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# Modern Partnership Law Comes to Kentucky: Comparing the Kentucky Revised Uniform Partnership Act and the Uniform Act from Which it was Derived

Allan W. Vestal<sup>1</sup> & Thomas E. Rutledge<sup>2</sup>

## I. INTRODUCTION

In 2006, Kentucky adopted two new partnership laws governing the general and the limited partnership.<sup>3</sup> Based on, respectively, the Uniform Partnership Act of 1997 (“RUPA”)<sup>4</sup> and the Uniform Limited Partnership Act

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<sup>3</sup> H.B. 234, containing both Kentucky’s versions of RUPA and ULPA, was introduced by Representative Scott W. Brinkman to the 2006 General Assembly on January 5, 2006. 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. The bill passed the full House of Representatives by a vote of ninety-three to six on February 27, 2006. It was then referred to the Senate, where it was assigned to the Judiciary Committee. That committee held hearings on March 16, and the bill was voted out of committee. The full Senate voted thirty-eight to zero in favor of the bill on March 22, 2006. The bill was signed by Governor Fletcher on April 5, 2006. *See* Ky. Legislative Research Comm’n, 06RS HB234, <http://www.lrc.ky.gov/record/06RS/HB234.htm> (last visited March 23, 2007).

<sup>4</sup> UNIF. P’SHIP ACT (1997) [hereinafter RUPA]. 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, “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 officially denominated the “Kentucky Revised Uniform Partnership Act (2006).” *See* KY. REV. STAT. ANN. § 362.1-1202 (West 2006).

(2001) ("ULPA"),<sup>5</sup> each of these laws is at minimum a modernization of and in certain respects a reconceptualization of these business structures as previously understood. Kentucky's version of RUPA ("KyRUPA") is codified in chapter 362.1 of the Kentucky Revised Statutes ("KRS").

We address the limited partnership act elsewhere.<sup>6</sup> In this Article, we take a first look at KyRUPA and compare it with the uniform act from which it was derived. A more detailed examination of KyRUPA, which also notes places where the new statute makes substantive changes in Kentucky's partnership laws from the old Uniform Partnership Act<sup>7</sup> and common-law regime, is available in electronic form.<sup>8</sup> As to the underlying structure and substance of RUPA, information is widely available.<sup>9</sup>

KyRUPA contains significant non-uniform provisions. In crafting KyRUPA 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>10</sup> In fact, both academics and practitioners have criticized RUPA from a variety of standpoints.<sup>11</sup> Generally speaking, departures from the uniform language of RUPA were proposed for KyRUPA where one of three factors was present. The first was where departures were required to accommodate a non-uniform retroactivity provision adopted by the legislature. The second was where there was developing a critical mass among adopting states that the uniform language was deficient and a clearly better alternative was available. The third was where departures were appropriate to address matters

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5 UNIF. LTD. P'SHIP ACT (2001) [hereinafter ULPA]. As adopted in Kentucky, the Uniform Limited Partnership Act (2001) is officially denominated the "Kentucky Uniform Limited Partnership Act (2006)." See KY. REV. STAT. ANN. § 362.2-1207 (West 2006).

6 Thomas E. Rutledge & Allan W. Vestal, *Modern Limited Partnership Law Comes to Kentucky: An Overview*, 34 N. KY. L. REV. (forthcoming 2007).

7 Kentucky adopted the Uniform Partnership Act (1914) in 1954, which was codified at KRS §§ 362.150 through 362.360. With respect to the adoption of that uniform act, see generally Willburt D. Ham, *Kentucky Adopts the Uniform Partnership Act*, 43 KY. L.J. 5 (1954).

8 Thomas E. Rutledge & Allan W. Vestal, *Modern Partnership Law Comes to Kentucky: An Overview*, <http://www.kentuckylawjournal.org/node/25>.

9 See, e.g., ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, *THE REVISED UNIFORM PARTNERSHIP ACT* (2006).

10 The authors were among the drafters of KyRUPA. The provisions dealing with secretary of state filings were prepared initially in coordination with Maryellen B. Allen, then general counsel to the secretary of state, and subsequently with Secretary of State Trey Grayson and Tracy Goff Herman, formerly director of the division of corporations. However, neither this article in general, nor the provisions addressing filings with the office of the secretary of state, have been reviewed or endorsed by that office.

11 See 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); J. Dennis Hynes, *Notice and Notification under the Revised Uniform Partnership Act: Some Suggested Changes*, 2 J. SMALL & EMERGING BUS. L. 299 (1998); Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993).

unique to Kentucky law, most frequently those dealing with filings with the office of the secretary of state. In Section II of the following discussion, we address Kentucky's non-uniform approach to retroactive application. In Section III, we address the second and third types of departures, appropriately placing emphasis on the second type.

## II. KENTUCKY'S NON-UNIFORM APPROACH TO RETROACTIVE APPLICATION

RUPA provides that the new Act will apply to (1) partnerships newly formed as of the first effective date of the Act, (2) preexisting partnerships which opt to come under RUPA as of the date of their election, and (3) all other pre-existing partnerships as of the second effective date of the Act.<sup>12</sup> Thus RUPA will, as of the second effective date, apply to all partnerships. A number of states have varied the uniform provision on retroactive application, including Kentucky.<sup>13</sup>

KyRUPA has an initial effective date of July 12, 2006.<sup>14</sup> All partnerships formed in Kentucky on or after that date are governed by the new law. However, Kentucky's previous partnership law ("KyUPA"), absent a contrary election, will continue to govern all partnerships formed prior to July 12, 2006.<sup>15</sup> Existing LLPs may elect to be governed by KyRUPA by filing a statement of qualification.<sup>16</sup> In doing so, an LLP will take on the full shield protections of KyRUPA.<sup>17</sup> Conversely, existing LLPs may continue to be bound by KyUPA and will continue to file an annual LLP registration.<sup>18</sup> As LLP registration statements filed under KyUPA expire annually,<sup>19</sup> all LLPs will have to decide whether to become subject to KyRUPA or remain subject to KyUPA on or before July 12, 2006, and they will do so each year thereafter unless an election is made to be governed by KyRUPA. Partnerships that are not LLPs may elect to be governed by KyRUPA by an agreement of the partners sufficient to modify the partnership agreement.<sup>20</sup> Furthermore, a filing by the partnership of any of the statements provided for in RUPA<sup>21</sup> will likewise constitute an election to be governed by the new law.<sup>22</sup> Partnerships formed on or after July 12, 2006, may not elect to

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12 RUPA §§ 1204, 1206.

13 Allan W. Vestal, "*Wide Open*": *Nevada's Innovative Market in Partnership Law*, 35 HOFSTRA L. REV. 275, 281–82 (2006).

14 KY. REV. STAT. ANN. § 362.1-1204(1)(a) (West 2006).

15 *Id.* § 362.1-1204(1)(b); *Id.* § 362.1-1204(2).

16 *See id.* § 362.1-1204(2).

17 *Id.* § 362.1-306(3).

18 *Id.* § 362.555(1), (5).

19 *Id.* § 362.555(5).

20 *Id.* § 362.1-1204(2).

21 *See, e.g., id.* § 362.1-303.

22 *See id.* § 362.1-1204(2). As set forth in section 79 of House Bill 234, the second sentence

be governed by KyUPA. A partnership formed under KyUPA that elects to be governed by KyRUPA may not revoke that election.

### III. KENTUCKY'S SUBSTANTIVE AND TECHNICAL DEPARTURES FROM RUPA

RUPA is divided into twelve articles, and the following discussion follows that outline.

#### A. Article 1—General Provisions

1. *RUPA Section 101—Definitions.*—RUPA § 101 sets forth a series of defined terms, as to which the only departure from RUPA in KyRUPA is in the definition of “distribution.”<sup>23</sup> KyRUPA adds a series of additional defined terms, namely those for “deliver/delivery,”<sup>24</sup> “electronic transmission/electronically transmitted,”<sup>25</sup> “entity,”<sup>26</sup> “professional partnership,”<sup>27</sup> “professional services,”<sup>28</sup> “regulatory board,”<sup>29</sup> “sign/signature,”<sup>30</sup> and “name of record with the Secretary of State.”<sup>31</sup> In addition to the definitions set forth

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of KRS § 362.1-1204(2) referred to the filing of a statement “pursuant to this *section*.” H.B. 234, 2006 Gen. Assem., Reg. Sess. (Ky. 2006), *available at* <http://www.lrc.ky.gov/record/06RS/HB234/bill.doc> (emphasis added). The correct language is “pursuant to this *subchapter*,” (emphasis added), and this correction was made by the reviser of statutes in the codification of HB 234. As a filing of a statement by a partnership requires the signature of two partners, *see* KY. REV. STAT. ANN. § 362.1-105(3) (West 2006), and contains a deemed declaration that it is accurate under penalty of perjury, *see* KY. REV. STAT. ANN. § 362.1-105(7) (West 2006), a single partner may not change an existing KyUPA partnership to one governed by KyRUPA. Two partners could do so, and they would thereafter be subject to the consequences of their perjury as well as liable to their other partners for the consequence of their action if they had not been authorized to make the filing.

23 The modification of the definition of “distribution” in KyRUPA, KRS § 362.1-101(4), serves in part to track non-conforming language in the Delaware adoption of RUPA. *See* DEL. CODE ANN. tit. 6, § 15-101(4) (2006). The KyRUPA provision, underlined to show the language not found in RUPA, is: “‘Distribution’ means a transfer of money or other property from a partnership to a partner in the partner’s capacity as a partner or to the transferee of all or a part of a partner’s transferable interest.” KY. REV. STAT. ANN. § 362.1-104(4) (West 2006) (emphasis added).

24 KY. REV. STAT. ANN. § 362.1-101(3) (West 2006). This definition conforms to that in KRS § 271B.1-400(5).

25 *Id.* § 362.1-101(5). This definition conforms to that in KRS § 271B.1-400(8).

26 *Id.* § 362.1-101(6). This definition conforms to that in KRS § 271B.1-400(10).

27 *Id.* § 362.1-101(15). The definition is similar to that of a professional limited liability company in KRS § 275.015(18).

28 *Id.* § 362.1-101(16). This definition conforms to that in KRS § 275.015(19). Note that this definition differs from that set forth in KRS § 274.005(2) for the definition of what constitutes a “professional service” in the context of a professional service corporation.

29 *Id.* § 362.1-101(18). This definition conforms to KRS § 274.005(5) and § 275.015(20).

30 *Id.* § 362.1-101(19). This definition conforms to that in KRS § 271B.1-400(24).

31 *Id.* § 362.1-101(9).

in RUPA § 101, additional definitions used in article 9 appear in RUPA § 901. As none of the RUPA § 901 definitions conflict with or alter definitions contained in RUPA § 101, no structural reason for dividing the definitions between two provisions exists. However, as a concession to uniformity, the RUPA § 901 definitions have not been moved to KyRUPA § 101. “Transferable interest” is defined in RUPA § 502,<sup>32</sup> and this definition also has not been moved to KyRUPA § 101.

2. *RUPA Section 102—Knowledge and Notice.*—As adopted in KyRUPA, section 102 has been supplemented to incorporate an explicit cross-reference to the provisions whereby a person is deemed to be on notice of facts through the filing of a statement.<sup>33</sup> The uniform provision does not contain these explicit cross-references in the statute; rather it leaves to the specific statement provisions an indication of how the notice rules of RUPA § 102 are modified. Further departures are intended to increase the ability of a partnership to defend against inappropriate claims that the partnership should be bound by an unauthorized act of a partner, on the basis of apparent agency, where a third party had reason to know they could not properly rely upon apparent agency principles.<sup>34</sup> RUPA § 102(c) provides the rule as to how one gives notice, namely by taking steps “reasonably required” to inform the recipient of the information.<sup>35</sup>

3. *RUPA Section 103—Effect of Partnership Agreement; Nonwaivable Provisions.*—Setting aside issues of philosophy,<sup>36</sup> RUPA § 103 exists to address a perceived flaw in the 1914 version of the Uniform Partnership Act (“UPA”), namely the lack of certainty as to when the partnership agreement could alter the statutory default.<sup>37</sup> Desiring to avoid future confusion on the matter and resulting litigation, the drafters decided to make express when the

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32 *Id.* § 362.1-502.

33 *Id.* § 362.1-102(2)(d).

34 These modifications of the uniform language track proposals made in Hynes, *supra* note 11.

35 As adopted in KyRUPA, RUPA § 102(3) has been modified by substituting “reasonably calculated” for “reasonably required.” KY. REV. STAT. ANN. § 362.1-102(3) (West 2006). This change conforms to that set forth in VA. CODE ANN. § 50-73.80 (2006). In that same provision, the formula has been changed from “whether or not the other person learns of it” by substituting “whether or not the other person obtains knowledge of it.” KY. REV. STAT. ANN. § 362.1-102(3) (West 2006). This change in the uniform language conforms to that set forth in DEL. CODE ANN. tit. 6, § 15-102(c) (2006).

36 See Vestal, *supra* note 11, at 523–24.

37 For example, UPA expressly stated that the rights and duties of the partners in relation to the partnership “shall be determined, subject to any agreement between them.” KY. REV. STAT. ANN. § 362.235 (West 2006); UNIF. P’SHIP ACT § 18 (1914) [hereinafter UPA]. In contrast, UPA § 20 (KRS § 362.245), addressing the obligation to provide information, is silent regarding the ability to modify the obligation by agreement.

partnership agreement may supersede a specific rule set forth in RUPA. Further, they decided to do so in an integrated provision rather than by distribution of the rule throughout the Act. RUPA § 103(a) states that, except as limited by RUPA § 103(b), the partnership agreement will control the relations “among the partners and between the partners and the partnership.” The default rules of RUPA will govern when the partnership agreement is silent.<sup>38</sup> RUPA § 103(b) lists ten provisions as to which the partners’ power to modify the statutory provisions is limited.

RUPA § 103(b)(10), stating that the partnership agreement may not “restrict rights of third parties under this [Act],” has not been incorporated in KyRUPA. This exclusion was made because the provision says both too much and too little. On the first point, as recognized by the Official Comment, it states an axiom of contract law—a contract does not impact the rights of persons who are strangers to the contract.<sup>39</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>40</sup> What of the authorities granted to the secretary of state, the attorney general, and professional regulatory boards? The failure to incorporate RUPA § 103(b)(10) in KyRUPA 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 continue to apply.

Another deficiency of RUPA § 103(b) is that it fails to address the liabilities and remedies provisions of RUPA § 405. While the commentary to RUPA § 103(b) indicates that RUPA § 405 is not subject to modification,<sup>41</sup> RUPA § 405 is not itself referenced in RUPA § 103(b), and the NCCUSL’s own rules preclude expansion of the text by means of a comment.<sup>42</sup> The

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38 RUPA § 103(a).

39 See *id.* § 103, cmt. 12 (“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.”); see also *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.”).

40 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).

41 RUPA § 103, cmt. 1 (“Only the rights and duties listed in Section 103(b), and implicitly the corresponding liabilities and remedies under Section 405, are mandatory and cannot be waived or varied by agreement beyond what is authorized.”) (emphasis added).

42 See NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, 2003 REFERENCE BOOK, DRAFTING RULES FOR UNIFORM OR MODEL ACTS 10 (2003), available at <http://www.nccusl.org/nccusl/pdf/draftingmanual.pdf> (“Comments should not be used as a substitute for or to modify any substantive provision in the Act.”).

rationale for implicit restrictions on the remedies of RUPA § 405 is clear;<sup>43</sup> what is not clear is why they are not expressly referenced in RUPA § 103(b). Unwilling to perpetuate this lacuna in KyRUPA, a non-uniform provision has been added to the Kentucky adoption of RUPA § 103(b) providing that the partnership agreement may not: “Vary the liabilities and remedies under [RUPA § 405] to a greater extent than variations are in fact made under [RUPA § 103] in the substantive rights in the partnership agreement giving rise to the partner claims at issue.”<sup>44</sup> As such, neither crafty nor sloppy drafting may eliminate rights of redress where the conduct may not be directly sanctioned.

Returning to RUPA § 103(a), it should be recognized that RUPA § 101(7) defines a “partnership agreement” as including oral and implied, as well as written, agreements among the partners. Neither RUPA nor KyRUPA contains “statute of frauds” language requiring that partnership agreements departing from the default rule of the Act be in writing.<sup>45</sup> As such, the common law on contract modification remains applicable to partnership agreements, and oral agreements and course of conduct may often supplement a written agreement, even one that purports to be exclusively in writing and that precludes oral and/or course of conduct modifications.<sup>46</sup> The common

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43 HILLMAN, VESTAL & WEIDNER, *supra* note 9, at Authors' Comments 4.a. to RUPA § 103:

The rationale for implicit restrictions is clear: the rights protected by the restrictions on partner agreements in Section 103(b) are fully realized only through the remedies provided in Section 405, and the partners ought not be able to accomplish through the indirection of restricting remedies what they cannot accomplish directly because of the restrictions in Section 103(b).

*Id.*

44 KY. REV. STAT. ANN. § 362.1-103(2)(j) (West 2006). This language is taken from HILLMAN, VESTAL & WEIDNER, *supra* note 9, at § 103, Author's Comments 4.d, n. 75. This non-uniform provision is unique—to date no other state adoption of RUPA has included in the enactment of RUPA § 103(b) a provision addressing RUPA § 405.

45 The same is not true of the Kentucky statutes governing LLCs or corporations. *See, e.g.*, KY. REV. STAT. ANN. §§ 275.205, .220, .300 (West 2006) (each requiring that a departure from the default rule of the LLC Act be in a written operating agreement); *id.* §§ 271B.6-300(2), .7-020(1)(a), .7-280 (each allowing modifications of default rule in articles of incorporation, which must be in writing). Regarding the degree to which oral partnership agreements may be limited in enforceability by the Statute of Frauds (KRS § 371.010), *see Bessinger v. Kirkwood*, Nos. 1997-CA-000534-MR & 1997-CA-000610-MR, slip op. at 9 n.4 (Ky. Ct. App. Dec. 30, 1998) (“It is clear that partnership agreements do not fall within the Statute of Frauds, KRS 371.010.”) (citing *Frankfort & Cincinnati Ry. v. Jackson*, 156 S.W. 103 (Ky. 1913); *Goodwin v. Smith*, 134 S.W. 789 (Ky. 1911)). *But see* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, PARTNERSHIP LAW AND PRACTICE § 5:32 (2006) (“An agreement to form a partnership for more than one year is within the Statute of Frauds, and when there is no written agreement, the partnership arrangement can be dissolved without breach of contract at any time prior to part performance of the contract.”).

46 *See, e.g.*, L.K. Comstock & Co. v. Beacon Constr. Co., 932 F. Supp. 906 (E.D. Ky.



law is not, however, provided free reign. KyRUPA § 103(c), a non-uniform provision drawn from the Kentucky LLC Act, aims to supersede the common law as it relates to contractual modification, providing:

If a written partnership agreement contains a provision to the effect that any amendment to the partnership agreement must be in writing and adopted in accordance with the provisions of the partnership agreement, that provision shall be enforceable in accordance with its terms, and any agreement among the partners concerning the partnership which is not in writing and adopted in accordance with the provisions of the partnership agreement shall not be part of the partnership agreement.<sup>47</sup>

With this language, while neither RUPA nor KyRUPA imposes statute of frauds requirements upon the partnership agreement, the partners may adopt an integrated writing as the “partnership agreement” and (perhaps) preclude common law rules that would allow its amendment by oral agreements or course of conduct notwithstanding limitations upon modification or amendment.<sup>48</sup>

4. *RUPA Section 104—Supplemental Principles of Law.*—RUPA does not include a statement similar to that in UPA § 4(1), which states that “statutes in derogation of the common law are to be strictly construed.”<sup>49</sup> Instead, the drafters of RUPA explained that this “principle is now so well established that it is not necessary to so state in the Act.”<sup>50</sup> However, the non-uniform KyRUPA § 104(3) does contain such a statement.<sup>51</sup> This inclusion is consistent with Kentucky’s last major foray into unincorporated business organization law, namely the LLC Act, wherein such a derogation provision

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1993) (Written contract can be modified or abandoned by subsequent oral agreement where assertion of modification or abandonment is supported by clear and convincing evidence); *Whayne Supply Co. v. Gregory*, 291 S.W.2d 835, 838 (Ky. 1956) (“It is well settled that the parties to a written agreement may vary, alter, or modify it by a subsequent oral agreement in all cases where the contract is not one required by law to be in writing”); *Vinaird v. Bodkin’s Adm’x*, 72 S.W.2d 707, 711 (Ky. 1934) (“The power to modify or rescind a pre-existing contract is coextensive with the power to initiate it; . . . This rule prevails, though the contract recites that no modification shall be made except in writing.”) (citations omitted); *Manning Equip. Co. v. Moorhead*, No. 1999-CA-001423-MR (Ky. Ct. App. Feb. 23, 2001) (“[T]he power to modify or rescind a contract exists even if the contract states that the parties shall make no modification except in writing” (citing *Vinaird*, 72 S.W.2d at 711)); 17A AM. JUR. 2D *Contracts* § 514 n.3 (2006).

47 KY. REV. STAT. ANN. § 362.1-103(3) (West 2006); *accord id.* § 275.015(14).

48 The “(perhaps)” is important; it does not appear that any court, of Kentucky or otherwise, has ruled on whether a statutory provision of this nature will be sufficient to override the otherwise applicable common-law rule.

49 KY. REV. STAT. ANN. § 362.165(1) (West 2006).

50 RUPA § 104, official cmt.

51 KY. REV. STAT. ANN. § 362.1-104(3) (West 2006).

was included.<sup>52</sup> KyRUPA § 104(2) references KRS § 360.010 for the default applicable rate of interest for obligations arising under RUPA.<sup>53</sup>

Non-uniform KyRUPA § 104(3) also provides that it is not to “impair the obligation of any contract existing” when RUPA came into effect.<sup>54</sup> Had Kentucky adopted uniform transition language, this provision “would not have meant what it says” because KyUPA would at some point have been repealed, and all KyUPA partnerships would have been required to be governed by KyRUPA. This would have resulted in the alteration of existing partnership agreements by RUPA. The non-uniform transition provision, which allows election between governance by KyUPA or KyRUPA, allows this language to mean more of what it says. Existing actions and proceedings will not be affected by the election of a partnership to be governed by RUPA.<sup>55</sup>

Non-uniform KyRUPA § 104(4) preserves the authority of the various professional regulatory boards to govern the conduct of licensed professionals rendering services through a partnership. A professional regulatory board will continue to have any authority already granted it to preclude the use of the partnership structure to members of a profession or to adopt membership, transfer, or similar requirements perhaps akin to those in the Kentucky Professional Service Corporation Act.<sup>56</sup> However, no professional regulatory board has the authority to alter the rules of partner liability (e.g., the rule of limited liability in a limited liability partnership) that is otherwise available under KyRUPA.<sup>57</sup>

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<sup>52</sup> *Id.* § 275.003. Similar language appears as well in the Alabama and Delaware enactments of RUPA. ALA. CODE § 10-8A-104(c) (West 2006); DEL. CODE ANN. tit. 6, § 15-104 (2006).

<sup>53</sup> Although subject to a contrary provision in the partnership agreement, this interest rate will apply to payments made or liabilities incurred by a partner pursuant to RUPA § 401(d) (KRS § 362.1-401(4)), interest due on the buyout of a dissociated partner pursuant to RUPA § 701(b) (KRS § 362.1-701(3)), and damages owing from a partner's wrongful dissociation pursuant to RUPA § 602(c) (KRS § 362.1-602(3)).

<sup>54</sup> This non-uniform provision is based on KRS § 275.003.

<sup>55</sup> KY. REV. STAT. ANN. § 362.1-104(3) (West 2006); *see also id.* § 362.1-1204(2).

<sup>56</sup> *See, e.g., id.* § 274.017 (limitation upon permissible issuances and transfers of ownership interest); *id.* § 274.027 (limitations upon permissible managers); *id.* § 274.095 (mandatory redemption of ownership interest). *Accord id.* § 275.010. Note that profession-specific requirements may apply even though not set forth in the business organization law. *See, e.g., id.* § 325.301(1)(a) (restrictions on ownership and voting rights in accounting firms); *see also* Thomas E. Rutledge, *The Place (If Any) of the Professional Structure in Entity Rationalization*, 58 BUS. LAW. 1413 (2003).

<sup>57</sup> With the exception of attorneys, who are uniquely regulated by the Kentucky Supreme Court (*see* KY. CONST. § 116 (“The Supreme Court shall, by rule, govern admission to the bar and the discipline of members of the bar.”); *Ex parte* Auditor of Public Accounts, 609 S.W.2d 682, 684 (Ky. 1980) (“There can be no doubt that this constitutional amendment completely removed the subject from any legislative authority and rendered obsolete and ineffective the statutes pertaining to it.”)) rather than a legislatively created oversight board (e.g., the Kentucky Board of Medical Licensure), no professional regulatory board has to date imposed such rules

5. *RUPA Section 105—Execution, Filing, and Recording of Statements.*—Except to qualify a partnership as a limited liability partnership, RUPA does not mandate any filings by partnerships. However, in a significant departure from UPA, RUPA provides for various voluntary filings to facilitate notice of authority to Act on behalf of a partnership as well as record certain transactions.<sup>58</sup> Non-uniform definitions in KyRUPA for “deliver,” “electronic transmission,” and “sign”<sup>59</sup> contemplate that statements may be filed electronically.<sup>60</sup>

Statements filed by the partnership must be signed by two partners, while statements filed on behalf of a partner or other person need to be

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on either professional partnerships or professional LLCs, for which impositional authority is preserved with respect to LLCs under KRS § 275.010. In 1996, the Kentucky Supreme Court rejected a proposed rule that would have explicitly permitted the use of LLPs, as well as LLCs and PSCs, by attorneys. See John T. Ballantine & Thomas E. Rutledge, *Kentucky Supreme Court Rejects Use of LLCs, LLPs and PSCs by Attorneys*, BENCH & BAR, Winter 1996, at 21. It was not until 2000 that Kentucky attorneys were permitted to practice in the form of LLPs, LLCs, and other limited liability entities, and then only if certain malpractice insurance or other means of client protection were available. See KY. SUP. CT. R. 3.022 (governing forms of practice of law); KY. SUP. CT. R. 3.024 (setting forth requirements of practicing law in limited liability entities); see also Thomas E. Rutledge & John T. Ballantine, *Kentucky Supreme Court Considers Rule Permitting LLCs/LLPs/PSCs*, LLC ADVISOR, Aug. 20, 1999, at 4; James C. Seiffert, Scott W. Dolson & Thomas E. Rutledge, *Kentucky Supreme Court Approves the Practice of Law in Limited Liability Entities*, BENCH & BAR, Jan. 2000, at 53.

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<i>Statement of</i>	<i>KRS § 362.1-</i>	<i>Purpose</i>
Partnership Authority	303	Filed to record the existence of a partnership, identify which partners have authority to transfer partnership real property and address limitations on authority
Denial	304	Filed to deny one is a partner or another fact in a statement of partnership authority
Dissociation	704	Filed to record the dissociation of a partner
Dissolution	805	Filed to record that a partnership has dissolved and is winding up its business
Merger	907	Filed to record a merger
Qualification	1001	Filed to qualify a partnership as a limited liability partnership
Foreign qualification	1102	Filed to qualify a foreign limited liability partnership to transact business

59 KY. REV. STAT. ANN. § 362.1-101(3), (5), (19) (West 2006); *accord id.* § 271B.1-400(5), (8), (24).

60 As of this writing the secretary of state's office is not accepting electronic filings. These provisions afford the secretary of state's office the capacity, but not the obligation, to accept electronic filings. See also *id.* § 14.105 (as amended by 2007 Ky. Acts ch. 137 § 41).

signed only by that partner or person.<sup>61</sup> Under RUPA, it is unclear as to whether the perjury certification applies when a partner signs a statement on behalf of the partnership. The drafters' comment to RUPA § 105(c) states, in part: "To protect the partners and the partnership from unauthorized or improper filings, an individual who executes a statement as a partner must personally declare under penalty of perjury that the statement is accurate."<sup>62</sup> KyRUPA subjects all persons executing a statement, and not just those executing a statement on behalf of a partner (as contrasted with the partnership or a person who is not a partner), to the law of perjury.<sup>63</sup> The use of a non-uniform deemed declaration under penalty of perjury, rather than the RUPA "shall declare under penalty of perjury" formula, serves to remove any requirement that the statement include "penalty of perjury" language and any corresponding obligation on the secretary of state to determine whether the language incorporated into any statement presented for filing is sufficient. Furthermore, although not necessarily contiguous with the scope of the perjury provision, signing a knowingly false statement is a class B misdemeanor.<sup>64</sup>

Persons authorized to file a statement are authorized to correct or amend the statement.<sup>65</sup> This authority is subject to non-uniform limitations on the amendment and correction of statements of merger and dissolution.<sup>66</sup>

*6. Non-Uniform Filing Provisions.*—KyRUPA contains a series of non-uniform provisions addressing the interaction and mechanics of filing with the secretary of state, and certain provisions that appear in RUPA have been significantly revised. The revised language is based upon equivalent provisions of the Kentucky Business Corporation Act ("KyBCA") and the Kentucky Limited Liability Company Act ("KyLLCA"), so practitioners will be familiar with the requirements.<sup>67</sup>

<sup>61</sup> *See id.* § 362.1-105(3).

<sup>62</sup> RUPA § 105(c), cmt. 3.

<sup>63</sup> *Compare id.* § 105(c), with KY. REV. STAT. ANN. § 362.1-105(7) (West 2006). The non-uniform provision, conforming to KRS § § 271B.1-290 and 275.090, makes the knowing filing of a false statement a class B misdemeanor.

<sup>64</sup> KY. REV. STAT. ANN. § 362.1-105(8) (West 2006); *accord id.* § 275.090(2); *see also id.* § 271B.1-290(2).

<sup>65</sup> *Id.* § 362.1-105(4). The standard for the correction of a filed statement in KRS § 362.1-105(5) is non-uniform and conforms to that in KRS §§ 271B.1-240(1) and 275.065(1).

<sup>66</sup> *Id.* § 362.1-105(4).

<sup>67</sup> The following chart provides the sources upon which these non-uniform filing provisions are based:

<i>Non-Uniform Provision</i>	<i>Based Upon KRS §</i>
105(5)	271B.1-240, 275.065
105(7)	275.090

The Act permits filing a document with a delayed effective date of up to ninety days after the date it is filed, but it does not specify the effect of a document filed with a delayed effective date in excess of the maximum ninety days.<sup>68</sup> Possible alternatives are that (a) the filing is void *ab initio*,<sup>69</sup> or (b) the filing becomes effective on the ninetieth day. Of course, the better answer to either of these alternatives is either to properly count days and not file statements with purported effective dates more than ninety days in the future or for the secretary of state's office to identify and reject such defective filings.

7. *Annual Reports.*—The obligation to file an annual report is limited to those domestic partnerships that have elected limited liability partnership status by filing a statement of qualification and foreign limited liability partnerships that have filed a statement of foreign qualification.<sup>70</sup> A domestic partnership that has not filed a statement of qualification, even

<i>Non-Uniform Provision</i>	<i>Based Upon KRS §</i>
108	271B.1-200, 275.045
109	275.055
110	275.060, 271B.1-230
111	271B.1-250, 275.070
112	275.075
113	275.080
114(1)–(5)	275.100(2)–(6)
114(6)	275.410(5)
115	275.105
116	275.110
117	275.115
118	275.120
119	275.125
120	275.130
122	271B.14-200–14-230, 275.295
123	271B.15-300–15-320

68 KY. REV. STAT. ANN. § 362.1-110(2) (West 2006); *accord id.* §§ 271B.1-230(2), 275.060, 362.2-120(2).

69 *Cf. id.* § 362.1-110(1) (providing that a properly filed statement “shall be effective at the date and time of filing”). The negative implication of KRS § 362.1-110 is that an improperly filed statement would be void at the time of filing.

70 *Id.* § 362.1-121. RUPA § 1003 is the uniform provision dealing with annual reports. In KyRUPA, the provision has been moved forward in the Act for proximity to the other provisions dealing with secretary of state filings in general and administrative dissolution and revocation in particular. The provision has been redrafted to generally conform to other Kentucky statutes governing annual reports. *See id.* §§ 271B.16-220, 275.190.

if it has filed another statement, is not obligated to file an annual report. If a domestic limited liability partnership fails to file its annual report, its statement of qualification will be administratively dissolved.<sup>71</sup> In that situation, the partnership remains in place and is not dissolved. Rather, the partnership, while no longer a limited liability partnership, remains a valid partnership that may carry on the full range of business activities, and it is not constrained to only those activities appropriate to dissolution and winding up.<sup>72</sup> However, it loses the benefits of the LLP election, namely the provision of limited liability.<sup>73</sup> The administrative dissolution of the statement of qualification may be cured, and the cure will relate back to the date of the administrative dissolution.<sup>74</sup> A foreign LLP that fails to file an annual report will have its statement of foreign qualification revoked.<sup>75</sup> In that instance, the partnership will remain an LLP, that status having been determined by the jurisdiction in which its statement of qualification is filed.<sup>76</sup> However, it will lose the benefits of having filed the statement of foreign qualification.<sup>77</sup> The revocation of a statement of foreign qualification is not subject to cure. Rather, a new application for authority, in the form of a statement of foreign qualification, must be filed. For the period between the revocation and the effective date of the new statement of foreign qualification, the foreign LLP will have lacked authority to transact business in Kentucky.

Irrespective of whether the LLP in question is domestic or foreign, the annual report must set forth the name of the partnership, the state or jurisdiction under which it is formed, the street address of its chief executive officer and, if different, the street address of its Kentucky office, if any, and the registered agent and registered office in Kentucky.<sup>78</sup> The first annual report is due between January 1 and June 30 of the year following that in which the statement of qualification or statement of foreign qualification is first filed, and subsequent annual reports are due in the same period of each

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71 *Id.* § 362.1-122(1)(a). This provision is drawn from KRS § 271B.16-220 and § 275.190.

72 *Compare id.* § 271B.14-210(3) (administratively dissolved corporation restricted to activities appropriate for its winding up and dissolution), *with id.* § 275.300(2) (administratively dissolved LLC restricted to activities appropriate for its winding up and dissolution).

73 *Id.* § 362.1-306(3). This provision is drawn from KRS § 271B.14-200, § 271B.14-210, and § 275.295.

74 *Id.* § 362.1-122(6). This provision is drawn from KRS § 271B.14-220(3) and § 275.295(3)(c); *see also* *Fairbanks Arctic Blind Co. v. Prather & Assocs.*, 198 S.W.3d 143 (Ky. Ct. App. 2005).

75 KY. REV. STAT. ANN. § 362.1-122(3) (West 2006). This provision is drawn from KRS § 271B.15-300(1) and § 275.440(1).

76 *See id.* § 362.1-1101(1); RUPA § 1101(a).

77 KY. REV. STAT. ANN. § 362.1-123(4) (West 2006).

78 *Id.* § 362.1-121(1).

year thereafter.<sup>79</sup> An incomplete annual report will be returned for correction.<sup>80</sup> The annual report speaks to the information as of the day it is executed,<sup>81</sup> and information set forth in an annual report may be amended.<sup>82</sup>

### B. Article 2—Nature of Partnership.

1. *RUPA Section 201—The Partnership as an Entity.*—RUPA § 201, although not as clear as might be desired, provides that the limited liability partnership is a sub-category of a RUPA partnership and is not itself a separate form of business organization. In KyRUPA, the uniform language has been supplemented to make the point more express.<sup>83</sup>

2. *RUPA Section 202—Formation of a Partnership.*—Neither RUPA nor KyRUPA contains a “purpose” or a “powers” provision similar to those that appear in other entity laws.<sup>84</sup> KyRUPA, in a non-uniform provision, expressly recognizes the continuing authority of the various professional regulatory boards to regulate the licensing of those rendering professional services, the transfer of interests in a professional partnership, whether or not an LLP, or the rendering of more than one professional service through the partnership.<sup>85</sup> Conversely, it is expressly provided that a regulatory board may not restrict or limit the provision of KyRUPA providing limited liability for partners of an LLP.<sup>86</sup>

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79 *Id.* § 362.1-121(3); *accord id.* §§ 271B.16-220(3), 275.190(3).

80 *Id.* § 362.1-121(4); *accord id.* §§ 271B.16-220(4), 275.190(4).

81 *Id.* § 362.1-121(2); *accord id.* §§ 271B.16-220(2), 275.190(2).

82 The provision allowing for amendment of information set forth in the last annual report, *see* KY. REV. STAT. ANN. § 362.1-121(5) (West 2006), also appears in KyULPA, *see id.* § 362.2-210(5). The KyBCA and the KyLLCA were recently amended to include a similar provision. *See id.* § 271B.16-220 (as amended by 2007 Ky. Acts ch. 137 § 112); *id.* § 275.190 (as amended by 2007 Ky. Acts ch. 137 § 74). Note, however, that the registered officer/agent may not be changed in the annual report or by an amendment to the annual report. Rather, changes of that nature must be made on the appropriate form supplied by the secretary of state. *See id.* § 362.1-118(1); *accord id.* § 275.030(3)(a).

83 KRS § 362.1-201(2) departs from RUPA § 201(b) as illustrated by the underlined text: “A limited liability partnership is a partnership and continues to be the same entity that existed before the filing of a statement of qualification . . . .” *Id.* § 362.1-201(2) (emphasis added). The additional language is based upon DEL. CODE ANN. tit. 6, § 15-202(a) (2006). Similar reasoning appears in KRS § 362.175(1), which provides that a partnership: “includes, for all purposes of the laws of this Commonwealth, a registered limited liability partnership.” KY. REV. STAT. ANN. § 367.175(1) (West 2006).

84 *See, e.g.*, KY. REV. STAT. ANN. § 275.005 (West 2006) (lawful purposes of an LLC); *id.* § 271B.3-010(1) (lawful purposes of a corporation); *id.* § 275.010 (powers of an LLC); *id.* § 271B.3-020 (powers of a corporation); *id.* § 272.111 (purposes of an agricultural cooperative association).

85 *Id.* § 362.1-104(4). This provision is based upon KRS § 275.010.

86 *Id.* § 362.1-104(4). This provision is based upon KRS § 275.010.

3. *RUPA Section 203—Partnership Property.*—RUPA § 203 provides: “Property acquired by a partnership is property of the partnership and not of the partners individually.”<sup>87</sup> This provision embodies the entity treatment of a RUPA partnership<sup>88</sup> and affects both the partners and third-parties. In KyRUPA, the language of RUPA § 203 has been supplemented for purposes of clarity but not with the intention of altering the law.<sup>89</sup> Among partners, tenancy in partnership no longer applies,<sup>90</sup> and individual partners do not have a right to partition partnership property.<sup>91</sup> Also, the property may not be used by a partner for personal benefit,<sup>92</sup> and there is no right to either the withdrawal of the value of the contributed property or to an in-kind recovery of the value.<sup>93</sup> As to third parties, each partner has only his or her interest in the partnership, and a partner’s creditor has no claim to the partnership property.

*C. Article 3—Relations of Partners to Persons Dealing with Partnership*

1. *RUPA Section 303—Statement of Partnership Authority.*—While all of the various statements that are provided for in RUPA are innovations in partnership law, the statement of partnership authority is arguably the most innovative. RUPA § 301 provides that each partner has both actual and apparent agency authority to act on behalf of the partnership.<sup>94</sup> A statement of partnership authority is a means of modifying that authority, a modifica-

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87 RUPA § 203. For more information on this provision, see generally Edward S. Merrill, *Partnership Property and Partnership Authority Under the Revised Uniform Partnership Act*, 49 BUS. LAW. 83 (1993).

88 KY. REV. STAT. ANN. § 362.1-201(1) (West 2006).

89 As adopted in Kentucky, RUPA § 203 has been revised as follows: “Property transferred to or otherwise acquired by a partnership is property of the partnership and not of the partners individually.” KY. REV. STAT. ANN. § 362.1-203 (West 2006) (emphasis added to show the addition of language). Similarly, the KyLLCA specifically addresses transfers of LLC-owned property. See *id.* § 275.245(1). However, the KyBCA does not specifically reference transfers of corporate real property. Note also that the real property of a KyRUPA partnership is exempt from KRS § 381.135(1)(a)(1). See *id.* § 362.1-402(2).

90 *Id.* § 362.270(1) (“A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.”).

91 See also *id.* § 362.1-501. This alteration in a partner’s rights under UPA as contrasted with RUPA is both an example of the type of alteration that may give rise to a *Dartmouth College* type challenge to RUPA, see *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), as well as the type of issue that if not appreciated by counsel drafting in a new RUPA environment will lead to allegations of malpractice when the partnership agreement does not reflect the partners’ intentions. See generally Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994 Really be Retroactive?*, 50 BUS. LAW. 267 (1994).

92 See KY. REV. STAT. ANN. § 362.1-401(7) (West 2006); see also *id.* § 362.270(2)(a).

93 See *id.* § 362.2-501; see also *id.* § 362.1-203.

94 See *id.* § 362.1-301; RUPA § 301.



tion that is in part dependent upon whether the authority relates to a transfer of partnership real property or some other matter.<sup>95</sup>

Under RUPA, a statement of partnership authority is effective for five years from its filing or five years from its most recent amendment.<sup>96</sup> Non-uniform language adopted in KyRUPA requires that any amendment seeking to extend the duration of a statement of partnership authority must do so expressly.<sup>97</sup>

2. *RUPA Section 306—Partner’s Liability.*—Assuming a partnership has not elected to be a limited liability partnership, RUPA § 306(a) imposes joint and several liability upon each partner for all obligations of the partnership.<sup>98</sup> Substantially different rules apply where the partnership has filed a statement of qualification and elected LLP status. In an LLP, while the partnership’s assets are available to meet creditor claims,<sup>99</sup> partners enjoy

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95 The requirements for a statement of partnership authority are set forth in KRS § 362.1-303(1)(a). KRS § 362.1-303(1)(a)(5) is non-uniform and serves only to make statements of qualification and statements of partnership authority more easily cross-referenced. Although subsection (3) discusses the effect of a statement of partnership authority that has been filed but does not contain all of the required information, this provision is not a license to file an incomplete statement, and the secretary of state may refuse to accept a statement that does not satisfy the requirements of KRS § 362.1-303(1)(a). KRS § 362.1-303(3) applies to incomplete statements that slip through the screening mechanism. The requirements for execution of the statement of partnership authority are set forth in KRS § 362.1-105. At first reading, it may appear that KRS § 362.1-114 requires the name of each partnership filing a statement of partnership authority to be distinguishable upon the records of the secretary of state, but this is not correct. Rather, KRS § 362.1-114(1) is limited to partnerships that are filing statements of qualification, namely domestic limited liability partnerships, or statements of foreign qualification, as filed by a foreign limited liability partnership. KRS § 362.1-114(1), with its requirement of name distinguishability, is not applicable to a partnership that is not a limited liability partnership or foreign limited liability partnership. The uniform language of RUPA § 303(b) has been modified in KyRUPA to require that any request for a list of the partners in a partnership for which a statement of partnership authority has been filed must be in writing. Compare RUPA § 303(b), with Ky. REV. STAT. ANN. § 362.1-303(2) (West 2006).

The drafters of RUPA § 303 provided that “Filing a statement of partnership authority may be deemed to satisfy the disclosure required by a state’s fictitious name statute, if the state so chooses.” RUPA § 303, cmt. 1. Kentucky has not so chosen. Rather, compliance with Kentucky’s assumed name statute is required of any partnership doing business under a name other than its “real name” as defined in the statute. Ky. REV. STAT. ANN. § 365.015 (West 2006). For a review of the assumed name statute as updated in 2006, see Maryellen B. Allen & Thomas E. Rutledge, *2006 Amendments to the Assumed Name Statute: The Ongoing Task of Modernization and Clarification*, BENCH & BAR, May 2006, at 62.

96 RUPA § 303(g).

97 Ky. REV. STAT. ANN. § 362.1-303(7) (West 2006).

98 Compare Ky. REV. STAT. ANN. § 362.1-306(1) (West 2006), with *id.* § 362.220(1) (providing for either joint and several or joint liability on partnership obligations).

99 See Ky. REV. STAT. ANN. § 362.1-306(3) (West 2006) (“An obligation of the partnership incurred while the partnership is a limited liability partnership . . . is solely the obligation of the partnership.”); see also *Pytko v. Gadsby Hannah LLP*, No. 011546BLS, 2002 WL 31677458, at \*4 (Mass. Super. Ct. Oct. 30, 2002) (ruling that LLP status does not protect the partnership

limited liability from the debts and obligations of the partnership.<sup>100</sup> As adopted in KyRUPA, RUPA § 306(c) has been supplemented to include “indemnification” and “assessment.”<sup>101</sup> A non-uniform subsection (4) has been added, which provides: “Subsection (3) of this section shall not affect the liability of a partner in a limited liability partnership for his own negligence, wrongful acts, or misconduct.”<sup>102</sup> With this new language, it is made express that no partner in an LLP will be able to argue that the LLP election serves to protect the partner from personally bearing the consequences of his or her<sup>103</sup> own actions.

*3. RUPA Section 307—Actions By and Against Partnership and Partners.*—A non-uniform addition makes clear that a partner, solely in the partner’s capacity as a partner in a limited liability partnership, is not a proper party to a proceeding against the partnership.<sup>104</sup> This provision should not be read to limit the propriety of naming a partner as a party to an action arising prior to the time the partnership filed its statement of qualification.<sup>105</sup>

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itself from liability due to the actions of its employees in the course of performing services on behalf of the partnership).

100 With the grant of limited liability to the partners in an LLP, the partnership becomes perhaps indistinguishable from the corporation as to the most commonly (mis)understood characteristic of the corporate form, namely limited liability. The cynical “definition” of a corporation as “an ingenious device for obtaining individual profit without individual responsibility” illustrates this misunderstanding. Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. REV. 417, 418 (2006) (quoting AMBROSE BIERCE, *THE DEVIL’S DICTIONARY* 28 (1958)).

101 KY. REV. STAT. ANN. § 362.1-306(3) (West 2006). These additions mirror the prior law of KRS § 362.220(2).

102 *Id.* § 362.1-306(4). This subsection conforms to KRS § 362.220(3), and it is intended to be no broader than the “except that he may become personally liable by reason of his own acts or conduct” language of KRS § 271B.6-220(2).

103 The use of the masculine “his” in the Act is not meant to be gender specific; rather, it is a carry-over from the prior law.

104 KY. REV. STAT. ANN. § 362.1-307(6) (West 2006). This provision is based upon KRS § 275.155 and is similar to language adopted in CAL. CORP. CODE § 16306(g) (Deering 2007). See also *Page v. Roscoe, LLC*, 497 S.E.2d 422 (N.C. Ct. App. 1998) (sanctioning plaintiff’s counsel under Rule 11 for improperly naming LLC members in suit against LLC where statute specifically provided that members as members are not proper parties to a proceeding against the LLC). Naming an LLP partner based upon some other basis of liability, such as where the partner is the personal guarantor of a partnership debt, is not status based, and the partner in that other capacity may properly be named as a defendant in the suit.

105 See KY. REV. STAT. ANN. § 362.1-306(3) (West 2006) (“An obligation of a partnership incurred while the partnership is a limited liability partnership . . . is solely the obligation of the partnership.”) (emphasis added); RUPA § 306(c).

*D. Article 4—Relations of Partners to Each Other and to Partnership*

1. *RUPA Section 402—Distributions in Kind.*—RUPA § 402 deals with distributions in kind. However, the KyRUPA equivalent is significantly non-uniform. RUPA § 402 provides: “A partner has no right to receive, and may not be required to accept, a distribution in kind.”<sup>106</sup> KyRUPA provides:

(1) A partner, regardless of the nature of the partner’s contribution, has no right to demand and receive any distribution in kind from a partnership. A partner shall not be compelled to accept a distribution of any asset in kind from a partnership to the extent that the percentage of the asset distributed to the partner exceeds a percentage of that asset which is equal to the percentage in which the partner shares in distributions from the partnership. A partner may be compelled to accept a distribution of any asset in kind from a partnership to the extent that the percentage of the asset distributed to the partner is equal to a percentage of that asset which is equal to the percentage in which the partner shares in distributions from the partnership.

(2) The property of a partnership subject to this subchapter shall not be subject to KRS 381.135(1)(a).<sup>107</sup>

The effects of the uniform and KyRUPA provisions are significantly different. While they are parallel in eliminating any right to receive a distribution in kind,<sup>108</sup> they differ as to the ability to compel a partner to receive a distribution in kind. Under RUPA § 402, the decision as to whether a distribution in kind will be accepted is made by the recipient partner, and RUPA preserves in each individual partner the right to reject a distribution in kind even when the distribution is pro rata among the partners. KyRUPA preserves this right only if the asset is being distributed to the partners on a basis other than pro rata to the partners’ interest in the partnership. So long as the distribution is pro rata to the partners’ interest in the partnership, no individual partner has the right to reject the distribution.<sup>109</sup> RUPA § 807(a) has been modified in KyRUPA to accommodate this modification of the uniform act language.<sup>110</sup>

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<sup>106</sup> RUPA § 402.

<sup>107</sup> KY. REV. STAT. ANN. § 362.1-402 (West 2006). The non-uniform language in subsection (1) is substantially based upon DEL. CODE ANN. tit. 6, § 15-402 (2006).

<sup>108</sup> Note that this provision is not limited by RUPA § 103(b) and therefore may be modified in the partnership agreement. Modification may be appropriate where a partner has made a contribution of real or personal property that, upon a defined circumstance, is to be returned to the contributing partner. See also RUPA § 203. This rule conforms to that set forth in KRS § 275.220(1).

<sup>109</sup> A similar provision appears at KRS § 275.220(2).

<sup>110</sup> RUPA § 807(a) required that, upon the winding up of the partnership’s business, surplus assets must be paid in cash to the partners. KyRUPA contemplates distributions other than in cash. See KY. REV. STAT. ANN. § 362.1-807(1) (West 2006).

Subsection (2) of KyRUPA § 402 is also non-uniform. It serves to exempt a KyRUPA partnership and its property from the application of KRS § 381.135(1)(a)(1). This exemption is necessary to effectuate a number of philosophical differences between RUPA and UPA, including the treatment of the partnership as a legal entity and the ownership of partnership property by the entity rather than the partners as tenants in partnership.<sup>111</sup>

2. *RUPA Section 403—Partner's Rights and Duties With Respect to Information.*—A non-uniform addition to RUPA § 103(b)(2) precludes unreasonable restrictions on a partner's right to receive information under RUPA § 403(c) as well as unreasonable remedies for breach of those restrictions.<sup>112</sup> A non-uniform addition to RUPA § 403 expressly acknowledges that the partnership agreement may impose reasonable limitations upon the use of books, records, and information obtained under RUPA § 403 as well as define appropriate remedies for the breach of those limitations.<sup>113</sup>

3. *RUPA Section 404—General Standards of Partner's Conduct.*—No topic relating to RUPA has been more controversial than the existence, definition, and mutability of the fiduciary obligations of partners. For practitioners in Kentucky there is an additional complexity—the provisions adopted in KyRUPA are not uniform.

KyRUPA has modified the uniform language in two respects: it eliminates the exclusive character of the fiduciary obligations under RUPA, and it replaces the formulation of the duty of care under RUPA with a reasonable person formulation.<sup>114</sup>

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<sup>111</sup> See, e.g., KY. REV. STAT. ANN. §§ 362.1-201(1), .1-203, .1-501 (West 2006); RUPA §§ 201(a), 203, 501. Further, contrast these provisions with KRS § 362.270(1). KY. REV. STAT. ANN. § 362.270(1) (West 2006).

<sup>112</sup> See KY. REV. STAT. ANN. § 362.1-103(2)(b) (West 2006).

<sup>113</sup> Non-uniform KRS § 362.1-403(4) is based upon ULPA § 304(g). See also KY. REV. STAT. ANN. § 362.2-304(7) (West 2006).

<sup>114</sup> As adopted in Kentucky, RUPA § 404 has been modified as follows:

(1) The ~~only~~ fiduciary duties a partner owes to the partnership and the other partners include [are] the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.

(2) A partner's duty of loyalty to the partnership and the other partners includes, but is not limited to, [is limited to] the following:

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

(b) To refrain 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; and

(c) To refrain from competing with the partnership in the conduct

The first change in fiduciary duties under KyRUPA relates to the exclusivity of the statutory formulation. By its terms, RUPA creates an exclusive statutory formulation of fiduciary duties. This is true in two ways. Initially, RUPA exclusively limits the fiduciary duties of partners to a duty of loyalty and a duty of care.<sup>115</sup> RUPA then exclusively defines both duties.<sup>116</sup> KyRUPA reverses both exclusive formulations. First, KyRUPA allows for additional fiduciary duties beyond a duty of loyalty and a duty of care.<sup>117</sup> Second, KyRUPA allows for additional manifestations of the duty of loyalty and the duty of care beyond the bare statutory formulations.<sup>118</sup> These

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of the partnership business before the dissolution of the partnership.

(3) A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business includes, but is not limited to, [is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.] acting with the care that a reasonable person in a like position would exercise under similar circumstances and in a manner that the partner believes to be in the best interests of the partnership.

(4) A partner shall discharge the duties to the partnership and the other partners under this subchapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.

(5) A partner does not violate a duty or obligation under this subchapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

(6) A partner may lend money to, borrow money from, act as a surety, guarantor, or endorser for, guarantee or assume one (1) or more specific obligations of, provide collateral for and transact other business with the partnership, and as to each such loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law.

(7) This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

KY. REV. STAT. ANN. § 362.1-404 (West 2006) (emphasis added). A similar modification has been made to ULPA § 408 in its Kentucky adoption at KRS § 362.2-408.

115 RUPA § 404(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)."); see also HILLMAN, VESTAL & WEIDNER, *supra* note 9, at 249-51.

116 RUPA § 404(b) ("A partner's duty of loyalty to the partnership and the other partners is limited to the following . . ."); RUPA § 404(c) ("A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to . . ."); see also HILLMAN, VESTAL & WEIDNER, *supra* note 9, at 251-52.

117 KY. REV. STAT. ANN. § 362.1-404(1) (West 2006) ("The fiduciary duties a partner owes to the partnership and the other partners *include* the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.") (emphasis added).

118 *Id.* § 362.1-404(2) ("A partner's duty of loyalty to the partnership and the other partners *includes, but is not limited to* the following . . .") (emphasis added); *Id.* § 362.1-404(3) ("A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business *includes, but is not limited to* . . .") (emphasis added).

modifications will allow a greater scope for the development of the common law than would be anticipated under the uniform language. A number of states have adopted similar modifications, and the academic literature supports these changes.<sup>119</sup>

The second change in fiduciary duties under KyRUPA relates to the formulation of the duty of care. In RUPA, the statutory duty of care is cast in terms of “refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”<sup>120</sup> KyRUPA substitutes a reasonable person formulation, an affirmative charge for “acting with the care that a reasonable person in a like position would exercise under similar circumstances and in a manner that the partner believes to be in the best interests of the partnership.”<sup>121</sup>

4. *RUPA Section 405—Actions by Partnership and Partners.*—As previously noted, the Kentucky adoption of RUPA § 103(b) has been modified to include a non-uniform provision specifically addressing the remedies available in RUPA § 405.<sup>122</sup> This non-uniform provision, which is to date unique among the various adoptions of RUPA, serves to protect the remedies afforded by RUPA § 405 from inappropriate limitation in the partnership agreement notwithstanding the absence of a reference to RUPA § 405 in the uniform language of RUPA § 103(b).<sup>123</sup>

#### E. Article 5—Transferees and Creditors of Partner

1. *RUPA Section 501—Partner Not Co-owner of Partnership Property.*—The KyRUPA adoption of RUPA § 501 faithfully repeats the uniform language but also adds some non-uniform language. RUPA § 501 provides: “A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.”<sup>124</sup> To this language KyRUPA adds: “Partnership property is owned by the partnership as an entity.”<sup>125</sup> This new language repeats the rule of RUPA § 203, affirmatively stating where ownership of partnership property rests, before setting forth the uniform language and its affirmative declaration of rights that a partner does not have in partnership property.<sup>126</sup> The

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119 See HILLMAN, VESTAL & WEIDNER, *supra* note 9, at 249–66.

120 RUPA § 404(c).

121 KY. REV. STAT. ANN. § 362.1-404(3) (West 2006). This substitution is based on the work of noted commentator William Callison. See Callison, *supra* note 11.

122 KY. REV. STAT. ANN. § 362.1-103(2)(j) (West 2006); see also *id.* § 362.7-405.

123 See generally HILLMAN, VESTAL & WEIDNER, *supra* note 9, at 268–78.

124 RUPA § 501.

125 KY. REV. STAT. ANN. § 362.1-501 (West 2006).

126 See *id.* § 362.1-203 (“Property transferred to or otherwise acquired by a partnership is property of the partnership and not of the partners individually.”); RUPA § 203. The added

added language is not intended as a change in the substance of the provision.

2. *RUPA Section 503—Transfer of Partner's Transferable Interest.*—RUPA § 503 details the consequences of a transfer, pursuant to RUPA § 502, of a transferable interest. As adopted in Kentucky, RUPA § 503(d) has been modified by deleting “interest in distributions” and substituting in place thereof “transferable interest.”<sup>127</sup> Whereas the uniform language refers to “interest in distributions,” which is not a defined term, the non-uniform language utilizes the defined term.<sup>128</sup> It is worth noting that under this non-uniform language, with respect to a transferable interest that has been transferred by a partner, the partner likely loses the ability to seek a judicial determination that it is equitable to wind up the partnership.

Another non-uniform addition to RUPA § 503 provides that limitations upon transfers set forth in a partnership agreement will be enforceable notwithstanding KRS § 355.9-406 and § 355.9-408.<sup>129</sup> With this language, limitations upon a transfer will supersede the general rule under the Uniform Commercial Code enforcing the right to pledge payment rights.<sup>130</sup>

#### F. Article 6—Partner's Dissociation

1. *RUPA Section 601—Events Causing Partner's Dissociation.*—To ensure that RUPA § 103(b)(7) conforms 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

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text is in accord with non-uniform language adopted in Florida and Tennessee. See FLA. STAT. § 620.8501 (2001); TENN. CODE ANN. § 61-1-501 (2006); see also KY. REV. STAT. ANN. § 362.1-201(1) (West 2006).

127 Compare RUPA § 503(d) (“Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred.”), with KY. REV. STAT. ANN. § 362.1-503(4) (West 2006) (“Upon transfer, the transferor retains the rights and duties of a partner other than the transferable interest so transferred.”).

128 This change is consistent with that made in Tennessee's enactment of RUPA. See TENN. CODE ANN. § 61-1-503(d) (2006).

129 This non-uniform language is similar in effect to that utilized in Delaware. See DEL. CODE ANN. tit. 6, § 15-104(c) (2006).

130 See Lynn A. Soukup, “Opting In” to Article 8—Limited Liability Company and Partnership Interests as Collateral, Commercial Law Newsletter (newsletter of the ABA Uniform Commercial Code Committee), July 2002, reprinted in PUBOGRAM (newsletter of the ABA Committee on Partnerships and Unincorporated Business Organizations), November 2002; see also Robert R. Keatinge, *Taking and Enforcing Security Interests in Interests in Unincorporated Business*, LIMITED LIABILITY ENTITIES IN TIMES OF CHANGE, ALI-ABA (Mar. 12, 2002) VPC0312 ALI-ABA 245 (Westlaw); Robert R. Keatinge, *Interests in Unincorporated Organizations as Securities Under Article 8 of the UCC*, Limited Liability Entities in Times of Change, ALI-ABA (Mar. 12, 2002) WPC0312 ALI-ABA 361 (Westlaw),

determination or vary the right of a court to expel a partner in the event specified in [Section] 601(5)."<sup>131</sup>

*G. Article 7—Partner's Dissociation When Business Not Wound Up*

This article does not contain any non-uniform provisions.

*H. Article 8—Winding Up Partnership Business*

This article does not contain any non-uniform provisions.

*I. Article 9—Conversions and Mergers*

RUPA article 9, which has no counterpart in UPA, sets forth the procedure by which a partnership organized under RUPA may either merge with or convert into another business organization. As adopted in KyRUPA, article 9 is significantly non-uniform, having been modified to address procedures already in place since 1994 for mergers and conversions among various forms of business organizations.<sup>132</sup> As noted above,<sup>133</sup> article 9 begins with a series of definitions that are used exclusively in that article.<sup>134</sup>

The first transaction provided for is the conversion of a partnership into a limited partnership.<sup>135</sup> This conversion requires the approval of all the partners or such other threshold as is specified in the partnership agreement.<sup>136</sup> It is somewhat curious that this provision recites that the conversion requires, as a default, the approval of all the partners, as the conversion for one form of business organization into another must constitute an extraordinary transaction falling within the generally applicable unanimity requirement.<sup>137</sup> Upon the conversion, the partnership is required to cancel any statements of qualification and/or authority and certificates of assumed name of record with the secretary of state and then file a certificate of limited partnership.<sup>138</sup> It should be noted that the filing of the certificate of

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<sup>131</sup> KY. REV. STAT. ANN. § 362.1-103(2)(g) (West 2006). The uniform language provides only that the partnership agreement may not "vary the right of a court to expel a partner in the events specified in Section 601(5)." RUPA § 103(b)(7).

<sup>132</sup> For example, since 1994, Kentucky law has provided for the conversion of a general partnership into an LLC. KY. REV. STAT. ANN. § 275.370 (West 2006) (conversion of general partnership into limited liability company). Still, KyUPA did not provide for mergers between partnerships.

<sup>133</sup> See *supra* Part III(A)(1).

<sup>134</sup> As adopted in KyRUPA, Article 9 of RUPA constitutes KRS §§ 362.1-901 through 362.1-908.

<sup>135</sup> KY. REV. STAT. ANN. § 362.1-902 (West 2006).

<sup>136</sup> *Id.* § 362.1-902(2).

<sup>137</sup> *Id.* § 362.1-401(10); RUPA § 401(k).

<sup>138</sup> KY. REV. STAT. ANN. § 362.1-902(3) (West 2006).



limited partnership is to be made in the jurisdiction in which it is desired that the limited partnership be organized; there is no requirement that a Kentucky partnership convert into a Kentucky limited partnership. The certificate of limited partnership that is filed, in addition to satisfying the other requirements for a certificate of limited partnership, must recite that the limited partnership was converted from a partnership, the former name of the partnership, a recitation of the number of votes cast for and against the conversion, and, if that vote was less than unanimous, the threshold requirements for the approval of the conversion.<sup>139</sup> The conversion is effective when the certificate of limited partnership is filed or is otherwise effective by reason of a delayed effective date.<sup>140</sup> In a conversion, a general partner may become a limited partner. In that event, such individual remains liable for the debts and obligations of the partnership incurred before the conversion takes place.<sup>141</sup> With respect to third parties who undertake a transaction with the now-limited partnership through an individual they believe to be a general partner and within ninety days after the conversion, that limited partner is liable for that obligation.<sup>142</sup> As such, upon the conversion of a general partnership into a limited partnership, it is incumbent upon the now-limited partners to ensure that third parties are made aware of the entity's new status.

The prior statute enabling the conversion of a general partnership into a limited liability company, which was done exclusively in the KyLLCA and without a corresponding provision in KyUPA, is affirmed.<sup>143</sup>

Kentucky's version of RUPA also provides for the conversion of a limited partnership into a general partnership.<sup>144</sup> Although this provision is not referenced in KyRUPA § 103(2), the conversion of a limited partnership into a general partnership must be approved by all the partners of the limited partnership, irrespective of a contrary provision in the agreement of limited partnership.<sup>145</sup> Once the conversion is approved, the limited partnership is obligated to cancel its certificate of limited partnership and any certificate

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139 *Id.* § 362.1-902(3)(a)-(c); *accord id.* § 275.370(3).

140 *Id.* § 362.1-902(4); *accord id.* § 275.370(4).

141 *Id.* § 362.1-902(5); *accord id.* § 275.370(5) (continuing liability of the general partner upon the conversion of a general partnership into an LLC for pre-conversion debts of the partnership).

142 *Id.* § 362.1-902(5); *accord id.* § 275.370(5) (continuing liability of general partner, for ninety days after conversion of general partnership into LLC, for certain obligations undertaken with third-parties not aware of member status).

143 *Id.* § 362.1-902(6).

144 *Id.* § 362.1-903.

145 *Id.* § 362.1-903(2). The failure to reference this provision in RUPA § 103(b)/KRS § 362.1-103(2) is not a drafting oversight. Rather, RUPA § 103(6) addresses those provisions of RUPA that may not be or may be only to a limited degree modified by the partnership agreement. As the agreement of limited partnership at issue is not one created under RUPA, RUPA § 103(b) is not applicable to that agreement.

of assumed name of record with the Kentucky secretary of state,<sup>146</sup> with the conversion taking effect when the certificate of limited partnership is cancelled.<sup>147</sup> A limited partner who, by means of the conversion, becomes a general partner is liable for the debts and obligations of the partnership that are incurred after the conversion takes effect;<sup>148</sup> liability thereafter is determined under the generally applicable rules of partnership liability.<sup>149</sup> The partnership, at the time of the conversion, may file a statement of qualification, after which all partners of the limited partnership will enjoy the limited liability shield afforded by LLP status.

The effect of a conversion, whether it is into a general partnership or a limited partnership, is addressed in a single provision.<sup>150</sup> Upon a conversion, the same entity exists both before and after the conversion.<sup>151</sup> As such, the existence of the business entity has in no manner been altered by the conversion, and therefore the operation of “due on sale,” “due on merger,” or “due on dissolution” clauses of the entity’s obligations are not triggered. A number of other changes occur upon conversion including: the property and contract rights of the converting organization are fully vested in the converted organization; the converted organization is liable for all obligations of the converting organization; actions pending against the converting organization are continued against the converted organization (with the possibility that the name of the converted organization being substituted therein); a written agreement governing the converted organization is binding upon any person who becomes a partner in the converted organization; and the provisions of the plan of organization become applicable.<sup>152</sup> There is no right to dissent from a conversion.<sup>153</sup>

A partnership may merge with one or more general or limited partnerships pursuant to a plan of merger.<sup>154</sup> All partners of each partnership, or

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146 KY. REV. STAT. ANN. § 362.1-903(3) (West 2006); *accord id.* § 275.370(3)(d).

147 *Id.* § 362.1-903(4).

148 *Id.* § 362.1-903(5).

149 *Id.* § 362.1-903(5); *see also id.* § 362.1-306(2).

150 *Id.* § 362.1-904.

151 *Id.* § 362.1-904(1); *accord id.* § 275.375(1).

152 *Id.* § 362.1-904(2)(a)-(e). Similar but less expansive provisions appear at KRS § 275.375(2).

153 *Id.* § 362.1-904(3); *see also* *Welch v. Via Christi Health Partners, Inc.*, 133 P.3d 122, 129 (Kan. 2006) (“The right to appraisal under Kansas law is purely statutory.” (quoting *Wichers v. Soloman Valley Feed Lot, Inc.*, 704 P.2d 383, 385 (1985))).

154 KY. REV. STAT. ANN. § 362.1-905(1) (West 2006). The plan of merger must set forth the name of each party to the merger, the name of the entity surviving the merger, whether that surviving entity will be a partnership or a limited partnership and the status of each partner of the merging entities therein, and other terms and conditions of the merger, basis of conversion of interest of each party in the merger to interest in the surviving entity, which may include money or other property in whole or in part and the street address of the surviving entity’s chief executive office. *Id.* § 362.1-905(2)(a)-(f). This provision is based upon KRS § 275.355.

a lower number if specified in the partnership agreement, must approve the plan of merger. With respect to each limited partnership, the required number of concurring partners is governed by the jurisdiction where the limited partnership is organized. If the jurisdiction does not have a law governing the vote required for merger of a limited partnership, all partners to the limited partnership must agree to the plan of merger, irrespective of any provision in the agreement of limited partnership purporting to authorize a merger at some lower threshold.<sup>155</sup> A plan of merger may be amended or abandoned as so provided in the plan and takes effect upon the later of its approval, the filing of all documents required to effect the merger, or a delayed effective date.<sup>156</sup> Upon a merger becoming effective, the separate existence of each party to the merger, other than that of the entity surviving it, ceases, with all properties of the entities not surviving the merger vesting in the surviving entity and it taking on all obligations of all other parties to the merger.<sup>157</sup> An action or proceeding against an entity not surviving the merger continues as if the merger had not occurred, and the name of the surviving entity may be substituted in the action.<sup>158</sup> Where the entity surviving the merger is a foreign partnership or foreign limited partnership, the secretary of state is the surviving entity's agent for service of process with respect to any action to enforce an obligation of any Kentucky partnership or limited partnership not surviving the merger, and the surviving entity is obligated to notify the secretary of state of its mailing address so that process may be properly forwarded.<sup>159</sup> A partner in the entity surviving the merger is liable for all obligations upon which he or she was liable prior to the merger by reason of their position in either the surviving entity or other party to the merger.<sup>160</sup> In addition, each partner is liable on all obligations of the surviving entity incurred before the merger by a party to the merger, but those obligations may be satisfied only out of property of the partnership or limited partnership.<sup>161</sup> Obligations incurred subsequent to the merger, with respect to any limited partner, may be satisfied only out of property of the limited partnership, with liability in a general partnership being determined under the generally applicable rules for a general partnership.<sup>162</sup> In those instances where the obligations of a party to the merger are not satisfied out of the property of the surviving partnership or limited partnership, the general partners of the part of the business organi-

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155 *Id.* § 362.1-905(3).

156 *Id.* § 362.1-905(5). A delayed effective date provision is subject to the requirements KRS § 362.1-110.

157 *Id.* § 362.1-906(1)(a)-(c).

158 *Id.* § 362.1-906(1)(d).

159 *Id.* § 362.1-906(2); *accord id.* § 275.360(1)(d)(2).

160 *Id.* § 362.1-906(3)(a).

161 *Id.* § 362.1-906(3)(b).

162 *Id.* § 362.1-906(3)(c).

zation that incurred the obligation are subject to contribution obligations to satisfy those claims, in which instance that contribution obligation is determined as if that business organization, rather than merging, had been dissolved.<sup>163</sup>

There is no requirement that every partner in a partnership or limited partnership taking part in a merger must remain a partner in the surviving entity.<sup>164</sup> If a former partner does not continue as such, that partner is treated as having been dissociated upon the merger taking effect. The law governing the organization of that business organization will determine the rights of the dissociated partner.<sup>165</sup> Assuming the surviving entity is governed by KyRUPA, it may be bound by the acts of a dissociated general partner, and that dissociated general partner may have liability for transactions entered into by the surviving entity after the effective date of the merger.<sup>166</sup> There is no right to dissent from a merger.<sup>167</sup>

A merger involving a KyRUPA partnership may be made a public record by the surviving entity filing a statement of merger.<sup>168</sup> In contrast with the law of corporations and limited liability companies, the filing of the statement of merger is notice of a completed transaction, rather than an operative filing that itself effectuates the merger.<sup>169</sup> Upon the filing of a statement of merger, property held in the name of a party to the merger, other than real property, becomes property held in the name of the entity surviving the merger.<sup>170</sup> With respect to real property and the effectiveness

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163 *Id.* § 362.1-906(4).

164 *Id.* § 362.1-905(2)(e).

165 *Id.* § 362.1-906(5) (“The surviving entity shall cause a partner’s interest in the entity [surviving the merger] to be purchased under [KRS § 362.1-701] or another statute specifically applicable to that partner’s interest with respect to a merger”).

166 *Id.* § 362.1-906(5); *see also id.* §§ 362.1-702; 362.1-703.

167 *Compare id.* § 362.1-906(6), *with id.* § 271B.13-020(1)(a) (right of shareholdering corporation to dissent from a merger); *see also* *Welch v. Via Christi Health Partners, Inc.*, 133 P.3d 122, 129 (Kan. 2006) (“The right to appraisal under Kansas law is purely statutory.” (quoting *Wichers v. Soloman Valley Feed Lot, Inc.*, 704 P.2d 383, 385 (1985))).

168 KY. REV. STAT. ANN. § 362.1-907(1) (West 2006). There are no public filings to record the conversion of limited partnership into a partnership except the cancellation of the certificate of limited partnership, or of the conversion of a general partnership into a limited partnership except the filing of the certificate of limited partnership recording the fact of the conversion and the prior name of the general partnership.

169 *See id.* § 271B.11-050(2) (“A merger or share exchange shall take effect upon the effective date of the articles of merger or share exchange.”); *id.* § 275.360(2) (“A merger shall take effect upon the later of the effective date of the filing of the articles of merger or the date set forth in the articles of merger.”). The statement of merger must set forth the name of each partnership or limited partnership that is a party to the merger, the name of the surviving partnership or limited partnership, the chief executive office of the surviving entity, and, if it has one, its address in Kentucky, whether the surviving entity is a partnership or limited partnership and the effective date of the merger. *Id.* § 362.1-907(2)(a)–(c). The effective date of the merger is determined by KRS § 362.1-905(5).

170 *Id.* § 362.1-907(3). As such, upon the filing of a statement of merger, as regards

of a statement of partnership authority, a statement of merger filed with both the secretary of state and the county clerk for the county in which the real property is located serves to treat that property as held in the name of the surviving entity.<sup>171</sup> These provisions with respect to the deemed transfer of the name in which title is held to personal or real property are effective notwithstanding the fact that the statement of merger does not fully satisfy the statutory requirements.<sup>172</sup> The statute acknowledges that a limited partnership that is party to a merger, by reason of the governing limited partnership law, may be obligated to file additional documents.<sup>173</sup> If the limited partnership is governed by a law of a jurisdiction other than Kentucky, it will need to comply with any other requirements of its law in effectuating a merger.

The merger and conversion provisions of KyRUPA are not exclusive, and partnerships governed by RUPA may engage in any other transactions authorized by law.<sup>174</sup> For example, partnerships may continue to convert into limited liability companies as provided in the KyLLCA.<sup>175</sup>

#### *J. Article 10—Limited Liability Partnership*

This article does not contain any significant non-uniform provisions. It needs to be noted, however, that as a consequence of Kentucky's non-uniform rule permitting KyUPA to continue,<sup>176</sup> and with it KyUPA LLPs that afford only partial liability protection,<sup>177</sup> there is uncertainty as to whether a particular LLP is a full or partial shield to liability absent a review of the filings in the secretary of state's office.

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property other than real property, limitations or grants of authority pursuant to a statement of partnership authority are effective irrespective of whether the property is otherwise retitled in the name of the surviving partnership.

<sup>171</sup> *Id.* § 362.1-907(4). Note that this deemed retitling is effective only if the statement of merger is filed with the county clerk or other authority for the county in which the real property is located. 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 KRS § 142.050. *See id.* § 142.050(7)(h).

<sup>172</sup> *Id.* § 362.1-907(5).

<sup>173</sup> *Id.* § 362.1-907(6) (“A limited partnership party to a merger with the partnership shall file with the Secretary of State such documents as are provided for in the law governing the limited partnership.”).

<sup>174</sup> *Id.* § 362.1-908.

<sup>175</sup> *See id.* § 275.370.

<sup>176</sup> *See id.* § 362.1-1204(1).

<sup>177</sup> *See id.* § 362.220(2).

*K. Article 11—Foreign Limited Liability Partnership*

*1. RUPA Section 1101—Law Governing Foreign Limited Liability Partnership.*—RUPA § 1101(c) has been significantly revised in KyRUPA with modifications intended to broaden the scope of the provision. The uniform language of the provision states: “A statement of foreign qualification does not authorize a foreign limited liability partnership to engage in any business or exercise any power that a partnership may not engage in or exercise in this State as a limited liability partnership.”<sup>178</sup> As adopted in Kentucky, this provision provides:

No foreign partnership, including a foreign limited liability partnership that has filed a statement of foreign qualification, may engage in any business or exercise any power that a domestic partnership is forbidden to exercise or engage in by the laws of this Commonwealth.<sup>179</sup>

This modification serves two purposes. First, while it continues the rule that a foreign limited liability partnership may not “engage in any business or exercise any power” that is forbidden a domestic limited liability partnership, it extends that rule to all foreign partnerships, whether or not they are limited liability partnerships. Consequently, no foreign partnership may engage in a business or activity that is forbidden to a domestic partnership. Second, the modifications apply the “engage in any business or exercise any power” prohibition to all foreign limited liability partnerships, regardless of whether they have filed a statement of foreign qualification. Collectively, these modifications preclude a foreign partnership from avoiding the application of the “engage in any business or exercise any power” prohibition by not filing a statement of foreign qualification.<sup>180</sup>

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<sup>178</sup> RUPA § 1101(c).

<sup>179</sup> KY. REV. STAT. ANN. § 362.1-1101(3) (West 2006). The language was revised in part to conform to KRS § 275.380(2). *See also id.* § 271B.15-050(2).

<sup>180</sup> Such regulation of foreign LLPs is discussed generally by Professors Bromberg and Ribstein:

[M]ost LLP statutes provide that the law of the formation state of a foreign LLP governs organization, internal affairs, and the liability of the partners. These statutes make clear the parties' power contractually to select the choice of law by choosing their organization state. Some of these states add that the LLP shall not be denied registration or prohibited from doing business in the state by reason of any difference between the formation state and the operation state.

Notwithstanding these general provisions, local regulatory law clearly applies to certain matters. Foreign LLP provisions do not permit a foreign LLP to engage in business from which domestic LLPs are barred. Some states make this clear by providing that a foreign LLP

2. *RUPA Section 1102—Statement of Foreign Qualification.*—RUPA § 1102(a) provides that a foreign limited liability partnership must file a statement of foreign qualification before transacting business in the state.<sup>181</sup> The language of RUPA § 1102(b) addressing a delayed effective date for a statement of foreign qualification has been deleted from KyRUPA because it incorporates a non-uniform, general provision governing delayed effective dates.<sup>182</sup> For the same reason, the uniform provision addressing the effective date for amendments to or cancellations of the statement of foreign qualification<sup>183</sup> has not been adopted in KyRUPA.

A non-uniform provision has been added as KyRUPA § 1102(4) to make the right of the commonwealth to revoke the statement of foreign qualification express.<sup>184</sup> Another non-uniform provision, adopted at KyRUPA §

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has no greater rights or powers than a domestic LLP. In particular, . . . a professional LLP would be subject to the same restrictions, including limitation of liability, that are applied to domestic LLPs of the same type. The New York statute makes this clear by adding that partners who perform professional services in the state have the same liability as partners in domestic LLPs and are subject to New York professional practice rules. Other statutes explicitly provide that professional and other firms are subject to laws regulating specific types of business. Even in the absence of such provisions, local professional licensing laws and other regulation probably apply to all firms operating in the same state even if they are foreign LLPs.

ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT* § 6.02(d) (2007) (footnotes omitted). The greatest exposure will exist where professional services are rendered through a limited liability partnership in a jurisdiction that does not permit or expressly prohibits professional limited liability partnerships. The partners will be faced with admittedly dated cases such as *Lynch v. Perryman*, 119 P. 229 (Okla. 1911) and *Mann v. Commonwealth Bond Corp.*, 27 F. Supp. 315 (S.D.N.Y. 1938), which stand for the proposition that a foreign corporation may not be used in a state where a domestic corporation may not be used. *See also* Thomas E. Rutledge, *Limited Liability (or Not): Reflections on the Holy Grail*, 51 S.D. L. REV. 417, 440–42 (2006); Thomas E. Rutledge, *To Boldly Go Where You Have Not Been Told You May Go: LLCs, LLPs, and LLLPs in Interstate Transactions*, 58 BAYLOR L. REV. 205, 224–27 (2006).

181 *Cf.* KY. REV. STAT. ANN. § 271B.15-010(1) (West 2006) (requiring that a foreign corporation apply for a certificate of authority before transacting business); *id.* § 275.385(1) (requiring that a foreign limited liability company apply for a certificate of authority before transacting business); *id.* § 362.497(1) (requiring that a foreign limited partnership register with the secretary of state before transacting business); *id.* § 362.585(1) (requiring that a foreign limited liability partnership register with the secretary of state before transacting business). The activities that constitute “transacting business” are addressed in RUPA § 1104 (b) and KRS § 362.1-1104(2).

182 KY. REV. STAT. ANN. § 362.1-110(2) (West 2006); *accord id.* §§ 271B.1-230, 275.060.

183 RUPA § 1102(d).

184 KY. REV. STAT. ANN. § 362.1-1102(4) (West 2006). The state also has the right to revoke certificates of authority for foreign corporations and LLCs pursuant to KRS § 271B.15-300 and § 275.440.

1102(5),<sup>185</sup> complements RUPA § 1101(c). This provision states the rights of a foreign limited liability partnership in the language of a positive grant, as contrasted with the language of limitation used in RUPA § 1101(c), and it clarifies the state's authority to modify those rights in the future.

*3. RUPA Section 1104—Activities Not Constituting Transacting Business.*—RUPA § 1104(a) sets forth a list of activities that do not constitute “transacting business” and thus do not trigger the obligation to file a statement of foreign qualification.<sup>186</sup> The list of activities that do not constitute doing business has been adopted from RUPA without modification except for what has been adopted as subsection (j),<sup>187</sup> a non-uniform provision adopted to insure conformity with the parallel provisions in the KyLLCA and KyBCA. As made express in the statute, the scope of activities that necessitate a foreign LLP's qualifications to transact business is significantly less broad than the scope of those activities that may subject a foreign partnership to the jurisdiction of Kentucky courts under the long-arm statute.<sup>188</sup>

*4. RUPA Section 1105—Action by Attorney General.*—The authority of the attorney general under KyRUPA to maintain an action against a foreign limited liability partnership is broader than it is under RUPA. Under RUPA § 1105, the grant of authority to the attorney general is limited to actions against foreign limited liability partnerships.<sup>189</sup> Under RUPA, the action had to be based on a violation of one of the provisions of article 11<sup>190</sup> relating to foreign limited liability partnerships. KyRUPA empowers the attorney general to maintain an action against a foreign partnership for violation

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<sup>185</sup> *Id.* § 362.1-1102(5).

<sup>186</sup> *Id.* § 362.1-1104(1); RUPA § 1104.

<sup>187</sup> This non-uniform subsection provides that “[o]wning, without more, real or personal property” does not constitute “transacting business.” KY. REV. STAT. ANN. § 362.1-1104(1)(j) (West 2006). This language conforms to KRS § 275.385(2)(i) and § 271B.15-010(2)(i).

<sup>188</sup> *Id.* § 362.1-1104(3); *see, e.g.*, Mich. Wisc. Pipeline Co. v. Commonwealth, 474 S.W.2d 873 (Ky. 1971) (finding foreign corporation with property in Kentucky was subject to taxation and jurisdiction in Kentucky but was not required to qualify to transact business where all activities were in interstate commerce); Intercargo Ins. Co. v. B.W. Farrell, Inc., 89 S.W.3d 422, 427 (Ky. Ct. App. 2002) (finding Louisiana performance bond issuer subject to long-arm jurisdiction where a bond was signed in Kentucky following a board meeting in Kentucky that authorized the bond, and the issuer used letterhead of an affiliate with a Kentucky address); Commonwealth Dep't of Educ. v. Gravitt, 673 S.W.2d 428, 432 (Ky. Ct. App. 1984) (finding foreign corporation that agreed to modify van in Kentucky was subject to long-arm jurisdiction); Commonwealth v. Nat'l Steeplechase & Hunt Ass'n, 612 S.W.2d 347, 348–49 (Ky. Ct. App. 1981) (finding association whose activities did not require qualification to transact business was subject to service of process under the long-arm statute). The long-arm statute is KRS § 454.210.

<sup>189</sup> KY. REV. STAT. ANN. § 362.1-1105 (West 2006).

<sup>190</sup> RUPA §§ 1101–1103.



of any applicable provision of KyRUPA.<sup>191</sup> Actions under this section could include (i) an action to compel a foreign limited liability partnership that is transacting business to file a statement of foreign qualification, (ii) an action to compel a foreign limited liability partnership that refuses to file a statement of foreign qualification to cease transacting business, and (iii) an action to prevent a foreign limited liability partnership from engaging in an activity or business not permissible in that format.

#### *L. Article 12—Miscellaneous Provisions*

The only non-uniform provision in this article is KyRUPA § 1204, which governs the effective date and applicability of the Act and is discussed extensively above.<sup>192</sup>

#### IV. CONCLUSION.

It is of course a valid question to ask whether the adoption of KyRUPA is worth the effort. The adoption of the new law 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. These are very real costs. Still, as to KyRUPA, we believe that the answer has to be a resounding “yes.”

KyRUPA is a positive development for Kentucky for three general reasons. First, RUPA is a technically better partnership law than its predecessor. The new Act incorporates the current status of partnership law as it has grown through the common law and the continuing modernization of business organization law. Whether it is in the statements provided, the deemed accounts mechanism, the dissociation provisions, or the expanded and clarified informational rights, RUPA, over time, will prove to be a superior statutory framework for clients, practitioners, and judges. Second, by adopting RUPA, Kentucky moves into the mainstream of the progressive states in this important area of the 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. Uniformity permits businesspeople (and their attorney advisors) to look both to other states and major treatises for guidance. Third, by adopting RUPA, Kentucky burnishes its image as a favorable location in which to do business.

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<sup>191</sup> KY. REV. STAT. ANN. § 362.1-1105 (West 2006) (“The Attorney General may maintain an action to restrain a foreign limited liability partnership from transacting business in the Commonwealth in violation of this subchapter.”). The language “this subchapter” refers to the whole of KyRUPA. *Id.*

<sup>192</sup> *Id.* § 362.1-1204; *see supra* notes 12–22 and accompanying text for a detailed discussion of this provision.

The reality, of course, is that with modern choice of law provisions, business firms are not required to physically locate in the jurisdiction whose law they wish to have govern their internal affairs. But, it seems clear that firms use the progressive nature of a jurisdiction's business organization laws as a proxy for other, substantive considerations, and to that extent reforms such as RUPA may be seen to enhance economic development. With the adoption of RUPA, and other advances in business organization law recently undertaken in the commonwealth,<sup>193</sup> Kentucky has taken a significant step toward the forefront of states having modern business organization laws.

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<sup>193</sup> We refer here to Kentucky's adoption of the Uniform Limited Partnership Act and the progress made on technical amendments to Kentucky's corporation, business trust, and LLC statutes. *See* 2007 Ky. Acts, ch. 137.

