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The Uniform Limited Partnership Act (2001)  
Comes to Kentucky: An Owner's Manual

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# THE UNIFORM LIMITED PARTNERSHIP ACT (2001) COMES TO KENTUCKY: AN OWNER'S MANUAL

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## I. INTRODUCTION

2006 saw Kentucky adopt two new partnership laws governing the general and the limited partnership. Based on, respectively, the Uniform Partnership Act (1997)<sup>1</sup> ("RUPA")<sup>2</sup> and the Uniform Limited Partnership Act (2001)<sup>3</sup> ("ULPA"),<sup>4</sup> each of these laws is at minimum a modernization of and in certain

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+ Member, Stoll Keenon Ogden PLLC (Louisville, Kentucky); Adjunct Professor of Law, University of Kentucky College of Law (Lexington, Kentucky). My thanks to the baristas who made the innumerable coffees consumed in the course of drafting this article, and to my fellow members of the ABA's Committee on Partnerships and Unincorporated Business Organizations, especially Carter G. Bishop, J. William Callison, George W. Coleman, Ann E. Conaway, Allan G. Donn, Steven G. Frost, Thomas E. Geu, Elizabeth "Bitsy" Hester, Peter D. Hutcheon, Lewis R. Kaster, Robert R. Keatinge, Daniel S. Kleinberger, Scott E. Ludwig, Elizabeth S. Miller, and Barry B. Nekritz, each of whom, with Rutheford B. Campbell, Jr. and Allan W. Vestal, bear some responsibility for my education in RUPA, ULPA, and business organization law. I, however, bear sole responsibility for the manifest gaps therein. To each of you, *Vulgare amici nomen, sed rara est fides*.

1. UNIF. P'SHIP ACT, 6 Pt. 1 U.L.A. 1 (1997).

2. A note on the acronym "RUPA" and references to the "Revised" Uniform Partnership Act is in order. The correct name of the act is the "Uniform Partnership Act (1997)." Through much of its consideration by the National Conference of Commissioners of Uniform State Laws ("NCCUSL"), it was referred to as the Revised Uniform Partnership Act. In 1994, the "Revised" was dropped. Nevertheless, "Revised" and "RUPA" have become firmly fixed as the name of the act, and "RUPA" is used in NCCUSL's Prefatory Note to the Act. As adopted in Kentucky, the Uniform Partnership Act (1997) is denominated the "Kentucky Revised Uniform Partnership Act (2006)," see KY. REV. STAT. ANN. § 362.1-1202 (LexisNexis 2006), sometimes referenced herein as "KyRUPA." A review of KyRUPA, focusing upon its departure from the uniform act, appears at Allan W. Vestal & Thomas E. Rutledge, *Modern Partnership Law Comes to Kentucky: Comparing the Kentucky Revised Uniform Partnership Act and the Uniform Act From Which it was Derived*, 95 KY. L.J. 715 (2007) [hereinafter Vestal & Rutledge, *Modern Partnership Law Comes to Kentucky*].

3. UNIF. LTD. P'SHIP ACT, 6A U.L.A. 1 (2001).

4. The name of the uniform act upon which this statute is based is the "Uniform Limited Partnership Act (2001)." It is the successor of the Revision of Uniform Limited Partnership Act (1976) with 1985 Amendments. 6A U.L.A. 125. The Uniform Limited Partnership Act (1976) is commonly referred to as the ULPA. With the 1985 Amendments, the combined law was commonly referred to as the Revised Uniform Limited Partnership Act, or RULPA. The uniform act approved in 2001, a significant re-write of limited partnership law as contrasted with a mere revision/supplementation, was through the drafting process commonly referred to as ReRULPA, the "Revision" of RULPA. Still, the official acronym "ULPA" is used herein. As adopted in Kentucky, the Uniform Limited Partnership Act (2001) is denominated the "Kentucky Uniform

respects a reconceptualization of these business structures as previously understood.

The objective of this article is not to provide an entirely comprehensive review of the new limited partnership act - such is beyond the scope of any article. Notwithstanding what may appear as surface simplicity, RULPA is and was a complicated statutory system; ULPA is a more complex statute building upon the prior law.<sup>5</sup> We do not herein attempt to provide a complete exegesis of each provision or how it relates to all other provisions. Even were such possible, unanticipated fact situations will arise that we could not address. This article is meant to be an initial, and not the final, step in appreciating how this new statute functions. Our objectives are to introduce the structural themes that are used in the law, to highlight particular provisions that will dictate different consequences than what would apply under the predecessor laws, review the rules applicable when interfacing with the Secretary of State, and highlight departures from the uniform acts made in the Kentucky adoption.

As alluded to above, KyULPA contains non-uniform provisions; that non-uniform language is highlighted and discussed herein. In crafting KyULPA for submission to the Kentucky General Assembly, there was a continuing tension between the desire to adopt the uniform language and the realization that the uniform acts are not in any sense perfect.<sup>6</sup> In fact, both academics and practitioners have "had a field day"<sup>7</sup> criticizing the acts from standpoints of the structural decisions made in drafting to whether the language employed well suits the desired outcome.<sup>8</sup> Generally speaking, departures were made from the uniform language where there was developing a consensus that it was deficient and a clearly better alternative was available. As discussed in greater detail below, non-uniform transition provisions that are in the end "non-transition" have been adopted as well.<sup>9</sup> Other departures, most notably those dealing with

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Limited Partnership Act (2006)," *see* KY. REV. STAT. ANN. § 362.2-1207 (LexisNexis 2006), sometimes referenced herein as "KyULPA."

5. As observed by Niels Bohr, "If you are not completely confused by quantum mechanics, you don't understand it." Statement of Niels Bohr, Physics Musings: Quantum Mechanical Quotes, <http://phys.wordpress.com/2006/06/09/quantum-mechanical-quotes/> (last visited June 22, 2007).

6. The authors were the drafters of KyRUPA and KyULPA. The provisions dealing with Secretary of State filings were prepared initially in coordination with Maryellen B. Allen, general counsel to the office of the Secretary of State (1997-2002) and subsequently with Secretary of State Trey Grayson and Tracy Goff Herman, Director of the Division of Corporations. However, neither this article in general nor in particular the provisions addressing filings with the office of the Secretary of State have been reviewed or endorsed by that office.

7. Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act*, 37 SUFFOLK U.L. REV. 583, 631 n.227 (2004) [hereinafter Kleinberger, *User's Guide*].

8. For example, ULPA § 408 has been criticized, *see, e.g.*, J. William Callison, "The Law Does Not Perfectly Comprehend ...": The Inadequacy of the Gross Negligence Duty of Care Standard in Unincorporated Business Organizations, 94 KY. L.J. 451 (2006), and has in KyULPA been replaced with an entirely different formula.

9. *See infra* notes 13 through 21 and accompanying text.

filings with the office of the Secretary of State, address matters unique to Kentucky law.

*A. Are KyRUPA and KyULPA Worth the Trouble?*

It is a valid question to ask whether the adoptions of KyRUPA and KyULPA are a worthwhile effort. The adoption of the new laws entails significant transaction costs in attorney education, client education, confusion during the transition period, and the modification of existing partnership agreements to comply with the new law while continuing to reflect party expectations.<sup>10</sup> Still, the answer is a resounding “yes.” The new acts incorporate the current status of the law as it has grown through the common law and the continuing modernization of business organization law. Kentucky benefits from adopting uniform and model acts, especially in areas such as business organization law for which Kentucky courts issue few published decisions.<sup>11</sup> Uniformity permits business men and women (and their attorney advisors) to look to other states as well as major treatises for guidance. Those other states and treatises are now focused on RUPA and are moving their focus to ULPA. Furthermore, failure to adopt updated business law simply makes Kentucky a less viable jurisdiction for out of state businesses when considering expansion and investment opportunities.

*B. The Legislative Process*

H.B. 234, containing both KyRUPA and KyULPA, was introduced by Representative Scott W. Brinkman to the 2006 General Assembly on January 5, 2006.<sup>12</sup> The bill was assigned to the Judiciary Committee, and hearings were held on February 8. That day the bill was voted out of the Judiciary Committee with a favorable recommendation by a vote of 12 for and 1 against. The full House of Representatives voted 93 for and 6 against the bill on February 27, 2006, and it was referred to the Senate, where it was assigned to the Judiciary

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10. “Our dilemma is that we hate change and love it at the same time; what we really want is for things to remain the same but get better.” Statement of Sydney J. Harris, Wikipedia, available at [http://en.wikipedia.org/wiki/Sydney\\_Harris](http://en.wikipedia.org/wiki/Sydney_Harris) (last visited June 22, 2007).

11. As of this writing, although it has been effective since July 15, 1994, no Kentucky state court has published an opinion interpreting any provision of the Kentucky Limited Liability Company Act (the “KyLLCA”), found at KY. REV. STAT. ch. 275.

12. Essentially identical legislation had been introduced to the 2005 General Assembly (H.B. 246, introduced February 2, 2005), the 2004 General Assembly (H.B. 190, introduced January 6, 2004), and the 2003 General Assembly (H.B. 558, introduced February 18, 2003). Each of these prior introductions has been by Representative Brinkman. Breaking the log-jam on the consideration and passage of RUPA and ULPA was HCR 113, passed by the House Judiciary Committee on February 16, 2005. This resolution directed the House Judiciary Committee, prior to December 1, 2005, to consider RUPA, ULPA, amendments to the LLC Act and amendments to the Kentucky Business Corporation Act (the “KyBCA”). Amendments to the KyLLCA and the KyBCA were submitted to the 2006 General Assembly in, respectively, H.B. 349 and H.B. 350, but no action was taken on either proposal.

Committee. It held hearings on March 16, and the bill was voted out of committee on a vote of 10 for and 0 against. The full Senate voted 38 for and 0 against the bill on March 22, 2006. The bill was signed by Governor Fletcher on April 5, 2006.

### C. Codification and Effective Dates

The current partnership and limited partnership acts will remain in place and will continue to apply to certain partnerships formed prior to July 12, 2006.<sup>13</sup> KyRUPA is codified in KRS ch. 362.1 and KyULPA is codified in KRS ch. 362.2.

The states have adopted a variety of approaches to the phase-in of ULPA.<sup>14</sup> KyULPA has an initial effective date of July 12, 2006.<sup>15</sup> As of that date, all newly formed limited partnerships are organized under and governed by the new act. KyRULPA will continue to govern all limited partnerships formed under KyRULPA, namely those formed on or after July 15, 1988 and prior to July 12, 2006.<sup>16</sup> Limited partnerships formed prior to July 15, 1988 are not governed by KyRULPA unless they have elected to be so by filing an amended and restated

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13. KY. REV. STAT. ANN. § 362.1-1204 (LexisNexis 2006).

14. The states that have adopted ULPA to date, the statutory citations of those adoptions, the effective date for newly created limited partnerships, ULPA § 1206(a)(1), and the effective date for limited partnerships existing prior to the adoption of ULPA, ULPA § 1206(b), are as follows: Arkansas, H.B. 1009, 86th Gen. Assem., Reg. Sess. (Ark. 2007) (September 1, 2007); California, CAL. CORP. CODE §§ 15611 to 15723 (West 2006) (January 1, 2008) (January 1, 2010); Florida, FLA. STAT. §§ 620.1101 to 620.2205 (2006) (January 1, 2006) (January 1, 2007); Hawaii, HAW. REV. STAT. §§ 425E-101 to 425E-1205 (2006) (July 1, 2004) (December 31, 2004); Idaho, IDAHO CODE ANN. §§ 53-2-101 to 53-2-1205 (2006) (July 1, 2006) (July 1, 2006); Illinois, ILL. COMP. STAT. 215/0.01 to 215/1402 (2006) (January 1, 2005) (January 1, 2008); Iowa, IOWA CODE §§ 488.101 to 488.1207 (2007) (January 1, 2005) (January 1, 2006); Kentucky, KY. REV. STAT. ANN. §§ 362.2-102-362.2-1207 (LexisNexis 2006) (July 12, 2006) (n/a); Maine, ME. REV. STAT. ANN. tit. 31, §§ 1301-1461 (2006) (July 1, 2007) (July 1, 2008); Minnesota, MINN. STAT. §§ 321.0101 to 321.1208 (2006) (January 1, 2005) (January 1, 2007); Nevada, 2007 S.B. 72 (October 1, 2007) (n/a); New Mexico, H.B. 184, 48th Leg., 1st Sess. (N.M. 2007) (January 1, 2008) (n/a); North Dakota, N.D. CENT. CODE §§ 45-10.2-01 to 45-10.2-117 (2006) (July 1, 2005) (January 1, 2006). All other states, other than Louisiana and the District of Columbia, have adopted either RULPA(1976) or RULPA(1985), although there are various alterations in these various states. Louisiana has never adopted a uniform limited partnership act. Rather, Louisiana law recognizes the *Partnership in Commendam*. Louisiana partnerships in commendam are subject to the Louisiana Partnership Law, Articles 2801-2848 of the Louisiana Civil Code of 1870, which was amended and reenacted in 1980 by Act No. 150 of the regular session of the Louisiana legislature, effective on January 1, 1981. See generally Mark C. Schroeder, *Louisiana's New Partnership Provisions: A Review of the Changes and Some Continuing Problem Areas*, 42 LA. L. REV. 1429 (1982); Judy Y. Barrasso, *An Examination of Louisiana Limited Partnerships*, 55 TUL. L. REV. 515 (1981); Thomas M. Bergstedt, Comment, *Partnership in Commendam – Louisiana's Limited Partnership*, 35 TUL. L. REV. 815 (1961).

15. KY. REV. STAT. ANN. § 362.2-1205(1)(a) (LexisNexis 2006). KyRUPA has the same initial effective date. § 362.1-1204; see also Op. Ky. Att'y Gen. (OAG) 06-001 (April 19, 2006).

16. See KY. REV. STAT. ANN. § 362.521(1) (LexisNexis 2006) (Prior to amendment by 2006 Acts, ch. 149, § 238).

certificate of limited partnership.<sup>17</sup> A limited partnership existing on July 11, 2006, whether formed under KyRULPA or prior law, may elect to be governed by KyULPA by filing an amended and restated certificate of limited partnership.<sup>18</sup> Many existing limited partnerships will want to do so in order to take advantage of the advances made in the new statutes including LLLP status.<sup>19</sup> In the course of that amendment, a limited partnership desiring to be an LLLP must modify its name to meet the statutory requirements for the name of a LLLP.<sup>20</sup>

Kentucky adopted the UPA in 1954, and the likelihood of any pre-UPA partnerships remaining in existence is quite low. Kentucky adopted RULPA in 1988, but with the proviso that it would not govern limited partnerships formed prior to its effective date absent an election by a limited partnership to be governed by the new law.<sup>21</sup> From and after July 12, 2006, Kentucky will have:

- Partnerships formed prior to July 12, 2006 that remain governed by KyUPA;
- Partnerships formed on or after July 12, 2006 that are governed by KyRUPA;
- Partnerships formed prior to July 12, 2006 that have elected to be governed by KyRUPA;
- Limited partnerships formed prior to June 18, 1970 that remain governed by the then existing limited partnership law;
- Limited partnerships formed on or after June 18, 1970 and prior to July 15, 1988 that remain governed by the then existing limited partnership law;
- Limited partnerships formed prior to July 15, 1988 that elected to be governed by KyRULPA;
- Limited partnerships formed after July 15, 1988 and prior to July 12, 2006 that are governed by KyRULPA;
- Limited partnerships formed on or after July 12, 2006 that are governed by KyULPA;
- Limited partnerships formed prior to July 15, 1988 that elected to be governed by KyULPA; and

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17. KY. REV. STAT. ANN. §§ 362.521(1)-(2) (LexisNexis 2006). The prior limited partnership act, §§ 362.410-362.710, an enactment of the Uniform Limited Partnership Act (1916), was effective June 18, 1970 and applied to limited partnerships formed through July 14, 1988.

18. KY. REV. STAT. ANN. § 362.2-1204(2) (LexisNexis 2006). From July 12, 2006, a limited partnership formed under pre-KyRULPA law may elect to be governed by KyULPA, but may not elect to be governed by KyRULPA. *See* KY. REV. STAT. ANN. § 362.521(2) (LexisNexis 2006) as amended by 2006 Acts, ch. 149, § 238.

19. *See infra* notes 218 through 222 and accompanying text.

20. *See infra* note 65 and accompanying text.

21. *See supra* notes 16-17 and accompanying text.

- Limited partnerships formed under KyRULPA that elect to be governed by KyULPA.

#### D. *The Genesis of ULPA*

As RUPA was being completed there were calls for a similar rewrite of RULPA.<sup>22</sup> RUPA had been drafted with the intention that it no longer serve as the gap filler for limited partnership law.<sup>23</sup> As such, it was not drafted to address the concerns of limited partnerships. Furthermore, if applied as the gap filler for state enactments of RULPA (in either the 1976 or 1985 versions)<sup>24</sup> there would be fundamental shifts in the nature of the relationship between, on the one hand, the limited partnership and the limited partners and, on the other hand, the general partners. At the same time the limited partnership was itself facing a crisis of application. The widespread success of the LLC was usurping many of the traditional applications of the limited partnership, and new statutory mechanisms needed to be put in place to preserve the continuing utility of the structure in its most effective applications. A NCCUSL drafting committee was appointed in 1997, and in this project as contrasted with the earlier RUPA efforts, NCCUSL made greater use of, and in fact placed greater reliance upon, the various advisors appointed by the American Bar Association. ULPA was approved by NCCUSL in 2001, and was later in that year approved by the Committee on Partnerships and Unincorporated Business Organizations of the Section of Business Law, American Bar Association. Kentucky was the eighth jurisdiction to adopt ULPA.

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22. See, e.g., Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195, 1195-96 (1995) ("The Revised Uniform Partnership Act of 1994 (RUPA) is about to make the world of general partnerships chaotic. It promises to do the same to the world of limited partnerships. That chaos can be avoided if we move without delay to delink the law of limited partnerships from that of general partnerships by drafting and adopting a comprehensive uniform limited partnership act.") (citations omitted).

23. See KY. REV. STAT. ANN. § 362.523 (LexisNexis 2006); see also § 362.447.

24. ULPA is the fourth generation of the effort to craft a uniform act governing limited partnerships. The original Uniform Limited Partnership Act was adopted by NCCUSL in 1916 ("ULPA(1916)"). For a review of ULPA (1916), see, for example, William D. Lewis, *Uniform Limited Partnership Act*, 65 U. PA. L. REV. 715 (1916). ULPA (1916) was adopted in Kentucky in 1970, see 1970 Acts, ch. 97, and repealed in 1988, see 1988 Acts, ch. 284, § 65. Significant revisions were made to ULPA (1916) in 1976, resulting in the Revised Uniform Limited Partnership Act (1976) ("RUPA (1976)"). RULPA (1976) was never adopted in Kentucky. RUPA (1976) was materially revised in 1985, resulting in the Revised Uniform Limited Partnership Act (with 1985 amendments) ("RULPA (1985)"). RULPA (1985) was adopted in Kentucky in 1988. RULPA (1985) was followed by ULPA (2001).

### E. *The End of Linkage*

One crucial element in understanding ULPA is an appreciation of it as a free-standing organizational law not dependent upon any other act.<sup>25</sup> Under RULPA, where it was silent, reference was made to UPA for the controlling rule,<sup>26</sup> and from there to other principles of law.<sup>27</sup> Delinkage of the law began with RUPA, which excluded from its scope the limited partnership.<sup>28</sup> However, as the various state adoptions of RULPA continued to require a “gap filler,” references were continued to either the newly enacted RUPA or to the otherwise superseded UPA.<sup>29</sup> ULPA was written to be an entirely self-contained.<sup>30</sup> There is no mechanism by which a limited partnership formed under KyRULPA or the predecessor limited partnership act may elect to have KyRUPA serve as its “gap filler” statute.

## II. A KYULPA OWNER’S MANUAL

ULPA is divided into twelve articles, and this discussion follows that same outline. In the course of drafting ULPA, the drafting committee was following on RUPA. As such, for reasons at times well reasoned and at other times inexorably dogmatic, the language used often tracks the language used earlier in RUPA.

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25. See Kleinberger, *User’s Guide*, *supra* note 7, at 609 (“Of course, the new Act’s most fundamental change consists of replacing a linked statute with a stand alone statute.”). Professor Kleinberger served as the Reporter on ULPA.

26. RULPA § 1105 (1985); KY. REV. STAT. ANN. § 362.523 (LexisNexis 2006). Before that, under both the Uniform Limited Partnership Act (1976) and the Uniform Limited Partnership Act (1916), UPA served as a “gap filler,” providing the substantive law when the limited partnership law was silent. See RULPA § 1105 (1976); ULPA § 29 (1916); KY. REV. STAT. ANN. § 362.690 (repealed 1988); see also KY. REV. STAT. ANN. § 362.447 (LexisNexis 2006).

27. KY. REV. STAT. ANN. § 362.170 (LexisNexis 2006); UPA § 5 (1914).

28. RUPA § 202(b) (1997); KY. REV. STAT. § 362.1-202(2) (LexisNexis 2006). At that point, while RUPA “rejected” RULPA even as RULPA still referenced UPA. Such cases of unilateral linkage exist elsewhere in business organization law. For example, in Kentucky, the professional service corporation act, KY. REV. STAT. ch. 274, references the Kentucky Business Corporation Act, KY. REV. STAT. ch. 271B, where the PSC Act does not set forth a controlling rule. KY. REV. STAT. ANN. § 274.015(2) (LexisNexis 2006). Cooperative associations may elect to be governed, to the extent not set forth in KY. REV. STAT. ch. 272, by either the KyBCA, KY. REV. STAT. ch. 271B, or by the Non-Profit Corporation Act, KY. REV. STAT. ch. 273. See KY. REV. STAT. ANN. § 272.042.

29. While some states, in adopting RUPA, have then linked their existing limited partnership law, based upon RULPA, to RUPA, see, e.g., KAN. STAT. ANN. § 56-1a604 (2002), other states, while adopting RUPA, have retained the linkage of RULPA to the state adoption of UPA. See, e.g., DEL. CODE ANN. tit. 6, § 17-1105 (2006).

30. For a discussion of linkage and the process of delinking partnership and limited partnership law, see Elizabeth S. Miller, *Linkage and Delinkage: A Funny Thing Happened to Limited Partnerships When the Revised Uniform Partnership Act Came Along*, 37 SUFFOLK U. L. REV. 891 (2004).



*A. KyULPA Article 1 – General Provisions*

KyULPA's definitions have been carried over from the uniform act with only one modification; a non-uniform definition of "sign/signature," has been substituted.<sup>31</sup> In addition, non-uniform definitions of "deliver/delivery,"<sup>32</sup> "electronic transmission/electronic delivery,"<sup>33</sup> "name of record with Secretary of State,"<sup>34</sup> and "professional services"<sup>35</sup> have been added.

ULPA § 103, dealing with knowledge and notice, has been carried over from the uniform act without modification. As such, it does not conform to the provision in KyRUPA, which modified the uniform act language of RUPA.<sup>36</sup> As contrasted with the provisions under the KyBCA, KyULPA is focused upon when a person knows or should know of a fact, rather than upon the procedures by which information is delivered.<sup>37</sup> This provision as well contains several deemed notice provisions, namely:

- That a certificate of limited partnership filed by the Secretary of State is notice that a partnership is a limited partnership and that those who are named therein as general partners are general partners;<sup>38</sup>
- Notice that one has ceased to be a general partner ninety days after the filing of an amended certificate of limited partnership where the filing of the statement of dissociation;<sup>39</sup>
- The dissolution of a limited partnership ninety days after filing of an amendment to the certificate of limited partnership stating that it is dissolved;<sup>40</sup>

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31. This non-uniform definition conforms to that in KY. REV. STAT. ANN. § 362.1-101(19) (LexisNexis 2006), which itself conforms to § 271B.1-400(24).

32. KY. REV. STAT. ANN. § 362.2-102(4) (LexisNexis 2006); *accord* § 271B.1-400(5); § 362.1-101(3).

33. KY. REV. STAT. ANN. § 362.2-102(7) (LexisNexis 2006); *accord* § 271B.1-400(8); § 362.1-101(5).

34. KY. REV. STAT. ANN. § 362.2-102(15) (LexisNexis 2006); *accord* § 362.1-101(9).

35. KY. REV. STAT. ANN. § 362.2-102(20) (LexisNexis 2006); *accord* § 275.005(3); § 275.015(20); § 362.1-101(16).

36. *See* KY. REV. STAT. ANN. § 362.1-103 (LexisNexis 2006).

37. *Cf.* KY. REV. STAT. ANN. § 271B.1-410 (LexisNexis 2006).

38. KY. REV. STAT. ANN. § 362.2-103(3) (LexisNexis 2006). ULPA (1916) was silent as to the notice effect of the certificate of limited partnership. RULPA (1976) provided that the Certificate of Limited Partnership was notice of the existence of the limited partnership and that the persons listed therein as limited partners were limited partners, RULPA (1976) § 208, which treatment was consistent with interpretations of ULPA (1916). Conversely, RULPA (1985) provided that the certificate of limited partnership constituted the notice that the partnership is a limited partnership and of the identities of the general partners. RULPA (1985) § 208; KY. REV. STAT. ANN. § 362.429 (LexisNexis 2006).

39. KY. REV. STAT. ANN. § 362.2-103(4)(a) (LexisNexis 2006).

40. KY. REV. STAT. ANN. § 362.2-103(4)(b) (LexisNexis 2006).

- The cancellation of a limited partnership ninety days after the effective date of the statement of cancellation;<sup>41</sup>
- The limited partnership's conversion ninety days after the effective date of the conversion;<sup>42</sup> and
- The merger of the limited partnership ninety days after the effective date of the merger.<sup>43</sup>

A limited partnership organized under KyULPA is a legal entity distinct from its partners.<sup>44</sup> The adoption by a particular limited partnership of limited liability limited partnership status does not alter the entity, which is the same entity before and after any election into (or out of) that status.<sup>45</sup> A limited partnership may be formed for any lawful purpose *except for rendering professional services*.<sup>46</sup> The prohibition against a professional limited partnership is non-uniform; in the event that a limited partnership is formed to render professional services, it will likely be treated as a general partnership.<sup>47</sup> The provision that a limited partnership may be organized for any lawful purpose does not restrict a limited partnership to a for-profit purpose.<sup>48</sup> Still, the organization of a limited partnership other than with a for-profit motive will raise certain issues with respect to its structure and the application of ULPA.<sup>49</sup>

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41. KY. REV. STAT. ANN. § 362.2-103(4)(c) (LexisNexis 2006).

42. KY. REV. STAT. ANN. § 362.2-103(4)(d) (LexisNexis 2006).

43. KY. REV. STAT. ANN. § 362.2-103(4)(e) (LexisNexis 2006).

44. KY. REV. STAT. ANN. § 362.2-104(1) (LexisNexis 2006). This provision puts the partnership on the same footing as a corporation, a limited liability company, and a RUPA partnership, *see* KY. REV. STAT. ANN. § 362.1-201(1), and eliminates any argument that a limited partnership is simply an aggregate of its partners. None of ULPA (1916), RULPA (1976), nor RULPA (1985) addressed whether a limited partnership is an entity or an aggregate.

45. KY. REV. STAT. ANN. § 362.2-104(1) (LexisNexis 2006); *accord* § 362.1-201(1) (parallel treatment of a partnership that elects LLP status).

46. KY. REV. STAT. ANN. § 362.2-104(2) (LexisNexis 2006). *Cf.* § 271B.3-010(1) ("any lawful business"); § 275.005 ("any lawful business, including the provision of one (1) or more professional services"); § 362.175(1) ("a business for profit"); § 362.411 ("any business that a partnership without limited partners may carry on"); § 362.1-101(10) ("a business for profit").

47. Various states have non-uniform limitations on the permissible purposes of a limited partnership. For example, Illinois, which has adopted ULPA, does not allow limited partnerships to be banks, operate railroads, or with certain exceptions write insurance. 805 ILL. COMP. STAT. 215/104(b) (2006); *see also* Gregg v. SR Investors, Ltd., 966 F. Supp. 746, 748 (N.D. Ill. 1997) (limited partnership formed under RULPA to operate railroad, which purpose was forbidden a limited partnership under the law of Illinois pursuant to which it was formed, rendered purported limited partnership a general partnership.).

48. *Cf.* KY. REV. STAT. ANN. § 362.411 (LexisNexis 2006) ("[A] limited partnership may carry out any business that a partnership without limited partners may carry on."); § 362.175(1) ("a partnership is an association of two (2) or more persons to carry on as co-owners a business for-profit . . .").

49. *See* ULPA § 104 cmt subsec. (b) (2001)

In a change from RULPA, ULPA provides a default rule that each limited partnership will have perpetual duration.<sup>50</sup>

ULPA § 105 provides that a limited partnership has “the powers to do all things necessary or convenient to carry on its activities,” then goes on to expand this general grant, stating that the powers include “the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by a breach of the partnership agreement or violation of a duty to the partnership.”<sup>51</sup> Referencing the power of the limited partnership to sue for injuries caused to it or to enforce the partnership agreement “is mentioned specifically to establish that the limited partnership itself has standing to enforce the partnership agreement.”<sup>52</sup> The other basis for this language is that it needed to be made express in order that it could be provided that it could not be varied in the partnership agreement.<sup>53</sup> ULPA § 105 has been modified in KyULPA to include as the basis upon which a limited partnership may bring suit against a partner “an actual or threatened injury to the limited partnership.”<sup>54</sup> As such, no partner can defend against an action brought by the limited partnership on the basis that it involves only a prospective breach of the partnership agreement or violation of a duty to the partnership.<sup>55</sup>

With respect to each domestic limited partnership,<sup>56</sup> KyULPA will govern (i) relations among the partners, (ii) relations between the partners and the limited partnership, and (iii) the liability of a partner as a partner for an obligation of the limited partnership. On this last component it is important to note the limitation

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50. KY. REV. STAT. ANN. § 362.2-104(3) (LexisNexis 2006). This provision puts the limited partnership on a status equal to that of a corporation, § 271B.3-020(1), and a limited liability company, § 275.025(2). Cf. KY. REV. STAT. ANN. § 362.415(1)(e) (mandating that the certificate of limited partnership set forth “the latest date upon which the limited partnership is to dissolve.”).

51. KY. REV. STAT. § 362.2-105 (LexisNexis 2006); see also § 275.010. Cf. KY. REV. STAT. ANN. § 271B.3-020 (providing a “laundry list” of the powers of a corporation).

52. ULPA § 105 cmt. (2001). Compare *Bubbles & Bleach, LLC v. Becker*, No. 97 C 1320, 1997 WL 285938, at \*6 (N.D. Ill. May 23, 1997) (LLC not bound by arbitration clause in operating agreement), and *In re Am. Media Distribs., LLC*, 216 B.R. 486, 489-91 (Bankr. S.D.N.Y. 1998) (LLC is not a party to and therefore bankrupt LLC cannot assume operating agreement), with *Elf Atochem N.A., Inc. v. Jaffari*, 727 A.2d 286, 294 (Del. 1999) (LLC bound by choice of forum and arbitration clauses in operating agreement).

53. See KY. REV. STAT. ANN. § 362.2-110(2)(a) (LexisNexis 2006).

54. ULPA § 105 (2001), as modified in KyULPA, reads as follows:

A limited partnership has the powers to do all things necessary or convenient to carry on its activities, including the power to sue, be sued, and defend in its own name and to maintain an action against a partner for harm caused to the limited partnership by [a] an actual or threatened injury to the limited partnership, breach of the partnership agreement, or violation of a duty to the partnership.

See KY. REV. STAT. ANN. § 362.2-105 (LexisNexis 2006).

55. KY. REV. STAT. ANN. § 362.2-105 (LexisNexis 2006).

56. “Limited partnership” is a defined term in KY. REV. STAT. § 362.2-102(14) (LexisNexis 2006), and excludes a foreign limited partnership.

to partner liability as a partner;<sup>57</sup> this provision does not modify liabilities imposed under independent contracts or other law.<sup>58</sup> This governing law is not subject to modification by the partnership agreement.<sup>59</sup>

Law and equity supplement ULPA,<sup>60</sup> and interest will be determined in accordance with KRS § 362.010.<sup>61</sup> There has been added to the uniform language a non-uniform provision addressing the enforceability of agreements of limited partnership, which language is intended to place such agreement on even par with the limited liability company operating agreements.<sup>62</sup>

This provision, dealing with permissible names of limited partnerships, has been revised from the uniform language to track the provisions already in place in Kentucky for corporations and limited liability companies. Initially, any name must be distinguishable from any other name of record with the Kentucky Secretary of State.<sup>63</sup> Next, the name must include certain identifiers, and may not include certain terminology.

	Must Contain	May Not Contain
LP that is not an LLLP <sup>64</sup>	“limited” or “Ltd.” or “limited partnership” or “L.P.” or “LP”	“limited liability limited partnership” or “LLLP” or “L.L.L.P.”
LP that is an LLLP <sup>65</sup>	“limited liability limited partnership” or “LLLP” or “L.L.L.P.”	<i>Only</i> “limited partnership” or “L.P.” or “LP”

The name of a limited partnership organized under KyULPA may contain the name of any partner.<sup>66</sup> Assumed names remain governed by the assumed name

57. See KY. REV. STAT. ANN. § 362.2-303 (LexisNexis 2006) (liability shield of limited partners); § 362.2-404(3) (liability shield of general partners following an election of LLLP status); ULPA § 106 cmt. (2001).

58. See generally Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. REV. 417 (2006) [hereinafter Rutledge, *Holy Grail*].

59. See KY. REV. STAT. ANN. § 362.2-110(2)(b) (LexisNexis 2006); accord § 362.1-106(b).

60. KY. REV. STAT. ANN. § 362.2-107(1) (LexisNexis 2006). Cf. § 362.523.

61. KY. REV. STAT. ANN. § 362.2-107(2) (LexisNexis 2006); accord § 362.1-104(2).

62. KY. REV. STAT. ANN. § 362.2-107(3) (LexisNexis 2006); accord § 275.003. The same non-uniform language has been added to the Kentucky adoption of RUPA. See § 362.1-104(3).

63. KY. REV. STAT. ANN. § 362.2-108 (LexisNexis 2006); see also § 362.2-102(15) (definition of “name of record with the Secretary of State”); accord § 362.1-101(9). The “any name of record” includes the real name of any corporation, limited partnership, limited liability company, any name set forth on a registration as a limited liability partnership, see § 362.555, or Statement of Qualification, see § 362.1-1101, any fictitious name adopted for use in Kentucky, any reserved name, and any assumed name filed with the Secretary of State. It does not include trademark or service mark registrations, see § 365.571, or assumed name filings made by individuals.

64. KY. REV. STAT. ANN. § 362.2-108(2) (LexisNexis 2006). Under the prior law, the use of simply “L.P.” or “LP” was not acceptable as the identifier of a limited partnership. See § 362.403(1) (LexisNexis 1988).

65. KY. REV. STAT. ANN. § 362.2-108(3) (LexisNexis 2006).

statute<sup>67</sup> and not by KyULPA.<sup>68</sup> While the filing of a Certificate of Limited Partnership under a particular name will preclude the use of that name as the real, assumed, reserved, registered or fictitious name of another business entity in Kentucky, it does not preclude another use of that name by others.<sup>69</sup> With certain additional requirements, these name requirements apply as well to foreign limited partnerships authorized to transact business in Kentucky under KyULPA.<sup>70</sup>

ULPA § 109, dealing with name reservations, has been entirely rewritten in KyULPA to conform to practices and procedures already in place in Kentucky.<sup>71</sup> A foreign limited partnership applying for a certificate of authority to transact business<sup>72</sup> whose name is not distinguishable or does not meet the other statutory requirements may adopt a fictitious name and under that name qualify to and in fact transact business.<sup>73</sup>

KyULPA § 110, equivalent in function to KyRUPA § 103, details the place of the partnership agreement and its ability to modify the otherwise applicable default rules of ULPA. It begins by providing that except as limited by KyULPA § 110(b), the partnership agreement<sup>74</sup> shall govern “relations among the partners and between the partners and the partnership” and that where the

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66. KY. REV. STAT. ANN. § 362.2-108(1) (LexisNexis 2006). Cf. § 362.403(b) (prohibiting, subject to certain exceptions, the inclusion in the name of a limited partnership the name of a limited partner); § 362.050 (repealed 1988) (equivalent provision in Kentucky adoption of the ULPA (1916)).

67. KY. REV. STAT. ANN. § 365.015 (LexisNexis 2006). For a discussion of the amendments made to the assumed name statute in 2006 as they relate to limited partnerships and in general, see Maryellen B. Allen & Thomas E. Rutledge, *The 2006 Amendments to the Assumed Name Statute: The Ongoing Task of Modernization and Clarification*, 70 KY. BENCH & BAR 62 (May 2006) [hereinafter Allen & Rutledge, *Assumed Name*].

68. KY. REV. STAT. ANN. § 362.2-108(6) (LexisNexis 2006) (this provision is non-uniform).

69. KY. REV. STAT. ANN. § 362.2-108(7) (LexisNexis 2006); accord § 271B.4-010(6); § 275.100(6). Intellectual property protections in the form of trademark or service mark registrations may be appropriate. See also Allen & Rutledge, *Assumed Name*, supra note 67, at 63.

70. KY. REV. STAT. ANN. § 362.2-108(8) (LexisNexis 2006). Those additional limitations are set forth in § 362.2-905. Foreign limited partnerships remain capable, even after the adoption of KyULPA, of qualifying to transact business under KyRULPA. See § 362.497(1).

71. KY. REV. STAT. ANN. § 362.2-109 (LexisNexis 2006); accord § 362.1-115. This provision substantially is based on § 271B.4-020; § 275.105. However, the provision allowing the cancellation or renewal of a reservation, § 362.2-109(3), does not appear in the KyBCA or the KyLLCA.

72. KY. REV. STAT. ANN. § 362.2-902 (LexisNexis 2006).

73. KY. REV. STAT. ANN. § 362.2-905 (LexisNexis 2006). A fictitious name will constitute, for purposes of the assumed name act, the real name of the foreign limited partnership. See § 362.015(1)(c)(3); see also Allen & Rutledge, *Assumed Name*, supra note 67, at 63. Unlike the KyBCA, which requires delivery to the Secretary of State of a resolution of the board of directors of a foreign corporation seeking to adopt a fictitious name for use in Kentucky, see KY. REV. STAT. ANN. § 271B.15-060(1)(b) (LexisNexis 2006), no similar requirement applies to foreign limited partnerships.

74. The partnership agreement may be written or oral, may be implied from the facts, or may include a combination of written, oral and implied terms. KY. REV. STAT. ANN. § 362.2-102(17) (LexisNexis 2006).

partnership agreement does not otherwise provide, those relations shall be governed by KyULPA.<sup>75</sup> The provision then goes on to provide the other limits as to the degree to which the partnership agreement may modify certain of the otherwise applicable rules of ULPA. This exclusion was made because the provision both says too much and says too little. On the first point, the uniform language states an axiom of contract law - a contract does not impact the rights of persons who are strangers to the contract.<sup>76</sup> As for its deficiencies, it fails to define who are the “third parties” whose rights are being protected from restriction. Is the partnership, a legal entity, a party to the partnership agreement? What of persons who have express notice of the terms of the partnership agreement and who with that knowledge proceed to do business with the partnership?<sup>77</sup> What of the authorities granted the Secretary of State, the Attorney General, particular courts granted jurisdiction, and professional regulatory boards? The failure to incorporate ULPA § 110(b)(13) in KyULPA is not intended to be a substantive alteration. To the extent that it simply repeats an axiom of contract law, it is unnecessary. As for its lack of specificity, its absence does nothing to add to confusion, and principles of otherwise applicable law, such as contract and agency, will apply. Those limitations on the partnership agreement are that it may not:

- Vary the power of the limited partnership to sue, be sued or defend an action in its own name;<sup>78</sup>
- Vary the law applicable to the limited partnership;<sup>79</sup>
- Vary the requirements as to who may sign records on behalf of the limited partnership;<sup>80</sup>
- Vary the information that is required to be maintained under KRS 141.407 or unreasonably restrict the right to information available to general limited partners, it being made express, however, that the partnership agreement may provide a different location for the maintenance of the records, and reasonable limitations upon the

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75. KY. REV. STAT. ANN. § 362.2-110(1) (LexisNexis 2006). As such, in forming a limited partnership, even if there is no other conceptualization of the terms that will govern these relationships, there exists a “partnership agreement,” namely to be bound by the rules set forth in ULPA.

76. *See also* RUPA § 103 cmt 12 (1997) (“Although stating the obvious, subsection(b)(10) provides expressly that the rights of a third party under the Act may not be restricted by an agreement among the partners to which the third party has not agreed.”); *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky. Ct. App. 1985) (“It is the law in this jurisdiction that no stranger to a contract may sue for its breach unless the contract was made for his benefit.”).

77. *See generally* Robert R. Keatinge, *The Partnership Agreement and Third Parties: ReRULPA § 110(b)(13) v. RUPA § 103(b)(10)*, 37 SUFFOLK U. L. REV. 873 (2004).

78. KY. REV. STAT. ANN. § 362.2-110(2)(a) (LexisNexis 2006); *see also* § 362.2-105.

79. KY. REV. STAT. ANN. § 362.2-110(2)(b) (LexisNexis 2006); *see also* § 362.2-106.

80. KY. REV. STAT. ANN. § 362.2-110(2)(c) (LexisNexis 2006); *see also* § 362.2-204.

availability of use of records and appropriate remedies for breach of any reasonable restrictions on that use;<sup>81</sup>

- Eliminate a partner's duty of loyalty, but the partnership agreement may identify particular activities that do not violate the duty of loyalty, provided that such is not manifestly unreasonable, and may specify the voting threshold for the authorization or ratification, after full disclosure of all material facts, of a transaction that otherwise violate the duty of loyalty;<sup>82</sup>
- Unreasonably reduce the duty of care;<sup>83</sup>
- Eliminate the obligations of good faith and fair dealing, but may prescribe the standards by which the performance of these obligation will be measured provided that those defined standards may not be manifestly unreasonable;<sup>84</sup>
- Vary the power of a general partner to dissociate, except that it may be required that the notice of withdrawal be in a record;<sup>85</sup>
- Vary the right of a court to decree dissolution of the limited partnership in the circumstances described in the statute;<sup>86</sup>
- Vary the requirement that the business of the limited partnership be wound up on the terms defined in the statute;<sup>87</sup>
- Unreasonably restrict the right to bring an action;<sup>88</sup> and
- Restrict the right of a partner to consent to a merger or conversion or restrict the consent of a general partner to an amendment to the certificate of limited partnership deleting the election to be a limited liability limited partnership.<sup>89</sup>

The different formulations for the ULPA § 110(b) limitations, and their individual applications, have material consequences to the degree to which the partnership agreement may affect the applicable rules of ULPA - there is an uneven minimum "floor" to the partnership relationship, namely:

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81. KY. REV. STAT. ANN. § 362.2-110(2)(d) (LexisNexis 2006); *see also* § 362.2-111; § 362.2-304; § 362.2-407. The reference in this subparagraph to § 141.407 is a drafting mistake. § 141.407 addresses allowable income tax credits. The correct reference should be to § 362.2-111, information that must be maintained by a limited partnership.

82. KY. REV. STAT. ANN. § 362.2-110(2)(e) (LexisNexis 2006); *see also* § 362.2-408. With respect to the obligation of full disclosure in order for the authorization or ratification of an action otherwise involving a conflict of interest, see RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

83. KY. REV. STAT. ANN. § 362.2-110(2)(f) (LexisNexis 2006); *see also* § 362.2-408(3).

84. KY. REV. STAT. ANN. § 362.2-110(2)(g) (LexisNexis 2006); *see also* § 362.2-305(2); § 362.2-408(4).

85. KY. REV. STAT. ANN. § 362.2-110(2)(h) (LexisNexis 2006); *see also* § 362.2-604(1).

86. KY. REV. STAT. ANN. § 362.2-110(2)(i) (LexisNexis 2006); *see also* § 362.2-802.

87. KY. REV. STAT. ANN. § 362.2-110(2)(j) (LexisNexis 2006); *see also* § 362.2-803.

88. KY. REV. STAT. ANN. § 362.2-110(2)(k) (LexisNexis 2006); *see also* § 362.2-1001; § 362.2-1005.

89. KY. REV. STAT. ANN. § 362.2-110(2)(l) (LexisNexis 2006); *see also* § 362.2-1110(1); § 362.2-1110(2).

ULPA § 110(b)	Scope of Limitation	of ULPA §
1	May not vary	105
2	May not vary	106
3	May not vary	204
4	May not vary or may not unreasonably restrict	111, 304, 407
5	May not eliminate	408
6	May not unreasonably reduce	408(3)
7	May not eliminate, but may prescribe measurement standards that are not manifestly unreasonable	305, 408
8	May not vary	604
9	May not vary	802
10	May not vary	803
11	May not unreasonably restrict	1001, 1005
12	May not restrict	1110(1), 1110(2)

These various levels of limitation, for example what is the distinction between “unreasonably reduce” and “unreasonably restrict,” are not defined in ULPA, and the commentary provides scant guidance as to what was intended.

What appears in the uniform act as ULPA § 110(b)(13) has not been carried over into KyULPA.<sup>90</sup> A new subsection has been added to this section which, in non-uniform terms, provides specific enforcement for statute of fraud provisions set forth in partnership agreements.<sup>91</sup>

ULPA § 111 contains a detailed listing of records that are to be maintained by the limited partnership.<sup>92</sup> The records are to be maintained at the designated office,<sup>93</sup> but there is flexibility under a non-uniform addition to ULPA § 110 permitting the records to be maintained elsewhere.<sup>94</sup> It is important to note that

90. *Accord* KY. REV. STAT. ANN. § 362.1-103(2) (LexisNexis 2006) (not including in KyRUPA RUPA § 103(b)(10)). *See generally* Robert R. Keatinge, *The Partnership Agreement and Third Parties*, *supra* note 77.

91. *See* KY. REV. STAT. ANN. § 362.2-110(3) (LexisNexis 2006); *accord* § 275.015(14); § 362.1-103(3).

92. KY. REV. STAT. ANN. § 362.2-111 (LexisNexis 2006). The limitations upon the degree to which the partnership agreement may depart from KyULPA, § 362.2-110(2), contains, as it relates to information rights, a glaring error: § 362.2-110(2)(d) makes reference to § 141.407 where there clearly should be a reference to § 362.2-111 instead.

93. Defined at KY. REV. STAT. ANN. § 362.2-102(5), the designated office is identified in the certificate of limited partnership. *See also* ULPA § 114 (2001), KY. REV. STAT. ANN. § 362.2-114 (LexisNexis 2006).

94. KY. REV. STAT. ANN. § 362.2-110(2)(d) (LexisNexis 2006) (“[T]he partnership agreement may provide a different location for the maintenance of the books and records . . .”).



the partnership is required to maintain these records<sup>95</sup> and that they differ from those required under KyRULPA.<sup>96</sup> Note that these are the records that must be required as dictated by the limited partnership act; other law may require the maintenance of other records.<sup>97</sup>

A partner dealing with the partnership other than as a partner will be on an equal footing with a stranger who is dealing with the partnership. In KyULPA the provision has been modified to expand the various relationships a partner may have with the partnership that fall within the scope of the protections afforded by this provision.<sup>98</sup>

ULPA § 113 provides that a person<sup>99</sup> may be both a general and a limited partner, and provides that in each capacity he or she is governed by the rules applicable to that capacity.<sup>100</sup>

Unlike other business organization forms, which are required to maintain only a single office in Kentucky, that being the registered office, limited partnerships are obligated to maintain both a registered office and a designated office.<sup>101</sup> There is no requirement that either of these offices be that at which the partnership actually maintains its business activities. In contrast, foreign limited partnerships qualify to transact business in Kentucky are required to maintain only a registered office in Kentucky.<sup>102</sup> The registered agent must be an

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95. KY. REV. STAT. ANN. § 362.2-110(2)(d) (LexisNexis 2006) (“A limited partnership *shall* maintain . . .”) (*emphasis added*); ULPA § 111. The equivalent provision under KyRULPA is KY. REV. STAT. ANN. § 362.409.

96. Compare KY. REV. STAT. ANN. § 362.2-111 (LexisNexis 2006), with § 362.409.

97. For example, a partnership that is required to file a Form 1065 must furnish each partner with a Schedule K-1 that provides the partner’s distributive share of partnership income, gain, loss, deduction, or credit and any additional information that is necessary to enable the partner to determine the correct income tax treatment of a partnership item (Temporary Reg. §§ 1.6031(b)-1T(a)(3)). The Schedule K-1 must be furnished to each partner by the partnership on or before the due date of the partnership return (Form 1065) for the tax year (determined without regard to extensions). The partnership’s tax return is due on or before the 15th day of the fourth month following the end of the partnership’s tax year. For a calendar-year partnership, the partnership’s Form 1065 is due April 15 – the same date by which most individual partners must file their personal tax returns. See also *Starting a Business and Keeping Records*, Publication 583, Internal Revenue Service (Jan. 2007), available at <http://www.irs.gov/pub/irs-pdf/p583.pdf>.

98. ULPA § 112 has been modified in KyULPA, KY. REV. STAT. ANN. § 362.2-112 (LexisNexis 2006), as follows:

A partner may lend money to, borrow money from, act as a surety, guarantor or endorser for, guarantee or assume one or more specific obligations of, provide collateral for and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner.

The non-uniform language is drawn from Delaware, DEL. CODE ANN. tit. 6 § 15-119 (2006); a similar revision has been made in KyRUPA. See KY. REV. STAT. ANN. § 362.1-404(6) (LexisNexis 2006); see also § 362.413.

99. A term defined at KY. REV. STAT. ANN. § 362.2-102(18) (LexisNexis 2006).

100. KY. REV. STAT. ANN. § 362.2-113 (LexisNexis 2006).

101. KY. REV. STAT. ANN. § 362.2-114(1) (LexisNexis 2006); see also § 362.407(1); § 362.415(1)(b) (maintenance of registered office and designated office under KyRULPA).

102. KY. REV. STAT. ANN. § 362.2-114(2) (LexisNexis 2006).

individual resident in Kentucky, a domestic corporation, LLC or non-profit corporation, or a foreign corporation, LLC or non-profit corporation authorized to transact business in Kentucky, any of which must have a business address which is identical with the registered office.<sup>103</sup> Note that a limited partnership may not serve as the registered agent. The appointment of a registered agent, unless otherwise signing the record making that appointment, must be accepted in writing.<sup>104</sup> Non-uniform provisions address the change of the designated office, the registered office or the agent for service of process and the resignation of the registered agent and office.<sup>105</sup> The agent for service of process is the agent of the appointing limited partnership or foreign limited partnership for any process, notice or demand required or permitted by law.<sup>106</sup> Service upon the registered agent is not the exclusive means by which service may be made, and other legally available options remain viable.<sup>107</sup>

Partners in a limited partnership are expressly authorized to act without a meeting and to act by proxy.<sup>108</sup> Note that in acting without a meeting there is no requirement of a writing to record any action taken and that there is no requirement of unanimity of the partners participating.<sup>109</sup> Such requirements as to formality and procedures for meetings of the partners may be set forth in the partnership agreement.<sup>110</sup> However, the appointment of a proxy for a partner must be in a signed record. A partnership agreement may eliminate the requirement that the designation of a proxy be in writing, eliminate voting by proxy or actions other than at a physical meeting, or otherwise alter these procedural rules.

The Secretary of State is authorized to create certain forms and has the authority to make their use mandatory.<sup>111</sup> Other forms may be created and made available, but their use cannot be made mandatory.<sup>112</sup>

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103. KY. REV. STAT. ANN. § 362.2-114(3) (LexisNexis 2006); *accord* § 271B.15-070(1)(b); § 275.415(2); § 362.407(1)(b); § 362.1-117(1)(b).

104. KY. REV. STAT. ANN. § 362.2-114(4) (LexisNexis 2006). This provision is non-uniform. *Accord* § 271B.15-070(2); § 275.415(3); § 362.407(2); § 362.1-117(2).

105. *See* KY. REV. STAT. §§ 362.1-115; 362.2-116 (LexisNexis 2006); *accord* § 271B.15-080(1); § 271B.15-090(1)-(3); § 275.420(1); § 275.425(1)-(3).

106. KY. REV. STAT. ANN. § 362.2-117(1) (LexisNexis 2006); *accord* § 271B.15-100(1); § 275.130(1); § 362.1-120(1).

107. KY. REV. STAT. ANN. § 362-117(6) (LexisNexis 2006); *accord* § 271B.15-100(4); § 275.130(3); § 362.1-120(4); *see also* KY. R. CIV. P. 4.04(4).

108. KY. REV. STAT. ANN. § 362.2-118 (LexisNexis 2006); *accord* § 271B.7-220.

109. *Cf.* KY. REV. STAT. ANN. § 271B.7-040(3) (LexisNexis 2002) (contemplating a writing to record any action taken outside of a meeting); § 271B.8-210 (allowing directors to act by consent only when the action is unanimous); § 271B.7-040(2) (allowing, absent provision in articles of incorporation allowing for shareholders to act by a voting threshold of not less than 80% of the shares issued and outstanding, the shareholders to act only by unanimous written consent).

110. ULPA § 118 cmt. (2001).

111. KY. REV. STAT. ANN. § 362.2-119(1)-(2) (LexisNexis 2006). This provision is entirely non-uniform and is based on § 275.050 (LexisNexis 2002); *see also* § 271B.1-210; § 362.1-105(10)-(11) (LexisNexis 2002). Note that while § 362.2-119 contemplates forms for change of

Filings made under KyULPA are effective upon filing by the Secretary of State, except as there may be a delayed effective date, which the late effective date may be no more than ninety days after the date of delivery to the Secretary of State.<sup>113</sup> While certain limited partnership filings made with the Secretary of State are to be made as well with a county clerk, the document's effectiveness is not diminished by a failure to do so.<sup>114</sup>

There then follow a series of provisions dealing with filing mechanics, the registration of foreign limited partnerships, certification of documents filed with the Secretary of State, and filing fees.<sup>115</sup> These provisions are all non-uniform from ULPA and are based upon provisions in effect in the KyLLCA.<sup>116</sup>

#### *B. KyULPA Article 2 - Formation, Certificate of Limited Partnership and Other Filings*

A limited partnership is formed by filing a certificate of limited partnership with the Secretary of State.<sup>117</sup> The certificate must set forth:

- The name of the limited partnership (which name must comply with Ky. Rev. Stat. Ann. § 362.2-108);
- The street address of the initial designated office and the street address of the initial registered office and the name of the initial registered agent<sup>118</sup> at that office; and
- The name and mailing address of each general partner.<sup>119</sup>

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the designated office, registered office, and agent for service of process as being optional, under § 362.2-115(4) their use is mandatory.

112. KY. REV. STAT. ANN. § 362.2-119(3) (LexisNexis 2006).

113. This non-uniform provision is based on KY. REV. STAT. § 271B.1-230(1)-(2); § 275.060; *accord* § 362.1-110(2).

114. KY. REV. STAT. ANN. § 362.2-120 (LexisNexis 2006). This non-uniform provision is based on KY. REV. STAT. ANN. § 271B.1-230(3) (LexisNexis 2002); § 275.060(3).

115. KY. REV. STAT. ANN. § 362.2-121 (LexisNexis 2006); § 362.2-122; § 362.2-123 § 362.2-124; § 362.2-125.

116. *See* KY. REV. STAT. ANN. § 275.045 (LexisNexis 2002); § 275.055; § 275.070; § 275.080; § 275.110; *see also* § 271B.1-200; § 271B.1-220; § 271B.1-250; § 271B.1-270; § 271B.4-030; KY. REV. STAT. ANN. § 362.1-108 (LexisNexis 2006); § 362.1-109; § 362.1-111; § 362.1-113; § 362.1-116.

117. KY. REV. STAT. ANN. § 362.2-201(a) (LexisNexis 2006). The effective time and date of the certificate is determined by § 362.2-120.

118. At times KyULPA uses the term "agent for service of process," *e.g.*, KY. REV. STAT. ANN. §§ 362.2-114(1)-(2) (LexisNexis 2006); §§ 362.2-115(1), (4), while at other times "registered agent," *e.g.*, §§ 362.2-114(3)-(4); §§ 362.2-115(3)-(4), is used. The terms are interchangeable, and no distinction is meant by the use of one label or the other.

119. KY. REV. STAT. ANN. §§ 362.2-201(1)(a)-(d) (LexisNexis 2006).

The certificate may set forth any other desired information.<sup>120</sup> Also, if the limited partnership desires to be a limited liability limited partnership, it must so declare in the certificate of limited partnership.<sup>121</sup> The certificate of limited partnership must be accompanied by a statement of the initial registered agent consenting to serve as such.<sup>122</sup> The certificate of limited partnership must be signed by each general partner named therein.<sup>123</sup> ULPA contains a provision requiring only substantial compliance with the requirements for the contents of a certificate of limited partnership.<sup>124</sup> In light of the minimal requirements required as to the contents of a certificate of limited partnership, this provision has not been carried forward in KyULPA, and actual compliance with the requirements of the statute will be expected of those forming a limited partnership.<sup>125</sup> The provision goes on to address the relative weight of the certificate of limited partnership versus the partnership agreement. As to third parties who reasonably and to their detriment rely on the filed record, the filed record controls, but as to partners and their transferees, the partnership agreement controls over the public record.<sup>126</sup>

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120. KY. REV. STAT. ANN. § 362.2-201(1)(e) (LexisNexis 2006). Note, however, that the additional information does not, by its filing with the Secretary of State, constitute notice to third parties, *see* § 362.2-103(3), and additional information may not be contained in the Certificate of Limited Partnership with the objective of overriding the limitations upon the partnership agreement set forth in § 362.2-110(2).

121. KY. REV. STAT. ANN. § 362.2-201(2) (LexisNexis 2006). This provision is non-uniform. Under ULPA § 201(1)(d), the certificate of limited partnership was required to state “whether the limited partnership is a limited liability limited partnership.” The movement and rewording of this declaration is not intended as a change in the law, but rather to highlight the option of making the election and to clarify that the choice must be made by an affirmative statement. If limited liability limited partnership status is not elected, the liability of the general partners is determined under KY. REV. STAT. ANN. § 362.2-404(1) (LexisNexis 2006). If limited liability limited partnership status is elected, the liability of the general partners is determined under § 362.2-404(3). In the absence of an affirmative statement, the limited partnership will not be a limited liability limited partnership.

122. KY. REV. STAT. ANN. § 362.2-201(5) (LexisNexis 2006). This provision conforms to KY. REV. STAT. ANN. § 271B.5-010(2) (LexisNexis 2002); § 275.025(5); § 361.407(2).

123. KY. REV. STAT. ANN. § 262.2-204(1)(a) (LexisNexis 2006).

124. ULPA § 201(c) (2001) (“If there has been substantial compliance with subsection (a), subject to Section 206(c) a limited partnership is formed when the [Secretary of State] files the certificate of limited partnership.”).

125. Proper payment of the filing fee is a prerequisite to the filing of a certificate of limited partnership or any other filing made with the office of the Secretary of State. KY. REV. STAT. ANN. § 362.2-122(1) (LexisNexis 2006); *see also* 30 KY. ADMIN. REGS. 1:050(1) (2006) (“Filing fees shall be paid when a document is filed in the Office of the Secretary of State.”). Limited partnerships are statutory creatures that do not exist at common law, and may be formed only by complying with the applicable statutory requirements. *See* *Saulnier v. Fanaras Enters., Inc.*, 618 A.2d 841, 843 (N.H. 1992); *Dominion Nat’l Bank v. Sundowner Joint Venture*, 436 A.2d 501, 507-08 (Md. 1981). *But see* *Winter v. Beale, Lynch & Co.*, 603 N.Y.S.2d 846 (N.Y. App. Div. 1993) (Carro, J., dissenting) (failure to record a limited partnership affects only the rights of third parties, but does not similarly affect the rights of the partners as to one another).

126. KY. REV. STAT. ANN. § 362.2-201(4) (LexisNexis 2006). *Cf.* KY. REV. STAT. ANN. § 271B.2-060(2) (LexisNexis 2002) (bylaws may contain any provision not inconsistent with law or the articles of incorporation).

A certificate of limited partnership may be amended as well as restated, and a certificate must be amended upon:

- The admission of a new general partner;
- The dissociation of a general partner; or
- The appointment of a person to wind up the limited partnership.<sup>127</sup>

Each general partner is under a personal obligation to see that the information in the certificate of limited partnership is and remains current and accurate.<sup>128</sup> Articles of Correction filed with respect to a certificate of limited partnership, while generally relating back to the date of the original filing, do not relate back for purposes of constructive notice of the contents of the certificate as corrected or as to persons who have relied upon the information set forth in the certificate prior to its correction and who would be adversely affected by the correction.<sup>129</sup>

The notices filed upon the dissolution of a KyULPA limited partnership differ from those existing under existing corporate and LLC law. Initially, at the time of dissolution, the Certificate of Limited Partnership may need to be amended to make of record that a person other than a general partner has been appointed to oversee the winding up of the limited partnership's activities.<sup>130</sup> At the end of the winding up process, there is then delivered a Statement of Cancellation setting forth the name of the limited partnership, the date of the filing of its initial Certificate of Limited Partnership, and such other information as is determined appropriate.<sup>131</sup> This process differs from that under the corporate and LLC acts under which Articles of Dissolution are filed at the beginning of the winding up process, and there is no public filing indicating that the winding up has been completed.<sup>132</sup> This filing must be signed by the person so named.<sup>133</sup>

The provisions dealing with who must sign various filings made by or on behalf of the limited partnership are addressed in an integrated provision. The initial Certificate of Limited Partnership must be signed by each general partner, while any amendment designating an additional general partner must be signed by that new general partner.<sup>134</sup> An amendment to a Certificate of Limited Partnership by which the partnership either elects or terminates an election to be

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127. KY. REV. STAT. ANN. §§ 362.2-202(2)(a)-(c) (LexisNexis 2006).

128. KY. REV. STAT. ANN. § 362.2-202(3) (LexisNexis 2006). As this provision is not listed in ULPA § 110(b), presumably it could be restricted or eliminated in the partnership agreement. However, this is at best a rather questionable reading.

129. KY. REV. STAT. ANN. § 362.2-207(3) (LexisNexis 2006). Cf. RULPA § 603 (1985); KY. REV. STAT. ANN. § 362.427.

130. KY. REV. STAT. ANN. § 362.2-202(2)(c) (LexisNexis 2006).

131. KY. REV. STAT. ANN. § 362.2-203 (LexisNexis 2006).

132. Cf. KY. REV. STAT. ANN. § 271B.14-030 (LexisNexis 2002 & Supp. 2006); § 271B.14-050; § 275.315; § 275.300.

133. KY. REV. STAT. ANN. § 362.2-204(1)(d) (LexisNexis 2006).

134. KY. REV. STAT. ANN. §§ 362.2-204(1)(a), (c) (LexisNexis 2006).

a limited liability limited partnership must be signed by all general partners.<sup>135</sup> Certain other amendments need be signed only by one general partner.<sup>136</sup> Except where a general partner has dissociated by reason of death or incompetency, or there has been filed a Statement of Dissociation with respect to that general partner,<sup>137</sup> the Amendment to the Certificate of Limited Partnership recording the dissociation of that general partner needs to be as well signed by that dissociated general partner.<sup>138</sup> Filings made by a foreign limited partnership must be signed by at least one general partner.<sup>139</sup> Legal action to compel the execution of the document that needs to be signed may be brought in the circuit court in which the limited partnership maintains its registered office, and the court may order either that the responsible person execute the record or that the Secretary of State accept the document without signature.<sup>140</sup> The statute defines to whom the Secretary of State should return copies of filed documents.<sup>141</sup> A non-uniform provision addresses the filing of corrections to documents already filed.<sup>142</sup> There may exist personal liability with respect to filed documents containing information that was incorrect at the time of filing or that became incorrect with the passage of time and for which corrective filings have not been made.<sup>143</sup>

A Certificate of Existence for a domestic limited partnership, or a Certificate of Authorization for a foreign limited partnership, may be issued by the Secretary of State. In contrast with the declarations made in Certificates of Existence/Qualification under the KyBCA or the KyLLCA, the Secretary of State certifies that the last due annual report has been “filed” as contrasted with having been “delivered.”<sup>144</sup>

In a change from the practice under KyRULPA, limited partnerships governed by KyULPA and foreign limited partnerships qualified to transact business in Kentucky under KyULPA are required to file an annual report with the Secretary of State.<sup>145</sup> This requirement will apply as well to each limited partnership formed under KyRULPA or predecessor limited partnership law that

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135. KY. REV. STAT. ANN. § 362.2-204(1)(b) (LexisNexis 2006).

136. KY. REV. STAT. ANN. § 362.2-204(1)(e) (LexisNexis 2006).

137. KY. REV. STAT. ANN. § 362.2-605(4) (LexisNexis 2006).

138. KY. REV. STAT. ANN. § 362.2-204(1)(e)(3) (LexisNexis 2006).

139. KY. REV. STAT. ANN. § 362.2-204(1)(m) (LexisNexis 2006).

140. KY. REV. STAT. ANN. § 362.2-205 (LexisNexis 2006).

141. KY. REV. STAT. ANN. § 362.2-206 (LexisNexis 2006).

142. KY. REV. STAT. ANN. § 362.2-207 (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 275.065; § 271B.1-240 (LexisNexis 2002). As of this writing, the Secretary of State's office is beta testing a system for electronic filings. These provisions afford the Secretary of State's office the capacity, but not the obligation, to accept electronic filings. *See also* KY. REV. STAT. ANN. § 14.105 (LexisNexis 2002); KY. REV. STAT. ANN. § 362.1-108(3) (LexisNexis 2006).

143. KY. REV. STAT. ANN. § 362.2-208(1) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.1-290(1) (LexisNexis 2002); § 271B.1-290(2); § 275.090(1); § 275.290(2).

144. KY. REV. STAT. ANN. §§ 362.2-209(2)(d); 362.2-209(3)(d) (LexisNexis 2006). *Cf.* KY. REV. STAT. ANN. § 271B.1-280(2)(d) (LexisNexis 2002); § 275.085(2)(e).

145. KY. REV. STAT. ANN. § 362.2-210(1) (LexisNexis 2006).

by voluntary election becomes subject to KyULPA. The annual report will require each limited partnership to set forth:

- Its name and jurisdiction of organization;
- For domestic limited partnerships, the street address of the designated office;
- For foreign limited partnerships, the street address of its principal office; and
- The registered office and the name of the registered agent at that office.<sup>146</sup>

A change in the designated or registered office, or in the registered agent, will be accomplished by a separate filing and not by means of amending the annual report.<sup>147</sup> Changes in the general partners need to be disclosed by an amendment to the certificate of limited partnership and are not made of record in the annual report.<sup>148</sup>

A limited partnership that does not file its annual report within sixty days of the due date<sup>149</sup> is subject to administrative dissolution.<sup>150</sup> This non-uniform provision conforms to existing law under the KyBCA and KyLLCA, as well as law adopted for KyRUPA limited liability partnerships.<sup>151</sup> It should be noted that upon administrative dissolution, the limited partnership “continues in existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs.”<sup>152</sup> A limited partnership that has been administratively dissolved may apply for reinstatement, which reinstatement, if granted, will relate back to the original administrative dissolution.<sup>153</sup> A refusal by the Secretary of State to reinstate a limited partnership may be appealed.<sup>154</sup> The revocation of a certificate of authority granted a foreign limited

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146. KY. REV. STAT. ANN. § 362.2-210(1)(a)-(c) (LexisNexis 2006). The filing fee for the annual report is \$15.00. § 362.2-122(1)(t); *accord* KY. REV. STAT. ANN. § 271B.1-220(s) (LexisNexis 2002); § 275.055(u).

147. KY. REV. STAT. ANN. § 362.2-115(4) (LexisNexis 2006); *see also* § 362.2-210(4); *accord* KY. REV. STAT. ANN. § 275.040 (LexisNexis 2002); § 275.120.

148. KY. REV. STAT. ANN. § 362.2-202(2) (LexisNexis 2006).

149. *See* KY. REV. STAT. ANN. § 362.2-210(3) (LexisNexis 2006) (annual report is due by June 30 of the calendar year after which the limited partnership is formed and by June 30 of each year thereafter). For these purposes, the election by an existing KyRULPA or pre-KyRULPA partnership to be governed by KyULPA will constitute its date of formation.

150. KY. REV. STAT. ANN. § 362.2-809(1)(a) (LexisNexis 2006).

151. *See* KY. REV. STAT. ANN. § 271B.14-200 (LexisNexis 2002 & Supp. 2006); § 271B.14-210; § 275.295.

152. KY. REV. STAT. ANN. § 362.2-809(4) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.14-210(3) (LexisNexis 2002 & Supp. 2006); § 275.300(2).

153. KY. REV. STAT. ANN. § 362.2-810(3) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.14-220(3) (LexisNexis 2002 & Supp. 2006); § 275.295(3)(c).

154. KY. REV. STAT. ANN. § 362.2-811(2) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. §§ 271B.14-230 (LexisNexis 2002); § 275.450.

partnership<sup>155</sup> results in the revocation of its authority to transact business in Kentucky.<sup>156</sup> The revocation of the certificate of authority may be appealed.<sup>157</sup> Absent a successful appeal, a revocation is not subject to cure. Rather, a new application for certificate of authority must be filed, and for the period between the revocation of the Certificate of Authority and the issuance of a new Certificate of Authority, the foreign limited partnership was not qualified to transact business in Kentucky.

### C. *KyULPA Article 3 - Limited Partners*

A person becomes a limited partner (i) as provided in the partnership agreement, (ii) pursuant to a merger or conversion, or (iii) with the approval of all partners (both limited and general).<sup>158</sup> This is the same rule that applies under KyRULPA.<sup>159</sup> Not being referenced in ULPA § 110(b), the partnership agreement may provide other rules for admission of a limited partner, a fact contemplated by KRS § 362.2-301(1).

A limited partner, in that capacity, has no authority to serve as an agent of and bind the limited partnership.<sup>160</sup> However, this provision does not preclude one who is a limited partner from acting as an agent of the limited partnership. Such authority may be afforded them in the partnership agreement or by a specific delegation of authority by the limited partnership.<sup>161</sup> A general partner who is as well a limited partner has the agency authority of a general partner.<sup>162</sup>

Limited partners, as such, are afforded limited liability, and are not liable, including by reason of “indemnification, contribution, assessment or otherwise,”

155. In addition to failure to file a required annual report, a foreign limited partnership may have its certificate of authority revoked if (i) it is without an registered office or agent for sixty days, (ii) it fails to advise the Secretary of State of certain changes in the registered office or agent, or (iii) the Secretary of State receives notice of the disappearance of the limited partnership by reason of a merger. *See* KY. REV. STAT. ANN. §§ 362.2-906(1)-(4) (LexisNexis 2006).

156. KY. REV. STAT. ANN. § 362.2-907(3) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.15-310(3) (LexisNexis 2002); § 275.445(3).

157. KY. REV. STAT. ANN. § 362.2-907(6)-(8) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.15-310 (LexisNexis 2002); § 275.450.

158. KY. REV. STAT. ANN. §§ 362.2-301(1)-(3) (LexisNexis 2006).

159. *See* KY. REV. STAT. ANN. § 362.433 (LexisNexis 2002); § 362.531.

160. KY. REV. STAT. ANN. § 362.2-302 (LexisNexis 2006). As noted in the Official Comment to ULPA § 302:

In this respect a limited partner is analogous to a shareholder in a corporation; status as owner provides neither the right to manage nor a reasonable appearance of that right.

*See also* KY. REV. STAT. ANN. § 275.135(2) (LexisNexis 2002). A limited partner who without authority acts to bind the limited partnership will have violated the warranty of authority and is exposed to personal liability on the obligation created. *See* RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006); *see also* RESTATEMENT (SECOND) OF AGENCY §§ 140, 219 (1958).

161. *See* ULPA § 302 cmt. (2001).

162. KY. REV. STAT. ANN. § 362.2-113 (LexisNexis 2006); *see also* ULPA § 302 cmt. (2001).



for the debts and obligations of the limited partnership.<sup>163</sup> This limited liability is not lost if the limited partner “participates in the management and control of the limited partnership.”<sup>164</sup> This is a material departure from the prior law under which a limited partner who participated in the management and control of the limited partnership did so at the risk of waiving the limited liability otherwise afforded to them.<sup>165</sup> As is always the case when considering a business entity that affords its members limited liability it is important to keep in mind the outer limits of that protection.<sup>166</sup>

A limited partner, upon ten days notice in a record, may inspect and copy at the designated office of the limited partnership the information required to be maintained.<sup>167</sup> The limited partner is not required to set forth any purpose for seeking this information.<sup>168</sup> Assuming a series of conditions are satisfied, a limited partner is as well entitled to receive from the limited partnership “true and full information regarding the state of the activities and financial condition . . . and other information regarding the activities of the limited partnership.”<sup>169</sup> Those conditions are:

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163. KY. REV. STAT. ANN. § 362.2-303 (LexisNexis 2006). The terms “indemnification” and “assessment” are not uniform, and were added to KyULPA to conform to KY. REV. STAT. ANN. § 362.220(2) (LexisNexis 2002); *see also* KY. REV. STAT. ANN. § 326.1-306(3) (LexisNexis 2006).

164. KY. REV. STAT. ANN. § 362.2-303 (LexisNexis 2006).

165. *See* KY. REV. STAT. ANN. § 362.437 (LexisNexis 2002). Under traditional limited partnership law, limited partners were shielded from general liability for the debts and obligations for the limited partnership only so long as they did not take part in the active management of partnership. *See, e.g.*, KY. REV. STAT. ANN. § 362.437(1) (LexisNexis 2002); *see also* § 362.437(4). Partnership law, over the course of its development from the original 1916 Uniform Act through RULPA (1985), has increased the scope of activities in which limited partnership may engage without foregoing limited liability. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, *PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS* § 23:1 (2005). Still, the application of these numerous safe harbor provisions has in many particular cases been a question of fact, and therefore limited broad reliance thereon. *See id.* at § 23:4; *compare* *Alzado v. Blinder, Robinson & Co.*, 752 P. 2d 544, 552-53 (Colo. 1988) (control of expense distribution formula of partnership did not give limited partner control such that it could be liable to partnership creditors), *with* *Brooke v. M.T. Hood Meadows Or., Ltd.*, 725 P.2d 925, 929 (Or. Ct. App. 1986) (control by limited partner over distribution of limited partnership’s profits constituted control), *aff’d on reh’g*, 732 P.2d 36 (Or. Ct. App. 1986). *See generally*, Annotation, *Liability of Limited Partner Arising from Taking Part in Control of Business under Uniform Limited Partnership Act*, 79 A.L.R. 4th 427 (1990); *see also* ULPA § 303 cmt. (2001). With respect to the control rule and criticism thereof, *see generally* Joseph Basile, Jr., *Limited Liability for Limited Partners: An Argument for the Abolition of the Control Rule*, 38 VAND. L. REV. 1199 (1985); George W. Coleman & David A. Weatherbie, *Special Problems in Limited Partnership Planning*, 30 SW. L.J. 887, 897-909 (1976); Alan Feld, Comment, *The “Control” Test for Limited Partnerships*, 82 HARV. L. REV. 1471 (1969).

166. *See generally* Rutledge, *Holy Grail*, *supra* note 58.

167. KY. REV. STAT. ANN. § 362.2-304 (LexisNexis 2006); *see also* § 362.2-111 (LexisNexis 2006).

168. KY. REV. STAT. ANN. § 362.2-304(1) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.16-020(1) (LexisNexis 2002); § 275.185(2).

169. KY. REV. STAT. ANN. § 362.2-304 (LexisNexis 2006).

- The disclosure will be during regular business hours and at a reasonable location specified by the limited partnership;
- The information must be sought “for a purpose reasonably related to the partner’s interest as a limited partner”;
- The demand for the information must be in a record received by the limited partnership;
- The demand must describe “with reasonable particularity the information sought and the purpose for seeking the information”;
- The information sought must be “directly connected” to the limited partner’s purpose; and
- The request must be “just and reasonable.”<sup>170</sup>

The “just and reasonable” requirement modifies both the limited partner’s request as well as the information provided in response thereto.<sup>171</sup> Upon receipt of a request for information, the limited partnership is obligated to respond, stating either what information it will provide and when, or its reason for declining to provide any of the information sought.<sup>172</sup>

A dissociated limited partner has continuing information rights, but only for information pertaining to the period they were a limited partner.<sup>173</sup> The information must be sought utilizing the same procedures as those applicable to an incumbent limited partner, with the added obligation that they act in good faith.<sup>174</sup>

A limited partnership has the right to impose reasonable restrictions upon the use of information provided to limited partners, and should there be a question as to whether a proposed limitation is reasonable, the limited partnership will bear the burden of proof of demonstrating that they are so.<sup>175</sup> Should the incumbent or former limited partner seek to inspect information through an agent, that agent is equally bound by those limitations on use.<sup>176</sup> The limited partnership has the right to recover from either a current or a former limited partner for the

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170. KY. REV. STAT. ANN. § 362.2-304(2) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.16-020(3) (LexisNexis 2002).

171. Telephone conference between Thomas E. Rutledge and Daniel J. Kleinberger, ULPA Reporter (January 30, 2005).

172. KY. REV. STAT. ANN. § 362.2-304(3) (LexisNexis 2006). KyULPA does not contain a provision equivalent to KY. REV. STAT. § 271B.16-040 for a court ordered inspection of records. Still, a court’s equitable powers will undoubtedly reach the inspection of documents of a domestic limited partnership.

173. KY. REV. STAT. ANN. § 362.2-304(4) (LexisNexis 2006).

174. KY. REV. STAT. ANN. § 362.2-304(4)(b) (LexisNexis 2006).

175. KY. REV. STAT. ANN. § 362.2-304(7) (LexisNexis 2006). This provision applies to limitations imposed unilaterally by the limited partnership *ex post* the limited partner’s request for information. If limitations on the use of information are imposed by the partnership agreement, the limited partnership should not be subject to a burden of proving reasonableness.

176. KY. REV. STAT. ANN. § 362.2-304(10) (LexisNexis 2006).

“reasonable costs of copying, limited to the costs of labor and material”<sup>177</sup> incurred in responding to the request.

While the estate of a deceased limited partner has limited information rights,<sup>178</sup> the transferee of a limited partner does not have information rights.<sup>179</sup>

In addition to these obligations to respond to requests for information, there is an affirmative obligation to provide information to limited partners whenever a limited partner is:

to give or withhold consent on a matter, before the consent is given or withheld, the limited partnership shall, without demand, provide the limited partner with all information that the limited partnership knows and is material to the limited partner’s decision.<sup>180</sup>

The actions upon which a limited partner may be asked to give or withhold consent, unless modified by the partnership agreement, are:

- Admission of a limited partner;<sup>181</sup>
- Admission of a general partner;<sup>182</sup>
- Amendment of the partnership agreement;<sup>183</sup>
- The decision to amend the certificate of limited partnership so as to obtain or relinquish LLLP status;<sup>184</sup>
- The disposition of all or substantially all of the limited partnership’s property outside the ordinary course;<sup>185</sup>
- The compromise of a partner’s obligation to make a contribution or return an improper distribution;<sup>186</sup>
- Expulsion of a limited partner by consent of the other partners;<sup>187</sup>
- Expulsion of a general partner by consent of the other partners;<sup>188</sup>
- Redemption of a transferable interest subject to charging order using limited partnership property;<sup>189</sup>
- Causing dissolution by consent;<sup>190</sup>
- Causing dissolution by consent following the dissociation of a general partner, when at least one general partner remains;<sup>191</sup>

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177. KY. REV. STAT. ANN. § 362.2-304(8) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 271B.16-030(3) (LexisNexis 2002); § 275.185(2).

178. KY. REV. STAT. ANN. § 362.2-704 (LexisNexis 2006).

179. KY. REV. STAT. ANN. § 362.2-304(11) (LexisNexis 2006).

180. KY. REV. STAT. ANN. § 362.2-304(9) (LexisNexis 2006).

181. KY. REV. STAT. ANN. § 362.2-301(3) (LexisNexis 2006).

182. KY. REV. STAT. ANN. § 362.2-401 (LexisNexis 2006).

183. KY. REV. STAT. ANN. § 362.2-406(2)(a) (LexisNexis 2006).

184. KY. REV. STAT. ANN. § 362.2-406(2)(b) (LexisNexis 2006).

185. KY. REV. STAT. ANN. § 362.2-406(2)(c) (LexisNexis 2006).

186. KY. REV. STAT. ANN. § 362.2-502(3) (LexisNexis 2006).

187. KY. REV. STAT. ANN. § 362.2-601(2)(d) (LexisNexis 2006).

188. KY. REV. STAT. ANN. § 362.2-603(4) (LexisNexis 2006).

189. KY. REV. STAT. ANN. § 362.2-703(3)(c) (LexisNexis 2006).

190. KY. REV. STAT. ANN. § 362.2-801(2) (LexisNexis 2006).

- Avoiding dissolution and appointing a successor general partner, following the dissociation of the sole general partner;<sup>192</sup>
- Appointing a person to wind up the limited partnership when there is no general partner;<sup>193</sup>
- Approving, amending or abandoning a plan of conversion;<sup>194</sup> and
- Approving, amending or abandoning a plan of merger.<sup>195</sup>

The affirmative disclosure obligation prior to soliciting the views of the limited partners with respect to any of these actions applies as well to as any other actions upon which, pursuant to the partnership agreement, the limited partners are to consent. As noted in the Official Comment to ULPA § 304, “The duty stated in this subsection is at the core of the duties owed the limited partners by a limited partnership and its general partners.”

RULPA did not expressly address the degree to which the fiduciary duties applicable to partners would apply to limited partners.<sup>196</sup> ULPA addresses this oversight by clearly providing what obligations do attach to the limited partnership status. Initially, it is provided that, “A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner.”<sup>197</sup> With this provision, it is clear that limited partners as such do not owe fiduciary duties, a rule that accords with the lack of control and lack of agency authority that limited partners have in the limited partnership.<sup>198</sup> Note, however, that if the Agreement of Limited Partnership allocates managerial authority to a limited partner, they will have obligations, which may be fiduciary in nature, but in that situation the obligations are undertaken pursuant to contract and not by reason of status.<sup>199</sup> Limited partners are obligated to act consistent with an obligation of good faith and fair

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191. KY. REV. STAT. ANN. § 362.2-801(3)(a) (LexisNexis 2006).

192. KY. REV. STAT. ANN. § 362.2-801(3)(b) (LexisNexis 2006).

193. KY. REV. STAT. ANN. § 362.2-803(3) (LexisNexis 2006).

194. KY. REV. STAT. ANN. § 362.2-1103(1) (LexisNexis 2006); § 362.2-1103(2)(b).

195. KY. REV. STAT. ANN. §§ 362.2-1107(1)-(4) (LexisNexis 2006).

196. Under KY. REV. STAT. ANN. § 362.523 (LexisNexis 2006), the fiduciary duties set forth at § 362.250 and at common law are applied to the general partners of a limited partnership, while, § 362.447 further provides that a partner in a general partnership has the same rights and powers, is subject to the same restrictions, and shall have the same liabilities, as is a partner in a partnership without limited partners. Under RULPA, limited partners were generally not held to have fiduciary duties, *see, e.g., In re Villa W. Associates*, 146 F.3d 798, 807 (10th Cir. 1998); *Cantor Fitzgerald, L.P. v. Cantor*, No. 16297, 2000 WL 307370, at \*20 (Del. Ch. Mar. 13, 2000) ; *Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 746 A.2d 842, 864 (Del. Ch. 1999), notwithstanding the linkage of limited partnership law to general partnership law and the fiduciary duties obligations of both UPA § 21, KY. REV. STAT. ANN. § 362.250(1) (LexisNexis 2002), and at common law.

197. KY. REV. STAT. ANN. § 362.2-305(1) (LexisNexis 2006).

198. *See* ULPA § 305 cmt. (2001).

199. *Id.*; *see also* *KE Prop. Mgmt. Inc. v. 275 Madison Mgmt. Corp.*, No. 12683, 1993 WL 285900, at \*9 (Del. Ch. Jul. 21, 1993) (limited partner to whom partnership agreement delegated authority affecting management may be subject to fiduciary obligations).

dealing.<sup>200</sup> As, in this formulation, good faith and fair dealing are contractual obligations, and are not fiduciary in nature, they do not mandate self-abnegation or preclude a limited partner from, in the exercise of the rights and discharge of their duties, acting in their own self-interest.<sup>201</sup>

ULPA § 306 addresses the situation in which one becomes a general partner when he intended to be a limited partner and what steps they must be taken to avoid liability as a general partner.<sup>202</sup> A person finding himself in this situation is obligated to either cause the Certificate of Limited Partnership to be amended/corrected to state that they are not a general partner, or to withdraw from future participation in the venture.<sup>203</sup> In the event he chooses to withdraw, there exists no obligation to return previously received distributions; the focus is upon the avoidance of future distributions.<sup>204</sup> A person who endeavors to have the Certificate of Limited Partnership amended/corrected, but who is not able to do so, is able to withdraw from future participation in the venture even if that withdrawal would otherwise constitute a violation of the partnership agreement.<sup>205</sup> Still, that person, as a general partner, has personal liability for the debts and obligations of the limited partnership to any third party who believed in good faith that the person was a general partner.<sup>206</sup> While the statute requires that third party to have believed that person to have been a general partner, there is no statutory requirement that he otherwise relied upon that person in order that the liability be imposed.

#### D. *KyULPA Article 4 - General Partners*

A person becomes a general partner (i) as provided in the partnership agreement, (ii) upon admission as a replacement general partner after the dissociation of the last incumbent general partner, (iii) pursuant to a merger or conversion, or (iv) with the approval of all of the partners.<sup>207</sup> Note that the filing

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200. KY. REV. STAT. ANN. § 362.2-305(2) (LexisNexis 2006).

201. KY. REV. STAT. ANN. § 362.2-305(3) (LexisNexis 2006); *see also* ULPA § 305 cmt. (2001).

202. KY. REV. STAT. ANN. § 362.2-306 (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 362.439 (LexisNexis 2002).

203. What constitutes a prompt renunciation of future participation in the activities of the limited partnership is not addressed in the statute. *See* Ritzau v. Warm Springs W., 589 F.2d 1370, 1376-77 (9th Cir. 1979); Vidricksen v. Grover, 363 F.2d 372, 373 (9th Cir. 1966); Voudouris v. Walter E. Heller & Co., 560 S.W.2d 202, 208 (Tex. App. 1997).

204. ULPA § 306 cmt. (2001).

205. KY. REV. STAT. ANN. § 362.2-306(3) (LexisNexis 2006).

206. KY. REV. STAT. ANN. § 362.2-306(2) (LexisNexis 2006); *see also* KY. REV. STAT. ANN. § 362.2-606(2)(b) (LexisNexis 2002).

207. KY. REV. STAT. ANN. § 362.2-401 (LexisNexis 2006). The admission of a general partner subsequent to the dissociation of the last general partner is addressed in § 362.2-801. The consent of "all of the partners" addresses both the general and the limited partners, and may be modified in the partnership agreement. As this provision is not addressed in ULPA § 110(b)/KY. REV. STAT. ANN. § 362.2-110(1) (LexisNexis 2006), the "as provided by the partnership agreement" is

or amendment of the Certificate of Limited Partnership is not a pre-condition to one becoming a general partner.<sup>208</sup> Although the Certificate of Limited Partnership is required to name each general partner, general partner status is not dependent upon being so named in the certificate. Rather, upon admission as a general partner, that role is held, and there exists an obligation to amend the Certificate of Limited Partnership to so record the holding of that position. While each person named in the Certificate of Limited Partnership is as to third parties a general partner, the fact that one is not so listed in the Certificate of Limited Partnership is not conclusive that they are not a general partner.<sup>209</sup>

Each general partner, by virtue of that status, is an agent of the limited partnership for the purpose of its activities.<sup>210</sup> A limited partnership is bound by the acts of a general partner, including the signing of a record in the name of the partnership “for apparently carrying on in the ordinary course the limited partnership’s activities or activities of the kind carried on by the limited partnership.”<sup>211</sup> The exception to this rule is when (i) the general partner did not have the authority to act and (ii) the third party “knew, had received a notification, or had notice” that the general partner lacked authority to bind the limited partnership.<sup>212</sup> A private ordering, such as in the partnership agreement,

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unnecessary—that capacity already existed under ULPA § 110(a)/KY. REV. STAT. ANN. § 362.2-110(2).

208. See ULPA § 401, Official Comment. The limited partnership and each general partner are obligated to see to the amendment of the certificate to include the new general partner. KY. REV. STAT. ANN. § 362.2-202(2)(a) (LexisNexis 2006).

209. See ULPA § 401 cmt. subsec. (b)(1) ex. 2 (2001).

210. KY. REV. STAT. ANN. § 362.2-402(1) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 362.447 (LexisNexis 2002); § 362.190; *see also* KY. REV. STAT. ANN. § 362.1-301 (LexisNexis 2006).

211. KY. REV. STAT. ANN. § 362.2-402(1) (LexisNexis 2006).

212. KY. REV. STAT. ANN. § 362.2-402(1) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 362.1-301(2) (LexisNexis 2002); § 362.190(4); *see also* Fox Hill Office Investors, Ltd. v. Mercantile Bank, N.A., 926 F.2d 752, 754 (8th Cir. 1991) (limited partnership not bound on loan where the bank reviewed the partnership agreement and was on that basis aware of the limitation upon the general partner’s authority to borrow); Nat’l City Bank & Trust Co. v. Massey, 540 F. Supp. 566, 578 (M.D. Ga. 1982) (bank not a holder in due course of limited partner notes where bank had copy of partnership agreement and as such had notice of lack of authority to assign notes); Conn. Nat’l Bank v. Cooper, 656 A.2d 215, 219-20 (Conn. 1995) (bank’s officer had knowledge of restriction on the authority of general partner to confess a judgment on behalf of the limited partnership without consent of limited partnership and therefore confession of judgment was not upheld); Anchor Centre Partners, Ltd. v. Mercantile Bank, N.A., 803 S.W.2d 23, 32 (Mo. 1991) (limited partnership not bound by secured loan entered into by general partner purportedly on behalf of limited partnership when bank had previously reviewed partnership agreement and was on that basis aware that the consent of the limited partner was required for the pledge of partnership assets as collateral); Green River Assocs. v. Mark Twain Kan. City Bank, 808 S.W.2d 894, 897 (Mo. Ct. App. 1991) (bank could not rely on apparent agency authority of general partner in following instructions to wire limited partnership’s funds to account of general partner’s parent corporation where bank had reviewed and was aware of limitations in partnership agreement); Evans v. Pioneer Bank of Evanston, Wyo., 809 P.2d 251, 254-55 (Wyo. 1991) (where bank had copy of partnership agreement, note executed by one partner but not the other was not binding on partnership where partnership agreement required consent of managing partners).

limiting the general partner's agency authority does not preclude a partner from binding the partnership in violation of the limitation. A general partner violating the private ordering will be subject to the partnership's claim for damages.

A general partner cannot bind the limited partnership by an action "which is not apparently for carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership" unless the general partner is so authorized to act by all of the partners.<sup>213</sup>

The limited partnership is liable for the consequences of the actions of a general partner who (i) is "acting in the ordinary course of activities of the limited partnership" or (ii) is acting "with the authority of the limited partnership."<sup>214</sup> Further, if a general partner acting in either capacity receives or causes the limited partnership to receive the money or property of one who is not a partner, and that money or property is then misapplied by a (not necessarily the same) general partner, the limited partnership is liable to that third party for the loss.<sup>215</sup> These provisions state generally applicable rules of agency, namely that the principal (*i.e.*, the limited partnership) is liable for the actions of its agent (*i.e.*, the general partner) when the agent is acting in the course of the activities for which the principal has designated the agent to act.<sup>216</sup>

The general partners are jointly and severally liable for all liabilities of the limited partnership unless otherwise agreed by the claimant or provided by law.<sup>217</sup> However, a general partner is not personally liable for an obligation of the limited partnership incurred before that person's admission as a general partner.<sup>218</sup> The rule of joint and several liability is not applicable, however, if the issue arises when the limited partnership has elected to be a limited liability limited partnership. In that situation:

An obligation of a limited partnership incurred while the limited partnership is a limited liability limited partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the limited partnership. A general partner is not personally liable, directly or indirectly, by way of indemnification, contribution, assessment, or

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213. KY. REV. STAT. ANN. § 362.2-402(2) (LexisNexis 2006). As this provision is not referenced in ULPA § 110(b)/KY. REV. STAT. ANN. § 362.2-110(2) (LexisNexis 2006), this default rule of approval by all of the partners is subject to modification in the partnership agreement.

214. KY. REV. STAT. ANN. § 362.2-403(1) (LexisNexis 2006); *accord* § 362.210; § 362.1-305(1).

215. KY. REV. STAT. ANN. § 362.2-403(2) (LexisNexis 2006); *accord* § 362.215; § 362.1-305(2).

216. *See* RESTATEMENT (THIRD) OF AGENCY § 6.01 (2006); RESTATEMENT (SECOND) OF AGENCY §§ 140, 219 (1958).

217. KyRULPA did not contain a rule regarding the liability of the general partners for the debts and obligations of the general partnership. Rather, the liability was determined by reference to KyUPA. *See* KY. REV. STAT. ANN. § 362.523 (LexisNexis 2006); § 362.220.

218. KY. REV. STAT. ANN. § 362.2-404(2) (LexisNexis 2006). KyULPA does not attempt to define when an obligation is "incurred"; that issue is left to "other law." *Accord* § 362.1-306(2); § 362.230.

otherwise, for such an obligation solely by reason of being or acting as a general partner.<sup>219</sup>

This rule applies once the LLLP election is made.<sup>220</sup> If the partnership agreement is in effect before the LLLP election contained indemnification, contribution, assessment or other obligations inconsistent with limited liability, those provisions are ineffective<sup>221</sup> unless again adopted contemporaneous with or subsequent to the election to become an LLLP.<sup>222</sup>

KyULPA does not contain a provision similar to those that appear in the KyBCA and the KyLLCA providing that those acting on behalf of an entity before its organization are personally liable on all debts and obligations undertaken.<sup>223</sup> However, as this rule repeats generally applicable agency law, its absence does not indicate a different result.<sup>224</sup>

The question may be asked as to why the LLLP option was added to ULPA, and it may be asked as well why it was made an elective status rather than a default rule. As to the first question, the creation of the LLLP is parallel with the development of the LLP under the RUPA.<sup>225</sup> Certain states, prior to ULPA, permitted limited partnerships to elect limited liability partnership status,<sup>226</sup> and

219. KY. REV. STAT. ANN. § 362.2-404(3) (LexisNexis 2006). “Indemnification” and “assessment” are not uniform and conform to § 362.1-306(3) itself adopting the terms from § 362.220(3). § 138.183 was amended to address the general partners in a limited liability limited partnership, imposing upon them, and in parallel with the managers of an LLC and the partners in an LLP, liability for the taxes imposed under §§ 138.130-.205. Similar revisions were made in § 138.440 with respect to those taxes imposed by §§ 138.210-.446 and in § 139.185 § 142.404 was amended to include as responsible persons for those taxes imposed under § 142.400 general partners in a limited liability limited partnership, and as well to address the dissolution or withdrawal of a limited liability company, limited liability partnership, or limited liability limited partnership.

220. The issue of whether a claim arose before or after an election to be an LLLP is not addressed in the ULPA and is left to other law. Note that the election to become a limited liability limited partnership will not protect the general partners from liability on claims that arose prior to the time of filing of the LLLP election in the certificate of limited partnership. *See also supra* note 218 and accompanying text.

221. KY. REV. STAT. ANN. § 362.2-404(3) (LexisNexis 2006).

222. *Accord* KY. REV. STAT. ANN. § 362.1-306(3) (LexisNexis 2006).

223. *See* KY. REV. STAT. ANN. § 271B.2-040; § 275.095 (LexisNexis 2006).

224. *See* RESTATEMENT (THIRD) OF AGENCY § 6.04 (2006); *see also* *Deporter-Butterworth Tours, Inc. v. Tyrrell*, 503 N.E.2d 378, 384 (Ill. App. Ct. 1987); Rutledge, *Holy Grail*, *supra* note 58, at 430-32.

225. Still, “[a] foolish consistency is the hobgoblin of little minds.” Ralph Waldo Emerson, *Self-Reliance*, ESSAYS: FIRST SERIES (1841).

226. *See, e.g.*, Arizona, ARIZ. REV. STAT. ANN. § 29-367 (West 2007); § 29-1001(7), §§ 29-1101-1102, 1026(D); Arkansas, ARK. CODE ANN. § 4-42-703 (LexisNexis 2006) (repealed 2007); § 4-43-1110 (repealed 2007); Colorado, COLO. REV. STAT. ANN. §§ 7-64-306(3)-(4), 1001(1), 1002; § 7-90-301 (LexisNexis 2006); Delaware, DEL. CODE. ANN. tit. 6, § 17-214 (LexisNexis 2006); District of Columbia, D.C. CODE ANN. § 33-211.07 (LexisNexis 2006); Georgia, GA. CODE ANN. § 14-8-62(g) (LexisNexis 2006); § 14-9-403; Maryland, MD. CODE. ANN. CORPS. & ASS’NS § 10-805 (LexisNexis 2006); § 9A-1006; Missouri, MO. REV. STAT. § 358.510 (2006); North Carolina, N.C. GEN. STAT. § 59-210 (2006); Pennsylvania, 15 PA. CONS. STAT. § 8201 (2006); South Dakota, S.D. CODIFIED LAWS § 48-7-1106 (2006); Tennessee, TENN. CODE ANN. § 61-1-1001 (LexisNexis



the potential for doing so existed under most UPA-RULPA statutory schemes.<sup>227</sup> Furthermore, notwithstanding certain tax complexities that arose prior to the adoption of the current tax classification regulations,<sup>228</sup> it has been the common practice to organize a corporation, and more recently a limited liability company, to serve as the general partner of a limited partnership.<sup>229</sup> By doing so, as to third parties, the general partner was a limited liability entity, and the creditors, after exhausting the assets of the limited partnership, could look no further than the assets of that corporation/limited liability company. Those actually promoting/controlling the limited partnership would typically have owned the business entity that was the general partner, and through it enjoyed the economic benefits of control, without placing their personal assets, beyond those contributed to the general partner, at risk. For all intents and purposes, by satisfying the transactional costs of organizing and maintaining a special purpose corporation or limited liability company, making attendant tax filings and at times bearing a quite de minimus increase in the effective overall tax rate, limited liability was achieved. With the LLLP, complete limited liability can be achieved within the limited partnership, alleviating the need to create and maintain the special purpose corporation/limited liability company. Essentially, it was a matter of efficiency. At one point in the drafting process, ULPA would have provided a default rule of limited liability for all partners, whether they be general or limited. This option, however, was rejected for a variety of reasons including its degree of departure from what was commonly understood as the limited partnership, concerns regarding enactability among the states, and issues with respect to altering the rule for pre-ULPA limited partnerships that would at some point become subject to its rules either by affirmative election or a drag-in effective date. As a concession to these concerns, LLLP status was made elective and not mandatory.<sup>230</sup>

A general partner in a limited partnership that is not a LLLP or was not at the time the claim at issue arose may be joined in an action against a limited

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2006); Texas, TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 2.14 (Vernon 2006); Virginia, VA. CODE ANN. § 50-73.142 (LexisNexis 2006); *see also* Thomas E. Rutledge & Thomas Earl Geu, *A Practical Guide to the Limited Liability Limited Partnerships* § 2.2, in 1 STATE LIMITED PARTNERSHIP LAWS (Elizabeth S. Miller et al. eds., Aspen 2007).

227. Whether in any instance it was possible depended upon the state's formulation of the largely non-uniform LLP language adopted as an amendment to the state adoption of the UPA and whether a limited partnership was a "partnership" thereunder that could elect LLP status.

228. *See* Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 KY. L.J. 1, 54-89 (1995) [hereinafter Rutledge & Booth, *LLC Act*].

229. For a history of the use of a corporate general partner in a limited partnership, *see* Robert W. Hamilton, *Corporate General Partners of Limited Partnerships*, 1 J. SMALL & EMERGING BUS. L. 73, 77-86 (1997).

230. *See* Kleinberger, *User's Guide*, *supra* note 7, at 621.

partnership or named in a separate action.<sup>231</sup> A judgment against the limited partnership is not a judgment against any general partner, and no judgment against the limited partnership may be satisfied from assets of a general partner unless there is as well a judgment against the general partner.<sup>232</sup> A suit and a judgment against only the limited partnership will involve fewer costs to both the plaintiff and what would otherwise be the defendants and may be entirely appropriate where the claim can be satisfied from the limited partnership's assets. Where the plaintiff is not comfortable that limited partnership assets will be sufficient, some or all of the general partners will need to be made defendants.

Still, even where there is a judgment against a limited partner for an obligation of the limited partnership, that judgment may not be satisfied out of the general partner's personal property unless:

- A writ of execution against the limited partnership has been returned unsatisfied;
- The limited partnership is a debtor in bankruptcy;
- The general partner has agreed that the creditor need not exhaust the assets of the limited partnership;
- A court permits the judgment creditor to move first against the general partner because the assets of the limited partnership will clearly be insufficient to satisfy the judgment, the exhaustion of limited partnership assets will be excessively burdensome, or it is equitable; or
- The general partner is as well liable by law or contract independent of the existence of the limited partnership.<sup>233</sup>

ULPA § 406 is a central provision of the act, detailing certain rights of the general partners, detailing other rights of all partners, and reciting certain rights the general partners have against the limited partnership.<sup>234</sup>

Initially, each general partner has an equal (per capita) right to participate in the management and conduct of the limited partnership's activities.<sup>235</sup> Except where the consent of the limited partners is required by either the ULPA or by the partnership agreement, a decision may be made by either the single general

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231. KY. REV. STAT. ANN. § 362.2-405(1) (LexisNexis 2006); *accord* § 362.1-307(3). Naming the general partner of a LLLP when the sole basis of asserting liability against them is the status as a general partner may subject plaintiff's counsel to sanctions under Rule 11. *See* Page v. Roscoe, LLC, 497 S.E.2d 422 (N.C. Ct. App. 1998) (involving a suit in which members of LLC were named as parties notwithstanding statute providing that members are not proper parties to a suit against LLC). Naming an LLLP general partner based upon some other basis of liability, such as the personal guarantee of a debt or having been the actor that caused a tort, is not status based.

232. KY. REV. STAT. ANN. § 362.2-405(2) (LexisNexis 2006).

233. KY. REV. STAT. ANN. § 362.2-405(3) (LexisNexis 2006); *accord* § 362.1-307(4).

234. KY. REV. STAT. ANN. § 362.2-406 (LexisNexis 2006); *accord* § 362.1-404.

235. KY. REV. STAT. ANN. § 362.2-406(1) (LexisNexis 2006); *accord* § 362.1-401(6).

partner or, where there is more than one general partner, by a majority of the general partners. There is flexibility to alter this default management structure. For example, the partnership agreement may invest in the limited partners the right to participate in management decisions that would otherwise rest within the exclusive province of the general partners. Another option is to provide for differentiations among the general partners in either the partnership agreement or in a private agreement amongst themselves<sup>236</sup> as to who has particular authority over particular aspects of operations and activities. The act does not specifically reference the ability of a general partner to employ an agent or to otherwise delegate managerial authority over the limited partnership,<sup>237</sup> although the commentary indicates that such is permitted.<sup>238</sup> While under the prior law a delegation would not relieve the general partner of fiduciary obligations with respect to the performance (or not) of that agent,<sup>239</sup> the commentary to the ULPA indicates that the inquiry would be into the care employed in selecting the agent, the scope of the delegation and the supervision thereafter given to the agent's performance.<sup>240</sup>

Subject to the partnership agreement, the approval of all partners, general and limited, is required to amend the partnership agreement, amend the certificate of limited partnership to add or delete an election of limited liability limited partnership status, or dispose of all or substantially all of the limited partnership's assets outside the ordinary course of business.<sup>241</sup> Again, the partnership agreement may increase or decrease the number of actions requiring the approval of all partners.

From the limited partnership, general partners are entitled to (i) reimbursement by the limited partnership for payments made on behalf of the limited partnership in the course of its activities or to preserve its assets, (ii) indemnification by the limited partnership for liabilities incurred in the course of its activities or to preserve its assets,<sup>242</sup> and (iii) reimbursement of advances made in excess of the general partner's agreed capital contribution.<sup>243</sup>

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236. In the former case, the differentiations are binding upon the limited partners, while in the latter they are not.

237. Cf. KY. REV. STAT. ANN. § 275.135(5) (LexisNexis 2006).

238. ULPA § 406 cmt. (2001).

239. See, e.g., *Davenport Group, MG, L.P. v. Strategic Inv. Partners, Inc.*, 685 A.2d 715 (Del. Ch. 1996).

240. ULPA § 406 cmt. (2001).

241. KY. REV. STAT. ANN. § 362.2-406(2)(a)-(c) (LexisNexis 2006). This list of items requiring, absent a contrary provision in the partnership agreement, the consent of the limited partners, is partial; there are other actions that, all else being equal, will require their consent. See *supra* notes 181 through 195 and accompanying text.

242. KY. REV. STAT. ANN. § 362.2-406(6) (LexisNexis 2006); accord § 362.1-401(3).

243. KY. REV. STAT. ANN. § 362.2-406(4) (LexisNexis 2006); accord § 362.1-401(4). Payments on behalf of or advanced to the limited partnership are treated as loans that accrue interest as determined under § 362.2-107(2). See § 362.2-406(5).

Unless agreed in the partnership agreement, general partners are not entitled to remuneration for services rendered to the limited partnership.<sup>244</sup> It is important to note that this default rule is similar to, but departs in a material way, from the rule under the KyRUPA. In a general partnership, partners are not entitled to remuneration *except* in connection with the winding up and termination of the partnership.<sup>245</sup> In KyULPA there is no different treatment of the winding up and termination phase of the limited partnership.

Unlike the information rights of limited partners, which are specific and circumscribed, the information rights of general partners are near plenary. Each general partner may access the information that the limited partnership is required to maintain,<sup>246</sup> and may as well access, “any other records maintained by the limited partnership regarding the limited partnership’s activities and financial condition.”<sup>247</sup> As such, there is no requirement of a statement as to why information is wanted or the opportunity for the limited partnership to determine that the requested information will not be provided.<sup>248</sup>

Each general partner as well as the limited partnership itself is obligated to furnish to each general partner:

- Without demand, “any information concerning the limited partnership’s activities reasonably required for the proper exercise of the general partner’s rights and duties under the partnership agreement or” KyULPA;<sup>249</sup> and
- On demand, “any other information concerning the limited partnership’s activities, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.”<sup>250</sup>

A dissociated general partner has certain rights to information for the period they were a general partner on terms similar to those applicable to a current limited partner.<sup>251</sup> A dissociated general partner may be charged the costs of producing requested information<sup>252</sup>; there is no similar cost shifting mechanism for information sought by and provided to an incumbent general partner. As was the case with information provided to a limited partner, the limited partnership may impose “reasonable limitations” on the use of information provided a current or

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244. KY. REV. STAT. ANN. § 362.2-406(6) (LexisNexis 2006).

245. See KY. REV. STAT. ANN. § 362.1-401(8) (LexisNexis 2006); RUPA § 401(h) (1997).

246. See KY. REV. STAT. ANN. § 362.2-111 (LexisNexis 2006).

247. KY. REV. STAT. ANN. § 362.2-407(1) (LexisNexis 2006).

248. Cf. KY. REV. STAT. ANN. §§ 362.2-304(2)-(3) (LexisNexis 2006).

249. KY. REV. STAT. ANN. § 362.2-407(2)(a) (LexisNexis 2006).

250. KY. REV. STAT. ANN. § 362.2-407(2)(b) (LexisNexis 2006).

251. KY. REV. STAT. ANN. § 362.2-407(3) (LexisNexis 2006). The rights of the executor/personal representative of a deceased general partner are addressed in § 362.2-704.

252. KY. REV. STAT. ANN. § 362.2-407(7) (LexisNexis 2006); ULPA § 407(g) (2001).

former general partner, and bears the burden of proving that proposed limitations are reasonable.<sup>253</sup> Those limitations are binding as well on any agent or attorney through whom a current or former general partner inspects records.<sup>254</sup> Except with respect to a dissociated general partner, no transferee has rights under this section.

Few topics have caused the spillage of as much ink as the fiduciary obligations of partners.<sup>255</sup> The initial recommendation for the revision of UPA proposed that the fiduciary formulation of UPA § 21(1)<sup>256</sup> be reviewed and updated.<sup>257</sup> With the end of linkage of limited partnership to general partnership law, it became necessary for the limited partnership act to independently address the standards imposed upon the general partners. Following as it was on the heels of RUPA, ULPA adopted, as to the general partners, the same formulations for the fiduciary obligations of care and loyalty and the contractual obligations of good faith and fair dealing as had been recently approved.<sup>258</sup> Depending upon your frame of reference, RUPA either accurately codifies the common law as developed under UPA or adopts an entirely new regime that departs from the previously developed common law.<sup>259</sup> For practitioners in Kentucky there is as well an additional complexity – the provisions adopted in KyULPA are not uniform.<sup>260</sup> This discussion will review the fiduciary and other obligations of ULPA § 408, then review the limited modifiability of those provisions under ULPA § 110, then review the impact of the non-uniform revisions made to KyULPA § 408 in KyULPA.

A discussion of fiduciary obligations under partnership law must begin with UPA § 21(1), which provides:

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253. KY. REV. STAT. ANN. § 362.2-407(6) (LexisNexis 2006).

254. KY. REV. STAT. ANN. § 362.2-407(8) (LexisNexis 2006).

255. See Mark J. Loewenstein, *Fiduciary Duties and Unincorporated Business Entities: In Defense of the "Manifestly Unreasonable" Standard*, 41 TULSA L. REV. 411 (2006).

256. KY. REV. STAT. ANN. § 362.250(1) (LexisNexis 2006). The fiduciary obligations of the general partners in a limited partnership have, prior to ULPA (2001), been determined by reference to the law of general partnerships. See KY. REV. STAT. ANN. § 362.447 (LexisNexis 2006); § 362.523.

257. UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the Section of Business Law, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121, 151-52 (1987).

258. See RUPA § 404 (1997); see also ULPA § 408 (2001), in which the official comment identifies RUPA § 404 as its source.

259. See, e.g., Barbara Franklin, *Updating Partnerships—Efforts to Modernize Uniform Law Stir Debate*, NEW YORK L.J. 5 (May 20, 1993) (citing conflicting views on whether RUPA § 404 departs from the law as developed to date); Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 470 (1997) ("And disastrous is precisely what the fiduciary provisions of RUPA turn out to be.") [hereinafter Mitchell, *Naked Emperor*].

260. The non-uniform provisions in KyULPA § 408 track the non-uniform provisions of KyRUPA § 404. KY. REV. STAT. ANN. § 362.1-404 (LexisNexis 2006); see also Vestal & Rutledge, *Modern Partnership Law Comes to Kentucky*, *supra* note 2, at 733-35.

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.<sup>261</sup>

Just as often cited for the fiduciary obligations of partners are the words of Justice Cardozo in *Meinhard v. Salmon*,<sup>262</sup> to wit:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.<sup>263</sup>

Several points are worth noting. First, the language of RUPA § 21(1) and of *Meinhard* address what we think of today as the “duty of loyalty”; the “duty of care” is not addressed.<sup>264</sup> Second, while UPA speaks of the obligations of each partner to the partnership, *Meinhard* speaks of obligations among the partners

261. UPA § 21(1) (1914); KY. REV. STAT. ANN. § 362.250(1) (LexisNexis 2006).

262. *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928).

263. *Id.* at 546. This language has been criticized as overstating partner obligations. See, e.g., Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 458 (1987), which observed:

Although colorful, the judicial rhetoric inevitably overstates the standard of conduct the law actually imposes on partners. If partners truly are fiduciaries, they are a unique species of this group and cannot be subjected to traditional standards applicable to other types of fiduciaries. . . . Partners . . . are always joint owners. . . . Partners are not disinterested trustees, and the likelihood that most partners operate under a “punctilio of an honor the most sensitive” standard is remote.

A description of the fiduciary duties of the partners in a partnership predating UPA and likely informing the drafting of UPA § 21 was the Supreme Court's ruling in *Latta v. Kilbourn*, which provided:

[It is] well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

*Latta v. Kilbourn*, 150 U.S. 524, 541 (1893).

264. See also RUPA § 404(c) cmt 3 (1997) (“There is no statutory duty of care under the UPA . . .”).

without reference to the partnership. Third, while *Meinhard*'s lofty language, whether normative or aspirational, uses the term "fiduciary" and references the law of trusts, the term "fiduciary" does not appear in UPA § 21(1).<sup>265</sup> Still, there developed a broad body of decisional law addressing the twin fulcrums of fiduciary duty law, the duty of care and the duty of loyalty.<sup>266</sup>

Whether the common law as developed under UPA for the standard of care was that of an ordinarily prudent person,<sup>267</sup> some standard more relaxed than ordinary care,<sup>268</sup> or merely good faith,<sup>269</sup> has long been the subject of debate,<sup>270</sup> as has whether the relaxed standard of review of the business judgment rule is applicable in the partnership context.<sup>271</sup> Indeed, one may conclude that the relative paucity of case law (and the varying language employed by the courts in the case law) has not yielded the necessary critical mass of decisional law necessary to derive and impose a consistent standard. Regardless of the formulation of the standard of care employed, the question of whether such standard could be prospectively modified by the partners' agreement has also been the subject of some debate.<sup>272</sup>

ULPA addresses the fiduciary obligations in a manner entirely different than that set forth in UPA,<sup>273</sup> providing:

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265. "Fiduciary" does appear in the heading to RUPA § 21(1). The standard of a "trustee" appears in both UPA § 21(1), KY. REV. STAT. § 362.250(1), and in *Meinhard*.

266. See generally II ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.07 (2007).

267. Norwood P. Beveridge, *Duty of Care: The Partnership Cases*, 15 OKLA. CITY U. L. REV. 753, 754 (1990).

268. BROMBERG AND RIBSTEIN, *supra* note 266, at § 6.07(f).

269. CALLISON AND SULLIVAN, *supra* note 165, at § 12.02.

270. See, e.g., Gerard C. Martin, *Duties of Care Under the Revised Uniform Partnership Act*, 65 U. CHI. L. REV. 1307, 1309-10 (1998) ("While most courts and scholars agree that partners owe each other some duty of care under the UPA, there are some who argue the partners owe each other no duty of care whatsoever. Additionally, others disagree strongly about what that duty is.").

271. See generally Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343 (2005) [hereinafter Miller & Rutledge, *The Business Judgment Rule*].

272. See, e.g., Claire Moore Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993):

The most fundamental duty owed by partners to one another is a fiduciary duty. Partners may, however, believe that by mutual consent they can restrict or virtually eliminate these mutual obligations. Under current partnership law, this belief is probably mistaken; under most present judicial interpretations of the Uniform Partnership Act (UPA), fiduciary duties are mandatory provisions waivable only with informed consent, on a case-by-case basis. (footnotes omitted).

273. UPA § 21(1), adopted in Kentucky at KY. REV. STAT. ANN. § 362.250(1) (LexisNexis 2006), provides:

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transactions connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(a) The only fiduciary duties a general partner has to the limited partnership and the other partners are the duties of loyalty and care under subsections (b) and (c).

(b) A general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and

(3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities.

(c) A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership's activities is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.<sup>274</sup>

ULPA § 408(d) imposes upon each general partner, in the discharge of their obligations to the limited partnership and the other partners, and in the exercise of their rights vis-à-vis the other partners, whether arising under ULPA or the partnership agreement, obligations of good faith and fair dealing.<sup>275</sup> Referenced in ULPA § 110(b)(5), the obligation of good faith and fair dealing may not be eliminated, but reasonable standards of measurement may be imposed.<sup>276</sup>

What is meant by the imposition of the obligations of good faith and fair dealing upon partners has been subject to significant dispute. Good faith has traditionally been seen as an aspect of the partners' fiduciary obligations under

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274. ULPA §§ 408(a)-(c) (2001). ULPA § 408(c) has not been adopted in KyRUPA, and a unique and non-uniform provision appears in place thereof. See *infra* notes 304-05 and accompanying text.

275. KY. REV. STAT. § 362.2-408(4) (LexisNexis 2006); ULPA § 408(d) (2001).

276. KY. REV. STAT. § 362.2-110(2)(g) (LexisNexis 2006).



UPA,<sup>277</sup> and the *ABA-UPA Paper* sought incorporation into a revised UPA of a fiduciary duty of good faith.<sup>278</sup> Whether good faith is itself a fiduciary duty or a component of the enumerated duties is disputed in both the cases and the commentary,<sup>279</sup> and there is at least dicta in Kentucky indicating that the obligation is fiduciary in nature.<sup>280</sup>

Under ULPA, good faith is addressed not as a fiduciary concept, but as a contractual issue akin to that utilized under the Uniform Commercial Code.<sup>281</sup> At the same time, RUPA acknowledges that the definitions of good faith as the terms are utilized in the UCC<sup>282</sup> as “too narrow or not applicable.”<sup>283</sup> Not referenced in the commentary to RUPA is the definition of “good faith” set forth in the RESTATEMENT OF CONTRACTS § 205, namely “good faith performance of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party.” With respect to these obligations, the official commentary to RUPA provides:

The meaning of “good faith and fair dealing” is not firmly fixed under present law. “Good faith” clearly suggests a subjective element, while “fair dealing” implies an objective component. It was decided to leave

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277. See, e.g., *Newberger, Loeb's Co. v. Gross*, 563 F.2d 1057, 1078 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978) (primary elements of a partner's fiduciary obligations are “utmost good faith, fairness [and] loyalty”) (citations and quotation marks omitted).

278. UPA Revision Subcommittee, *supra* note 257, at 151.

279. See, e.g., *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (stating that good faith is a “subsidiary element” of the duty of loyalty); *Emerald Partners v. Berlin*, 787 A.2d 85, 95 (Del. 2001) (directors have “a triad of primary fiduciary duties: due care, loyalty, and good faith.”), *on remand*, No. 9700, 2003 WL 21003437, at \*39 n.133 (2003) (good faith is “a fundamental component of the duty of loyalty.”); Hillary A. Sale, *Delaware's Good Faith*, 89 CORNELL L. REV. 456 (2004) (arguing that good faith is a fiduciary duty separate from loyalty and care); John L. Reed & Matt Neiderman, “Good Faith” and the Ability of Directors to Assert § 102(b)(7) of the Delaware General Corporation Law as a Defense to Claims Alleging Abdication, Lack of Oversight, and Similar Breaches of Fiduciary Duty, 29 DEL. J. CORP. L. 111 (2004) (bad faith need not involve self-interest); Paul M. Altman & 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). Adding further confusion to the status of “good faith” is the Delaware General Corporation Law, which at § 102(b)(7) addresses limits on damages for a director's “breach of fiduciary duty” but providing no limitation on damages for actions “not in good faith.”

280. See, e.g., *Ray v. Vogt*, No. 1996-CA-003505-MR, slip op. at 4 (Ky. Ct. App. Oct. 2, 1998) (referring in dicta to “fiduciary duties of good faith and fair dealing”). More recently, in *Lach v. Man O'War*, fiduciary duties and “good faith” were conflated as the court wrote:

Next, Lach argues that the general partners breached their fiduciary duty by transferring partnership assets to the LLC. Partners have the duty to act with the utmost good faith to all other partners.

*Lach v. Man O'War, LLC*, No. 2004-CA-001958-MR, 2005 WL 3116000, at \*3 (Ky. Ct. App. Nov. 23, 2005) (citing *Axton v. Ky. Bottlers Supply Co.*, 166 S.W. 776, 778 (Ky. 1914)).

281. See RUPA § 404 cmt. 4 (1997) (referring to the Uniform Commercial Code while acknowledging that its definitions are too narrow for application in the partnership context).

282. “Honesty in fact” and “the observance of reasonable commercial standards of fair dealing in the trade.”

283. RUPA § 404 cmt. 4 (1997).

the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases. Some commentators, moreover, believe that good faith is more properly understood by what it excludes than by what it includes.

Good faith, as judges generally use the term in matters contractual, is best understood as an “excluder” – a phrase with no general meaning or meanings of its own. Instead, it functions to rule out many different forms of bad faith. It is hard to get this point across to persons used to thinking that every word must have one or more general meanings of its own – must be either univocal or ambiguous.<sup>284</sup>

The commentary to RUPA § 404(d) states that “in some situations the obligation of good faith includes a disclosure component. Depending upon the circumstances, a partner may have an affirmative disclosure obligation that supplements the Section 403 duty to render information.”

ULPA § 408(e)<sup>285</sup> provides:

A general partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the general partner's conduct furthers the general partner's own interests.

This provision and the official commentary thereto for the language as adopted in RUPA are deceptively brief considering the alteration in partnership law that follows, or at least may follow, from this language. Certain commentary states that the new language is meant to make clear that “a partner as such is not a trustee and is not held to the same standards as a trustee.”<sup>286</sup> If and to the extent that UPA and the common law hold a partner to the standards of a trustee, this provision is a material change in the law.<sup>287</sup> It is not clear, however, that the standard of a trustee was the applicable rule under UPA. Rather, the UPA statutory scheme dictated that “partners renounce the immediate, non-consensual pursuit of self interesting favor of the long term pursuit of self-interest through the collective mechanism of the partnership.”<sup>288</sup> There exist at least three alternative explanations to ULPA § 408(e). Under the first it is in the nature of

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284. RUPA § 404 cmt. 4 (1997) (citation omitted).

285. KY. REV. STAT. ANN. § 362.2-408(5) (LexisNexis 2006); accord § 362.1-404(5).

286. RUPA § 404 cmt 5 (1997). Cf. *Meinhard*, 164 N.E. at 546 (discussing a partner's obligations by reference to those of a “trustee”); see also *Enjoy Snax Vending, Inc. v. Williams Food Serv.*, No. 2003-CA-000717-MR, 2004 WL 2149193, at \*2 (Ky. Ct. App. Sept. 24, 2004) (“In Kentucky, it is well established that every contract has an implied covenant that imposes upon the parties a duty to conduct itself in a ‘bona fide’ manner. That duty requires the parties to act ‘in good faith; honestly, openly, and sincerely; without deceit or fraud.’”) (citations omitted).

287. See Donald J. Weidner, *RUPA And Fiduciary Duty: The Texture Of Relationship*, 58 L. & CONTEMP. PROBS. 81, 88 (1995) (“To emphasize: this language changes the basic statement of the default rule among partners. RUPA section 404(e) sets aside both partnership case law and basic agency doctrine requiring abnegation of self.”) [hereinafter Weidner, *RUPA and Fiduciary Duty*].

288. ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT § 404 cmt. 3c (2006).

an evidentiary rule that “the fact that a partner directly personally benefits from the partner’s conduct in the partnership context does not, without more, establish a violation of the partner’s duties or obligations under ULPA or the partnership agreement.”<sup>289</sup> An alternative reading is that so long as the limitations of the duty of loyalty as set forth in ULPA § 408(b), as perhaps modified within the constraints of ULPA § 110(b)(3), are satisfied, no action of a general partner, even if undertaken without notice or informed consent, will constitute a violation of the duty of loyalty or the obligations of good faith and fair dealing.<sup>290</sup> At the same time, it cannot be read as permitting a partner to act adversely to or in conflict with the partnership; such a reading would nullify ULPA § 408(b)(2).<sup>291</sup> A third possible interpretation is that ULPA § 408(e) incorporated a “fairness” test pursuant to which, in assessing a self-interested act by a partner, the examination is two-fold: Was there benefit to the partner and was there detriment to the partnership and/or the other partners? Absent the second element, the partner’s action does not violate the obligation of loyalty.<sup>292</sup> This interpretation gives effective meaning to the otherwise curious term “merely” as utilized in the statute.

Factors distinguishing ULPA § 408 from UPA § 21(1) include the former’s:

- Exclusion of the common law from further informing the fiduciary duties among the partners;<sup>293</sup>
- Effort of comprehensively codify both the standard of care and the standard of loyalty;<sup>294</sup>

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289. See Weidner, *RUPA And Fiduciary Duty*, *supra* note 287, at 88.

290. *Id.*; see also Allan W. Vestal, “... Drawing Near the Fastness?” - *The Failed United States Experiment in Unincorporated Business Entity Reform*, 26 J. CORP. L. 1019, 1022 (2001). It appears that this interpretation is endorsed by Donald Weidner, the reporter on RUPA. See Donald J. Weidner, *Pitfalls in Partnership Law Reform: Some United States Experience*, 26 J. CORP. L. 1031, 1038 (2001).

291. KY. REV. STAT. § 362.1-404(2)(b) (LexisNexis 2006) (a partner’s duty of loyalty includes refraining “from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership.”).

292. Mitchell, *Naked Emperor*, *supra* note 259, at 473-76.

293. See RUPA § 404 cmt. 1 (1997) (“Section 404 is both comprehensive and exclusive. In that regard, it is structurally different from the UPA which touches only sparingly on a partner’s duty of loyalty and leaves further development of the fiduciary duties of partners to the common law of agency.”); see also HILLMAN ET AL., *supra* note 288, at § 404 cmt. 1 (“First, RUPA presents an exclusive statutory treatment of partners’ fiduciary duties. Unlike the UPA, which co-exists with the common law, RUPA attempts to displace the common law and define the fiduciary duties of partners entirely by statute.”). Consequent to statutory departure from RUPA, neither of these comments reflects the law in Kentucky.

294. See, e.g., RUPA § 404 cmt. 2 (1997) (“Section 404(b) provides three specific rules that comprise a partner’s duty of loyalty. These rules are exclusive and encompass the entire duty of loyalty.”); HILLMAN ET AL., *supra* note 288, at § 404 cmt. 2 (“By its terms, RUPA comprises an exclusive statement of the fiduciary duties of partners among themselves and to the partnership. The formulation is exclusive in two ways; the duties of loyalty and care are the only components of the partners’ fiduciary duties, and the duties themselves are exclusively defined.”). Consequent to statutory departure from ULPA, neither of these comments reflects the law in Kentucky.

- Limitation of the fiduciary obligations to those of care and loyalty;<sup>295</sup>
- Temporal limitation of the duty of loyalty that excludes pre-formation activities;<sup>296</sup>
- Exclusion of an obligation to provide information from the fiduciary framework;<sup>297</sup>
- Incorporation of the contractual obligations of good faith and fair dealing as modifiers of the discharge of the fiduciary obligations;<sup>298</sup> and
- Provision that, by means of ULPA § 110(b), subject to defined limitations, the fiduciary obligations may be modified by private ordering.<sup>299</sup>

KyULPA has modified the uniform language to eliminate the exclusivity of the fiduciary obligations to those of care and loyalty and further eliminated the exclusivity of the formula employed for each. This elimination of exclusivity is accomplished by three modifications: (i) the deletion of the statement that care and loyalty are the “only” fiduciary duties and the substitution of a statement that the fiduciary duties “include” care and loyalty;<sup>300</sup> (ii) the deletion of a statement that the duty of loyalty is “limited to” and the substitution of a statement that the duty of loyalty “includes, but is not limited to”;<sup>301</sup> and (iii) the

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295. See HILLMAN ET AL., *supra* note 288, at § 404 cmt. 3 (“First, RUPA excludes from the fiduciary duties formulation the common-law obligation of disclosure, and places the disclosure provisions in another section. Second, RUPA downgrades the common-law fiduciary duty of good faith to the status of a non-fiduciary ‘obligation.’”).

296. UPA § 21(1), KY. REV. STAT. § 362.250(1) (LexisNexis 2006), applies to the “formation, conduct, or liquidation of the partnership,” while ULPA §§ 408(b) and 408(c) apply to the conduct and the winding up of the partnership. “Reference to the ‘formation’ of the partnership has been eliminated from RUPA because of concern that the duty of loyalty could be inappropriately extended to the pre-formation period when that parties are really negotiating at arm’s length.” RUPA § 404 cmt. 2 (1997). This is a significant departure from UPA as the common law has imposed fiduciary obligations during the formation period. See, e.g., *Waite ex rel. Bretton Woods Acquisition Co. v. Sylvester*, 560 A.2d 619, 625 (N.H. 1989). The obligations of good faith and fair dealing do not apply during the formation period as they modify obligations under ULPA and the partnership agreement, neither of which is applicable until the partnership comes into existence.

297. See HILLMAN ET AL., *supra* note 288, at § 404 cmt. 3a(i) (“Defining the disclosure obligation as non-fiduciary is a significant departure from existing law, since the present [UPA] regime affirmatively requires that partners make disclosures under certain well-defined circumstances such as upon transactions with the partnership, the purchase of a partnership interest from a partner or sale of a partnership interest to a partner.”).

298. HILLMAN ET AL., *supra* note 288, at § 404 cmt. 3b. Note that the *ABA-UPA Paper* suggested that the new formulation include good faith as a fiduciary obligation. See UPA Revision Subcommittee, *supra* note 257, at 151.

299. This addition was requested in the *ABA-UPA Paper*. See UPA Revision Subcommittee, *supra* note 257, at 126.

300. Compare KY. REV. STAT. ANN. § 362.2-408(1) (LexisNexis 2006), with ULPA § 408(1) (2001).

301. Compare KY. REV. STAT. ANN. § 362.2-408(2) (LexisNexis 2006), with ULPA § 408(2) (2001).

deletion of a statement that the duty of care “is limited to” and the substitution of a statement that the duty of care “includes, but is not limited to.”<sup>302</sup> These modifications will allow a greater scope for the development of the common law than would be anticipated under the uniform language, and is a change that has been supported in the academic literature.<sup>303</sup> In addition, an entirely non-uniform formula for the duty of care has been adopted. While ULPA recited the standard of care as being refraining from “grossly negligent or reckless conduct, intentional misconduct or a knowing violation of the law,” KyULPA adopts an aspirational model for the standard of care, expecting of the partners that they act “with the care that a reasonable person in a like position would exercise under similar circumstances and in a manner the partner believes to be in the best interests of the partnership.”<sup>304</sup> This aspirational standard avoids the “socially impoverished message” of the RUPA/ULPA duty of care formula<sup>305</sup> and preserves an expectancy in partners that, while perhaps not that of Cardozo’s “trustee,” is still meaningful.

The provisions of ULPA § 408 are subject to modification in the partnership agreement only within the constraints of ULPA §§ 110(b)(5), (6), and (7).<sup>306</sup> These limits on modification as set forth in KyULPA are the same as those in ULPA notwithstanding the fact that the standards themselves are different between KyULPA and ULPA. It is not possible to eliminate the duty of loyalty<sup>307</sup> or unreasonably reduce the duty of care.<sup>308</sup> So long as they are not manifestly unreasonable, specific types or categories of activities may be identified as not violating the duty of loyalty.<sup>309</sup> What constitutes “manifestly unreasonable” is not defined. Similarly, while the duty of care may not be “unreasonably reduced,”<sup>310</sup> that threshold is not defined. The obligation of good faith and fair dealing may not be eliminated, but subject to a requirement that

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302. Compare KY. REV. STAT. ANN. § 362.2-408(3) (LexisNexis 2006), with ULPA § 408(3) (2001).

303. See, e.g., Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 524-34 (1993) [hereinafter Vestal, *Fundamental Contractarian*].

304. See KY. REV. STAT. ANN. § 362.2-408(3) (LexisNexis 2006). Cf. ULPA § 408(c) (2001).

305. Vestal, *Fundamental Contractarian*, *supra* note 303, at 523, 573-74.

306. KY. REV. STAT. ANN. §§ 362.2-110(2)(e)-(g) (LexisNexis 2006).

307. KY. REV. STAT. ANN. § 362.2-110(2)(e); accord § 362.1-103(2)(e). Cf. DEL. CODE tit. 6 § 15-103(f) (2006) (allowing the prospective elimination of the duty of loyalty and/or the duty of care). The KyLLCA permits the elimination of personal liability for monetary damages for a breach of the duties set forth in KY. REV. STAT. ANN. § 275.170. See KY. REV. STAT. ANN. § 275.180(1) (LexisNexis 2006). Under the KyBCA, the Articles of Incorporation may eliminate or limit a director’s personal liability so long as the elimination or limitation does not extend to certain categories of conduct including those in which the director has a personal financial interest or personal benefit, the approval of an improper distribution, or “for acts or omissions not in good faith or which involve intentional misconduct or are known to the director to be a violation of law.” § 271B.2-020(2)(d); see also § 271B.8-300(5)(b).

308. KY. REV. STAT. ANN. § 362.2-110(2)(d) (LexisNexis 2006); accord § 362.1-103(2)(d).

309. KY. REV. STAT. ANN. § 362.2-110(2)(e)1 (LexisNexis 2006); accord § 362.1-103(2)(e)1.

310. KY. REV. STAT. ANN. § 362.2-110(2)(f) (LexisNexis 2006).

they not be manifestly unreasonable, the standards by which good faith and fair dealing will be applied are permitted.<sup>311</sup>

The provision authorizing for an ex post facto approval, upon full disclosure, of an action otherwise violating the standard of loyalty is confirmatory as, under generally applicable contract and agency law, the partners would have the capacity to authorize such actions.<sup>312</sup> Therefore, this aspect of ULPA merely confirms that prevailing law.<sup>313</sup>

Whether the business judgment rule is applicable to the duty of care analysis under KyULPA is debatable.<sup>314</sup>

#### E. *KyULPA Article 5 – Contributions and Distributions*

A partner's contribution to the limited partnership may be in the form of tangible or intangible property, including a promissory note.<sup>315</sup> The obligation to contribute, as undertaken, is not excused by the partner's death, disability, or other inability to perform.<sup>316</sup> In the event of a failure to make a contribution of services or other property, the partner is obligated to contribute cash of equal value.<sup>317</sup> The compromise of an obligation to make a contribution may be only by all of the partners.<sup>318</sup> However, if a creditor has extended credit based upon a contribution obligation, they may enforce the original contribution, notwithstanding any inter-se compromise thereof.<sup>319</sup>

311. KY. REV. STAT. ANN. § 362.2-110(2)(g) (LexisNexis 2006); *accord* § 362.1-103(2)(e).

312. KY. REV. STAT. ANN. § 362.2-110(2)(e)(2) (LexisNexis 2006); *accord* § 362.1-103(2)(e)(2).

313. *See* RUPA § 103 cmt 5 (1997) ("Subsection (b)(3)(ii) is intended to clarify the right of partners, *recognized under general law*, to consent to a known past or anticipated violation of duty and to waive their legal remedies for redress of that violation.") (emphasis added); *see also* RESTATEMENT (THIRD) OF AGENCY § 8.06 (2006).

314. *See* Miller & Rutledge, *The Business Judgment Rule*, *supra* note 271.

315. Note that, unlike the rule under the KyLLCA, KY. REV. STAT. ANN. § 275.200(1) (LexisNexis 2006), there is no requirement in KyULPA that the agreement to make a contribution to a limited partnership be in writing. Prior to the 2002 amendment to the Kentucky Constitution, there existed a requirement that "stock" be issued only for services performed or value paid. *See* KY. CONST. § 193 (repealed 2002). This provision had not been made expressly applicable to limited partnerships organized pursuant to KyRULPA notwithstanding that the Kentucky Constitution defined "corporation" to include joint stock companies and associations, KY. CONST. § 208 (repealed 2002), and that "corporation" may include a "partnership, joint stock company or association." KY. REV. STAT. ANN. § 446.010(8) (LexisNexis 2006); *see also* Rutledge & Booth, *LLC Act*, *supra* note 228, at 25.

316. KY. REV. STAT. ANN. § 362.2-502(1) (LexisNexis 2006); *accord* § 275.200(2).

317. KY. REV. STAT. ANN. § 362.2-503(2) (LexisNexis 2006); *accord* § 275.200(3). The agreed cash value of the contribution that was to have been in services or property other than cash is required to be agreed to and maintained in the limited partnership's records. § 362.2-502(2); § 362.2-111(9)(a).

318. As this provision is not referenced in KY. REV. STAT. ANN. § 362.2-110(2) (LexisNexis 2006), the unanimity threshold may be modified in the partnership agreement.

319. KY. REV. STAT. ANN. § 362.2-502(3) (LexisNexis 2006); *accord* § 275.200(5). Still, a recovery brought about by a suit by a creditor of the limited partnership to enforce a limited

The general rule for distributions from a limited partnership, whether they be interim or liquidating, is that they be made among the partners in proportion to the respective values of the contributions received from the partners.<sup>320</sup> In a change from prior law, “[T]his section apportions distributions in relation to the value of contributions received from each partner without regard to whether the limited partnership has returned any of those contributions.”<sup>321</sup> This alteration conforms the ULPA to the practice under which the limited partnership agreement provides the initial distributions will be a return of the amount contributed, thereby avoiding taxable income to the extent of the contribution returned.<sup>322</sup> Many limited partnership agreements will provide alternative measures for the ratio of sharing distributions. However, care must be taken when doing so as the sharing ratios have additional impacts such as the allocation of certain voting rights.<sup>323</sup>

Partners are not entitled to any distribution from the limited partnership except upon dissolution and winding up unless the limited partnership should decide to make an interim distribution.<sup>324</sup> In many instances this rule will be altered in the partnership agreement, compelling distributions, if otherwise permissible, to meet the tax obligations of the partners or upon reaching certain pre-determined targets. The dissociation of a partner does not itself give rise to a right to a distribution.<sup>325</sup>

ULPA § 506, addressing distributions in kind as adopted in the KyULPA, has been modified and supplemented. The first provision has been supplemented to make clear that irrespective of the nature of a partner’s contribution to the limited partnership, there is no right to demand that any distribution be in any form other than cash.<sup>326</sup> There are, as well, alterations to the wording regarding

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partner’s contribution obligation would be to the partnership, and not to the creditor acting on its behalf.

320. KY. REV. STAT. ANN. § 362.2-503 (LexisNexis 2006). Nearly the same rule applies under KyUPA. See § 362.459. Under the KyLLCA, distributions are shared among the members in proportion to their capital contributions. § 275.210. Cf. § 362.235(1); § 362.1-402 (each providing, *inter alia*, a default rule that distributions among the partners will be made per capita).

321. ULPA § 503 cmt. (2001).

322. See also RUPA § 503 (1997).

323. See, e.g., KY. REV. STAT. ANN. § 362.1-801 (LexisNexis 2006); § 362.2-803(3). Of course, attention must as well be paid to limitations upon distributions imposed by the Internal Revenue Code. See generally Terence Cuff, *Drafting Partnership and LLC Agreements* (pts. 1-4), 3 BUS. ENTITIES 22 (2001), 4 BUS. ENTITIES 26 (2001), 5 BUS. ENTITIES 38 (2001); 6 BUS. ENTITIES 12 (2001).

324. KY. REV. STAT. ANN. § 362.2-504 (LexisNexis 2006).

325. KY. REV. STAT. ANN. § 362.2-505 (LexisNexis 2006). In effect, the same rule applied under KyUPA, § 362.461, and its provision that interim and liquidating distributions upon dissociation would be only as so provided in the partnership agreement. See also § 362.465; § 362.467.

326. KY. REV. STAT. ANN. § 362.2-506(1) (LexisNexis 2006). The revision to this sentence in KyULPA is “A partner, regardless of the nature of the partner’s contribution, has no [~~does not have a~~] right to demand or receive any distribution from a limited partnership in any form other than cash.” Accord § 362.1-402(1); § 362.469; § 275.220(1).

the propriety of distributions in kind. While the uniform language and KyULPA are parallel in eliminating any right to receive a distribution in kind, they differ as to the ability to compel a partner to receive a distribution in kind. Under ULPA § 506, the decision as to whether a distribution in kind will be acceptable is made by the recipient partner and preserves in the recipient partner the right to reject a distribution in kind even when the distribution is pro-rata among the partners. KyULPA preserves the partner's right to reject an in kind distribution only if the distribution is on a basis other than pro-rata among all of the partners. So long as the in kind distribution is pro-rata among all of the partners in proportion to their respective interests in the limited partnership, no individual partner has the right to reject the distribution.<sup>327</sup> With the non-uniform revisions, there is greater flexibility with respect to distributions in kind, including as part of a liquidating distribution.<sup>328</sup>

Once the determination is made that a distribution will be made, each partner, to the extent entitled to participate therein, has the status of and is entitled to the rights of a creditor of the limited partnership.<sup>329</sup> If, however, the partner (including a dissociated partner) to whom a distribution is to be made owes an amount to the limited partnership, an example being to satisfy a contribution obligation, the distribution may be held back by the limited partnership as an offset.<sup>330</sup>

Distributions, whether interim or liquidating, may not be made by a limited partnership when either of two statutory tests is not satisfied. First, a distribution may not be made if it violates the partnership agreement.<sup>331</sup> Second, a limited partnership is prohibited from making distributions that would render

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327. See KY. REV. STAT. ANN. § 362.2-506(1) (LexisNexis 2006).

328. KY. REV. STAT. ANN. § 362.2-506(1) (LexisNexis 2006); *see also* § 362.1-402(1). KyULPA § 506(2) is non-uniform, and exempts a KyULPA limited partnership from the application of KY. REV. STAT. ANN. § 381.135(a)(1). *See* § 362.2-506(2).

329. KY. REV. STAT. ANN. § 362.2-507 (LexisNexis 2006); *accord* § 362.471 (granting to each partner or limited partner the status and remedies available to general creditors of the limited partnership with respect to any right to receive a distribution); § 275.225(4); § 275.235 (granting to each member the status of and remedies available to creditors of an LLC with respect to any right to receive a distribution); § 271B.6-400(6) (granting shareholders the status and remedies of creditors of a corporation with respect to declared but unpaid dividends); *Taylor v. Axton-Fisher Tobacco Co.*, 173 S.W.2d 377 (Ky. Ct. App. 1943); *see also* KY. REV. STAT. ANN. § 362.2-508(5) (LexisNexis 2006).

330. KY. REV. STAT. ANN. § 362.2-507 (LexisNexis 2006).

331. KY. REV. STAT. ANN. § 362.2-508(1) (LexisNexis 2006). This curious provision is the only instance in which ULPA states that a limited partnership may not do something "in violation of the partnership agreement." Even were it entirely absent, the same outcome would follow by virtue of ULPA § 110(a)/KY. REV. STAT. ANN. § 362.2-110(1) (LexisNexis 2006). In that the "partnership agreement" constitutes the agreement of the partners with respect to the operation of the partnership, *see* § 362.2-102(17), where a distribution is made and all partners consent thereto, it could be said that there is an amendment to the partnership agreement either permitting or ratifying that distribution and therefore that not only is not in violation of the partnership agreement, but rather that it is in compliance with the partnership agreement.



the limited partnership insolvent or otherwise impair its capital.<sup>332</sup> A distribution is forbidden if, after it is made:

- The limited partnership would not be able to pay its debts as they became due in the ordinary course of business; or
- The total assets of the limited partnership would be exceeded by the sum of its total liabilities and the amount necessary to satisfy the dissolution rights of any interests which are superior to the dissolution rights of the partner(s) receiving the distribution.<sup>333</sup>

A limited partnership<sup>334</sup> is permitted to determine that a distribution is not prohibited by reference to financial statements prepared under practices and principals reasonable under the circumstances or a fair valuation or other methods reasonable under the circumstances.<sup>335</sup> Therefore, it is not necessary that the limited partnership prepare its financial statements in accordance with generally accepted accounting principles consistently applied ("GAAP"). This flexibility in the preparation of financial statements will accommodate many small businesses that prepare their financial statements on a cash basis or otherwise do not follow GAAP.

The impact of a distribution upon the capital of a limited partnership is measured:

- In the case of a "purchase, redemption, or other acquisition of a transferable interest" as of the date the limited partnership's assets are transferred or the debt is incurred; and
- In all other instances as of the date the distribution is authorized, provided payment is to occur within 120 days after the date of the authorization of the payment, or the actual date of distribution, if such occurs more than 120 days after the date of authorization.<sup>336</sup>

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332. KY. REV. STAT. ANN. § 362.2-508(2) (LexisNexis 2006); *accord* § 275.225.

333. KY. REV. STAT. ANN. §§ 362.2-508(2)(a)-(b) (LexisNexis 2006); *accord* §§ 275.225(1)(a)-(b); §§ 271B.6-400(3)(a)-(b). *Cf.* § 362.473(applying only a balance sheet insolvency test).

334. Note that this determination is made by the limited partnership, not by the general partners.

335. KY. REV. STAT. ANN. § 362.2-508(3) (LexisNexis 2006); *accord* § 271B.6-400(4); § 275.225(2); *see also* Imperial Trading Co., Inc. v. Uter, 837 So.2d 663, 675 (La. Ct. App. 2002) (affirming trial court's finding that manager was personally liable, along with member, for assenting, without reasonable care or inquiry, to distribution to member while LLC was unable to pay its debts as they came due and that other manager was not liable where evidence supported his lack of knowledge of distribution, but reversing trial court's finding on other payments on basis record did not support imposing liability for checks payable to manager without evidence that they were distributions or that such a distribution violated the statutory restrictions). Even though a proposed distribution does not violate these provisions, further investigation of the effect of the distribution under fraudulent conveyance law is in order. *See, e.g., In re Brentwood Lexford Partners, LLC*, 292 B.R. 255, 264-65 (Bankr. N.D. Tex. 2003).

336. KY. REV. STAT. ANN. § 362.2-508(4) (LexisNexis 2006); *accord* §§ 275.225(3)(a)-(b); § 271B.6-400(5)(c).

A distribution may be made contingent upon the ability of the limited partnership to make such payments,<sup>337</sup> in which instance that contingent liability will not be used to assess the propriety of the distribution,<sup>338</sup> but the effect of the payment on that obligation is measured anew as of the date each payment is actually made.<sup>339</sup>

In a non-uniform provision, the limitations upon “distributions” are not applicable to compensatory payments made by the limited partnership to its partners.<sup>340</sup> This is accomplished by excluding from the definition of a “distribution” compensatory payments made for services rendered to or on behalf of the LLC or as part of a retirement or other benefits program. The issue that arises is that while corporate officers and employees will typically receive salaries that are not construed as “distributions,” payments to partners for services rendered are treated as “distributions” under both state and tax law. This can give rise to a fundamentally unfair distinction in treatment. Imagine two entities ABC, Inc. and XYZ, LLLP. Mary is a shareholder and an employee of ABC, Inc. and is a general partner of XYZ, LLLP, for which she performs services. ABC, Inc. pays to Mary \$1,000 in salary when the corporation is insolvent as determined under KRS § 271B.6-400(3). XYZ, LLLP makes a \$1,000 “distribution” to Mary for services rendered when the LLLP is insolvent. Absent this non-uniform provision, the \$1,000 paid Mary by ABC, Inc. is not subject to recovery as a wrongful distribution, while the \$1,000 paid Mary by XYZ, LLLP may be subject to recovery as a wrongful distribution.<sup>341</sup> The non-uniform provision precludes this inequitable result.

If a general partner consents<sup>342</sup> to a distribution that violates the limitations imposed by ULPA § 508 and it is demonstrated that in doing so the general partner failed to satisfy the duty of care, the general partner is liable to the limited partnership for the excess of distribution over the permissible amount.<sup>343</sup> The recipient of a distribution, knowing it to have been improperly declared, is liable to the limited partnership to the extent the distribution made exceeded the distribution that could properly have been made.<sup>344</sup> A general partner against

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337. KY. REV. STAT. § 362.2-508(6) (LexisNexis 2006); accord § 275.225(5).

338. KY. REV. STAT. ANN. § 362.2-508(6) (LexisNexis 2006); accord § 275.225(1).

339. KY. REV. STAT. ANN. § 362.2-508(7) (LexisNexis 2006); accord § 275.225(6).

340. KY. REV. STAT. ANN. § 362.2-508(8) (LexisNexis 2006).

341. A broader review of this issue appears in Marshall Paul, Stuart Levine & Joyce Kuhns, *Righting the Wrong Approach to Wrongful Distributions in Limited Liability Entities*, 3 J. OF LIMITED LIABILITY COMPANIES 164 (Spring 1997); see also Allan G. Donn, *Limited Liability Entities for Law Firms - 10 Years Later*, 7 PASSTHROUGH ENTITIES 19, 23 (Aug. 2004).

342. The statute is silent as to any liability of a limited partner to whom a right to consent to a distribution has been allocated in the limited partnership agreement.

343. KY. REV. STAT. ANN. § 362.2-509(1) (LexisNexis 2006). While this provision is similar to that set forth for limited liability companies, see § 275.230(1), the KyLLCA does not condition personal liability upon a breach of duty by the member/manager approving the improper distribution.

344. KY. REV. STAT. ANN. § 362.2-509(2) (LexisNexis 2006).

whom recovery of the improper portion of a distribution is sought may implead and seek contribution from (i) any other general partner who participated in violating the standard of care in declaring the distribution and (ii) to the extent the distribution was improper, any other partner who received the distribution.<sup>345</sup>

An action for recovery of an improper distribution, or to require contribution from those who approved or received the impermissible distribution, may not be brought except within the two years the distribution.<sup>346</sup> A waiver of the partnership's right to seek recovery of an improper distribution is effective only if approved by all of the partners, and no waiver is binding upon a third party who without notice of a compromise has extended credit to the limited partnership based upon the recovery of an improper distribution.<sup>347</sup>

#### F. *KyULPA Article 6 - Dissociation*

The ULPA §§ 601 through 604 address the dissociation of partners, either limited or general, from a limited partnership.

KyULPA provides that a limited partner has no right to disassociate from the partnership prior to its termination.<sup>348</sup> Still, while lacking the right to dissociate, and subject to a contrary provision in the partnership agreement, a limited partner may dissociate, by giving notice of its "express will" to do so, even though that dissociation may be wrongful.<sup>349</sup> Under the KyRULPA as originally adopted, absent the partnership agreement specifying a time or event upon which a limited partner could properly withdraw from the partnership, or in the absence of a definite time for the dissolution of the partnership, a limited partner had the statutory right to withdraw from the partnership six months following the giving of notice of withdrawal to each general partner.<sup>350</sup> Having withdrawn, the limited partner was entitled to receive whatever payment certificate or, in the agreement of limited partnership or, in the absence of any such provision, the "fair value" of the limited partner's interest in the partnership as of the date of

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345. KY. REV. STAT. ANN. § 362.2-509(3) (LexisNexis 2006). Cf. §§ 275.230(2)(a)-(b); § 271B.8-330(1)(b).

346. KY. REV. STAT. ANN. § 362.2-509(4) (LexisNexis 2006). Cf. § 275.230(3); § 271B.8-330(3) (providing for two year period of recovery from the date the effect of the distribution is measured).

347. KY. REV. STAT. ANN. § 362.2-502(3) (LexisNexis 2006).

348. KY. REV. STAT. ANN. § 362.2-601(1) (LexisNexis 2006). As originally adopted in Kentucky, KyRULPA provided that a limited partner could withdraw from the partnership on six months prior written notice, and thereafter receive a distribution of the fair value of the limited partner's interest in the partnership. See § 362.465; § 362.467, each as prior to 1998 amendments. In 1998 these provisions were amended, see 1998 Ky. Acts ch. 341, §§ 50-51, to eliminate both any right of withdrawal, absent an enabling provision in the partnership agreement or the unanimous approval of the other partners, and of a liquidating payment upon withdrawal, unless such are set forth in a written partnership agreement.

349. KY. REV. STAT. ANN. § 362.2-601(2)(a) (LexisNexis 2006).

350. KY. REV. STAT. ANN. § 362.463 (LexisNexis 2006).

withdrawal, which fair value was to be determined “based upon his right to share in distributions from the limited partnership.”<sup>351</sup>

In addition to withdrawal by express will of a limited partner, a limited partner will be dissociated from the limited partnership upon:

- An event specified in the partnership agreement as causing a dissociation of a person as a limited partner;<sup>352</sup>
- The expulsion of a limited partner by the unanimous consent of the other partners if it is unlawful to carry on the activities of the limited partnership with that person as a limited partner, if all of that limited partner's transferable interest in the partnership has been transferred other than for purposes of giving security of pursuant to an unperfected charging order, in the case of a limited partner that is a corporation, 90 days after delivery by the limited partnership to the limited partnership that it will be expelled consequent to the filing of a certificate of dissolution, the revocation of its charter, or in the case of a limited partnership that is a limited liability company or a partnership, it being dissolved and its business wound up;<sup>353</sup>
- A judicial determination pursuant to an application by the limited partnership that a person should be expelled as a limited partner because they have engaged in conduct that is wrongful and that adversely and materially affects the limited partnership, willful or pursuant material breaches of the partnership agreement or the obligations of good faith and fair dealing thereunder or they have engaged in conduct relating to the activities of the limited partnership such that it is not reasonably practical to thereafter carry on its activities with that person as a limited partnership.<sup>354</sup>

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351. KY. REV. STAT. ANN § 362.467 (LexisNexis 2006) (prior to 1998 amendment by 1998 Ky. Acts ch. 341, § 51). These provisions of KyRULPA were amended in 1998 with the objective of eliminating the right of withdrawal and in so doing making limited partnerships formed a KyRUPA more viable as estate planning vehicles.

352. Ky. REV. STAT. ANN § 362.2-601(2)(b) (LexisNexis 2006). In contrast with the rule requiring that there be maintained in a record a listing of the events that would cause the dissolution of the limited partnership, 362.2-111(9)(d), there exists no statutory requirement that the event or events that would cause the dissociation of a limited partner be set forth in a record.

353. Ky. REV. STAT. ANN. § 362.2-601(2)(d) (LexisNexis 2006). With respect to the treatment of a corporation and the suspension of its right to conduct business, such could take place by reason of an administrative dissolution that is remedied, with that remedy relating back, after the effective date of its expulsion as a limited partner. In that instance, the expulsion from the limited partnership will be effective notwithstanding the subsequent reinstatement. Note as well that, in the case of a limited liability company, there is not similar treatment in the event of administrative dissolution as its expulsion is conditioned upon the business being wound up; where administrative dissolution leads only to reinstatement within the applicable time period, and no actions toward the winding up are taken, expulsion from the limited partnership will not automatically happen.

354. Ky. REV. STAT. ANN. § 362.2-601(2)(e) (LexisNexis 2006).

- The death of a limited partner who is an individual;<sup>355</sup>
- In the case of a limited partner that is a trust or trustee, a distribution of the trust entire transferable interest other than by reason of the substitution of a successor trustee;<sup>356</sup>
- In the case of the limited partnership that is an estate or the personal representative of an estate, distribution of its entire transferable interest in the limited partnership other than by reason of the appointment of a successor personal representative;<sup>357</sup>
- Other termination of a limited partner who is not an individual partnership, limited liability company, corporation, trust or estate;<sup>358</sup> or
- Upon the merger and conversion of the limited partnership if either limited partnership is not the surviving entity or if, in the course of the merger and conversion, that person does not become a limited partner in the successor entity.<sup>359</sup>

Upon dissociation, the limited partner is not entitled to a buyout of their interest in the partnership.<sup>360</sup> Rather, the limited partner retains only their transferable interest in the partnership, becoming, in effect, a transferee of their own interest.<sup>361</sup> A limited partner so dissociated has no rights as a limited partner, is no longer bound by obligations of good faith and fair dealing, except with respect to those matters that have arisen prior to the dissociation, and at the same time is not discharged from any obligations of the limited partnership or other partners incurred prior to the dissociation, which obligations may include those of contribution.<sup>362</sup> Furthermore, in that the limited partner has altered their status, on an economic basis, to that of a mere transferee, they are no longer owed fiduciary duties.<sup>363</sup>

ULPA § 603<sup>364</sup> addresses those events that cause the dissociation of a general partner from the partnership, a term functionally defined in ULPA §

355. KY. REV. STAT. ANN. § 362.2-601(2)(f) (LexisNexis 2006).

356. KY. REV. STAT. ANN. § 362.2-601(2)(g) (LexisNexis 2006).

357. KY. REV. STAT. ANN. § 362.2-601(2)(h) (LexisNexis 2006).

358. KY. REV. STAT. ANN. § 362.2-601(2)(i) (LexisNexis 2006).

359. KY. REV. STAT. ANN. § 362.2-601(2)(j) (LexisNexis 2006).

360. KY. REV. STAT. ANN. § 362.2-505 (LexisNexis 2006). Cf. § 362.1-701.

361. KY. REV. STAT. ANN. § 362.2-602(1)(c) (LexisNexis 2006). A limited partner so dissociated has no rights as a limited partner, is no longer bound by obligations of good faith and fair dealing, except with respect to those matters that have arisen prior to the dissociation, and at the same time is not discharged from any obligations of the limited partnership or other partners incurred prior to the dissociation, which obligations may include those of contribution.

362. KY. REV. STAT. ANN. § 362.2-602(1) (LexisNexis 2006); § 362.2-602(2).

363. See KY. REV. STAT. ANN. § 362.2-408(1) (LexisNexis 2006); see also *Levine v. Marray Hill Manor Co.*, 532 N.Y.S.2d 130, 132 (N.Y. App. Div. 1988) (an assignee of an interest in a limited partnership is not owed fiduciary duties).

364. KY. REV. STAT. ANN. § 362.1-601 (LexisNexis 2006).

605<sup>365</sup> by its effect. However, dissociation does not in and of itself terminate a partner's economic relationship with the partnership.<sup>366</sup>

Under ULPA § 603, a partner will be dissociated upon any of a series of events, events that are in part dependent upon the type (*e.g.*, individual, corporation) of partner.<sup>367</sup> ULPA § 110(b) limits modification of ULPA § 603 in only one aspect. The only permissible limit on a voluntary withdrawal under ULPA § 603(b)(1) is to require that the notice provided the partnership be in writing.<sup>368</sup> It is worth noting that the right of a court to order a ULPA § 603(5) judicial expulsion of a partner may be varied in the partnership agreement.<sup>369</sup>

ULPA § 802 is referenced in ULPA § 110(b)(9), which provides that the partnership agreement may not “vary the power of a court to decree dissolution in the circumstances specified in Section 802.”<sup>370</sup> Reasonable minds can differ as to the proper interpretation of ULPA § 110(b)(9) and its preclusive effects. Under one reading, there remains open the opportunity for the partnership agreement to impose additional procedural requirements, such as requiring collective action by the partners in order to initiate an action for expulsion, on the theory that such requirements neither vary the “power of a court”<sup>371</sup> nor the “circumstances specified in Section 802.”<sup>372</sup> By way of contrast, the Official Comment to RUPA § 103(b)(7), upon which ULPA § 110(b)(8) is based, appears to be broader than the text of the provision itself,<sup>373</sup> and precludes such procedural limitations upon the unilateral right of a partner to initiate an expulsion action under RUPA § 601(5), stating in part “Under subsection (b)(7), the right of a partner to seek court expulsion of another partner under 601(5) can not be waived or varied (*e.g.*, requiring a 90-day notice) by agreement.”<sup>374</sup> In order that RUPA § 103(b)(7) may conform to its commentary, it has been amended in KyRUPA to provide that the partnership agreement may not “Vary the right of a partner or the partnership to seek a partner's expulsion by judicial determination or vary the right of a court to expel a partner in the events specified in KRS 362.1-601(5).”<sup>375</sup>

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365. KY. REV. STAT. ANN. § 362.2-605 (LexisNexis 2006).

366. KY. REV. STAT. ANN. § 362.2-605(5) (LexisNexis 2006).

367. The events causing the dissociation of a partner are in part generic to all partners irrespective of type, KY. REV. STAT. ANN. §§ 362.2-603(1)-(6) (LexisNexis 2006), and in part are dependent upon the nature of the partner. §§ 362.1-602 (7)-(10).

368. ULPA § 110(b)(8) (2001); KY. REV. STAT. ANN. § 362.2-110(2)(h) (LexisNexis 2006).

369. ULPA § 603(5) cmt. subsec. (5) (2001). *Cf.* KY. REV. STAT. ANN. § 362.1-103(2)(g) (LexisNexis 2006).

370. ULPA § 110(b)(9) (2001); KY. REV. STAT. ANN. § 362.1-110(2)(i) (LexisNexis 2006).

371. ULPA § 110(b)(9) (2001); KY. REV. STAT. ANN. § 362.1-110(2)(i) (LexisNexis 2006).

372. ULPA § 110(b)(9) (2001); KY. REV. STAT. ANN. § 362.1-110(2)(i) (LexisNexis 2006).

373. However, NCCUSL's own rules preclude the expansion of the substantive text of a uniform act by the commentary. *See* National Conference of Commissioners on Uniform State Laws, Procedural and Drafting Manual 10 (1997) (“Comments should not be used as a substitute for or to modify any substantive provision in the Act.”).

374. RUPA § 103(b)(7) cmt. 9 (1997).

375. KY. REV. STAT. ANN. § 362.1-103(2)(g) (LexisNexis 2006).

The dissociation of a partner by reason of being a debtor in bankruptcy is problematic, especially if the partnership is a limited liability limited partnership. The Bankruptcy Code, at sections 365 and 541, disfavors so called "ipso facto" provisions, namely those that are triggered by the bankruptcy filing and which have the effect of reducing the value of the interest in the hands of the debtor.<sup>376</sup> Traditionally, partnership agreements have been viewed as executory agreements, namely those requiring continuing performance and obligations from all of the partners and the partnership. On this basis, the dissociation of a partner by reason of bankruptcy was deemed appropriate. One aspect of those continuing obligations was the shared obligations of the partners to contribute toward the satisfaction of partnership obligations. This rationale may not exist in a LLLP absent a contrary provision in the partnership agreement; not only are the general partners not liable for the debts and obligations of the partnership, but also they have no obligations to contribute toward obligations satisfied by other partners.<sup>377</sup>

ULPA § 604 addresses when a general partner's dissociation from the partnership is wrongful. Note that even if wrongful, the partner has the right to dissociate. Hence, "A person has the power to dissociate at any time as a general partner, rightfully or wrongfully, by express will pursuant to KRS 362.2-603(1)."<sup>378</sup> As such, the distinction between the power and the right to dissociate (withdraw from the partnership) is retained.<sup>379</sup> This power may not be varied in the partnership agreement.<sup>380</sup> A dissociation that is wrongful exposes the dissociating partner to liability to the partnership and to the other partners for

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376. See, e.g., *In re Rittenhouse Carpet, Inc.*, 56 B.R. 131, 131-32 (Bankr. E.D. Pa. 1985) (provisions of partnership agreement and of state law purporting to remove the general partner upon bankruptcy nullified by bankruptcy code § 365(e)); *In re Fid. Am. Mortgage Co.*, 10 B.R. 781 (Bankr. E.D. Pa. 1981); *In re Nizny*, 175 B.R. 934 (Bankr. S.D. Ohio 1994); *In re Corky Foods Corp.*, 85 B.R. 903 (Bankr. S.D. Fla. 1988); see also *In re Priestly*, 93 B.R. 253, 258 (Bankr. D.N.M. 1988) (portions of partnership agreements held to be property rights and other portions to be executory agreements; right to manage partnership is executory and under Bankruptcy Code § 365(c) not assignable without consent of limited partners). Cf. *In re Plunkett*, 23 B.R. 392, 394 (Bankr. E.D. Wis. 1982) (debtor in possession could participate in management of partnership).

377. As of this writing there is no published ruling assessing whether an LLLP agreement is or is not an executory agreement and the impact of limited liability upon the traditional analysis of partnership agreements. See also *In re Ehmann*, 319 B.R. 200 (Bankr. D. Ariz. 2005), *aff'd*, 334 B.R. 437, *withdrawn*, 337 B.R. 228 (Bankr. D. Ariz. 2006); *In re Baldwin*, No. 04-72919, 2006 WL 2034217 (B.A.P. 10th Cir. July 11, 2006); Thomas E. Geu & Thomas E. Rutledge, *Guess Who's Coming to Dinner?: The Bankruptcy Trustee's Ability to Become a Member and the Ehmann Decision*, 7 BUS. ENTITIES 32 (2005); Thomas E. Rutledge & Thomas Earl Geu, *In re Ehmann II: Now You See It, Now You Don't*, 8 BUS. ENTITIES 44 (2006); James J. Wheaton, *Current Status of Bankruptcy Issues* (Mar. 16, 2006), in ALI-ABA VIDEO L. REV. (2006); Susan Kalinka, *In re Ehmann: Bankruptcy Court Decision Portends Problems for Manager-Managed LLCs*, 84 TAXES 5 (2006).

378. KY. REV. STAT. ANN. § 362.2-604(1) (LexisNexis 2006).

379. KY. REV. STAT. ANN. § 362.2-604(2) ("A person's dissociation as a general partner is *wrongful only if* . . .") (emphasis added); see also § 362.300(2).

380. KY. REV. STAT. ANN. § 362.2-110(2)(h) (LexisNexis 2006).

damages caused by the dissociation.<sup>381</sup> Furthermore, if a wrongful dissociation results in the dissolution of the partnership, the wrongfully dissociating partner is not entitled to participate in the winding up.<sup>382</sup> A dissociation is wrongful if:

(a) It is in breach of an express provision of the partnership agreement;  
or

(b) In the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking if any of the following apply:

1. The partner withdraws by express will;
2. The partner is expelled by judicial determination under KRS 362.2-603(5);
3. The partner is dissociated by becoming a debtor in a bankruptcy; or
4. In the case of a partner who is not an individual, trust other than a business trust, or estate, the partner is expelled or otherwise dissociated because it willfully dissolved or terminated.<sup>383</sup>

ULPA § 605 addresses the consequences of a dissociation, whether proper or wrongful, of a general partner. As to the dissociated partner:

- The partner's right to participate in the management and conduct of the partnership's business terminates;<sup>384</sup>
- Certain aspects of the partner's duty of loyalty terminate;<sup>385</sup> and
- The general partner's duty of care and other aspects of the duty of loyalty continue only as to matters and events occurring before the dissociation.<sup>386</sup>

Interestingly, and for understandable reasons, ULPA § 605 does not expressly address the continuation, subsequent to dissociation, of a partner's obligations of good faith and fair dealing. These obligations modify other obligations of the partners under the Act and the partnership agreement. As such, to the extent that obligations continue subsequent to dissociation, which question is in part dependent upon whether the dissociation will be followed

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381. KY. REV. STAT. ANN. § 362.1-604(3) (LexisNexis 2006); *see also* § 362.2-605(6).

382. KY. REV. STAT. ANN. § 362.2-605(1) (LexisNexis 2006).

383. KY. REV. STAT. ANN. § 362.2-604(2)(b) (LexisNexis 2006).

384. *See* KY. REV. STAT. ANN. § 362.2-605(1) (LexisNexis 2006).

385. *See* KY. REV. STAT. ANN. § 362.2-605(2); *see also* § 362.2-404(2)(c).

386. KY. REV. STAT. ANN. § 362.2-605(3) (LexisNexis 2006); *see also* § 362.2-408(2)(a); § 362.2-408(2)(b); § 362.2-408(3).



with winding up and termination, the obligations of good faith and fair dealing will continue in force. As obligations, including fiduciary obligations, diminish or terminate, the contractual obligations of good faith and fair dealing will as well diminish and terminate.

ULPA § 606 addresses the ongoing agency authority of a general partner subsequent to the general partner's dissociation. Assuming the partnership has not otherwise ceased to exist, the former general partner may still bind the limited partnership if:

- The action would have been within the authority of a general partner who is not dissociated;
- It has been less than two years since the general partner's dissociation; and
- The third party did not have notice of the dissociation and reasonably believed that the person was still a general partner.<sup>387</sup>

While the limited partnership may be bound to the third party by a dissociated general partner, the dissociated general partner is liable to the limited partnership and to any general partner for any damage caused to the limited partnership or them by that obligation.<sup>388</sup> In light of the continuing authority of a dissociated general partner, it is advised that the statement of dissociation and the amendment of the certificate of limited partnership, both recording the dissociation, be filed as soon as is possible, and that steps be taken to put third-parties on notice of these filings.<sup>389</sup>

ULPA § 607 addresses the continuing obligations of a general partner, as a general partner, for the obligations of the limited partnership subsequent to dissociation. Initially, dissociation does not relieve a general partner of an obligation incurred by the limited partnership prior to the dissociation.<sup>390</sup> While a general partner is not exposed on obligations of the limited partnership accrued after dissociation, there are two exceptions to the rule. First, if the general

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387. KY. REV. STAT. ANN. § 362.2-606(1) (LexisNexis 2006). Note that the final clause requires both components; they are not alternatives.

388. KY. REV. STAT. ANN. § 362.2-606(2) (LexisNexis 2006). The term used is "damage," and not "cost," because the limited partnership may in fact benefit from the transaction to which it was improperly bound. *Accord* § 362.1-702(2).

389. The dissociated general partner is obligated, at the request of the limited partnership, to sign an amendment to the certificate of limited partnership stating that they have dissociated. *See* KY. REV. STAT. ANN. § 362.2-605(4) (LexisNexis 2006). As well, a statement of dissociation may be filed with the Secretary of State. The notice effect of the two filings is the same. *See* § 362.2-103(4)(a). While filing a statement of dissociation is optional, amending the certificate of limited partnership to delete the dissociated general partner is mandatory. *See* § 362.2-202(2)(b).

390. KY. REV. STAT. ANN. § 362.2-607(1) (LexisNexis 2006). For the period that the limited partnership is a limited liability limited partnership, the general partner will not have liability for the obligations of the limited partnership. As was the case under ULPA § 404, KY. REV. STAT. ANN. § 362.2-404, other law will determine when an obligation was "incurred."

partner's dissociation results in the limited partnership's dissolution, the otherwise dissociated partner is liable as is any other general partner under ULPA 404 for an obligation undertaken under ULPA 804.<sup>391</sup> Second, if the dissociation does not result in the dissolution of the limited partnership, the general partner is liable for obligations of the limited partnership if:

- A general partner would be liable on the obligation; and
- At the time the third party enters into the transaction: it has been less than two years since the general partner's dissociation; the third party did not have notice of the dissociation and reasonably believed that the person was still a general partner.<sup>392</sup>

A creditor of the limited partnership may release a dissociated general partner from liability on an obligation, but the release requires the consent of the limited partnership.<sup>393</sup> Alternatively, a dissociated general partner is automatically released if the creditor, with notice of the dissociation and without seeking and receiving the consent of the dissociated general partner, agrees to a material alteration of the obligation.<sup>394</sup>

#### *G. KyULPA Article 7 - Transferable Interests and Rights of Transferees and Creditors*

ULPA § 701 defines a partner's transferable interest in the limited partnership as the right to receive distributions, and further provides that the transferable interest is personal property.<sup>395</sup> The transfer of a transferable interest is permissible, does not dissociate the transferor, and does not cause the dissolution of the limited partnership.<sup>396</sup> A transferee is entitled to receive distributions made with respect to the transferable interest, whether periodic or liquidating.<sup>397</sup> The receipt of a transferable interest does not entitle the transferee to participate in the management of the limited partnership or to access information except upon the winding-up of the partnership and then only from the date of dissolution.<sup>398</sup> Still, the transferee has no right to participate in the management of the limited partnership and is not owed fiduciary obligations or obligations of good faith and fair dealing. The transfer of a transferable

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391. KY. REV. STAT. ANN. § 362.2-607(2) (LexisNexis 2006).

392. KY. REV. STAT. ANN. § 362.2-607(3) (LexisNexis 2006). Note that both components are required; they are not alternatives.

393. KY. REV. STAT. ANN. § 362.2-607(4) (LexisNexis 2006).

394. KY. REV. STAT. ANN. § 362.2-607(5) (LexisNexis 2006).

395. KY. REV. STAT. ANN. § 362.2-701 (LexisNexis 2006); *accord* § 362.1-502; *see also* § 275.250 (LexisNexis 2006).

396. KY. REV. STAT. ANN. §§ 362.2-702(1)(a)-(b); *accord* §§ 362.1-503(1)(a)-(b); *see also* § 275.255(1).

397. KY. REV. STAT. ANN. § 362.2-702(2) (LexisNexis 2006).

398. KY. REV. STAT. ANN. § 362.2-702(1)(c) (LexisNexis 2006).

interest does not deprive the transferor of the rights not encompassed within the transferable interest, including the right to participate in management, to inspect records, and to benefit from the fiduciary obligations of the general partners. As such, barring expulsion,<sup>399</sup> the transferor limited partner retains those rights.<sup>400</sup> The partnership agreement may contain limitations upon the transferability of a transferable interest, but those limitations are effective only as to a third party that has notice thereof.<sup>401</sup> The addition of non-uniform new subsection (8) to ULPA § 702 serves to preempt KRS §§ 355.9-406 and 355.9-408, which may themselves be interpreted to preempt limitations upon the transfer of the transferable interest contained in the limited partnership agreement.<sup>402</sup>

ULPA § 703 details the rights of a judgment creditor vis-à-vis a partner's transferable interest.<sup>403</sup> Essentially, a charging order is a lien on the transferable interest<sup>404</sup> entitling the holder to receive all distributions that would be otherwise made to the partner until such time as the judgment is satisfied.<sup>405</sup> That lien is subject to foreclosure, and the purchaser of the lien will have the rights of a transferee.<sup>406</sup> The charged interest, prior to foreclosure, is subject to redemption by the judgment debtor/partner, by another partner, or by the partnership.<sup>407</sup> Various state exemption laws are applicable to the transferable interest and as

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399. See KY. REV. STAT. ANN. § 362.2-601(2)(d)(2) (LexisNexis 2006).

400. KY. REV. STAT. ANN. § 362.2-702(4) (LexisNexis 2006).

401. KY. REV. STAT. ANN. § 362.2-702(6) (LexisNexis 2006).

402. KY. REV. STAT. ANN. § 362.2-702(8) (LexisNexis 2006). Similar non-uniform language was added to KyRUPA. See KY. REV. STAT. ANN. § 362.1-503(7) (LexisNexis 2006); see also § 355.9-406; § 355.9-408; Lynn A. Soukup, "Opting In" to Article 8—LLC, GP & LP Interests as Collateral, COM. L. NEWSL. (ABA Uniform Commercial Code Committee, Chicago, Ill.), July, 2002, at 1; Robert R. Keatinge, Taking and Enforcing Security Interests in Interests in Unincorporated Businesses (Mar. 12, 2002), in ALI-ABA VIDEO L. REV. (2002); Robert R. Keatinge, Interests in Unincorporated Organizations as Securities Under Article 8 of the UCC (Mar. 12, 2002), in ALI-ABA VIDEO L. REV. (2002).

403. See generally Jacob Stein, *Building Stumbling Blocks: A Practical Take on Charging Orders*, 8 BUS. ENTITIES 28 (2006); Thomas E. Rutledge, *Charging Orders: Some of What You Ought to Know* (pts. 1-2), 9 J. PASSTHROUGH ENTITIES 19, 25 (2006) [hereinafter Rutledge, *Charging Orders*].

404. Defined at KY. REV. STAT. ANN. § 362.2-102(26) (LexisNexis 2006).

405. KY. REV. STAT. ANN. § 362.2-703(1) (LexisNexis 2006); accord 362.1-504; § 362.285(1); § 275.260. The decision in *Hubbard v. Talbott Tavern, Inc.*, No. 2003-CA-001468-MR, 2006 WL 2089308 (Ky. App. July 28, 2006), as regards charging orders is not a correct application of the law. The Court of Appeals upheld a trial court order that "assigned" to the judgment creditor the judgment debtor's membership interest in each of three LLCs and further directed that, by reason of the assignment, the judgment debtor be dissociated and cease to be a member of each of the LLCs. It said as well that the assignments of the membership interests would continue until the judgment was satisfied. The Court justified the order of dissociation on the basis of § 275.280(1), which provides that a member is dissociated when they "make an assignment for the benefit of creditors." The charging order provision of the KyLLCA, KY. REV. STAT. ANN. § 275.260 (LexisNexis 2006), does not use the word or otherwise authorize an assignment.

406. KY. REV. STAT. ANN. § 362.2-703(2) (LexisNexis 2006).

407. KY. REV. STAT. ANN. § 362.2-703(3) (LexisNexis 2006).

- After the dissociation of a general partner, if there is at least one remaining general partner and the partners entitled to receive a majority of the distribution decide to dissolve;<sup>417</sup>
- Ninety days after the dissociation of the last general partner, unless within that ninety-day period the limited partners elect a new general partner and that new general partner is admitted in accordance with that consent;<sup>418</sup>
- Ninety days after the dissociation of the last limited partner, unless a new limited partner is in that period admitted;<sup>419</sup>
- Administrative dissolution;<sup>420</sup> or
- Judicial dissolution on the basis that “it is not reasonably practicable to carry on the business of the limited partnership in accordance with its partnership agreement.”<sup>421</sup>

After dissolution, a limited partnership continues in existence only for the purposes of its winding up.<sup>422</sup> In the course of the winding up, the limited partnership is to discharge its liabilities, settle and close its activities, and marshal and distribute its assets.<sup>423</sup> If the limited partnership does not have a general partner, by a majority vote in accordance to their right of the distributions, the limited partners may elect a person to wind up the limited

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limited partners, determined in proportion to the ratios to receive distributions, in order to approve the voluntary dissolution of the limited partnership. The modification of this threshold, which may be further modified in the partnership agreement, is intended to increase the utility of KyULPA for estate planning purposes. This non-uniform provision continues the rule of unanimity amongst all of the partners contained in KyRULPA. *See* § 362.487(3).

417. KY. REV. STAT. ANN. § 362.2-801(3)(a) (LexisNexis 2006). The election to dissolve the limited partnership needs to be made within ninety days after the general partner's dissociation. In this instance all partners vote as a single class and voting rights are proportional to distributional rights. *See* § 362.2-503. As transferees do not exercise management rights or otherwise participate in the direction of the limited partnership, § 362.2-701; § 362.2-702(1)(c), they do not participate in the vote, and the distributional rights associated with the transferable interests held by transferees are excluded from the calculation of a majority.

418. KY. REV. STAT. ANN. § 362.2-801(3)(b) (LexisNexis 2006); *see also* § 362.2-401. *Cf.* § 362.487(4) (limited partnership will dissolve unless partners vote to continue it).

419. KY. REV. STAT. ANN. § 362.2-801(4) (LexisNexis 2006); *see also* § 362.2-301.

420. KY. REV. STAT. ANN. § 362.2-801(5) (LexisNexis 2006); *see also* § 362.2-809.

421. KY. REV. STAT. ANN. § 362.2-802 (LexisNexis 2006). This is the same standard as that applied in KyRULPA. *See* § 362.489. This provision is referenced in § 362.2-110(2)(i), which proscribes any effort in the partnership agreement to “vary the right of a court to decree dissolution in the circumstances specified in KRS 362.2-802.” § 362.2-110(2)(i). The partnership agreement may add additional bases for seeking judicial dissolution. Whether the partnership agreement may require the arbitration of whether “it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement” is open to dispute. While the official comment in ULPA § 110(b)(9) (2001) indicates that arbitration of such disputes is proper, there exists case law to the contrary. *See, e.g.,* *Sivsa Entm't v. World Int'l Network*, No. B164377, 2004 WL 1895080 (Cal. Ct. App. Aug. 25, 2004); *Willie Gary LLC v. James & Jackson*, No. 1781, 2006 WL 75309 (Del. Ch. Jan. 10, 2006).

422. KY. REV. STAT. ANN. § 362.2-803(1) (LexisNexis 2006); *accord* § 271B.14-050(1); § 275.300(2); § 362.1-802(1); *see also* § 362.2-202(2)(c); § 362.2-803(2)(a).

423. KY. REV. STAT. ANN. § 362.2-803(2)(b) (LexisNexis 2006).

partnership.<sup>424</sup> That person has agency authority on behalf of the limited partnership<sup>425</sup> and is required to change the amendment of the certificate of limited partnership to state that the limited partnership has no general partner and identify themselves as the person appointed to wind it up.<sup>426</sup> Judicial supervision of the winding up may be ordered where there is no general partner and no person is appointed to oversee the winding up within a reasonable time or at any other time the applicant shows good cause.<sup>427</sup>

After dissolution, an action of a general partner or a person appointed to oversee the winding up will bind the limited partnership if the action is appropriate for the winding up or as to persons who do not have notice of the dissolution, if it would be appropriate to bind the limited partnership in its ordinary course.<sup>428</sup> After dissolution, a dissociated general partner binds a limited partnership for up to two years or such shorter period ending upon notice of the dissociation on an act appropriate for the winding up or as to those without notice of the dissolution on an act that would have been appropriate to bind the partnership in its ordinary course.<sup>429</sup> A general partner with knowledge of the dissolution that causes the limited partnership to incur an obligation other than one appropriate for the winding up, or a dissociated general partner binding the limited partnership on any obligation, is liable to the limited partnership for all resulting damages incurred by the partnership and any other current or dissociated general partner.<sup>430</sup>

Known claims<sup>431</sup> against the dissolved limited partnership may be addressed and disposed of by notice from the limited partnership to the creditor.<sup>432</sup> A claimant must respond to the notice and file a claim within the defined time

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424. KY. REV. STAT. ANN. § 362.2-803(3) (LexisNexis 2006).

425. KY. REV. STAT. ANN. § 362.2-803(3)(a) (LexisNexis 2006); *see also* § 362.2-804. *Cf.* § 362.491 (in absence of a general partner, the limited partners are empowered to oversee winding up). A person appointed, in the absence of a general partner, to oversee the winding up of the limited partnership is not a general partner and is not subject to § 362.2-408. *See* ULPA § 803 cmt. (2001).

426. KY. REV. STAT. ANN. § 362.2-803(3)(b) (LexisNexis 2006); *see also* § 362.2-202(2)(c) (LexisNexis 2006).

427. KY. REV. STAT. ANN. § 362.2-803(4) (LexisNexis 2006).

428. KY. REV. STAT. ANN. § 362.2-804(1) (LexisNexis 2006); *see also* § 362.2-402(1).

429. KY. REV. STAT. ANN. § 362.2-804(2) (LexisNexis 2006); *see also* § 362.2-606.

430. KY. REV. STAT. ANN. § 362.2-805 (LexisNexis 2006).

431. Known claims do not include contingent claims or those based on an event occurring after the effective date of dissolution. KY. REV. STAT. ANN. § 362.2-806(4) (LexisNexis 2006); *accord* § 271B.14-060(4); § 275.320(4).

432. KY. REV. STAT. ANN. § 362.2-806 (LexisNexis 2006). The notice must be in a record and must set forth the requirements of the claim, provide a mailing address to which a claim is to be sent, state a deadline for receipt of claims, which deadline may not be less than one-hundred-twenty days after the claimant's receipt of the notice, state the claims will be barred if not received within that period and unless the limited partnership was from its inception a limited liability limited partnership, state the claims against the general partners on those partnership obligations will be likewise time barred. *Accord* § 271B.14-060; § 275.320. This provision has no counterpart in KyRULPA.

period of not less than one-hundred-twenty days or the claim will be time barred. A claim may also be barred if the limited partnership rejects the claim and the claimant does not commence an action for its enforcement within ninety days after receipt of the notice of rejection.<sup>433</sup>

A limited partnership may as well publish notice of its dissolution and solicit creditor claims.<sup>434</sup> The creditors whose claims may be time barred through publication are known claimants who did not receive the record notice of the dissolution, claimants who submitted a claim on which the limited partnership did not act, and claims based on a contingency or an event occurring after the effective date of dissolution.<sup>435</sup> A claim that is not barred may be enforced to the extent of the undistributed assets of the limited partnership and the liquidating distributions made and may as well be enforced against the general partner who is liable thereon.<sup>436</sup> However, a claim barred as to enforcement against the limited partnership is likewise barred as against any general partner.<sup>437</sup>

A domestic limited partnership may be administratively dissolved if it does not file its annual report with the Secretary of State within sixty days after the due date, it is without a registered office or agent for sixty days, or it fails to notify the Secretary of State of changes in its registered office or registered agent.<sup>438</sup> The Secretary of State, by a letter sent to the limited partnership at its registered office, will notify it that grounds exist for the administrative dissolution, and the limited partnership will be afforded sixty days to correct those deficiencies.<sup>439</sup> Thereafter, the Secretary of State may administratively dissolve the limited partnership.<sup>440</sup> A limited partnership administratively

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433. Curiously, there is no requirement that the rejection of a claim be in a record.

434. KY. REV. STAT. ANN. § 362.2-807(1) (LexisNexis 2006). The notice is published at least once in a paper of general circulation in the county in which the limited partnership's principal office or, if that office is not in Kentucky, the county in which the registered office, is located. § 362.2-807(2)(a). The published notice must describe the information required in a claim against the limited partnership and the mailing address to which it may be sent. § 362.2-807(2)(b). The published notice must also state that a claim will be time barred if no proceeding to enforce it is brought within five years of the publication and that claims against general partners will also be time barred. §§ 362.2-807(2)(c)-(d).

435. KY. REV. STAT. ANN. § 362.2-807(3) (LexisNexis 2006). Cf. § 271B.14-070(3) (claims barred two years after publication); § 275.325(3) (claims barred two years after publication unless against professional limited liability company).

436. KY. REV. STAT. ANN. § 362.2-807(4) (LexisNexis 2006).

437. KY. REV. STAT. ANN. § 362.2-808 (LexisNexis 2006). While both the KyBCA and the KyLLCA allow shareholders and members, respectively, to waive limited liability for some or all debts and obligations of the entity, § 271B.6-220(2); § 271B.2-020(2)(b)(5); § 275.150(2), neither addresses the survival (or not) of claims against responsible shareholders/members when time barred against the corporation/LLC.

438. KY. REV. STAT. ANN. § 362.2-809(1) (LexisNexis 2006); accord §§ 271B.14-200(1)-(3); §§ 275.295(1)(a)-(c).

439. KY. REV. STAT. ANN. §§ 362.2-809(2)-(3) (LexisNexis 2006).

440. KY. REV. STAT. ANN. § 362.2-809(1) (LexisNexis 2006). A copy of the certificate of dissolution is to be mailed by the Secretary of State to the limited partnership at its registered office. With respect to this provision as well as the preceding provision, providing that the Secretary of State will give notice to the limited partnership by mail to its registered office, there is

dissolved continues in existence but may carry on only those activities that are necessary to its winding up and liquidation.<sup>441</sup> The authority of an appointed registered agent is not terminated by the administrative dissolution of a limited partnership.<sup>442</sup> A limited partnership, having been administratively dissolved, may apply for reinstatement provided that it has not taken any action necessary to wind up and terminate its business.<sup>443</sup> If the Secretary of State grants reinstatement to the limited partnership, the reinstatement relates back to the date of the administrative dissolution, the limited partnership may carry on with business as if the administrative dissolution never occurred.<sup>444</sup> A denial of an application for reinstatement may be appealed to the Franklin Circuit Court.<sup>445</sup>

In winding up its activities, the assets of the limited partnership (which for these purposes include required contributions from general partners) will be applied first to satisfy the limited partnership's obligations to creditors, a class that may include partners as well as creditors.<sup>446</sup> To the extent that the limited partnership has assets after satisfying creditors' claims, those assets are to be distributed in cash or in kind amongst the partners.<sup>447</sup> If, on the other hand, the assets of the limited partnership are insufficient to satisfy creditor claims, persons who were general partners in the limited partnership that was not a limited liability limited partnership are obligated to contribute towards the unsatisfied obligations, with the *pro rata* share of the obligations being based

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an obvious logical inconsistency in that the limited partnership may in fact be being dissolved because of a failure to properly maintain a registered office.

441. KY. REV. STAT. ANN. § 362.2-809(4); *accord* § 275.300(2); § 271B.14-210(3).

442. KY. REV. STAT. ANN. § 362.2-809(5) (LexisNexis 2006); *accord* § 275.300(3)(g); § 271B.14-210(4).

443. KY. REV. STAT. ANN. §§ 362.2-810(1), (4) (LexisNexis 2006); *accord* § 271B.14-220(4) (reinstatement possible if corporation has not undertaken actions necessary to its winding up). The application for reinstatement must set forth the name of the limited partnership and the effective date of the administrative dissolution, state that the grounds for the administrative dissolution either never existed or have been addressed, state that the name of the limited partnership satisfies the legal requirements and be submitted with the reinstatement penalty and the filing fee, and any delinquent annual reports. § 362.2-810(1)(a)-(d)

444. KY. REV. STAT. ANN. § 362.2-810(3) (LexisNexis 2006); *accord* § 275.295(3)(c); § 271B.14-220(3); *see also* Fairbanks Arctic Blind Co. v. Prather & Assocs., 198 S.W.3d 143 (Ky. Ct. App. 2005). *Cf.* Forleo v. Am. Prod. of Ky., Inc., No. 2005-CA-000196-MR, 2006 WL 2788429 (Ky. Ct. App. Sept. 29, 2006).

445. KY. REV. STAT. ANN. § 362.2-811 (LexisNexis 2006); *accord* § 275.295(4); § 271B.14-240.

446. KY. REV. STAT. ANN. § 362.2-812(1) (LexisNexis 2006). Unlike KyRULPA, KyULPA does not immediately subordinate claims for declared but unpaid distributions to a second tier of obligations. *Compare* KY. REV. STAT. ANN. § 362.2-812(1), *with* § 362.493(1).

447. KY. REV. STAT. ANN. § 362.2-812(2) (LexisNexis 2006). This provision is non-uniform. Under ULPA § 812(2) (2001), all limited partnership assets are to be liquidated and the proceeds thereof distributed in cash; ULPA § 812 does not contemplate distributions in kind. The non-uniform language has been added in KyULPA to permit in kind distributions. The agreement of limited partnership may provide that, upon liquidation, all assets will be distributed in cash, and in-kind distributions will not be permitted. *See* KY. REV. STAT. ANN. § 362.2-110(1) (LexisNexis 2006).

upon the right to receive distributions amongst the general partners.<sup>448</sup> To the extent that a general partner does not make a required contribution obligation, the other general partners are required to satisfy that obligation,<sup>449</sup> and those contributing general partners then have a claim against the general partner who is in default.<sup>450</sup> The estate of a deceased general partner is liable for any contribution obligations they would have under this provision,<sup>451</sup> and an assignee for the benefit of creditors or person appointed to represent their interests, as well as any other partner, may enforce these contribution obligations.<sup>452</sup>

### I. *KyULPA Article 9 - Foreign Limited Partnerships*

Article 9 of ULPA addresses the treatment of and qualification to transact business by foreign limited partnerships.<sup>453</sup>

A foreign limited partnership is governed as to its internal affairs and the liability of its partners, general and limited, for debts and obligations of the partnership by the law of the state under which it is organized.<sup>454</sup> While differences between the laws of Kentucky and of the jurisdiction of organization are not a basis for refusing to grant a certificate of authority to transact business,<sup>455</sup> a certificate of authority to transact business does not authorize a foreign limited partnership to engage in a business or exercise a power that is not available to a domestic limited partnership.<sup>456</sup>

Like certain other acts, KyULPA defines not what constitutes “transacting business,”<sup>457</sup> which would necessitate the requirement to qualify to do so,<sup>458</sup> but

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448. KY. REV. STAT. ANN. § 362.2-812(3) (LexisNexis 2006).

449. KY. REV. STAT. ANN. § 362.2-812(3)(b) (LexisNexis 2006); § 362.2-812(3)(c).

450. *See* KY. REV. STAT. ANN. § 362.2-812(4) (LexisNexis 2006).

451. KY. REV. STAT. ANN. § 362.2-812(5) (LexisNexis 2006).

452. KY. REV. STAT. ANN. § 362.2-812(6) (LexisNexis 2006).

453. *See also* KY. REV. STAT. ANN. § 362.2-102(9) (LexisNexis 2006) (defining “foreign limited partnership”); § 362.2-102(10) (defining “foreign limited liability limited partnership”).

454. KY. REV. STAT. ANN. § 362.2-901(1) (LexisNexis 2006); *accord* § 271B.15-050(3); § 275.380(1)(a). KyRULPA provided only that the law of the jurisdiction of organization would govern the liability of the limited partners, § 362.495, leaving open the question as to whether Kentucky or foreign law would govern the liability of the general partners. One consequence of the KyULPA rule is that the law of piercing the veil as it exists in the jurisdiction of organization will apply in any piercing suit that may be brought against a foreign limited partnership in Kentucky.

455. KY. REV. STAT. ANN. § 362.2-901(2) (LexisNexis 2006); *accord* § 275.380(1)(b). For example, the material differences between RULPA and KyULPA may not preclude a foreign limited partnership organized under an adoption of RULPA from qualifying to transact business under KyULPA.

456. KY. REV. STAT. ANN. § 362.2-901(3) (LexisNexis 2006); *accord* § 271B.15-050(3); § 275.380(2). As such, in that a domestic limited partnership organized under KyULPA may not render professional services, *see* § 362.2-104(2), neither may a foreign limited partnership qualifying to transact business under KyULPA. *See also* Rutledge, *Holy Grail*, *supra* note 58, at 439-43. Conceivably, however, a foreign limited partnership practicing a profession could qualify under KyRULPA as it does not preclude a professional limited partnership.

457. Whether a foreign business organization is transacting business in the state is largely a question of fact to be determined by the circumstances of each particular case. *See, e.g.*, Etheridge



rather sets forth a non-exclusive list of certain acts that do not constitute transacting business.<sup>459</sup> The act makes clear that owning income producing real or personal property, unless otherwise excluded, will constitute transacting business<sup>460</sup> and that what constitutes “transacting business” does not apply to determine whether a foreign limited partnership is subject to service of process, taxation, or other regulation by Kentucky.<sup>461</sup>

A foreign limited partnership that is transacting business in Kentucky applies for a certificate of authority by filing an application with the Secretary of State. In addition to the information required by the act,<sup>462</sup> the application must be

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v. Grove Mfg. Co., 287 F. Supp. 437 (W.D. Ky. 1968). The phrase “doing business” is not a technical term but should be read as ordinary words having their ordinary meaning. See *WSAZ, Inc. v. Lyons*, 254 F.2d 242 (6th Cir. 1958). In the only modern (*i.e.*, within the last 25 years) published case decided on the issue, the Kentucky Court of Appeals held that a foreign corporation was not transacting business in Kentucky where it: (i) sanctioned steeplechase races, (ii) collected in New York race entry materials and prepared booklets and identification badges and (iii) rented and delivered, but did not set up, race related equipment. *Commonwealth ex rel. Stephens v. Nat’l Steeplechase & Hunt Ass’n, Inc.*, 612 S.W.2d 347 (Ky. Ct. App. 1981).

458. KY. REV. STAT. ANN. § 362.2-902 (LexisNexis 2006).

459. KY. REV. STAT. ANN. § 362.2-903 (LexisNexis 2006); *accord* § 271B.15-010(2); § 275.385(2). KyULPA does not include in the list of activities that do not constitute transacting business “owning, without more, real or personal property.” *Cf.* § 271B.15-010(2)(i); § 275.385(2)(i).

460. KY. REV. STAT. ANN. § 362.2-903(2) (LexisNexis 2006).

461. KY. REV. STAT. ANN. § 362.2-903(3) (LexisNexis 2006); *see also* *Intercargo Ins. Co. v. B.W. Farrell, Inc.*, 89 S.W.3d 422, 427 (Ky. Ct. App. 2002) (Louisiana performance bond issuer subject to long-arm jurisdiction where bond signed in Kentucky following board meeting in Kentucky authorizing bond and issuer used letterhead of an affiliate with a Kentucky address); *Ky. Dep’t of Educ. v. Gravitt*, 673 S.W.2d 428, 432 (Ky. Ct. App. 1984) (foreign corporation that agreed to modify van in Kentucky [most likely an isolated transaction or a transaction in interstate commerce] subject to long-arm jurisdiction); *Nat’l Steeplechase*, 612 S.W.2d at 348-49 (association whose activities did not require qualification to transact business subject to service of process under the long-arm statute); *Mich. Wis. Pipeline Co. v. Commonwealth*, 474 S.W.2d 873, 875 (Ky. 1971) (foreign corporation with property in Kentucky, while subject to taxation and jurisdiction in Kentucky, was not required to qualify to transact business where all activities were in interstate commerce).

462. The application must set forth: the name of the foreign limited partnership, which name must comply with KY. REV. STAT. ANN. § 362.2-108, or, if it does not, a fictitious name adopted as provided in § 362.2-905; the name of the jurisdiction under whose law the limited partnership is organized; its principal office address and other addresses required by the jurisdiction of organization; the street address of the initial registered office in Kentucky and the name of the registered agent at that office; the name, street and mailing address of each general partner; and a statement as to whether the foreign limited partnership is a foreign limited liability limited partnership. KY. REV. STAT. ANN. § 362.2-902(1) (LexisNexis 2006); *accord* § 271B.15-030(1); § 275.395(1). Applications for a certificate of authority need to be corrected or amended to keep the information therein current. § 362.2-908; *accord* § 271B.15-040; § 275.400. If a foreign limited partnership holding a certificate of authority changes its name to one that does not meet the requirements of KyULPA, it may not transact business in Kentucky until it receives an amended certificate of authority issued under a fictitious name. § 362.2-905(2); *accord* § 271B.15-400(1)(a); § 275.400(1)(a). A limited partnership that has an appointed registered agent may also be served through the Secretary of State in accordance with the long-arm statute. *See, e.g.*, *Haven Point Enters., Inc. v. United Ky. Bank, Inc.*, 690 S.W.2d 393, 394 (Ky. 1985) (service of process on Secretary of State in accordance with long-arm statute, even where foreign corporation had a

accompanied by the equivalent of a certificate of existence from the foreign limited partnership's jurisdiction of organization<sup>463</sup> and the consent of the initial agent for service of process to serve in that capacity.<sup>464</sup> Assuming the application is complete and the filing fee properly paid, the Secretary of State will return to the foreign limited partnership a certificate of authority to transact business.<sup>465</sup> The attorney general may bring an action against a foreign limited partnership that is transacting business without authority.<sup>466</sup>

A certificate of authority to transact business may be revoked by the Secretary of State if the foreign limited partnership does not file its annual report,<sup>467</sup> is without a registered office or agent, or fails to notify the Secretary of State of changes in the registered office or agent or if the foreign limited partnership is dissolved or ceases to exist by reason of a merger.<sup>468</sup> The Secretary of State will notify the foreign limited partnership that grounds exist for the revocation of the certificate of authority, give it sixty days to respond, and thereafter may revoke the certificate of authority, whereupon the authority of the foreign limited partnership to transact business in Kentucky ceases.<sup>469</sup> The revocation of a certificate of authority shall appoint the Secretary of State as the foreign limited partnership's agent for service of process for claims arising during the period it was qualified to transact business, but the revocation does not terminate the authority of the appointed registered agent.<sup>470</sup>

A foreign limited partnership, having received a certificate of authority, may cancel the qualification by filing a certificate of cancellation with the Secretary of State.<sup>471</sup> The cancellation of a certificate of authority will not terminate the

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registered agent/office in Kentucky, was effective and conferred personal jurisdiction); *Star Elkhorn Coal Co. v. Red Ash Pocahontas Coal Co.*, 102 F. Supp. 258 (E.D. Ky. 1951); *Ford Motor Credit Co. v. Nantz*, 516 S.W.2d 840 (Ky. 1974); *Davis v. Wilson*, 619 S.W.2d 709, 710-11 (Ky. Ct. App. 1980); *Dakota Enters., Inc. v. Carter*, No. 2001-CA-002417-MR, 2003 WL 21241656 (Ky. Ct. App. May 30, 2003).

463. KY. REV. STAT. ANN. § 362.2-902(2) (LexisNexis 2006); *accord* § 271B.15-030(2). *Cf.* § 275.395(1)(g) (for foreign LLC, application need only include a statement that foreign LLC exists without requirement of official certificate). KyRULPA does not require either a certificate of existence or a statement as to its good standing under the laws of the jurisdiction of organization. § 362.497.

464. KY. REV. STAT. ANN. § 362.2-902(3) (LexisNexis 2006); *accord* § 271B.15-030(3); § 275.395(2); § 362.497(3); § 362.1-117(2).

465. KY. REV. STAT. ANN. § 362.2-904 (LexisNexis 2006); *accord* § 362.499. Filing fees are set forth in § 362.2-122.

466. KY. REV. STAT. ANN. § 362.2-910 (LexisNexis 2006); *accord* § 362.509; § 362.1-1105.

467. *See* KY. REV. STAT. ANN. § 362.2-904 (LexisNexis 2006).

468. KY. REV. STAT. ANN. § 362.2-906; *accord* § 271B.15-300; § 275.400.

469. KY. REV. STAT. ANN. §§ 362.2-907(1)-(3) (LexisNexis 2006); *accord* § 271B.15-310; § 275.445. A foreign limited partnership whose certificate of authority is revoked may appeal to the Franklin Circuit Court. §§ 362.2-907(6)-(8).

470. KY. REV. STAT. ANN. §§ 362.2-907(4), (5) (LexisNexis 2006); *accord* §§ 271B.15-310(4)-(5), §§ 275.445(4)-(5).

471. KY. REV. STAT. ANN. § 362.2-909 (LexisNexis 2006); *accord* § 271B.15-200; § 275.435.

Secretary of State's authority to serve as agent for service of process for causes of action arising from having transacted business in Kentucky.

#### J. *KyULPA Article 10 - Actions by Partners*

Article 10 of ULPA, titled "Actions by Partners," addresses direct and derivative actions brought in limited partnerships.<sup>472</sup> The partnership agreement may not "unreasonably" restrict the right to bring such an action.<sup>473</sup>

A direct action may be brought by a partner against another partner or the partnership to protect that partner's rights or interests under the partnership agreement, KyULPA or independently of the partnership relationship, but the plaintiff is required to plead and prove an injury that is not solely the consequence of an injury to the limited partnership.<sup>474</sup>

A derivative action may be brought by any partner to enforce a right of the limited partnership provided that demand has been made upon the general partners and they have not done so within a reasonable time and that the partner bringing the action was a partner at the time of the conduct giving rise to the cause of action or is the successor by operation of law of one who was a partner.<sup>475</sup> Save for the recovery of expenses and reasonable attorneys fees expended in a successful derivative action, all proceeds of a derivative action are property of the limited partnership on whose behalf the action was brought and not of the plaintiff bringing the action on behalf of the limited partnership.<sup>476</sup>

#### K. *KyULPA Article 11 - Conversion and Merger*

Article 11 of KyULPA sets forth the terms and conditions under which a limited partnership may merge with or convert into another form of business

472. Derivative actions are addressed in KyRULPA at KY. REV. STAT. ANN. §§ 362.511-.517 (LexisNexis 2002).

473. See KY. REV. STAT. ANN. § 362.2-110(2)(k) (LexisNexis 2006).

474. KY. REV. STAT. ANN. 362.2-1001; see also Daniel S. Kleinberger, *Direct Versus Derivative and the Law of Limited Liability Companies*, 58 BAYLOR L. REV. 63 (2006).

475. KY. REV. STAT. ANN. §§ 362.2-1002-1003 (LexisNexis 2006). The complaint must "with particularity" recite the date and content of the demand made on the general partner(s) and the response thereto. § 362.2-1004; accord § 271B.7-400(1); § 362.513 (ownership requirement); § 271B.7-400(2) (demand requirement). While there is no requirement that the demand is in writing, such is advisable in order that this requirement, if need be, may be satisfied. KyRULPA permitted a derivative plaintiff to proceed without making a demand upon the general partners where the demand would be not likely to succeed, in effect a futility argument. See KY. REV. STAT. ANN. § 362.511 (LexisNexis 2002); § 362.515; accord § 271B.7-400(2). While neither ULPA nor KyULPA contains an "adequate representation" requirement for the limited partner bringing a derivative action, cf. KY. REV. STAT. ANN. § 271B.7-400(1) (LexisNexis 2003), FED. R. CIV. P. 23.1 does impose such a rule, and a court may find that one should be imposed as a matter of common law.

476. KY. REV. STAT. ANN. § 362.2-1005 (LexisNexis 2006); accord KY. REV. STAT. ANN. § 362.517 (LexisNexis 2002). KyULPA does not contain a provision shifting to the plaintiff partner the costs and expenses of the defendants in a derivative action determined to have been brought without reasonable cause. Cf. KY. REV. STAT. ANN. § 271B.7-400(4) (LexisNexis 2003).

organization. These provisions have been substantially modified from the uniform act in order to remain consistent with provisions adopted in 1994 addressing mergers and conversions between general partnerships, limited partnerships and limited liability companies.<sup>477</sup> The provision begins with a series of defined terms that are used exclusively in Article 11.<sup>478</sup> With respect to conversions, those that are provided for are of:

- Partnership into a limited partnership;<sup>479</sup>
- Limited partnership into a partnership;<sup>480</sup>
- Limited partnership into a limited liability company;<sup>481</sup> and
- Limited liability company into a limited partnership.<sup>482</sup>

With respect to the conversion of a limited liability company into a limited partnership, the plan of conversion must be in a record and must set forth: the name of the LLC; the name of the limited partnership into which it will be converted; the terms and conditions of the conversion, including how the interest in the converting limited liability company will be treated in the converted limited partnership; and the organizational documents of the converted limited partnership.<sup>483</sup> This express provision with respect to the requirement of a writing for the conversion of an LLC into a limited partnership necessarily precludes an oral plan of conversion. Of course, while other conversions do not mandate that the plan of conversion be set forth in a writing, such is always advisable.

In order to be approved by a converting limited partnership, the plan of conversion must be approved by all partners in the converting limited partnership.<sup>484</sup> While the agreement of limited partnership may provide for the approval of the conversion by less than unanimous consent of all partners, protections exist for those who, subsequent to the conversion, will be generally liable for the debts and obligations of the converted entity.<sup>485</sup> A plan of conversion, after approval, may be amended or abandoned as provided therein or

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477. See KY. REV. STAT. ANN. § 275.345; § 275.370; § 362.531 (LexisNexis 2003); see also Rutledge & Booth, *LLC Act*, *supra* note 228, at 44-45 (discussing §§ 275.370, 275.375 and conversion of limited partnership into LLC).

478. KY. REV. STAT. ANN. § 362.2-1101 (LexisNexis 2006).

479. KY. REV. STAT. ANN. § 362.2-1102(1) (LexisNexis 2006); see also § 362.1-902.

480. KY. REV. STAT. ANN. § 362.2-1102(2) (LexisNexis 2006); see also § 362.1-903.

481. KY. REV. STAT. ANN. § 362.2-1102(3) (LexisNexis 2006); see also KY. REV. STAT. ANN. § 275.370 (LexisNexis 2003).

482. KY. REV. STAT. ANN. § 362.2-1102(4) (LexisNexis 2006). A new section has been added to the KyLLCA enabling a limited liability company to convert into a limited partnership pursuant to this provision. See KY. REV. STAT. ANN. § 275.372 (LexisNexis 2003).

483. KY. REV. STAT. ANN. § 362.2-1102(5) (LexisNexis 2006).

484. KY. REV. STAT. ANN. § 362.2-1103(1) (LexisNexis 2006).

485. KY. REV. STAT. ANN. § 362.2-1103(1) (LexisNexis 2006); see also § 362.2-1110.

by that same vote of the partners as was necessary for its approval.<sup>486</sup> In the non-uniform provision, it is made express that no partner has the right to dissent from a conversion unless that right of dissent is set forth in the partnership agreement.<sup>487</sup>

When the conversion is of a limited liability company into a limited partnership, a certificate of limited partnership must be delivered to the Secretary of State setting forth the information otherwise required for a certificate of limited partnership,<sup>488</sup> as well as a statement that the limited liability company has been converted into a limited partnership, the name of the converting limited liability company and its jurisdiction of organization, the effective date of the conversion, statement that the conversion was approved as required by the statute governing the converted LLC, and if the converted limited liability company is a foreign limited liability company not authorized to transact business in Kentucky, the address to which service served upon the Secretary of State may be forwarded.<sup>489</sup> The conversion of the limited liability company into a limited partnership is effective when the certificate of limited partnership takes effect.<sup>490</sup>

A converted organization remains the same entity both before and after the conversion.<sup>491</sup> Upon a conversion taking effect, all property and contract rights, as well as all other rights, privileges and immunities of the converting entity become those of the converted entity without assignment, reversion or impairment, the obligations of the converting entity are the obligations of the converted entity, an action or proceeding against the converting entity may be continued as if the conversion had not occurred, and the name of the converted entity may be substituted in that pending action or proceeding in place of the name of the converting entity, and any written partnership agreement shall be binding upon each person who becomes a partner in the converted partnership.<sup>492</sup> A converted entity organized outside the Commonwealth of Kentucky is deemed to have consented to the jurisdiction of the courts of Kentucky to enforce any obligations of the converting limited partnership if it was in Kentucky subject to suit on that obligation.<sup>493</sup> In a nonuniform provision, although one simply

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486. KY. REV. STAT. ANN. § 362.2-1103(2) (LexisNexis 2006).

487. KY. REV. STAT. ANN. § 362.2-1103(3) (LexisNexis 2006).

488. See KY. REV. STAT. ANN. § 362.2-201 (LexisNexis 2006).

489. KY. REV. STAT. ANN. §§ 362.2-1104(1)(a)-(f) (LexisNexis 2006).

490. KY. REV. STAT. ANN. § 362.2-1104(2) (LexisNexis 2006). That effective date will be determined in accordance with § 362.2-120.

491. KY. REV. STAT. ANN. § 362.2-1105(1) (LexisNexis 2006); accord KY. REV. STAT. ANN. § 362.1-904(1); § 275.375(1) (LexisNexis 2003).

492. KY. REV. STAT. ANN. § 362.2-1105(2) (LexisNexis 2006). This provision is substantially non-uniform, departing from ULPA with respect to the effect of conversion, with non-uniform language conforming in part to KY. REV. STAT. ANN. § 275.375(2) (LexisNexis 2003) and also incorporating certain concepts set forth in the MODEL ENTITY TRANSACTIONS ACT, 6A U.L.A. 2 (Supp. 2007).

493. KY. REV. STAT. ANN. § 362.2-1105(3) (LexisNexis 2006).

repetitious of other provisions of KyULPA, one who, by reason of a conversion, becomes a general partnership in a limited partnership that is not itself a limited liability limited partnership will be liable on only those obligations of the limited partnership incurred after the conversion.<sup>494</sup>

Limited partnerships are authorized to merge with domestic or foreign partnerships, limited partnerships, limited liability companies or corporations, provided that, with respect to any domestic limited partnership that is a party to the merger, the merger is properly approved and is not forbidden by the partnership agreement, that with respect to each domestic partnership, limited liability company or corporation, the applicable controlling laws have been satisfied, and that any foreign entity party to the merger properly complies with its governing laws.<sup>495</sup> There must exist a written plan of merger setting forth the name of each business entity participating in the merger and name of the entity surviving the merger, the terms and conditions of the proposed merger including a statement as to whether limited liabilities retained by the surviving business entity, the manner of conversion of interest in the various entities and to those of the surviving entity or into cash or other property, amendments to the publicly filed organizational documents of any limited liability company, corporation or limited partnership that is surviving the entity, and such additional terms as are deemed necessary or desirable.<sup>496</sup> Unless the partnership agreement provides otherwise, the plan of merger must be approved by all of the partners.<sup>497</sup> A plan of merger may provide for the manner in which it may be amended before the articles of merger were filed with the Secretary of State, as well as the means by which it may be abandoned or subject to contractual right, and in the absence of such a provision it may be abandoned or amended by that vote necessary for its initial approval.<sup>498</sup> In a non-uniform provision, there exists no right of dissent from a merger except as may be set forth in the partnership agreement.<sup>499</sup>

While the statutory language with respect to the approval of a merger does not specifically do so, as contrasted with the language with respect to the

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494. KY. REV. STAT. ANN. § 362.2-1105(4) (LexisNexis 2006); *see also* § 362.2-404(2); *accord* § 275.370(5).

495. KY. REV. STAT. ANN. § 362.2-1106 (LexisNexis 2006). This provision is entirely non-uniform.

496. KY. REV. STAT. ANN. § 362.2-1106(2) (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 275.355 (LexisNexis 2003).

497. KY. REV. STAT. ANN. § 362.2-1107(1) (LexisNexis 2006). *Cf.* KY. REV. STAT. ANN. § 275.370(2) (LexisNexis 2003) (providing, in part, that conversion of a limited partnership into a limited liability company must be approved by all the partners “notwithstanding any provision to the contrary in the limited partnership agreement”). KY. REV. STAT. ANN. § 362.2-1108(1)(a) (LexisNexis 2006), as adopted, contains a typographical error; the first “of” in the provision should read “and.”

498. KY. REV. STAT. ANN. § 362.2-1107(3) (LexisNexis 2006).

499. KY. REV. STAT. ANN. § 362.2-1107(4) (LexisNexis 2006). This provision is based upon the Delaware LLC Act. *See* DEL. CODE ANN. tit 6, § 18-210 (2006); *accord* KY. REV. STAT. ANN. § 275.030(6) (LexisNexis 2006); § 275.345(3); § 275.350(4).

approval of a conversion, the approval of a merger, notwithstanding a provision of the partnership agreement allowing less than the approval of a merger by less than unanimous vote of all partners, remains subject to the provision that the approval is not effective without the approval of those partners who will become personally liable to the debts and obligations of the surviving entity.<sup>500</sup>

After the plan of merger is approved by each constituent organization, the surviving entity is to deliver to the secretary of state articles of merger executed by each party to the merger and setting forth the name and jurisdiction of organization of each entity that is a constituent party to the merger, the plan of merger, the name of the business entity surviving the merger, a statement that the plan of merger was duly authorized by each constituent business entity in accordance with its governing law, and if the surviving entity is not organized in Kentucky, a statement that it agrees that it may be served with process in Kentucky in a proceeding to enforce any obligation of party to the merger that was organized in Kentucky as well as for the enforcement of its obligations arising from the merger and the appointment of the Secretary of State as its agent for service process in any such proceeding.<sup>501</sup> The merger takes effect upon the effective filing of the articles of merger.<sup>502</sup> Upon filing, the articles of merger cancel the Certificate of Limited Partnership of any limited partnership that does not survive the merger.<sup>503</sup> On a merger taking effect, the separate existence of any domestic limited partnership other than a domestic limited partnership surviving the merger, ceases, and the title of all real estate and other property of any domestic limited partnership party to the merger and not surviving it becomes vested in the surviving entity without reversion or impairment, the surviving entity takes on responsibility for liabilities of each domestic limited partnership that is a party to the merger, any proceeding pending against a domestic limited partnership that is a party of the merger may be continued against the surviving entities, and the name of the surviving entities may be substituted in that proceeding, the certificate of limited partnership, as well as the agreement of limited partnership, if it is the entity surviving the merger, as amended to the extent provided in the plan of merger and the conversion in the

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500. See KY. REV. STAT. ANN. § 362.2-1110 (LexisNexis 2006); see also § 362.2-1101(12)(definition of “surviving organization”).

501. KY. REV. STAT. ANN. § 362.2-1108(1) (LexisNexis 2006). Furthermore, if the entity surviving the merger is a foreign partnership, limited partnership or limited liability company, the surviving entity is liable for any obligation of payment to dissenting shareholders under subchapter 13 of the KyBCA, and appoints the secretary of state as its agent for service of process with respect to the enforcement thereof. § 362.2-1108(3)

502. KY. REV. STAT. ANN. § 362.2-1108(2) (LexisNexis 2006); see also § 362.2-1120.

503. KY. REV. STAT. ANN. § 362.2-1108(5) (LexisNexis 2006). This rule is in contrast to that set forth at § 275.370, which requires that the certificate of limited partnership be cancelled before the conversion into an LLC, § 275.370(3)(d), and that the conversion is effective upon the cancellation of the certification of limited partnership, § 275.370(4), and is consistent with KY. REV. STAT. ANN. § 362.541(5).

interest of the various constituents to the merger are converted as provided in the plan of merger.<sup>504</sup>

The deletion from a certificate of limited partnership that it is a limited liability limited partnership must have the approval of all general partners unless the limited partnership agreement provides that amendment may be made by the consent of less than all the general partners, which authorization for a less than unanimous approval of the deletion may be utilized if and only if the general partner consented to that provision,<sup>505</sup> and that consent does not exist merely because the partner has agreed that the partnership agreement may be amended by the consent of less than all partners.<sup>506</sup>

Neither a conversion nor a merger of the limited partnership will discharge any current or former general partner from liability for the debts and obligations of the limited partnership, but at the same time various rights with respect to discharge and contribution are retained.<sup>507</sup> Furthermore, the lingering apparent agency of general partners of a limited partnership taking part in a conversion or merger otherwise itself is recognized, and where the limited partnership was not an LLLP, the partner remains personally liable after the merger to third parties if they did not have notice of the conversion or merger and had reasonable belief that they were doing business with a limited partnership that is not a limited liability limited partnership properly represented by that person as a general partner.<sup>508</sup> Furthermore, the former general partners of a limited partnership taking part in a merger or conversion may continue to bind the surviving entity to third parties who do not have notice of the conversion or merger and who reasonably believe that they are dealing with a limited partnership and that the person with whom they are dealing is a general partner thereof.<sup>509</sup>

The provisions set forth in KyULPA with respect to the mergers and conversions of limited partnership are permissive and are not mandatory, and limited partnerships may take part in similar transactions under such other means as may be provided by other laws.<sup>510</sup>

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504. KY. REV. STAT. ANN. § 362.2-1109 (LexisNexis 2006); *accord* KY. REV. STAT. ANN. § 275.365; § 271B.11-060 (LexisNexis 2003). The conversion of any of a partnership, limited partnership, corporation, or limited liability company into a partnership, limited partnership, corporation, or limited liability company, or any merger of any combination of partnerships, limited partnerships, corporations, or limited liability companies, is exempt from the real estate transfer tax otherwise imposed by KY. REV. STAT. ANN. § 142.050(2) (LexisNexis 2006). *See* § 142.050(7)(h).

505. KY. REV. STAT. ANN. § 362.2-1110(2) (LexisNexis 2006).

506. KY. REV. STAT. ANN. § 362.2-1110(3) (LexisNexis 2006).

507. KY. REV. STAT. ANN. § 362.2-1111 (LexisNexis 2006).

508. KY. REV. STAT. ANN. § 362.2-1111(2) (LexisNexis 2006).

509. KY. REV. STAT. ANN. § 362.2-1112 (LexisNexis 2006); *accord* § 362.1-404(6).

510. KY. REV. STAT. ANN. § 362.2-1113 (LexisNexis 2006); *accord* § 362.1-908.



### L. *KyULPA Article 12 - Miscellaneous Provisions*

Article 12 contains a series of “miscellaneous,” but at times still crucial provisions. First, it is directed that this act be applied and interpreted so as to promote uniformity among the states.<sup>511</sup> The official name of KyULPA, the “Kentucky Uniform Limited Partnership Act (2006),” is provided.<sup>512</sup> Severability is provided for.<sup>513</sup> The effective date for newly formed partnerships and the application of KyULPA to pre-existing partnerships, a topic already discussed, is addressed.<sup>514</sup> Last, it is specified that KyULPA does not affect actions or rights commenced or accrued prior to it taking effect.<sup>515</sup>

### III. ARE WE FINALLY DONE?

It certainly would be nice if, with the adoption of RUPA and ULPA, we could say that Kentucky’s menu of organizational laws were up to date and we may for the time being expect the law to stabilize. Alas, such is not to be. Business organization law continues to develop at a dizzying pace.<sup>516</sup> Both already existing<sup>517</sup> and in-progress uniform business organization acts<sup>518</sup> will need to be considered for adoption in Kentucky. Updates to the KyBCA and the KyLLCA<sup>519</sup> will need to be drafted and adopted. There has been released a new model non-profit corporation act that needs to be considered. Junction box transaction statutes will continue to develop<sup>520</sup> and may be appropriate for adoption, and the future model of a unified business entity code remains a possibility.<sup>521</sup> Still, while much work remains to be done even after the adoption

511. KY. REV. STAT. ANN. § 362.2-1201 (LexisNexis 2006); *accord* § 362.165(4); § 362.519; § 362.1-1201.

512. KY. REV. STAT. ANN. § 362.2-1202 (LexisNexis 2006).

513. KY. REV. STAT. ANN. § 362.2-1203 (LexisNexis 2006); *accord* § 362.1-1203; § 271B.17-040.

514. KY. REV. STAT. ANN. § 362.2-1204 (LexisNexis 2006); *accord* § 362.1-1204.

515. KY. REV. STAT. ANN. § 362.2-1205 (LexisNexis 2006); *accord* § 362.1-1205; § 271B.17-030(1)(b); § 271B.17-030(1)(d); *see also* § 362.525.

516. *See generally* Thomas E. Rutledge, *The Alphabet Soup of Unincorporated Business Law: Using LLCs, LPs, LLPs, GPs, LLLPs, & BTs and Dealing with RUPA, ReRULPA, UnETA, MITA, & META* (Feb 2, 2006), in *ALI-ABA VIDEO L. REV.* (2006).

517. *E.g.*, UNIF. UNINCORPORATED NONPROFIT ASS’N ACT, 6A U.L.A. 651 (2003).

518. *E.g.*, UNIF. STATUTORY TRUST ACT, available in draft form at [http://www.law.upenn.edu/bll/archives/ulc/ubta/2007\\_amdraft.htm](http://www.law.upenn.edu/bll/archives/ulc/ubta/2007_amdraft.htm) (last visited Sept. 1, 2007).

519. Since its adoption in 1988, the KyBCA has not been regularly reviewed and as appropriate, updated to the evolving Model Business Corporation Act. Bills proposing modest updates to this law as well as the LLC Act, both submitted to the 2006 General Assembly, were not taken up. H.B. 349, 350. NCCUSL, in the summer of 2006, completed and approved the Revised Uniform Limited Liability Company Act, 6A U.L.A. 213 (Supp. 2007), and the Committee on Partnerships and Unincorporated Business Organizations of the Section of Business Law, American Bar Association, is drafting a new Prototype Limited Liability Company Act.

520. *E.g.*, MODEL ENTITY TRANSACTIONS ACT, 6A U.L.A. 2 (Supp. 2007).

521. *See generally* Robert R. Keatinge, *Plumbing and Other Transitional Issues*, 58 BUS. LAW. 1051 (2003); Thomas F. Blackwell, *The Revolution is Here: The Promise of a Unified Business Entity Code*, 24 J. CORP. L. 333 (1999); Robert R. Keatinge, *Universal Business Organization*

of KyRUPA and KyRULPA, Kentucky has taken a significant step forward in moving to the forefront of states having modern business organization laws.

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*Legislation: Will It Happen? Why and When*, 23 DEL. J. CORP. L. 29 (1998); John H. Matheson & Brent A. Elson, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1 (1996).