The New Limited Partner Liability Shield: Has the Vanquished Control Rule Unwittingly Resurrected Lingering Limited Partner Estoppel Liability as Well as Full General Partner Liability?

Carter G. Bishop†
Copyright © 2004 Carter G. Bishop

“Beware lest you lose the substance by grasping at the shadow.”

THE DOG AND THE SHADOW

“If a limited partner wears a T-Shirt to every meeting with a person dealing with the partnership stating that s/he is NOT A GENERAL PARTNER, then they will never incur estoppel liability.”

MARTY LUBAROFF’S FAMOUS “T-SHIRT RULE”
(AS RECALLED BY ROBERT KEATINGE)

For nearly 100 years, limited partnership law has made a limited partner personally liable for part or all of the partnership’s obligations only if that partner participates in the management and control of the partnership’s business (“control rule”). Management and control are normally statutorily reserved for general partners who are personally liable for partnership obligations. Nonetheless, the partnership agreement may authorize such limited partner participation but only at the risk that the limited partner will incur personal liability. In an attempt to fortify the limited partner liability shield, the Uniform Limited Partnership Act of 2001 made it easier for a limited partner to participate in the partnership’s business as a limited partner but eliminated the venerable control rule. At the same time the Act made other important changes, which make it easier for a limited partner to actually become a general partner through the implied consent of the other partners. Notably, unlike in prior Acts, a limited partner may become a general partner without the written consent of the remaining partners. Because of these sweeping changes that allow and encourage a

† Carter G. Bishop, Professor of Law, Suffolk University Law School, Boston, Massachusetts. Professor Bishop was the organizer of the Symposium and in that regard wishes to thank all the authors who took their valuable time to contribute to this important Symposium. In particular, special appreciation is extended to Professor Daniel S. Kleinberger, the Reporter for the Uniform Limited Partnership Act 2001, and the National Conference of Commissioners on Uniform State Laws, whose support made possible the drafting of the Act. Professor Bishop also wishes to thank his Research Assistant, Christoph Rothschild, JD 2003, Suffolk University Law School, who provided invaluable research and assistance in the research, preparation, and writing of this Article.
limited partner to participate in partnership business either as a limited or implied general partner, this Article argues that, notwithstanding the elimination of the control rule, a limited partner may become personally liable for partnership obligations in two ways—both related to the fact that a limited partnership is the only entity some of whose owners have a full liability shield (limited partners) and some of whose owners have no liability shield (general partners). The control rule itself is a mere byproduct of this fact and not the central cause for limited partner personal liability. Part IV(A) of this Article postulates that a limited partner may become liable for all the partnership obligations by becoming a silent general partner and that broad and full participation in management is evidence of the consent of the remaining partners to make the limited partner also a general partner. Creditor reliance is irrelevant to this determination, which focuses upon the consent and intent of the remaining partners. Part IV(B) argues that participation short of that mentioned may also create a justified and reasonable (although mistaken) belief on the part of a creditor that the limited partner is a general partner. In these cases, common law and general partnership estoppel liability will make the limited partner personally liable to those creditors who relied upon that participation to extend credit upon its belief. Thus stated, the elimination of the control rule is a hollow promise vacant of the liability protection it presupposes and further operates to encourage the very participation that may result in personal liability. Fortunately, the simple “fix” is for the partnership to become a limited liability limited partnership (LLLP) and eliminate the dual-track owner liability pattern responsible for liability. In such a case, a limited partner would have no personal liability even if s/he becomes a general partner. Further, detrimental creditor reliance for estoppel liability would no longer be possible. Given these possible if not probable outcomes and the likely fact that all limited partnerships will become LLLPs, the only surprising fact is that the Act did not simply make the LLLP the default liability structure. By failing to do so, it may eventually create unintended liability to those small limited partnerships least able and likely to be advised by sophisticated lawyers. If true, history will repeat itself yet again by eventually and predictably generating yet another revision of the Act to further fortify the limited partner liability shield.

INTRODUCTION

The heart and soul of limited partnership law is that general partners are personally liable for partnership obligations but limited partners are not. Protecting limited partners from personal responsibility has not been as easy as this simple mission would suggest. The central focus of every promulgated uniform limited partnership act since 1916 has been to fortify the limited partner liability shield and make it more impervious to assault. So it was with the Uniform Limited Partnership Act of 1916 (ULPA 1916), the Revised Uniform Limited Partnership Act of 1976 (RULPA 1976), and the Revised Uniform Limited Partnership Act of 1985 (RULPA 1985). While each promulgated act attempted to strengthen the limited partner liability shield,
various statutory expressions were retained to protect creditors who dealt with the limited partnership reasonably believing a limited partner was a general partner.

One long-lived expression was the so-called “control rule,” which, to varying degrees, made a limited partner personally liable for the obligations of the partnership if, like a general partner, the limited partner took part in the management and control of the partnership’s affairs. At the same time, these various uniform acts made it very difficult for a limited partner to become a general partner. The reason was simple. Allocating personal liability to a limited partner for assuming an overly active management role was necessary to protect creditors, but making that person a general partner would have radically altered the *inter se* management rights of the partners without their consent. Thus, participation could make a limited partner liable, but the written consent of the partners was required to make that person a general partner.

The ancient and now extinct “control rule” was born with ULPA 1916, modified in both RULPA 1976 and RULPA 1985, and finally buried by the

1. UNIF. LTD. P’SHIP ACT (1916) [hereinafter ULPA 1916]. ULPA 1916 section 7 is discussed extensively in Part III.B and provides: “A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.” *Id.*

2. UNIF. LTD. P’SHIP ACT (1976) [hereinafter RULPA 1976]. RULPA 1976 section 303 is discussed extensively at Part III.C and provides:

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] takes part in the control of the business. However, if the limited partner’s participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he [or she] is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner;
(2) consulting with and advising a general partner with respect to the business of the limited partnership;
(3) acting as surety for the limited partnership;
(4) approving or disapproving an amendment to the partnership agreement; or
(5) voting on one or more of the following matters:
   (i) the dissolution and winding up of the limited partnership;
   (ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;
   (iii) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
   (iv) a change in the nature of the business; or
   (v) the removal of a general partner.

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him [or her] in the business of the limited partnership.

(d) A limited partner who knowingly permits his [or her] name to be used in the name of the limited partnership, except under circumstances permitted by Section 102(2), is liable to creditors who
Uniform Limited Partnership Act of 2001 (ULPA 2001). However, ULPA

extend credit to the limited partnership without actual knowledge that the limited partner is not a
general partner.

3. UNIF. LTD. P'SHIP ACT (1985) [hereinafter RULPA 1985]. RULPA 1985 section 303 is discussed
extensively at Part III.D and provides:

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited
partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her]
rights and powers as a limited partner, he [or she] participates in the control of the business.
However, if the limited partner participates in the control of the business, he [or she] is liable only to
persons who transact business with the limited partnership reasonably believing, based upon the
limited partner’s conduct, that the limited partner is a general partner.

(b) A limited partner does not participate in the control of the business within the meaning of
subsection (a) solely by doing one or more of the following:

(i) being a contractor for or an agent or employee of the limited partnership or of a general
partner or being an officer, director, or shareholder of a general partner that is a corporation;

(ii) consulting with and advising a general partner with respect to the business of the limited
partnership;

(iii) acting as surety for the limited partnership or guaranteeing or assuming one or more
specific obligations of the limited partnership;

(iv) taking any action required or permitted by law to bring or pursue a derivative action in the
right of the limited partnership;

(v) requesting or attending a meeting of partners;

(vi) proposing, approving, or disapproving, by voting or otherwise, one or more of the following
matters:

(a) the dissolution and winding up of the limited partnership;

(b) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all
of the assets of the limited partnership;

(c) the incurrence of indebtedness by the limited partnership other than in the ordinary
course of its business;

(d) a change in the nature of the business;

(e) the admission or removal of a general partner;

(f) the admission or removal of a limited partner;

(g) a transaction involving an actual or potential conflict of interest between a general
partner and the limited partnership or the limited partners;

(h) an amendment to the partnership agreement or certificate of limited partnership; or

(i) matters related to the business of the limited partnership not otherwise enumerated in
this subsection (b), which the partnership agreement states in writing may be subject to
the approval or disapproval of limited partners;

(7) winding up the limited partnership pursuant to Section 803; or

(8) exercising any right or power permitted to limited partners under this [Act] and not
specifically enumerated in this subsection (b).

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other
powers by a limited partner constitutes participation by him [or her] in the business of the limited
partnership.

(d) A limited partner who knowingly permits his [or her] name to be used in the name of the limited
partnership, except under circumstances permitted by Section 102(2), is liable to creditors who
extend credit to the limited partnership without actual knowledge that the limited partner is not a
general partner.

4. UNIF. LTD. P'SHIP ACT (2001) [hereinafter ULPA 2001]. ULPA 2001 section 303 is discussed
extensively at Part III.E and provides:

An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the
obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by
way of contribution or otherwise, for an obligation of the limited partnership solely by reason of
being a limited partner, even if the limited partner participates in the management and control of the
2001 also made it infinitely easier for a limited partner to become a general partner by eliminating the writing requirement. Unfortunately, and as this Article suggests, these two revisions work at cross purposes to undermine the goal of the elimination of the control rule. While participation alone cannot make a limited partner personally liable, under the relaxed method to become a general partner, that participation is evidence of the consent of the other partners to make the limited partner a general partner. Moreover, when that participation deceives a creditor into extending credit to the partnership upon the faith that the limited partner is a general partner, estoppel law may make the limited partner personally liable. As this Article suggests, ULPA 2001 may have thus elevated the limited partner personal liability stakes rather than reducing that liability.

During its storied existence, the control rule operated to make a limited partner personally liable for the obligations of the limited partnership simply because s/he participated in the control of the business. Often misunderstood, never defined, and inconsistently applied, the control rule operated to undermine the limited partner liability shield, the hallmark of the limited partnership. Consequently, one of the most laudable efforts of ULPA 2001 was to make the limited partner liability shield more secure by reducing liability exposure merely because the limited partner participates in the control of the limited partnership’s business. To this end, ULPA 2001 section 303 boldly declares that a limited partner is not personally liable for an obligation of the limited partnership solely by reason of being a limited partner, “even if the limited partner participates in the management and control of the limited partnership.”5

This Article applauds the ULPA 2001 elimination of the control rule but criticizes its elimination of the written requirement for one to become a general partner and the failure to address estoppel liability in the same context. Specifically, the elimination of the control rule dangerously invites broader limited partner participation in the management and control of partnership affairs without acknowledging that the very participation invited may invoke narrower but substantial estoppel liability. At the same time, the participation may serve as evidence of the oral consent of the parties that the limited partner is to become a general partner. Estoppel may make a limited partner personally liable to a creditor who extends credit to the partnership on the reasonable faith that the limited partner is a general partner. It only applies when the limited partner is not actually a general partner. However, ULPA 2001 also makes it easier for the same conduct to be used as evidence that the partners have consented that the limited is to become a general partner.

This Article constructs how and why a creditor may be legitimately so

5. See infra Part IV (discussing and analyzing ULPA 2001 section 303).
deceived, that estoppel liability applies to limited partnerships, and that the notice function of the certificate of limited partnership does not negate otherwise reasonable creditor reliance. It also constructs how the same participation may also be evidence of the consent of the partners that the limited partner is to become a general partner—an argument not previously available because all previous limited partnership acts required the written consent of the partners to make a limited partner a general partner.

This theory is developed in several foundational phases. Part I develops the background of the relationship between control rule liability and estoppel liability. Part II sets forth the evolution of control rule liability from ULPA 1916 (birth), RULPA 1976 (modification), RULPA 1985 (modification), and ULPA 2001 (burial). Part II thus analyzes the original intent and purpose of the control rule and the changing role of creditor reliance in its application. The reliance analysis is useful in understanding the role of estoppel reliance, which is developed in Part III. The Part III analysis focuses primarily upon how and why estoppel has always applied to limited partnerships but was seldom utilized as a liability theory because of the presence of the control rule. The elimination of the control rule elevates estoppel to primacy. Part III also develops the doctrine of constructive notice in the context of a limited partnership that arises from facts required to be stated in a filed certificate of limited partnership. The analysis concludes that a “negative notice” concept has never existed to negate creditor reliance that a limited partner is not a general partner simply because the limited partner is either designated in the certificate as a limited partner (RULPA 1976 to RULPA 1985 only) or not designated as a general partner.

Part IV, the center piece of this Article, then analyzes limited partner liability in two phases. Part IV.A considers when and how participation may be used as evidence of the oral consent of the partners that the limited partner is, in fact, to become a general partner. Part IV.B then considers estoppel liability that occurs when the limited partner participation, short of that discussed in Part IV.A, is adequate to deceive a creditor into reasonably believing that the limited partner is actually a general partner. Expectedly, there is a paucity of case law applying estoppel liability where the control rule was eliminated. Georgia law is particularly useful in this context as its limited partnership law eliminated the control rule as early as 1988. Part V concludes that with the elimination of the writing requirement to become a general partner, substantial limited partner participation is more likely to make the limited partner a general partner. Also, notwithstanding the elimination of the control rule, estoppel law is alive and well in limited partnership law and will be an increasing ally of creditors who extend credit on the reasonable but mistaken belief that a limited partner is, in fact, a general partner.
I. BACKGROUND OF THE CONTROL RULE AND ESTOPPEL LIABILITY

Under ULPA 2001, general partners are personally liable for the obligations of a limited partnership solely by virtue of their status as a general partner. Limited partners are not personally liable for the obligations of a partnership solely by virtue of their status as a limited partner. To some degree this liability allocation conforms to the management responsibilities statutorily allocated to the two types of partners. General partners, simply by virtue of their status as a general partner, are agents of the limited partnership and have equal but exclusive rights in the management and conduct of its activities. Limited partners, simply by virtue of their status as a limited partner, are not agents of the limited partnership and have no rights in the management and conduct of its activities. These allocations are only default rules and the partnership agreement, which need not be in writing, may redistribute these responsibilities between and among the general and limited partners. Like any person, a limited partner may become an agent of a limited partnership other than by limited partner status when the partnership actually utilizes their services as an agent. This agency, however, is a common law agency and not statutory. In addition, like any person, a limited partner may become a general partner without the written consent of the other partners.

A common law agent acting for a disclosed principal in an authorized manner does not generally become personally liable to third parties for contracts made on behalf of the principal. The liability question becomes considerably more complicated when the partnership agreement redistributes control and management responsibilities to a limited partner that are allocated, by statute, exclusively to the general partner. When this occurs, it is quite easy for a creditor to become confused as to whether a limited partner is also acting

6. ULPA 2001 § 404(a); see also ULPA 1916 § 9(1); RULPA 1976 § 403(b); RULPA 1985 § 403(b).
7. ULPA 2001 § 303. ULPA 2001 section 303 provides a limited partner is not personally liable for partnership obligations “solely” by reason of being a limited partner. Id.; see also ULPA 1916 § 7; RULPA 1976 § 303(a); RULPA 1985 § 303(a).
8. ULPA 2001 § 402(a).
11. See ULPA 2001 §§ 302, 406(a). Unfortunately, ULPA 2001 section 302 is more clear that a limited partner is not an agent to third parties, and that a limited partner has no rights to participate in the management and control of the limited partnership activities. ULPA 2001 section 406(a), however, provides for this result in the negative by specifically allocating “exclusive” management rights to the general partners.
12. ULPA 2001 § 102(13).
13. ULPA 2001 § 110(a).
14. See ULPA 2001 § 107(a). ULPA 2001 section 107(a) provides that unless otherwise displaced by a specific provision, the principles of common law and equity apply.
15. See ULPA 2001 § 401(4) (requiring “consent” of all partners, but consent not required to be in writing).
as a general partner. A creditor might easily confuse the limited partner for a
general partner because general partners are allocated the entire management
responsibility for the partnership affairs. To further complicate matters, the
partnership agreement, including amendments, may be oral, thus recognizing
the actual conduct and course of performance of the partners in redirecting
management and control from general partners to limited partners.

In a bold attempt to create parity between limited partners and corporate
shareholders, limited liability company members, and limited liability
partnership partners, ULPA 2001 purports to eliminate the ancient control
rule.\(^\text{17}\) To this end, ULPA 2001 section 303 declares that a limited partner is
not personally liable for obligations of the limited partnership “even if the
limited partner participates in the management and control of the limited
partnership.”\(^\text{18}\) The implications of this language are the subject of this Article.

Can it be true? May the partners redirect statutory management and control
responsibilities over partnership affairs from the general partners to limited
partners without making the limited partners personally liable in the same way
as general partners? If so, are there any limitations on this concept? At the
extreme, may the partnership agreement allocate all the rights to management
and control to a limited partner who acts as the functional equivalent of a
“silent” general partner but without any accompanying general partner
liability? Given that a written document is no longer required to make a person
a general partner, would such conduct be evidence of the intent and consent to
make a person a general partner when they assume the responsibilities of a
general partner?

This Article postulates that a limited partner can never be protected as a
 corporate shareholder. The reason is simple and irrefutable. Unlike
corporations (and limited liability companies, limited liability general
partnerships, and limited liability limited partnerships), where no owner is
liable for the debts and obligations of the entity, limited partnerships have two
forms of owner liability. One involves the characteristic unlimited liability of a
general partner, and the other involves the limited liability of a limited
partner.\(^\text{19}\) No other business form provides this unique dual-track liability
construct and thus, no other business form presents the same issues and
problems whether formed under the Uniform Partnership Act of 1914 (UPA

---

17. ULPA 2001 § 303 cmt.

An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the
obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by
way of contribution or otherwise, for an obligation of the limited partnership solely by reason of
being a limited partner, even if the limited partner participates in the management and control of the
limited partnership.

Id.

19. ULPA 2001 §§ 303, 404(a). General partners of a limited partnership are personally liable for the
debts and obligations of the partnership, but limited partners are not. Id.
1914), the Revised Uniform Partnership Act of 1997 (RUPA), the Uniform Limited Liability Company Act (ULLCA), or the Model Business Corporation Act (MBCA). 20

This is not to suggest that the elimination of control liability has no impact on the personal liability of a limited partner. Given the simultaneous elimination of the writing requirement to become a general partner however, the value of the control rule was seriously undermined. The question remains when and under what circumstances will a limited partner be subjected to liability for participating in the control of the partnership affairs? The answer to this most complicated question critically depends upon a proper delineation of conduct-based liability forms making a limited partner personally liable for some or all partnership obligations notwithstanding their limited partner status. This Article explores two such theories. The first, or control rule liability, relates to full liability for all partnership obligations, which may or may not be triggered by specific creditor reliance. The same kind of liability exists when the participation makes the limited partner a general partner. The second, or estoppel liability, relates to liability for only those partnership obligations extended by creditors in reasonable reliance upon the notion that the limited partner was a general partner.

These two important but quite different theories of “conduct-based” liability operate to make a limited partner personally liable to some or all of a limited partnership’s creditors. Distinguishing between them is important because they impose different types of liability upon a limited partner and, hence, require different standards of proof. The first and broader concept involves control rule liability, which is based upon a specific limited partnership statute and makes a limited partner equally liable with the general partner for all partnership obligations regardless of whether a creditor extended credit to the partnership upon the faith that the limited partner was a general partner. Depending upon the specific statutory language, specific creditor reliance may or may not be an element of this liability (but typically is not). The second and narrower concept is estoppel liability, which is based upon a specific general partnership statute, which supplants limited partnership law. When applicable, estoppel liability only makes a limited partner liable to those specific creditors who extended credit to the partnership specifically upon the faith that the limited partner was a general partner.

This Article postulates that the elimination of statutory control liability has

20. UNIF. P'SHIP ACT § 15 (1914) [hereinafter UPA 1914] (holding every partner in a general partnership liable for all partnership obligations); UNIF. P'SHIP ACT § 306(a) (1997) [hereinafter RUPA] (same); RUPA § 306(c) (stating no partners are liable for partnership obligations when partnership becomes a limited liability partnership). In a limited liability company, no member is personally liable for the debts and obligations of the limited liability company. UNIF. LTD. LIAB. CO. ACT § 303 (1996) [hereinafter ULLCA]. In a corporation, no shareholder is personally liable for the debts and obligations of the corporation. MODEL BUS. CORP. ACT § 6.22 (1979) [hereinafter MBCA].
no effect upon the separate and broader liability associated with becoming a
general partner. The elimination of the writing requirement to become a
general partner places limited partners who participate in management and
control at risk at having obtained the necessary “consent” to become a general
partner. Also, the elimination of the control rule did not eliminate the narrower
estoppel liability. Accordingly, even without statutory control liability, a
limited partner may be estopped from denying personal liability to those
creditors who extend credit to the partnership on the reasonable belief that the
limited partner is in fact a general partner. Moreover, and more
controversially, the creditor’s reasonable belief may be based upon the limited
partner’s participation in control even though statutory control liability has
been eliminated for participation in control. Ultimately, the elimination of
control without the addition of a separate statutory basis for estoppel liability
presents a trap for the unwary limited partner who, free from the shackles of
control liability, believes that s/he may participate in the control of the
partnership with impunity.

The control rule liability theory was designed to create personal liability of a
limited partner equal to that of a general partner when a limited partner “acted
like a general partner.” Early notions of a limited partnership did not conceive
of the entity as a “partnership” at all but rather an association in which limited
partners were members. When the limited partner participated in the control of
the entity much like a general partner, however, the statutory control standard
literally created a general partnership between the general partner and the
overly active limited partner. Although conceived as a form of statutory
liability, then available linkage statutes making general partnership law
applicable when not inconsistent with limited partnership statutes could have
provided the same framework. Presumably these general partnership laws were
not separately invoked because of the availability of the limited partnership
control rule liability. Importantly, just as one becoming a general partner with
another became personally liable for all the obligations of the partnership, a
limited partner similarly situated became personally liable for all the
obligations of the limited partnership. This meant that specific creditor reliance
was not a required ingredient of the personal liability. Accordingly, a limited
partner became personally liable under the control theory to all creditors of the
partnership regardless of whether a creditor extended credit to the partnership
upon the specific faith that the limited partner was a general partner rather than
a limited partner. Indeed, the creditor could recover from the limited partner
even though the creditor had no knowledge of the limited partner’s
participation in the control of the partnership’s affairs. The evolution of control
liability through the various uniform laws may be summarized as follows:

- CONTROL LIABILITY. Control liability evolved with and without
statutory reliance elements because of various interpretations and
amendments:
- **No Reliance Control Liability (1916 and 1976).** ULPA 1916 section 7 imposed full “general partner liability” when a limited partner participated in the control of the partnership. The chosen language made it unclear whether creditor reliance was a factor in this liability determination. RULPA 1976 section 303(a) clarified that a level of participation “substantially the same as” that of a general partner created liability equal to that of a general partner. This liability form was imposed even when a partnership creditor had no contact with the limited partner and was not aware of the limited partner’s participation. This liability form was eliminated by RULPA 1985 section 303(a) and, of course, was not resurrected by ULPA 2001 section 303. Moreover, the ULPA 2001 “de-linkage” from general partnership laws means that a limited partner could conceivably engage in conduct that would have created a general partnership with the general partner under general partnership law but does not do so under limited partnership law. While a questionable policy decision, given the historic attack on the limited partner liability shield, it is certainly defensible.

- **Reliance Control Liability.** RULPA 1985 eliminated the full no reliance liability that arguably existed in ULPA 1916 and clearly existed under RULPA 1976. It further clarified that the remaining narrow liability was based exclusively upon specific creditor reliance and then only to those creditors. RULPA 1976 section 303 created special reliance liability to a limited partner to protect a creditor who extended credit upon the faith and “knowledge” of a limited partner’s participation in control. Participation in control was finally defined to exclude a non-exclusive list of safe harbor activities. The fact that a limited partner was named as such in a filed certificate of limited partnership was constructive notice that the person was a limited partner (but not constructive notice that the person was not also a general partner). RULPA 1985 section 303 expanded the list of safe harbor activities and eliminated the requirement that the creditor have knowledge of the limited partner’s participation. It substituted a more general reasonable belief standard which presumably did not require specific reliance. By eliminating the requirement that a limited partner be named in the certificate, RULPA 1985 also eliminated any possible constructive notice that a person was a limited partner. A person named as a general partner was constructive notice that such a person was a general partner, but a person not named as a general partner was not constructive notice that the person was not a general partner.
ULPA 2001 continued this notice pattern but eliminated any notion of control-based reliance entirely, at least if the liability was to be based upon participation in control.

Contrasted with control liability, “estoppel” liability theory has always required specific creditor reliance and, therefore, often creates a much narrower pattern of limited partner liability. Estoppel liability is generally more difficult to prove. Given the historical primacy of the easier control liability theory, estoppel has played a minor judicial role in creditor efforts to extend personal liability to limited partners. Indeed, few cases have interpreted the evolving and broader control liability form itself.

Given the recent elimination of statutory control liability, this Article hypothesizes that estoppel liability will return with a vengeance as the only remaining legitimate theory to make a limited partner personally liable to a creditor who extended credit to a limited partnership upon the reasonable faith that the limited partner was in fact a general partner. Moreover, given the continued extremely narrow use of the “constructive notice” function of facts stated in the certificate of limited partnership, the reasonableness of that reliance will depend upon equitable inquiry factors such as the size and sophistication of the credit extension, the sophistication of the creditor, and the nature of the limited partner deception. The evolution of the application of estoppel liability to limited partnerships through the various uniform laws may be summarized as follows:

- **ESTOPPEL LIABILITY.** Estoppel liability has always applied to limited partnerships but has been seldom used because of the prevalence of control liability. Now that control liability has been eliminated, estoppel liability may be expected to police legitimate limited partner deceptions of creditors who extend credit on the faith that the limited partner is in fact a general partner. The application of estoppel liability is an indirect matter that relies upon either direct linkage statutes or the continued application of law and equity.

  - ULPA 1916. The general partnership UPA 1914 section 16 partner estoppel statute applied “indirectly” to limited partnerships through UPA 1914 section 6(2), which applied general partnership law to limited partnerships unless it was inconsistent with limited partnership law. ULPA 1916 itself was silent about the application of UPA 1914 provisions.
  
  - RULPA 1976 AND RULPA 1985. Beginning with RULPA 1976 and continuing with RULPA 1985, UPA 1914 provisions were applied “directly” by a specific limited partnership statute. RULPA 1976 and RULPA 1985 section 1105 provides that general partnership law applies to limited partnerships in any case.

– ULPA 2001. Although ULPA 2001 “de-linked” limited partnership law from general partnership law in an attempt to make limited partnership law “free standing,” ULPA 2001 section 107(a) provides that the principles of law and equity (including estoppel) continue to govern limited partnerships. Moreover, ULPA 2001 section 107 commentary suggests that general partnership law will have continuing relevance where the differences in general and limited partnership law are immaterial. Estoppel is certainly one of those areas.

Given this background, Part II below traces the development of control rule liability throughout its nearly one hundred-year existence. This exploration helps to frame and explain why and whether estoppel liability might remain and why it has not been earlier invoked.

II. THE EVOLUTION OF “CONTROL RULE” LIABILITY AND THE ROLE OF RELIANCE IN UNIFORM LIMITED PARTNERSHIP ACTS FROM 1916 TO 2001

A. Introduction

Then University of Pennsylvania Law School Dean and Professor William Draper Lewis, the principal architect of ULPA 1916, designed it to dramatically increase the reliability and stability of the limited partner liability shield. His overarching paradigm was that a limited partner was not a “partner” at all, as that term was defined under UPA 1914. He conceived the term “limited partner” as merely reflecting accepted terminology but that such a person was really a member of an unincorporated association with two classes of members. That so, he conceived that various breaches of the statutory requirements to form and operate the association should not result in the limited partner “becoming” a general partner. Thus, a limited partner did not become liable as a general partner unless s/he participated in the control of the business under the standard set forth under ULPA 1916 section 7. Even then, the resulting liability was arguably only to particular creditors who had detrimentally relied upon that participation to be deceived into thinking the limited partner was really a general partner. The resulting limited liability was designed to overrule prior case law under variant pre-existing state limited partnership laws.

Unfortunately, Professor Lewis’ conception of the limited partner was not uniformly respected or perhaps understood—even in states that had adopted ULPA 1916. While a few courts followed the ULPA 1916 lead and required creditor reliance to impose liability upon a limited partner, most failed to adopt or follow the reliance requirement. Worse, those decisions treated a limited partner participating in the control of the partnership as a general partner.
Since reliance was not a factor, once liability was imposed it extended to all creditors—much the same as a general partner. Some blame can be cast upon the ULPA 1916 statutory language, which created liability when a limited partner participated in control but neither defined the term control nor specifically mentioned reliance as a factor. Only the commentary placed reliance in the center of the analysis.

These over-expansive decisions interpreting ULPA 1916 created the need for a major 1976 revision of the ULPA 1916 section 7 control liability language. The improvement arrived with RULPA 1976. RULPA 1976 section 303 clarified that two forms of liability were at stake: firstly, full general liability as a general partner when a limited partner’s participation in control was “substantially the same” as that of a general partner coupled with a non-exclusive listing of activities that were not to be considered participation; and secondly, specific creditor reliance liability where a creditor reasonably relied upon actual knowledge of the limited partner’s participation in control (except for those activities excluded from control participation). While RULPA 1976 thankfully incorporated the reliance test into the statutory language thus clarifying such liability under ULPA 1916, it also perpetuated the control rule liability even when reliance was not present. Arguably, this was an extension of liability not previously contemplated by Professor Lewis and its “introduction” was controversial on policy grounds since a creditor could proceed against a limited partner even in the absence of any deception and thus obtain a clear windfall.22 The following chart reveals the relevant statutory rules and sources from 1914 through 2001:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>§ 7 (limited partner liable only if takes part in the control of the business)</td>
<td>§ 303 (Divided control liability into two parts: (i) Substantially Same Silent GP Rule—Full general partner liability when LP participation is substantially same)</td>
<td>§ 303 (eliminated “substantially same” test; shifted from actual knowledge to reasonable belief test; and expanded)</td>
<td>§ 303 (eliminated the control rule and provided no liability even if participates in management and control)</td>
<td></td>
</tr>
</tbody>
</table>

22. See UPA 1914 §§ 6-7; RUPA § 202. A similar “windfall” benefits creditors who extend credit to one person not realizing that s/he is a partner with a second person and then later impose liability upon the second person as well. The unintended formation of a general partnership has long been associated with disastrous consequences and today remains as virtually the only liability form where one can unintentionally become liable to creditors of the entity not known to have been formed. Partly this is because the formation of a general partnership does not depend upon the intent of the parties or any public filing. See UPA 1914 §§ 6-7; RUPA § 202.
that of a general partner, and (ii) *Less Than Substantially Same Rule*—Liability only to those creditors specifically relying upon actual knowledge of lesser participation to believe LP was a GP. Various *statutory safe harbors* based on common law added to make clear what activity will not count as participation in control

| Certificate Partner Designation Requirements | § 2 (certificate must designate each general and limited partner) | § 201 (certificate must designate each general and limited partner) | § 201 (certificate must designate only each general partner) |
| Notice | None | § 208 (certificate “positive” constructive notice that a designated LP is a LP and that a designated GP is a GP but not “negative” constructive notice that a LP not also listed as a GP was not a GP) | § 208 (eliminated certificate notice effect as to limited partners but retained positive constructive notice as to designated general partners) |
| Statutory Gaps & Linkage Rules | UPA § 6(2) | § 1105 | § 1105 |

None | (Prefatory Note)
B. The ULPA 1916 Section 7 Control Rule

ULPA 1916 was based on the 1822 New York limited partnership statute and the 1907 English Limited Partnership Act. At the time ULPA 1916 was adopted by the National Conference of Commissioners on Uniform State Laws, it was assumed that, under common law and the then existing UPA 1914, a creditor could lend money to a business without forming a general partnership with the debtor. This meant that the creditor would not become liable for any “partnership” obligations related to the debtor’s business by merely accepting a share of profits as interest to compensate the creditor.

The picture changed when a lender, in addition to normal creditor protections, assumed some measure of “control” over the debtor’s business operations. In this latter case, the risk of the lender forming a partnership with

---


The system of limited partnerships, which was introduced by statute into this State, and subsequently very generally adopted in many other States of the Union, was borrowed from the French Code. (3 Kent, 36; Code de Commerce, 19, 23, 24). . . . [I]t has existed in France from the time of the middle ages; mention being made of it in the most authentic commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar Latinity of the middle ages it was styled commenda, and in Italy accommoda. In the statutes of Pisa and Florence, it is recognized so far back as the year 1166; also in the ordinance of Louis-le-Hutin, of 1315; the statutes of Marseilles, 1253; of Genoa, of 1588. In the middle ages it was one of the most frequent combinations of trade, and was the basis of the active and widely-extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean, was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age, and even traveled under the protection of the arms of the Crusaders to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste, or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading classes, and brought the Commons into position as an influential estate in the Commonwealth.

Lewis, supra, at 716.

24. Ltd. P’ships Act, 1907 (Eng.).

A limited partnership must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners, who shall at the time of entering into such partnership contribute thereto a sum or sums as capital or property valued at a stated amount, and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

Id. at ch. 24, § 4 (2).

25. Lewis, supra note 23, at 719.
the debtor increased.26 This conception and role of a “limited partner” permeated the design of ULPA 1916 and the liability of a limited partner and is easily recognized in the early control rule language. ULPA 1916 section 7 provided: “A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.”27

As drafted, section 7 merely reflected the then understanding of law regarding the formation of a general partnership as applied to third party loans to a business.28 Indeed, William Draper Lewis thought a limited partner was not a “partner” at all in any true sense of the word and that a limited partnership was not a “partnership” in any similar sense because the true limited partner was not carrying on a business “with” the general partner or the partnership.29 Professor Lewis envisioned a limited partner as a profit-share creditor who would not become a partner absent participation in the control of the business. When that occurred, he viewed the enterprise as a general partnership, at least between the general partner and the control participating creditor-limited partner. ULPA 1916 was thus drafted for other reasons—namely to negate other problems present in state limited partnership laws.

The most prevalent problem was that state limited partnership laws were drafted at a time when any interest in a business made the holder a “partner” and therefore liable for the obligations of the “partnership” business.30 Consequently, courts interpreted those statutes with two fundamental principles in mind. Firstly, a limited partner is a partner like all others unless and except to the extent the person can establish exact and precise conformance with the statutory prerequisites for limited liability.31 Other commentators have noted pre-ULPA 1916 strict statutory construction with regard to limited liability for

27. ULPA 1916 § 7 (emphasis added).
28. ULPA 1916 § 2. ULPA 1916 section 2 set forth the requirements to be contained in a filed certificate of formation and declared that a limited partnership was formed at the time when there was substantial compliance with the filed certificate. Section 2(1)(a)(IV) required the certificate to name every general and limited partner but did not state the effect of failing to name a person as a limited partner or as a general partner. Moreover, UPA 1914 section 3 considered knowledge and notice but did not address the question of whether a person has notice of facts contained in a file document.
29. See Lewis, supra note 23, at 724; UPA 1914 § 6(1). As discussed later, Lewis envisioned that a limited partner was simply a member of an association with two classes of members and thus failures of the partnership process did not result in the limited partner being treated as a general partner. Lewis, supra note 23, at 718. Professor Lewis lamented that American businesses were essentially forced to choose between the corporation and general partnership and a large part of this failure was due to the failure of the limited partnership to meet business needs. Id.
30. Lewis, supra note 23, at 720.
31. Lewis, supra note 23, at 720.
a limited partner.\textsuperscript{32} Secondly, to enforce this interpretation, any minute failure with regard to the formalities or requirements of the certificate and any minute participation in the conduct of the business means that a person dealing with the partnership may consider the limited partner a partner in all respects and liable for the obligations of the business as the general partner.\textsuperscript{33} When coupled with the fact that any misstatement in the certificate by any one limited partner made all limited partners liable as a general partner, Lewis observed that the contemporary pre-ULPA 1916 limited partnership was practically confined to those with but a single limited partner.\textsuperscript{34} Personal liability for a false certificate resulted regardless of whether the other limited partners had any reason to believe the statement was untrue and regardless of whether there was any detrimental reliance by any creditor.\textsuperscript{35} Accordingly, Lewis stated the central purpose of ULPA 1916 as follows:

The act proceeds on the assumption that no public policy requires a person who contributes to the capital of the business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business, provided creditors have no reason to believe at the times their credits were extended that such person was so bound. It, therefore, deals in a radically different manner from former limited partnership acts with the consequences of a false statement in the certificate.\textsuperscript{36}

In order to carry out these purposes, ULPA 1916 reflected several specific statutory references. First, ULPA 1916 section 6 specifically provided that a false statement in the certificate created liability only to any limited partner who knew the statement to be false when signed (or later learned of the falsity but failed to counter the falsity before the detrimental reliance occurred) but then only to one who suffered loss by reliance on the statement.\textsuperscript{37} Accordingly, section 6 absolved innocent limited partners and further provided that even limited partners who knew of the false statement were only liable as a general partner to those creditors who extended credit on the faith of the accuracy of the statement and thereafter suffered a loss as a result of its falsity (specific reliance). Similarly, ULPA 1916 section 11 reflected that a person who

\textsuperscript{33} Lewis, supra note 23, at 720.
\textsuperscript{34} Lewis, supra note 23, at 721.
\textsuperscript{35} Lewis, supra note 23, at 721.
\textsuperscript{36} Lewis, supra note 23, at 723 (emphasis added).
\textsuperscript{37} Lewis, supra note 23, at 723.

Liability for false statements in certificate. If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false (a) At the time he signed the certificate, or (b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in Section 25(3).

ULPA 1916 § 6.
contributed capital to the partnership erroneously believing that s/he has become a limited partner is not, by reason of exercise of the rights of a limited partner, a general partner provided that upon learning of the mistakes the interest in profits is renounced.  

In this way, Lewis envisioned that the errors of prior state limited partnership laws would be corrected. By statute, ULPA 1916 made clear that a limited partner was not a “partner” at all, and thus failures of the partnership “process” did not make such a person a partner. “In the Uniform Act the person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner; he is a member of an association having two classes of members, the general partners, and the contributors called limited partners.”

Returning to the matter of control rule liability, ULPA 1916 section 7 provides that a limited partner does not become liable as a general partner unless he takes part in the control of the business. Professor Lewis did not comment extensively on the parameters of this provision in his later summary analysis of the act nor in the commentary to ULPA 1916 section 1 defining a limited partnership. Moreover, ULPA 1916 itself does not define the term “control.” However, Professor Lewis’ later explanatory article provides significant insights that the “control rule” was derived from and dependent upon a similar analysis in the prior UPA 1914 that determined when a creditor formed a partnership with the debtor by assuming some control over the debtor’s business. This construction is reinforced by several points. Firstly, Lewis did not consider a limited partner a “partner” in a partnership at all, at least within the contexts of a UPA 1914 general partner and general

38. Lewis, supra note 23, at 724.

Status of person erroneously believing himself a limited partner. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership having the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

ULPA 1916 § 11.


40. Lewis, supra note 23, at 724.

41. See generally Lewis, supra note 23.

42. ULPA 1916 § 1.

Limited partnership defined. A limited partnership is a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Id.

partnership. Secondly, he considered a person a partner when s/he participated in the “control” of the business, a concept important for determining the absence of a UPA 1914 partnership. Thirdly, ULPA 1916 defaults to UPA 1914 in situations not directly considered under ULPA 1916, at least for purposes of determining when a contributing limited partner becomes a “partner” with the general partner. In this case, ULPA 1916 “borrows” a control rule test articulated somewhat earlier in UPA 1914 for determining when a person becomes a partner but does not elaborate or further define the parameters of control. Indeed, the language of ULPA 1916 section 7 suggests that any participation in control results in a limited partner becoming liable as a general partner.

The commentary to ULPA 1916 section 1 is useful as it somewhat mitigates this harsh approach by requiring a limited partner to exercise “some degree” of control and further, by reason of that control exercise, creditors had “reason to believe” at the times their credits were extended that such person was a general partner (specific reliance). Indeed, the ULPA 1916 commentary indicates that it was purposefully designed to avoid this approach which may have been the prevalent view under other limited partnership statutes pre-existing ULPA 1916. “The limited partner, on any failure to follow the requirements in regard to the certificate or any participation in the conduct of his business, loses his privilege of limited liability and becomes, as far as those dealing with the business are concerned, in all respects a partner.” This over-extension of limited partner liability was the most prevalent reason for the drafting of ULPA 1916.

Thus, ULPA 1916 section 7 developed two mutually dependent variables to assure that minor and irrelevant control participations by a limited partner did not make that limited partner a general partner: (i) more than a minimalist participation in control was contemplated (as determined under the UPA 1914 standards for determining when a creditor forms a partnership with a debtor by virtue of participating in the control of the debtor’s business); and (ii) specific creditor detrimental reliance was required. Even a limited partner who violated the control test and participated too significantly in the business arguably would not become liable as a general partner (even though such behavior might have created such a general partnership under strict UPA 1914 standards) unless a creditor relied upon that participation. Even then, unlike a true general

44. See ULPA 1916 § 1 (referring to general and limited partners as “members” not partners). “First: In the draft the person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner. He is, however, a member of the association (see Sec. 1.).” ULPA 1916 § 1 cmt.
45. See UPA 1914 §§ 6-7.
46. See RUPA 1976 § 1105; ULPA 1916 § 29.
47. See Jacobs, supra note 43, at 286. This interpretation was never seriously entertained or adopted.
48. See ULPA 1916 § 1 cmt. (emphasis added); Lewis, supra note 23, at 723.
49. ULPA 1916 § 1 cmt.
50. ULPA 1916 § 1 cmt.
partner, liability extended only to that specific creditor who relied on the limited partner’s participation. Thus, ULPA 1916 envisioned creditor “reliance” as a critical and necessary component of limited partner liability.51

In part, these tests had “reliance” roots in other earlier UPA 1914 provisions similar to estoppel. For example, UPA 1914 section 16(1) provides that a person not actually a partner is nevertheless liable as an actual partner to those who have extended credit to the partnership on the faith that the person is a partner. The liability is premised upon a misrepresentation made directly by the person or by another person acting on that person’s behalf with consent. However, specific differences remained between limited partner liability based upon direct creditor reliance and more general estoppel.52

This envisioned limited role of “reliance” under ULPA 1916 was hardly universally recognized. Indeed, post-ULPA 1916 case law generally determined unlimited limited partner liability (as a general partner) 53 or no liability at all, 54 both based on the perceived degree of participation in control and neither based on specific creditor reliance.55 While a few cases followed the spirit of ULPA 1916 and required reliance to create liability,56 most cases

51. Wilke, supra note 32, at 518.
52. See Norman Abrams, Imposing Liability for “Control” Under Section 7 of the Uniform Limited Partnership Act, 28 CASE W. RES. L. REV. 785, 787-88 (1977). A specific reliance test requires the creditor to establish that credit was extended on the belief that the limited partner was a general partner and that this belief was created by the limited partner or by others with that partner’s approval. In this case, the limited partner would be liable to that particular creditor only. A more general estoppel test requires that the creditor establish that a reasonable person would believe that the limited partner was a general partner. Actual reliance is not necessary. A creditor could recover even if the creditor was aware that the limited partner was indeed a limited partner.

53. See Holzman v. De Escamilla, 195 P.2d 833 (Cal. 1948) (holding limited partners liable as general partners under control test because they dismissed manager, approved appropriate crops, and possessed authority over bank accounts but creditor reliance not mentioned); Gast v. Petsinger, 323 A.2d 371 (Pa. 1974) (holding two limited partners liable as general partners under control test because employed by and consulted with partnership, but creditor reliance not mentioned); see also Alan L. Feld, The ‘Control’ Test For Limited Partners, 82 HARV. L. REV. 1471, 1475 (1969).

54. See e.g., Plasteel Prods. Corp. v. Helman, 271 F.2d 354 (1st Cir. 1959) (limited partners executed certificate of limited partnership making their designate the general sales manager but the employment was never consummated and thus no participation in control but no mention of reliance—although plaintiff was the general partner such that reliance may have been waived); Weil v. Diversified Props., 319 F. Supp. 778 (D.D.C. 1970) (general partner suit arguing that limited partners liable as general partners for control participation but court determined no liability because section 7 primarily to protect creditors—not a general partner—and casual advice activities did not amount to participation in day-to-day control activities, but no mention of creditor reliance); Grainger v. Antoyan, 313 P.2d 848 (Cal. 1957) (limited partner employee not liable under control test because no power to hire or fire employees or control pricing as to partnership matters, but creditor reliance not mentioned or discussed as a liability factor); Trans-Am Builders, Inc. v. Woods Mill, Ltd., 210 S.E.2d 866 (Ga. 1974) (limited partner casual advice on construction project after finance failure did not amount to participation in control but no mention of creditor reliance).

55. Perhaps proving that courts tend to read and interpret statutory language and not its purpose as reflected by drafting comments. In this sense, ULPA 1916 was a “drafting failure” for failing to properly articulate the role of reliance directly in the statutory language of section 7.

56. Silvola v. Rowlett, 272 P.2d 287 (Colo. 1954) (creditor accountant sued limited partner for control liability but denied because he knew limited partner’s status as such and also the alleged activities were not
did not. As a result, the ULPA 1916 section 7 attempt to clarify prior law and clearly link “reliance” to limited partner liability for participation in control was a clear failure.\(^57\) These and other matters precipitated a 1976 revision whose efforts were primarily directed to strengthening the limited partner liability shield.

C. The RULPA 1976 Section 303 Control Rule

As with the original drafting of ULPA 1916, the potential liability of limited partners under that act was the single most important issue triggering a 1976 revision in RULPA 1976.\(^58\) As described earlier,\(^59\) courts failed miserably to incorporate Professor Lewis’ reliance test into the control rule articulated in ULPA 1916 section 7. Accordingly, when a limited partner was liable under the ULPA 1916 section 7 control rule, s/he was most often personally liable for all partnership obligations just as the general partner. Minute failures of the control rule anti-participation were therefore devastating, thus requiring statutory repair to ULPA 1916 section 7.

Indeed, Professor Lewis’ two factor test for control rule participation-based approach was in many cases substantially conflated. Lewis required a consideration of two factors: (i) the depth of participation in control; and (ii) those creditors who reasonably relied on that participation to extend credit reasonably believing that the limited partner was a general partner. In essence, RULPA 1976 section 303 attempted to make clear that reliance was a critical factor in limited partner liability in all cases except where the limited partner’s participation in control was substantially similar to that of a silent\(^60\) general partner.\(^61\) Moreover, participation in control was defined to include the pre-

---

\(^{57}\) See Abrams, supra note 52, at 787-88 (confusion existed because courts based liability upon different and various degrees of control and creditor reliance); Wilke, supra note 32, at 519.

\(^{58}\) RULPA 1976 Prefatory Note.

\(^{59}\) See supra Part I.B.

\(^{60}\) A silent general partner would be a person who in substance acts as general partner but, in form, claims to be a limited partner with limited liability. Such conduct would have imposed general liability upon a limited partner under ULPA 1916 and, in fact, case law generally followed this approach. See Holzman v. De Escamilla, 195 P.2d 833 (Cal. 1948); Jacobs, supra note 43, at 286.

\(^{61}\) RULPA 1976 Prefatory Comment.

Article 3 deals with the single most difficult issue facing lawyers who use the limited partnership form of organization: the powers and potential liabilities of limited partners. Section 303 lists a number of activities in which a limited partner may engage without being held to have so participated in the control of the business that he assumes the liability of a general partner. Moreover, it goes on to confine the liability of a limited partner who merely steps over the line of
1976 case law exclusions: (i) consulting with the general partner;\(^{62}\) (ii) acting as a surety for the general partner;\(^{63}\) (iii) advising the general partner regarding the partnership’s business;\(^{64}\) (iv) running an errand for the partnership;\(^{65}\) (v) advising third parties regarding the status of the partnership;\(^{66}\) (vi) bringing an action for dissolution and acting as a receiver;\(^{67}\) and (vii) taking possession of partnership property following dissolution.\(^{68}\)

In order to make clear the application of the control rule to a limited partner, RULPA 1976 promulgated a new section 303:

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he \[or she\] is also a general partner or, in addition to the exercise of his \[or her\] rights and powers as a limited partner, he \[or she\] takes part in the control of the business. However, if the limited partner’s participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he \[or she\] is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

1. being a contractor for or an agent or employee of the limited partnership or of a general partner;
2. consulting with and advising a general partner with respect to the business of the limited partnership;
3. acting as surety for the limited partnership;
4. approving or disapproving an amendment to the partnership agreement; or
5. voting on one or more of the following matters:
   (i) the dissolution and winding up of the limited partnership;
   (ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;

---

64. See Silvola v. Rowlett, 272 P.2d 287 (Colo. 1954); Jacobs, supra note 43, at 286.
65. See McKnight v. Ratcliff \& Johnson, 44 Pa. 156 (1863); Jacobs, supra note 43, at 286.
68. See Lawson v. Wiltner, 3 Phil. 122 (Pa. 1858); Jacobs, supra note 43, at 286.
The incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
(iv) a change in the nature of the business; or
(v) the removal of a general partner.

The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him [or her] in the business of the limited partnership.

(d) A limited partner who knowingly permits his [or her] name to be used in the name of the limited partnership, except under circumstances permitted by Section 102(2), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.69

The different language was designed to accomplish several goals. The first sentence of RULPA 1976 section 303(a) retained the ULPA 1916 section 7 language “takes part in the control of the business.” The RULPA 1976 comments reveal this consistency was designed to assure that judicial decisions interpreting that language in section 7 remained effective under section 303 unless and to the extent expressly modified by new statutory language.70

The second sentence was new and specifically intended to address the ULPA 1916 unfairness attached to making a limited partner liable as a general partner for ambiguous acts which minimally overstepped the control line. Accordingly, the second sentence makes a limited partner personally liable as a general partner only when the participation in control is substantially the same as the exercise of the powers of a general partner.71 Thus, RULPA 1976 section 303(a) reflected two distinct policy decisions, two forms of liability, and required specific reliance to impose liability where the participation is less than substantially the same as a general partner.

- **Substantially Same Participation Rule.** When a limited partner’s participation in control is substantially the same as a general partner, the limited partner is liable as a general partner (implied implication) (full general partner liability). In this case, the creditor need not have actual knowledge of participation in control and need not have relied on that participation to extend credit. Some would argue this is a creditor windfall because the creditor was not deceived and therefore deserves no protection.72

- **Less Than Substantially Same Participation Rule.** When a limited

---

69. RULPA 1976 § 303.
70. RULPA 1976 § 303 cmt.
71. RULPA 1976 § 303 cmt.
partner’s participation in control is not substantially the same as a
general partner, the limited partner will be liable only to those creditors
who extended credit reasonably believing the limited partner was a
general partner (express implication and retained ULPA 1916 section 7)
(liability only to those who reasonably relied). In this case, the creditor
must have actual knowledge of the participation and reasonably relied
upon that participation to extend credit.

The second interpretation is consistent with both ULPA 1916 section 7 as
well as its usage in RULPA 1976 section 303(a). Without the second
interpretation, the first sentence retaining liability for participation in the
control of the business would have no meaning. Thus, the entire structure of
section 303(a) has meaning only if one accepts two levels of liability. Firstly,
full liability as a general partner, limited by the second sentence to those
circumstances where the level of participation is substantially the same as a
general partner and where no specific creditor reliance is necessary to create
full liability. Secondly, partial specific reliance liability where the participation
was less than that of a general partner but nevertheless substantial enough to
create justified reliance on the part of a specific creditor.73

Importantly, ULPA 1976 section 303(b) set forth several “safe harbor”
activities, which a limited partner could carry on without being deemed to have
taken part in the control.74 These specifically enumerated categories of
“participation” were viewed either as those necessary to protect the limited
partner’s investment as any normal inactive investor75 or those not exercised in
the role of a limited partner but by any stranger interacting with the
partnership.76 Moreover, the express activities are not exclusive.77

These safe harbor categories shielded limited partners from both general
liability and direct creditor reliance liability. Both forms of liability required
that the limited partner participate in control. These forms of participation
were not so viewed and intended to make the limited partnership more usable
by freeing up limited partners to act in a reasonable manner to protect their
investment and as a stranger transacting business with the partnership—both
without fear of losing the liability shield.

73. See Kessler, supra note 72, at 164 (arguing that rather than clarifying the parameters of liability, the
second sentence merely transfers the uncertainty from “participation in control” to what constitutes
“substantially the same”).

74. ULPA 1976 § 303 cmt. While these safe harbors reflect prior case law, they largely adopt prior
statutory amendments from Delaware, Nevada, and Washington. See Kessler, supra note 72, at 165.

75. ULPA 1976 § 303(b)(4)-(5) (discussing amendment of partnership agreements and voting).

76. ULPA 1976 § 303(b)(1)-(3) (addressing contractors, employees, and agents of the partnership,
consulting with and advising a general partner, and acting as a surety); see Jacobs, supra note 43, at 286.

77. RULPA 1976 § 303(c); see Kessler, supra note 72, at 165 (arguing RULPA 1976 language an
improvement, but does not go far enough). The Kessler article also argues that the participation in control test
is inappropriate in that if there is no deception to a creditor then a mere creditor windfall occurs. Kessler, supra
note 72, at 165.
Perhaps the most significant contribution of the RULPA 1976 section 303 was that it clarified that creditor reliance was necessary to create specific creditor liability and no other liability existed unless the limited partner’s participation in control was substantially the same as a general partner. Courts had easily assumed that participation in control substantially the same as a general partner would create general unlimited liability even without reliance. Section 303 reinforced this, but added several important safe harbors to shield the limited partners from that result based upon defined acts. Since these safe harbor acts were judicially created and recognized prior to 1976, this was a necessary statutory amendment but more clarifying. However, prior to 1976, reliance liability was expressed only in the commentary and not in the express language of ULPA 1916 section 7. Thus, arguably the most important contribution of RULPA 1976 section 303 was to move the reliance limitation from the commentary to the statutory language.

Since Professor Lewis conceived limited partner liability only when a creditor was deceived into believing that a limited partner was a general partner, the addition of general and unlimited liability where participation was “substantially the same” as that of a general partner, regardless of whether a creditor was deceived, was an unfortunate extension of liability. It not only perpetuated the role of the control rule in determining liability, but it also did so even when the creditor was not deceived and did not rely upon the misrepresentation. This is particularly surprising given that RULPA 1976 section 303(d) creates liability to creditors without reliance when a limited partner permits his name to be used in the name of the partnership.

Given that the filed certificate of limited partnership adequately informs creditors of the identity of general partners,78 arguably control rule liability should have been eliminated in RULPA 1976 rather than expanded and remaining liability based upon equitable reliance79 or estoppel arguments.80 While these two tests differ, they provide an adequate basis to protect creditors who have been misled by a limited partner parading as a general partner but seeking refuge as a limited partner.81

The required terms of a certificate of limited partnership were also modified from ULPA 1916. Consistent with ULPA 1916, RULPA 1976 section 201(a)(4) specifically required the certificate to list both general and limited

78. RULPA 1976 § 201(a)(3).
79. RULPA 1976 § 303(a), (d).
80. UPA 1914 § 16.
81. See Abrams, supra note 52, at 787-88; see also Kessler, supra note 72, at 167. A specific reliance test requires the creditor to establish that credit was extended on the belief that the limited partner was a general partner and that this belief was created by the limited partner or by others with approval. In this case, the limited partner would be liable to that particular creditor only. A more general estoppel test requires that the creditor establish that a reasonable person would believe that the limited partner was a general partner. Actual reliance is not necessary. A creditor could recover even if the creditor was aware that the limited partner was indeed a limited partner.
partners. In a new section titled “Scope of Notice,” RULPA 1976 section 208 attempted to quantify the meaning of both a required certificate designation and the failure to designate under the requirement. Section 208 provided that a properly filed certificate was notice of the fact that a limited partner stated therein was indeed a limited partner. The Commentary made clear that the effect of the certificate naming a limited partner was to be “constructive notice” of the status of limited partners identified therein.82 However the commentary concludes with the following broad statement: “While this section is designed to preserve the limited liability of limited partners, the notice provided is not intended to change any liability of a limited partner which may be created by his action or inaction under the law of estoppel, agency, fraud, or the like.”84 Accordingly, while the notice provision appeared to protect a limited partner named in the certificate from being considered a general partner by virtue of any participation in control, the commentary clearly indicated this was not true. At the same time, RULPA 1976 section 303(a) clarified with its “specific reliance” liability provision that a limited partner’s liability for participation in control less than substantially the same as a general partner extended only to third parties with “actual knowledge” of the participation in control. Presumably, since the “constructive notice” provision of RULPA 1976 section 208 did not preclude the application of equitable estoppel, the constructive notice did not rise to the level of actual knowledge in order to negate estoppel. Moreover, RULPA 1976 section 1105 provided that in any case not governed by the limited partnership act, the UPA 1914 provision applicable to partnerships generally applied.85

D. The RULPA 1985 Section 303 Control Rule

RULPA 1985 was designed to further modernize the law regarding limited partnerships. While recognizing that the partnership agreement is the central document of importance, RULPA 1985 further clarified the notice role of the certificate of limited partnership and thus eliminated unnecessary information from its required contents. The most important change was the elimination of the requirement to designate the names of the limited partners.86

82. RULPA 1976 § 208 cmt. The term “constructive notice” was not defined, but presumably the term meant that third parties who had not actually read the certificate were treated as if they had been provided a copy of that notice. In order to be charged with knowledge of the facts therein, the third party would of course have to actually read the certificate or be told the contents.
83. Id.
84. Id.
85. RULPA 1976 § 1105 cmt. (providing provision intended to merely follow ULPA 1916 section 6, which provided for liability for false statements).
86. RULPA 1985 Prefatory Comment.

Article 2 collects in one place all provisions dealing with execution and filing of certificates of limited partnership and certificates of amendment and cancellation. When adopted in 1976, Articles 1 and 2 reflected an important change in the <<prior>> statutory scheme: recognition that the
As with RULPA 1976, the RULPA 1985 amendments were most directly concerned with the liability of limited partners who participated in the control of the business. 87 As with RULPA 1976, RULPA 1985 made the limited partner liability shield more secure in order to increase the comfort with the limited partnership vehicle. RULPA 1985 section 303 provided:

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] participates in the control of the business. However, if the limited partner participates in the control of the business, he [or she] is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner.

(b) A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by doing one or more of the following:

(1) being a contractor for or an agent or employee of the limited partnership or of a general partner or being an officer, director, or shareholder of a general partner that is a corporation;

(2) consulting with and advising a general partner with respect to the business of the limited partnership;

(3) acting as surety for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership;

basic document in any partnership, including a limited partnership, is the partnership agreement. The certificate of limited partnership is not a constitutive document (except in the sense that it is a statutory prerequisite to creation of the limited partnership), and merely reflects the most basic matters as to which government officials, creditors, and others dealing or considering dealing with the partnership should be put on notice. This principle is further implemented by the 1985 Act’s elimination of the requirement, carried from the original 1916 Act into the 1976 Act, that the certificate of limited partnership set out the name, address, and capital contribution of each limited partner and certain other details relating to the operation of the partnership and the respective rights of the partners. The former requirement served no significant practical purpose while it imposed on limited partnerships (particularly those having large numbers of partners or doing business in more than one state) inordinate administrative and logistical burdens and expenses connected with filing and amending their certificates of limited partnership.

Id.

87. RULPA 1985 Prefatory Comment.

Article 3 deals with the single most difficult issue facing lawyers who use the limited partnership form of organization: the powers and potential liabilities of limited partners. Section 303 lists a number of activities in which a limited partner may engage without being held to have so significantly participated in the control of the business that he acquires the liability of a general partner. Moreover, it goes on to confine the liability of a limited partner who merely participates in control to situations in which persons who actually know of that participation in control are misled thereby to their detriment into reasonably believing the limited partner to be a general partner. This "detrimental reliance" test, together with an expansion of the “laundry list” of specific activities in which limited partners may participate without incurring liability, are among the principal innovations in the 1985 Act.

Id.
(4) taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership;

(5) requesting or attending a meeting of partners;

(6) proposing, approving, or disapproving, by voting or otherwise, one or more of the following matters:

   (i) the dissolution and winding up of the limited partnership;
   (ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership;
   (iii) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
   (iv) a change in the nature of the business;
   (v) the admission or removal of a general partner;
   (vi) the admission or removal of a limited partner;
   (vii) a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;
   (viii) an amendment to the partnership agreement or certificate of limited partnership; or
   (ix) matters related to the business of the limited partnership not otherwise enumerated in this subsection (b), which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners;

(7) winding up the limited partnership pursuant to Section 803; or

(8) exercising any right or power permitted to limited partners under this [Act] and not specifically enumerated in this subsection (b).

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him [or her] in the business of the limited partnership.

(d) A limited partner who knowingly permits his [or her] name to be used in the name of the limited partnership, except under circumstances permitted by Section 102(2), is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner. 88

RULPA 1985 thus made several modifications to the RULPA 1976 section 303 control rule liability test and the related provisions dealing with the scope and effect of information required to be contained in the filed certificate of limited partnership. Firstly, the RULPA 1985 section 208 scope of notice provision was watered down or downgraded to lessen the notice effect of the

88. RULPA 1985 § 303.
filed certificate. RULPA 1985 section 201(a)(4) eliminated the requirement that limited partners be named in the certificate but retained the required naming of every general partner. Because of this, RULPA 1985 section 208 had to be changed to alter the notice effect regarding the status of a person as a limited partner. Accordingly, RULPA 1985 section 208 was amended to provide that the certificate was “notice” that persons named in the certificate as general partners were indeed general partners. Also, the commentary was amended to dampen the effect of the notice effect regarding the status of partners as limited partners. The comment specifically noted that the fact that a person was not named as a general partner was not “implied notice” that a limited partner was not also a general partner.

Amendments and changes to RULPA 1976 section 303 were more direct. Generally, the changes to section 303 were designed to strengthen the limited partner liability shield. The extremely important second sentence in section 303(a) was drastically modified. The first part of the sentence creating personal liability for a limited partner whose level of participation was “substantially the same” as a general partner was eliminated and the safe harbor provisions were expanded. The commentary specifically noted that

89. RULPA 1985 § 208. “The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as general partners are general partners, but it is not notice of any other fact.” Id. This provision was carried over to ULPA 2001 section 103(c).

90. RULPA 1985 § 208 cmt.

Section 208 first appeared in the 1976 Act, and referred to the certificate’s providing constructive notice of the status as limited partners of those so identified therein. The 1985 Act’s deletion of any requirement that the certificate name limited partners required that Section 208 be modified accordingly. By stating that the filing of a certificate of limited partnership only results in notice of the general liability of the general partners, Section 208 obviates the concern that third parties may be held to have notice of special provisions set forth in the certificate. While this section is designed to preserve by implication the limited liability of limited partners, the implicit protection provided is not intended to change any liability of a limited partner which may be created by his action or inaction under the law of estoppel, agency, fraud, or the like.

Id.

91. RULPA 1985 § 303(a).

92. RULPA 1985 § 303(b)(6)-(8).

(6) proposing, approving, or disapproving, by voting or otherwise, one or more of the following matters:

• the dissolution and winding up of the limited partnership;
• the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership;
• the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
• a change in the nature of the business;
• the admission or removal of a general partner;
• the admission or removal of a limited partner;
• a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners;
• an amendment to the partnership agreement or certificate of limited partnership; or
• matters related to the business of the limited partnership not otherwise enumerated in this
the deletion was designed to eliminate full general liability when the third party had no knowledge of the conduct. 93 This was a clear change in direction from that envisioned by Professor Lewis, who thought liability should follow a traditional partnership determination. 94 Accordingly, full liability for a “silent general partner” was eliminated. 95

Secondly, the actual knowledge limitation in the second sentence relating to specific reliance liability was modified. 96 Specifically, the language “with actual knowledge of his participation in control” was eliminated and the language “reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner” was substituted. The comments do not clarify the reason for the change but the substituted language does not directly require reliance. 97 Such reliance could easily be based upon a reasonable belief rather than actual knowledge and thus the substituted language appears to have lowered the standard for specific reliance-based control liability. In addition, it is important that RULPA 1985 did not amend or otherwise qualify the application of RULPA 1985 section 1105. That section provides that in any subsection (b), which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners;

(7) winding up the limited partnership pursuant to Section 803; or

(8) exercising any right or power permitted to limited partners under this [Act] and not specifically enumerated in this subsection (b).

Id.

93. RULPA 1985 § 303(a) cmt.

The second sentence of Section 303(a) reflects a wholly new concept in the 1976 Act that has been further modified in the 1985 Act. It was adopted partly because of the difficulty of determining when the “control” line has been overstepped, but also (and more importantly) because of a determination that it is not sound public policy to hold a limited partner who is not also a general partner liable for the obligations of the partnership except to persons who have done business with the limited partnership reasonably believing, based on the limited partner’s conduct, that he is a general partner.

Id.

94. See supra note 5 and accompanying text.

95. See RULPA 1985 Prefatory Comment. RULPA 1985 specifically struck the following prefatory comment from RULPA 1976:

General liability for partnership debts is imposed only on those limited partners who are, in effect, “silent general partners.” With that exception, the provisions of the new Act that impose liability on a limited partner who has somehow permitted third parties to be misled to their detriment as to the limited partner’s true status confine that liability to those who have actually been misled.

RULPA 1976 Prefatory Comment.

96. RULPA 1985 § 303(a).

(a) Except as provided in subsection (d), a limited partner is not liable for the obligations of a limited partnership unless he [or she] is also a general partner or, in addition to the exercise of his [or her] rights and powers as a limited partner, he [or she] participates in the control of the business. However, if the limited partner participates in the control of the business, he [or she] is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner.

Id.

case not provided for in the limited partnership statute, UPA 1914 applies. This would include the UPA 1914 section 16 partner by estoppel provision. This construction is particularly obvious given that RULPA 1985 does not directly provide for estoppel but the commentary to RULPA 1985 section 208 does so provide. By way of summary, RULPA 1985 modified limited partner liability as follows:

- **Substantially Same Participation Rule.** Full liability as a silent general partner was eliminated, and along with it control liability without reliance (however, UPA 1914 section 16 estoppel liability was retained via the RULPA 1985 section 1105 linkage to UPA 1914).

- **Less Than Substantially Same Participation Rule.** Regardless of the level of participation, personal liability results only from a creditor’s specific reliance upon a limited partner’s participation reasonably believing that the limited partner is a general partner.

Case law discussing the effect of these amendments is sparse. One particular case of note quite specifically discusses the RULPA 1985 amendments and their effect on reliance. *Gateway Potato Sales v. G. B. Investment Co.*[^98] analyzed Arizona law on this point. In 1985, Sunworth Corporation (sole general partner) and G. B. Investment Company (sole limited partner) formed an Arizona limited partnership, Sunworth Packing. The limited partnership was to engage in potato farming in Arizona. Robert Ellsworth, the president of the corporate general partner, contacted Robert Pribula at Gateway Potato Sales for the purpose of purchasing seed potatoes on behalf of the limited partnership. Pribula was hesitant to do business with Ellsworth because of his prior bankruptcy. He proceeded to sell seed to the partnership on credit upon the faith of Ellsworth assurances that his partner was a large financial institution which was actively involved in the business. Gateway did not meet any G. B. Investment employees and never had any direct contact with any of its employees. Its case was based entirely upon the representations of the general partner concerning the limited partner involvement. Upon non-payment, Gateway sued the limited partner G. B. Investment Company.

Arizona had recently adopted the RULPA 1976 version of section 303 liability but had not adopted the RULPA 1985 amendments to section 303.[^99] Accordingly, a limited partner was liable under two theories of control participation: (i) liability as a general partner if the participation in control was substantially the same as a general partner; and (ii) specific creditor liability to those who transact business with the partnership with “actual knowledge” of

that participation. The trial court granted the limited partner’s motion for summary judgment because there was no “direct contact” by the third party with the limited partner and thus the credit was not extended with “actual knowledge” of the limited partner’s participation.

The court of appeals reversed as a matter of law. The court reasoned that when liability is premised upon limited partner participation, which is “substantially the same” as that of the general partner, RULPA 1976 section 303(a) does not require actual knowledge and hence no direct reliance for purposes of determining full liability. Direct actual knowledge and hence direct contact with the limited partner is only required when liability is premised upon specific reliance.

E. The ULPA 2001 Section 303 Control Rule

Given the difficulty in defining “control,” determining when and under what circumstances liability should be imposed for “participation,” ULPA 2001 simply eliminated all vestiges of the venerated control rule. The Prefatory Note indicates that the control rule is an anachronism in a world with fully-shielded entities.

At the same time, ULPA 2001 section 201(a)(3) continues the RULPA 1985 rule that general but not limited partners are required to be named in the certificate of limited partnership. However, ULPA 2001 section 103(c) provides that the function of the certificate operates as notice only of the fact that a person named as a general partner therein is a general partner. The

100. Gateway Potato Sales, 822 P.2d at 493.
101. Id. at 495.
102. Id. at 497.
103. Id.
104. ULPA 2001 § 303.

No Liability as Limited Partner for Limited Partnership Obligations. An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

Id.

105. ULPA 2001, Prefatory Note.

RULPA provides only a restricted liability shield for limited partners. The shield is at risk for any limited partner who “participates in the control of the business.” RULPA section 303(a). Although this “control rule” is subject to a lengthy list of safe harbors, RULPA section 303(b), in a world with LLPs, LLCs and, most importantly, LLLPs, the rule is an anachronism. This Act therefore eliminates the control rule and provides a full, status-based shield against limited partner liability for entity obligations. The shield applies whether or not the limited partnership is an LLLP. See RULPA § 303.

Id.

106. ULPA 2001 § 103(c).

(c) A certificate of limited partnership on file in the [office of the Secretary of State] is notice that the partnership is a limited partnership and the persons designated in the certificate as general partners are general partners. Except as otherwise provided in subsection (d), the certificate is not
comments clarify that the certificate is not notice of the fact that a person not named as a general partner is not a general partner.107 This means that a limited partner not named in the certificate as a general partner could still become a general partner. The commentary to ULPA 2001 section 401 makes clear two conclusions that arise from the failure of the certificate to designate a person as a general partner: (i) the failure is not notice that a person not named as a general partner is not a general partner and thus does not act as notice to one who does not actually review the certificate (no constructive notice); and (ii) the failure does not impart knowledge to a third party who actually reviews the certificate from claiming that a person not named as a general partner is indeed a general partner.

Further, ULPA 2001 section 107(a) provides that unless displaced by specific sections of the limited partnership act, principles of law and equity supplement ULPA 2001. No specific ULPA 2001 section dispenses with estoppel liability. Consequently, estoppel liability should continue to apply to ULPA 2001 limited partnerships and its limited partners.108

III. THE EVOLUTION OF CONTROL LIABILITY & THE INTER-RELATIONSHIP OF ESTOPPEL AND RELIANCE

From its earliest conception, the management of a limited partnership has been vested exclusively in a general partner who manages partnership affairs for passive investor limited partners. Even though the relationship between general and limited partners is labeled a “partnership,” the word “limited” was designed to indicate it was not a true partnership at all but rather an

---

107. ULPA 2001 § 103 cmt.

Subsection (c)—This subsection provides what is commonly called constructive notice and comes essentially verbatim from RULPA Section 208. As for the significance of constructive notice “that the partnership is a limited partnership,” see Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997, 1001-03 (Colo. 1998) (interpreting a comparable provision of the Colorado LLC statute and holding the provision ineffective to change common law agency principles, including the rules relating to the liability of an agent that transacts business for an undisclosed principal).

As for constructive notice that “the persons designated in the certificate as general partners are general partners,” Section 201(a)(3) requires the initial certificate of limited partnership to name each general partner, and Section 202(b) requires a limited partnership to promptly amend its certificate of limited partnership to reflect any change in the identity of its general partners. Nonetheless, it will be possible, albeit improper, for a person to be designated in the certificate of limited partnership as a general partner without having become a general partner as contemplated by Section 401. Likewise, it will be possible for a person to have become a general partner under Section 401 without being designated as a general partner in the certificate of limited partnership. According to the last clause of this subsection, the fact that a person is not listed in the certificate as a general partner is not notice that the person is not a general partner. For further discussion of this point, see the Comment to Section 401.

Id.

unincorporated association in which the limited partner is merely a member but not a “partner.” As such, limited partners were accorded statutory powers to monitor their investment, but when a limited partner acted contrary to this statutory construct and “took part in the control” of the business, the limited partner actually became a silent general partner, resulting in full liability as any general partner.

Control liability was thus born with the Uniform Limited Partnership Act of 1916 and buried nearly one hundred years later with the Uniform Limited Partnership Act of 2001. Its storied journey and existence is nearly mystical. Intervening modifications attempted to clarify its contours, parameters, and meaning, but merely confused its application. Clarity was elusive in the Revised Uniform Limited Partnership Act of 1976 and again in the Revised Uniform Limited Partnership Act of 1985.

The generational confusion is fueled by the lack of an ULPA 1916 section 7 definition of the term “control” and the resultant role of creditor reliance. The role of creditor reliance is further confused because the Uniform Partnership Act of 1914 supplants limited partnership law and limited partnership law itself has toyed with the role of “constructive notice” of facts required to be stated in a certificate of limited partnership. These notice statutes are never dispositive of the reliance issue because they are not notice of facts not actually stated. Thus, even though ULPA 2001 does not require a limited partner to be designated as such in the certificate and does require the general partners to be designated, the comments make clear that the fact that a person not stated to be a general partner may nevertheless still be a general partner.

A. Applicability of Estoppel Doctrine to Limited Partnerships

UPA 1914 adopted a specific statutory “estoppel” provision before the later promulgation of ULPA 1916. The Revised Uniform Partnership Act of 1994 (RUPA 1994) adopted the UPA 1914 provision in a slightly altered form but primarily intact. None of the limited partnership act versions have adopted a similar estoppel provision, and thus the question exists whether and to what extent the UPA 1914 estoppel statute applies to ULPA 1916, RULPA 1976, RULPA 1985, and ULPA 2001. The brief answer is that estoppel applies

109. ULPA 1916 § 7. “A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.” Id. (emphasis added).

110. ULPA 2001 § 303.

An obligation of a limited partnership, whether arising in contract, tort, or otherwise, is not the obligation of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for an obligation of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership. Id. (emphasis added).
through various “linkage” or “relevancy” theories.

UPA 1914 section 16 provides that a person is liable for any representation (or consent thereto) of partnership to any person who relies on the representation to extend credit to the actual or apparent partnership.\footnote{UPA 1914 § 16.} The section prevents a person not actually a partner from using the partnership as a deception to obtain funds. In these cases, the person is estopped from denying the existence of the partnership they represented. To establish liability, the creditor must prove that: (i) the would-be partner held herself out as a partner; (ii) the holding out was directly by the would-be partner (or by others with her consent); (iii) the creditor had knowledge of the holding out; and (iv) the creditor detrimentally relied on the ostensible partnership by extending credit upon its faith.\footnote{See Brown v. Gerstein, 460 N.E.2d 1043 (Mass. App. Ct. 1984), review denied, 464 N.E.2d 73 (Mass. 1984).}

UPA 1914 section 6(2) provides that general partnership law applies to limited partnerships except where limited partnership law is inconsistent with the applicable general partnership law.\footnote{UPA 1914 § 6(2).} Since there is no specific limited partnership estoppel statute, there is no conflict and thus the general partnership estoppel law should apply to limited partnerships to prevent a limited partner from denying that she is also a general partner in appropriate circumstances.\footnote{See Joseph J. Basile, Jr., \textit{Limited Liability for Limited Partners: An Argument for the Abolition of the Control Rule}, 38 \textit{VAND. L. REV.} 1199, 1222 (1985).}

\footnote{UPA 1914 § 16.}


\footnote{UPA 1914 § 6(2).}

\footnote{But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; \textit{but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.}}
Both RULPA 1976 and RULPA 1985 section 303 provided creditor-specific reliance control liability. However, the RULPA 1976 section 303 version, like estoppel, required the creditor to possess actual knowledge of the participation in control. This is most likely simply redundant of UPA 1914 section 16 estoppel liability, as both would be based upon the limited partner’s participation in the management and control of the partnership, and both are based upon the creditor’s actual knowledge.\textsuperscript{115} However, RULPA 1985 section 303 alters the required state of creditor awareness of the participation from “actual knowledge” to a mere “reasonable belief.” Accordingly, RULPA 1985 section 303 is inconsistent with UPA 1914 section 16 in that the former does not require specific creditor reliance whereas estoppel liability does require reliance.\textsuperscript{116} Provided this interpretation is correct, the UPA 1914 section 6(2) language would preclude the application of UPA 1914 section 16 estoppel liability. However, the preclusion is meaningless as the specific statute actually lowered the required state of creditor awareness of the participation and thus expanded liability.

RUPA 1994 section 308 adopted the general position of UPA 1914 section 16 with a few modifications. The section title was changed from “Partner By Estoppel” to “Liability of Purported Partner.” Otherwise, RUPA 1994 section 308(a) generally continues the same liability standards and basis for a private (reliance required) and public (no reliance required) holding out as in its predecessor UPA 1914 section 16.\textsuperscript{117}

UPA 1914 section 6(2) provided general partnership law applied to limited partnerships unless the limited partnership law was inconsistent. RUPA 1994 section 202 did not adopt that provision as it was considered redundant.\textsuperscript{118} At the time, RULPA 1976 section 1105 and RULPA 1985 section 1105 both provided the same result. However, ULPA 2001 specifically “de-linked” from UPA 1914 and RUPA 1994 general partnership law in order to become a free-standing statutory body of limited partnership law.\textsuperscript{119} This raises the question as to whether the general partnership estoppel law applies to partnerships formed under ULPA 2001. Although the de-linking approach itself would argue that neither UPA 1914 section 16 nor RUPA 1994 section 308 applies, other ULPA 2001 provisions and commentary point in the other direction.

First, ULPA 2001 section 107(a) specifically provides that principles of law and equity apply unless displaced by specific provisions. There are no specific ULPA 2001 provisions that expressly deny applicability of estoppel doctrines. In addition, commentary suggests the same result when the differences between

\begin{itemize}
  \item \textsuperscript{115} See id.
  \item \textsuperscript{117} See RUPA 1994 § 308(a) cmt.
  \item \textsuperscript{118} See RUPA 1994 § 202 cmt.
  \item \textsuperscript{119} See ULPA 2001 Prefatory Comment.
\end{itemize}
limited and general partnerships are immaterial to the question.\textsuperscript{120} Estoppel liability pertaining to misrepresentation of partner status is not different under general and limited partnership law. Accordingly, the estoppel theory of UPA 1914 section 16 and RUPA 1994 section 308 should continue to apply to a ULPA 2001 limited partnership.

\textbf{B. Effect of Constructive Notice Doctrines on Estoppel Reliance}

Estoppel reliance of course must be reasonable under all the circumstances. Specifically, in this context, a creditor who extends credit to the partnership upon the faith that the limited partner is a general partner must not actually know or have reason to know that person is not a general partner.\textsuperscript{121} Since a limited partnership must file a public document in the form of a certificate of limited partnership in order to achieve limited liability for its limited partners, an issue exists as to whether a third party creditor is charged with knowledge of the facts contained in that certificate. Of course, if the third party creditor actually reads the certificate, it would be charged with knowledge of the facts contained therein. RULPA 1976 introduced a more troubling “constructive notice” function of the certificate in RULPA 1976 section 208,\textsuperscript{122} which extends further and charges a third party with knowledge of the facts contained in the certificate—even if the creditor has not read the public document.\textsuperscript{123} RULPA 1976 section 201(a)(4) provided that the certificate must designate the name of every partner and further specify whether each partner is a limited or general partner. RULPA 1976 section 208 then provided that the fact that a person is designated in the certificate as a limited partner or general partner is notice of that fact. Given the fact that RULPA 1976 required the certificate of limited partnership to designate both general and limited partners and then further provided that the designation of a person as a limited partner was notice that the person was a limited partner, the issue exists as to whether a creditor would be charged with the knowledge that a limited partner was not also a

\textsuperscript{120} See ULPA 2001 § 107 cmt. Also, ULPA 2001 section 401 commentary clearly indicates that the failure to designate a person as a general partner is not notice of the fact that the person is not a general partner. This reinforces the application of traditional notions of apparent authority, an equitable doctrine that operates similarly to estoppel.

\textsuperscript{121} UPA 1914 § 16; RUPA § 308.

\textsuperscript{122} RULPA 1976 § 208. “The fact that a certificate of limited partnership is on file in the office of the Secretary of State is notice that the partnership is a limited partnership and the persons designated therein as limited partners are limited partners, but it is not notice of any other fact.” Id.

\textsuperscript{123} RULPA 1976 § 208 cmt.

Section 208 is new. By stating that the filing of a certificate of limited partnership only results in notice of the limited liability of the limited partners, it obviates the concern that third parties may be held to have notice of special provisions set forth in the certificate. While this section is designed to preserve the limited liability of limited partners, the notice provided is not intended to change any liability of a limited partner which may be created by his action or inaction under the law of estoppel, agency, fraud, or the like.

\textit{Id.}
general partner to thus preclude justified estoppel reliance. The commentary to the RULPA 1976 section 208 notice section makes clear that the doctrines of estoppel remain intact to create potential liability for a person designated as a limited partner in the certificate: “While this section is designed to preserve the limited liability of limited partners, the notice provided is not intended to change any liability of a limited partner which may be created by his action or inaction under the law of estoppel, agency, fraud, or the like.”

This of course means that while the designation of a person as a limited partner in the certificate is notice that the person is a limited partner, it is not notice of the fact that the person is not also a general partner.

This notice function was eviscerated somewhat by the RULPA 1985 amendments to RULPA 1976 sections 201 and 208. In general, RULPA 1985 section 201(a)(3) eliminated the requirement that the certificate designate each partner and specify in each case whether the person was a general or limited partner. Instead, RULPA 1985 section 201(a)(3) required only that the certificate designate the general partners. Consistent therewith, RULPA 1985 also amended Section 208, the notice section, to remove the constructive notice effect that a person designated as a limited partner was in fact a limited partner. RULPA 1985 section 208 provided that the fact that a person was designated as a general partner was notice of that fact but not notice of any other fact. Importantly, although the commentary was modified to reflect the fact that the certificate no longer designated limited partners and thus was no longer notice that a limited partner was a limited partner, the important estoppel commentary was retained: “While this section is designed to preserve the limited liability of limited partners, the notice provided is not intended to change any liability of a limited partner which may be created by his action or inaction under the law of estoppel, agency, fraud, or the like.”

Both RULPA 1976 section 208 and RULPA 1985 section 208 provided that the certificate was notice only of a fact required to be stated therein and then only if the fact was provided. Neither purported to provide “negative notice” of facts not stated therein. Accordingly, even a limited partner designated as such in the certificate under the RULPA 1976 version and who acted like a general partner to deceive a creditor into extending credit upon the faith of that assumption could not depend upon the notice function of the certificate to “negate” the fact that s/he was also a general partner. The RULPA 1976 version would only provide notice that the person was at least a limited partner.
Even that notice function was removed by the RULPA 1985 version. Finally, merely because a person was not designated as a general partner under either act did not preclude a creditor from relying upon the fact that the person was a general partner.

This latter fact was made clear by ULPA 2001. First, like RULPA 1985 section 201, ULPA 2001 did not require the certificate of limited partnership to designate limited partners but did require the certificate to designate general partners.\(^{128}\) ULPA 2001 section 103(b)(4) and (c) provide a person has notice of the fact that a person designated as a general partner in the certificate is in fact a general partner but that the certificate is not notice of any other fact. The commentary, however, makes clear that a person could be designated as a general partner and not actually be a general partner and likewise a person not designated as a general partner may still be a general partner.\(^{129}\) That same commentary specifically provides that the fact that a person not listed as a general partner is “not notice” that the person is not a general partner.\(^{130}\) This is further confirmed by ULPA 2001 section 401 commentary which provides that the “omission of a person’s name from the certificate’s list of general partners is not notice that the person is not a general partner.”\(^{131}\)

Accordingly, even when the certificate required the designation of all limited and general partners, the designation of a person as a limited partner and not a general partner did not provide notice that a person was not a general partner. As clarified by ULPA 2001, only positive notice results from items required to be stated in the certificate and also so stated. No limited partnership notice provision has ever suggested that a concept of negative notice should apply. Accordingly, not naming a person as a general partner is not and never has been notice of the fact that a person may not be a general partner or acting in that regard.

IV. LIMITED PARTNER LIABILITY WITHOUT THE CONTROL RULE

With the background developed in Parts I-III, analysis focuses upon the form of specific creditor reliance necessary to create limited partner estoppel liability. This analysis is particularly acute given that ULPA 2001 section 303 sets forth two important aspects of limited partner personal liability: a limited partner is not personally liable for an obligation of the limited partnership “solely” by reason of that person’s status as a limited partner (“status rule”); and the status rule is not altered even if the limited partner participates in the management and control of the limited partnership (“participation rule”).

---

128. ULPA 2001 § 201(a)(3) (providing certificate must state “the name and the street and mailing address of each general partner”).
129. ULPA 2001 § 103 cmt.
130. Id.
Given that the status rule is the first and most important rule and that the participation rule “modifies” it, the question remains regarding the meaning of the modification. The “solely” language of the status rule must mean, as suggested, that a limited partner is not personally liable for any partnership obligation merely because they are a limited partner. This rudimentary reading merely comports with the understanding of limited partnership law since the inception of ULPA 1916. What does “solely” mean? The commentary suggests that the “solely” language protects a limited partner from personal liability for partnership obligations only when a person is “claimed to be liable on account of being a limited partner.” Accordingly, the commentary sets forth several situations in which a limited partner may become personally liable because that person is not acting “solely” as a limited partner: a person who acts both as a general partner and a limited partner will be liable as a general partner for the limited partnership’s obligations (“general partner liability”); and a limited partner may become liable as a result of the limited partner’s own wrongful conduct and thus the status rule does not prevent a third party from asserting that the limited partner is personally liable by reason of the limited partner’s own wrongful conduct (“wrongful conduct rule”).

A. Limited Partner Liability As A General Partner

The general partner liability rule seems self-obvious but it begs the questions as to when and under what circumstances a limited partner is also acting as a general partner. The certificate of limited partnership is required to set forth the names and addresses of all general partners. However, the fact that a person is not so named or designated does not control whether that person actually is a general partner. The ULPA 2001 commentary makes very clear that a person’s status as a general partner does not depend upon designations as such in the certificate. Rather a person generally “becomes” a general partner of a limited partnership by agreement and consent of all the partners. The exclusionary rule that a limited partner is not personally liable solely by reason of being a limited partner even if that person participates in the control and management of the limited partnership makes this line difficult to determine.

With little fanfare and no explanatory commentary, ULPA 2001 section 401 radically altered the way a person may become a general partner. Under ULPA 1976 section 401, a person may only become a general partner with the specific

132. ULPA 2001 § 303 cmt.
133. Id.
134. ULPA 2001 § 201(a)(3).
135. See ULPA 2001 §§ 103(c), 401.
written consent of each partner. The ULPA 1985 amendments to section 401 clarified that the partnership agreement could also specify how a person becomes a limited partner (but if the agreement is silent, again only the written consent of all partners will suffice). The writing requirement prevents accidental admissions of general partners and would generally preclude authorized limited partner participation in management and control from being considered an admission as a general partner. ULPA 2001 section 401, however, eliminated the writing requirement for a person to become a general partner.

Exactly when does a limited partner become a general partner? What role does participation in management play in this issue? Stated another way, since the RULPA 1976 and RULPA 1985 writing requirement has been eliminated, when will the partners be “deemed” to have impliedly consented to a limited partner becoming a general partner—even though that person is not designated as such in the certificate and even though the partnership agreement does not expressly refer to the person as a general partner? Since becoming a general partner is primarily dependent upon the consent of all the partners, that consent is not required to be memorialized in a written partnership agreement as it may be an oral understanding or even merely reflect course of performance, and the failure of the filed certificate to designate a person as a general partner does not preclude that person’s status as such, the matter seems “open for discussion.” It would seem to be largely a question of determining the intent of the partners. What better method of determining the intent of the partners than their objective manifestations to authorize a limited partner to perform all or substantially all the functions of a general partner?

In a circular way, ULPA 2001 section 303 may have vanquished the control rule but at the same time reintroduced the “substantially same” rule as briefly set forth in RULPA 1976 section 303(a). However, the ULPA 2001

137. RULPA 1976 § 401. “After the filing of a limited partnership’s original certificate of limited partnership, additional general partners may be admitted only with the specific written consent of each partner.”

138. RULPA 1985 § 401.

139. See Sloan v. Thornton, 457 S.E.2d 60 (Va. 1995) (holding limited partner did not become general partner by signing guaranty because no written consent of other partners).

140. ULPA 2001 § 401.

A person becomes a general partner:
(1) as provided in the partnership agreement;
(2) under Section 801(3)(B) following the dissociation of a limited partnership’s last general partner;
(3) as the result of a conversion or merger under [Article] 11; or
(4) with the consent of all the partners.
elimination of the control rule entirely only makes sense provided that the threshold bar to application of this rule must be reasonably high. In other words, the limited partner participation should be perilously close to coinciding or replacing the duties of the designated general partner in order for this standard of “implied general partner” to apply. Perhaps the most important point is that this liability assuredly exists. The commentary makes clear that the limited partner shield does not protect a limited partner who is also a general partner. Exactly when a limited partner “becomes” a general partner by the implied consent of the other partners by virtue of participation is a fact question left with the courts. If there is any objection on this ground it is again that the outward appearance of ULPA 2001 section 303 is that participation in control is no longer relevant to the limited partner liability question. In fact, nothing could be further from the truth. Limited partners and their counsel who read the ULPA 2001 section 303 language too literally may be headed for monstrous and unanticipated liability.

Finally, much the same as with the “substantially same” limited partner liability under RULPA 1976 section 303(a), it is unclear that creditor reliance is necessary to deduce this result. The reason is simple. A person does not become a general partner under ULPA 2001 section 401 through creditor reliance. One becomes a general partner primarily through the agreement or consent of all the partners.

All this essentially means that a limited partner may still be liable as a general partner even though the certificate does not designate that person as a general partner. The essential problem that has plagued limited partnership acts since their inception is the fragility of the limited partner liability shield. It is a mistake to think that the fragility is related to the control rule. The control rule is simply symptomatic of the problem. The simple problem is that the shield fragility is related to the dual-track nature of liability shields present in one single entity. A general partner is personally liable for all the partnership obligations and has exclusive statutory inter-se management and external third party agency rights. A limited partner has none of these characteristics—at least by statute. The fact that general and limited partners are free to rearrange these inter-se management and third party agency rights by a secret and private oral arrangement simply presents detrimental reliance problems of hideous proportions for all creditors who would deal with the partnership.

Fortunately, the “fix” is relatively straightforward. ULPA 2001 permits a limited partnership to become a limited liability limited partnership by so designating itself in the certificate of limited partnership.141 When this occurs, the general partners are no longer personally liable for the debts and obligations of the partnership.142 Of course, limited partners continue not to be personally

141. ULPA 2001 § 201(a)(4).
142. ULPA 2001 § 404(c).
liable for the partnership obligations. Accordingly, assuming that the creditor is aware of the nature of the entity it is dealing with, deception that a shielded owner (limited partner) is in fact an unshielded owner (general partner) is no longer possible. Since the name of a limited liability limited partnership must contain some designation such as LLLP indicating the status of the limited partnership to those who would deal with the partnership, the concerns described in this Article disappear. The reason for the disappearance is that the dual-track liability shield and its attendant detrimental reliance problems are eliminated. Given the concerns discussed in this Article and given the ease with which a limited liability limited partnership may be created, it would be extremely surprising that counsel would not suggest and urge the LLLP route for every limited partnership. Unfortunately, from a policy perspective, this may mean that those deals with the least amount of lawyering are the most at risk of not adopting the LLLP status. Given this possible if not probable outcome, it is surprising that the National Conference of Commissioners did not simply make the limited partnership a fully shielded entity. In other words, the proper default rule arguably should be that every limited partnership is an LLLP with the possibility retained to allow the parties to specially tailor the deal to make the general partner personally liable. Perhaps we can hope for as much on the next revision of the limited partnership act. If this Article is correct, and history yet again proves the limited partner liability shield to be too fragile, another revision to strengthen the shield will most likely occur. In the meantime, it may be expected that individual state adoptions may consider making the LLLP the default limited partnership rule.

B. Limited Partner Estoppel Liability

The above described liability of a limited partner as a full general partner for all the obligations of the limited partnership would presumably require a very high threshold of participation in the control and management of the limited partnership. Thus, given that most limited partnerships will operate with an active general partner, one would expect that liability to be rare but nonetheless existent. That liability is also not creditor reliance dependent.

The primary thesis of this Article is that a lesser standard of limited partner participation in the control and management of the limited partnership creates

---

143. ULPA 2001 § 303.
144. ULPA 2001 § 108(c).
145. This of course places greater emphasis on those who represent the LLLP to properly use and disclose the partnership’s proper name. The use of fictitious or assumed names that do not carry the limiting designation do not import the same type of notice to those who would deal with the partnership.
146. This does not do violence to the concept of a true general partnership where all the partners are personally liable for the debts and obligations of the partnership. Of course, the limited liability partnership (LLP) is already becoming standard fare for that entity. See RUPA §§ 306(c), 1001-1003.
estoppel liability to specific creditors who mistakenly relied upon the fact that a limited partner was a general partner. Stated another way, when limited partner participation in the control and management is inadequate to imply the consent of the remaining partners that the limited is also a general partner under the above section, may that same participation nevertheless support a mistaken but reasonable creditor belief that the limited is a general partner who therefore extends credit to the partnership upon that faith? The answer to this question lurks in the law of estoppel. As set forth above in Parts I-III, estoppel applies to an ULPA 2001 partnership.

Fortunately, this question and application has some precedent. Not of course under the new ULPA 2001 section 303 statute, but under state law that earlier modified its limited partnership law to eliminate the “control rule.” In 1988, Georgia modified its version of RULPA 1985 section 303 to simply provide: “A limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner and does not become so by participating in the management or control of the business.”

The commentary to that section is quite revealing. It provides that other measures were worthy and more appropriate to protect creditor reliance:

The following is a summary of the reasons for eliminating the “control” rule:

1. The control rule has, over the years, been greatly watered down, so that in its current version in RULPA there is no liability without creditor reliance and a broad safe harbor as to what constitutes control.

2. Even in a watered down form, the control rule leaves some uncertainty as to liability of limited partners, and therefore operates as an important disincentive to limited partnership investments. In particular, many of the “safe harbor” categories of non-control acts are open to interpretation.

3. Even without a control rule, third parties are protected if (despite their ability to check the certificate) they are misled by a limited partner’s participation in control into believing that he is a general partner. Thus, a limited partner may be liable on estoppel (see Section 14-8-16) or fraud grounds, or on general equitable grounds under a “veil-piercing” theory. Fraud liability may be imposed, for example, if the limited partner’s name is used in the name of the partnership in violation of Section 14-9-102. This Section only eliminates liability imposed solely because a limited partner participates, as such, in control of the business.

4. The control rule is not effective in fulfilling the objective of ensuring that only those with personal liability, and thus a strong incentive to be careful, will manage the business. General partners can always incorporate or delegate control to individuals other than limited partners. The control rule may actually serve to weaken the quality of management since the risk of liability for

participation in control deters limited partners from monitoring the generals. If third party creditors want a limitation on partner participation in control, Section 14-9-303 does not prevent third parties from entering into agreements, similar to loan covenants, that provide for certain rights if the limited partners participate in control. Finally, it should be noted that RULPA section 303 does not protect third parties who are misled other than by relying on a limited partner’s participation in control.148

Thus conceived and soon implemented, it was not long until a creditor argued under the new Georgia law that it was deceived into believing that a limited partner was a general partner and thus detrimentally extended credit on that belief. In *Antonic Rigging & Erecting of Missouri, Inc. v. Foundry East Limited Partnership*,149 a Missouri contractor brought suit against a Georgia limited partnership and its general and limited partners for damages resulting from the breach of a contract. The limited partners filed a motion for summary judgment arguing that a limited partner cannot be personally liable for partnership obligations “merely by participating in the management or control of the partnership.” In July, 1989, NAPPCO, Inc. (NAPPCO), Mayflower Group, Ltd., (Mayflower Group) and Mayflower Foundry created the Foundry East Limited Partnership (Foundry LP) with NAPPCO to act as the sole general partner (as well as a limited partner) and Mayflower Group and Mayflower Foundry to act as limited partners.150 Foundry LP was to build and operate a steel and pipe foundry in Georgia on property owned by the Mayflower Group. In order to build and fit the foundry, Foundry LP negotiated with Antonic Rigging and Erecting of Missouri, Inc. (Antonic Rigging) to perform the actual construction work. NAPPCO had discussed the project with Antonic Rigging prior to the formation of Foundry LP, and indicated that NAPPCO would be the general partner with the Mayflower Group. NAPPCO had worked with Antonic Rigging on prior ventures. Ultimately, NAPPCO signed three contracts dated August 17, 1989, with Antonic Rigging as the general partner. Although the name of the limited partnership does not appear on the documents, Antonic Rigging acknowledged that it believed that it was contracting with the limited partnership through NAPPCO, its general partner, and that the Mayflower Group and Mayflower Foundry would be limited partners making substantial monetary contributions. Nearly all Antonic Rigging’s contacts were with NAPPCO as it had only one telephone contact introduction to a Mayflower officer. Indeed, it was not until November, 1989, well after the contracts were executed, that Antonic Rigging’s representatives personally met any Mayflower representatives. However, NAPPCO informed

---

148. *Id.*
150. Mayflower Group and Mayflower Foundry owned 20% and 80% respectively of the Class A limited partnership units, whereas NAPPCO owned 100% of the Class B limited partnership units (as well as 100% of the general partnership units).
Antonic Rigging that Mayflower parties would be very active in the deal and that they would be committing several million in capital. In frequent meetings between NAPPCO and Antonic Rigging, NAPPCO would telephone the Mayflower parties and discuss issues with them.

At the November meeting, it became obvious that NAPPCO was experiencing financial difficulties and that the project was suffering. NAPPCO withdrew as the sole general partner on May 24, 1990. NAPPCO and Mayflower representatives agreed to form a corporation designated as AMT Foundry (AMT) to serve as the substitute general partner. Shortly thereafter, the ownership of AMT was restructured so that Mayflower Foundry and Mayflower Group owned eighty percent and twenty percent of AMT’s stock, respectively. Within a few months, Antonic Rigging was replaced with another contractor and so it sued for billed and unpaid amounts on the contracts.

In addition to suing the limited partnership, Antonic Rigging also sued Mayflower Foundry and Mayflower Group arguing that its participation in the management and control of the limited partnership made it liable as a general partner. The court rejected the argument since the applicable Georgia statute specifically stated the opposite. The applicable rule is that a limited partner is not liable for partnership obligations by reason of being a limited partner and does not become so by participation in the management and control of the partnership.\footnote{GA CODE ANN. § 14-9-303 (1989).} Antonic Rigging did not argue that either Mayflower Foundry or Mayflower Group became a general partner under other Georgia law, which provides that additional general partners may be admitted as provided in a written partnership agreement or, if that agreement is silent, with the written consent of all the partners.\footnote{GA CODE ANN. § 14-9-401 (1989). “After the formation of a limited partnership, additional general partners may be admitted as provided in writing in the partnership agreement or, if the partnership agreement does not provide in writing for the admission of additional general partners, with the written consent of all partners.” Id.}

Unlike the more flexible method for becoming a general partner under ULPA 2001 section 401 which recognizes oral agreements and course of performance,\footnote{See supra Part IV.A.} the Georgia statute requires a written acknowledgement of such status. This of course makes it much more difficult (if not impossible) to “become” a general partner in an informal way through the implied consent of the remaining partners proven through extensive participation in control and management. Furthermore, the case was not clear that the participation by the Mayflower parties was in their capacity as a limited partner. After the resignation of NAPPCO as general partner, the Mayflower parties formed AMT and arguably participated in management in their capacity as its officers and directors and not as limited partners. Given that AMT was already liable as the corporate general partner, this precluded personally liable of the limited partners unless Antonic Rigging could successfully argue that
AMT was inadequately capitalized and used as a vehicle to defraud Antonic Rigging. This would be difficult as Antonic Rigging was fully aware of the NAPPCO financial difficulty and resignations and the subsequent creation of AMT to further the business of the limited partnership.

Thus blocked by the facts of the case in pursuing the Mayflower parties as general partners, Antonic Rigging next argued several theories that would have nonetheless made the Mayflower limited partners personally liable on other grounds. The court specifically recognized that, notwithstanding the plain language of the Georgia statute, which eliminated control rule liability, other situations might make a limited partner personally liable for some or all partnership obligations.\textsuperscript{154} First, the court analyzed whether estoppel liability might make the Mayflower limited partners personally liable for the damages arising from the alleged Antonic Rigging breach. Importantly, the court referred to its general partnership estoppel statute, which prevents one not actually a partner from asserting that defense.\textsuperscript{155} The court noted that although this statute applies to general partnerships, “the overall principles of partnership by estoppel translate easily into the limited partner context.”\textsuperscript{156} In order for this doctrine to apply, the court noted that a limited partner must hold themselves out as a general partner or consent to another holding them out as a general partner and that a creditor relies on the misrepresentation to extend credit to the partnership on their faith.\textsuperscript{157} Unfortunately, when the original contracts were executed on behalf of the limited partnership in August 1989, Antonic Rigging was dealing exclusively with NAPPCO as the sole and exclusive general partner and was aware that the Mayflower parties were in fact limited partners. Even though NAPPCO represented that the limited partners would be active in the business, it was not represented that the limited partners were general partners and Antonic Rigging was aware that the limited partners were in fact limited partners.\textsuperscript{158}

Although the creditor lost the case in \textit{Antonic Rigging}, it was nonetheless instructive. First, like ULPA 2001, the case considered limited partner personal

\textsuperscript{154} \textit{Antonic Rigging}, 773 F. Supp. at 431. The court used the unfortunate language that the limited partner could become liable “as a general partner.” The other situations discussed and analyzed generally only set forth personal liability to specific creditors based on reasonable creditor reliance.

\textsuperscript{155} \textsc{Ga. Code Ann.} § 14-8-16. This statute is patterned after UPA 1914 section 16.

\textsuperscript{156} \textit{Antonic Rigging}, 773 F. Supp. at 431; see also \textsc{Zeiger v. Wilf}, 755 A.2d 608, 622 (2000) (citing \textit{Antonic Rigging} with approval but also determined creditor reliance lacking).

\textsuperscript{157} \textit{Antonic Rigging}, 773 F. Supp. at 431. The court noted that creditor reliance is not necessary in Georgia if the limited partner either holds themselves out as a general partner or consents to another person so holding them out and the holding out is a “public representation.” \textit{Id.}

\textsuperscript{158} \textit{Id.} at 431-32. The court also determined there was no basis for piercing the corporate veil of AMT, the corporate general partner, in order to reach the personal assets of its two shareholders—the Mayflower parties (also the two limited partners). The court determined that there was no evidence that the Mayflower shareholders intended to use the AMT corporate partner to perpetuate a fraud. Once again, Antonic Rigging was perfectly aware of the corporate structure, which occurred well after the contracts in question were executed and arguably breached.
liability in the context of the vanquished control rule. Thus, Georgia law is very similar to ULPA 2001. Second, notwithstanding the absence of the control rule, the case considered the personal liability of a limited partner as a general partner and also under estoppel liability. The facts in the case prevented estoppel reliance but the facts were somewhat rare on that basis. Antonic Rigging had a prior relationship with the NAPPCO general partner. In other cases, it is more likely that the creditor will be a stranger to the partnership and thus a limited partner participating in the control and management will need to take care to actively disclose their limited partner status.\footnote{Lubaroff, “T-Shirt Rule,” supra prefatory comment, at 667.}

Third, for those states that adopt ULPA 2001, the outcome on the matter of general partner liability will be more prevalent. In those states that adopt ULPA 2001, the limited partner participation may be used as implied consent of the other partners that the limited partner is also a general partner. While admittedly the standard would require a very high participation threshold, it is nonetheless possible.

Finally, as with the full liability for a limited partner whose participation also makes that person a general partner,\footnote{See supra Part IV.A.} estoppel liability disappears when the limited partnership becomes a limited liability limited partnership. ULPA 2001 permits a limited partnership to become a limited liability limited partnership by so designating itself in the certificate of limited partnership.\footnote{ULPA 2001 § 201(a)(4).} When this occurs, the general partners are no longer personally liable for the debts and obligations of the partnership.\footnote{ULPA 2001 § 404(c).} Of course, limited partners continue not to be personally liable for the partnership obligations.\footnote{ULPA 2001 § 303.} Accordingly, assuming that the creditor is aware of the nature of the entity it is dealing with, deception that a shielded owner (limited partner) is in fact an unshielded owner (general partner) is no longer possible. Since the name of a limited liability limited partnership must contain some designation such as LLLP indicating the status of the limited partnership to those who would deal with the partnership, the concerns described in this Article disappear. The reason for the disappearance is that the dual-track liability shield and its attendant detrimental reliance problems are eliminated.\footnote{This of course places greater emphasis on those who represent the LLLP to properly use and disclose the partnership’s proper name. The use of fictitious or assumed names that do not carry the limiting designation do not import the same type of notice to those who would deal with the partnership.} Given the concerns discussed in this Article and given the ease with which a limited liability limited partnership may be created, it would be extremely surprising that counsel would not suggest and urge the LLLP route for every limited partnership.
V. CONCLUSION

Cases like *Antonic Rigging* demonstrate that limited partners who personally hold themselves out as a general partner or consent to another so holding them out will be liable to creditors who justifiably rely on their represented general partner status to extend credit to the partnership. Indeed, if the holding out is public, many states like Georgia would not require creditor reliance in order to make the limited partner personally liable. It remains to be seen how and whether limited partner participation in the control and management of the partnership’s business will serve as a reasonable basis for such a conclusion. A limited partner could of course participate while disclosing that s/he was doing so only as a limited partner and the vanquished control rule should protect the limited partner in these cases. When the limited partner is not quite so careful, a dangerous impression may be created by the participation that indeed the limited is acting as a general partner.

Also, while *Antonic Rigging* rejected the argument that the limited was also a general partner in that case, Georgia law and RULPA 1976 section 401 and RULPA 1985 section 401 more carefully require that a person must be “admitted” as a general partner and some states require the consent or admission to be in writing. ULPA 2001 requires only the informal consent of the partners. This consent may be inferred from the limited partner’s substantial participation in the management and control of the business—traditionally a general partner function and one only allocated to the limited partner by the consent and agreement of the partners. Thus, the very allocation of management and participation rights to a limited partner is some evidence that the person is also a general partner.

These points merely serve as a reminder that totally eliminating personal liability of a limited partner will never be possible unless and until the general partner is not personally liable for the partnership’s obligations. This of course happens when a limited partnership becomes a LLLP. The *Antonic Rigging* case did not involve a LLLP. Prudence therefore dictates that one should always counsel existing and newly formed limited partnerships to become a LLLP and judiciously observe the use of name requirements to publicly inform those dealing with the partnership that it is an LLLP. In a way, Marty Lubaroff’s T-Shirt rule, quoted at the beginning of this Article, is now embodied in the LLLP designation. Like a bold beacon, the name designation informs those dealing with the partnership that they may not rely upon the credit and personal liability of any general creditor in extending credit to the partnership—and certainly not a limited partner’s credit.

But for those limited partnerships that have not become LLLPs, and as difficult as these cases will be, equitable considerations should dictate when the risk of loss associated with a credit extension will be shifted from a normal credit risk of a creditor to the limited partner. Estoppel and specific reliance
have served this purpose well in the past. The risk should be shifted to the limited partner when a creditor extends credit to the partnership reasonably believing that the limited partner was actually a general partner or was acting as a surety for the credit. The reasonableness of the creditor’s reliance should not be negated by any constructive notice feature of a filed certificate of limited partnership, which fails to designate the limited partner as a general partner and indeed should not be negated by an actual review of such a certificate. The resolution should rest in the nature of the limited partner’s conduct and the reasonableness of the creditor’s response to that conduct. In the final analysis, even though a limited partner may now “participate” in the management and control of the partnership’s business, a creditor still has the right to assume that ultimate management is vested in a general partner. Thus, a limited partner who acts too much like a general partner will become one to a creditor who extends credit reasonably relying upon the faith of that conduct.