

Document Gamma
for 11-30-16 UPSA Internet meeting

SECTION [601]¹
“MERGING IN AND OUT”²
dsk – 11-28-16

SECTION 601. PROTECTED SERIES AS PARTY TO MERGER.

(a) A protected series may be party to a merger only according to the following rules:

(1) The merger is effected under [cite provisions of the limited liability company statute authorizing a limited liability company to be party to a merger with another person or entity and, for the purposes the merger provisions, defining “person” or entity to include a protected series].³

(2) The only other party to the merger is a limited liability company, and the surviving entity is one of the parties.

(3) The merger taking effect does not cause a protected series to be established, a limited liability company to be formed, or any other entity or person to come into existence.⁴

(4) The statement of merger delivered to the [Secretary of State] for filing on behalf of the protected series:

(A) shall be:

¹ If the committee decides to include merger provisions, they will comprise Article 6. The “foreign” provisions will become Article 7.

² To minimize complexity and avoid unintended consequences, this section is intentionally very bare bones, allowing only the simplest merger in and merger out transactions.

³ Statutes vary as to how they define “person” and “entity”. Some definitions make “entity” a subset of “person” and some *vice versa*. The standard ULC definitions make “person” the broader category. However, to participate in an entity transaction under a uniform business entities act, a “person” must be an “entity”. Although the UPSA defines a protected series as a “person” but not an “entity”, a protected series is an “entity” under the special, entity-transaction definitions in ULLCA (2013) and the Unif. Bus. Org. Code. Given the variations in state statutes as to the set/subset issue, this section refers to both terms.

⁴ Paragraph 3 may be implicit in Paragraph 2.

14 (i) designated as “protected series merger statement”; and
15 (ii) signed and delivered by the series limited liability company
16 that established the protected series; and
17 (B) otherwise comply with [cite to section of limited liability company
18 statute governing the contents of a statement of merger].
19 (b) If before a merger authorized under subsection (a) takes effect, a claim under Section
20 402 has been made against a party to the merger, the claim is an obligation of the surviving
21 entity for the purposes of [cite to section of limited liability company statute stating the effects of
22 a merger].⁵

⁵ It is certainly arguable that such claims come within the traditional concept of “liabilities” of a party to a merger or other entity transaction. According to Ed Smith, chair of the drafting committee on the Uniform Voidable Transactions Act, such claims are with that act’s definition of “claim”. Section 1(3) states: “‘Claim’, except as used in ‘claim for relief’, means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” However, neither the UPSA nor ULLCA define “claim”. So, this subsection is included for the avoidance of doubt.