



KANSAS BAR ASSOCIATION

The Business Entity Transactions Act: What Kansas Business Lawyers Need to Know

By Richard C. Stevens, Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita

Kansas S.B. 132 is the Business Entity Transactions Act, and on April 6, 2009, the governor approved the bill,¹ without a single opposing vote having been cast in the Kansas House or Senate while the bill moved through each chamber.² The Business Entity Transactions Act (BETA) is a new piece of legislation that is designed to fill a void in the Kansas statutory framework for what we can loosely refer to as cross-entity transactions. As lawyers know, there are several entity types: corporations, limited liability companies, limited partnerships, partnerships, and their other variants. BETA creates a statutory framework for the movement of the underlying interests in these entities into another entity type without requiring the dissolution and reorganization of the original entity. This article will attempt to briefly explain what BETA will add to Kansas Business Law for practitioners who may choose to use its provisions after it becomes law on July 1, 2010.³

Interestingly – and, as was the case in the regulation of securities – Kansas is one of the first to adopt an Entity Transactions Act.⁴ As explained in testimony to the Senate Judiciary Committee, BETA is the result of a desire to “accomplish [cross-entity transactions] with appropriate approvals [and] without having to dissolve an entity and without extinguishing any obligations owed by preceding entities in the process.”⁵

In order to better understand what BETA does, we should first examine the current statutory landscape in Kansas. Presently there are statutory frameworks for the creation, governance, and other activities of corporations, limited liability companies, limited partnerships, and partnerships, as can be depicted in this table:

Type of Entity or Transaction	Corporations ⁶	Limited Liability Companies ⁷	Limited Partnerships ⁸	Partnerships ⁹
Mergers with other entities of the same type?	Yes	Yes	Yes	Yes
Conversion into another entity type?	No	Yes, but not into a Corporation	Yes, but not into a Corporation	Yes, but not into a Corporation
Mixed Entity Merger ¹⁰ Provisions?	Yes (only applies to mergers)	Yes (only applies to mergers)	Yes (only applies to mergers)	Yes (only applies to mergers)
Interest Exchanges?	No	No	No	No
Domestications?	No	No	No	No

In the last three rows this table shows the areas where BETA most changes the existing statutory framework. First, let’s briefly examine BETA by Article.

Article 1¹¹ simply recites the definitions of the entity types to which BETA applies and excludes some particular entities: “Entities regulated under chapter 40 [(insurance companies)] of the Kansas Statutes Annotated; (b) banks and trust companies organized under chapter 9 of the Kansas Statutes Annotated; (c) credit unions organized under K.S.A. 17-2201 *et seq.*, and amendments thereto; and (d) professional corporations formed under the Kansas professional corporation law or limited liability companies organized under the Kansas revised limited liability company act to render a professional service, as defined at K.S.A. 17-2707, and amendments thereto.”¹²

Article 2¹³ governs mergers and consequently starts by excluding mergers between two entities of the same type because those transactions are already provided for in the Kansas statutes – as depicted in row two of the previous table – and, thus, eliminates double coverage in the statutes. Article 2, then proceeds to redefine a process by which dissimilar entities types can merge as

FOOTNOTES

1. <http://www.kslegislature.org/bills/2010/132.pdf>.

2. <http://www.kslegislature.org/legisrv-billtrack/searchBills.do?number=132>.

3. Kansas S.B. 132, § 52.

4. Kansas and Idaho are the first two states to adapt the Model Entity Transactions Act first drafted by the National Conference of Commissioners on Uniform State Laws. http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-menta.asp. See also <http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=100>.

5. Testimony of Edwin W. Hecker Jr. to the Senate Judiciary Committee on S.B. 132, Feb. 3, 2009.

6. See Ch. 17 of the Kansas Statutes Annotated.

7. See Ch. 17, art. 76 of the Kansas Statutes Annotated.

8. See Ch. 56a of the Kansas Statutes Annotated.

9. See Ch. 56, art. 1a of the Kansas Statutes Annotated.

10. See Ch. 17, art. 77 of the Kansas Statutes Annotated (all sections repealed by S.B. 132).

11. Kansas S.B. 132, §§ 1-10.

12. *Id.* § 10(a)-(d). Some practitioners may be interested to note that public utilities are apparently covered by BETA. Testimony of Edwin W. Hecker Jr. to the Senate Judiciary Committee on S.B. 132, Feb. 3, 2009.

13. Kansas S.B. 132, §§ 11-16.

the entirety of Chapter 17, Article 77 – “Merger or Consolidation; Constituent Entity” is repealed by BETA.¹⁴ Unfortunately, a detailed examination of the process is beyond the scope of this brief article, but the references should be helpful.

Article 3¹⁵ is where BETA starts to add significantly to Kansas Business Law. Article 3 creates the new concept of an “interest exchange” and eliminates the need to execute a reverse triangular merger¹⁶ when an acquiring entity wishes to acquire and hold another entity as a subsidiary.¹⁷ Further, the article provides for a means by which a certificate of interest exchange shall be filed with the secretary of state.¹⁸ Article 3 raises a practice point: should the entity-governing documents you draft for your clients contain explicit approval requirements for “interest exchanges”? Most entities require majority or super-majority approval for merger activity as is provided for in Article 2, but it may be best practice to include the term “interest exchange” explicitly in the provisions regarding the approval of transactions by the entity in any documents you prepare if only to eliminate confusion going forward. This might be particularly important in a Manager-Managed LLC Operating Agreement that carefully delineates the powers of the LLC Manager.

Article 4¹⁹ creates a single-entity conversion framework, and for the purposes of this writing, the most important point to note is that upon the conversion of an entity into another entity type:

all property of the converting entity continues to be vested in the converted entity without assignment, reversion or impairment; (3) all liabilities of the converting entity continue as liabilities of the converted entity; (4) except as provided by law other than this act or the agreement of conversion, all of the rights, privileges, immunities, powers and purposes of the converting entity remain in the converted entity;²⁰

Consequently, as a matter of statute, entities will not be able to convert as a mean of escaping their obligations. Practitioners have no way to predict how such conversion will be viewed by the IRS. For instance, might an agent of the IRS construe a state-law conversion as a taxable liquidating event depending upon the entity type being converted to and from? How should an entity deal with its IRS status type upon conversion? These questions and others should be thoroughly examined before embarking on an entity conversion. It will be interesting to observe the IRS’ reaction to some of these new transaction types.

Article 5 sets up the domestication framework by which a Kansas entity could domesticate in a foreign jurisdiction or a foreign entity could domesticate in Kansas (at this writing apparently only Idaho entities would have the necessary state law). Prior to Article 5, Kansas had no domestication framework, thus it is entirely new law for Kansas. Nonetheless, its significance may be limited to the occasion where an entity wishes to domesticate in another jurisdiction. Lastly, Article 6 primarily conducts the house cleaning needed in the Kansas Statutes to implement BETA.

Let’s re-examine our table in a post-BETA Kansas:

Type of Entity or Transaction	Corporations ²⁴	Limited Liability Companies ²⁵	Limited Partnerships ²⁶	Partnerships ²⁷
Mergers with other entities of the same type?	Yes	Yes	Yes	Yes
Conversion into another entity type?	Yes	Yes	Yes	Yes
Mixed-Entity Mergers ²⁸	Yes	Yes	Yes	Yes
Interest Exchanges?	Yes	Yes	Yes	Yes
Domestications?	Yes	Yes	Yes	Yes

Upon initial examination, BETA shows promise in simplifying certain transaction types between entities and providing the necessary framework at the secretary of state’s office. Nonetheless, when the statutes expand, practitioners must be cautious to account for the differences in their day-to-day practices. Before pulling the trigger on a BETA transaction for a compelling state law reason, just remember that the IRS is not bound to follow the National Conference of Commissioners on Uniform State

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14. Kansas S.B. 132, Preamble.

15. Kansas S.B. 132, §§ 17-22.

16. See <http://www.investopedia.com/terms/t/trm.asp>.

17. Testimony of Edwin W. Hecker Jr. to the Senate Judiciary Committee on S.B. 132, Feb. 3, 2009.

18. Kansas S.B. 132, § 21(a).

19. Kansas S.B. 132, §§ 23-28.

20. Kansas S.B. 132, § 28(a)(2)-(4).

21. Kansas S.B. 132, §§ 29-34.

22. Kansas S.B. 132, §§ 35-52.

23. Testimony of Edwin W. Hecker Jr. to the Senate Judiciary Committee on S.B. 132, Feb. 3, 2009.

24. See Chapter 17 of the Kansas Statutes Annotated.

25. See Chapter 17, Article 76 of the Kansas Statutes Annotated.

26. See Chapter 56a of the Kansas Statutes Annotated.

27. See Chapter 56, Article 1a of the Kansas Statutes Annotated.

28. These are now provided for in BETA.

Law's views when construing the tax effect of a particular "interest exchange" or conversion. Additionally, for good measure add the term "interest exchange" to your entity governing documents in the provisions dealing with approval and governance. If you have thoughts about this article, wish to point out my errors, or hear of issues surrounding the use of BETA's provisions in the years to come, please contact me. ■

About the Author



Richard C. Stevens practices at the law firm of Martin, Pringle, Oliver, Wallace & Bauer LLP in Wichita. His primary practice areas are business law, estate planning, real estate law, trademark law, and technology and computers. While in law school at the Washburn University School of Law, he earned a certificate in business and transactional law, which focused on linking clients' financial and business needs to good legal planning. Stevens' undergraduate work included a minor in accounting and a major in management information systems from Wichita State University. Prior to attending law school, he worked in the information technology field for more than five years. You can find Stevens at www.martinpringle.com.