

# ILLINOIS BAR JOURNAL

The Magazine of Illinois Lawyers

March 2012 • Volume 100 • Number 3 • Page 164 •

*Reprinted with permission of the Illinois Bar Journal. Copyright by the Illinois State Bar Association.*



## Business Law

# Should Illinois Have A Statutory Business Trust Act?

**Thirty-two states have some form of business trust statute. Illinois does not. Should it?**

By Asalya Akhmerova and William Price

Illinois does not yet have a statute for the creation and administration of entities known as business trusts. Of course, Illinois recognizes common law trusts, but these are much different from the legally recognized entity of business trust.

### **Statutory v. common law business trusts**

A common law business trust arises from a private action. As a result, the trust must transact business, sue, and be sued in the name of the trustee and in the trustee's capacity as such. By contrast, a statutory business trust is an entity, separate from its trustees and beneficial owners, with the capacity to sue and be sued, own property, and transact business in its own name. A

statutory business trust is formed by filing a certificate of trust with a public official, typically the Secretary of State.

The National Conference of Commissioners on Uniform State Laws (NCCUSL) has proposed a Uniform Statutory Trust Entity Act (USTEA), which is substantially modeled after the Delaware and Connecticut statutory trust statutes.

So why would Illinois adopt a business trust statute? Several factors favor that approach. From the state's perspective, especially in its current financial condition, the appeal is potential revenue from filings, reports, and taxation that are required from other forms of entities.

In addition, having a statutory business trust statute would permit Illinois to more directly participate in this huge part of the economy. Benefits from a business trust statute include the following:

- Entity status - the ability to transact business and to sue and be sued in the name of the trust.
- Pass-through taxation - the Internal Revenue Code permits trust income to be taxed once, with rules attributing trust income to the grantor, trustees, or beneficiaries, depending on the trust structure.
- Flexible form - providing clear standards for the entity, such as indemnification of those who act on behalf of the entity (with exceptions such as fraud and bad faith), and protecting the beneficial owners.
- Availability of series trusts, commonly used in the mutual fund industry.
- Simplification of entity filing requirements.

### **Other benefits of the statutory trust**

The business trust is one of the predominant business entities in the U.S. economy, with activity measuring in the trillions of dollars. Adoption of a statutory trust act could help facilitate Illinois organization of

- pension trusts, which own more than a quarter of all U.S. equities and at least half of all U.S. debt;
- investment pools, such as mutual funds;
- real estate investment trusts (REITs), which can take advantage of pass-through tax treatment even though publicly traded;
- asset securitization trusts, which eliminate bankruptcy and liability risk from the entity creating the trusts;
- debt securities (corporate and governmental), which use a corporate trustee to administer payments and to collect pledged taxes and other revenue streams, if necessary, to guarantee bondholder payments; and
- regulatory compliance trusts, for everything from nuclear power station decommissioning to lawyer's trust accounts.

All these can be operated in Illinois, but they are usually legally domiciled in other states, which means an additional level of taxes and paperwork for organizers.

Some might oppose creating new entity types if existing ones can achieve the same results. Others would argue that creating a legal framework for a business trust entity, even if using an existing entity could achieve the same results, would help bring organizers to Illinois.

The Institute of Illinois Business Law has established a subcommittee to review whether Illinois should have a business trust statute and, if so, the provisions the statute would contain. The subcommittee will work with officials from the Illinois Secretary of State and comparable committees of the Illinois State Bar Association and the Chicago Bar Association. Comments from attorneys are welcome, either by logging in and posting a public comment on the ISBA website with this article at [www.isba.org/ibj](http://www.isba.org/ibj) or by contacting coauthor William Price.

*Asalya Akhmerova is a third-year student at the Chicago-Kent College of Law and the author of an extensive research memorandum on statutory trusts for the Institute of Illinois Business Law. William A. Price <[wprice@growthlaw.com](mailto:wprice@growthlaw.com)>, an attorney in private practice in Warrenville, chairs the Business Trusts Subcommittee of the Institute of Illinois Business Law.*