A User’s Guide to the New Uniform Limited Partnership Act

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I.  INTRODUCTION:  WHY (ALREADY) A NEW LIMITED PARTNERSHIP ACT?

The “shelf life” on uniform entity acts seems to be decreasing.1  The original Uniform Partnership Act (UPA) lasted eight decades, and the original Uniform Limited Partnership Act (ULPA (1916)) lasted six.  In contrast, the 1976 Revised Uniform Limited Partnership Act (RULPA (1976)) warranted major revisions after just nine years (RULPA (1985)),2 and only sixteen years later NCCUSL recommended to the states that they adopt ULPA (2001) to replace RULPA in toto.  NCCUSL’s Revised Uniform [General] Partnership Act—RUPA3—was first approved in 1992 and went through five official versions in its first five years of existence.4  NCCUSL’s Uniform Limited Liability Company Act (ULLCA) was substantially amended just one year after its initial adoption,5 is less than a decade old, and is already subject to a NCCUSL

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1. Uniform acts are drafted and adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL).  According to NCCUSL’s website, “The organization comprises more than 300 lawyers, judges and law professors, appointed by the states as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands, to draft proposals for uniform and model laws on subjects where uniformity is desirable and practicable, and work toward their enactment in legislatures.”  NCCUSL, Background, at http://www.nccusl.org (last visited Mar. 9, 2004).


5. See UNIF. LTD. LIAB. CO. ACT Prefatory Note (1996) [hereinafter ULLCA].  ULLCA was first approved in 1994 and then amended in 1995.  ULLCA Prefatory Note.
drafting project that will propose a second generation, replacement LLC act.6

The rapidity of change is not limited to unincorporated entities or to uniform
acts. In the past twenty years, the ABA Corporate Law Committee has made
numerous major revisions to the Model Business Corporations Act, addressing
inter alia: distributions,7 conflict of interest transactions,8 limitation on director
liability,9 derivative proceedings,10 closely held corporations,11 shareholder
meetings and voting,12 standards of conduct and liability for directors,13
standards of conduct for officers,14 appraisal rights,15 fundamental changes,16
and domestication and conversion.17

There are many explanations for the increasing pace of change,18 but with
ULPA (2001) the principal explanation is simple: RUPA called into question

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(providing that directors may rely on all defenses ordinarily available to directors, including the business
judgment rule, in cases alleging unlawful distributions). For the history of MBCA amendments discussed here
and below, see Committee on Corporate Laws, American Bar Association, Model Business Corporation Act
Annotated Introduction, at xxxi–xliii.
subchapter F, replacing concise but general provisions with pages of detailed definition and elaborately-
delineated safe harbors).
9. MBCA amendments (1990) (adopting section 2.02(b)(4)) (authorizing the articles of incorporation to
include provisions that eliminate or limit the liability of directors to shareholders and the corporation).
10. MBCA amendments (1990) (adopting subchapter D) (eliminating the “demand required/demand
excused” distinction in favor of a “universal demand” requirement).
11. MBCA § 7.32 amendments (1990) (providing greater certainty and more flexibility to “close
corporations” by allowing more latitude in tailoring governing rules).
12. MBCA subchapt. B & D amendments (1997) (expressly authorizing electronic proxies; permitting the
articles of incorporation to vary the percentage of shares required to make or revoke a written demand for a
special meeting).
13. MBCA §§ 8.30, 8.31 amendments (1998) (recognizing a conceptual and practical difference between
standards of conduct and standards of liability, clarifying a director’s authority to delegate and rely on others,
delineating the burden of proof for a plaintiff seeking money damages, setting a statute of limitations for an
action for contribution or recoupment).
14. MBCA § 8.42 amendments (1998) (stating that the statutory standards apply to all officers rather than
just those with “discretionary authority” and providing that non-compliance with the statutory standards does
not give rise to automatic liability).
15. MBCA ch. 13 amendments (1999) (providing several new definitions, including the term “fair value”;
decreasing the scope of shareholder appraisal rights).
16. MBCA amendments (1999) (adopting section 6.2(f)) (providing a new uniform voting rule for all
share issuances, article amendments, mergers, share exchanges, acquisitions or dispositions of assets, or
dissolutions that require shareholder approval).
17. MBCA amendments (2002) (adopting new chapter 9) (adopting a new chapter that permits a
corporation to use a simplified approach to change its state of incorporation or transform itself into another type
of entity).
18. See RULPA (1985) Prefatory Note. For example, the 1985 amendments to RULPA reflected a
fundamental paradigm shift; they recognized that an entity created through a public filing could nonetheless
have a private agreement as its principal governing document. Id. RULPA (1985) thus implemented “the
principle that the limited partnership agreement, not the certificate of limited partnership, is the primary
constitutive, organizational, and governing document of a limited partnership.” Id. In contrast, 1995 revisions
to the then-new ULLCA were “to harmonize the Act with new and important Internal Revenue Service
announcements.” ULLCA Prefatory Note.
the venerable “linkage” between the uniform limited partnership act and the
uniform general partnership act, thereby cutting the ground out from under
RULPA.

Neither ULPA (1916) nor RULPA are stand alone acts. Each is linked to
and premised on the law of general partnerships, and the link actually predates
any uniform limited partnership act. UPA section 6(2)—adopted in 1914—
provides: “this act shall apply to limited partnerships except in so far as the
statutes relating to such partnerships are inconsistent herewith.”

Both ULPA (1916) and RULPA recognize and depend on linkage. The
1916 Act expressly incorporates the law of general partnerships both to define
the permitted purposes of a limited partnership and to delineate the role and
responsibilities of a limited partnership’s general partners. Section 3 of the
1916 Act provides: “A limited partnership may carry on any business which a
partnership without limited partners may carry on, except [here designate the
business to be prohibited].” Section 9 delineates the “[r]ights, powers and
liabilities of a general partner” by stating, subject to a list of exceptions, that
“[a] general partner shall have all the rights and powers and be subject to all the
restrictions and liabilities of a partner in a partnership without limited partners.”

RULPA contains comparable specific links, supplanted with a general
linkage provision that refers to the general partnership statute: “In any case not
provided for in this [Act] the provisions of the Uniform Partnership Act
govern.”

Linkage created various theoretical and practical problems but was

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19. RULPA section 106 (Nature of Business) is identical to ULPA (1916) section 3. Compare RULPA §
   106, with ULPA (1916) § 3. RULPA section 403 parallels ULPA (1916) section 9(1) and provides:
   (a) Except as provided in this [Act] or in the partnership agreement, a general partner of a limited
       partnership has the rights and powers and is subject to the restrictions of a partner in a partnership
       without limited partners.
   (b) Except as provided in this [Act], a general partner of a limited partnership has the liabilities of a
       partner in a partnership without limited partners to persons other than the partnership and the other
       partners. Except as provided in this [Act] or in the partnership agreement, a general partner of a
       limited partnership has the liabilities of a partner in a partnership without limited partners to the
       partnership and to the other partners.

20. RULPA § 1105. Both the specific and general links appeared in the 1976 version and were
    unchanged by the 1985 amendments. Id.

21. The Prefatory Note to ULPA (2001) explains:

This arrangement has not been completely satisfactory, because the consequences of linkage are not
(applying UPA section 42 in favor of a limited partner), Porter v. Barnhouse, 354 N.W.2d 227, 232-
33 (Iowa 1984) (declining to apply UPA section 42 in favor of a limited partner) and Baltzell-Wolfe
(holding that neither the specific provisions of the general partnership statute nor those of the limited
partnership statute determined the liability of a person who had withdrawn as general partner of a
limited partnership). Moreover, in some instances the “not inconsistent” rules of the UPA can be
incontrovertibly a fundamental part of limited partnership law.\textsuperscript{22} RUPA “unsettled matters,”\textsuperscript{23} because RUPA’s drafters expressly declined to decide whether linkage still made sense. To make sure that RUPA itself did not answer that question, RUPA’s drafters revised or eliminated the UPA language that had linked the UPA to the limited partnership statutes. Thus, RUPA’s definition of “partnership” excludes limited partnerships,\textsuperscript{24} and RUPA contains nothing equivalent to the general linkage provision of UPA (1914), section 6(2).

To make clear that the linkage question remained open, RUPA’s Prefatory Note explained:

Partnership law no longer governs limited partnerships pursuant to the provisions of RUPA itself. . . . No substantive change in result is intended, however. Section 1105 of RULPA already provides that the UPA governs in any case not provided for in RULPA, and thus the express linkage in RUPA is unnecessary. Structurally, it is more appropriately left to RULPA to determine the applicability of RUPA to limited partnerships. It is contemplated that the Conference will review the linkage question carefully, although no changes in RULPA may be necessary despite the many changes in RUPA.\textsuperscript{25}

The Conference did review “the linkage question,” forming a Drafting Committee in 1997 to consider changes to RULPA (1985). Linkage was literally the most fundamental question the Drafting Committee had to consider, and the committee promptly decided to de-link.\textsuperscript{26} That decision

\textsuperscript{22} RULPA’s general linkage provision appeared in the 1976 version without official comment. The 1985 revision did not affect the linkage text but did add a comment that reflected the longstanding and fundamental role of linkage: “The result provided for in Section 1105 would obtain even in its absence in a jurisdiction which had adopted the Uniform Partnership Act, by operation of Section 6 of that act.”

\textsuperscript{23} ULPA (2001) Prefatory Note (The Decision to “De-Link” and Create a Stand Alone Act).

\textsuperscript{24} RUPA § 101 cmt.

\textsuperscript{25} RUPA Prefatory Note.

\textsuperscript{26} The author served as the reporter for the drafting committee and recalls no disagreement on this point, either from the NCCUSL commissioners or the ABA advisors. A note to the second draft states “[c]onsistent with the Drafting Committee’s instructions, Draft #2 continues to de-link RULPA from the general partnership act.” Proposed Revisions to the Revised Uniform Limited Partnership Act, Draft #2, Prefatory Note to the Drafting Committee and its Advisors and Observers, Temporary Section Numbers (Feb. 1998) [hereinafter Revised Uniform Limited Partnership Act] (hereinafter Revised Uniform Limited Partnership Act). A detailed discussion of the wisdom of de-linkage is beyond the scope of article. The Drafting Committee explained its decision as follows:

The Committee saw several substantial advantages to de-linking. A stand alone statute would:

\begin{itemize}
  \item be more convenient, providing a single, self-contained source of statutory authority for issues pertaining to limited partnerships;
  \item eliminate confusion as to which issues were solely subject to the limited partnership act and which required reference (i.e., linkage) to the general partnership act; and
  \item rationalize future case law, by ending the automatic link between the cases concerning
meant the committee had “to draft and recommend a stand alone act,” which in turn meant that the committee had to pass in review not only all of RULPA’s provisions but also all of RUPA’s. The review also had to take into account developments in the related areas of limited liability companies and limited liability partnerships.

Eight decades after the adoption of the UPA, RUPA made inescapable the question of linkage. Approximately fifteen years after the substantial revision of RULPA, the Drafting Committee’s answer to the linkage question made inevitable NCCUSL’s approval of a wholesale replacement for RULPA.

This article seeks to provide a user’s guide to ULPA (2001), which is “far longer and more complex than its immediate predecessor.” This Introduction has described the genesis of ULPA (2001), and Part II explains briefly why states should adopt the new Act in place of RULPA. Part III describes the new Act’s basic structure, identifies the various sources for the Act’s provisions, explains how the Act’s various articles relate to each other, and provides in tabular form an overview of the differences between the new Act and RULPA (1986). Part IV identifies eleven major areas of practical concern under the new Act, and for each of those areas: (i) compares the new Act’s provisions in detail with the provisions of RULPA (and, where useful, with ULPA (1916)); and (ii) identifies salient issues (including some traps for the unwary and uninitiated) that warrant special attention from practitioners who will make use

Thus, a stand alone act seemed likely to promote efficiency, clarity, and coherence in the law of limited partnerships.

In contrast, recommending linkage would have required the Drafting Committee to (1) consider each provision of RUPA and determine whether the provision addressed a matter provided for in RULPA; (2) for each RUPA provision which addressed a matter not provided for in RULPA, determine whether the provision stated an appropriate rule for limited partnerships; and (3) for each matter addressed both by RUPA and RULPA, determine whether RUPA or RULPA stated the better rule for limited partnerships.

That approach was unsatisfactory for at least two reasons. No matter how exhaustive the Drafting Committee’s analysis might be, the Committee could not guarantee that courts and practitioners would reach the same conclusions. Therefore, in at least some situations linkage would have produced ambiguity. In addition, the Drafting Committee could not guarantee that all currently appropriate links would remain appropriate as courts begin to apply and interpret RUPA. Even if the Committee recommended linkage, RUPA was destined to be interpreted primarily in the context of general partnerships. Those interpretations might not make sense for limited partnership law, because the modern limited partnership involves fundamentally different relations than those involved in “the small, often informal, partnership” that is “[t]he primary focus of RUPA.” RUPA, Prefatory Note.

The Drafting Committee therefore decided to draft and recommend a stand alone act.


27. ULPA (2001) Prefatory Note (The Decision to De-Link and Create a Stand Alone Act). “Since the Conference has recommended the repeal of the UPA, it made no sense to recommend retaining the UPA as the base and link for a revised or new limited partnership act.” Id.

of the Act. Part V states a conclusion.

II. IS IT WORTH ENACTING?

Is it worthwhile for a state to enact ULPA (2001)? Even assuming that the new Act makes some improvements over RULPA,29 are those improvements worth the “learning curve” involved whenever a new statute replaces an older one? After all, sometimes stability is more important that currency.30 Moreover, is the limited partnership itself worth much attention at a time when the limited liability company seems the vehicle of choice for most unincorporated business enterprises?

As to the latter question, recent statistics compiled by the International Association of Commercial Administrators (IACA) indicate that the limited partnership remains a significant entity choice. IACA’s members report more than 63,000 new limited partnerships filings in 2000, more than 55,000 in 2001, and more than 63,000 in 2002.31

Although the numbers for new limited partnerships are small in comparison to the numbers for new limited liability companies,32 and the trend is gradually down, thousands form limited partnerships each year. Moreover, there are hundreds of thousands of existing limited partnerships, whose legal character and relations (both among the partners and with third parties) depend in part on the relevant limited partnership act. In the scheme of things, the limited partnership’s role may have diminished, but it has not disappeared.33

As for the “learning curve” question, RUPA has changed the calculus, because RUPA proposes the repeal of the UPA. Therefore, any state that enacts RUPA must, during the RUPA-enactment process, make a choice about the state’s limited partnership law. The choice is not open-ended. There are

29. See infra Part III (providing a detailed comparison of the acts); infra Part IV (analyzing some major differences between the acts).

30. The “cause of stability and certainty in the law” is most often cited in discussions of stare decisis. E.g., Bocchino v. Nationwide Mut. Fire Ins. Co., 716 A.2d 883, 887 (Conn.1998). However, stability is also a value when considering the pace of statutory change.

31. Compiled from the 2002 & 2003 reports of IACA, which were formerly available at the IACA website: http://www.iaca.org. The numbers overstate the situation somewhat, because they lump together new filings of certificates of limited partnership (each representing a newly formed limited partnership) and new applications by existing limited partnerships seeking authority to do business in a “foreign” jurisdiction (i.e., a jurisdiction other than the filing entity’s state of organization). The latter category is far smaller than the former, however.

32. IACA figures for new LLC filings were 475,437 in 2000; 541,109 in 2001; and 697,405 in 2002. These figures have the same overlap problem as the limited partnership figures. See supra note 31.

33. IRS figures show that the number of limited partnerships filing federal tax returns actually increased from 1996 to 2001 (from slightly over 300,000 annually to slightly below 400,000 annually). At the same time, the number of LLC returns increased almost four-fold (from slightly more than 200,000 to approximately 800,000). BILL PRATT & MAUREEN PARSONS, INTERNAL REVENUE SERVICE, PARTNERSHIP RETURNS 52 fig. H (2001), available at http://www.irs.gov/pub/irs-soi/01/partnr.pdf (last visited Mar. 9, 2004).
four basic alternatives:34

- repeal the UPA and link RULPA to RUPA, a result which the drafters of RUPA expressly declined to recommend and which would make sense only after replicating the careful study which NCCUSL conducted while developing ULPA (2001);35

- preserve the UPA for pre-existing general partnerships and as a linked foundation to RULPA, a result which frustrates RUPA’s express objective of applying (after a suitable transition period) to all general partnerships and assumes that none of RUPA’s innovations make sense for either existing or new limited partnerships;

- preserve the UPA only as a linked foundation to RULPA, a result which makes sense only on the assumption that, although the UPA is no longer the best law for general partnerships, it somehow remains good law for limited partnerships;37


Thus, once a state adopts RUPA, the state must necessarily adopt a new legal regime for its limited partnerships. *Stare decisis et non quieta movere* is simply not an option, and the question then becomes whether ULPA (2001) is better than the other choices.

The answer to that question is yes, at least for any state that wishes to preserve the limited partnership form as an entity that is conceptually and practically distinct from limited liability companies and limited liability partnerships. ULPA (2001) “targets two types of enterprises that seem largely beyond the scope of LLPs and LLCs: (i) sophisticated, manager-entrenched

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34. See Miller, *supra* note 21, at 895-99. Colorado took a fifth, hybrid approach, allowing each limited partnership to choose between being linked to the UPA or RUPA. *Id.*

35. For example, RUPA ends a general partner’s non-compete obligation at dissolution, which may make sense in a general partnership but not in most limited partnerships. See *infra* note 245. Equally or perhaps more problematically, RUPA empowers a court to expel a general partner without dissolving the partnership, and the partnership agreement may not alter that power. *Id.* Also, RUPA provides transferees a limited right to seek dissolution of the partnership, a type of intervention which ULPA (2001) does not permit. *Id.*; Miller, *supra* note 21, at 895-99 (citing examples of questions raised by RULPA-RUPA link). Nonetheless, to date most states which have enacted RUPA have chosen to link RULPA to RUPA. Miller, *supra* note 21, at 895-99. There is no indication that any of these states first conducted a substantial, provision-by-provision review to determine RUPA’s suitability. See also Robert P. Keatinge et al., *Limited Liability Partnerships: The Next Step in the Evolution of the Unincorporated Business Organization*, 51 BUS. LAW. 147, 157 n.66 (1995) (stating that “[t]he relationship between the general partnership statute and RULPA (commonly referred to as ‘linkage’) is a complex one which in many respects is only now being fully considered as a result of the adoption of RUPA”); Allan W. Vestal, *A Comprehensive Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195, 1196 (1995) (urging de-linkage and stating that, after RUPA, “[t]he nexus [between general partnership law and limited partnership law] is no longer clear, the substance is no longer appropriate, and the uniformity (and the associated benefit of stability for limited partnerships) is fast disappearing”).

36. See RUPA § 1205 (repealing the UPA); § 1206 (b) (establishing “drag in” date after which all pre-existing general partnerships become subject to RUPA).

37. Delaware has taken this approach. See Miller, *supra* note 21, at 898.

38. The phrase in Latin means “[t]o stand by things decided, and not to disturb settled points.” BLACK’S LAW DICTIONARY 1414 (7th ed. 1999).
commercial deals whose participants commit for the long term, and (ii) estate planning arrangements (family limited partnerships). \(^{39}\) ULPA (2001) is a blueprint for such arrangements.

Of course, other structures are available for these purposes. For example, some states have sculpted their LLC statutes to serve estate planning needs. However, this sculpting has imposed on a general purpose vehicle (the LLC) a set of default rules that may be at odds with the expectations of many users—especially unsophisticated users. \(^{40}\) As for manager entrenchment, it certainly can be achieved by carefully and minutely revising the default rules provided by most state LLC acts. But why not provide entrepreneurs and their counsel a vehicle expressly designed for those results?

The benefits go beyond reducing transaction costs. ULPA (2001) is a statute whose key provisions and overall architecture signal to investors and judges alike that to buy into this vehicle is to accept as a fundamental premise “strong centralized management, strongly entrenched,” and “passive investors with little control over or right to exit the entity.” \(^{41}\) For example, ULPA (2001) section 406(a) states: “Except as expressly provided in this [Act], any matter relating to the activities of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners.” ULPA (2001) section 302 states: “A limited partner does not have the right or the power as a limited partner to act for or bind the limited partnership,” and an official comment explains: “Section 302 essentially excludes limited partners from the ordinary management of a limited partnership’s activities. [Subsection 406(a)] states affirmatively the general partners’ commanding role.” \(^{42}\)


40. In the estate planning context, valuation discounts depend on the default rules provided by the state statute under which the entity is formed. Consequently, retrofitting a state entity statute to maximize discounts means shaping key default provisions to serve those ends. In general, maximum discounts require a statute that—absent a contrary agreement among the owners—restricts each owner’s ability to turn the ownership interest into cash. Restraints on alienation and dissolution are therefore quite important. See Thomas Earl Geu, Selected Estate Planning Aspects of the Uniform Limited Partnership Act (2001), 37 Suffolk Univ. L. Rev. 735, 771 (2004).

41. ULPA (2001) Prefatory Note (The Act’s Overall Approach). Although, for example, nothing prevents an LLC’s operating agreement from giving an entrenched manager the sole discretion to dissolve the enterprise, that allocation of power fits far more easily into the “mindset” of a limited partnership. In re Estate of Rubloff, 645 N.E.2d 370, 372 (Ill. App. Ct. 1994) (enforcing a provision of a limited partnership agreement that permitted the general partner to dissolve the limited partnership simply by giving notice); In re Bel Air Assocs., Ltd., 4 B.R. 168, 171 (Bankr. Okla. 1980) (noting with approval that “the [limited] partnership agreement itself . . . provides for dissolution of the partnership at the sole discretion of the General Partner”).

42. ULPA (2001) § 406(a) cmt. Another comment lists the few extraordinary matters in which limited partners have a say:

- admission of a limited partner, Section 301(3)
- admission of a general partner, Section 401(4)
- amendment of the partnership agreement, Section 406(b)(1)
- the decision to amend the certificate of limited partnership so as to obtain or relinquish LLLP status, Section 406(b)(2)
The issue of manager expulsion illustrates some of the advantages of having available a statute designed for a strong-manager form of enterprise. Suppose that (i) the partnership agreement of a limited partnership does not provide for the expulsion of the general partner, (ii) the general partner has engaged in serious misconduct, and (iii) some of the limited partners wish to expel the general partner but not dissolve the limited partnership. Under RULPA, as linked to UPA, it is an open question whether a court may grant that relief. RULPA itself contemplates only “the general partner [being] removed in accordance with the partnership agreement” and the UPA, likewise, refers only to “the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners.” Neither act considers whether a court retains the inherent equitable power to order expulsion, and neither act considers whether, assuming the court has that power, the partnership agreement can prevent the power from being used.\footnote{There is some authority for a court’s inherent power to remove a general partner of a limited partnership. For example, in \textit{Curley v. Brignoli \& Roberts Associates}, the court first determined that the general partner’s misconduct justified dissolution of limited partnership as provided by applicable statutes, but noted that certain parties had “strenuously argued against immediate dissolution of the partnership as a going concern.” 746 F. Supp 1208, 1221 (S.D.N.Y. 1989). The court then held:

Under its inherent equitable powers the Court concludes [that the miscreant general partner] is legally incapable of performing its statutory duties as the General Partner of [the limited partnership] fairly and in good faith, and therefore grants plaintiffs’ more limited request for removal of . . . the General Partner, and will appoint an interim receiver until such reasonable time as a majority of the limited partners exclusive of [the removed general partner] vote to continue the partnership and appoint one or more new General Partners as successor to [the removed general partner].

\textit{Id.}; see also \textit{Fox v. Prudent Res. Trust} 69 F.R.D. 74, 81 (E.D. Pa. 1975) (holding that “the equitable powers of the court include the power to remove . . . the general partner” but doubting whether the court “could realistically make such an order”), Drucker v. Mige Assocs. II, 639 N.Y.S.2d 365, 367 (App. Div. 1996) (citing...}
Linking RULPA to RUPA does not resolve the matter, even though RUPA section 601(5) empowers a court to expel a general partner that has committed serious misconduct. It is by no means certain that RUPA’s expulsion provision will apply to a limited partnership. Assuming that RULPA’s general linkage provision is amended or interpreted to refer to RUPA (rather than the UPA), RUPA will apply “[i]n any case not provided for in” RULPA. But RULPA has a provision that describes when “a person ceases to be a general partner of a limited partnership,” and the description does not include court-ordered expulsion.

Moreover, if RUPA section 601(5) does apply, in some circumstances the result may be quite bad. Many limited partnership deals are premised on the continuing involvement of a particular general partner, and the parties might well agree at the outset that it should be impossible to remove the general partner without dissolving the partnership. Given such an agreement, a court should lack the power to order the general partner’s expulsion, but under RUPA section 103(b)(7), the partnership agreement may not “vary the right of a court to expel a partner in the events specified in Section 601(5).”

ULPA (2001) is sensitive to both the drafting and the business issues. Section 603(5) expressly authorizes a court to order a general partner’s expulsion, while Section 110 just as clearly permits the partnership agreement

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46. RUPA section 601(5) provides the following event of general partner dissociation:

on application by the partnership or another partner, the partner’s expulsion by judicial determination because:

(i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;

(ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or

(iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner.

47. RULPA § 1105.

48. RULPA section 402 is captioned “Events of Withdrawal,” but the section does not confine itself to a general partner’s voluntary withdrawal. See RULPA § 402. In particular, RULPA section 402(3) provides for a general partner’s removal as provided in the partnership agreement. § 402(3). A counter-argument could be made under RULPA section 403(a), which provides that “a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners.” § 403(a) (emphasis added). Arguably, susceptibility to judicial expulsion is a “restriction” on a general partner. This argument is weak, however, not only because it stretches considerably the ordinary notion of “restrictions” but also because it fails to read RULPA section 403(a) in para materia with section 1105. The same arguments for and against linkage on this point could be made if RULPA were linked to the UPA, but in that context the arguments would be moot. Unlike RUPA, the UPA does not provide for court-ordered expulsion of a general partner.
to negate that authorization.\textsuperscript{49} In addition, the application for judicial expulsion must come from “the limited partnership,”\textsuperscript{50} which means that a disgruntled limited partner must first meet the requirements for a derivative claim before asking a court to de-throne the king.\textsuperscript{51} This stricture is consistent with the premise of “strong centralized management, strongly entrenched,”\textsuperscript{52} but leaves recourse available in cases of genuine managerial abuse. Any limited partner who can make a substantial claim for judicial expulsion should have little difficulty pleading the necessary facts to establish demand futility.\textsuperscript{53}

III. SOURCES FOR, STRUCTURE OF, AND CHANGES MADE BY ULPA (2001)

\textbf{A. Sources}

The earliest drafts of what became ULPA (2001) incorporated as much as possible the language of RULPA (1985).\textsuperscript{54} However, as the Drafting Committee realized the full drafting implications of de-linkage, it shed its initial fealty to RULPA (1985), and the drafts began to rely increasingly on RUPA. In the final version of the new Act, many of the key sections have Comments indicating a RUPA section as “source.”\textsuperscript{55}

The rationale for this reliance is three-fold. First, as a “stand alone” Act, ULPA (2001) needed to replace those fundamental rules previously supplied to the law of limited partnerships by the uniform general partnership act.\textsuperscript{56} RUPA was (and is) NCCUSL’s current best thinking on the law of general partnerships, so it was inevitable for the Drafting Committee to look to RUPA as a basic premise. Second, the Drafting Committee envisioned the new Act and RUPA as existing in tandem, addressing closely related subjects. Wherever “the fundamental differences between a general partnership and

\textsuperscript{49} ULPA (2001) section 110(a) provides generally that the partnership agreement controls \textit{inter se} relations, subject only to a set of statutory provisions protected by subsection (b). See ULPA § 110(a). Subsection (b) does not protect Section 603(5). In contrast, subsection (b) does prohibit the partnership agreement from varying the power of the court to decree dissolution as provided by the statute. § 110(b)(9).

\textsuperscript{50} ULPA (2001) § 603(5).

\textsuperscript{51} ULPA (2001) §§ 1002-1005.

\textsuperscript{52} ULPA (2001) Prefatory Note (The Act’s Overall Approach).

\textsuperscript{53} ULPA (2001) §§ 1002(2), 1004(b).

\textsuperscript{54} See First Draft of Proposed Revisions to the Revised Uniform Limited Partnership Act, Prefatory Note to the Drafting Committee & Its Advisors (July 1997) (on file with author) (“Consistent with the Drafting Committee’s instructions, this draft delinks RUPA from the general partnership act while seeking to preserve as much as possible RUPA’s basic organization, language and ‘look and feel.’”).

\textsuperscript{55} E.g., ULPA (2001) § 110 (partnership agreement; source: RUPA § 103); ULPA (2001) § 402 (agency power of general partner; source: RUPA § 301); ULPA (2001) § 601 (dissociation as limited partner; source: RUPA § 601); ULPA (2001) § 603 (dissociation as general partner; source: RUPA § 603); ULPA (2001) § 702 (transfer of partner’s transferable interest; source: RUPA § 503); ULPA (2001) § 803 (winding up; source: RUPA §§ 802 and 803).

\textsuperscript{56} See supra notes 19-27 and accompanying text (explaining linkage principle).
limited partnership [were] immaterial," it made sense for the companion statutes to have parallel provisions. Although the two Acts are not in pari materia, parallelism would reduce the "learning curve" for practitioners and judges alike. Third, in a few instances, the RUPA formulation represented the results of lengthy deliberation, spirited debate, and hard bargaining over difficult issues. The Drafting Committee hoped that incorporating the RUPA solution would avoid reopening a previously concluded debate.

The new Act does incorporate some provisions from RULPA, often revised into a more modern style, as well as a number of provisions from ULLCA. ULLCA was particularly influential for provisions pertaining to public filings and supplied the key provision for resolving differences between the public record and the private agreement among the owners.

B. Structure

ULPA (2001) structure is an amalgam of the architecture of RUPA and ULLCA, spread across the following 12 articles:

   Article 1—the most eclectic of the Articles, captioned "General Provisions.

This Article includes definitions, some "plumbing" (e.g., permissible name and required office and agent for service of process), provisions that pertain specifically to partners but equally to both kinds of partner (e.g., business transactions of partner with partnership, dual capacity, consent and proxies

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57. ULPA (2001) § 107(a) cmt.
58. See, e.g., Khela v. Neiger, 648 N.E.2d 1329, 1330 (N.Y. 1995) (applying the in pari materia doctrine because "Labor Law §§ 241 and 241-a, similar in purpose, are both part of the statutory scheme addressing 'Building, Construction, Demolition and Repair Work'").
59. The new Act’s provisions on general partner fiduciary duty are the most important reflection of this reason. See infra notes 227-29 and accompanying text. Other articles in this issue criticize this rationale. J. William Callison & Allan W. Vestal, The Want of a Theory, Again, 37 Suffolk Univ. L. Rev. 719 (2004); Larry E. Ribstein, Fiduciary Duties and Limited Partnership Agreements, 37 Suffolk Univ. L. Rev. 927 (2004).
60. E.g., ULPA (2001) § 802 (Judicial Dissolution; source: RULPA § 802).
62. See ULPA (2001) §§ 901-908 cmt. (indicating ULLCA and few RUPA provisions as sources). For example, ULLCA provisions substantially influenced the new Act’s Article 9, concerning foreign limited partnerships.
63. See ULPA (2001) § 201(d) cmt. (noting that source of provision is "ULLCA Section 203(c)"); infra note 360; infra note 367 and accompanying text (discussing section 201(d) of ULPA (2001)).
64. ULPA (2001) § 102 (general); § 103 (knowledge and notice). ULPA (2001) section 111 is an operative provision, requiring the limited partnership to maintain certain required records, but also functions like a definition, specifying which records are required.
of partners,\textsuperscript{69} the fundamental characterization of a limited partnership as an entity with perpetual duration,\textsuperscript{70} and the all-important section 110 that states the role, power, and limitations of the partnership agreement.\textsuperscript{71} Section 110(b) is especially important, because its list of non-waivable provisions refers to 8 of the Act's 12 articles.

Article 2—whose content is adequately described by its caption: "Formation; Certificate Of Limited Partnership and Other Filings."

Article 3—captioned “Limited Partners” and containing most, but not all, of the provisions specifically pertaining to limited partners. As indicated above, Article 1 contains several provisions applicable both to limited and general partners. Articles 5 (pertaining to financial matters) and 7 (pertaining to a partner’s transferable interests) concern limited and general partners alike, and Article 6 contains two provisions dealing with the causes and effects of a person’s dissociation as a limited partner.\textsuperscript{72} Consent rights for limited partners appear in a number of provisions outside of Article 3:

- admission of a general partner, Section 401(4)
- amendment of the partnership agreement, Section 406(b)(1)
- the decision to amend the certificate of limited partnership so as to obtain or relinquish LLLP status, Section 406(b)(2)
- the disposition of all or substantially all of the limited partnership’s property, outside the ordinary course, Section 406(b)(3)
- the compromise of a partner’s obligation to make a contribution or return an improper distribution, Section 502(c)
- expulsion of a limited partner by consent of the other partners, Section 601(b)(4)
- expulsion of a general partner by consent of the other partners, Section 603(4)
- redemption of a transferable interest subject to charging order, using limited partnership property, Section 703(c)(3)
- causing dissolution by consent, Section 801(2)
- causing dissolution by consent following the dissociation of a general partner, when at least one general partner remains, Section 801(3)(A)
- avoiding dissolution and appointing a successor general partner, following the dissociation of the sole general partner, Section 801(3)(B)
- appointing a person to wind up the limited partnership when there is no general partner, Section 803(C)
- approving, amending or abandoning a plan of conversion, Section 1103(a) and (b)(2)

\textsuperscript{69} ULPA (2001) § 118. Article 1 does not contain all such provisions. Articles 5 and 7, pertaining respectively to financial rights and transfer of interests, also apply to both types of partners.

\textsuperscript{70} ULPA (2001) § 104.

\textsuperscript{71} ULPA (2001) § 110.

\textsuperscript{72} ULPA (2001) §§ 601, 602.
• approving, amending or abandoning a plan of merger, Section 1107(a) and (b)(2).73

Article 4—captioned “General Partners” and containing some, but not most, of the provisions specifically pertaining to general partners. A limited partnership is a manager-dominated entity, its general partners are its top managers, and, therefore, provisions concerning general partners are inevitably to be found throughout the new Act. Article 4 contains mostly provisions that state the general management rights,74 powers75 and responsibilities of the general partners.76 The Article also contains a section captioned “Becoming a General Partner,”77 although another very important provision on that subject appears in section 801(3)(B).78

Article 5—captioned “Contributions and Distributions” and comprising most of the Act’s provisions on the financial rights and obligations of the partners. Article 5’s provision on “Sharing of Distributions” has significant non-economic ramifications because other provisions structure partner consent mechanisms “in relation to the right to receive distributions.”79 The Article also includes several sections which can impose liability on a partner, former partner and even a transferee.80 One key economic provision appears outside this Article in section 812 (disposition of assets following dissolution of the limited partnership).

Article 6—captioned “Dissociation” and containing almost all the new Act’s provisions on that subject. This Article contains two provisions on the dissociation of a person as a limited partner;81 the rest of the Article concerns persons dissociated as general partners.82 Although one provision is captioned

73. This list appears in the comment to ULPA (2001) section 302, where it also includes “admission of a limited partner, Section 301(3).”
75. ULPA (2001) § 402 (General Partner Agent of Limited Partnership); § 403 (Limited Partnership Liable for General Partner’s Actionable Conduct).
76. ULPA (2001) § 404 (General Partner’s Liability); § 407 (Right of General Partner and Former General Partner to Information); § 408 (General Standards of General Partner’s Conduct).
77. ULPA (2001) § 401.
78. ULPA (2001) section 801(3)(B) provides for the non-unanimous selection of a general partner when the dissociation of a general partner has left the limited partnership without any general partners. This provision helps protect a limited partnership against dissolution. See infra notes 153-54 and accompanying text.
79. ULPA (2001) § 503 cmt. (giving as examples sections 801 and 803(c)).
80. ULPA (2001) § 502 (partner’s liability for promised contribution, applicable to former partners per 602(b) and 605(b)); § 509(a) (liability for persons who, as general partners, consent to an improper distribution); § 509(b) (recapture liability of “partner or transferee” that knowingly receives an improper distribution).
82. The phrase “person dissociated as a [general or limited] partner” is a term of art in the new Act. See ULPA (2001) § 603 cmt. (“This Act refers to a person’s dissociation as a general partner rather than to the dissociation of a general partner, because the same person may be both a general and a limited partner. See § 113 (Dual Capacity). It is possible for a dual capacity partner to dissociate in one capacity and not in the other.” (emphasis in original)); § 601 cmt. (same, as to “person dissociated as a limited partner”).
“Effect of Dissociation as General Partner,” other provisions both within and outside the Article are important on that point as well.

Article 7—captioned “Transferable Interests and Rights of Transferees and Creditors” and reflecting the “pick your partner” approach that is characteristic of partnership law. Although short and patterned quite tightly after the parallel provisions of both RUPA and ULLCA, this Article is fundamental to the new Act. The Article’s four sections define the nature of each partner’s interest in a limited partnership and (as a default rule) strictly limit a partner’s transfer rights. Concomitantly, those sections strictly limit the rights of transferees, creditors of partners, and creditors of transferees.

Article 8—captioned “Dissolution” and containing all the new Act’s provisions on that topic. The concept of “dissolution” is germane to various sections outside this Article. For example, the Act’s provisions on conversions and mergers provide that those transactions do not effect a dissolution “for the purposes of [Article] 8,” and the Act’s provisions on the power to bind the limited partnership organize themselves according to whether the limited partnership is dissolved at the time of the relevant act. For the most part, however, Article 8 is self-contained.

Article 9—captioned “Foreign Limited Partnerships” and containing mostly mechanical provisions relating to certificates of authority. This Article does contain one very important non-mechanical provision that prescribes the law governing foreign limited partnerships. Under section 901, “[t]he laws of the

84. ULPA (2001) § 606 (Power to Bind and Liability to Limited Partnership Before Dissolution of Partnership of Person Dissociated as General Partner); § 607 (Liability to Other Persons of Person Dissociated as General Partner); § 804 (Power of General Partner and Person Dissociated as General Partner to Bind Partnership After Dissolution); § 805 (Liability After Dissolution of General Partner and Person Dissociated as General Partner to Limited Partnership, Other General Partners, and Persons Dissociated as General Partner); § 1112 (Power of General Partner and Person Dissociated as General Partners to Bind Organization After Conversion or Merger).
85. See infra notes 388-93 and accompanying text (discussing this approach).
86. The parallel provisions appear in RUPA, Article 5, sections 501-504, and ULLCA, Article 5, sections 501-504. The principal difference between RUPA and ULLCA is that RUPA uses the term “transferable interest” and ULLCA uses “distributional interest.” Compare RUPA §§ 501-504, with ULLCA §§ 501-504. ULPA (2001) follows RUPA’s usage.
87. ULPA (2001) § 701 (Partner’s Transferable Interest).
88. ULPA (2001) § 702 (Transfer of Partner’s Transferable Interest).
89. ULPA (2001) §§ 702, 704 (Rights of the estate of a deceased partner).
90. ULPA (2001) § 703 (Rights of Creditor of Partner or Transferee). This is the so-called “charging order” provision.
91. ULPA (2001) §§ 1105(b)(6), 1109(a)(8).
92. As to the power-to-bind of a person dissociated as a general partner, ULPA (2001) section 606 applies before dissolution and section 804 afterwards. As to current general partners, before dissolution ULPA (2001) sections 402 and 403 govern. After dissolution, section 804 applies. It is arguable that section 402 continues to apply after dissolution, because section 804 is evidently shaped in the contours of section 402 and contains nothing to parallel section 403. The same situation exists under RUPA and ULLCA. See RUPA §§ 301, 302, 804; ULLCA §§ 301, 302, 804.
State or other jurisdiction under which a foreign limited partnership is organized governs not only "relations among the partners of the foreign limited partnership and between the partners and the foreign limited partnership," but also "the liability of partners as partners for an obligation of the foreign limited partnership." At first glance, this language may read like a codification of the "internal affairs" doctrine, and RULPA section 901 is to the same effect. Nonetheless, the consequences are remarkable. "A purely internal affair concerns only the internal structure and workings of the organization and has no direct impact on anyone outside the organization." It undoubtedly makes sense, therefore, for a court to apply foreign law when deciding a dispute inter se a foreign limited partnership and its partners. "In contrast, if the efficacy of a shield is at issue, parties outside the organization [such as creditors of the organization who seek to hold the owners liable] are almost necessarily involved." As a result, some courts have suggested that—at least with regard to equitable claims for "piercing" a liability shield—the forum state should apply its own law. ULPA (2001) section 901, like its predecessor, forecloses that approach.

Article 10—captioned "Actions by Partners" and stating rules both for direct and derivative actions. The Article's provision on direct actions, section 1001, is noteworthy for (i) following RUPA in providing that an accounting is not a precondition for a direct claim by a partner, (ii) codifying the distinction between and direct and a derivative claims, and (iii) providing the correct rule for making that distinction. The codification is important, given the

95. See BISHOP & KLEINBERGER, supra note 94, ¶ 6.08[4], at 6-64 n.298 (discussing the rationale underpinning "internal affairs" doctrine). Since any rights held by a transferee must have originated with a partner, transferee rights also come within the realm of "internal affairs." See ULPA (2001) § 102(22)-(23) (defining "transferable interest" and "transferee"); § 110(b)(13) (stating that partnership agreement may not "restrict rights under this [Act] of a person other than a partner or a transferee").
96. BISHOP & KLEINBERGER, supra note 94, ¶ 6.08[4], at 6-64 to 6-65 (footnotes omitted).
97. E.g., In re Botten, 54 B.R. 707, 708 (Bankr. W.D. Wis. 1985) (“Internal affairs of corporations as a general matter are governed by the law of the state of incorporation [citation omitted]. Whether a corporate veil should be pierced is a different matter since the rights of third parties are affected.”); Abu-Nassar v. Elders Futures, Inc., No. 88 Civ. 7906, 1991 WL 45062, at *10 (S.D.N.Y. Mar. 28, 1991) (holding that, although Lebanese law applied to determine whether a Lebanese limited liability company was duly formed and whether its owners benefited from a liability shield, forum law applied to determine whether to pierce the corporate veil); see also Gallinger v. N. Star Hosp. Mut. Assurance, Ltd., 64 F.3d 422, 428 (8th Cir. 1995) (applying, without expressly considering the choice of law issue, the law of the forum state to determine whether to pierce the veil of a business entity organized under Bermuda law). See BISHOP & KLEINBERGER, supra note 94, ¶ 6.08[6], at 6-66 to 6-69 & Supp. 2002, at S6-64.
98. ULPA (2001) § 1001(a).
99. ULPA (2001) section 1001(b) makes the distinction one of direct versus indirect injury, and eschews the misleading concepts of "special injury" and injuries of the "same character." For a critique of those latter concepts, see Daniel S. Kleinberger & Igmanta Bergmanis, Direct vs. Derivative, or "What’s a Lawsuit Between Friends in an 'Incorporated Partnership'?", 22 WM. MITCHELL L. REV. 1203, 1249-55 (1996)
fundamental role of the partnership agreement, the status of each partner as a party to the agreement, and the resulting temptation to assume that any breach of the partnership agreement gives rise to a direct claim by any partner.\textsuperscript{100}

The Article’s provisions on derivative actions are not remarkable. They are faithfully derived from RULPA’s Article 10, with the language modernized. What is remarkable is a related provision of Article 1, which expressly (albeit obliquely) empowers the partnership agreement to restrict a partner’s right to bring a derivative claim. Section 110(b)(11) prohibits the partnership agreement only from “unreasonably restrict[ing] the right to maintain an action under [Article] 10”\textsuperscript{101} and thus condones reasonable restrictions.

The Drafting Committee adopted this approach without citing any supportive precedent, and a comment to section 110 does provide a cautionary note:

\begin{quote}
The reasonableness of a restriction on derivative actions should be judged in light of the history and purpose of derivative actions. They originated as an equitable remedy, intended to protect passive owners against management abuses. A partnership agreement may not provide that all derivative claims will be subject to final determination by a special litigation committee appointed by the limited partnership, because that provision would eliminate, not merely restrict, a partner’s right to bring a derivative action.\textsuperscript{102}
\end{quote}

Article 11—captioned “Conversion and Merger” and providing a comprehensive vehicle for organic transactions of various types so long as one participant is a limited partnership organized under the Act. This Article involves several innovations but stops short of the “junction box” approach contemplated by the Modern Entity Transactions Act (META) now under consideration by NCCUSL and the American Bar Association.\textsuperscript{103} The Article’s most noteworthy provisions: (i) delineate the lingering power-to-bind\textsuperscript{104} and

\begin{footnotesize}
\begin{itemize}
  \item In ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract. Within a limited partnership, however, different circumstances may exist. A partner does not have a direct claim against another partner merely because the other partner has breached the partnership agreement. Likewise a partner’s violation of this Act does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

100. See ULPA (2001) § 1001(b) cmt.

101. ULPA (2001) § 110(b)(11) (emphasis added). This provision also applies to a partner’s right to bring a direct action, but in that context the provision is unremarkable. \textit{id.}


\end{itemize}
\end{footnotesize}
lingering exposure to personal liability\textsuperscript{105} of general partners, and persons previously dissociated as general partners, when a limited partnership disappears as a result of a conversion or merger; and (ii) grant a heavily protected veto right to any partner in a limited partnership who, as a result of a conversion or merger, is to be personally liable for the obligations of the converted or surviving entity.\textsuperscript{106}

Under this Article, the term “conversion” encompasses not only transactions in which an entity becomes another type of entity (with or without a change the jurisdiction under whose laws the entity is organized) but also what some statutes label “domestications”\textemdash i.e., transactions in which the entity remains the same type and changes solely the jurisdiction under whose laws it is organized.\textsuperscript{107} The Article omits what META labels “interest exchanges”\textemdash a generalization of the concept of a share exchange.\textsuperscript{108} Far more significantly, the Article omits any protection for transferees, leaving that concern to “other law.”\textsuperscript{109}

\textit{Article 12\textendash containing “Miscellaneous Provisions.”}\textemdash Most of this Article is NCCUSL boilerplate. Section 1206 contains some complicated provisions for applying the new Act to pre-existing partnerships.

\textbf{C. Table of Changes}

The Prefatory Note to ULPA (2001) ends with a table comparing “some of the major characteristics” of the new Act with those of its immediate predecessor.\textsuperscript{110} “In most instances, the rules involved are ‘default’ rules\textemdash i.e., subject to change by the partnership agreement.”\textsuperscript{111} The table is reproduced below.

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>RULPA (1985)</th>
<th>ULPA (2001)</th>
</tr>
</thead>
<tbody>
<tr>
<td>relationship to general partnership act</td>
<td>linked, Sections 1105, 403; UPA Section 6(2)</td>
<td>de-linked (but many RUPA provisions incorporated)</td>
</tr>
<tr>
<td>permitted purposes</td>
<td>subject to any specified exceptions, “any”</td>
<td>any lawful purpose, Section 104(b)</td>
</tr>
</tbody>
</table>

\begin{itemize}
\item \textsuperscript{105} ULPA (2001) § 1111(b).
\item \textsuperscript{106} ULPA (2001) § 1110(a), (c). Section 1110(b) provides the same protection with the regard to a decision to relinquish LLLP status. \textit{See infra} notes 169-98 and accompanying text (discussing LLLP status).
\item \textsuperscript{107} ULPA (2001) § 1102 cmt.
\item \textsuperscript{109} ULPA (2001) §§ 1102(b)(3) cmt., 1106(b)(3) cmt. For a discussion of this issue, see notes 393-421 and accompanying text, below.
\item \textsuperscript{110} ULPA (2001) Prefatory Note (Comparison of RULPA and this Act).
\item \textsuperscript{111} Id.; \textit{see also} Miller, supra note 21, at 908-12 (setting forth useful table of statutory comparisons).
\end{itemize}
<table>
<thead>
<tr>
<th>Topic</th>
<th>Description</th>
<th>Reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business that a partnership without limited partners may carry on,</td>
<td>“constructive notice via publicly filed documents” only that limited partnership exists and that designated general partners are general partners, Section 208</td>
<td>Section 106</td>
</tr>
<tr>
<td>constructive notice via publicly filed documents</td>
<td>RULPA constructive notice provisions carried forward, Section 103(c), plus constructive notice, 90 days after appropriate filing, of: general partner dissociation and of limited partnership dissolution, termination, merger and conversion, Section 103(d)</td>
<td></td>
</tr>
<tr>
<td>Duration</td>
<td>specified in certificate of limited partnership, Section 201(a)(4)</td>
<td>perpetual, Section 104(c); subject to change in partnership agreement</td>
</tr>
<tr>
<td>Use of limited partner name in entity name</td>
<td>prohibited, except in unusual circumstances, Section 102(2)</td>
<td>permitted, Section 108(a)</td>
</tr>
<tr>
<td>Annual report</td>
<td>none</td>
<td>required, Section 210</td>
</tr>
<tr>
<td>Limited partner liability for entity debts</td>
<td>none unless limited partner “participates in the control of the business” and person “transact[s] business with the limited partnership reasonably believing . . . that the limited partner is a general partner,” Section 303(a); safe harbor lists many activities that do not constitute participating in the control of the business, Section 303(b)</td>
<td>none, regardless of whether the limited partnership is an LLLP, “even if the limited partner participates in the management and control of the limited partnership,” Section 303</td>
</tr>
<tr>
<td>Limited partner duties</td>
<td>none specified</td>
<td>no fiduciary duties “solely by reason of being a limited partner,” Section 305(a); each limited partner is obliged to “discharge duties . . . and”</td>
</tr>
<tr>
<td>partner access to information—required records/information</td>
<td>all partners have right of access; no requirement of good cause; Act does not state whether partnership agreement may limit access; Sections 105(b) and 305(1)</td>
<td>list of required information expanded slightly; Act expressly states that partner does not have to show good cause; Sections 304(a), 407(a); however, the partnership agreement may set reasonable restrictions on access to and use of required information, Section 110(b)(4), and limited partnership may impose reasonable restrictions on the use of information, Sections 304(g), 407(f)</td>
</tr>
<tr>
<td>partner access to information—other information</td>
<td>limited partners have the right to obtain other relevant information “upon reasonable demand,” Section 305(2); general partner rights linked to general partnership act, Section 403</td>
<td>for limited partners, RULPA approach essentially carried forward, with procedures and standards for making a reasonable demand stated in greater detail, plus requirement that limited partnership supply known material information when limited partner consent sought, Section 304; general partner access rights made explicit, following ULLCA and RUPA, including obligation of limited partnership and general partners to volunteer certain information, Section 407; access rights provided for former partners, Sections 304 and 407</td>
</tr>
<tr>
<td>general partner liability for entity</td>
<td>complete, automatic and formally inescapable, LLLP status available via a simple statement in the</td>
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<tr>
<td>Category</td>
<td>Details</td>
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<tr>
<td>debts</td>
<td>Section 403(b) (n.b.—in practice, most modern limited partnerships have used a general partner that has its own liability shield; e.g., a corporation or limited liability company) certificate of limited partnership, Sections 102(9), 201(a)(4); LLLP status provides a full liability shield to all general partners, Section 404(c); if the limited partnership is not an LLLP, general partners are liable just as under RULPA, Section 404(a)</td>
<td></td>
</tr>
<tr>
<td>general partner duties</td>
<td>linked to duties of partners in a general partnership, Section 403 RUPA general partner duties imported, Section 408; general partner’s non-compete duty continues during winding up, Section 408(b)(3)</td>
<td></td>
</tr>
<tr>
<td>allocation of profits, losses and distributions</td>
<td>provides separately for sharing of profits and losses, Section 503, and for sharing of distributions, Section 504; allocates each according to contributions made and not returned eliminates as unnecessary the allocation rule for profits and losses; allocates distributions according to contributions made, Section 503 (n.b.—in the default mode, the Act’s formulation produces the same result as RULPA formulation)</td>
<td></td>
</tr>
<tr>
<td>partner liability for distributions</td>
<td>recapture liability if distribution involved “the return of . . . contribution”; one year recapture liability if distribution rightful, Section 608(a); six year recapture liability if wrongful, Section 608(b) following ULLCA Sections 406, 407, the Act adopts the RMBCA approach to improper distributions, Sections 508, 509</td>
<td></td>
</tr>
<tr>
<td>limited partner voluntary dissociation</td>
<td>theoretically, limited partner may withdraw on six months notice unless partnership agreement specifies a term for the limited partnership or withdrawal events for no “right to dissociate as a limited partner before the termination of the limited partnership,” Section 601(a); power to dissociate expressly recognized, Section 601(b)(1), but can be eliminated by the partnership agreement</td>
<td></td>
</tr>
<tr>
<td>Limited Partner</td>
<td>Involuntary Dissociation</td>
<td>Lengthy List of Causes, Section 601(b), Taken with Some Modification from RUPA</td>
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<td>--------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Limited Partner</td>
<td>“Fair value . . . based upon [the partner’s] right to share in distributions,” Section 604</td>
<td>No payout; person becomes transferee of its own transferable interest, Section 602(3)</td>
</tr>
<tr>
<td>General Partner</td>
<td>Voluntary Dissociation</td>
<td>RULPA Rule Carried Forward, Although Phrased Differently, Section 604(a); Dissociation Before Termination of the Limited Partnership is Defined as Wrongful, Section 604(b)(2)</td>
</tr>
<tr>
<td>General Partner</td>
<td>Involuntary Dissociation</td>
<td>Following RUPA, Section 603 Expands the List of Causes, Including Expulsion by Court Order, Section 603(5)</td>
</tr>
<tr>
<td>General Partner</td>
<td>Dissociation—Payout</td>
<td>“Fair value . . . based upon [the partner’s] right to share in distributions,” Section 604, Subject to Offset for Damages Caused by Wrongful Withdrawal, Section 602</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Limited Partner</th>
<th>Involuntary Dissociation</th>
<th>Not Addressed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited Partner</td>
<td>Dissociation—Payout</td>
<td>“Fair value . . . based upon [the partner’s] right to share in distributions,” Section 604</td>
</tr>
<tr>
<td>General Partner</td>
<td>Voluntary Dissociation</td>
<td>Right Exists Unless Otherwise Provided in Partnership Agreement, Section 602; Power Exists Regardless of Partnership Agreement, Section 602</td>
</tr>
<tr>
<td>General Partner</td>
<td>Involuntary Dissociation</td>
<td>Section 402 Lists Causes</td>
</tr>
<tr>
<td>General Partner</td>
<td>Dissociation—Payout</td>
<td>“Fair value . . . based upon [the partner’s] right to share in distributions,” Section 604, Subject to Offset for Damages Caused by Wrongful Withdrawal, Section 602</td>
</tr>
</tbody>
</table>

Note: RULPA = Revised UniformLimited Partnership Act; RUPA = Uniform Partnership Act.
<table>
<thead>
<tr>
<th>transfer of partner interest—nomenclature</th>
<th>“Assignment of Partnership Interest,” Section 702</th>
<th>“Transfer of Partner’s Transferable Interest,” Section 702</th>
</tr>
</thead>
<tbody>
<tr>
<td>transfer of partner interest—substance</td>
<td>economic rights fully transferable, but management rights and partner status are not transferable, Section 702</td>
<td>same rule, but Sections 701 and 702 follow RUPA’s more detailed and less oblique formulation</td>
</tr>
<tr>
<td>rights of creditor of partner</td>
<td>limited to charging order, Section 703</td>
<td>essentially the same rule, but, following RUPA and ULLCA, the Act has a more elaborate provision that expressly extends to creditors of transferees, Section 703</td>
</tr>
<tr>
<td>dissolution by partner consent</td>
<td>requires unanimous written consent, Section 801(3)</td>
<td>requires consent of “all general partners and of limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective,” Section 801(2)</td>
</tr>
<tr>
<td>dissolution following dissociation of a general partner</td>
<td>occurs automatically unless all partners agree to continue the business and, if there is no remaining general partner, to appoint a replacement general partner, Section 801(4)</td>
<td>if at least one general partner remains, no dissolution unless “within 90 days after the dissociation . . . partners owning a majority of the rights to receive distributions as partners” consent to dissolve the limited partnership; Section 801(3)(A); if no general partner remains, dissolution occurs upon the passage of 90 days after the dissociation, unless before that deadline limited partners owning a majority of the rights to receive distributions owned by limited partners consent to continue the business and admit at least one new general partner</td>
</tr>
<tr>
<td>Filings Related to Entity Termination</td>
<td>Certificate of limited partnership to be cancelled when limited partnership dissolves and begins winding up, Section 203</td>
<td>Limited partnership may amend certificate to indicate dissolution, Section 803(b)(1), and may file statement of termination indicating that winding up has been completed and the limited partnership is terminated, Section 203</td>
</tr>
<tr>
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</tr>
<tr>
<td>Procedures for Barr ing Claims Against Dissolved Limited Partnership</td>
<td>None</td>
<td>Following ULLCA Sections 807 and 808, the Act adopts the RMBCA approach providing for giving notice and barring claims, Sections 806 and 807</td>
</tr>
<tr>
<td>Conversions and Mergers</td>
<td>No provision</td>
<td>Article 11 permits conversions to and from and mergers with any “organization,” defined as “a general partnership, including a limited liability partnership; limited partnership, including a limited liability limited partnership; limited liability company; business trust; corporation; or any other entity having a governing statute . . . [including] domestic and foreign entities regardless of whether organized for profit.” Section 1101(8)</td>
</tr>
<tr>
<td>Writing Requirements</td>
<td>Some provisions pertain only to written understandings; see, e.g., Sections 401 (partnership agreement may “provide in writing for the admission of partner and a new general partner is admitted, Section 801(3)(B))</td>
<td>Removes virtually all writing requirements; but does require that certain information be maintained in record form, Section 111</td>
</tr>
</tbody>
</table>
additional general partners”; such admission also permitted “with the written consent of all partners”), 502(a) (limited partner’s promise to contribute “is not enforceable unless set out in a writing signed by the limited partner”), 801(2) and (3) (dissolution occurs “upon the happening of events specified in writing in the partnership agreement” and upon “written consent of all partners”), 801(4) (dissolution avoided following withdrawal of a general partner if “all partners agree in writing”)


According to the Prefatory Note to RULPA (1985), most of the 1985 revisions were to implement “the principle that the limited partnership agreement, not the certificate of limited partnership, is the primary constitutive, organizational, and governing document of a limited partnership.”

Otherwise, “the 1985 Act . . . follows the 1976 Act very closely in most

112. RULPA (1985) Prefatory Note.

The provisions relating to general partners are collected in Article 4. It differs little from the corresponding article in the 1976 Act, except that some of the 1976 Act’s references to the certificate of limited partnership have been changed to refer instead to the partnership agreement. . . . [As to Article 5 the] 1976 Act explicitly permitted contributions to the partnership to be made in the form of the contribution of services and promises to contribute cash, property, or services, and provided that those who failed to perform promised services were required, in the absence of an agreement to the contrary, to pay the value of the services as stated in the certificate of limited partnership. These important innovations of the 1976 Act are retained in substance in the 1985 Act. However, the 1985 Act substitutes the partnership agreement and the records of the limited partnership for the certificate of limited partnership as the place such agreements are to be set out and such information is to be kept.
respects. It makes almost no change in the basic structure of the 1976 Act.\textsuperscript{113} In contrast, the Prefatory Note to ULPA (2001) lists thirty categories of comparison between RULPA (1985) and the new Act,\textsuperscript{114} and one recent analysis lists 12 specific major differences:

In contrast to RULPA, ULPA (2001):

1. is a stand alone act... incorporating essentially verbatim many important provisions from RUPA;
2. provides constructive notice, 90 days after appropriate filing, of general partner dissociation and of limited partnership dissolution, termination, merger, and conversion;
3. has a perpetual duration, subject to change by the partnership agreement (and to earlier dissolution following the dissociation of a general partner and otherwise by partner consent);
4. expressly delineates the permissible scope and effect of the partnership agreement;
5. provides a complete, corporate-like liability shield for limited partners “even if the limited partner participates in the management and control of the limited partnership”;
6. permits a limited partnership to be a limited liability limited partnership (LLLP), and thereby makes a complete, corporate-like liability shield available to general partners;
7. gives limited partners the power but not the right to dissociate before the limited partnership’s termination and allows the partnership agreement to eliminate even the power;
8. eliminates any pre-termination pay out to dissociated partners, unless the partnership agreement provides otherwise;
9. eschews the UPA’s open-ended approach to general partner fiduciary duties and incorporates essentially verbatim RUPA’s provision on fiduciary duty and the obligation of good faith and fair dealing;
10. provides for judicial expulsion of a general partner, although the partnership agreement can negate this provision;
11. makes dissolution following a general partner’s dissociation less likely, by replacing RULPA’s unanimous consent rule with a two pronged approach:
   a. if at least one general partner remains, no dissolution unless “within 90 days after the dissociation... partners owning a majority of the rights to receive distributions... partners” consent to dissolve the limited

\textsuperscript{113} Id.
\textsuperscript{114} ULPA (2001) Prefatory Note (Comparison of RULPA and this Act). The Prefatory Note presents this list in tabular form. The table is reproduced above.
partnership;

b. if no general partner remains, dissolution occurs upon the passage of 90 days after the dissociation, unless before that deadline limited partners owning a majority of the rights to receive distributions owned by limited partners consent to continue the business and admit at least one new general partner and a new general partner is admitted; and

12. authorizes a limited partnership to participate in mergers and conversions.115

This Part of this article highlights eleven of the most significant areas of difference between the new Act and its predecessor, and for each area explores some salient ramifications—be they opportunities, traps for the unwary, or merely complexities.

A. De-Linking and the Case Law from Other Statutes

Of course, the new Act’s most fundamental change consists of replacing a linked statute with a stand alone statute. The most obvious consequence is that new Act does not depend for its meaning or its effect on the language of any other statute.

The new Act, however, borrows much of its language from other uniform and model acts,116 so judicial interpretations of those acts may be instructive. As for case law interpreting predecessor limited partnership acts,117 applicability depends whether the new Act has preserved the statutory language or approach analyzed in the earlier decision.

A comparable issue situation existed when RULPA replaced ULPA (1916). For example, Gregg v. S.R. Investors, Ltd.118 considered whether RULPA section 304 (recourse for person erroneously believing himself [or herself] limited partner) was available to investors who had intended to become limited partners in a railroad operation. The applicable limited partnership statute did not permit a limited partnership to operate a railroad, and the court had earlier decided that, as a result, no limited partnership had been formed. The plaintiffs argued that this earlier decision rendered section 304 unavailable to the would-be limited partners. The court rejected that argument, relying on a seventy-four year-old U.S. Supreme Court decision that had addressed the same issue under ULPA (1916) section 11.119

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115. DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIP AND LLCs § 12.3.3, at 411-12 (footnotes omitted).
116. See infra Part III (setting forth detailed discussion of this point).
117. This assertion assumes that a predecessor act does not itself apply to the particular matter. ULPA (2001) section 1206 contains detailed transition provisions under which all pre-existing limited partnerships will eventually become subject to the new Act. This approach follows RUPA section 1206. However, ULPA (2001) section 1206(b) does preserve certain pre-existing rules for pre-existing partnerships unless the partnership elects otherwise. This approach is derived from RULPA section 1104(3)(4).
119. Id. at *3 (citing Giles v. Vette, 263 U.S. 553 (1924)).
That reliance was certainly correct. Although the two sections differ in many specifics, they take essentially the same approach to the same question, and none of the specific differences are relevant to the issue decided in Gregg. The same line of precedent should also apply under ULPA (2001) section 306, which is the new Act’s analog to RUPA section 304. Section 306 is a “substantially redrafted” version of section 304, but the re-drafting was merely “for reasons of style.”

Prodigy Centers/Atlanta No. 1 L.P. v. T-C Associates, Ltd. provides another example. A certified question from the Eleventh Circuit asked the Georgia Supreme Court to determine whether a partner’s financial rights in a limited partnership are a “chose in action.” To make that determination, the Court looked both to Georgia’s version of ULPA (1916) and to Georgia’s version of RULPA, even though the two statutes differed as to (i) the default rule for allocating partners’ financial rights, and (ii) the document through which the default allocations could be varied. From the perspective of the “chose in action” question, those differences were immaterial. What mattered was the way the statutes conceptualized a partner’s financial rights and what procedures the statutes established to allow a creditor to levy on those rights. On those two points, the two statutes were functionally identical.

This precedent also will survive under ULPA (2001). The new Act preserves the longstanding concept of a partner’s financial rights, albeit in more modern language, and continues the charging order as the sole remedy for a judgment creditor of a partner or partner’s transferee.

The results should be different where the new Act reflects a change in policy. For example, in JRY Corp. v. LeRoux, a group of limited partners urged the court to interpret the partnership agreement in light of the “control rule” safe harbor provisions contained in RULPA section 303(b). Had the court accepted that view, the decision would be irrelevant under ULPA (2001); the new Act categorically rejects the control rule and therefore omits RULPA’s safe

120. ULPA (2001) § 306 cmt.
122. Id. at 212-13; see also Kenworthy v. Hargrove, 855 F. Supp. 101, 104 (E.D. Pa. 1994) (“The determination of whether to apply the ULPA or the new RULPA in this matter [concerning derivative claims] is not material, however, since the RULPA contains a similar provision to that found in the older ULPA, governing the ability of limited partners to bring an action on behalf of the partnership.”); In re Sharps Run Assocs., L.P., 157 B.R. 766, 776 (Bankr. D. N.J. 1993) (applying case law decided under ULPA (1916), despite some differences with the analogous provisions of RULPA, because the language relevant to the issue being decided “is the same, for all intents and purposes”).
123. See supra notes 95-102 and accompanying text.
124. JRY Corp. v. LeRoux, 464 N.E.2d 82, 88 n.10 (Mass. App. Ct. 1984). Under RULPA section 303(a), a limited partner who “participates in the control of the business” risks personal liability for the limited partnership’s obligations. See infra notes 199-212 and accompanying text. RUPA section 303(b) contains a lengthy list of safe harbors. § 303(b).
harbors. 126

As for case law dealing with general partners in general partnerships, the analysis is more complicated. Both ULPA (1916) and RULPA specifically linked the rights, powers, and restrictions of “a general partner in a limited partnership” to those of “a partner in a partnership without limited partners.” 127 That link does not exist under the new Act, and according to an official Comment, “a court should not assume that a case concerning a general partnership is automatically relevant to a limited partnership governed by this Act.”128 That Comment suggests the following guidelines: “A general partnership case may be relevant by analogy, especially if (1) the issue in dispute involves a provision of this Act for which a comparable provision exists under the law of general partnerships; and (2) the fundamental differences between a general partnership and limited partnership are immaterial to the disputed issue.”129

B. Elimination of the Business Purpose Requirement

ULPA (2001) section 104(b) provides that “[a] limited partnership may be organized under this [Act] for any lawful purpose.” Viewed abstractly, this provision is shocking. For as long as U.S. law has recognized partnerships, it has been axiomatic that a partnership is an enterprise formed for the purpose of seeking profit. 130 Every uniform partnership act other than ULPA (2001) conceives of a partnership as “an association of two or more persons to carry on as co-owners a business for profit.” 131 The new Act’s approach thus seems to

126. ULPA (2001) § 303; see also Bassan v. Inv. Exch. Corp., 524 P.2d 233, 239-40 (Wash. 1974) (holding that a combination of express and implied terms of the partnership agreement authorized the general partner’s sale of property to the limited partnership at a profit and seeming to underscore the appropriateness of the limited partners’ agreed-to dependence on the general partner by stating that “[a] limited partner is not bound by the obligations of the partnership and is not subject to the liability of a general partner, unless he takes part in the control of the business”).

127. RULPA § 403(a); ULPA (1916) § 9(1).


129. Id.

130. E.g., Berthold v. Goldsmith, 65 U.S. 536, 541 (1860) (“Partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them.”); Ward v. Thompson, 63 U.S. 330, 333 (1859) (“A contract of partnership is where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits.”).

131. See RUPA § 101(6); UPA § 6(1). ULPA (1916) section 3 provides that “A limited partnership may carry on any business which a partnership without limited partners may carry on,” subject to any specified restrictions, and RULPA section 106 is identical. ULPA (1916) § 3; RULPA § 106. RUPA section 101 defines “business,” consistent with ordinary usage, to “[include[] every trade, occupation, and profession.” § 101. UPA section 2 has the identical definition. Compare ULLCA § 101(3) (defining business to include not only “every trade, occupation, profession” but also any “other lawful purpose, whether or not carried on for profit”). Early drafts of ULPA (2001) copied ULLCA’s language, but after the Act’s first reading at NCCUSL’s 2000 Annual Meeting, the drafting committee adopted a more direct approach. See Proposed Draft to the Revised Uniform Limited Partnership Act n.2 (Apr. 2001) (on file with author) (“At its St. Petersburg
tear the law of limited partnerships away from its roots.

The change may be less momentous than it seems, however. Limited liability company statutes have already paved the way toward this entity version of androgyny. Although some LLC statutes require a limited liability company to have business purpose, most do not.132 Moreover, it seems likely that almost all limited partnerships will have something like a business purpose. The new Act’s basic architecture presupposes a pecuniary orientation; ULPA (2001) seems an inconvenient vehicle for housing non-commercial activities.133

The new approach does have at least one major advantage—namely, permitting people to form a limited partnership without having to worry whether the limited partnership’s activities qualify as a for-profit business. Suppose, for example, that the family matriarch decides to use a limited partnership to hold land subject to whatever purpose she may subsequently determine. Under prior limited partnership statutes, she should worry (at least in passing) that a disgruntled limited partner will seek dissolution on the grounds that the limited partnership is not carrying on a business for profit.134

Beach meeting, the Drafting Committee decided to eschew the ‘Humpty Dumpty’ approach to defining ‘business.’ This decision accords with several comments made from the floor at the 2000 Annual Meeting.”)


Most states permit a limited liability company to be organized for any “lawful purpose” but do not include the phrase “whether or not for profit.” A few states combine the expansive “lawful purpose” language with that further clarifying phrase. See, e.g., 6 Del. C. § 18-106, K.S.A. § 17-7668, 18 Okl. St. § 2002, and W. V. Code § 31B-1-112. A few states impose a “lawful business” requirement. See, e.g., Cal. Corp Code § 17002, C.R.S § 7-80-103, or refer to any business purpose subject to other law. See, e.g., Minn. Stat. § 322B.10, N.D. Cent. Code, § 10-32-04, and Tex. Rev. Civ. Stat. art. 1528n 2.01A. (The MBCA takes the “lawful business” approach. See MBCA § 3.01(a).)

133. The Comment to ULPA (2001) section 104(b) warns: “[M]any of the Act’s default rules presuppose at least a profit-making purpose. . . . If a limited partnership is organized for an essentially non-pecuniary purpose, the organizers should carefully review the Act’s default rules and override them as necessary via the partnership agreement.” § 104(b) cmt.

134. See In re Smith, 185 B.R. 285, 295 (Bankr. S.D. Ill. 1995). In Smith, a limited partner’s trustee in bankruptcy sought dissolution of the limited partnership on the grounds that the limited partnership “has failed to act in accordance with its stated purpose of investing in real estate and that the partnership, which simply holds title to the residence, is not conducting a business of real estate investment.” Id. The court declined to rule via summary judgment “whether merely holding title to real estate . . . constitutes carrying on a business under Illinois law,” because “[t]he Court has no evidence before it to show whether the limited partnership is simply holding title to real estate as opposed to conducting a business of real estate investment.” Id. In another part of the decision, the court held that the trustee succeeded to the limited partner’s right to sue for dissolution. See BISHOP & KLEINBERGER, supra note 94, ¶ 9.02[7][c][iv] (Rights of the trustee in bankruptcy) (criticizing holding in Smith); see also Roby v. Day, 635 P.2d 611 (Okl. 1981). Day concerned an arrangement for the collective purchase, organized storage, and individualized distribution of alcohol through a supposed limited partnership. The Oklahoma Supreme Court rejected the arrangement on several grounds, one of which was that the supposed limited partnership failed the requirement of a for-profit purpose. Day, 635 P.2d at 613-15.

The only enterprise which plaintiff’s scheme contemplates “carrying on” is the replenishment of alcoholic consumables as the common supply diminishes, a project which falls short of a program
The worry might also extend to claims from creditors. Arguably at least, a limited partnership that lacks a proper purpose is no limited partnership at all, and even its passive “owners” are at risk of personal liability.\(^{135}\)

Eliminating the business purpose requirement may also make limited partnerships marginally more attractive for tax-exempt non-profit corporations that are seeking vehicles for joint ventures. To qualify for tax-exempt status under IRC section 501(c)(3), a corporation must be “organized and operated exclusively for charitable and educational purposes.”\(^{136}\) The requirement can be at issue when a non-profit corporation combines with other persons in a seemingly commercial venture.\(^{137}\) The requirement can be met if the non-profit controls the venture and the venture is designed primarily to serve a purpose acceptable under section 501(c)(3).\(^{138}\) Using a limited partnership as the joint venture vehicle does not automatically give the venture an unacceptable commercial purpose;\(^{139}\) in this context, tax law seems to ignore partnership law’s business purpose requirement.\(^{140}\) However, a non-profit corporation which the contemplated partners will “carry on as co-owners a business for profit.”... [T]he purchase of alcohol by a “partnership” for consumption by the individual partners without profit to the partnership is not an authorized purpose for the formation of a partnership.\ldots

135. Gregg v. S.R. Investors, 966 F. Supp. 746 (N.D. Ill. 1997) (providing a worrisome, albeit not completely parallel, example). The case involved a limited partnership formed to operate a railroad. Id. at 746. The applicable limited partnership statute that prohibited that purpose, and the court held that a limited partnership sought to be formed for an improper purpose exposes its owners to liability as general partners. Id. at 748; see also Katherine D. Black et al., When A Discount Isn’t A Bargain: Debunking The Myths Behind Family Limited Partnerships, 32 U. MEM. L. REV. 245, 272 (2002) (stating that “without the business purpose and profit motive, [a family limited partnership] may not qualify as a partnership” for state law purposes and that “[i]f the [family limited partnership] does not qualify as a partnership, it will not be afforded limited liability,” but citing no authority).

136. Plumstead Theatre Soc., Inc. v. Comm’r, 675 F.2d 244, 244 (9th Cir. 1982).

137. E.g., St. David’s Health Care Sys. v. United States, Civ. No. A-01-CA-046, 2002 U.S. Dist. LEXIS 10453, at *9 (W.D. Tex. June 7, 2002) (“An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.”), vacated & remanded by 349 F.3d 232 (5th Cir. 2003). See generally BISHOP & KLEINBERGER, supra note 94, ¶ 1.10 (Supp. 04-1 (Exempt Organization Commercial Activity and Joint Ventures) forthcoming July 2004).

138. Housing Pioneers Inc. v. Comm’r 65 T.C.M. (CCH) 2191 (1993) (holding that a non-profit entity had to be organized exclusively for exempt purposes to qualify for tax-exempt status and that, although some non-exempt purposes could be permitted, a single substantial non-exempt purpose would defeat the exemption). In Housing Pioneers, the court concluded that the non-profit entity’s non-exempt purpose was substantial, because the owners of the for-profit entities would benefit financially from the non-profit entity’s tax-exempt activities. Compare St. David’s, 2002 U.S. Dist. LEXIS 10453, at *9 (holding that a not-for-profit hospital remained a tax-exempt organization after it entered into a limited partnership with a for-profit health care company, because the arrangement satisfied the primary activities prong of the operational test). See generally BISHOP & KLEINBERGER, supra note 94, ¶ 1.10 (Supp. 04-1 (Exempt Organization Commercial Activity and Joint Ventures) forthcoming July 2004).

139. Plumstead Theatre, 675 F.2d at 244 (affirming the Tax Court’s determination that a non-profit corporation qualified for section 501(c)(3) status even though the corporation served as the sole general partner in a limited partnership).

140. In other contexts, just the opposite is true. See infra notes 142-43 and accompanying text.
could strengthen its position on the section 501(c)(3) issue by stating in the partnership agreement that the limited partnership is *not* organized primarily for the purpose of carrying on a profit-making business.\(^{141}\) Such a statement is certainly more consonant with ULPA (2001) than with either of its predecessor acts.

The elimination of the business purpose requirement does create some opportunities for misunderstanding. Two concern tax law. First, a genuinely non-business limited partnership will not provide its owners any pass through deductions.\(^{142}\) Taxpayers cannot transmute non-deductible personal expenses into deductible business expenses by incurring those expenses through a non-business limited partnership. Although a non-business limited partnership is probably classified as a partnership under the check-the-box tax regulations,\(^{143}\) deductibility is a separate matter. Deductibility is premised on the expenses being inured in connection with a trade or business, which in turn presupposes a for-profit purpose.\(^{144}\)

Second, a non-business limited partnership cannot provide the valuation discounts that estate planners seek through so-called family limited partnerships. “A family limited partnership will be recognized for tax purposes if the partnership was formed for a business, financial or investment reason, or the partnership did in fact engage in business, financial or investment activities.”\(^{145}\)

There are non-tax concerns as well. As already noted, most of the Act’s provisions assume a business purpose, so the partnership agreement for a non-business limited partnership must be carefully and specially tailored. That special tailoring should not only encompass ordinary matters (such as

\(^{141}\) Redlands Surgical Servs. v. Comm’r, 113 T.C. 47, 78-79 (1999), rev. denied & aff’d, 242 F.3d 904 (9th Cir. 2001). The court stated that

> [n]othing in the . . . Partnership agreement, or in any of the other binding commitments relating to the operation of the Surgery Center, establishes any obligation that charitable purposes be put ahead of economic objectives in the Surgery Center’s operations. The . . . Partnership agreement does not expressly state any mutually agreed-upon charitable purpose or objective of the partnership.

\(^{142}\) Such deductions are a major attraction for many investors in limited partnerships. See, e.g., Burns v. Plaza W. Assocs., 979 S.W.2d 540, 548 (Mo. App. 1998) (noting “the tax driven nature of real estate syndications . . . which were designed to take advantage of existing tax laws by maximizing partnership obligations which could be utilized to create loss pass through[s] to the partners”).

\(^{143}\) Although these regulations use the term “business entities” to define their scope, that term means “any entity recognized for federal tax purposes . . . that is not properly classified as a trust under § 301.7701-4 or otherwise subject to special treatment under the Internal Revenue Code.” See Treas. Reg. § 301.7701-2(a). There is no reference to, let alone requirement of, a business or for-profit purpose. BISHOP & KLEINBERGER, supra note 94, at ch. 2 (providing overview and analysis of check-the-box regulations).

\(^{144}\) E.g., Gefen v. Comm’r, 87 T.C. 1471, 1497 (1986) (holding in favor of a limited partner and noting that “[a]n activity is a trade or business for purposes of section 162 if it is carried on with the predominant purpose and intention of making a profit”).

\(^{145}\) Black et al., supra note 135, at 270 (citing cases).
allocation of management authority) but should also extend to unpleasant contingencies.

For example, having a non-business purpose cuts a limited partnership off from case law precedent that guides courts in determining whether to dissolve a limited partnership on the grounds that “it is not reasonably practicable to carry on the business in conformity with the partnership agreement.” The corresponding provision in the new Act refers instead to “the activities of the limited partnership.” Courts have some understanding of business impracticability; the potential for economic benefit serves as the context for discerning the partners’ deal as reflected in the partnership agreement. That context is inapposite with a non-business limited partnership, and therefore the partnership agreement must carefully and completely describe its own context.

A non-business purpose may also change the way in which a limited partnership or its partners are affected by other law. Consider, for example, a prejudgment attachment statute that permits an attachment order against a natural person only “on a claim which arises out of the conduct by the defendant of a trade, business, or profession.” Under RULPA or ULPA (1916), the “trade, business, or profession” characterization seems a foregone conclusion. Any contrary characterization would imperil the limited partnership’s status as a limited partnership. Under ULPA (2001), in contrast, there is no automatic characterization. It is open to a general partner to argue, for instance, that the limited partnership operates the “hobby farm” truly as a hobby and not as a business.

C. Entity Durability and the End of the Limited Partner’s Put Right

ULPA (2001) section 104(c) provides, subject to any contrary provision in the partnership agreement, that “[a] limited partnership has a perpetual duration,” and section 602(a)(3) provides that, “[u]pon a person’s dissociation as a limited partner . . . any transferable interest owned by the person in the person’s capacity as a limited partner immediately before dissociation is owned by the person as a mere transferee.” The same rule applies to the transferable

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146. RULPA § 802 (emphasis added).
147. ULPA (2001) § 802 (emphasis added).
148. See, e.g., PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd., No. 89-10788, 1989 WL 63901, at *5-6 (Del. Ch. June 8, 1989) (granting dissolution after analyzing in detail the particular business project contemplated by the partnership agreement). See generally BISHOP & KLEINBERGER, supra note 94, ¶ 9.02(7)[a][i] (discussing the “not reasonably practicable” standard). In a sense, the profit purpose is a “meta” usage of trade that informs a court’s understanding of the meaning of the partnership agreement. Compare U.C.C. § 1-205(2) (2004) (defining usage of trade); U.C.C. § 1-205(5) (providing that, where appropriate, a usage of trade “shall be used in interpreting the agreement”).
149. This example is based on Security Pacific National Bank v. Matek, 223 Cal. Rptr. 288, 290 (Ct. App. 1985), construing section 483.010(c) of the California Code of Civil Procedure.
150. See supra notes 134-35 and accompanying text.
151. ULPA (2001) §§ 104(c), 602(a)(3). Following RUPA section 502, the new Act uses “transferable
interest of a person dissociated as a general partner.152

The dissociation of a general partner does not itself cause the limited partnership to dissolve. If at least one general partner remains, there is no dissolution unless “within 90 days after the dissociation . . . partners owning a majority of the rights to receive distributions as partners” consent to dissolve the limited partnership.153 Even if no general partner remains, dissolution can be avoided if, within ninety days after the dissociation, “consent to continue the activities of the limited partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective; and . . . at least one person is admitted as a general partner in accordance with the consent.”154 In sum, under the new Act, a limited partnership can be quite a durable entity, and, absent a contrary agreement, the partners’ economic interests are “locked in” so long as the entity endures.

Formally at least, the corresponding rules in RULPA are quite different. RULPA section 201(4) requires the certificate of limited partnership to state “the latest date upon which the limited partnership is to dissolve,” and section 604 provides that, subject to the partnership agreement, “any withdrawing partner . . . is entitled to receive, within a reasonable time after withdrawal, the fair value of his [or her] interest in the limited partnership as of the date of withdrawal based upon his [or her] right to share in distributions from the limited partnership.”155 Limited partners have what amounts to a statutory “put” right, because, RULPA section 603 provides: “[i]f the [partnership] agreement does not specify in writing the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may

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152. ULPA (2001) § 605(a)(5); see infra notes 385-418. As explained below, “mere transferees” are in a vulnerable position, owed neither fiduciary duty nor the obligation of good faith and fair dealing, and even denied any significant information rights. The result is temporarily different when a partner dissociates by dying. ULPA (2001) section 704 grants “the deceased partner’s personal representative or other legal representative . . . for the purposes of settling the estate, . . . the rights of a current limited partner” to obtain information. § 704.

153. ULPA (2001) § 801(3)(A). Note that a remaining general partner does not have a “bust up” right, unless the partnership agreement so provides.

154. ULPA (2001) § 801(3)(B). Note that this provision deviates from the new Act’s usual approach to partner consent, which is to require unanimity. See ULPA (2001) § 302 cmt. (listing various provisions which contemplate unanimous consent). The deviation increases the chances of a limited partnership surviving the dissociation of its sole general partner.

withdraw upon not less than six months’ prior written notice.”

General partners have the right to withdraw only as provided in the partnership agreement and the power to withdraw despite any prohibition stated by the partnership agreement.

The withdrawal of a RULPA general partner puts the limited partnership at risk of dissolution. If no general partner remains, dissolution is avoided only “if, within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership and to the appointment of one or more additional general partners.” Even if a general partner remains and is willing to continue the business, dissolution occurs unless either the partnership agreement provides for continuity or all the partners consent.

Although these formal differences are quite substantial, the practical consequences may be considerably less dramatic. The relevant rules are default rules under both Acts, subject to change in the partnership agreement. Moreover, RULPA's statutory “put” right is close to a mirage, “since RULPA § 201(a)(4) requires the certificate of limited partnership to state a definite term . . . [and] the term will be repeated in most limited partnership agreements.” In addition, in some states, estate planners have repealed even the default put right, presaging the approach of ULPA (2001).

ULPA (2001)'s default rules do eliminate one nasty trap for the unwary. Under RULPA section 801(4), problems can arise if, pursuant to the limited partnership agreement, the limited partners remove a sole general partner without first adding a pretender to the throne (i.e., a new general partner). If the removal leaves the limited partnership without any remaining general partner—even momentarily—the limited partnership is arguably dissolved.

156. RULPA § 603.
157. RULPA § 602. “[I]f the withdrawal violates the partnership agreement, the limited partnership may recover from the withdrawing general partner damages for breach of the partnership agreement and offset the damages against the amount otherwise distributable to him [or her].” Id.
158. RULPA § 801(4).
159. Id. “Influenced by tax classification developments . . . some RULPA states have amended their RULPA dissolution provisions to lower the quantum of consent needed to avoid dissolution following the withdrawal of a general partner.” KLEINBERGER, supra note 115, § 12.2.7, at 408-09 n.37.
160. KLEINBERGER, supra note 115, § 12.2.7, at 409 n.41.
161. See ULPA (2001) Prefatory Note (Comparison of RULPA and this Act) (stating that “due to estate planning concerns, several States have amended RULPA to prohibit limited partner withdrawal unless otherwise provided in the partnership agreement”); e.g., ARIZ. REV. STAT. § 29-333 (2003) (“A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement.”); COLO. REV. STAT. § 7-62-603 (2002) (“A limited partner may only withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement.”); FLA. STAT. ANN. § 620.143(1) (2002) (“A limited partner may withdraw from a limited partnership only at the time or upon the occurrence of an event specified in the partnership agreement or certificate of limited partnership.”); KY. REV. STAT. ANN. § 362.465 (West 2002) (“Unless otherwise provided in a partnership agreement, a limited partner has no right to withdraw from a limited partnership. If the partnership agreement does not specify a time a limited partner may withdraw, a limited partner may not withdraw prior to the time for the dissolution and winding up of the limited partnership without the unanimous consent of the partners.”).
unless all the remaining partners consent. Continuity provisions in the limited partnership agreement are inapplicable, because such provisions apply only if “there is at least one other general partner” following “an event of withdrawal.”

Timing thus becomes crucial; a nanosecond can matter and a case can turn on whether the act of removing a miscreant general partner occurs simultaneously with the act of appointing a replacement.

Matters are considerably simpler under ULPA (2001) section 801(3). Most fundamentally, the limited partnership agreement controls the nexus between a general partner’s dissociation and the dissolution vel non of the limited partnership. A continuity provision could therefore apply regardless of whether a sole general partner is removed before, after, or during the appointment of a substitute general partner. If the partnership agreement is silent, section 801(3)(B) allows “limited partners owning a majority of the rights to receive distributions as limited partners” ninety days to consent to continue the business and obtain the appointment of a replacement general partner.

D. Limited Partnerships and Limited Liability

When NCCUSL promulgated the 1985 revisions to RULPA, owner liability for partnership debt was axiomatic. Whether the enterprise was a general or limited partnership, each general partner was inescapably liable by status for each obligation of the partnership. Limited partners were shielded from that automatic, status-based liability, but under the “control rule” they risked their shield if they participated overmuch in the management of the limited partnership. The connection between partner status and personal liability seemed a key characteristic both of state partnership law and the federal tax law.
classification regime.\textsuperscript{165}

In 1997, when NCCUSL began the process that resulted in ULPA (2001), all the axioms had changed. Tax classification no longer paid attention to partner liability,\textsuperscript{166} and the advent of limited liability partnerships meant that partner personal liability was no longer the “hallmark consequence” even of a general partnership.\textsuperscript{167} The spread and success of limited liability companies made automatic owner liability for entity debt seem anachronistic.

Under ULPA (2001), the limited partnership catches up with LLPs and LLCs; the rules applicable to partner liability in a limited partnership are changed fundamentally. The new act offers a full, corporate-like liability shield to each general partner in a \textit{limited liability limited partnership} and ends the “control rule” exception to the limited partner shield.\textsuperscript{168}

\textbf{E. Limited Liability and General Partners—LLLPs}

By the time NCCUSL began work on ULPA (2001), the limited liability partnership was firmly established as a preferred form of general partnership.\textsuperscript{169} Moreover, “a growing number of states” had authorized the limited liability limited partnership (LLLP—pronounced triple \textit{L} \textit{P})—i.e., a limited partnership in which “both general and limited partners benefit from a full, status-based liability shield that is equivalent to the shield enjoyed by corporate shareholders, LLC members, and partners in an LLP.”\textsuperscript{170}

\begin{footnotesize}
\begin{enumerate}
\item See BISHOP \& KLEINBERGER, supra note 94, ¶ 1.01[3]. “Limited liability” was one of the four corporate characteristics used under the then-applicable Kintner Regulations to determine whether an unincorporated business organization would be taxed as a partnership. \textit{Id.}
\item Since 1986, the Internal Revenue Service had recognized that partner personal liability was not a prerequisite to partnership tax classification, and effective January 1, 1997, partnership structure ceased to have anything to do with partnership tax classification. BISHOP \& KLEINBERGER, supra note 94, ¶ 1.01[3].
\item KLEINBERGER, supra note 115, § 7.3, at 200.
\item The new Act also modernizes the rule for determining when a partner or transferee is liable to return a distribution. RULPA section 608 reflects an antiquated notion of stated capital, e.g. Kittredge \textit{v.} Langley, and depends on a recondite subsection that determines when a distribution constitutes the return of a contribution. 169 N.E. 626, 631 (1930) (Cardozo, J.) (equating capital contributions to a “trust fund”); see RULPA § 608(g). Borrowing from the Model Business Corporation Act, ULPA (2001) sections 508 and 509 reflect the modern approach to limitations on distributions and liability for improper distributions. ULPA (2001) §§ 508, 509. Unlike some corporate statutes, section 509 imposes liability both on those who decide to make an improper distribution and those who knowingly receive an improper distribution. § 509.
\item A limited liability partnership is a general partnership that has complied with a public filing requirement (and sometimes an insurance requirement) to obtain either a full or limited liability shield for its general partners. See KLEINBERGER, supra note 115, § 14.2, at 455–58 (setting forth brief explanation of history and nature of LLPs).
\item ULPA (2001) Prefatory Note (Availability of LLLP Status); see also KLEINBERGER, supra note 115, § 14.3.1, at 465. [In the decade preceding the adopting of ULPA (2001)] the following pattern developed:
\begin{enumerate}
\item Several states expressly permitted a limited partnership to invoke the LLP provisions of the state’s general partnership statute.
\item A few states provided for LLLPs directly, solely through language in the limited partnership statute.
\end{enumerate}
\end{enumerate}
\end{footnotesize}
The NCCUSL Drafting Committee saw no reason to drag its feet and decided early in its process that the new Act should provide for limited liability limited partnerships. The Committee also decided on an uncomplicated mechanism for obtaining LLLP status. A limited partnership is formed by filing a certificate of limited partnership, and through that certificate a limited partnership may elect to be a limited liability limited partnership simply by stating that “the limited partnership is a limited liability limited partnership.”

The general partners of a limited liability limited partnership benefit from the same liability shield afforded general partners in a RUPA LLP:

An obligation of a limited partnership incurred while the limited partnership is a limited liability limited partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the limited partnership. A general partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or acting as a general partner. This subsection applies despite anything inconsistent in the partnership agreement that existed immediately before the consent required to become a limited liability limited partnership under Section 406(b)(2).

3. A few states expressly precluded a limited partnership from being an LLLP.

4. Most state partnership statutes did not expressly address the issue.

As to the first and second categories, by 2002 more than 15 states had authorized the existence of limited liability limited partnerships, although at least initially in a few of these states the LLLP shield protected only general and not limited partners.

As to the fourth category, despite the statutory silence it is possible to argue “based on the language of the UPA, RUPA, and RULPA” that a limited partnership may invoke the LLP provisions of its state’s general partnership act, at least to provide a liability shield for the limited partnership’s general partners.

KLEINBERGER, supra note 115, § 14.3.1, at 465 (footnotes omitted).

171. The first draft considered by the Drafting Committee provided for limited liability limited partnerships. See First Draft of Proposed Revisions to the Revised Uniform Limited Partnership Act § 403C(c) (July 1997) (on file with author).

172. See ULPA (2001) § 101(9) (defining a “limited liability limited partnership” as “a limited partnership whose certificate of limited partnership states that the limited partnership is a limited liability limited partnership”); § 201(a)(4) (requiring the certificate of limited partnership to state “whether the limited partnership is a limited liability limited partnership”). An existing ordinary limited partnership can become an LLLP by amending its certificate of limited partnership. ULPA (2001) § 104(a) (“A limited partnership is the same entity regardless of whether its certificate states that the limited partnership is a limited liability limited partnership.”); § 202(d) (“A certificate of limited partnership may be amended at any time for any other proper purpose as determined by the limited partnership.”).

173. ULPA (2001) § 404(c). The language comes essentially verbatim from RUPA section 306(c). The last sentence, also taken essentially verbatim from RUPA, is intended to protect against what has been termed “the contribution conundrum.” See KLEINBERGER, supra note 115, § 14.2.6, at 461-66; see also RUPA § 306 cmt. 3.

Inter se contribution agreements may erode part or all of the effects of the liability shield. For example, Section 807(f) provides that an assignee for the benefit of creditors of a partnership or a partner may enforce a partner’s obligation to contribute to the partnership. The ultimate effect of
The only question the drafting committee seriously debated was whether the new Act should permit limited partnerships to elect into LLP status (the approach followed by all then existing LLP provisions) or instead provide LLP status as the default rule (and allow limited partnership to elect out). The earliest drafts required an election in, but the Committee soon voted to “flip” the default and provide LLP status unless the limited partnership chose otherwise. The Committee later “flopped” back to its original position, largely in recognition that the new Act “is designed to serve preexisting limited partnerships as well as limited partnerships formed after the Act’s enactment [and] [m]ost of those preexisting limited partnership will not be LLPs.”

The Drafting Committee remained concerned, however, that the “elect in” approach could prejudice inexperienced practitioners and lay organizers, who might be unaware of the availability and benefits of LLP status. The Committee attempted to remedy this problem by requiring each limited partnership to state in its certificate of limited partnership “whether”—not “if”—the limited partnership is a limited liability limited partnership. “The requirement is intended to force the organizers of a limited partnership to decide whether the limited partnership is to be an LLP.”

Like the shields provided under corporate, LLC, and LLP law, the LLP shield protects only against status-based liability and has no effect on liability resulting from a general partner’s conduct. Although the final sentence of subsection (c) negates such provisions existing before a statement of qualification is filed, it will have no effect on any amendments to the partnership agreement after the statement is filed.

In the case of an LLP, the key moment is when the partners consent to have the limited partnership become an LLP.

174. See Proposed Draft to the Revised Uniform Limited Partnership Act 5 n.9 (Apr. 2001) (on file with author). The decision to “flip” was affectionately dubbed the “Haynsworth Flip,” in honor of Dean Harry Haynsworth, a member of the drafting committee, who made the motion to “flip” the default rule.

175. ULPA (2001) Prefatory Note (Availability of LLP Status). The decision to return to the original approach was affectionately dubbed “the Haynsworth flop,” in honor of the commissioner who made the motion to return to the original position.


177. ULPA (2001) § 201(a)(4) cmt.


179. The result is the same in the corporate context. Scutieri v. Miller, 605 So. 2d 972, 973 (Fla. Dist. Ct. App. 1992) (stating that individual officers and agents of a corporation are personally liable when they have committed a tort even if the tortious acts were performed within the scope of employment; and holding that corporate officers could therefore be liable for defamation even though the plaintiff had settled the claim
a general partner that “actually supervises the activities of [a LLLP] facility” that mishandles hazardous waste may be liable as an “operator” under subsection 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.\footnote{Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1503–05 (11th Cir. 1996) (discussing standards for “operator” liability in the contexts of corporations and limited partnerships).}

The LLLP provisions of ULPA (2001) raise several technical issues, most of which the Act addresses directly. Two are left to other law.

- **Effect of LLLP shield on limited partner liability**—Under the law of some states, LLLP status affects only the shield of a limited partnership’s general partners. Under the law of other states, LLLP protection applies as well as to limited partners\footnote{KLEINBERGER, supra note 115, § 14.3.1, at 465.} (and thereby overturns the “control rule” discussed below). Under ULPA (2001), LLLP status affects only general partners, because the new Act provides a full liability shield to limited partners regardless of LLLP status.\footnote{ULPA (2001) § 303; see infra notes 213-26 and accompanying text.}

- **Contribution obligations among general partners when the limited partnership has been an LLLP only part of its existence**—General partners of an ordinary limited partnership are jointly and severally liable for the limited partnership’s obligations.\footnote{ULPA (2001) § 406(a). This rule is taken essentially verbatim from RUPA section 306(a).} This simple rule can have complicated results if: (i) a limited partnership was an LLLP for only part of its existence; (ii) the limited partnership dissolves without having enough funds to pay its creditors; (iii) the set of persons who were general partners while the limited partnership was an LLLP is not identical to the set of persons who were general partners while the limited partnership was an ordinary limited partnership.

This scenario raises two issues: (1) how does the dissolved limited partnership allocate its assets as between “shielded” obligations (i.e., those incurred when the limited partnership was an LLLP), and “unshielded obligations” (i.e., those incurred when the limited partnership was an ordinary limited partnership);\footnote{“Following RUPA and the UPA, this Act leaves to other law the question of when a limited partnership obligation is incurred.” ULPA (2001) § 404 cmt.} and (2) to the extent persons are liable as general partners or former general partners for obligations in the latter, unshielded category, how do those persons share the burden?

against the corporation); Robsac Indus., Inc. v. Chartpak, 497 A.2d 1267 (N.J. Super. Ct. App. Div. 1985) (reversing summary judgment for defendant corporate officer charged with malicious interference with contract, fraudulent misrepresentation, and defamation, notwithstanding that liability also was imposed on corporation). Whether the limited partnership will be vicariously liable for the general partner’s conduct is a separate question, determined under ULPA (2001) section 403 (Limited Partnership Liable For General Partner’s Actionable Conduct).
On the first question, the new Act is silent. The creditors on the “shielded” obligations will want the assets to be allocated first to their obligations, arguing that the creditors on the “unshielded” obligations have the additional recourse to the general partners. The persons liable as general partners on the “unshielded” obligations will argue that their liability should be a last recourse. An analogous question can arise under general partnership law, where a general partner has joined the partnership after the partnership has incurred a significant debt. There is, unfortunately, no case law on that point, but, in the LLLP context, bankruptcy law should disfavor any priority for “unshielded” obligations as improperly benefiting insiders.

On the second question—loss sharing as to unshielded obligations—the Act furnishes a default rule that allocates responsibility for each unsatisfied, unshielded claim among “each person that was a general partner when the obligation was incurred and that has not been released from the obligation.” The allocation mirrors venerable rules on loss sharing among general partners and requires contribution “in proportion to the right to receive distributions in the capacity of general partner in effect for each of those persons when the obligation was incurred.”

General partners may of course use the partnership agreement to

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185. RUPA section 307(d) supports this position, at least obliquely. Comment 4 to that provision explains:

Subsection (d) requires partnership creditors to exhaust the partnership’s assets before levying on a judgment debtor partner’s individual property where the partner is personally liable for the partnership obligation under Section 306. That rule respects the concept of the partnership as an entity and makes partners more in the nature of guarantors than principal debtors on every partnership debt. It is already the law in some States.

186. Under RUPA section 306(b) and UPA section 17, an incoming partner is not personally liable for partnership obligations incurred before the person became a partner. See RUPA § 306(b); UPA § 17.

187. Bankruptcy law has struggled with the analogous situation of corporations that, in the shadow of insolvency, choose to pay off debts guaranteed by corporate insiders. Such payments benefit not only the creditor but also the insider guarantor (by discharging the insider’s guaranty obligation). Some cases have held that the trustee could recapture the payments from the creditor, even if the creditor was not an insider. Statutory change reversed those cases, but “there is no question that the amount transferred may . . . be recovered from the insider-guarantor.” LAWRENCE PONOROFF & STEPHEN E. SNYDER, COMMERCIAL BANKRUPTCY LITIGATION § 10:22 (database update) (Jan. 2004).

188. ULPA (2001) § 812(c)(1). For the Act’s rules on release and discharge of former general partners, see ULPA (2001) section 607.

189. UPA section 18(a) provides that each general partner in a general partnership “must contribute towards the losses . . . according to his share in the profits.” § 18(a). RUPA section 401(b) replicates the UPA rule: “Each partner . . . is chargeable with a share of the partnership losses in proportion to the partner’s share of the profits.” Compare UPA § 18(a), with RUPA § 401(b).

190. ULPA (2001) § 812(c)(1). If “a person does not contribute” as required, the other persons must fill the gap “in proportion to the right to receive distributions in the capacity of general partner in effect for each of those other persons when the obligation was incurred.” ULPA (2001) § 812(c)(2).
change this *inter se* arrangement, but no amendment to the agreement can prejudice the rights of a person who has dissociated as a general partner. If the person remains part of the limited partnership as a limited partner, such a prejudicial amendment would violate the duty of good faith and fair dealing. If the person is no longer even a limited partner, the amendment would violate ULPA (2001) section 110(b)(13) in that it would “restrict rights under this [Act] of a person other than a partner or a transferee.”

- **Effect of LLLP vel non statement requirement on pre-existing limited partnerships**—As noted above, the new Act requires each certificate of limited partnership to state “whether” the limited partnership is a limited liability limited partnership. The Act also provides for pre-existing limited partnerships to become subject to the new Act after a suitable transition period. The transition rules exempt pre-existing limited partnership from the LLLP vel non statement requirement. A “limited partnership formed before [the effective date of this Act] . . . is not required to amend its certificate to comply with Section 201(a)(4).”

- **Defective formation of a LLLP**—ULPA (2001) provides recourse for a person who invests in an enterprise “erroneously believing self to be [a] limited partner,” but says nothing about a person who erroneously believes “self” to be the general partner in an LLLP. The Drafting Committee considered this issue, as reflected in the following excerpt from the Reporter’s Notes to the March, 1999 draft:

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191. ULPA (2001) § 110(a) (stating that, subject to a list of non-waivable provisions, “the partnership agreement governs relations among the partners”).

192. See infra notes 250-66 and accompanying text. Often the same person will be both a general and limited partner, ULPA (2001) § 113 (dual capacity), and a person’s dissociation in one capacity does not necessarily effect a dissociation in the other capacity, ULPA (2001) § 603 cmt. Also, a partnership agreement can provide that a person dissociated as a general partner becomes a limited partner. *E.g., In re Cardinal Indus., Inc.*, 116 B.R. 964, 975 (Bankr. S.D. Ohio 1990) (noting that “[t]he Partnerships Agreements . . . provide that if the [general partner] withdraws as a general partner, the [general partner’s] Economic Interests are to be preserved and such interests are to be either satisfied or converted into limited partnership interests upon its withdrawal as general partner”).

193. The dissociated person’s economic interest might be frozen in as “a mere transferee,” but the person’s rights under the allocation/contribution arrangement are as a former general partner and not *qua* transferee. *See* ULPA (2001) § 605(5).

194. *Supra* notes 176-77 and accompanying text.

195. ULPA (2001) § 1206(b). This approach follows RUPA section 1206(b). Neither Act recommends any particular length for the transition period. The first version of ULPA (2001)’s transition provisions referred to the end of the transition period as the “drag-in date.” Proposed Draft to the Revised Limited Partnership Act § 1205 (May 2001) (on file with author). The final version refers, more gently, to the “all-inclusive date.”

196. ULPA (2001) § 1206(c)(2).

197. ULPA (2001) § 306. This provision is based on RULPA section 304, which was derived from ULPA (1916) section 11. *See* ULPA (2001) § 306 cmt.; RULPA (1985) § 304 cmt.
N.b.—neither [the limited partner] provision nor any other in this draft deal with a general partner who starts an enterprise erroneously believing the enterprise to be an LLLP. This issue can be labelled “defective formation” and only arises with regard to full shield entities. With an ordinary limited partnership, the general partner is always liable for the business’ debts and so the niceties of formation have little impact.

Corporate law has dealt with this issue in various ways, including: MBCA § 6 (persons assuming to act when de jure corporation not yet formed); RMBCA § 2.04 (liability for preincorporation transactions); the doctrines of de facto incorporation and corporation by estoppel. ULLCA does not address the subject.

If the Committee wishes, the next draft can include a provision immunizing general partners who in good faith but erroneously believe themselves to be general partners of an LLLP. It can be argued that such people are indistinguishable from “persons purporting to act as or on behalf of a corporation [not] knowing there was no incorporation.” RMBCA § 2.04. In deciding this point, it is well to consider that a LLLP resembles an LLC at least as much as a corporation and that ULLCA is a very recent Uniform Act. Absent a good reason to the contrary, why not follow ULLCA rather than the RMBCA?

The Committee chose to follow ULLCA rather than the RMBCA, and the consequences for general partners of defective LLLP formation are left to “the principles of law and equity.”

F. Limited Liability and Limited Partners—The End of the Control Rule

The control rule has been a core but troubling part of the uniform law of limited partnerships since 1916. ULPA (1916) section 7 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

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198. ULPA (2001) § 107 (supplement principles of law). For a discussion of how the corporate doctrines of de facto incorporation and corporation by estoppel might apply outside the corporate context, see Bishop & Kleinberger, note 94 above, ¶ 6.02[2][d]. For a case applying estoppel to protect limited partners, see Garrett v. Koepke, 569 S.W.2d 568, 579 (Tex. Ct. App. 1978), holding that:

since [the limited partnership act] is a notice statute and since appellants already had the information that would have been provided by compliance with the statute prior to dealing with the limited partnership, the failure to comply with [the statute’s filing requirements] does not cause appellees to lose their status as limited partners.

199. Joseph J. Basile, Jr., Limited Liability For Limited Partners: An Argument For The Abolition Of The Control Rule, 38 VAND. L. REV. 1199, 1202-04 (1985). Limited partners were at greater risk under the various state statutes that predated ULPA (1916). Id.
control of the business." How much participation is too much under this formulation is unclear, and the drafters of RULPA (1976) described the control rule as part of “the single most difficult issue facing lawyers who use the limited partnership form of organization: the powers and potential liabilities of limited partners.”

RULPA (1976) attempted to decrease “the difficulty of determining when the ‘control’ line has been overstepped,” and RULPA (1976) section 303 replaces the brief rule of ULPA (1916) section 7 with a more complicated formulation:

A limited partner is not liable for the obligations of a limited partnership unless... 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.

See also, e.g., Frigidaire Sales Corp. v. Union Prop., Inc., 544 P.2d 781, 784 (Wash. Ct. App. 1976) (“A limited partner is made liable as a general partner when he participates in the ‘control’ of the business in order to protect third parties from dealing with the partnership under the mistaken assumption that the limited partner is a general partner with general liability.”), aff’d, 562 P.2d 244, 246-47 (Wash. 1977) (“In the eyes of the law it was [the corporate general partner], as a separate corporate entity, which entered into the contract with petitioner [the creditor] and controlled the limited partnership. Further, because respondents [the limited partners] scrupulously separated their actions on behalf of the corporation from their personal actions, petitioner never mistakenly assumed that respondents were general partners with general liability.”).

Among other problems, the original formulation resulted in difficult and sometimes conflicting decisions as to whether limited partners who co-owned and managed a corporate general partner could be liable under the control rule. Compare Frigidaire Sales, 562 P.2d at 246-47 (limited partners not liable), with Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975) (limited partners liable). The problem arguably persisted under RULPA (1976), but the 1985 amendments added to the safe harbor list “being an officer, director, or shareholder of a general partner that is a corporation.” RULPA (1985) § 303(b)(1). It remains possible to use the corporate doctrine of piercing the veil to hold personally liable the shareholders of a corporation that is a general partner of a limited partnership. Piercing makes the shareholders liable for the corporation’s obligations, and the corporation—as a general partner—is liable by status for limited partnership’s obligations. See, e.g., Autrey v. 22 Tex. Servs. Inc., 79 F. Supp. 2d 735, 740-45 (S.D. Tex. 2000) (denying summary judgment motion of defendants on piercing claim).

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with actual knowledge of his participation in control.\textsuperscript{204}

This formulation distinguishes between “participation in the control of the business [that] is . . . substantially the same as the exercise of the powers of a general partner” and participation that is not. For the former subcategory, the participation alone suffices to inculpate and the resulting limited partner liability therefore extends to involuntary as well as voluntary creditors. For the latter subcategory, only creditors “who transact . . . with actual knowledge” can set aside the limited partner’s shield. In addition, RULPA (1976) includes a lengthy list of “safe harbor” activities\textsuperscript{205} and provides that: “A limited partner does not participate in the control of the business within the meaning of [the control rule] solely by doing one or more of” the safe harbor activities.\textsuperscript{206}

Thus under the 1976 Act a person seeking to impose owner liability on a limited partner would have to:

- prove the necessary quantum of participation without reference to any of the safe harbor activities;
- establish either that:
  - the limited partner’s participation in control amounted to that of a general partner (a virtual impossibility, given the safe harbors); or that
  - the person seeking to impose liability was a voluntary creditor (i.e., one who had “transacted business” with the limited partnership) actually knowing of the limited partner’s participation in control.

The 1985 amendments made a claimant’s task still more difficult, eliminating automatic liability for limited partner participation “substantially the same as the exercise of the powers of a general partner,” requiring the claimant to show that it had “transact[ed] business with the limited partnership, reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner,” and expanding the list of safe harbor activities.\textsuperscript{207}

\textsuperscript{204} RULPA (1976) § 303(a).
\textsuperscript{205} See infra note 207 (setting forth 1976 list of safe harbors).
\textsuperscript{206} RULPA (1976) § 303(b).
\textsuperscript{207} The following “redline” shows the changes the 1985 amendments made to the safe harbor list:

(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;
4. approving or disapproving an amendment to the partnership agreement, taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership; or
The first two changes made it impossible for involuntary creditors to use the control rule and replaced the 1976’s “actual knowledge” element with language approaching a reliance requirement. The expansion of the safe harbor list included various specific governance functions (e.g. “requesting or attending a meeting of partners;” proposing or approving “a transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners” and, even more significantly, expressly immunized “proposing, approving, or disapproving, by voting or otherwise . . . matters related to the business of the limited partnership not otherwise enumerated in this [safe harbor list], which the partnership agreement states in writing may be subject to the approval or disapproval of limited partners.”

A New Jersey court characterized these developments as “a consistent movement to insure certainty and predictability respecting the obligations and potential liability of limited partners . . . accomplished . . . by consistently reducing and restricting the bases on which a general partner’s unrestricted liability can be imposed on a limited partner.” The court added: “Under the present version of the Uniform Act, the imposition of such liability (absent fraud or misleading) is severely limited.”

The drafters of ULPA (2001) saw no reason to preserve the control rule’s
complexity and uncertainty. “In a world with LLPs, LLCs and, most importantly, LLLPs, the control rule has become an anachronism. This Act therefore takes the next logical step in the evolution of the limited partner’s liability shield and renders the control rule extinct.”

ULPA (2001) section 303 therefore provides:

SECTION 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.

The shield thus created applies regardless of whether the limited partnership is a limited liability partnership. The emphasized language specifically repudiates the control role, and under ULPA (2001) limited partner status cannot be an element in a claim that a limited partner is liable for an obligation of the limited partnership. The purpose of Section 303 is to “bring[] limited partners into parity with LLC members, LLP partners and corporate shareholders.”

213. A few states had already come to the same conclusion and had eliminated the control rule from their respective state limited partnership statute. E.g., N.C. GEN. STAT. § 59-303 (2003) (“A limited partner is not liable for the obligations of a limited partnership by reason of being a limited partner and does not become liable for the obligations of a limited partnership by participating in the management or control of the business of the limited partnership.”); GA. CODE ANN. § 14-9-303 (2002) (“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.”).

214. ULPA (2001) § 303 cmt. It can be argued that ULPA (2001) is merely effectuating the goal of the principal drafter of ULPA (1916). Basile, supra note 199, at 1205. “Professor Lewis wrote that most of the differences between the ULPA and the existing statutes reflected the drafters’ desire to provide limited partners ‘with the same sense of security from any possibility of unlimited liability as the subscribers to the shares of a corporation.’” Id. (quoting William Draper Lewis, The Uniform Limited Partnership Act, 65 U. PA. L. REV. 715, 723 (1917)).

215. ULPA (2001) § 303 (emphasis added). This language is derived virtually verbatim from the LLP provision of RUPA section 306(c). See also ULPA (2001) § 404(c) (stating the shield for a general partner in a limited liability limited partnership and also following RUPA’s LLP language).

216. ULPA (2001) § 303 cmt.; see also ULPA (2001) § 101(11) (defining “limited partnership” as “an entity . . . formed under this [Act]” and referring inclusively but not exclusively to a “limited liability limited partnership”).

217. ULPA (2001) § 303 cmt. Consistent with this view, the new Act changes the rule on permissible names of limited partnerships, and eliminates the prohibition against a limited partnership’s name including the name of a limited partner. See ULPA (2001) § 108(a) cmt.

Predecessor law, RULPA Section 102, prohibited the use of a limited partner’s name in the name of a limited partnership except in unusual circumstances. That approach derived from the 1916 Uniform Limited Partnership Act and has become antiquated. In 1916, most business organizations were either unshielded (e.g., general partnerships) or partially shielded (e.g., limited partnerships), and it was reasonable for third parties to believe that an individual whose own name appeared in the name of a business would “stand behind” the business. Today most businesses have a full shield (e.g.,
The effect of this “shield” is limited; the protection is against claims asserted “by reason of [a person] being a limited partner.”218 Thus, “this section does not prevent a limited partner from being liable as a result of the limited partner’s own conduct and is therefore inapplicable when a third party asserts that a limited partner’s own wrongful conduct has injured the third party.”219 For example, if a limited partner purports to bind the limited partnership to a contract and lacks the power to do so, the limited partner is liable to the third party for breach of the warranty of authority.220 However, that liability does not arise from or pertain to the person’s status as a limited partner. Rather, the liability is part of the law of agency. Likewise, if limited partners so control a limited partnership operations so as to qualify as “operators” of a hazardous waste facility under CERCLA (Comprehensive Environmental Response Compensation & Liability Act of 1980), they risk CERCLA liability just like corporate shareholders.221

The limited partner shield has no affect on debts which a partner might owe the limited partnership, because those debts are not obligations of the limited partnership.222 Thus, the shield “does not eliminate a limited partner’s liability for promised contributions or improper distributions. That liability pertains to a person’s status as a limited partner but is not liability for an obligation of the limited partnership.”223

It could be argued that ending the control rule runs counter to the new Act’s corporations, limited liability companies, most limited liability partnerships), and corporate, LLC and LLP statutes generally pose no barrier to the use of an owner’s name in the name of the entity. This Act eliminates RULPA’s restriction and puts limited partnerships on equal footing with these other “shielded” entities.

218. ULPA (2001) § 303. “Thus, a person that is both a general and limited partner will be liable as a general partner for the limited partnership’s obligations.” § 303 cmt.; see also ULPA (2001) § 113 (Dual capacity—consequences of a person being both a general and a limited partner). Of course, if the limited partnership is a LLLP, then a dual capacity partner will be shielded in both capacities.

219. ULPA (2001) § 303 cmt. Compare RMBCA § 6.22(b) (“A shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.”).

220. Restatement (Second) of Agency section 329 states: “A person who purports to make a contract, conveyance or representation on behalf of another who has full capacity but whom he has no power to bind, thereby becomes subject to liability to the other party thereto upon an implied warranty of authority, unless he has manifested that he does not make such warranty or the other party knows that the agent is not so authorized.” See also KLEINBERGER, supra note 115, § 4.2.2, at 130-31.

221. Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1503-05 (11th Cir. 1996) (discussing standards for “operator” liability as applied to limited partners). Professor Bishop suggests that a limited partner’s involvement in a limited partnership’s activity would give rise to a claim that the limited partner is de facto a general partner or a claim of liability by estoppel. See Carter G. Bishop, 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?, 37 Suffolk Univ. L. Rev. 667 (2004).

222. For the same reason, the shield is “inapplicable to claims by the limited partnership or another partner that a limited partner has breached a duty under this Act or the partnership agreement.” ULPA (2001) § 303 cmt.

223. ULPA (2001) § 303 cmt. (internal citations omitted; emphasis in original).
tilt toward “strong centralized management, strongly entrenched” and “passive investors with little control over . . . the entity.” After all, the control rule imposes potentially draconian consequences on limited partners who meddle in matters committed to the discretion of the general partners, so eliminating those consequences arguably promotes (or at least removes a disincentive for) meddling.

The short answer is that allocation of managerial authority is a matter _inter se_ the partners and should not be enforced by providing claims to third parties. If limited partners “meddle,” then _ex hypothesi_ they will be either violating the Act, breaching the partnership agreement, or doing both. The general partners have sufficient legal and equitable remedies without needing a statutory _in terrorem_ provision.

### G. The Foibles of Fiduciary Duty and Good Faith

Although no part of RUPA generated more controversy than its approach to fiduciary duties and the obligation of good faith and fair dealing, ULPA

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225. Basile, supra note 199, at 1218 (“Assuming that there is something pernicious about limited partners telling a general partner to plant watermelons, peppers, and eggplant, instead of beans an assumption whose validity is not beyond question; the control rule may have been appropriate to discourage such officiousness.”) (internal footnote omitted). There is scant, if any, support for this proposition in the case law. After years of looking, the author has found only one passage in one decision even remotely supportive. In re Estate of Hall, 535 A.2d 47, 56 (Pa. 1987), uses the control rule to support the partnership agreement’s allocation of managerial discretion to the general partners.

Claimants cannot have it both ways. In exchange for exposure to only limited liability, and the tax advantages available because of the use of the limited partnership entity . . . , the limited partners must abstain from participation in the conduct of the business. Discretion to conduct the business and to make routine and normal business judgments must, therefore, rest with the general partner, and that is precisely what these agreements provided.

At most, this passage takes the then applicable tax classification regulations and control rule as givens and suggests that the partnership agreement should be understood in the context of those givens. That proposition is sensible. See BISHOP & KLEINBERGER, supra note 94, ¶ 5.06[3][e][i] (tax classification regulations as a device for interpreting the [operating] agreement). But the passage has nothing to say about whether those givens should remain so.

226. ULPA (2001) section 1001(a) recognizes that “a partner may maintain a direct action against . . . another partner for legal or equitable relief . . . to enforce the rights and otherwise protect the interests of the partner, including rights and interests under the partnership agreement or this [Act].” Id. The general partner would be “required to plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership,” ULPA (2001) § 1001(b), but interference with the general partner’s managerial prerogatives would certainly qualify. The claim would analogous to a claim by a corporate shareholder for interference with voting rights. See, e.g., Lapidus v. Hecht, 232 F.3d 679, 683 (9th Cir. 2000) (holding that corporate shareholders may bring a direct action against the corporation when the injury suffered is predicated upon a violation of shareholder voting rights); In re Ionosphere Clubs Inc., 17 F.3d 600, 604 (2d Cir. 1994) (holding that minority shareholders may bring a direct action against majority shareholders who interfere with their voting rights).

227. Academics have had a field day with the subject. See, e.g., Claire Moore Dickerson, Is it Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act, 64 U. COLO.
(2001) adopts RUPA’s formulation essentially verbatim. ULPA (2001) section 408 (General Standards of General Partner’s Conduct) is virtually a copy of RUPA section 404 (General Standards of Partner’s Conduct), and the new Act likewise mirrors RUPA in restricting how much the partnership agreement may change the duties of loyalty and care and the obligation of good faith and fair dealing.228

While some have argued that RUPA’s approach is “radical,”229 the decision to incorporate RUPA’s approach into ULPA (2001) is in one sense quite traditional. Neither ULPA (1916) nor RULPA detail the duties of general partners; ULPA (1916) section 9(1) and RULPA section 403 each incorporate by reference the law applicable to “a partner in a partnership without limited partners”—i.e., a general partnership.

Traditional or not, ULPA (2001)’s approach creates a number of issues worth noting.

Essentially the same language but substantially different contexts—Although ULPA (2001) section 408 adopts the language of RUPA section 404 virtually word for word, the two provisions apply in substantially different contexts. “The primary focus of RUPA is the small, often informal, partnership,”230 with the partners in a largely egalitarian relationship. In a RUPA partnership, unless otherwise agreed, “[e]ach partner has equal rights in the management and conduct of the partnership business.”231 In contrast, ULPA (2001) provides a blueprint for a manager-dominated enterprise in which passive investors depend on and generally defer to the manager.232

This difference in context will perhaps make a difference in how courts apply the RUPA/ULPA(2001) fiduciary formulation, at least in close cases. Fiduciary duty is context-sensitive, because dependency and vulnerability form the duty’s core raison d’être.233 Fiduciary duty exists, in part, to protect those

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228. Compare ULPA (2001) § 110(b)(5)-(7), with RUPA § 103(b)(3)-(5). For criticism of this approach, see Callison & Vestal, note 59 above.


230. RUPA Prefatory Note.

231. RUPA § 401(f).


233. United States v. Chestman, 947 F.2d 551, 569 (2d Cir. 1991) (“A fiduciary relationship involves discretionary authority and dependency: One person depends on another—the fiduciary—to serve his
who have entrusted their affairs to others. Arguably at least, the greater the entrusting and dependency (and, therefore, the less the entrusting person is able to self-protect)—the more aggressive a court should be in scrutinizing the fiduciary’s conduct.

The same may be true when courts scrutinize partnership agreements that restrict or reshape the duty of loyalty or the obligation of good faith and fair dealing. Following RUPA, the new Act imposes a “not manifestly unreasonable” standard on such efforts. There are as yet no RUPA cases on
this subject, but certainly reasonableness is context dependent. A restriction that passes statutory muster where the partners are genuinely co-equals may be manifestly unreasonable where all but one partner have committed themselves to total dependence on that one partner.

Only the limited partnership is protected by the stated duty of loyalty—Like RUPA section 404(b), ULPA (2001) section 408(b) purports to state a "general partner’s duty of loyalty to the . . . partnership and the other partners," and lists three rules which exhaustively comprise that duty. The rules express standard aspects of the duty of loyalty and prohibit usurpation of a partnership opportunity, self-dealing and dealing on behalf of a person with an interest adverse to the partnership, and competing with the partnership.

The reference to "the other partners" is misleading, however, because none of the listed rules say anything about partner-to-partner relations. To the contrary, each of the rules functions to protect the limited partnership and its activities. The phrase arguably makes sense under RUPA, because that Act does not recognize the distinction between direct and derivative claims.

239. But see ALAN R. BROMBERG & LARRY E. RIBSTEIN, IV BROMBERG AND RIBSTEIN ON PARTNERSHIP § 16.07(b), at 16:146 (criticizing the standard as "so vague that sophisticated planners would be foolish to rely on them . . . [and] sure to enmesh in litigation unfortunate partners who attempt private ordering of fiduciary duties").

240. See BLACK’S LAW DICTIONARY 1272 (7th ed. 1999) (defining "reasonable" as “[f]air, proper, or moderate under the circumstances”) (emphasis added).

241. ULPA (2001) § 408(b) (emphasis added). Comparable language appears in RUPA section 404(a) and ULPA (2001) section 408(a), referring to duties "owed to the limited partnership and the other partners." RUPA § 404(a); ULPA (2001) § 408(a).

242. ULPA (2001) § 408(b) states:
A general partner’s duty of loyalty to the limited partnership and the other partners is limited to the following:
(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership’s activities or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;
(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership’s activities as or on behalf of a party having an interest adverse to the limited partnership; and
(3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership’s activities.

ULPA (2001) § 408 (emphasis added). RUPA section 404(b) also contains the phrase “is limited to.”


244. ULPA (2001) § 408(b)(2).

245. ULPA (2001) § 408(b)(3). The comparable RUPA provision ends this obligation at dissolution. See RUPA § 404(b)(3). A comment to ULPA (2001) section 408(b) explains the difference: “A general partner’s duty under this subsection continues through winding up, since the limited partners’ dependence on the general partner does not end at dissolution.” § 408(b) cmt. b. Like RUPA, ULPA (2001) leaves for other law the rules governing pre-formation dealings between would-be partners. See RUPA § 404 cmt. 2 (“Reference to the ‘formation’ of the partnership has been eliminated by RUPA [and therefore by ULPA (2001)] because of concern that the duty of loyalty could be inappropriately extended to the pre-formation period when the parties are really negotiating at arm’s length.”).

246. RUPA § 405 cmt. 2 (“[A] partner may bring a direct suit against the partnership or another partner for
ULPA (2001), in contrast, recognizes and buttresses that distinction. ULPA (2001) section 1001(b) codifies the direct injury requirement, and a comment to section 408 states that “The reference to ‘other partners’ does not affect the distinction between direct and derivative claims.”

In sum, under the new Act partners cannot look to the duty of loyalty to protect them against overreaching and oppressive conduct by general partners.

The obligation of good faith and fair dealing as a (narrow) means to police partner-to-partner conduct—If, as just demonstrated, fiduciary duties under the new Act do not address partner-to-partner relations, where does the new Act encompass the famous “punctilio of an honor the most sensitive”? The answer must be the statutory obligation of good faith and fair dealing; there is no other place within the statute which is sufficiently open-ended.

The new Act copies RUPA’s formulation of that statutory obligation: “A . . . partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.” But what is the content of this statutory obligation?

On this question, the drafters of RUPA “punted”:

The meaning of “good faith and fair dealing” is not firmly fixed under present almost any cause of action arising out of the conduct of the partnership business. . . . Since general partners are not passive investors like limited partners, RUPA does not authorize derivative actions, as does RULPA Section 1001.”

247. ULPA (2001) section 1001(b) provides: “A partner commencing a direct action [to enforce rights under the Act or the partnership agreement] is required to plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership.”

248. ULPA (2001) § 408(a) cmt.

249. The situation is no different where RULPA has been linked to RUPA, because the analysis stated here applies equally to RUPA section 404(b). RUPA linkage to RUPA does not include RUPA section 405 (allowing direct actions and eschewing derivative claims), because RULPA sections 1001-1004 specifically provide for derivative claims. See RULPA §§ 1001-1004. For the most part, the analysis stated in the text applies as well to the RUPA/ULPA (2001) duty of care. In a few circumstances, however, a general partner’s duty of care might extend directly to another partner. For example, a general partner is deciding whether to seek expulsion of another partner, the general partner may have a duty to use care in deciding whether the grounds for expulsion exist. See Bishop & Kleinberger, supra note 94, ¶ 8.03[2][d][iii], at 8-48 to 8-51 (providing an analysis of this point in analogous context of limited liability companies).


251. The new Act does, however, provide information rights and obligations that parallel an important practical aspect of Cardozo’s punctilio. See infra notes 267-304 and accompanying text.

252. ULPA (2001) section 305(c) refers to limited partners, and section 408(c) to general partners. § 305(c); § 408(c). Apparently through an oversight, these provisions refer to “partnership” rather than “limited partnership.” Compare ULPA (2001) § 408(a)-(c) (each referring to limited partnership). The RUPA provision is RUPA section 404(d).
law. “Good faith” clearly suggests a subjective element, while “fair dealing” implies an objective component. It was decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases.

RUPA’s drafters did, however, suggest two important limiting principles. First, in partner-to-partner dealings, “[a] partner as such is not a trustee and is not held to the same standards as a trustee.”254 By statute, self-interested action is not per se bad and does not ipso facto breach the obligation of good faith and fair dealing.255 Second, “[t]he obligation of good faith and fair dealing . . . is not . . . a separate and independent obligation. It is an ancillary obligation that applies whenever a partner discharges a duty or exercises a right under the partnership agreement or the Act.”256

The new Act copies RUPA’s language on partner self-interest. ULPA (2001) sections 305(c) and 408(e) each state: “A . . . partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the . . . partner’s conduct furthers the . . . partner’s own interest.”257 As for the content of the statutory obligation of good faith and fair dealing, the new Act’s Comments go further than RUPA’s in attempting to explain the obligation’s purpose and limits:

The obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner’s own self-interest. Courts should not use the obligation to change ex post facto the parties’ or this Act’s allocation of risk and power. To the contrary, in light of the nature of a limited partnership, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The partnership agreement or this Act may grant discretion to a partner, and that partner may properly exercise that discretion even though another partner suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur. The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties’ agreed-upon arrangements. Once such a purpose appears, courts should not second guess a

253. RUPA § 404 cmt. 4.
254. RUPA § 404 cmt. 5. Although the Comment does not expressly refer to partner-to-partner transactions, it must be those transactions that the Comment is addressing. In the context of partner-to-partnership relations, the statutory text refers to the partner “as trustee.” RUPA § 404(b)(1).
255. RUPA § 404(e); § 404(e) cmt. 5.
256. RUPA § 404 cmt. 4.
257. ULPA (2001) § 305(c) (referring to limited partners); § 408(e) (referring to general partners). RUPA section 404(e) is identical, except that it refers simply to a “partner.” § 404(e).
party’s choice of method in serving that purpose, unless the party invoking the obligation of good faith and fair dealing shows that the choice of method itself lacks any honestly-held purpose that legitimately comports with the parties’ agreed-upon arrangements.

In sum, the purpose of the obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.\footnote{258}

This approach seems consistent with the “ancillary” nature of the statutory obligation, the statutory recognition that self-interested behavior can be proper (even normal) in partner-to-partner dealings, and the assumption that many of the ventures that use the Act will be “sophisticated . . . commercial deals.”\footnote{259} Whether courts will accept the Comment’s narrow view of good faith and fair dealing remains to be seen. It is important to note, however, that much of the conduct excoriated in Cardozo’s famous maxim is also actionable under other law, especially the law of fraud, and may also be remedied under other, more specific provisions of ULPA (2001).

A recent South Carolina case nicely illustrates this point. \textit{Redwend Limited Partnership v. Edwards} involved a claim that a withdrawn general partner had usurped a partnership opportunity, and, at the trial court level, the defendant successfully asserted a withdrawal agreement, thereby obtaining summary judgment.\footnote{260} Invoking fiduciary duty and “the punctilio of an honor the most sensitive,”\footnote{261} the Court of Appeals reversed and remanded for trial so that McDaniel, the plaintiff partner, could try to prove that Edwards, the general partner, had procured the withdrawal agreement through fraud. The court stated: “Apodictically, Edwards was in a fiduciary relationship with McDaniel and owed McDaniel the highest loyalty. The nature of the partnership relationship imposed a fiduciary duty upon Edwards to refrain from taking any advantage of McDaniel by even the slightest misrepresentation or concealment.”\footnote{262}

This language suggests that the fiduciary characterization is key to the claim of fraud, but actually the plaintiff’s evidence presented a clear case of affirmative misrepresentation which would have been actionable in an arm’s length relationship.\footnote{263} Moreover, although the court viewed the withdrawal agreement as a partner-to-partner transaction,\footnote{264} the gravamen of the case was a

\footnote{258. ULPA (2001) § 305(b) cmt.; see also ULPA (2001) § 408(d) cmt. (“This provision [on the obligation of good faith and fair dealing] is identical to Section 305(b) and the Comment to Section 305(b) is applicable here.”).}
\footnote{259. ULPA (2001) Prefatory Note (The Act’s Overall Approach).}
\footnote{260. 581 S.E.2d 496 (S.C. Ct. App. 2003).}
\footnote{261. \textit{Id.} at 505-06.}
\footnote{262. \textit{Id.} at 506}
\footnote{263. \textit{Id.}}
\footnote{264. \textit{Edwards}, 581 S.E. 2d at 506 (characterizing Edwards as taking advantage of Daniels).}
usurpation of a partnership opportunity which the usurping partner sought to justify through an agreement. In that context, it is not merely the obligation of good faith and fair dealing that applies under the new Act; the general partner’s fiduciary of loyalty is involved as well.265 A partner seeking a waiver or limitation on that duty has a fiduciary’s obligation of candor and affirmative disclosure.266 In addition, under the new Act’s provision on informational rights (discussed below), the general partner also has a statutory obligation to volunteer information.

Information rights, although excluded from the realm of fiduciary duty, are comprehensively addressed by the new Act—Corporate law generally treats a director’s state law duty to provide information to shareholders as an aspect of fiduciary duty.267 In contrast, ULPA (2001) follows RUPA and excludes information rights and obligations from that realm.268 ULPA (2001) section 408(a) states that “[t]he only fiduciary duties that a general partner has to the limited partnership and the other partners are the duties of loyalty and care under subsections (b) and (c).”269 As just explained, the duty of loyalty is strictly limited, and its stated aspects do not entail any disclosure obligation. In other contexts, the duty of care has been considered a partial source of a duty of disclosure,270 but it would take considerable imagination to infer a robust disclosure obligation from the duty of care alone—especially when that duty “is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.”271


266. E.g., RESTATEMENT (SECOND) OF CONTRACTS § 173(b) (“When Abuse Of A Fiduciary Relation Makes A Contract Voidable”). According to the Restatement: “If a fiduciary makes a contract with his beneficiary relating to matters within the scope of the fiduciary relation, the contract is voidable by the beneficiary, unless . . . [inter alia] all parties beneficially interested manifest assent with full understanding of their legal rights and of all relevant facts that the fiduciary knows or should know.” Id.

The new Act does not change the longstanding rules as to how a general partner may obtain consent to undertake an opportunity that would otherwise be forbidden by the duty of loyalty, although ULPA (2001) section 110(b)(5)(A)-(B) do channel the analysis to be used in determining how far the partnership agreement may go in deciding such matters in advance.


268. See Donald J. Weidner, Cadwalader, RUPA and Fiduciary Duty, 54 WASH. & LEE L. REV. 877, 911-12 (1997). The common law of agency seems more in accord with RUPA’s approach. In the Restatement (Second) of Agency, an agent’s duty to give information, section 381, is listed among the “duties of service and obedience” (Title B of Chapter 13) and not among the “duties of loyalty” (Title C of Chapter 13). RESTATEMENT (SECOND) OF AGENCY § 381 (1958).

269. ULPA § 408(a) (emphasis added).

270. E.g., Malone, 722 A.2d at 11 (“The duty of directors to observe proper disclosure requirements derives from the combination of the fiduciary duties of care, loyalty and good faith.”).

271. ULPA (2001) § 408(c).
ULPA (2001), however, does not leave partners “in the dark.” To the contrary, the new Act (i) specifies in considerable detail the information available on demand to a general partner, a former general partner, a limited partner, a former limited partner, and the estate of a deceased partner; and (ii) states significant obligations for the volunteering of information.

With regard to limited partner information rights, a Comment contrasts the new Act’s approach with predecessor law:

Like predecessor law, this Act divides limited partner access rights into two categories—required information and other information. However, this Act builds on predecessor law by:

- expanding slightly the category of required information and stating explicitly that a limited partner may have access to that information without having to show cause
- specifying a procedure for limited partners to follow when demanding access to other information
- specifying how a limited partnership must respond to such a demand and setting a time limit for the response
- retaining predecessor law’s “just and reasonable” standard for determining a limited partner’s right to other information, while recognizing that, to be “just and reasonable,” a limited partner’s demand for other information must meet at minimum standards of relatedness and particularity
- expressly requiring the limited partnership to volunteer known, material information when seeking or obtaining consent from limited partners
- codifying (while limiting) the power of the partnership agreement to vary limited partner access rights
- permitting the limited partnership to establish other reasonable limits on access
- providing access rights for former limited partners.

The requirement that the limited partnership volunteer information to limited partners appears in ULPA (2001) section 304(i):

Whenever this [Act] or a partnership agreement provides for a limited partner to give or withhold consent to a matter, before the consent is given or withheld, the limited partnership shall, without demand, provide the limited partner with all information material to the limited partner’s decision that the limited

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277. That is, information the limited partnership is required to maintain. See ULPA (2001) § 111.
278. ULPA (2001) § 305 cmt. The comment to section 407, on general partner information rights, explains: “This section’s structure parallels the structure of Section 304 and the Comment to that section may be helpful in understanding this section.” ULPA (2001) § 407 cmt.
partnership knows.\textsuperscript{279}

This duty “is at the core of the duties owed the limited partners by a limited partnership and its general partners” and “is enforceable through the full panoply of ‘legal or equitable relief’ provided by Section 1001(a) [authorizing direct actions by a partner], including in appropriate circumstances the withdrawal or invalidation of improperly obtained consent and the invalidation or rescission of action taken pursuant to that consent.”\textsuperscript{280} However, the statutory duty applies only to “information . . . that the limited partnership knows” and therefore does not extend to creating information. Except in extraordinary circumstances, however, the limited partnership will know each item of information known by any of its general partners,\textsuperscript{281} and, if a non-partner individual is “conducting the transaction” for the limited partnership, the law attributes that individual’s knowledge to the partnership.\textsuperscript{282}

The new Act also establishes an obligation to volunteer information to general partners:

Each general partner and the limited partnership shall furnish to a general partner . . . without demand, any information concerning the limited partnership’s activities . . . reasonably required for the proper exercise of the general partner’s rights and duties under the partnership agreement or this [Act] . . . .\textsuperscript{283}

This provision differs from the parallel provision pertaining to limited partners in four ways. First, the duty is imposed not only on the limited partnership but also on each general partner. That is, general partners, as co-managers, owe each other a duty to keep each other informed. Second, the duty is continuous and general; it is not limited to situations in which some particular consent is at issue. This approach fits the ongoing managerial role of the general partners, who are responsible not only for specific decisions but also for generally superintending the enterprise. Third, the information subject to the duty is delineated differently. The phrase “reasonably required for the proper exercise of the general partner’s rights and duties” replaces materiality, the concept used for the limited partner provision. The latter concept is

\textsuperscript{279} According to this subsection’s comment, the approach is taken not from RUPA (whose informational rights are crafted only for general partners) but rather from ULLCA section 408(b). ULPA (2001) § 304(i) cmt.

\textsuperscript{280} ULPA (2001) § 304(j) cmt.

\textsuperscript{281} ULPA (2001) § 103(h) (attribution to limited partnership of information known by a general partner). In extreme situations, a general partner’s failure to learn information might breach the partner’s duty of care. The partner might be liable for damages to any other partner directly injured, ULPA (2001) § 1001(b), but the “improperly unknown” information would not trigger the limited partnership’s disclosure obligation.

\textsuperscript{282} ULPA (2001) § 103(g) (general principles for attributing information to “a person other than an individual”).

\textsuperscript{283} ULPA (2001) § 407(b)(1). The provision is based on RUPA section 403(c). ULPA (2001) § 407(b) cmt.
transaction specific and therefore under-inclusive for general partners who have a continuous supervisory role. Fourth, the general partner provision does not expressly limit its scope to known information. However, neither does the provision expressly obligate any general partner to go beyond the duty of care to create, learn or otherwise obtain information in order to volunteer that information to fellow general partners.

The information rights of limited partners and former limited partners are subject to restriction, both via the partnership agreement and through the unilateral decision of the limited partnership (which in this, as in most contexts, means the general partners). The source of the restrictions determines both what restrictions may be imposed and who has the burden of proof in a dispute over the propriety of a restriction.

<table>
<thead>
<tr>
<th>PARTNERSHIP AGREEMENT</th>
<th>SECTION 304(g)</th>
<th>SECTION 407(f)</th>
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<tbody>
<tr>
<td>how restrictions</td>
<td>by the consent of partners when they adopt or amend the partnership agreement, unless the partnership agreement provides another method of amendment</td>
<td>by the general partners, acting under Section 406(a)</td>
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<td>what restrictions</td>
<td>“reasonable restrictions on the availability and use”</td>
<td>“reasonable restrictions on the use of information”</td>
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<td>may be imposed</td>
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284. That is, materiality is usually assessed with regard to a particular decision. See, e.g., Restatement (Second) of Contracts § 162(2) (“A misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.”); Dan B. Dobbs, The Law of Torts § 476, at 1363 (West Group 2000) (“Representations are material if a reasonable person would want to consider the fact represented in determining whether to enter the transaction in question, and also if a reasonable person would not care about the fact but the plaintiff attaches her own idiosyncratic importance to it and the defendant knows it.”); Thomas Lee Hazen, The Law of Securities Regulation § 3.4[2], at 133 (4th ed. 2002) (“Materiality consists of those facts with [sic—which] a reasonable investor would consider significant in making an investment decision.”).

285. See ULPA (2001) § 406(a) (providing that, subject to a very short list of exceptions, “any matter relating to the activities of the limited partnership may be exclusively decided by the general partner or, if there is more than one general partner, by a majority of the general partners”).

286. The following table is based on the table that appears in ULPA (2001) section 304, Comment to Subsection (g). The sole change is the added reference in the top right-hand cell to restrictions made under section 407(f). This addition is consistent with the comment to section 407(f), which states in part: “This provision is identical to Section 304(g) and the Comment to Section 304(g) is applicable here.” ULPA (2001) § 407(f) cmt.

287. Section 304(g) pertains to restrictions imposed by the limited partnership on information rights of present and former limited partners, while section 407(f) empowers the limited partnership to impose restrictions on the information rights of current and former general partners. Compare ULPA (2001) § 304(g), with § 407(f). Although the language of section 407(f) is identical to the language of section 304(g), “general and limited partners have sharply different roles. A restriction that is reasonable as to a limited partner is not necessarily reasonable as to a general partner.” ULPA (2001) § 407(f) cmt.
Despite the new Act’s comprehensive treatment of information issues, some questions and rough edges remain—The new Act’s information provisions contain at least two areas ripe for mischief and a third where just results might require reliance on other law. The first potential for mischief pertains to limited partners who use their statutory information rights to acquire confidential information of the limited partnership. It would seem obvious that a duty of confidentiality should accompany that information, but the new Act does not state so expressly.

The concept of fiduciary duty will not help. “A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner.” The obligation of good faith and fair dealing might encompass a duty to keep confidential the limited partnership’s information, but it would be wiser to include confidentiality obligations in the partnership agreement. The partnership agreement may not “unreasonably restrict the right to information . . . , but . . . may impose reasonable restrictions on the availability and use of information.” Protecting the limited partnership’s confidential information is certainly a reasonable restriction. In addition, if the partnership agreement neglects to provide adequate protection, the general partners can do so unilaterally under ULPA (2001) section 304(g)—

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288. The same problem does not exist for general partners, because confidential information constitutes “limited partnership property” and therefore comes within a general partner’s duty of loyalty. ULPA (2001) § 408(b)(1). In addition, a general partner’s handling of confidential information comes with the general partner’s duty of care. ULPA (2001) § 408(c) (“refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law”). However, when particularly sensitive information is involved, limited partners might wish to have the partnership agreement obligate the general partner to a higher standard of carefulness than is provided in section 408(c).

289. ULPA (2001) § 305(a).

290. See supra notes 250-66 and accompanying text (discussing how that obligation might function to “catch” issues excluded by statute from the realm of fiduciary duty).


292. A comment suggests that “[i]n determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored.” ULPA (2001) § 110(b)(4) cmt. Emphasizing one type of information that partners sometimes wish to keep confidential, the same comment notes: “Restricting access to or use of the names and addresses of limited partners is not per se unreasonable.” Id.
at the last minute, if necessary. (N.B.—unilaterally imposed restrictions can restrict only use and not availability.)

The second potential for mischief pertains to general partners, who might be permitted by the partnership agreement to engage in competing enterprises. If the partnership agreement does permit a general partner to compete, it should also explicitly exempt the general partner from having to disclose within the limited partnership any confidential information generated in a competing enterprise. Otherwise, (i) the general partner may be obliged under section 407(b)(1) to share that information with any fellow general partners (thereby doubtlessly breaching a duty to the other enterprise); and (ii) under section 103(h), the limited partnership will know what the general partner knows. If the information is “material,” the limited partnership will be obligated under section 304(i) to disclose the information to the limited partners.

The third area concerns the coverage of the obligation to volunteer information. The obligation is triggered only in respect of decisions to be made according to, or rights and duties existing under, “the partnership agreement” or “this Act.” For example, the obligation applies when the limited partners are asked to consent to the admission of a new general partner and when the general partners are deciding whether to make an interim distribution. The obligation might not apply, however, when a general partner or the limited partnership offers to purchase a limited partner’s transferable interest. Certainly the limited partner’s agreement would involve “consent,” but is it “this [Act] or a partnership agreement [that] provides for [the] limited partner to give or withhold consent”? If not, the obligation does not apply.

It can be argued that the obligation does apply. Although the Act does not expressly refer to the would-be transferor giving or withholding consent to the transfer, the Act does expressly grant the right to make the transfer: “A transfer, in whole or in part, of a partner’s transferable interest is

293. “It is not per se manifestly unreasonable for the partnership agreement to permit a general partner to compete with the limited partnership.” ULPA (2001) § 110(b)(5)(A) cmt.
294. See ULPA (2001) § 407(b)(1); § 103(h). This attribution of knowledge occurs regardless of whether the general partner communicates the information to anyone within the limited partnership. ULPA (2001) § 103(h). “A general partner’s knowledge . . . of a fact relating to the limited partnership is effective immediately as knowledge of . . . the limited partnership, except in the case of a fraud on the limited partnership committed by or with the consent of the general partner.” § 103(h).
295. ULPA (2001) § 304(i) (volunteering information to limited partners).
297. ULPA (2001) § 301(3). This provision, which states a default rule, also requires consent from each general partner.
298. ULPA (2001) § 504. Following the entity approach, ULPA (2001) section 504 correctly identifies the limited partnership as the decision maker, but “[u]nder Section 406(a), the general partner or partners make this decision for the limited partnership.” § 504 cmt.
299. ULPA (2001) § 304(i) (emphasis added).
permissible. Therefore, the Act “provides [albeit indirectly] for a limited partner to give or withhold consent.”

The problem with this argument is that it proves too much, for it is equally applicable regardless of whether the limited partner is contemplating a sale to a general partner, the limited partnership, another limited partner or an outsider. The argument would therefore require the limited partnership to volunteer all known “material” information every time a limited partner tries to sell a transferable interest to an outsider. That obligation would be unprecedented in the law of business organizations and would impose a substantial burden on the limited partnership.

Moreover, the “solution” would reach far beyond the real problem—i.e., unfair purchasing by those with “inside information.” That problem exists only when the would-be buyer is either the limited partnership or a general partner, and in those circumstances other law provides adequate recourse. Whether the general partner deals directly, or causes the limited partnership to deal, the buyer stands in a relationship of trust and confidence to the seller. As a result, a disclosure obligation arises under both contract and tort law. And, because a limited partner’s transferable interest is a security under both federal and state securities law, there may be disclosure obligations under those regimes as well.

Delegation’s effect on a fiduciary duties—A general partner may certainly delegate managerial responsibilities, and the partnership agreement may reallocate to one or more limited partners functions which the new Act assigns to the general partners. The Drafting Committee considered carefully how

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301. ULPA (2001) section 408’s reference to fiduciary duties being owed “to the limited partnership and the other partners,” criticized above, may be helpful here. See supra notes 246-48 and accompanying text.
302. RESTATEMENT (SECOND) OF CONTRACTS § 161(d) (stating that “[a] person’s non-disclosure of a fact is equivalent to an assertion that the fact does not exist . . . where the other person is entitled to know the fact because of a relation of trust and confidence between them”).
303. L & B Hosp. Ventures, Inc. v. Healthcare Int’l, Inc., 894 F.2d 150, 151 (5th Cir. 1990), cert. denied, 498 U.S. 815 (1991); Matek v. Murat, 862 F.2d 720, 726 n.8 (9th Cir. 1988), overruled on other grounds by Holden v. Hagopian, 978 F.2d 1115, 1119 (9th Cir. 1992); Rodeo v. Gillman, 787 F.2d 1175, 1177 (7th Cir. 1986) (holding limited partner’s option to buy out general partner insufficient to negate security claim); Siebel v. Scott, 725 F.2d 995, 998 (5th Cir. 1984) (eleven limited partners joined to own and operate cable television system, cert. denied, 467 U.S. 1242 (1984); Mayer v. Oil Fields Sys. Corp., 721 F.2d 59, 65 (2d Cir. 1983) (limited partner sued general partner over scheme to repay limited partner’s investment with artificially inflated stock); Secs. & Exch. Comm’n v. Murphy, 626 F.2d 633, 640 (9th Cir. 1980) (cable television limited partnership found to be a security, and general partner enjoined from further securities violations).
304. BISHOP & KLEINBERGER, supra note 94, ¶ 11.01.
305. ULPA (2001) § 406(a) cmt. (“The authority granted by this subsection includes the authority to delegate.”). Such delegation is customary and, when a general partner is an entity, inevitable. See RESTATEMENT (SECOND) OF AGENCY § 5(c) cmt. (“It is to be noted that when a corporation or partnership is an agent, its officers, employees, and individual partners necessarily act as subagents in the performance of the principal’s affairs, since such organizations can act only through others.”); KLEINBERGER, supra note 115, § 2.8.3, at 63 (discussing agent’s authority to redelegate).
306. ULPA (2001) section 406(a) allocates all managerial responsibility to the general partners “except
such delegation or allocation might affect a general partner’s fiduciary duty.

On the simpler question of delegation to a third party, the Committee quickly reached a conventional conclusion. The Act “does not prevent a general partner from delegating one or more duties, but delegation does not discharge the duty.”307 In particular, a general partner’s delegation does not discharge or eliminate the partner’s duty of loyalty with regard to the delegated matter. For example, a general partner who delegates to a “leasing manager” all day-to-day responsibility for the limited partnership’s rental property does not thereby become entitled to compete with the limited partnership in the rental market.308

Delegation can, however, be a key fact in determining whether a general partner has breached the duty of care. A comment to the new Act provides two contrasting examples:

**EXAMPLE:** A sole general partner personally handles all “important paperwork” for a limited partnership. The general partner neglects to renew the fire insurance coverage on a building owned by the limited partnership, despite having received and read a warning notice from the insurance company. The building subsequently burns to the ground and is a total loss. The general partner might be liable for breach of the duty of care under Section 408(c) (gross negligence).

**EXAMPLE:** A sole general partner delegates responsibility for insurance renewals to the limited partnership’s office manager, and that manager neglects to renew the fire insurance coverage on the building. Even assuming that the office manager has been grossly negligent, the general partner is not necessarily liable under Section 408(c). The office manager’s gross negligence is not automatically attributed to the general partner. Under Section 408(c), the question is whether the general partner was grossly negligent (or worse) in selecting the general manager, delegating insurance renewal matters to the general manager and supervising the general manager after the delegation.309

On the more complicated question of the partnership agreement reallocating authority from the general to the limited partners, the Drafting Committee initially considered language based on ULLCA sections 409(h)(3) and (4) and

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307. ULPA (2001) § 406(a) cmt.; § 408 cmt. This proposition is axiomatic in common law. See, e.g., Restatement of Contracts § 318(3); Kleinberger, supra note 115, §§ 4.4.2–3, at 140-41.

308. The partnership agreement, however, may permit this competition. ULPA (2001) § 110(b)(5)(A) (authorizing “the partnership agreement . . . to identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable”); ULPA (2001) § 110(b)(5)(A) cmt. (“It is not per se manifestly unreasonable for the partnership agreement to permit a general partner to compete with the limited partnership.”).

309. ULPA (2001) § 406(a) cmt.
RMBCA section 7.32(e). In somewhat different ways, these provisions cause fiduciary duty to shift *pro tanto* with the managerial authority. The ULLCA provision leaves a gap, stripping duties from the managers to the extent discretion is vested in the members but assigning the duty to a member only to the extent the member actually exercises the authority. Thus, a member’s nonfeasance might not be actionable:

In a manager-managed company . . . a member who pursuant to the operating agreement exercises some or all of the rights of a manager in the management and conduct of the company’s business is held to the standards of [management] conduct . . . [including fiduciary duty] to the extent that the member exercises the managerial authority vested in a manager by this [Act]; and . . . a manager is relieved of liability imposed by law for violation of the standards prescribed [for management conduct, including fiduciary duty] . . . to the extent of the managerial authority delegated to the members by the operating agreement.  

The RMBCA leaves no gap. The directors are relieved to the extent their discretion or power is limited; vesting of that discretion or power in others imposes the corresponding duties on those others regardless of whether they exercise the discretion or power:

An agreement authorized by this section [concerning shareholder agreements] that limits the discretion or powers of the board of directions shall relieve the directors of, and impose upon the person or persons in whom such discretion or powers are vested, liability for acts or omissions imposed by law on directors to the extent that the discretion or powers of the directors are limited by the agreement.

For a combination of reasons, the Drafting Committee eventually rejected any *pro tanto* approach, and the new Act contains nothing comparable to

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310. ULLCA § 409(h)(3)-(4).
311. RMBCA § 7.32(e).
312. Those reasons included: (1) Given the Act’s “strong manager” construct, a general partner’s fiduciary duties should be nondelegable. It would be improper to allow a *pro tanto* provision to “strip away” a general partner’s fiduciary duty. (2) Fiduciary duty properly attaches to managers, given their ongoing control of an enterprise’s operations and should not automatically extend to mere owners who might be able to bargain for an increased role in governance (and thereby some increased control over the general partners). (3) Any *pro tanto* provision would inevitably create difficult line-drawing issues. Suppose, for example, a partnership agreement required the general partners to prepare and submit an annual operating budget to the limited partners. Consider how difficult it would be to divide the budgetary duty of care between the general and limited partners. (4) A *pro tanto* provision would necessarily be under-inclusive, unless the provision were to cover not only reallocation via the partnership agreement but also delegation by the general partner to one or more limited partners through a separate agreement. (5) If the partnership agreement allocates substantial managerial authority to limited partners who misuse that authority to unfairly prejudice other partners, the statutory obligation of good faith and fair dealing will provide adequate recourse. See Wilmington Leasing, Inc v. Parrish Leasing Co., No. 15202, 1996 WL 752364, at *14 n.19 (Del. Ch. Dec. 23, 1996) (reflecting second reason). As that case explained:

A fiduciary is typically one who is entrusted with the power to manage and control the property of
ULLCA section 409(h)(3) or RMBCA section 7.32(e). Section 408 (General Standards of General Partner’s Conduct) says nothing about the effect of reallocation of management authority, and section 305 (Limited Duties of Limited Partners) states in relevant part: “A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner.”

It is left to the comments to consider the duty-related effects of a substantial reallocation.

According to those comments, although “delegation does not discharge the duty” of a general partner, the requirements of the duty as applied will vary depending on how much and what authority has been taken away:

If the partnership agreement removes a particular responsibility from a general partner, that general partner’s fiduciary duty must be judged according to the rights and powers the general partner retains. For example, if the partnership agreement denies a general partner the right to act in a particular matter, the general partner’s compliance with the partnership agreement cannot be a breach of fiduciary duty. However, the general partner may still have a duty to provide advice with regard to the matter. That duty could arise from the fiduciary duty of care under Section 408(c) and the duty to provide information under Sections 304(i) and 407(b).

As for limited partners, the proper standard is good faith and fair dealing, not fiduciary duty:

Fiduciary duty typically attaches to a person whose status or role creates significant power for that person over the interests of another person. Under this Act, limited partners have very limited power of any sort in the regular activities of the limited partnership and no power whatsoever justifying the imposition of fiduciary duties either to the limited partnership or fellow partners. It is possible for a partnership agreement to allocate significant managerial authority and power to a limited partner, but in that case the power exists not as a matter of status or role but rather as a matter of contract. The proper limit on such contract-based power is the obligation of good faith and fair dealing, not fiduciary duty, unless the partnership agreement itself expressly imposes a fiduciary duty or creates a role for a limited partner [such as an agent] which, as a matter of other law, gives rise to a fiduciary duty.

another. In this case, that description would seem to fit Parrish [the general partner], who has almost exclusive control over the management of the Partnership. Therefore, it is with some irony that Parrish argues that the Limited Partners have breached their fiduciary duties in attempting to remove the General Partner who manages and controls their property, and with whom they are no longer satisfied. In this particular case, that action is more akin to shareholders voting to remove a board of directors—action to which fiduciary duties would not normally attach.

313. ULPA (2001) § 305(a).
316. ULPA (2001) § 305(a) cmt.
This position may seem at odds with some Delaware case law, but the
difference is mostly a matter of terminology. In *K.E. Property Management, Inc. v. 275 Madison Management Corp.*, the Delaware Chancery Court seemed
to hold that limited partners owe fiduciary duties because the Delaware version
of RULPA is linked to the Delaware version of the UPA, which provides that
all partners owe fiduciary duty to each other. However, a subsequent
decision, *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, stated a
narrower view:

In deciding whether a limited partner of a Delaware limited partnership owed a
fiduciary duty to the general partner when removing the general partner
pursuant to its contractual right under the partnership agreement, this Court in *K.E. Property Management* merely stated that “to the extent that a partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to the obligations of a fiduciary, including the obligation to act in good faith as to the other partners.” In making this ruling, the Court relied on the proposition that under the Delaware Uniform Partnership Act all partners owe each other fiduciary obligations. The Court relied on this proposition because the Delaware Revised Uniform Limited Partnership Act does not specifically state whether a limited partner owes a fiduciary duty to a general partner and in such instances refers the Court to the DUPA. It is clear, however, through the Court’s qualification of its ruling, that the K.E. Property Management Court was not adopting that proposition in its entirety but was limiting it to situations in which a “partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership.”

Thus, where the “partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership,”
Delaware law might impose context-specific fiduciary duties while ULPA (2001) would rely on the duty of good faith and fair dealing.

But how significant is this difference? As *Bond Purchase, L.L.C.* illustrates,
under Delaware law “good faith” is part of “fiduciary duty,” and the Delaware cases on limited partner fiduciary duty mostly involve claims *inter se*
the partners, not claims that a limited partner has breached a duty to the limited
partnership. Moreover, the Delaware limited partnership statute gives the

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319. See also *Boxer v. Husky Oil Co.*, 429 A.2d 995, 997 (Del. Ch. 1981) (stating that general partner in limited partnership is generally required “to exercise the utmost good faith, fairness, and loyalty”).

320. *LUBAROFF & ALTMAN*, supra note 317, § 11.2.7. *Cantor Fitzgerald L.P. v. Cantor* is an exception, but that case involved a partnership agreement that recognized that all partners, including the limiteds, owed a duty of loyalty to the limited partnership. 724 A.2d 571 (Del. Ch. 1998). According to ULPA (2001) section 302, Comment to Subsection (a), courts applying the new Act should recognize and enforce such contractually
partnership agreement “maximum” power, which extends to defining and restricting fiduciary duties. Indeed, where the partnership agreement grants power to limited partners, it simultaneously legitimizes any good faith exercise of that power.

Therefore, given a properly drawn partnership agreement, a claim that a Delaware limited partner has breached a fiduciary duty to a fellow partner through the exercise of some power granted by the partnership agreement will likely fail unless the claimant can show that the challenged conduct reflects “the conscious doing of a wrong because of dishonest purpose or moral obliquity.”

This standard seems quite similar to the concept of “conduct [that] has no honestly-held purpose that legitimately comports with the parties’ agreed upon arrangements.” As discussed above, the “honestly-held/legitimately-agreed-to fiduciary duties. ULPA (2001) § 302(a) cmt.

321. In a non-uniform provision, the Delaware version of RULPA states: “It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.” DEL. CODE ANN. tit. 6, § 17-1101(c) (2003).

322. Another non-uniform provision of Delaware RULPA states:

To the extent that, at law or in equity, a partner or other person has duties (including fiduciary duties) and liabilities relating thereto to a limited partnership or to another partner or to another person that is a party to or is otherwise bound by a partnership agreement, (1) any such partner or other person acting under the partnership agreement shall not be liable to the limited partnership or to any such other partner or to any such other person for the partner’s or other person’s good faith reliance on the provisions of the partnership agreement, and (2) the partner’s or other person’s duties and liabilities may be expanded or restricted by provisions in the partnership agreement.


323. Wilmington Leasing, Inc v. Parrish Leasing Co., No. 15202, 1996 WL 752364, at *14 (Del. Ch. Dec. 23, 1996) (stating that the partnership agreement “specifically delineates the conditions under which the Limited Partners are permitted to remove the General Partner and, therefore, sets the standard by which the Limited Partners’ conduct is to be measured”); Sonet v. Timber Co., 722 A.2d 319, 324 (Del. Ch. 1998).

[Under Delaware limited partnership law a claim of breach of fiduciary duties must first be analyzed in terms of the operating governing instrument—the partnership agreement—and only where that document is silent or ambiguous, or where the principles of equity are implicated, will a Court begin to look for guidance from the statutory default rules, traditional notions of fiduciary duties, or other extrinsic evidence.

Gotham Partners, 817 A.2d at 171 n.38 (quoting language in Sonet case); LUBAROFF & ALTMAN, supra note 317, § 11.2.8, at 11-26.15 (“The Act . . . expressly permits a limited partner’s duties (including fiduciary duties to the extent they exist) to be defined in a partnership agreement.”).

324. Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P., 624 A.2d 1199, 1208 n.16 (Del. 1993) (“The term ‘bad faith’ is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it . . . contemplates a state of mind affirmatively operating with furtive design or ill will.”) (quoting BLACK’S LAW DICTIONARY 337 (5th ed. 1983)) (internal quotations omitted).

325. ULPA (2001) § 305(b) cmt.

326. See supra note 258 and accompanying text.
comports” standard appears in a comment to the new Act which explains how the obligation good faith and fair dealing is properly used to police partner-to-partner relations. Thus in this area, Delaware law and the new Act might agree in substance and differ only semantically.

H. The Role of the Public Record

Both under the new Act and its predecessors, a limited partnership is a creature created through the public record. The new Act is distinctive, however, in the extent to which it (i) provides for constructive notice through the public record, and (ii) contemplates the complexities that can result if the public listing of a limited partnership’s general partners deviates from the actual situation inter se the partners. Also worth noting is the extent to which the public record under the new Act may fail to indicate a limited partnership’s demise and how the new Act handles conflicts between the public record and the partnership agreement.

1. The Public Record and Constructive Notice—In General

Under RULPA (1986), “[t]he 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.” ULPA (2001) section 103(c) replicates that language but subjects it to an important exception—namely section 103(d).

Section 103(d) provides for “what is commonly called constructive notice” as to the dissociation of a person as a general partner, the dissolution of a limited partnership, the termination of a limited partnership, and a limited partnership’s conversion or participation in a merger. In each case, the notice is effective ninety days after the effective date of an appropriate public filing and serves, “in conjunction with other sections of [the new] Act to curtail the power to bind and personal liability of

327. ULPA (2001) section 201(a) states: “In order for a limited partnership to be formed, a certificate of limited partnership must be delivered to the [Secretary of State] for filing.” RULPA (1985) section 201, RULPA (1976) section 201, and ULPA (1916) section 2(b) are essentially the same, although the four statutes differ as to what the certificate must contain.

328. ULPA (2001) section 103(c) modernizes the wording, dispensing with an antiquated adjective (“therein”): “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 notice of any other fact.” ULPA (2001) § 103(c).

329. ULPA (2001) § 103(d) cmt.


general partners and persons dissociated as general partners. 334 For example, under ULPA (2001) section 804(a)(2), a general partner’s statutory power to bind the limited partnership changes when the limited partnership dissolves. For acts that are not “appropriate for winding up the limited partnership’s activities,”335 that power exists only if the “general partner’s act after dissolution . . . would have bound the limited partnership . . . before dissolution” AND “at the time the other party enters into the transaction, the other party does not have notice of the dissolution.”336 Under ULPA (2001) section 103(d)(2), a person has that notice “90 days after the effective date of an amendment to the certificate of limited partnership stating that the limited partnership is dissolved.”337 Similarly, under section 103(d)(1), a statement of dissociation or an appropriate amendment to the certificate of limited partnership will give constructive notice of a person’s dissociation as a general partner, which in turn will curtail the person’s lingering exposure to liability for partnership obligations incurred subsequently if the limited partnership continues without dissolution.338

The constructive notice provisions of ULPA (2001) section 103(d) have obvious practical implications for third parties dealing with a limited partnership. Ignore the public record at your own risk. The contents of that record can cut off your rights, even if you have an otherwise reasonable belief would have otherwise supported a claim.339

In contrast, the practical implications of ULPA (2001) section 103(c) are not so obvious. What does it mean that the filed certificate “is notice that the partnership is a limited partnership”? What is the significance of the restrictive language that, except as expressly provided in subsections (c) and (d), “the certificate is not notice of any other fact”? What are the consequences of the world having notice that “the persons designated in the certificate as general partners are general partners”?334

334. ULPA (2001) § 103(d) cmt.
337. The Act does not indicate whether that notice is effective to defeat the other party’s claim against the general partner for breach of the agency law warranty of authority. See KLEINBERGER, supra note 115, § 4.2.2, at 130-31 (explaining the warranty of authority). This problem does not exist under RUPA, from which ULPA (2001) took the idea of constructive notice through filings. RUPA confines the effects of its constructive notice provisions to “the purposes of” specified operative provisions of that Act. RUPA § 704(b)-(c).
338. ULPA (2001) § 607(c)(2)(B); see also ULPA (2001) § 402(a) (general partner’s statutory apparent authority to bind limited partnership curtailed if “notice under §103(d) [indicates] that the general partner lacked authority”); § 606(a)(2)(B) (notice of dissociation curtails power of dissociated general partner to bind the partnership); § 1111(b)(1)(A) (notice of conversion or merger curtails lingering exposure to personal liability of person who was a general partner of converted or merged limited partnership); § 1112(a)(2) (notice of conversion or merger curtails power of general partner of converted or merged limited partnership to bind the converted or surviving organization).
339. On the flip side, ULPA (2001) protects a third party that relies on the public record even if the partnership agreement conflicts with the public record. See infra notes 360, 368 and accompanying text.
The answer to the first question is “not much, if anything.” The various attributes of a limited partnership take effect when the state filing officer files the certificate of limited partnership (assuming that the contents of the certificate are in “substantial compliance” with the Act’s requirements).\(^\text{340}\) In particular, the Act’s liability shields are self-executing, so notice that “the partnership is a limited partnership” is unnecessary to protect the limited partners (and, in the case of a LLLP, the general partners) from personal liability for the limited partnership’s obligations.\(^\text{341}\) Nor is such notice necessary to make general partners liable for the obligations of an ordinary limited partnership; that liability results from status and exists regardless of whether the claimant knew of the status when the limited partnership obligation was incurred.\(^\text{342}\) Moreover, notice that “the partnership is a limited partnership” is ineffective to shelter a person who purports to act on behalf of a limited partnership without fully disclosing its existence. Liability in those circumstances results not from lack of notice that a limited partnership exists but rather from lack of sufficient notice that the person is acting on behalf of the limited partnership.\(^\text{343}\)

The second question has a more satisfying answer. The significance of the restrictive, “no other notice” language is two-fold. First, there is no constructive notice of any information in the certificate of limited partnership except as specifically provided in subsections (c) and (d). For example, a certificate of limited partnership might state that “the business of this limited partnership is restricted to cultivation of honey and does not extend to the sale of honey bees,”\(^\text{344}\) but that statement has no effect on the power of a general partner to sell the limited partnership’s honey bees to a third party who has no

\(^\text{340}\) ULPA (2001) § 201(c).

\(^\text{341}\) According to the Comment to RULPA (1976), section 208 was intended to give notice of the limited partner status of limited partners, who, under the 1976 Act, had to be individually listed in the certificate of limited partnership. See RULPA (1976) § 208 cmt. “This limited liability was subject to ‘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. The liability was also subject to the control rule. See supra notes 199-212 and accompanying text. The notion of “notice” has caused at least one court to grant limited partners limited liability even when no limited partnership had been formally created. Garrett v. Koepke, 569 S.W.2d 568, 579 (Tex. Civ. App. 1978) (holding that “since [the limited partnership act] is a notice statute and since appellants already had the information that would have been provided by compliance with the statute prior to dealing with the limited partnership, the failure to comply with [the statute’s filing requirements] does not cause appellees to lose their status as limited partners”).

\(^\text{342}\) ULPA (2001) § 404. The situation was the same under RULPA, which incorporated by reference the UPA’s rule on general partner liability, which in turn was based on status, not notice. See RULPA § 403(b); UPA § 15.

\(^\text{343}\) See ULPA (2001) § 103(c) cmt. (citing Water, Waste & Land, Inc. v. Lanham, 955 P.2d 997, 1001-03 (Colo. 1998), for the proposition that a comparable provision of the Colorado LLC statute was ineffective to change common law agency principles, including the rules relating to the liability of an agent that transacts business for an undisclosed principal).

\(^\text{344}\) Under ULPA (2001) section 201(b), a certificate of limited partnership may include “other matters” beyond the information required by section 201(a).
knowledge of the statement.\textsuperscript{345} Second, there is no constructive notice of information \textit{absent} from the certificate. Most importantly, this point means that fact that a person is \textit{not} designated as a general partner in the certificate is \textit{not} notice that the person is \textit{not} a general partner.\textsuperscript{346}

2. The Public Record, Constructive Notice and General Partner Status

As for the third question—the significance of notice that “the persons designated in the certificate as general partners are general partners”—the answer is quite complicated. Although the new Act requires that the certificate of limited partnership accurately list the general partners,\textsuperscript{347} the Drafting Committee expressly rejected any provision that would “make a person’s status as a general partner dependent on the person being so designated in the certificate of limited partnership.”\textsuperscript{348} ULPA (2001) section 401 (Becoming a general partner) nowhere mentions a public filing. Neither does ULPA (2001) section 603, which lists events of “Dissociation as General Partner.”

Thus, a person might be a general partner per the agreement of the partners and not yet be reflected as such in the certificate of limited partnership. Also, a person might be designated a general partner in the certificate of limited partnership even after the person has been dissociated. These two situations are different, but they raise the same four issues: (1) Who is responsible for bringing the public record back in conformity with the “true” situation \textit{inter se} the partners? (2) Who is liable if the disconnect between the public record and private situation causes harm to someone? (3) What effect does the disconnect have on the power of a person to bind the limited partnership? (4) How does the disconnect affect a dispute \textit{inter se} the partners over the person’s status, in particular if the partnership agreement is at odds with the public record?

(1) Responsibility for conforming the public record to the private arrangement—Both the limited partnership and the general partners are responsible for resolving any disconnect concerning the status of a person as a general partner. Under ULPA (2001) section 202(b): “A limited partnership shall promptly deliver to the [Secretary of State] for filing an amendment to a

\textsuperscript{345} The third party would have to establish either that the general partner had actual authority or that the transaction was “for apparently carrying on in the ordinary course the limited partnership's activities or activities of the kind carried on by the limited partnership.” ULPA (2001) § 402(a)-(b). In that factual dispute, the limited partnership could not assert that the certificate of limited partnership gave the third party notice of the restriction.

\textsuperscript{346} ULPA (2001) § 401 cmt. To the contrary, a person may be a general partner even though not so designated in the certificate of limited partnership. \textit{See infra} notes 364-66 and accompanying text (concerning power-to-bind of non-designated general partner).

\textsuperscript{347} ULPA (2001) § 201(a)(3) (requiring the certificate of limited partnership as delivered to the [Secretary of State] for filing to “state...the name and the street and mailing address of each general partner”), § 202(b) (requiring a prompt amendment of the certificate “to reflect (1) the admission of a new general partner; [and] (2) the dissociation of a person as a general partner”).

\textsuperscript{348} ULPA (2001) § 401 cmt.
certificate of limited partnership to reflect: (1) the admission of a new general partner; [and] (2) the dissociation of a person as a general partner.\textsuperscript{349} Under ULPA (2001) section 202(c), “[a] general partner that knows that any information in a filed certificate of limited partnership . . . has become false due to changed circumstances shall promptly” take appropriate action to correct the information, which in the case of general partner designation means “caus[ing] the certificate to be amended.”\textsuperscript{350} Most often, these two provisions will be redundant of each other. It is the responsibility of the general partners, as managers, to maintain the limited partnership’s public record.\textsuperscript{351} Section 202(c) mostly serves to underscore that point, becoming independently important only if the majority of general partners obstruct the filing of a necessary amendment to the certificate.

(2) Liability for harm resulting from a disconnect between the public record and the private arrangement—Here, too, both the limited partnership and the general partners are involved—albeit in different ways. General partner exposure is the more direct:

If a record delivered to the [Secretary of State] for filing under this [Act] and filed by the [Secretary of State] contains false information, a person that suffers loss by reliance on the information may recover damages for the loss from: . . . a general partner that has notice that the information has become false because of changed circumstances, if the general partner has notice for a reasonably sufficient time before the information is relied upon to enable the general partner to effect an amendment under Section 202 [or] file a petition [for a court order to correct the record] pursuant to Section 205.\textsuperscript{352}

“The LLLP shield is irrelevant” to a liability claim asserted under this provision against a general partner,\textsuperscript{353} because the liability is not that of the limited partnership and does not result solely (and vicariously) from a person’s status as a general partner. Rather, the liability is “direct liability” and results from the general partner’s failure to comply with obligations mandated by the Act.\textsuperscript{354}

In contrast, the limited partnership faces no direct liability for failing its obligation to “promptly” remedy an inaccuracy in a general partner.

\textsuperscript{349} ULPA (2001) § 202(b)(1)-(2).
\textsuperscript{350} ULPA (2001) § 202(c)(1).
\textsuperscript{351} See ULPA (2001) § 204 (a) (requiring signing by general partners on records delivered for filing on behalf of the limited partnership); § 406(a) (general management authority of general partners).
\textsuperscript{352} ULPA (2001) § 208(a) (2). The provision also pertains to information inaccurate upon filing, which is not relevant here, and mentions other methods of correcting the record, which do not apply to the changed status of a general partner. See also ULPA (2001) § 103(b) (defining notice).
\textsuperscript{353} ULPA (2001) § 208 cmt.
\textsuperscript{354} ULPA (2001) § 208 cmt. Section 208(a) “does not require a party who relies on a record to demonstrate that the reliance was reasonable” because “[r]ecords filed under this Act are signed subject to the penalties for perjury.” Id. However, proof that the claimant had contradictory information could undercut the claimant’s proof of reliance.
designation. Its risk is that a person dissociated as a general partner will retain the power to bind the limited partnership. This risk is discussed in the following section.

(3) Effect of disconnect on person’s power to bind the limited partnership—
This issue has two different aspects, one applicable when the certificate of limited partnership fails to reflect the dissociation of a person as a general partner and the other applicable when the certificate fails indicate the admission of a general partner.

In the former situation, the certificate’s continuing inaccuracy can sustain for up to two years the dissociated general partner’s statutory apparent authority to bind the limited partnership. The generally applicable “power to bind” provision, ULPA (2001) section 402, ceases to apply upon disassociation, regardless of whether the certificate is properly amended or a statement of disassociation filed, because (i) the Act makes a clear distinction for power-to-bind purposes between current general partners and persons dissociated as general partners,\(^{355}\) and (ii) the occurrence of dissociation does not depend on a public filing.\(^{356}\) Section 402 applies only to current general partners, while ULPA (2001) sections 606(a) and 804(a) govern persons dissociated as general partners.\(^{357}\)

Sections 606(a) and 804(b) both recognize the power of a dissociated partner to bind the limited partnership for up to two years following the dissociation,\(^{358}\) if “the other party does not have notice of the dissociation and reasonably believes the person is a general partner.”\(^{359}\) So long as the certificate of limited partnership continues to inaccurately designate the person as a general partner, a third party can have notice of the dissociation only through actual knowledge,\(^{360}\) receipt of a notification,\(^{361}\) or the filing by the dissociated general partner of a statement of dissociation.\(^{362}\) The limited partnership is thus

\(^{355}\) ULPA (2001) § 606 cmt. But see ULPA (2001) § 402 cmt. (in which the Example suggests that, absent a proper filing, section 402 might apply to determine whether an expelled general partner has the power to bind a limited partnership).

\(^{356}\) ULPA (2001) § 402. ULPA (2001) section 603 (Dissociation as General Partner) nowhere indicates that dissociation depends on a public filing. Section 603 thus accords with section 401, which does not make a public filing a precondition to a person becoming a general partner.

\(^{357}\) Compare ULPA (2001) § 402, with § 606(a), and § 804(a). ULPA (2001) section 1112(b) deals with a person dissociated as a general partner through a conversion or merger.


\(^{360}\) ULPA (2001) § 103(b)(1). The situation is more complicated if the partnership agreement indicates that the person is no longer a general partner and the third party is aware of the discrepancy between the certificate of limited partnership and the partnership agreement. If the third party has reasonably relied to its detriment on the certificate, as between the third party and the limited partnership “the certificate of limited partnership . . . prevail[s].” ULPA (2001) § 201(d)(2).


\(^{362}\) ULPA (2001) § 103(d)(1). The notice takes effect ninety days after the effective date of the filing. Id.
best protected if it promptly amends the certificate, as required by law.  

In the obverse situation, where a person is admitted as a general partner, but the certificate of limited partnership does not so reflect, the relevant power-to-bind provisions are ULPA (2001) sections 402 and 403.  

Each of these apply to general partners, a status which, as previously discussed, is determined according to ULPA (2001) section 401 (Becoming General Partner), not by what is stated in the public record.  

Even if a third party knows that certificate of limited partnership does not designate the person as a general partner, the result might be the same.

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. Therefore, a Third Party review of the certificate does not mean that Third Party knew, had received a notification or had notice that [the undesignated general partner] lacked authority. At most, [the limited partnership] could argue that, because Third Party knew that [the undesignated general partner] was not listed in the certificate, a transaction entered into by [the undesignated general partner] could not appear to Third Party to be for apparently carrying on the limited partnership’s activities in the ordinary course.

The situation is even clearer for limited partnership liability asserted under ULPA (2001) section 403 (Limited Partnership Liable for General Partner’s Actionable Conduct). Here the first element of the claimant’s case is that the wrongdoer was a general partner at the time of the “wrongful act or omission, or other actionable conduct.” Since general partner status is determined under section 401 and not with reference to the certificate of limited partnership, a non-designated general partner is nonetheless a general partner for the purposes of section 403.

363. The notice takes effect ninety days after the effective date of the amendment. ULPA (2001) § 103(d)(1). The amendment will also prevent the former general partner from affecting the public record on behalf of the limited partnership. See ULPA (2001) § 204 (stating who must sign record delivered for filing under Act and referring, for records delivered on behalf of limited partnership, to general partners “listed in the certificate”). The Comment to Subsection (a) of section 204 explains:

The recurring reference to general partners “listed in the certificate” recognizes that a person might be admitted as a general partner under Section 401 without immediately being listed in the certificate of limited partnership. Such persons may have rights, powers and obligations despite their unlisted status, but they cannot act as general partners for the purpose of affecting the limited partnership’s public record.


367. ULPA (2001) § 403 cmt. “A general partner can cause a limited partnership to be liable under this section, even if the general partner is not designated as a general partner in the certificate of limited partnership.” Id. In a narrow set of circumstances, the non-designation might be relevant. If a non-designated general partner does an act without actual authority and not “in the ordinary course of the activities of the limited partnership,” then section 403(b) will make the limited partnership liable only if the general partner was
(4) Effect inter se the partners of a discrepancy between the publicly filed list of general partners and the partners’ private understanding—On this issue, there is an easy answer if the partners’ private understanding is reflected in the partnership agreement. Among the partners and transferees, “the partnership agreement prevails.” 368 The situation might be more complicated if the partnership agreement has not been amended to reflect the change. In that event, the question of who is and is not a general partner inter se the partners could become a contentious dispute of fact. 369

3. The Public Record and the State of a Limited Partnership’s Health

The juridical demise of a limited partnership, like that of a general partnership, begins with dissolution and proceeds through winding up. 370 Although the public record is the only means to create a limited partnership, under ULPA (2001), a limited partnership’s demise can begin and even end privately. Although the new Act provides each limited partnership a perpetual duration, 371 that provision is a default rule, subject to change in the partnership agreement, which is a private document. 372 Moreover, unless otherwise provided in the partnership agreement, the consent of the partners can cause dissolution, 373 and the dissociation of a general partner can result in dissolution, 374 despite the ostensible perpetual term and without any filing being made to change the limited partnership’s public record.

A limited partnership “may amend its limited partnership to state that the acting with apparent authority. See ULPA (2001) § 403 cmt. (quoting Comment to RUPA section 305, to indicate that the reference in ULPA (2001) section 403(a) to “authority” encompasses both actual and apparent authority). If apparent authority is thus the pivotal question, and the third party has actual knowledge that the general partner is not so designated in the certificate of limited partnership, that knowledge might undercut the third party’s claim that it reasonably believed the general partner had the authority to undertake the actionable conduct on behalf of the limited partnership.


369. It is certainly easy enough to have the partnership agreement establish record-related preconditions to becoming a general partner—e.g., that no one becomes a general partner until so reflected in the certificate of limited partnership or until so reflected in the limited partnership’s private required records. See ULPA (2001) § 111(1) (requiring limited partnership to maintain current list of all partners). Although ULPA (2001) section 401(4) states that a person may become a general partner simply “with the consent of all the partners,” this provision is a default rule, subject to the partnership agreement. § 110(a). A corresponding precondition to dissociation might not be so simple. For example, if a partnership agreement were to override ULPA (2001) section 603 and provide that no dissociation takes effect until reflected in the limited partnership’s required records, the death of a general partner’s sole general partner might create a legal limbo.


371. ULPA (2001) § 104(c).

372. ULPA (2001) § 801(1) (stating that “a limited partnership is dissolved... upon... the happening of an event specified in the partnership agreement”).

373. ULPA (2001) § 801(2).

374. ULPA (2001) § 801(3). The dissociation of a limited partnership’s sole limited partner can have the same result. ULPA (2001) § 801(4).
limited partnership is dissolved,” and, through constructive notice, that amendment will curtail the power of current and former general partners to bind the limited partnership. However, the amendment is not mandatory, which means that the failure to amend does not render the information in the certificate false, which in turn means that general partners can neither be held liable for the failure to amend nor compelled by court order to make an amendment.

“A dissolved limited partnership that has completed winding up may deliver to the [Secretary of State] for filing a statement of termination,” which “provides constructive notice, 90 days after the statement’s effective date, that the limited partnership is terminated . . . [and] effectively terminates any apparent authority to bind the limited partnership.” Like an amendment to the certificate indicating dissolution, this statement is not mandatory.

If a limited partnership fails to make its required annual report, it can be administratively dissolved and that dissolution will appear on the public record. Otherwise, however, a limited partnership’s public record is not a reliable indicator of the limited partnership’s juridical state of health. If the certificate of limited partnership has been amended to indicate dissolution, that amendment is significant. However, the absence of such an amendment does not mean that the limited partnership has not been dissolved. Likewise, a filed statement of termination is significant, but the absence of such a statement is not.

376. ULPA (2001) §§ 103(d)(2), 804(a); see supra notes 328-39 and accompanying text (discussing this mechanism further). A dissolved limited partnership may also wish to cut off claims by giving notice to known and unknown creditors. See ULPA (2001) §§ 806, 807. Although notice to unknown creditors is done publicly—i.e., through publication—no amendment to the certificate of limited partnership is required.
377. If the dissolution made the information in the certificate false, ULPA (2001) section 202(c) would require the general partners to promptly eliminate the falsehood, which would require “caus[ing] the certificate to be amended.” § 202(c)(1). (ULPA (2001) section 202(c)(2) is inapplicable, because neither a statement of change nor a statement of correction would be appropriate to indicate dissolution.) Requiring the general partners to file the amendment, however, would mean that filing an amendment would be mandatory, which would contradict the use of the word “may” in ULPA (2001) section 803(a)(1).
378. A general partner can be liable under ULPA (2001) section 208(a)(2) only if the relevant record (in this instance the certificate of limited partnership) “contains false information.”
379. ULPA (2001) section 205(a) (Signing and Filing Pursuant to Judicial Order) applies only when “a person required by this [Act] to sign a record or deliver a record to the [Secretary of State] for filing does not do so.”
381. ULPA (2001) § 203 cmt.
382. See ULPA (2001) § 203 (using “may” to refer to the filing of a statement of termination); § 803(b)(1) (same). “Therefore, it is not possible to use Section 205 (Signing and Filing Pursuant to Judicial Order) to cause a statement of termination to be filed.” ULPA (2001) § 203 cmt.
383. ULPA (2001) § 809(a)(2). Administrative dissolution may also occur if the limited partnership fails to paying a fee due under the Act to the filing office. ULPA (2001) § 809(a)(1).
384. ULPA (2001) § 809(b) (requiring filing officer to file determination that administrative dissolution is appropriate); § 809(c) (providing that filing of a declaration of dissolution effects administrative dissolution).
The situation under RULPA is only somewhat different. Although the certificate of limited partnership must state “the latest date upon which the limited partnership is to dissolve,” private agreements and private events can cause earlier dissolution. A dissolved limited partnership is required to file “a certificate of cancellation” to indicate “dissolution and the commencement of winding up,” but RULPA states no consequence for a limited partnership that fails to comply. Moreover, there is no filing to indicate the completion of winding up, and no administrative dissolution mechanism to allow the filing officer to clear away the dead wood.

1. The Vulnerability of Transferees

On the status of transferees of a partnership interest, ULPA (2001) differs from RULPA in nomenclature and form but not in substance. RULPA refers to “assignment” and “assignee” of an interest, while ULPA (2001) uses the terms “transfer” and “transferee.” RULPA obliquely delineates what a partner may and may not assign, and ULPA (2001) does so directly. But under each Act:

- unless the partnership agreement provides otherwise or unless the other partners consent
- all that can be transferred is a partner’s economic interest (i.e., the right to receive distributions), and
- the transferee does not become a partner, has no rights to become a partner, and has no right to participate in or obtain information about the management of the partnership or the conduct of its activities.

386. RULPA (1985) § 801(2) (“upon the happening of events specified in writing in the limited partnership agreement”); § 801(3) (“written consent of all partners”); § 801(4) (“an event of withdrawal of a general partner” unless specified conditions are met).
387. RULPA § 203.
388. RULPA §§ 702, 704.
389. ULPA (2001) § 102(21) (defining “transfer”); § 102(23) (defining “transferable interest”); § 701 (Transferable Interest); § 702 (Transfer of Partner’s Transferable Interest). In its approach to transfers and transferees, the new Act closely follows RUPA. See supra notes 73-78 and accompanying text.
390. RULPA section 702 first states that “a partnership interest is assignable in whole or in part,” and then provides that “[a]n assignment of a partnership interest does not . . . entitle the assignee to become or to exercise any right of a partner.”
391. ULPA (2001) § 701 (stating that “[t]he only interest of a partner which is transferable is the partner’s transferable interest”); § 702 (stating directly the results which do and do not follow from a transfer of a transferable interest).
392. Under some Acts, a very limited right to information “kicks in” when the entity dissolves. E.g., UPA § 27(2) (“In case of a dissolution of the partnership, the assignee is entitled to receive his assignor’s interest and may require an account from the date only of the last account agreed to by all the partners.”); RUPA § 503(c) (“In a dissolution and winding up, a transferee is entitled to an account of partnership transactions only from the date of the latest account agreed to by all the partners.”); ULPA (2001) § 702(c) (“In a dissolution and winding up, a transferee is entitled to an account of the limited partnership’s transactions only from the date of
This approach is entirely consistent with the overall law of partnerships, both general and limited, and both reflects and implements that law’s characteristic “pick your partner” principle. The approach does, however, leave a transferee in a highly vulnerable position viz a viz the partnership—unless the partnership or its partners owe some duty that would protect the transferee from misconduct that damages, destroys or expropriates value of the transferee’s interest.

Certainly no such duty appears on the face of ULPA (2001). The fiduciary duties of a general partner run only to “to the limited partnership and the other partners,” and the statutory obligation of good faith and fair dealing appears to have the same scope: “A . . . partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.”

Transferee vulnerability is by no means unique to ULPA (2001); it follows from an essential attribute of the law of partnerships—namely, that a transferee interest can exist even after the partner who originally owned it has ceased to be a partner.

In this area, partnership . . . law differs dramatically from corporate law. Under corporate law, an assignee interest can exist only in connection with an existing share (and shareholder). An assignee therefore can (and should) look to the assignor/shareholder to protect the assignee’s interest in the event the corporation undertakes some major restructuring or other change affecting the assignee’s rights. The assignor can provide that protection by exercising the assignor’s rights as a shareholder. (Given corporate law’s approach to free transferability of interests, the assignment may have included the right to exercise the assignor’s shareholder rights.)

The vulnerability of a “bare transferee” can be exploited in various ways.

393. See BISHOP & KLEINBERGER, supra note 94, ¶ 8.03[1][b], at 8-24, ¶ 8.06[1][b], at 8-100 (Supp. 03-1) (explaining this principle). The law of limited liability companies has copied partnership law on this point. Id.; see also Briefing Memo from the Reporters to the Drafting Committee on Amendments to the Uniform Limited Liability Company Act 9-10 (May 2003) (for Atlanta Meeting) (on file with author).

394. ULPA (2001) § 408(a); see supra notes 241-49 and accompanying text.

395. ULPA (2001) § 305(b) (limited partners); § 408(d) (general partners) (emphasis added). As explained by a comment to RUPA, the obligation of good faith and fair dealing is “ancillary” to a partner’s existing rights and duties; it is “is a contract concept, imposed on the partners because of the consensual nature of a partnership.” § 404 cmt. 4. Therefore, the obligation does not support extending protection to mere transferees, who are neither parties to the partnership agreement nor partners.

396. See, e.g., Bane v. Ferguson, 890 F.2d 11 (7th Cir. 1989) (Posner, J.) (holding that partnership did not owe fiduciary duty of care to former partner to safeguard his retirement benefits by not voting against disastrous merger with another law partnership); BISHOP & KLEINBERGER, supra note 94, ¶ 8.06[2][e], at 8-120 to 8-124 (Supp. 03-1) (discussing problem in context of limited liability companies).

397. Briefing Memo from the Reporters to the Drafting Committee on Amendments to the Uniform Limited Liability Company Act 11 (May 2003) (for the Atlanta meeting) (on file with author).

398. An early draft of the new Act defined “bare transferable interest” as “a transferable interest whose
ways—e.g., through an extension of the term of the partnership beyond that which exists when the transferee acquired the transferable interest, an amendment to the partnership agreement which advantages partners to the prejudice of bare transferees, a breach of the duty of loyalty that benefits the partners, a merger or conversion of the partnership that “shuffles the equity” of the partnership to the prejudice of the transferees.

It was the last-named context that caused the new Act’s Drafting Committee to consider transferee vulnerability, because such organic changes necessarily affect the owners of bare transferable interests. A note to very first draft

original owner is dissociated.” Draft of July, 1998, § 101(a). An endnote explained: “Unlike RUPA and ULLCA, this draft contemplates a partner dissociating without being bought out. It is therefore possible that transferees will exist even though the partner who originally owned the transferable interest is no longer a partner. This term refers to that situation.” Id. § 101(a) n.1. The Drafting Committee liked neither the name nor the idea of providing any substantial rights to owners of “bare transferable interests,” and the term was deleted from subsequent drafts.

399. As explained in a briefing memo recently prepared for a new NCCUSL drafting committee, this problem has been addressed in those uniform acts that contemplate entities being at will or for a specified term. UPA section 32(2) provided for a judicial decree of dissolution inter alia:

On the application of the purchaser of a partner’s interest [whether the purchase occurred voluntarily or through foreclosure of a charging order]

(a) After the termination of the specified term or particular undertaking,
(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

RUPA continued this approach, adding (or, arguably, making explicit) a requirement that the court determine that it is “equitable” to wind up the business. RUPA § 801(6). ULLCA section 801(a)(5) follows RUPA section 801(6) essentially verbatim and provides for dissolution of an LLC inter alia:

on application by a transferee of a member’s interest, [upon] a judicial determination that it is equitable to wind up the company’s business:

(i) after the expiration of the specified term, if the company was for a specified term at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer; or
(ii) at any time, if the company was at will at the time the applicant became a transferee by member dissociation, transfer, or entry of a charging order that gave rise to the transfer.

Briefing Memo from the Reporters to the Drafting Committee on Amendments to the Uniform Limited Liability Company Act 10-11 (May 2003) (for the Atlanta meeting) (on file with author). ULPA (2001) contains no comparable provision, because the new Act provides a perpetual term. See supra note 151 and accompanying text.

400. See ULPA (2001) § 1102(b)(3) (requiring a plan of conversion to include “the manner and basis for converting interests in the converting organization into any combination of money, interests in the converted organization, and other consideration”) (emphasis added); § 1106(b)(3) (same as to mergers). The situation is necessarily the same under the conversion and merger provisions of RUPA and ULLCA, although the relevant provisions of these Acts do not all call direct attention to the problem. See RUPA § 902(b) (merely stating that “[t]he terms and conditions of a conversion of a [general] partnership to a limited partnership must be approved by all of the partners or by a number or percentage specified for conversion in the partnership agreement”); § 903(b) (same as to conversion of a limited partnership to a general partnership); § 905(b)(5) (requiring the plan of merger to state “the manner and basis of converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or part”); ULLCA §
considered by the Committee highlighted the vulnerability:

What protection exists for holders of such “bare” interests? They have no right to vote and no right to seek appraisal. Contrast the situation for partners who lack enough votes to block a merger. Suppose, for example, that: (i) a limited partnership has two classes of limited partner interests, (ii) the partnership agreement allows a merger to occur if a majority of all interests, voting in the aggregate, concur, and (iii) a merger is proposed and approved with provisions that significantly prejudice one of the classes. At least the owners of interests of the disadvantaged class can claim breach of the duty of good faith and fair dealing. Transferees do not even have that recourse. One possible solution—extend the obligation of good faith and fair dealing to transferees, but only in the context of a merger.

The Drafting Committee rejected that “possible solution,” as well as another suggestion that would have (i) provided bare transferees the right to vote as a class on a proposed conversion or merger, while (ii) permitting the limited partnership to buy out recalcitrant transferees in order to overcome transferee blocking rights.402 Instead, the new Act consigns this issue to other law. As to conversions:

902(c) (requiring “[a]n agreement of conversion [to] set forth the terms and conditions of the conversion of the interests of partners of a partnership or of a limited partnership, as the case may be, into interests in the converted limited liability company or the cash or other consideration to be paid or delivered as a result of the conversion of the interests of the partners, or a combination thereof.”) (emphasis added); ULLCA § 904(b)(5) (requiring a plan of merger to state “the manner and basis for converting the interests of each party to the merger into interests or obligations of the surviving entity, or into money or other property in whole or in part”).


402. In the July, 1999 Draft, § 1111 read as follows:

SECTION 1111. CONSENT REQUIRED FROM CERTAIN TRANSFEREES.
(a) Except as provided in subsection (b), if a limited partnership is a converting business organization or a constituent business organization and mere transferees own transferable interests in the limited partnership, the conversion or merger must be approved:

(1) if the transferable interests owned by mere transferees comprise a single class, by mere transferees owning a majority of the profit interests held by mere transferees; and

(2) if the transferable interests owned by mere transferees comprise more than one class, in each class by mere transferees owning a majority of the profit interests of that class owned by mere transferees.

(b) If a converting or constituent business organization fails to obtain the consent required by subsection (a), the business organization may use the provisions of Section 1110 [giving the business organization a “fair value” call right] to proceed with the conversion or merger, but:

(1) if the transferable interests owned by mere transferees comprise a single class, the business organization must invoke Section 1110 to the same extent and to the same effect as to every mere transferee; and

(2) if the transferable interests owned by mere transferees comprise more than one class and the business organization invokes Section 1110 as to a transferable interest owned by a mere transferee, the business organization must invoke Section 1110 to the same extent and to the same effect as to all transferable interests in that class owned by mere transferees.
If the converting organization is a limited partnership, the plan of conversion will determine the fate of any interests held by mere transferees. This Act does not state any duty or obligation owed by a converting limited partnership or its partners to mere transferees. That issue is a matter for other law.  

As to mergers:

If a constituent organization is a limited partnership, the plan of merger will determine the fate of any interests held by mere transferees. This Act does not state any duty or obligation owed by a constituent limited partnership or its partners to mere transferees. That issue is a matter for other law.  

The problem with this approach is that other law provides no protection.

Although the case law is not abundant, it all points in the same direction—against the transferee. For example, in 1957, the Nevada Supreme Court rejected an assignee’s challenge to self-dealing transactions between partners and their affiliated corporation, even though the partnership had subsequently dissolved and the assignee had a right to an accounting of “partnership assets existing at the time of dissolution or disposed of prior thereto and subsequent to the date of his assignment.” The core of the plaintiff’s claim was that those assets included “an equitable interest in the [partners’] corporate holdings arising by virtue of constructive trust,” but the Court said flatly no. In doing so, the Court categorically rejected the plaintiff’s contention that “a fiduciary relationship existed between himself [a mere assignee] and the partners.”

More than twenty years later, in 1979, the California court of appeals reached the same conclusion, ruling that “a mere assignee has no voice in the

403. ULPA (2001) § 1102(b)(3) cmt.
404. ULPA (2001) § 1106(b)(3) cmt. In contrast, the rights of partners are substantial. Unless the partnership agreement provides otherwise, each partner has a veto right over a conversion or merger. ULPA (2001) § 1103(a) (unanimous consent required to approve plan of conversion); § 1107(a) (same as to plan of merger). Even if the partnership agreement provides for less-than-unanimous consent, partners retain other protections.

If the converting organization is a limited partnership subject to this Act, the partners of the converting organization are subject to the duties and obligations stated in this Act, including Sections 304 (informational rights of limited partners), 305(b) (limited partner’s obligation of good faith and fair dealing), 407 (informational rights of general partners), and 408 (general partner duties).

405. “The notion that ‘other law’ will protect transferees is thus reminiscent of a scene from a cartoon version of THE WIND IN THE WILLOWS, in which a judge charges the jury: ‘The prisoner is entitled to the benefit of the doubt, BUT IN THIS CASE THERE IS NO DOUBT.’” Briefing Memo from the Reporters to the Drafting Committee on Amendments to the Uniform Limited Liability Company Act 10 (May 2003) (for the Atlanta meeting) (on file with author).
406. The following analysis is based on Bishop & Kleinberger, note 94 above, ¶ 8.06[2][e], at 8-120 to 8-124.
408. Id.
internal management of a partnership,” not even to challenge an alleged self-dealing arrangement between the limited partnership’s general partner and an affiliate of the general partner. More than ten years after that, in 1991, the Fifth Circuit canvassed the available law, decided that “an assignment of a partnership interest does not bring the transferee into a fiduciary relationship with the remaining partners” and stated: “No contrary decisions have been cited to us, nor has our research disclosed any.”

The vulnerability issue is perhaps best exposed in Bauer v. Blomfield Company/Holden Joint Venture, a decision of the Alaska Supreme Court which features a vehement dissent. A commission arrangement between a partnership and a third party had the effect of drying up all the partnership profits. The arrangement had been approved by all partners, but an assignee of a partnership interest objected. The majority opinion held that a mere assignee “was not entitled to complain about a decision made with the consent of all the partners,” because recognizing such complaints would permit outside interference in the partnership in contravention of the partnership statute. As for partner duties to assignees, the concept warranted only a footnote: “We are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner’s interest.”

The dissent used a traditional metaphor to sum up its concerns (and the vulnerability issue): “It is a well-settled principle of contract law that an assignee steps into the shoes of an assignor as to the rights assigned. Today, the court summarily dismisses this principle in a footnote and leaves the

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410. Griffin v. Box, 910 F.2d 255, 261 (5th Cir. 1990) (citations omitted); see also Griffin v. Box, 956 F.2d 89, 92-93 (5th Cir. 1992) (denying unit holders who had not been admitted as limited partners any standing under state law to object to the conversion of a limited partnership into a corporation, even though the conversion directly affected the unit holders’ rights), reh’g denied, 959 F.2d 969 (5th Cir. 1992) (TABLE); 7547 Corp. v. Parker & Parsley Dev. Partners, L.P., 38 F.3d 211, 219 (5th Cir.1994) (denying “unit holders” standing to contest a roll-up and stating that “[w]e can only conclude that the Texas legislature specifically determined not to include assignees and transferees among those with derivative standing and instead deliberately chose to allow a partnership agreement to define the persons upon whom standing to sue derivatively would be conferred”), Adams v. United States, No. 396CV3181D, 2001 WL 1029522, at *5 (N.D. Tex. Aug 24, 2001) (holding that “[p]artners do not owe a [fiduciary] duty to the assignee of a partner,” even to the estate of deceased partner; deciding thereby an issue crucial to determining the proper discounts to be applied when valuing an estate).
412. Id. at 1366. Note that ULPA (2001) section 110(b)(5)(B) specifically authorizes the partnership agreement to “specify the number or percentage of partners which may authorize or ratify, after full disclosure to all partners of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.” ULPA § 110(b)(5)(B). The provision does not require the partnership agreement to consider the rights of transferees, nor does the provision require that the consenting partners be disinterested. See ULPA (2001) § 110(b)(5)(B) cmt.
413. Bauer, 849 P.2d at 1367.
414. Id.
415. Id. at 1367 n.2.
assignee barefoot.” 416  As to the effect of the majority opinion, the dissent was blunt but accurate:

The statute’s intent is to assure that an assignee does not interfere in the management of the partnership while receiving “the profits to which the assigning partner would otherwise be entitled.” As interpreted by the court, the statute now allows partners to deprive an assignee of profits to which he is entitled by law for whatever outrageous motive or reason. The court’s opinion essentially leaves the assignee of a partnership interest without remedy to enforce his right. 417

ULPA (2001) did not invent these problems, as already explained, 418 but two aspects of the new Act may make the vulnerability worse. First, unlike prior uniform partnership acts, the new Act provides a perpetual term. Under prior acts, a transferee at least had a “shot” at judicial intervention if the partners extended the partnership’s operations beyond the term in place when the transfer occurred. 419  The “shot” is gone under the new Act. Second, far more than RULPA, the new Act protects a limited partnership from dissolving as a result of the dissociation of a general partner. 420 A transferee is thus not only vulnerable, but potentially so in perpetuity. 421

V. CONCLUSION

ULPA (2001) is a well constructed modernization of an important business entity statute. Shaped at least as much by its ABA advisors as by the Uniform Law Commissioners who had voting rights on the Drafting Committee, the new Act resolves problems made inescapable by the enactment of RUPA and remodels the limited partnership to function well as an alternative among limited liability partnerships, limited liability companies, and corporations. No one would claim that enacting ULPA (2001) “[w]ill change the pebbles of our

416. Id. at 1367-68 (Matthews, J., dissenting).
417. Bauer, 849 P.2d at 1368 (statutory citation omitted).
418. See supra notes 388-93 and accompanying text.
419. See supra note 160 (discussing these judicial intervention provisions). RULPA contains no such provision, but UPA’s provision is arguably applicable through general linkage. See supra notes 19-27 and accompanying text (detailing linkage). In an at-will general partnership, the claim can be brought at any time. “The rationale seems to be that a transferee has an enforceable expectation in whatever the entity’s term happened to be when the transfer took effect.” Bishop & Kleinberger, supra note 94, ¶ 9.02[7][c], at 9-48. According RUPA section 801, Comment 9, RUPA’s protection of transferees “cannot be varied in the partnership agreement.” RUPA § 801 cmt. 9. The ULLCA provision, in contrast, is a default rule. See ULLCA § 103(b)(6) (mentioning parts of ULLCA dissolution provision that are non-waivable and omitting this provision).
420. See supra notes 153-54 and accompanying text.
421. For a possible way around this problem, not only under ULPA (2001) but for all “bare transferees,” see Bishop & Kleinberger, note 94 above, ¶ 8.06[2][c], at 8-123 to 8-124, suggesting that Restatement (Second) of Contracts section 338 (Discharge of an Obligor After Assignment) and U.C.C. section 9-408(a) and (b) (Modification of Assigned Contract) might by analogy support extending the obligation of good faith and fair dealing.
puddly thought to orient pearls,” 422 but the new Act can make life easier—more flexible and simultaneously more certain—for both preexisting limited partnerships and those formed after the new Act takes effect.