THE 2017 AMENDMENTS TO KENTUCKY'S BUSINESS ENTITY STATUTES

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Kentucky did not see significant changes to its business entity laws in 2017, but it did see a series of changes that incrementally addressed existing ambiguities, provided additional clarity, and created additional capabilities. Specifically, one bill addressed a number of technical points across the range of business entity statutes,[1] while a second bill effected amendments to the Kentucky Business Corporation Act to provide for public benefit corporations.[2] This article will review these developments in the same order, concluding with a few observations as to other bills of interests. Both of these bills became effective on June 29, 2017.[3]

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[1] S.B. 235, 2017 Leg., Reg. Sess. (Ky. 2017). This proposal was submitted by Senator Morgan McGarvey as S.B. 235 on February 16, 2017. S.B. 235, KY. LEGIS., http://www.lrc.ky.gov/record/17RS/SB235.htm (last visited Nov. 30, 2017). The bill was assigned to the Senate Economic Development, Tourism, and Labor Committee, and was favorably reported therefrom on February 28th. *Id.* It passed the Senate on a unanimous vote on March 1st. *Id.* When presented on the floor by Senator McGarvey, Senate President Stivers asked if there were any questions. Responding to the resulting silence, he chuckled and observed, "I didn't think so." Morgan McGarvey, *Recap of the Legislative Week*, MORGANMCGARVEY.COM (March 3, 2017), http://www.morganmcgarvey.com/news/2017/3/3/wvpwubclbvfab6dd0x6chcb9mtyt29. In the House it was assigned to the Small Business and Information Technology Committee, where it was heard on March 15th, and approved. S.B. 235, *supra*. The bill was approved, with a floor amendment, by the House on March 29th. *Id.* The Senate concurred. *Id.* On April 12, the bill became effective notwithstanding never having been signed by the governor. *Id.*

[2] H.B. 35, 2017 Leg., Reg. Sess. (Ky. 2017). This legislation was introduced by Representative Jerry Miller as H.B. 235, the bill having been pre-filed. HB 35, KY. LEGIS., http://www.lrc.ky.gov/record/17RS/HB35.htm (last visited Nov. 30, 2017). It was reported favorably on February 9, 2017 by the House State Government Committee, and passed out of the House on February 13th. *Id.* In the Senate, the bill was assigned to the Agriculture Committee, from which it was favorably reported on February 28th. *Id.* The bill came before the entire Senate on March 7th. *Id.* This legislation was signed by the governor on March 20, 2017. *Id.*

[3] *See* Ky. Att'y Gen. Op. OAG 17-007 (Apr. 7, 2017).

I. VENUE FOR UNINCORPORATED ENTITIES

Kentucky has long had a statute providing, *inter alia*, that a corporation is subject to venue in the county in which it maintains its registered office.[4] There was not, however, similar clarity with respect to unincorporated business organizations. An argument could be made that the statute governing venue for corporations extended to LLCs and other business forms that are not incorporated,[5] but the application is less than obvious. A new provision addresses that lacuna, providing that unincorporated business organizations required to maintain a registered agent and officer are subject to venue in the county in which the registered officer is maintained.[6]

II. CHARGING ORDERS

Across all of the charging order statutes, parallel amendments have been made in order to address aspects of this often misunderstood remedy.[7]

The respective charging order statutes[8] provide, in order to satisfy a judgment, that a charging order may be issued with respect to a member's or partner's interest in the LLC, partnership, etc. However, when one parses the statute, it becomes clear that "limited liability company," "partnership," etc. refers to a domestic organization, i.e., one organized in Kentucky.[9] There

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[4] *See* KY. REV. STAT. ANN. § 452.450 (West 1942); *see also* Kem Mfg. v. Ky. Gem Coal Co., 610 S.W.2d 913, 913 (Ky. Ct. App. 1980) ("[A] corporation may not defeat venue in an action brought in the court in which its registered agent is located."). For an admittedly dated review of venue in Kentucky, see William H. Fortune, *Venue of Civil Actions in Kentucky*, 60 KY. L.J. 497 (1972).

[5] *See* KY. REV. STAT. ANN. § 446.010(11) (West 2017) (stating that the definition of "corporation" includes a "company, person, partnership, joint stock company, or association").

[6] *See* Act of Apr. 12, 2017, ch. 193, § 1, 2017 Ky. Acts (codified at KY. REV. STAT. ANN. § 14A.4-060 (West 2017)). Note that this provision is not intended to be exclusive as to any other provision that would give rise to venue in any particular court. Rather, this statute only affirms that venue is appropriate in this particular county. *See also* KY. REV. STAT. ANN. § 452.450 (West 1952).

[7] With respect to the charging order generally, see Thomas E. Rutledge & Sarah S. Wilson (now Reeves), *An Examination of the Charging Order under Kentucky's LLC and Partnership Acts (Part I)*, 99 KY. L.J. ONLINE 85 (2011); Thomas E. Rutledge & Sarah S. Wilson, *An Examination of the Charging Order under Kentucky's LLC and Partnership Acts (Part II)*, 99 KY. L.J. ONLINE 107 (2011).

[8] *See* KY. REV. STAT. ANN. § 275.260 (West 2017) (LLCs); KY. REV. STAT. ANN. § 362.285 (West 2017) (partnerships governed by the Kentucky Uniform Partnership Act); KY. REV. STAT. ANN. § 362.1-504 (West 2017) (general partnerships governed by the Kentucky Revised Uniform Partnership Act (2006)); KY. REV. STAT. ANN. § 272A.6-050 (West 2017) (limited cooperative associations); KY. REV. STAT. ANN. § 362.481 (West 2017) (limited partnerships governed by the Revised Uniform Limited Partnership Act); KY. REV. STAT. ANN. § 362.2-703 (West 2017) (limited partnerships governed by the Kentucky Uniform Limited Partnership Act (2006)); KY. REV. STAT. ANN. § 386A.6-060 (West 2017) (statutory trusts governed by the Kentucky Uniform Statutory Trust Act).

[9] *See, e.g.*, § 275.260(1) ("This section provides the exclusive remedy by which the judgment creditor of a member or the assignee of a member may satisfy a judgment out of the judgment debtor's

then arises the question as to whether a Kentucky court may apply any of the charging order statutes to issue a charging order with respect to an interest in a partnership or LLC organized outside of Kentucky. If the answer to that question is "no," what then would be the remedy that a Kentucky court could issue with respect to an interest in a foreign partnership or LLC?

This question is exactly the problem addressed by the *Heather Apartments* decision.[10] Andrew Grossman was the judgment-debtor to Fannie Mae.[11] Grossman alleged he could not satisfy the judgment because his funds were invested in an LLC, and further argued that the only remedy Fannie Mae was entitled to vis-à-vis his interest in that LLC was a charging order.[12] That LLC was organized in the Cook Islands.[13] The *Heather Apartments* court determined that the "sole and exclusive remedy" language of the Minnesota LLC Act's charging order provision[14] did not apply vis-à-vis a foreign (i.e., non-Minnesota) LLC.[15]

> Finally, Grossman argues that Fannie Mae's only remedy is to obtain a charging order under Minn. Stat. § 322B.32 (2012). But this argument fails because that statute only applies to Minnesota limited liability companies. Chapter 322B defines a "limited liability company" as "a limited liability company, other than a foreign limited liability company, organized or governed by this chapter." Minn. Stat. § 322B.03, subd. 28 (2012). Because LSPG Shoreline was organized in, and is governed by, the laws of the Cook Islands, chapter 322B does not apply.[16]

Amendments made to Kentucky's various charging order statutes reject the *Heather Apartments* analysis and provide that a Kentucky court may issue

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limited liability company interest.") (emphasis added); KY. REV. STAT. ANN. § 275.015(12) (West 2017) (defining "limited liability company" as organized "under this chapter"); § 275.015(9) (defining "foreign limited liability company").

[10] *See* Fannie Mae v. Heather Apartments Ltd. P'ship., No. A13-0562, 2013 WL 6223564 (Minn. Ct. App., Dec. 2, 2013).

[11] *Id.* at *2.

[12] *Id.* at *15–16.

[13] *Id.* at *16.

[14] *See* MINN. STAT. § 322B.32 (1992).

[15] *Fannie Mae*, 2013 WL 6223564, at *16.

[16] *Id.* at *6; *see also* Arayos, LLC v. Ellis, Misc. Act. No. 15-0027-WS-M, 2016 WL 1642676 (S.D. Ala. April 25, 2016) ("More importantly, as noted *supra*, plaintiff's filings reflect that Lodge Entertainment is a Wyoming limited liability company, and that Jonesboro Investments is a Nevada limited liability company. Plaintiff has presented no argument explaining why it contends a provision of the Alabama Business and Nonprofit Entities Code would empower this Court to issue a charging order as to a judgment debtor's membership interest in Wyoming and Nevada limited liability companies, as part and parcel of the judgment creditor's efforts to enforce a judgment entered by a federal court in Maine. On its face, Alabama Code § 10A-5-6.05(a) does not appear to authorize issuance of charging orders relating to foreign limited liability companies.").

a charging order with respect to the partnership or LLC interest in a foreign organized partnership or LLC.[17] As such, it is clear that if the judgment-debtor is subject to the jurisdiction of a Kentucky court, irrespective of where the LLC or partnerships might be organized,[18] a Kentucky court has the capacity to issue a charging order against the judgment-debtor's interest therein.[19]

The second change made across the various charging order statutes addresses the situation of a member's breach of the operating agreement or other conduct giving rise to a claim for monetary damages in favor of the partnership or LLC against the partner or member. On similar facts, certain courts have accepted the argument that the partner's or member's liability to the partnership or LLC may be satisfied only by means of a charging order. The addition made to the Kentucky statutes precludes that result.

The problem here addressed is exemplified by *Kaufman v. HLK, LLC*.[20] Therein, Kaufman defaulted on his obligation to make the capital

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[17] *See* KY. REV. STAT. ANN. § 275.260(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 13, 2017 Ky. Acts) (governing LLCs); KY. REV. STAT. ANN. § 362.285(9) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 16, 2017 Ky. Acts) (partnerships governed by the Kentucky Uniform Partnership Act); KY. REV. STAT. ANN. § 362.1-504(9) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 18, 2017 Ky. Acts) (general partnerships governed by the Kentucky Revised Uniform Partnership Act (2006)); KY. REV. STAT. ANN. § 272A.6-050(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 9, 2017 Ky. Acts) (limited cooperative associations); KY. REV. STAT. ANN. § 362.481(9) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 17, 2017 Ky Acts) (limited partnerships governed by the Revised Uniform Limited Partnership Act); KY. REV. STAT. ANN. § 362.2-703(9) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 19, 2017 Ky. Acts) (limited partnerships governed by the Kentucky Uniform Limited Partnership Act (2006)); KY. REV. STAT. ANN. § 386A.6-060(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 21 2017 Ky. Acts) (statutory trusts governed by the Kentucky Uniform Statutory Trust Act); *see also* Mahalo Invs. III, LLC v. First Citizens Bank & Tr. Co., 769 S.E.2d 154, 158–59 (Ga. Ct. App. 2015) ("[I]t is only necessary for a court to have jurisdiction over the judgment debtor to have authority to enter charging orders against the judgment debtor's interest."); Vision Marketing Res., Inc. v. McMillin Grp., LLC, No. 10-2252-KHV, 2015 WL 4390071, at *4 (D. Kan. July 15, 2015) ("The Court need not have jurisdiction over the LLC entity itself in order to issue a charging order, when it has jurisdiction over the LLC member because the LLC has no right or direct interest affected by the charging order. Rather it is the judgment debtor's interest in and right to future distributions of the LLC that is being charged."). In *German American Capital Corp. v. Morehouse*, No. GJH-13-296, 2017 WL 3411941 (D. Md. Aug. 7, 2017), decided after the consideration and approval of this amendment, the court found that the charging order provisions of the Maryland LLC Act could be applied as to the defendant's interests in a Georgia organized LLC. In effect, this decision is consistent with the Kentucky statute, as amended. In contrast, in *Peach Reo, LLC v. Rice*, No. 2:12-CV-02752-SHM, 2017 WL 2963511 (W.D. Tenn. July 11, 2017), the court, in considering charging orders sought against interests in LLCs organized in Tennessee, Mississippi, and Delaware, applied the laws of the jurisdiction of organization.

[18] Where an LLC interest is located is a subject of debate. *See, e.g.*, JPMorgan Chase Bank N.A. v. McClure, 393 P.3d 955, 958–59 (Colo. 2017).

[19] Whether, as to a non-Kentucky entity, the judgment and the charging order must be domesticated in the entity's jurisdiction of organization in order to bind the foreign entity is a question governed by other law. *See also McClure*, 393 P.3d at 961–62, *aff'g* 395 P.3d 1123 (Colo. App. 2015).

[20] No. 59797, 2013 WL 5230797 (Nev. Sept. 12, 2013).

contribution called for by the operating agreement.[21] While Hawley, the other member, asserted that Kaufman was not a member, the court found that not to be the case.[22] Rather, Kaufman was a member, and the LLC was entitled to offset his default against the amounts he would receive upon liquidation.[23] A prior order had held that the charging order against Kaufman was the sole means by which a judgment on the default could be collected.[24]

Under this reasoning, the injured LLC was restricted in its recovery to the judgment-debtor's anticipated distributions from the LLC. In effect, the judgment was nonrecourse to the judgment-debtor's interest in the venture save and except to the extent that the LLC should ever make a distribution. If and to the extent distributions were not made, the LLC was deprived of any effective remedy. In addition, the LLC effectively became the financing vehicle for satisfaction of the judgment.

To avoid this and similar results, an addition made across the charging order statutes makes clear that this is not the proper analysis and that to the extent a partner or member is the judgment-debtor of the venture, the venture may collect against all assets of the judgment-debtor, not only the stream of distributions from the venture.[25]

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[21] *Id.* at *1.

[22] *Id.*

[23] *See id.* ("Kaufman's failure to make his initial contribution only creates a liability to the LLC for the amount owed, while the remaining assets of the LLC should be divided based on the members' percentage interest in the LLC as stated in the operating agreement.").

[24] *Id.* at *2.

[25] *See* KY. REV. STAT. ANN. § 275.260(7) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 13, 2017 Ky. Acts) (governing LLCs) ("This section does not apply to the enforcement of a judgment by a limited liability company against a member of that company."); KY. REV. STAT. ANN. § 362.285(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 16, 2017 Ky. Acts) (partnerships governed by the Kentucky Uniform Partnership Act); KY. REV. STAT. ANN. § 362.1-504(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 18, 2017 Ky. Acts) (general partnerships governed by the Kentucky Revised Uniform Partnership Act (2006)); KY. REV. STAT. ANN. § 272A.6-050(7) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 9, 2017 Ky. Acts) (limited cooperative associations); KY. REV. STAT. ANN. § 362.481(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 17, 2017 Ky. Acts) (limited partnerships governed by the Revised Uniform Limited Partnership Act); KY. REV. STAT. ANN. § 362.2-703(8) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 9, 2017 Ky. Acts) (limited partnerships governed by the Kentucky Uniform Limited Partnership Act (2006)); KY. REV. STAT. ANN. § 386A.6-060(7) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 21, 2017 Ky. Acts) (statutory trusts by the Kentucky Uniform Statutory Trust Act). While decided after S.B. 235 was submitted to the 2017 General Assembly, this amendment is consistent with the ruling made in *Gillet v. ZUPT, LLC*, 523 S.W.3d 749 (Tex. Ct. App. 2017). Therein, the LLC held a judgment against a member consequent to his breach of fiduciary duties. *Id.* at 753. The judgment-debtor asserted the judgment could be enforced only via a charging order. *Id.* at 757. This notion was rejected: "But that reasoning for preventing foreclosure of a member's interest does not apply in a situation such as that before us, where the judgment creditor seeking turnover of the membership interest is the very same limited liability company from which the membership interest derives." *Id.* at 757; *see also id.* at 758 ("[T]he reasoning behind requiring a charging order as the exclusive remedy is inapposite when the judgment creditor seeking the membership interest

III. DERIVATIVE ACTIONS

Technical amendments, each of a conforming nature without any change to the underlying law, have been made to the derivative action provisions of the Kentucky Uniform Limited Partnership Act (2006), the LLC Act, and the Kentucky Uniform Statutory Trust Act. The rules governing derivative actions[26] have required that the plaintiff, acting on behalf of the business organization, through the pendency of the action remain an equity participant in the venture.[27] In certain instances, this requirement has been expressly set forth in the statute.[28] In other instances, it has been applied notwithstanding the absence of a statute to that effect.[29] For the avoidance of doubt as to the existence of this requirement in the context of a limited partnership, LLC, and statutory trust, the continuous ownership requirement has been added to those statutes.[30]

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is the entity from which the membership interest derives.").

[26] *See generally* Thomas E. Rutledge, *Who Will Watch the Watchers?: Derivative Actions in Nonprofit Corporations*, 103 KY. L.J. ONLINE 31 (2015).

[27] *See, e.g.*, Bacigalupo v. Kohlhapp, 240 S.W.3d 155, 156 (Ky. Ct. App. 2007); *see also* Pagtakhan-So v. Cueto, No. 16-5320, 2016 WL 617429, at *5 n.6 (E.D. Ky. Feb. 16, 2016) ("It is undisputed that only Pagtakhan-So was a Trustee of the Foundation at the time that the Complaint and Amended Complaint were filed. Michigan law only allowed derivative claims by current shareholders and members at the time the Amended Complaint was filed. M.C.L. § 450.2491 (repealed 2015). None of the plaintiffs are currently Trustees of the Foundation and none of the current Trustees have moved to intervene. There is no evidence on which this Court could conclude that these plaintiffs "fairly and adequately represent" other similarly-situated Trustees in pursuing the rights of the Foundation.").

[28] *See, e.g.*, KY. REV. STAT. ANN. § 271B.7-400(1) (West 2017); KY. REV. STAT. ANN. § 272A.13-020(1)(b) (West 2012). For derivative actions in federal court, FED. R. CIV. P. 23.1 will apply to provide this rule. *See* FED. R. CIV. P. 23.1(1) ("The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of shareholders or members who are similarly situated in enforcing the rights of the corporation or association."); *see also* DEBORAH A. DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS – LAW AND PRACTICE § 4.3(1) (2016–17) ("[M]ost federal courts have applied the contemporaneous ownership requirement in Rule 23.1 when it conflicted with the applicable state law.") (citation omitted).

[29] *See, e.g.*, Fenley v. Kamp Kaintuck, Inc., No. 2010-CA-001926-MR, 2011 WL 5443440, at *3 (Ky. Ct. App. Nov. 10, 2011).

[30] *See* KY. REV. STAT. ANN. § 275.260 (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 15, 2017 Ky. Acts); KY. REV. STAT. ANN. § 362.2-933 (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 19, 2017 Ky Acts); KY. REV. STAT. ANN. § 386A.6-110(5) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 27, 2017 Ky. Acts); *see also* Watkins v. Stock Yards Bank & Tr. Co., No. 2011-CA-000228-MR, 2012 WL 2470692 (Ky. Ct. App. June 29, 2012); Davis v. Comed, Inc., 619 F.3d 585, 593-94 (6th Cir. 1980); Aztec Oil & Gas, Inc. v. Fisher, 152 F. Supp. 3d 832, 857–58 (S.D. Tex. Jan 21, 2016); Schwartz v. Coyle, No. 2011-CA-002335-MR, 2013 Ky. App. Unpub. LEXIS 310, at *12–13 (Ky. Ct. App. Apr. 19, 2013); Avon Tape, Inc. v. Shuman, No. 04-0068 BLS, 2006 WL 933395, at *6–7 (Mass. Super. Ct. Mar. 22, 2006).

IV. DEFINITIONS

The definition of an "Entity" as utilizing the Kentucky Business Entity Filing Act[31] has been expanded to include both the Limited Cooperative Association and the Unincorporated Nonprofit Association.[32] Corresponding revisions have been made to the definition of a "Foreign entity."[33] A new defined term has also been added for "Foreign Unincorporated Nonprofit Association."[34] In parallel, a defined term for "Unincorporated Nonprofit Association" has been added.[35] Additionally, the definition of "Registered office" was revised to make express that the registered office address must be a street address.[36]

V. UNINCORPORATED NONPROFIT ASSOCIATIONS

Three small additions have been made to the statute with respect to Unincorporated Nonprofit Associations.[37] First, the $15.00 filing fee for the filing of the Certificate of Association is made express;[38] this is the same fee that was previously set pursuant to the "any other filing" category.[39] Second, with respect to the annual report filed by an Unincorporated Nonprofit Association, it must set forth the name and business address of each manager thereof.[40]

The revision to the Unincorporated Nonprofit Association Act proper is in the nature of a "belt and suspenders." The default rule is that the participants in an Unincorporated Nonprofit Association are jointly and

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[31] *See generally* Kentucky Business Entity Filing Act, KY. REV. STAT. ANN. §§ 14A.1-010–14A.9-090 (West 2011); Thomas E. Rutledge and Laura K. Tzanetos, *The Kentucky Business Entity Filing Act: The Next Step Forward in the Rationalization of Business Entity Law*, 38 N. KY. L. REV. 423 (2011).

[32] *See* KY. REV. STAT. ANN. § 14A.1-070(7) (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 3, 2017 Ky. Acts).

[33] *See id.* § 14A.1-070(10).

[34] *See id.* § 14A.1-070(16).

[35] *See id.* § 14A.1-070(43).

[36] *See id.* § 14A.1-070(35).

[37] Unincorporated nonprofit associations were first authorized by statute in Kentucky in 2015 pursuant to the adoption of the Uniform Unincorporated Nonprofit Association Act. *See generally* Thomas E. Rutledge, *The 2015 Amendments to the Kentucky Business Entity Statutes*, 43 N. KY. L. REV. 129, 156–72 (2015–16).

[38] *See* KY. REV. STAT. ANN. § 14A.2-060(1)(u) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 4, 2017 Ky. Acts).

[39] *See id.* § 14A.2-060(1)(p); *see also* Rutledge, *supra* note 37, at 161.

[40] *See* KY. REV. STAT. ANN. § 14A.6-010(1)(d)(6) (West 2017). With respect generally to the obligation of an unincorporated nonprofit association to file an annual report, see § 14A.6-010(6); see also Rutledge, *supra* note 37, at 159. With respect to who is a manager, see KY. REV. STAT. ANN. § 273A.095 (West 2017); see also Rutledge, *supra* note 37, at 164–65.

severally liable for its debts and obligations.[41] The Act provides that the association's members may enjoy limited liability by filing a certificate of association.[42] Assuming no Certificate of Association is in place and that a judgment has been issued against the association, KRS § 273A.040 details when the judgment may and may not be enforced against a member's assets. The addition made to the statute makes express that KRS § 273A.040 is without application if the members enjoy limited liability consequent to the filing of a Certificate of Association.[43]

VI. THE BUSINESS CORPORATION ACT

Two changes made to the Business Corporation Act both relate to advancement or indemnification. The first change deletes KRS § 271B.8-530(1)(a).[44] This provision, which applied to advancement of expenses, previously required that the director furnish to the corporation a "written affirmation of his good faith belief that he has met the standard of conduct described in KRS 271B.8-510."[45] In that no director would ever state that they are not able to deliver the affirmation or otherwise submit that they have failed to satisfy the standard imposed by KRS § 271B.8-510, no benefit was achieved by requiring this written affirmation. For that reason, it has been deleted from statute.[46]

The second revision deals with the disinterested requirement with respect to approving either advancement or indemnification. Previously, with respect to any vote of the shareholders to either grant or deny indemnification or advancement, when that determination was made by the shareholders, shares controlled by the directors who were parties to the action, almost exclusively as defendants, could not be voted on that determination. In effect, with respect to the defendants, they are stripped, as shareholders, of voting rights with respect to both indemnification and advancement. There was no, however, parallel provision excluding from that vote the shares held by persons who are plaintiffs. Consider a corporation structured as follows:

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41 *See* Rutledge, *supra* note 37, at 159.

42 *See* KY. REV. STAT. ANN. § 273A.030(1) (West 2015); *see also* Rutledge, *supra* note 37, at 159–61.

43 *See* KY. REV. STAT. ANN. § 273A.040(3) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 10, 2017 Ky. Acts); *see also* Rutledge, *supra* note 37, at 161 n.223.

44 *See* KY. REV. STAT. ANN. § 271B.8-530 (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 6, 2017 Ky. Acts).

45 KY. REV. STAT. ANN. § 271B.8-530 (West 1989) (amended by Act of Apr. 12, 2017, ch. 193, § 6, 2017 Ky. Acts).

46 The Model Business Corporation Act (2016 Revision) likewise deleted this requirement. *See* MODEL. BUS. CORP. ACT § 8.53 (AM. BAR ASS'N 2016).

	Shares	Alignment
Amy	50	Plaintiff
Laura	50	Plaintiff
Sharon	50	Unaligned
Tony	50	Defendant
Alex	50	Defendant

Assume that Tony and Alex are the corporation's directors. Assume as well that Amy and Laura have initiated a derivative action charging Alex and Tony with breach of their fiduciary obligations to the corporation. Under the statute prior to this amendment, neither Alex nor Tony could vote their respective shareholdings either in favor or against advancement or indemnification. However, each of Amy and Laura, notwithstanding their position as plaintiffs in the action, could vote with respect to advancement or indemnification. Being a foregone conclusion they would vote against it, in effect they would outvote Sharon and advancement or indemnification would not be available. As amended, only Sharon, not being a party to the action, would be able to vote, and she would presumably be able to make a disinterested determination as to whether or not indemnification or advancement should be provided.[47]

Another change made to the Business Corporation Act relates to amendment of the bylaws. Prior to this amendment, the Business Corporation Act provided, in rejection of the "vested rights" doctrine,[48] that the shareholders have no vested rights in the articles of incorporation.[49] This affirmative declaration left open, however, the question as to whether there could exist any vested rights in bylaws. This revision of the Business Corporation Act makes express that there are no vested property rights in any provision of the bylaws,[50] thereby eliminating the argument that there could exist vested rights in the bylaws because they were not

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[47] *See* KY. REV. STAT. ANN. § 271B.8-550(2)(d) (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 7, 2017 Ky. Acts). Nothing in this amendment alters other mechanisms by which advancement or indemnification may be approved, examples being disinterested directors or special counsel. *See* § 271B.8-550(2)(a); § 271B.8-550(2)(c).

[48] *See, e.g.*, Sautter v. Supreme Conclave, Improved Order of Heptasophs, 71 A. 232, 233 (N.J. 1908); A.W. Ayers v. Burley Tobacco Growers Coop. Ass'n, 344 S.W.2d 836, 838 (Ky. 1961); McCallum v. Asbury, 393 P.2d 774, 775–76 (Or. 1964); *see also* Thomas E. Rutledge & Katharine M. Sagan, *An Amendment Too Far?: Limits on the Ability of Less Than All Members to Amend the Operating Agreement*, 16 FLA. ST. U. BUS. L. REV. 1 (2017).

[49] *See* KY. REV. STAT. ANN. § 271B.10-010(2) (West 2017).

[50] *See* KY. REV. STAT. ANN. § 271B.10-200(3) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 8, 2017 Ky. Acts).

specifically referenced in the statute in the same manner as were the articles of incorporation.[51]

VII. THE LIMITED LIABILITY COMPANY ACT

Three small and rather technical revisions have been made to the Limited Liability Company Act. First, the definition of a "Nonprofit limited liability company" has been supplemented to make express that an LLC is a nonprofit LLC only if there is an express election in its articles of organization.[52] Even if an LLC has one or more nonprofit purposes, it is not subject to the provisions applicable to nonprofit LLC's absent the election into that status in the articles of organization.

The second revision made to the LLC Act is a deletion from KRS § 275.280, it addressing when a person is dissociated from an LLC. Initially, what was KRS § 275.280(1)(c)4 has been deleted, it previously providing that a member is removed as a member "upon resignation."[53] This provision is an artifact of the original 1994 LLC Act, which allowed a member to resign upon 30 days written notice.[54] In 1998, the LLC Act was amended to delete the right of a member to, unilaterally, resign from the LLC.[55] Thereafter, in 2010,[56] the LLC Act was further amended by adding what are now KRS § 275.280(3) and (4), those provisions providing a limited right of resignation in an LLC that it is member-managed and detailing the effect of that resignation.[57] These provisions cover the topic except to the extent otherwise provided in a written operating agreement.

The addition of new subsection (6) to KRS § 275.280 makes it even more express that, upon dissociation of a member, neither the member nor any

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[51] This revision of the statute is consistent with the Model Business Corporation Act (2016 Revision). *See* MODEL. BUS. CORP. ACT § 10.2(c) (AM. BAR ASS'N 2016).

[52] *See* KY. REV. STAT. ANN. § 275.015(19) (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 11, 2017 Ky. Acts).

[53] *See* KY. REV. STAT. ANN. § 275.280 (West 2012), *amended by* Act of Apr. 12, 2017, ch. 193, § 14, 2017 Ky. Acts.

[54] *See* KY. REV. STAT. ANN. § 275.280(3) (West 1994), *repealed by* Act of Apr. 7, 1998, ch. 341, § 37, 1998 Ky. Acts ("Unless a written operating agreement provides in writing that a member has no power to withdraw by voluntary act from a [LLC], the member may do so by giving thirty (30) days written notice to the other members, or other notice as provided in a written operating agreement."); *see also* Thomas E. Rutledge & Lady E. Booth, *The Limited Liability Company Act: Understanding Kentucky's New Organizational Option*, 83 KY. L.J. 1, 35 (1994–95).

[55] *See* Act of Apr. 7, 1998, ch. 341, § 37, 1998 Ky. Acts (codified at KY. REV. STAT. ANN. § 275.280 (West 2017)).

[56] *See* Act of Apr. 13, 2010, ch. 133, § 37, 2010 Ky. Acts (codified at KY. REV. STAT. ANN. § 275.280 (West 2017)).

[57] *See also* Thomas E. Rutledge, *The 2010 Amendments to Kentucky's Business Entity Laws*, 38 N. KY. L. REV. 383, 399–402 (2011).

assignee thereof[58] is entitled to any liquidating distribution or other liquidation of their interest in the LLC.[59]

There are as well a pair of substantive additions to the LLC Act. First, many LLC Acts provide a mechanism for the judicial expulsion of a member.[60] Prior to its amendment in 2017, the Kentucky LLC Act lacked such a provision. Rather, expulsion of a member could be effected if and only if provided for in a written operating agreement.[61] Absent the foresight to include a provision in the operating agreement, there was no right to affect a member's expulsion from the LLC.[62] A new section has been added to the LLC Act to provide for judicial expulsion of a member. The standard for expulsion, adopted from the Revised Uniform LLC Act,[63] requires a showing that the member:

> (a) has engaged, or is engaging, in wrongful conduct that has adversely and materially affected, or will adversely and materially affect, the company's activities;
>
> (b) has willfully or persistently committed, or is willfully and persistently committing, a material breach of the operating agreement or the person's duties or obligations under KRS 275.170; [or]
>
> (c) has engaged or is engaging in conduct relating to the company's activities which makes it not reasonably practicable to carry on the activities

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58 *See* KY. REV. STAT. ANN. § 275.280(6) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 14, 2017 Ky. Acts) ("Except as set forth in a written operating agreement, the dissociation of a member does not entitle the former member or any assignee thereof to any distribution."). Note that in certain instances a former member may become their own assignee, such as the case of a member who resigns. *See also id*. § 275.280(4).

59 *See also* Thomas E. Rutledge, *Chapman v. Regional Radiology Associates, PLLC: A Case Study in the Consequences of Resignation*, 100 KY. L.J. ONLINE 15 (2011).

60 *See, e.g.*, REVISED PROTOTYPE LLC ACT §§ 602(e)(1)–(3) (AM. BAR ASS'N 2011); REVISED UNIF. LTD. LIAB. CO. ACT § 602(5), 6B U.L.A. 502 (2008); TENN. CODE ANN. § 48-249-503(a)(6) (West 2006).

61 *See also* KY. REV. STAT. ANN. § 275.280(1)(e)1 (West 2017); Page v. ADS Investments, LLC, C.A. No. NM-2006-0334, 2014 R.I. Super. LEXIS 106 (Super. Ct. Aug 5, 2014) ("[A]bsent a provision in an operating agreement allowing for the involuntary removal of members, the parties seeking removal are left to the default rules [of the LLC Act]."); Man Choi Chiu v. Chiu, 896 N.Y.S.2d 131, 132 (N.Y. App. Div. 2010) (discussing that a provision of LLC Act addressing expulsion of a member only indicated that operating agreement could provide for expulsion; absent having done so there is no right to expel a member); Brazil v. Rickerson, 268 F. Supp. 2d 1091, 1099 (W.D. Mo. 2003).

62 Statutory rights of expulsion, on limited bases, exist in the partnership and limited partnership acts. *See* KY. REV. STAT. ANN. § 362.1-601(4)(a) (West 2006) ("The partner's expulsion by the unanimous vote of the other partners if: (a) It is unlawful to carry on the partnership business with that partner."); *id*. § 362.2-601(2)(d)1 ("It is unlawful to carry on the limited partnership's activities with that person as a limited partner"). Under the Uniform Partnership Act, upon similar circumstances, the partnership itself dissolved. *See* KY. REV. STAT. ANN. § 362.300(3) (West 2007).

63 *See* REVISED UNIF. LTD. LIAB. CO. ACT § 602(5), 6B U.L.A. 502 (2008).

with the person as a member.[64]

In addition, and departing from RULLCA, the operating agreement may, if in writing, provide additional grounds for judicial expulsion.[65] While this provision is complementary of the already existing law that a written operating agreement may provide for events upon which a member will be disassociated,[66] it is not duplicative. The new provision provides for judicial supervision of, and concurrence to give final effect to, expulsion. The previously existing provision is self-effectuating. In the drafting of an operating agreement, persons may be more comfortable accepting expulsion provisions that contemplate judicial supervision rather than an equivalent standard that gives rise only to an action for breach of the operating agreement.

Examples of the application of those standards include *IE Test LLC v. Carroll,*[67] *Medical College of Aruba*,[68] and *Kenny v. Fulton Associates, LLC*.[69] In the *IE Test* dispute, after ten years of litigation and two rulings by lower courts to the contrary, the New Jersey Supreme Court held that the statutory requirements for Carroll's judicial expulsion were not satisfied and that he remained a member.[70] *Aruba I*[71] involved the determination, on egregious facts, that certain members were subject to judicial expulsion from an LLC; *Aruba II*[72] and *Aruba III*[73] address questions of buy-out and valuation of the interest held by the expelled members. The *Kenny* decision initially involved a dispute over whether the assignees of a member should

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[64] KY. REV. STAT. ANN. § 275.172 (West 2017); *see also* REVISED UNIF. LTD. LIAB. CO. ACT § 602(5), 6B U.L.A. 502.

[65] *See* § 275.172(1)(d) (created by Act of April 12, 2017, ch. 193, § 2, 2017 Ky. Acts).

[66] *See* KY. REV. STAT. ANN. § 275.280(1)(c)1 (West 2017) ("In accordance with a written operating agreement . . . .").

[67] IE Test LLC v. Carroll, 140 A.3d 1268 (N.J. 2016). In this instance, involving a three member LLC, two of the members asserted that the third, Carroll, was acting in opposition to the best interests of the LLC and, on that basis, sought his expulsion by judicial order. *Id.* at 1271. The New Jersey Supreme Court, reversing both the trial court and the intermediate appellate division, held that Carroll's actions were not adverse to the interests of the LLC or otherwise in violation of the statutory standard for expulsion. *Id.* at 1279–81.

[68] All Saints Univ. of Med. Aruba v. Chilana, No. C-147-08, 2012 WL 6652510, at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2010) (*Aruba I*); All Saints Univ. of Med., Aruba v. Chilana, No. C-147-08, 2015 WL 6456117 (N.J. Super. Ct. App. Div. Oct. 27, 2015) (*Aruba II*); All Saints Univ. of Med., Aruba v. Chilana, No. C-147-08, 2015 WL 11254290 (N.J. Super. Ct. App. Div. Aug. 5, 2016) (*Aruba III*).

[69] No. 1-15-3426, 2016 IL App (1st) 152536 (Dec. 27, 2016).

[70] *IE Test LLC*, 140 A.3d at 1281.

[71] *See Aruba I*, 2012 WL 6652510.

[72] *See Aruba II*, 2015 WL 6456117.

[73] *See Aruba III*, 2015 WL 11254290.

be recognized as substitute members.[74] In determining that they should be so recognized, the court found that the other member acted unreasonably and in violation of the operating agreement, thereby justifying both judicial expulsion and a buy-out.[75]

The statute is silent, and indeed is agnostic, as to the manner in which judicial intervention will be sought. For example, the LLC could expel a member and, coincident with doing so, bring a declaratory judgment action seeking confirmation that the expulsion was justified.[76] Alternatively, a company could expel a member and then the expelled member could initiate an action against the LLC seeking a determination that the expulsion was invalid on the basis that the standards were not satisfied.

Going forward, operating agreements should provide for who in the LLC may cause it to affect a judicial expulsion. If no provision is made, presumably the general default will apply.[77] But if the approach selected is to expel and then seek a declaratory judgment on the expulsion, compliance with the provision governing suits brought on behalf of the LLC may be applicable.[78] The merit of the latter, at least from the perspective of those seeking to affect the expulsion, is that it is arguably a disinterested vote; the member being expelled does not participate therein.[79] Conversely, the member whose expulsion is being sought, who could be a majority owner, may view a default of a disinterested vote as being inappropriate. As always, careful drafting for the particular deal is not only appropriate but necessary.

Left to be resolved is whether the determination of expulsion (or not) may be referred to an arbitrator. While clearly an arbitration agreement in an operating agreement is possible, some may question whether the statutory grounds for judicial expulsion are able to be effectuated by an arbitrator. Conversely, on the basis of both federal and state policy in favor of

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[74] *See Kenny*, 2016 IL App (1st) 152536, ¶ 20–21.

[75] *See id.* at ¶ 75–85.

[76] Unless otherwise mandated by the operating agreement, it is not necessary that a member receive notice that expulsion is being considered. *See* KY. REV. STAT. ANN. § 275.175(7) (West 2017) Leigh v. Crescent Square, Ltd., 608 N.E.2d 1166 (Ohio Ct. App. 1992).

[77] *See* § 275.175(1) ("Unless otherwise provided in the articles of organization, a written operating agreement, or this chapter, the affirmative vote, approval, or consent of a majority-in-interest of the members or a simple majority of the managers, each having a single vote, shall be required to decide any matter connected with the business affairs of the limited liability company.").

[78] *See* KY. REV. STAT. ANN. § 275.335 (West 2015); *see also* Rutledge, *supra* note 37, at 140–47.

[79] *See id.* § 275.335(3). There is, admittedly, something of a chicken and egg problem in this analysis. The member, being expelled, has an interest adverse to the LLC only after the vote to expel has been made. Until the vote there is only a proposal, and the LLC's interest has not been determined. Practically, this is too fine a hair to split, and even where the operating agreement does not provide better clarity, the member whose expulsion is under consideration should not, under KRS § 275.335, be permitted to vote thereon.

enforcement of agreements to arbitrate, it appears referral to arbitration should be permissible.[80]

As is the case with any other disassociation, upon judicial expulsion the member becomes their own assignee[81] and is not entitled, unless a written operating agreement provides to the contrary, to a liquidating distribution.[82]

Third, additions have been made as to the manner in which members make determinations. The LLC Act is silent as to procedural matters such as the contents of and minimum notice of a member meeting,[83] quorum requirements, [84] etc. A new section makes express that these topics are governed by whatever is agreed to in a written operating agreement.[85] Where they are not provided for in the operating agreement of a particular LLC, the LLC Act will not provide default rules. There has been added, however, a provision allowing the requisite threshold of the members[86] to act by a written consent without the requirement of a meeting of all of the members.[87] With

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[80] *See also* Duke v. Graham, 158 P.3d 540 (Utah 2007) (stating the provisions of the Utah LLC Act provide for judicial expulsion of members, and judicial removal of managers did not strip arbitrator of the authority to remove members and managers.).

[81] *See* KY. REV. STAT. ANN. § 275.280(5) (West 2017).

[82] *See also id.* § 275.280(6) (created by Act of Apr. 12, 2017, ch. 193, § 14, 2017 Ky. Acts); Rutledge, *supra* note 59.

[83] *Contra* KY. REV. STAT. ANN. § 271B.7-050(1) (West 1988) (requiring ten days' notice of a meeting of the shareholders); KY. REV. STAT. ANN. § 272.161 (West 1984) (requiring ten days' notice of a meeting of the members of the association); KY. REV. STAT. ANN. § 272A.5-070 (West 2012) (requiring ten days' notice of a meeting of members); KY. REV. STAT. ANN. § 273.197 (West 2015) (requiring ten days' notice of meeting of the members).

[84] *Contra* KY. REV. STAT. ANN. § 271B.7-250(1) (West 1988) (discussing quorum for a meeting of the shareholders); KY. REV. STAT. ANN. § 272A.5-090 (West 2012) (discussing quorum for meeting of the members of a limited cooperative association); KY. REV. STAT. ANN. § 273.203 (West 1968) (discussing quorum of the members of a nonprofit corporation). None of the partnership or limited partnership acts address notice or quorum requirements. The Kentucky Uniform Statutory Trust Act is express that the governing instrument may address those matters, but does not provide any default rules in the absence of doing so. *See* KY. REV. STAT. ANN. § 386A.1-030(4)(d) (West 2015); *see also* Thomas E. Rutledge, *The Kentucky Uniform Statutory Trust Act (2012): A Review*, 40 N. KY. L. REV. 93 (2012–13).

[85] *See* KY. REV. STAT. ANN. § 275.175(6) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 12, 2017 Ky. Acts). This provision is based upon the Delaware LLC Act. *See* DEL. CODE ANN. tit. 6, § 18-302(c) (2012) ("A limited liability company agreement may set forth provisions relating to notice of the time, place or purpose of any meeting at which any matter is to be voted on by any members, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.").

[86] Typically, a majority-in-interest thereof. *See* § 275.175(1); *see also* § KY. REV. STAT. ANN. 275.015(15) (providing the definition of "majority-in-interest"). Alternatively, if the operating agreement sets a different threshold, that threshold may act under this provision.

[87] *See* § 275.175(7) (created by Act of Apr. 12, 2017, ch. 193, § 12, 2017 Ky Acts). This provision is based on the Delaware LLC Act. *See* DEL. CODE ANN. tit. 6, § 18-302(c) (2016) ("A limited liability company agreement may set forth provisions relating to notice of the time, place or purpose of any meeting

this provision there is a clear manner for the requisite threshold of the members to act, and the action cannot be challenged on the basis of lack or insufficiency of notice, absence of quorum, etc. The requirement that the action approved be in writing serves obvious evidentiary purposes and is in the nature of a statute of frauds.[88] Note, however, that there is no requirement that the writing be signed by the members who consent thereto.

VIII. THE "FULL NAME" FOR PURPOSES OF FILING DEEDS

In 2016, the General Assembly amended KRS § 382.135 by the addition of subsection (1)(a) thereto, requiring that a deed set forth the "full name" each of the grantor and the grantee.[89] The statute, as amended, did not identify what constitutes the "full name."[90] The 2017 revision to KRS § 382.135 addresses that lacuna, defining what would constitute the "full name" for both natural persons and various business organizations.[91] With respect to individuals, the "full name" will be as determined under the Kentucky UCC for purposes of identifying a debtor who is a natural person. Typically, this will be their name as set forth on a valid driver's license;[92] otherwise it will be the first given name and a surname.[93] In contrast, with respect to business organizations, the "full name" is synonymous with the "real name" as determined under the Kentucky Assumed Name Statute.[94] Left unaddressed is what is the real name of a donative (as contrasted with a business or statutory) trust.

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at which any matter is to be voted on by any members, waiver of any such notice, action by consent without a meeting, the establishment of a record date, quorum requirements, voting in person or by proxy, or any other matter with respect to the exercise of any such right to vote.").

[88] *See* KY. REV. STAT. ANN. § 371.010 (West 2017). The requirement of a writing is in the nature of a safe harbor—a written action approved by the requisite threshold of the members will be presumptively valid to bind the LLC. If, in contrast, the requisite threshold of the members agrees to a course of action, but does not memorialize it in writing, the LLC is bound, but there is an evidentiary question as to the parameters of the member's agreement. However, the action is neither void nor voidable consequent to not being in written form.

[89] *See* KY. REV. STAT. ANN. § 382.135 (West 2017) (amended by Act of Apr. 12, 2017, ch. 193, § 22, 2017 Ky. Acts).

[90] *See also* J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 298 (Scholastic Press 1998) ("Call him Voldemort, Harry. Always use the proper name for things. Fear of a name increases fear of the thing itself.").

[91] *See* KY. REV. STAT. ANN. § 382.135(6) (West 2017) (created by Act of Apr. 12, 2017, ch. 193, § 22, 2017 Ky. Acts).

[92] *See* KY. REV. STAT. ANN. § 355.9-503 (West 2017).

[93] *See id.* § 355.9-503.

[94] *See* KY. REV. STAT. ANN. § 365.015 (West 2017).

IX. PUBLIC BENEFIT CORPORATIONS

In 2017, the Kentucky General Assembly adopted amendments to the Business Corporation Act enabling the formation of a "public benefit corporation,"[95] an organizational form pursuant to which a business corporation may devote certain of its assets to a defined "public benefit" without running afoul of any "shareholder wealth maximization" obligation that may exist.[96]

Generally, an important point about benefit corporations is that they are not charities, and they are not organized as nonprofit corporations. Rather, every benefit corporation is first a business corporation subject to the Kentucky Business Corporation Act. Second, and in furtherance thereof, there is no separate benefit corporation statute. Rather, the benefit corporation provisions are scattered throughout the Business Corporation Act. As a corollary to that last rule, except to the extent that the particular benefit corporation provisions direct a different rule, a benefit corporation is subject to all of the provisions of the Business Corporation Act. To that end, a benefit corporation is somewhat similar to a professional service corporation, an organizational form that begins as a business corporation and then makes particular elections, subjecting itself to the particular requirements of the professional corporation statute and otherwise governed by the Business Corporation Act. However, the analogy breaks down in the structure of the statutes in that the PSC requirements are set forth in a freestanding chapter of the KRS.

There are essentially three models for benefit corporation statutory language;[97] for these purposes it suffices to note that the Kentucky statute is based on that used in Delaware.

A. Why Benefit Corporations?

The notion of the benefit corporation arose out of the question of whether a corporation, or more correctly whether the board of directors of a corporation, may direct the application of company assets to the remediation of identified societal challenges where that remediation is not clearly beneficial to the corporation (other than, generally, as a member of society).

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[95] Act of Mar. 20, 2017, ch. 28, 2017 Ky. Acts.

[96] Benefit corporation legislation, all in essentially the same form, had been previously considered by the General Assembly. *See* H.B. 66, 2014 Leg., Reg. Sess. (Ky. 2014); H.B. 11, 2015 Leg., Reg. Sess. (Ky. 2015); H.B. 50, 2016 Leg., Reg. Sess. (Ky. 2016).

[97] For a review of these three models, see, *e.g.*, J. William Callison, *Benefit Corporations, Innovation and Statutory Design*, 26 REGENT U. L. REV. 143 (2013–14).

While a corporation has the capacity to make charitable contributions,[98] that capacity is limited to contributions that are beneficial to the corporation.[99] Notwithstanding broad interpretations of the ability of a corporation to make charitable contributions of its assets—an expenditure of company assets that does not clearly benefit the corporation—would the directors who authorized the expenditure be subject to charges of having breached their fiduciary obligations by wasting corporate assets? Alternatively, could the board be charged with having failed to discharge its obligation to maximize shareholder wealth by making those expenditures? Benefit corporation status was created to address that question, providing an organizational form in which the expenditure of company assets on the public benefits identified by the corporation and set forth in its articles of organization would be appropriate, and no claim against the directors could stand. Substantively, the effect of benefit corporation status is to relieve the board of directors of the shareholder wealth maximization obligation.

This effort begs an important question, namely whether directors are subject to a wealth maximization obligation. There is minimal support for this obligation in the case law. While typically every "Business Associations" class will include a review of the decision rendered in *Dodge v. Ford*,[100] a nearly century old decision of the Michigan Supreme Court, what is seldom identified is the fact that this case is nearly unique in espousing the shareholder wealth maximization principal.[101] A review of the commentary espousing current shareholder wealth maximization as a norm implicitly acknowledges that shareholder wealth maximization is not an existing

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[98] *See, e.g.*, KY. REV. STAT. ANN § 271B.3-020(1)(m) (West 1988) (stating that a corporation may "[m]ake donations for the public welfare or for charitable, scientific, or educational purposes").

[99] *See id.* § 271B.3-020(1) ("Unless its articles of incorporation provide otherwise, every corporation shall have perpetual duration and succession in its corporate name and shall have the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation power to…").

[100] Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) ("A business corporation is organized and carried on primarily for the benefit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among shareholders in order to devote them to other purposes.").

[101] *See also* eBay Inc. v. MercExchange, LLC, 547 U.S. 388 (2006); In re Trados Inc. Shareholder Litig., 73 A.3d 17, 37 (Del. Ch. 2013) ("In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital, as warranted for an entity with perpetual life in which the residual claimants have locked in their investment."); In re Novell, Inc. Shareholder Litig., No. 6032-VCN, 2013 WL 322560, at *7 (Del. Ch. Jan. 3, 2013) ("There is no single path that a board must follow in order to maximize stockholder value, but directors must follow a path of reasonableness which leads toward that end."); Leo Strine, *A Job is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71 (2015).

binding obligation, but is rather more in the nature of a proposal.[102] The recent prominence of the shareholder wealth maximization obligation can be traced not to either statutory or case law, but rather to commentary substantially beginning with a short article by Milton Friedman[103] and from there developed in the "law and economics" scholarship.

Others have put forth cogent arguments that shareholder maximization is in fact not the obligation of the board of directors.[104] In the particular instance of Kentucky, it is at minimum open to debate whether there exists a shareholder wealth maximization obligation in corporate law. Unlike Delaware, which develops its law of fiduciary obligations via court decisions, Kentucky utilizes a statutory formula defining what the obligations of a director are with respect to the discharge of director functions.[105] Those duties run to the benefit of the corporation itself.[106] The shareholders, as contingent beneficiaries of any increase in the corporation's value, have no claim

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[102] *See, e.g.*, Bernard S. Sharfman, *Shareholder Wealth Maximization and its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 393 (2014) ("There is widespread support for the idea that shareholder wealth maximization *should be* the primary norm underlying corporate governance. It is widely accepted that shareholder wealth maximization enhances corporate decision-making and can be understood as a proxy for social welfare maximization.") (emphasis added) (citations omitted); Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 577–83 (2003) (arguing that the shareholder wealth maximization norm should be a default rule, but permitting contrary private ordering); Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L L. 45, 45 (2002) (describing the shareholder wealth maximization norm as "well-established in U.S. corporate law" and treating it "as given").

[103] *See* Milton Friedman, *The Social Responsibility of Business to Increase its Profits*, N.Y. TIMES MAG. (Sept. 13, 1970).

[104] *See, e.g.*, LYNN A. STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 29 (2012); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps*., 25 REGENT U. L. REV. 269, 282 (2013) ("[N]o corporate statute states that a corporation must maximize profits or shareholder wealth."); Lyman Johnson & David Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 10–15 (2015) (surveying academic literature on the shareholder wealth maximization norm and concluding that there is none); Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163 (2008); Steve Denning, *The Origin of 'The World's Dumbest Idea': Milton Friedman*, FORBES (June 26, 2013); *see also* Burwell v. Hobby Lobby, Inc., 134 S. Ct. 2751, 2771 (2014) ("[M]odern corporation law does not require for-profit companies to maximize profits at the expense of anything else, and many do not do so."); Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 173 (2012) ("[A]n analysis of corporate behavior indicates that corporations with general purpose statements, regardless of the state of incorporation, are not restricted to only activities that maximize shareholder wealth.").

[105] *See* KY. REV. STAT. ANN. § 271B.8-300(1) (West 2017).

[106] *See, e.g.*, 1400 Willow Council of Co-Owners v. Ballard, 430 S.W.3d 229, 241 (Ky. 2013) (holding that a director's fiduciary duties are owed to the corporation); Griffin v. Jones, No. 2014-CA-000402-MR, 2015 WL 4776300, at *4 (Ky. Ct. App. Aug. 14, 2015) (holding that both the common law and statutory fiduciary obligations imposed upon members of the board of directors and corporate officers run to the benefit of the corporation).

thereon absent an interim or a liquidating distribution.[107] Under Kentucky law, there is a tenuous connection between the shareholders and the corporation to whom the fiduciary duties are owed by the directors. While it might be possible to posit an obligation to enhance the value of the corporation, it is difficult to see how that could be equated with an obligation to maximize the return for shareholders.

Beyond that structural paradigm, there is the express wording of the Business Corporation Act allowing the directors to consider the interests of constituencies and stakeholders other than the shareholders.[108] While, admittedly, this language appears in the subchapter of the KRS that addresses board responses to takeover proposals, it is not limited to such a situation.[109] As such, under Kentucky's statutory law, irrespective of any provision dealing with benefit corporations, the board of directors already has the flexibility to consider stakeholders other than the shareholders. As those considerations would typically run adverse to a wealth maximization obligation, it is again highly questionable whether one exists under Kentucky law.

Furthermore, benefit corporation language is essentially redundant of a carefully crafted purpose clause. No change in the law was necessary in order to enable the shareholders to define a corporation's purpose as including what is labeled as a public benefit, and the directors could not have been criticized for applying corporate assets in furtherance thereof.[110]

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[107] *See also* KY. REV. STAT. ANN. § 271B.6-400(6) (West 2017); STOUT, *supra* note 104, at 37–38 (explaining the flaws in the notion that the shareholders "own" the corporation).

[108] *See* KY. REV. STAT. ANN. § 271B.12-210(4) (West 2017) ("In discharging its duties under this section, *or otherwise*, the board of directors, in considering the best interests of the corporation, may consider in addition to the interests of the corporation's shareholders, any of the following: (a) The interests of the corporation's employees, suppliers, creditors and customers; (b) The economy of the state and nation; (c) Community and societal considerations; and (d) The long-term as well as short-term interests of the corporation and its shareholders, including the possibility that these interests may be best served by the continued independence of the corporation.") (emphasis added).

[109] *See id.* ("or otherwise"); *see also* Rutherford B. Campbell, *Kentucky Corporate Fiduciary Duties*, 93 KY. L.J. 551, 562 (2005).

[110] *See also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 35–36 (Harvard Univ. Press 1991) ("[W]hat is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? . . . Our response to such question is: who cares? If the *New York Times* is formed to publish a newspaper first and make a profit second, no one should be allowed to object. Those who came in at the beginning consented, and those who came later bought stock the price of which reflected the corporation's tempered commitment to a profit objective. If a corporation is started with a promise to pay half the profits to the employees rather than the equity investors, that too is simply a term of the contract."); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1752 (2006) (arguing that flexibility to engage in "private ordering" is a goal in Delaware corporate law); Jonathan R. Macey, *A Close Read of an Excellent Commentary on Dodge v. Ford*, 3 VA. L. & BUS. REV. 177, 179 (2008) (arguing that shareholder profit maximization is a default rule that the shareholders may modify by private agreement). *See generally*

B. Statutory Requirements Applicable to PBCs

The mechanics of electing into public benefit corporation status are both few and straightforward. First, the name of the corporation must end with any of "public benefit corporation," "benefit corporation," "P.B.C.," or "PBC."[111] Note that there is no restriction of the term "benefit" to public benefit corporations.[112] In consequence, the non-PBC "Employee Benefits Corporation" is and remains a legitimate name. Second, the corporation's articles of incorporation must both recite that it is a public benefit corporation and recite what public benefit or benefits it has assumed.[113] It is important to note that these are two distinct obligations, and the mere recitation of what the public benefit purposes assumed by the corporation is not sufficient to satisfy the obligations that the articles recite that the corporation is a public benefit corporation. The only other structural requirement, but one not of public records, is that the share certificates issued by a benefit corporation must recite the fact that it is a benefit corporation.[114] Existing corporations that desire to take on benefit corporation status may do so pursuant to an election made by the board of directors and the shareholders.[115] Initially, the corporation will need to amend its articles of incorporation to (i) change the corporation's name to include one of the required identifiers,[116] (ii) affirmatively elect the corporation's public benefit corporation status, and (iii) recite the public benefit purpose(s).[117] The corporation will also need to cancel its outstanding share certificates and issue new share certificates reciting that the corporation is a public benefit corporation.[118] Approval of the amended (or amended and restated) articles of incorporation will follow the usual procedures with the caveat that the amendments electing into PBC

Thomas E. Rutledge, *Purpose: If You Don't Know Where You Are Going, How Will You Know If You Have Arrived*, J. PASSTHROUGH ENTITIES, Nov.–Dec. 2017, at 37 (discussing the benefits and flexibility of purpose clauses in partnership and LLC agreements).

[111] *See* KY. REV. STAT. ANN. § 14A.3-010(2)(a)(3) (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 1, 2017 Ky. Acts).

[112] *See id.*

[113] *See* KY. REV. STAT. ANN. § 271B.2-020 (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 4, 2017 Ky. Acts).

[114] *See* KY. REV. STAT. ANN. § 271B.6-260(3) (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 5, 2017, Ky. Acts).

[115] *See* KY. REV. STAT. ANN. § 271B.11-025 (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 3, 2017 Ky. Acts).

[116] *See* § 14A.3-010(2)(a)(3).

[117] *See* KY. REV. STAT. ANN. § 271B.16-020 (West 2017).

[118] *See* § 271B.6-260.

status will be effective if and only if they receive the approval of 90% or more of the shareholders irrespective of whether voting or non-voting.[119]

A shareholder voting against the election into public benefit corporation status, where the election otherwise satisfies the 90% threshold requirement, is afforded the right to dissent from the transaction.[120] The limitations imposed on election into PBC status apply equally to the merger of an existing corporation into a PBC.[121] Should a PBC desire to shed that status, that would be accomplished through amendment of the articles of incorporation deleting the various public benefit corporation provisions and the issuance of new share certificates. In order to delete those provisions, there must be approval of both the Board of Directors[122] and not less than two-thirds of the incumbent shareholders.[123] This two-thirds threshold is higher than the general requirement of a simple majority of the members to approve an amendment of the articles of incorporation.[124] In the event that a shareholder should vote against the deletion of the public benefit corporation provisions from the articles of incorporation, and that vote otherwise receives the required two-thirds threshold, the shareholder may exercise dissenter rights.[125]

While some may suggest that the election by an existing corporation to become a PBC, or the election by a PBC to cease to have that status, should be treated as a "conversion", little could be further from the truth.

In a true conversion, a venture changes its organizational form. Hence, a corporation can "convert" into an LLC,[126] and an LLC can convert into a limited partnership.[127] In the same vein, general partnerships and limited partnerships may convert into an LLC.[128] The common factor is that there is always a change in form, a fact recognized by the Kentucky Supreme Court in *Lach v. Man O'War*.[129] A corporation, whether a public benefit corporation or otherwise, is organized under the Kentucky Business Corporation Act.[130] A corporation electing to become a PBC is exactly the same corporation it

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119 *See* § 271B.11-025(1)(a).
120 *See* KY. REV. STAT. ANN. § 271B.13-020 (West 2017).
121 *See* § 271B.11-025(1)(b).
122 *See* KY. REV. STAT. ANN. § 271B.10-030 (West 1988).
123 *See* § 271B.11-025(3).
124 *See* § 271B.10-030(5).
125 *See* § 271B.13-020.
126 *See* KY. REV. STAT. ANN. § 275.376 (West 2015).
127 *See* KY. REV. STAT. ANN. § 362.2-952(4) (West 2006).
128 *See* KY. REV. STAT. ANN. § 275.370 (West 2010).
129 *See* Lach v. Man O'War, LLC, 256 S.W.3d 563, 567–69 (Ky. 2008).
130 *See* KY. REV. STAT. ANN. § 271B.1-400(5) (West 2017) (defining "corporation" as including a public benefit corporation).

was previously. Likewise, a corporation electing to terminate its status as a PBC is likewise the exact same entity it was prior to that determination.

Ergo, the election by a corporation to become a PBC, or the determination by a PBC to cease to be in that status, is in no manner a "conversion."[131] Consequent thereto, in the event of either of these transactions, the corporation will maintain the same federal and state taxpayer identification numbers, and likewise will maintain the same Secretary of State identification number. The change in name[132] will be reported on a Kentucky Department of Revenue Form 10A104.[133]

The enforcement of a corporation's discharge of its public benefit purposes will be by means of a shareholder derivative action.[134] The statute contains a curious provision with respect to those actions. Specifically, it is provided that the derivative action to enforce the public benefit purpose must be brought by shareholders owning (assuming the PBC is not publicly traded) 2% of the corporation's outstanding shares.[135] Generally speaking, the Kentucky Business Corporation Act does not impose a minimum threshold on those shareholders permitted to bring a derivative action, and it is unclear why one is necessary or appropriate in the context of a PBC.

Each year, a PBC is obligated to issue a report to its shareholders "as to the corporation's promotion of the public benefit or public benefits identified in the articles of incorporation in the best interest of those materially affected by the Corporation's conduct."[136] The statement must include:

> (a) The objectives that the board has established to promote the public benefit or public benefits and interests;
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> (b) The standards that the board of directors has adopted to measure the corporation's progress in promoting the public benefit or public benefits and interests;
>
> (c) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting the public

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[131] Likewise, the election by a corporation that is a professional service corporation to shed that status is not a conversion. *See* KY. REV. STAT. ANN. § 274.015(3) (West 2010); *see also* KY. REV. STAT. ANN. § 271B.1-400(5) (West 2017) (including professional service corporation in the definition of "corporation").

[132] *See* KY. REV. STAT. ANN. § 14A.3-010(2)(a)(3) (West 2017).

[133] *See Form 10A104*, KY. DEP'T OF REVENUE (2017), https://revenue.ky.gov/Forms/10A104.pdf.

[134] *See* KY. REV. STAT. ANN. § 271B.7-400(8) (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 6, 2017 Ky. Acts).

[135] *See id.*

[136] KY. REV. STAT. ANN. § 271B.16-210(2) (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 9, 2017 Ky. Acts).

benefit or public benefits and interests; and

(d) An assessment of the corporation's success in meeting the objectives and promoting the public benefit or public benefits and interests.[137]

This additional task will need to be calendared and satisfied each year by the Board of Directors or, should it so desire, a committee thereof.[138] A corporation may provide in its articles of incorporation that the public benefit report will be made available to the public.[139] It is also provided that a PBC may, but is not obligated to, elect to have a third-party certification as to its promotion of a public benefit.[140]

C. Modification of Director Duties in a PBC

A new section has been added to the Business Corporation Act, applicable to public benefit corporations, detailing the flexibility afforded the Board of Directors to pursue the public benefit and defining such pursuit as being within the appropriate discharge by the directors of their obligations. Specifically, new subsection (8) to KRS § 271B.8-300 provides:

(8) In a public benefit corporation:

(a) The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its articles of incorporation;

(b) A director of the public benefit corporation shall not, by virtue of the public benefit provisions set forth in the corporation's articles of incorporation, have any duty to any person on account of any interest of the person in the public benefit or public benefits identified in the articles of incorporation or on account of any interest materially affected by the corporation's conduct;

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[137] *Id.*

[138] In Kentucky's 2017 H.B. 35, as initially tendered to the General Assembly, this public benefit report would be required only every other year. The reduction to an annual report was contained in a House Committee Substitute. *See* H.B. 35 (As Introduced), KY. LEGIS., http://www.lrc.ky.gov/recorddocuments/bill/17RS/HB35/orig_bill.pdf (last visited November 30, 2017).

[139] *See* § 271B.16-210(3)(a) (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 9, 2017 Ky. Acts).

[140] *See id*. § 271B.16-210(3)(b). As such, it is *not* necessary that a Kentucky-organized public benefit corporation be certified by B-Labs or any similar organization.

> (c) With respect to a decision implicating the balance requirement in paragraph (a) of this subsection, a director shall act in conformity with subsection (1) of this section; and
>
> (d) The articles of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this subsection shall not constitute an act or omission not in good faith or a breach of the duty of loyalty.[141]

New subparagraph (8)(a) is not particularly noteworthy in that, as previously identified, no doubt the equivalent effect could have been achieved prior to the adoption of the PBC amendments through careful drafting of the corporation's purpose clause as set forth in its articles of incorporation. As such, this language should be interpreted as being confirmatory in nature. More important is new subsection (8)(b), which makes it clear that the intended third party beneficiaries of the corporation's public benefit purpose do not themselves have the ability to enforce or challenge the manner of discharge thereof.[142] This is an important clarification in that it reinforces the already existing rule that the obligations of the directors run to the corporation;[143] this provision avoids the risk of divided loyalties. New subsection (8)(d) affords a public benefit corporation the opportunity, in its articles of incorporation, to impose a heightened standard of culpability with respect to the failure to satisfy the obligation to act in good faith or in conformity with the applicable duty of loyalty.[144] The specifics of this language are not detailed in the statute.

Whether the expenditures made in furtherance of a PBC's public benefit purpose will be deductible for federal[145] and state[146] purposes will be determined under those laws.[147]

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[141] *See* KY. REV. STAT. ANN. § 271B.8-300(8) (West 2017) (created by Act of Mar. 20, 2017, ch. 28, § 7, 2017 Ky Acts).

[142] *See id.*

[143] *See id.* § 271B.8-300(1) (directors owe duties "to the corporation"); KY. REV. STAT. ANN. § 273.215(1) (West 1988) (directors owe duties "to the corporation"); 1400 Willow Council of Co-Owners v. Ballard, 430 S.W.3d 229, 241 (Ky. 2013) (a director's fiduciary duties are owed to the corporation); Griffin v. Jones, No. 2014-CA-000402-MR, 2015 WL 4776300, at *4 (Ky. Ct. App. Aug. 14, 2015).

[144] *See id.* § 271B.8-300(8)(d).

[145] *See, e.g.*, 26 U.S.C. § 162 (2014); *see also Publication 535*, IRS (Jan. 19, 2017), https://www.irs.gov/pub/irs-pdf/p535.pdf.

[146] *See generally* KY. REV. STAT. ANN. §§ 141.010–.990 (West 2016) (governing state income taxes and deductions).

[147] *See also* Emily Cohen, *Benefit Express: How the Benefit Corporation's Social Purpose Changes the Ordinary and Necessary*, 4 WM. & MARY BUS. L. REV. 269 (2013).

X. IN OTHER NEWS

There were several other legislative proposals in the 2017 General Assembly that should be recognized.

Amendments were made to the statute governing post-judgment interest. Under the prior law, post-judgment interest was fixed at 12%, subject to the discretion of the court to impose a lower rate.[148] Under the new regimen, except for child support and workers' compensation claims, for which the default rate remains 12%, the default rate is reduced to 6%.[149]

A proposal[150] to adopt a wide range of amendments to the non-profit corporation acts, amendments substantially equivalent to those proposed in 2016,[151] died in committee.[152]

In recent years, both the National Labor Relations Board and private parties have brought suits asserting that, at least upon particular fact situations, a franchisor should be treated as the joint-employer of employees of a franchisee.[153] Kentucky's courts have to date not been open to these

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[148] *See* KY. REV. STAT. ANN. § 360.040 (West 1982), *amended by* Act of Mar. 16, 2017, ch. 17, § 1, 2017 Ky. Acts.

[149] *See* KY. REV. STAT. ANN. § 360.040 (West 2017) (amended by Act of Mar. 16, 2017, ch. 17, § 1, 2017 Ky. Acts).

[150] *See* H.B. 385, 2017 Leg., Reg. Sess. (Ky. 2017).

[151] *See* H.B. 367, 2016 Leg., Reg. Sess. (Ky. 2016).

[152] *See* H.B. 385, KY. LEGIS., http://www.lrc.ky.gov/record/17RS/HB385.htm (last visited Nov. 30, 2017).

[153] *See* Korsak v. Honey Dew Assocs., Inc., No. PC 13-0105, 2015 R.I. Super. LEXIS 120, at *20 (Super. Ct. Sept. 15, 2015); Browning-Ferris Indus. of Cal., Inc., 362 N.L.R.B. No. 186 (Aug. 27, 2015) (finding that direct control over the essential terms of employment included "matters related to the employment relationship such as hiring, firing, discipline, supervision, and direction"); Daniel Wiessner, *Judge Certifies Class of McDonald's Franchise Workers in Wage-and-Hour Lawsuit*, REUTERS LEGAL, July 11, 2016, at 1 ("U.S. District Judge James Donato in San Francisco on Thursday rejected claims by McDonald's Corp, represented by Jones Day, that the workers could not show on a classwide basis that they believed the company was their employer. . . . The fact that each employee spent every work day in a restaurant heavily branded with McDonald's trademarks and name is also informative."); Janet Sparks, *Dominos Liable in Franchisee Sexual Harassment Case*, BLUE MAUMAU (July 7, 2012, 1:40 PM), http://www.bluemaumau.org/11752/dominos_liable_franchisee_sexual_harassment_case; *see also* Michael Lotito, Maury Baskin & Missy Parry, *NLRB Imposes New "Indirect Control" Joint Employer Standard in Browning-Ferris*, LITTLER (Aug. 28, 2015), https://www.littler.com/publication-press/publication/nlrb-imposes-new-indirect-control-joint-employer-standard-browning ("The [National Labor Relations] Board voted 3-2 to change its joint employer standard with Chairman Pearce, Member Hirozawa and Member McFerran representing the majority and Member Miscimarra and Member Johnson dissenting. The question before the Board was whether Browning-Ferris Industries (BFI) was a joint employer with Leadpoint, a staffing services company, in a union representation election covering Leadpoint's employees. The Board concluded that BFI and Leadpoint were joint employers under the representation petition filed by union Teamsters Local 350. In finding that BFI was a joint employer with Leadpoint, the Board relied on BFI's *indirect control* and reserved contractual authority over essential terms and conditions of employment of the Leadpoint-supplied employees.") (emphasis added).

arguments.[154] Still, in an effort to preclude the argument, a series of parallel amendments provide, *inter alia*, that the franchisor is not the joint-employer of the employees of the franchisee.[155] It bears noting that this is a problem which calls for a national solution. While the General Assembly, within the confines of Kentucky,[156] can pass laws governing the nature and incidence of the employer and employee relationship, it cannot act outside of its borders.[157] Therefore, in any foreign state without a similar statute, an employee of a franchisee may still assert claims against a Kentucky-based franchisor premised upon an alleged joint-employer relationship.

The exemptions from the otherwise applicable obligation to maintain workers' compensation coverage were extended to certain ministers of religion and cemetery and church caretakers who, in either instance, render services for no more than ten hours a week.[158]

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[154] *See, e.g.*, Uninsured Emp'rs' Fund v. Crowder, No. 2014-CA-001556-WC, 2016 WL 2605624 (Ky. May 5, 2016); Doctor's Assocs., Inc. v. Uninsured Emp'rs' Fund, 364 S.W.3d 88 (Ky. 2011); *see also* David J. Kaufmann et al., *A Franchisor is Not the Employer of its Franchisees or Their Employees*, 34 FRANCHISE L.J. 439 (Spring 2015).

[155] *See* KY. REV. STAT. ANN. § 337.010 (West 2017) (amended by Act of Mar. 16, 2017, ch. 24, § 1, 2017 Ky. Acts); KY. REV. STAT. ANN. § 338.021 (West 2017) (amended by Act of Mar. 16, 2017, ch. 24, § 2, 2017 Ky. Acts); KY. REV. STAT. ANN. § 341.070 (West 2017) (amended by Act of Mar. 16, 2017, ch. 24, § 3, 2017 Ky. Acts); KY. REV. STAT. ANN. § 342.690 (West 2017) (amended by Act of Mar. 16, 2017, ch. 24, § 4, 2017 Ky. Acts); KY. REV. STAT. ANN. § 344.030 (West 2017) (amended by Act of Mar. 16, 2017, ch. 24, § 5, 2017 Ky. Acts). Each statute was amended to provide:

> (a) Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisee, neither a franchisee nor a franchisee's employee shall be deemed to be an employee of the franchisor for any purpose under this chapter.
>
> (b) Notwithstanding any voluntary agreement entered into between the United States Department of Labor and a franchisor, neither a franchisor nor a franchisor's employee shall be deemed to be an employee of the franchisee for any purpose under this chapter.
>
> (c) For purposes of this subsection, "franchisee" and "franchisor" have the same meanings as in 16 C.F.R. sec. 436.1.

Act of Mar. 16, 2017, ch. 24, 2017 Ky. Acts.

[156] By its terms, this statute extends only to the existence of an employer-employee relationship, and does not reach other allegations of franchisor control over, and consequent responsibility for, franchisee conduct. *See, e.g.*, Johnson v. Seagle Pizza, Inc., No. 2015-CA-000085-MR, 2016 WL 4410705 (Ky. Ct. App. Aug. 19, 2016) (rejecting claim that franchisor should be liable for murder that occurred off-site following a robbery).

[157] There has been proposed (but not as of this writing passed) legislation that in the context of the National Labor Relations Act (NLRA), 29 U.S.C. § 152 (1978), would limit the *Browning-Farris* decision to situations in which the alleged joint control of an employee is "actual, direct, and immediate" as to the "essential terms of employment." *See* H.R. 3459, 114th Cong. (1st Sess. 2015); *see also* Peter Schaumber, *An Obama Labor Ruling That Threatens Small Business*, WALL ST. J., Aug. 6, 2017. Still, if passed, this proposal would not apply outside the NLRA, and other than as persuasive authority would not control questions of state contract law and theories of vicarious liability.

[158] *See* KY. REV. STAT. ANN. § 342.650(9)–(10) (West 2017) (created by Act of Mar. 21, 2017, ch. 85, § 1, 2017 Ky. Acts).

The 2017 General Assembly considered, but did not approve, H.B. 369, an effort designed to limit asbestos-related liability of successor corporations to the "fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation."[159] Under the bill, "the successor corporation shall not have responsibility for successor asbestos-related liabilities in excess of this limitation."[160] There was contentious testimony before the House Economic Development & Workforce Investment Committee about this proposal. While the bill was passed out of that Committee, it was not heard by the full House.[161]

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[159] *See* H.B. 369, 2017 Leg., Reg. Sess. (Ky. 2017).

[160] H.B. 368, § 4, 2017 Leg., Reg.Sess. (Ky. 2017).

[161] H.B. 369, KY. LEGIS., http://www.lrc.ky.gov/record/17RS/HB369.htm (last visited Nov. 30, 2017).