

LIMITED LIABILITY COMPANIES IN KENTUCKY  
(UKCLE 2011)

2014-1 Cumulative Supplement to Chapter 8

*Statutory Transactions: Conversion, Mergers and Share Exchange*

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(1) Page 157, Section [8.9]. Add the following two paragraphs to the end of Section [8.9]:

It is important to appreciate that the LLC Act does not provide the same notice and procedural requirements vis-à-vis the consideration and approval of a merger as is mandated by the Business Corporation Act. In the Business Corporation Act, in order for a merger to be effected, the transaction must be approved and recommended to the shareholders by the board of directors or, in the alternative, transmitted to the shareholders without a recommendation<sup>1</sup> where the shareholders are invited to review and either approve or not approve the transaction.<sup>2</sup> The notice to the shareholders must provide that a purpose of the shareholder meeting is to consider the plan of merger, which notice must as well include a copy or a summary of that plan.<sup>3</sup> The LLC Act contains no such requirements.

The determination that the LLC Act should not contain these or similar requirements is in no manner a deficiency in the LLC Act or a drafting oversight. The rules embodied in the Business Corporation Act are not the normative standard against which the rules embodied in other business entity statutes are to be measured.<sup>4</sup> Rather, in the Business Corporation Act,

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<sup>1</sup> KY. REV. STAT. ANN. § 271B.11-030(2)(a).

<sup>2</sup> KY. REV. STAT. ANN. § 271B.11-030(2)(b).

<sup>3</sup> KY. REV. STAT. ANN. § 271B.11-030(4).

<sup>4</sup> See *Pannell v. Shannon*, 425 S.W.3d 58, 67 (Ky. 2014) (LLCs “are creatures of statute controlled by Kentucky Revised Statutes (KRS) Chapter 275.”); see also *KNC Investments, LLC v. Lane’s End Stallions, Inc.*, 2011 WL 5507395 (E.D. Ky. 2011) (“No justification exists to extend Kentucky law that by its own terms is strictly limited to corporations to non-corporate entities such as the LDK Syndicate.”); Rutledge, *Vampires and the Law of Business Organizations: The Fruitless Search for Authenticity*, J. PASSTHROUGH ENTITIES, Nov./Dec. 2011, 51. None of the Kentucky Revised Uniform Partnership Act (2006), the Kentucky Uniform Limited Partnership Act

consequent to the mandated utilization of the board of directors,<sup>5</sup> it being separate and distinct from the body of shareholders, various notice requirements have been mandated.<sup>6</sup> In contrast, LLCs are governed by the LLC Act,<sup>7</sup> and the LLC Act allows the determination, by private agreement, amongst the parties to the venture as to these matters.<sup>8</sup> There is simply no validity to the assertion that the same rules that govern a corporate merger should apply as well to the merger of an LLC.<sup>9</sup> Rather, in the case of an LLC, whatever rules and procedures have been dictated by the operating agreement will control.

(1) Page 162, § 8.15, first paragraph. Replace the first paragraph of Section [8.15] to read as follows:

In 2007, the LLC Act was amended to enable LLCs to engage in share exchanges with corporations.<sup>10</sup> The transaction authorized works only in one direction, namely of that of the LLC acquiring the shares. The corporation whose shares are at issue may be either domestic or foreign provided that, in the instance of a foreign corporation, the share exchange is permitted

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(2006) nor the Kentucky Uniform Statutory Trust Act (2012) mandate procedural requirements as to the approval of a merger similar to those imposed by the Business Corporation Act. The corporate law paradigm, rather than being normative, is in fact atypical.

<sup>5</sup> See KY. REV. STAT. ANN. § 271B.8-010(1).

<sup>6</sup> The Kentucky Uniform Limited Cooperative Association Act, which like a business corporation provides for management in a board that is distinct from the membership (*see* KY. REV. STAT. ANN. § 272A.8-010(2)), likewise imposes notice and requirements similar to those used in the BCA. *See* KY. REV. STAT. ANN. § 272A.16-050(2).

<sup>7</sup> *See Pannell v. Shannon*, 425 S.W.3d 58, 67 (Ky. 2014) (LLCs “are creatures of statute controlled by Kentucky Revised Statutes (KRS) Chapter 275.”)

<sup>8</sup> *See* KY. REV. STAT. ANN. § 275.003(1).

<sup>9</sup> *See also KNC Investments, LLC v. Lane’s End Stallions, Inc.*, 2011 WL 5507395 (E.D. Ky. 2011) (“No justification exists to extend Kentucky law that by its own terms is strictly limited to corporations to non-corporate entities such as the LDK Syndicate.”).

<sup>10</sup> *See* KY. REV. STAT. ANN. § 275.500; *see also* Rutledge, *The 2007 Amendments to the Kentucky Business Entity Statutes*, 97 KENTUCKY LAW JOURNAL 229, 257-58 (2008-09).

under the laws of its jurisdiction of incorporation.<sup>11</sup> Whether “not forbidden” is equivalent to “permitted” is a question to be assessed under that foreign law.

There does not exist a statutory transaction pursuant to which a corporation may acquire the limited liability company interests in a LLC. This is not to say, however, that a corporation and a LLC are precluded from engaging in a share exchange in which the corporation is the acquiring party. Rather, such a transaction will be simply pursuant to private contract enforceable in accordance with the terms of that agreement. There will exist no statutory overlay as to either the requirements for the approval of the transaction, its legal effect amongst the parties thereto or its effect as to third parties.

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<sup>11</sup> KY. REV. STAT. ANN. § 275.500(1).