(1).
493. Id. § 386A.8-050(2). A creditor does not, by means of this provision, have standing to apply for court supervision of the winding up and liquidation.
494. See, e.g., §§ 271B.14-060, 275.320.
495. See, e.g., KY. REV. STAT. ANN. § 275.320(1) (stating that "upon dissolution . . . a [LLC] may dispose . . . ") (emphasis added); see also Bear Inc. v. Smith, 303 S.W.3d 137, 145-46 (Ky. Ct. App. 2010).
496. KY. REV. STAT. ANN. § 386A.8-060(1).
497. Id. § 386A.8-060(2)(c).
• the mailing address to which the claim should be sent;  
• the deadline of not less than 120 days after the date of the notice by which claims must be received; and  
• provide notice that the claim will be barred if not received by the deadline.

A claim will be barred if having received notice the claimant does not submit the claim within the required period. A claim will likewise be barred if the claimant whose claim has been submitted and rejected does not within ninety days after the rejection commence an action to enforce it. Assuming no newspaper publication, the statute is silent as to the treatment of a claim timely submitted upon which the statutory trust neither gives a rejection nor an acceptance. Claims that may be barred do not include those that are contingent or based upon events occurring after the date of dissolution.

As was the case on the procedures utilized to afford known creditors notice of dissolution, those for notice to unknown creditors are based upon predecessor law. Again, while generally giving notice through these procedures is optional, doing so is mandatory in the dissolution of a series trust. Notice is given by publication in a general circulation paper for the county in which the principal office in Kentucky, or if none, the registered office where the statutory trust is or was last located. The published notice must recite:

• the name of the statutory trust and the names under which any series has conducted business;  
• describe the information to be provided in a claim and the address to which it should be mailed; and  
• state that the claim will be barred if a proceeding to enforce it is not brought within two years after publication of the notice.

The running of the two-year period will bar the claims of:

505. Id. § 386A.8-070(1). See also § 386A.1-020(29) (definition of a "series trust").
507. Id. § 386A.8-070(2)(a). Curiously, the equivalent provisions of the corporate, LLC and limited partnership acts do not contain an express requirement to name the entity of whose dissolution notice is being given. Still, the necessity of doing so is obvious.
• claimants who should but did not receive notice as known
  claimants;\(^{510}\)
• claimants who submitted a claim that was not acted upon;\(^{511}\) and
• claimants whose claim is contingent or based on an event occurring
  after the effective date of dissolution.\(^{512}\)

Creditor claims are enforced against assets in the following order:
• first, the assets still held by the statutory trust;\(^{513}\) and
• second, against the assets distributed in liquidation to the beneficial
  owners and pro-rata among them.\(^{514}\)

An innovation in Kentucky’s business entity laws permits a statutory trust,
having given notice to known and unknown claimants, to apply to a court to
determine the amount to be set aside to address creditor claims.\(^{515}\) The statutory
trust must give notice of the proceeding to its known claimants\(^{516}\) and a guardian
ad litem may be appointed to represent the interests of the unknown claimants.\(^{517}\)
To the extent the court determines that assets are set aside to satisfy unknown or
contingent claims or those based on events arising after the effective date of
dissolution, they will be available for the statutory period for satisfaction of
those obligations, and any further assets distributed in liquidation to the
beneficial owners will not be subject to recovery.\(^{518}\) After the two-year period
has run, any assets not distributed in satisfaction of creditor claims will be
distributed among the beneficial owners.\(^{519}\)

In the course of winding up, the assets of a statutory trust must be distributed
first to its creditors, a class that may include beneficial owners who are
creditors.\(^{520}\) This first priority is not subject to alteration in the governing
instrument.\(^{521}\) Second, assuming no contrary private ordering, assets may be

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\(^{510}\) Id. § 386A.8-070(3)(a). Accord §§ 271B.14-070(3)(a), 275.325(3)(a), 362.2-807(3)(a).
\(^{511}\) Id. § 386A.8-070(3)(b). Accord §§ 271B.14-070(3)(b), 275.325(3)(b), 362.2-807(3)(b).
\(^{512}\) Id. § 386A.8-070(3)(c). Accord §§ 271B.14-070(3)(c), 275.325(3)(c), 362.2-807(3)(c).
\(^{513}\) The degree to which a provision of this nature has the effect of an impermissible statute of repose
  has not been addressed by the Kentucky courts. See, e.g., Perkins v. Northeastern Log Homes, 808
  S.W.2d 809 (Ky. 1991).
\(^{514}\) Id. § 386A.8-070(4)(a).
\(^{515}\) KY. REV. STAT. ANN. § 386A.8-070(4)(b).
\(^{516}\) Id. § 386A.8-070(5).
\(^{517}\) Id. § 386A.8-070(6).
\(^{518}\) Id. § 386A.8-070(7). \(But see \) § 386A.8-070(4)(b).
\(^{519}\) Similar provisions exist in Delaware corporate law and section 710(e) of the Revised
  Prototype Limited Liability Company Act. See DEL. CODE ANN. tit. 8, § 280(c); Revised Prototype
  Limited Liability Company Act, supra note 278, at 64-65.
\(^{520}\) KY. REV. STAT. ANN. § 386A.8-080(1)(a). For example, a beneficial owner who sold an
  asset to the statutory trust in a seller financed transaction would be a creditor under this provision.
\(^{521}\) Id. § 386A.1-040(2)(a).
distributed in satisfaction of declared but unpaid distributions. The next level of distributions, and again assuming no contrary private ordering, is to the beneficial owners in proportion to their right to receive distributions prior to dissolution.

Article 9 - Qualification of Foreign Statutory Trust to Transact Business

With one exception, the entirety of Article 9 of USTA has been deleted from KyUSTA, these matters being now governed by the Kentucky Business Entity Filing Act (KyBEFA). It is stated expressly that each foreign statutory trust is subject to the Business Entity Filing Act. What activities will necessitate a certificate of authority, the requirements for and effect of a certificate of authority, and the consequences of the failure to have a required certificate of authority, the revocation of a certificate of authority, and the voluntary relinquishment of a certificate of authority will all be governed exclusively by its terms. The qualification of a foreign statutory trust to transact business does not require any certified record from its jurisdiction of organization, but rather only a representation from its representative that it exists in that foreign jurisdiction. Still, there has been retained from USTA the rules as to the internal affairs of a foreign statutory trust and the rules of liability applicable to beneficial owners, trustees and, among the series of a statutory trust, it being provided that those issues will be governed by the law of the jurisdiction of organization. The specific inclusion of the books and records of the foreign statutory trust within the matters addressed by the law of the jurisdiction of organization is consistent with other Kentucky law. The express statement that the law governing the liability of a particular series of a foreign statutory trust will be governed by the law of its jurisdiction of organization is an

522. Id. § 386A.8-080(1)(b).
523. Id. § 386A.8-080(1)(c). Unlike under the LLC Act, there is not, unless the governing instrument should so provide, a penultimate stage at which a return in satisfaction of contributions is made. See id. § 275.310(3).
524. See generally Rutledge & Tzanetzos, supra note 2.
525. KY. REV. STAT. ANN. § 386A.9-010(2).
526. See id. § 14A.9-010.
527. See id. §§ 14A.9-030, 14A.9-050.
528. See id. § 14A.9-020.
529. See id. §§ 14A.9-070, 14A.9-080, 14A.9-090.
530. Id. § 14A.9-060.
531. KY. REV. STAT. ANN. § 14A.9-030(2). See also Rutledge & Tzanetzos, supra note 2, at 447.
532. See KY. REV. STAT. ANN. § 386A.9-010(1). See also UNIF. STAT. TRUST ENTITY ACT § 901(a), 6B U.L.A. 146 (2012 supp.).
533. See, e.g., KY. REV. STAT. ANN. § 14A.9-030(3). As to the rationale for the inclusion of this non-uniform language, see Rutledge, The 2007 Amendments, supra note 141, at 238-39.
expansion of the otherwise applicable rules that follow from the internal affairs doctrine.\footnote{534}

A foreign statutory trust may not be denied a certificate of authority on the basis that the law governing statutory trusts in that foreign jurisdiction is substantially different from that employed in Kentucky,\footnote{535} but at the same time a foreign statutory trust holding a certificate of authority may not engage in any business or exercise a power that is not permitted to a domestic statutory trust.\footnote{536} For example, in that KyUSTA precludes the formation of a professional statutory trust, a foreign statutory trust may not be utilized in Kentucky to render professional services.

If the name of a foreign statutory trust is not available either because it includes a non-permitted identifier\footnote{537} or because it is not distinguishable on the records of the Secretary of State,\footnote{538} the foreign statutory trust may adopt a fictitious name.\footnote{539} A foreign statutory trust may register its name,\footnote{540} thereby making it of record with the Secretary of State. A foreign statutory trust, even if not qualified to transact business, may apply for a certificate of assumed name.\footnote{541}

Having qualified to transact business a foreign statutory trust is obligated to update information of record with the Secretary of State\footnote{542} and to file an annual report.\footnote{543} A foreign statutory trust that violates these obligations is subject to having its certificate of authority revoked.\footnote{544}

Article 10 - Miscellaneous Provisions

While the act directs that in its interpretation consideration is to be given to the promotion of uniformity among the states,\footnote{545} this provision should not apply when KyUSTA embodies a policy determination different from that in the

\footnotesize{534. See Rutledge, Again, For the Want of a Theory, supra note 22, at 328-38; Bishop and Kleinberger, Limited Liability Companies, supra note 43, at ¶14.06, 14-109 ("Many (perhaps most) LLC statutes make foreign law controlling where the question is the liability of a member of the obligations of a foreign LLC. However, Delaware's internal shields do not implicate that question. Instead, they raise an entirely different question — namely, whether a forum state should defer to a foreign state's rules on an entity's ability to segregate its assets and its creditors' access to those assets.") (footnote omitted).

536. Id. § 386A.9-010(4). See also id. § 14A.9-050(2).
537. See id. § 14A.3-010(15).
538. See id. § 14A.3-010(1).
539. See id. § 14A.3-040.
541. See id. § 365.015.
542. See id. § 14A.9-040.
543. See id. § 14A.6-010.
544. See id. § 14A.9-070.
545. Id. § 386A.10-010.}
uniform act. The relationship of the statute to the federal Electronic Signatures in Global and National Commerce Act is detailed. It is provided that KyUSTA does not impact upon actions pending or rights accrued as of its effective date. The previously reviewed rules as to application of KyUSTA to existing business trusts are detailed as are the rules as to KyUSTA’s effective date.

VII. CONCLUSION

The Kentucky Uniform Statutory Trust Act (2006) adds an innovative option to the menu of available organizational forms. While a variety of factors have historically limited the utility of the business trust, notably the absence of a comprehensive statute, KyUSTA, it is anticipated, will initiate at minimum greater consideration and as appropriate greater utilization of the form. At the same time it must be recognized that there are particular issues in the use of the statutory trust. The drafting of a governing instrument is an involved process. “Corporate” law attorneys often lack a substantive background in the trust law against which the governing instrument is drafted, giving rise to a variety of problems including the failure to appreciate rules to either be incorporated or avoided. The complexity of the rules governing series and the necessity of carefully tracking both the associated beneficial owners and the assets of and associated with each series cautions against the use of this new option absent circumstances where this functionality is needed and there is a commitment of sufficient assets to address both the known requirements and the significant unknown complexities of the structure. Still, the function is there and should be utilized in appropriate circumstances.

546. See, e.g., supra notes 299-300 and accompanying text (trustees may not vote by proxy); supra notes 360-67 and accompanying text (trustee answerable for performance of trustee’s agent).
547. KY. REV. STAT. ANN. § 386A.10-020.
548. Id. § 386A.10-030.
549. See supra notes 14-18 and accompanying text.