UNIFORM LIMITED PARTNERSHIP ACT (2001)

(Last Amended 2013)

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ON UNIFORM STATE LAWS

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IN ALL THE STATES

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WITH PREFATORY NOTE AND COMMENTS

August 19, 2015

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UNIFORM LIMITED PARTNERSHIP ACT (2001)
(Last Amended 2011)

TABLE OF CONTENTS

2001 PREFATORY NOTE..... 1
PREFATORY NOTE TO 2011 AND 2013 HARMONIZATION AMENDMENTS 11
EXPLANATORY NOTE ON THE REVISED COMMENTS 12

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. 14
SECTION 102. DEFINITIONS. 14
SECTION 103. KNOWLEDGE; NOTICE. 23
SECTION 104. GOVERNING LAW. 26
SECTION 105. PARTNERSHIP AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS. 28
SECTION 106. PARTNERSHIP AGREEMENT; EFFECT ON LIMITED PARTNERSHIP AND PERSON BECOMING PARTNER; PREFORMATION AGREEMENT. 44
SECTION 107. PARTNERSHIP AGREEMENT; EFFECT ON THIRD PARTIES AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF LIMITED PARTNERSHIP. 46
SECTION 108. REQUIRED INFORMATION. 49
SECTION 109. DUAL CAPACITY. 52
SECTION 110. NATURE, PURPOSE, AND DURATION OF LIMITED PARTNERSHIP. 53
SECTION 111. POWERS. 54
SECTION 112. APPLICATION TO EXISTING RELATIONSHIPS. 54
SECTION 113. SUPPLEMENTAL PRINCIPLES OF LAW. 57
SECTION 114. PERMITTED NAMES. 58
SECTION 115. RESERVATION OF NAME. 60
SECTION 116. REGISTRATION OF NAME. 60
SECTION 117. REGISTERED AGENT. 61
SECTION 118. CHANGE OF REGISTERED AGENT OR ADDRESS FOR REGISTERED AGENT BY LIMITED PARTNERSHIP. 62
SECTION 119. RESIGNATION OF REGISTERED AGENT. 64
SECTION 120. CHANGE OF NAME OR ADDRESS BY REGISTERED AGENT. 65
SECTION 121. SERVICE OF PROCESS, NOTICE, OR DEMAND. 66
SECTION 122. DELIVERY OF RECORD. 68
SECTION 123. RESERVATION OF POWER TO AMEND OR REPEAL. 68

[ARTICLE] 2

FORMATION; CERTIFICATE OF LIMITED PARTNERSHIP AND OTHER FILINGS

SECTION 201. FORMATION OF LIMITED PARTNERSHIP; CERTIFICATE OF LIMITED PARTNERSHIP. 69
SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF LIMITED PARTNERSHIP. 71
SECTION 203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO [SECRETARY OF STATE]. 73
SECTION 204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER. 75
SECTION 205. LIABILITY FOR INACCURATE INFORMATION IN FILED RECORD. 76
SECTION 206. FILING REQUIREMENTS. 77
SECTION 207. EFFECTIVE DATE AND TIME. 79
SECTION 208. WITHDRAWAL OF FILED RECORD BEFORE EFFECTIVENESS. 80
SECTION 209. CORRECTING FILED RECORD. 81
SECTION 210. DUTY OF [SECRETARY OF STATE] TO FILE; REVIEW OF REFUSAL TO FILE; DELIVERY OF RECORD BY [SECRETARY OF STATE]. 82
SECTION 211. CERTIFICATE OF GOOD STANDING OR REGISTRATION. 85
SECTION 212. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE]. 87

[ARTICLE] 3

LIMITED PARTNERS

SECTION 301. BECOMING LIMITED PARTNER. 88
SECTION 302. NO AGENCY POWER OF LIMITED PARTNER AS LIMITED PARTNER. 89
SECTION 303. NO LIABILITY AS LIMITED PARTNER FOR LIMITED PARTNERSHIP OBLIGATIONS. 91
SECTION 304. RIGHTS TO INFORMATION OF LIMITED PARTNER AND PERSON DISSOCIATED AS LIMITED PARTNER. 92
SECTION 305. LIMITED DUTIES OF LIMITED PARTNERS. 97
SECTION 306. PERSON ERRONEOUSLY BELIEVING SELF TO BE LIMITED PARTNER. 99

[ARTICLE] 4

GENERAL PARTNERS

SECTION 401. BECOMING GENERAL PARTNER. 100
SECTION 402. GENERAL PARTNER AGENT OF LIMITED PARTNERSHIP. 102
SECTION 403. LIMITED PARTNERSHIP LIABLE FOR GENERAL PARTNER'S ACTIONABLE CONDUCT. 105
SECTION 404. GENERAL PARTNER'S LIABILITY. 106
SECTION 405. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS. 113
SECTION 406. MANAGEMENT RIGHTS OF GENERAL PARTNER. 116

SECTION 407. RIGHTS TO INFORMATION OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER. 119
SECTION 408. REIMBURSEMENT; INDEMNIFICATION; ADVANCEMENT; AND INSURANCE. 124
SECTION 409. STANDARDS OF CONDUCT FOR GENERAL PARTNERS. 126

[ARTICLE] 5

CONTRIBUTIONS AND DISTRIBUTIONS

SECTION 501. FORM OF CONTRIBUTION. 133
SECTION 502. LIABILITY FOR CONTRIBUTION. 134
SECTION 503. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE DISSOLUTION. 135
SECTION 504. LIMITATIONS ON DISTRIBUTIONS. 137
SECTION 505. LIABILITY FOR IMPROPER DISTRIBUTIONS. 140

[ARTICLE] 6

DISSOCIATION

SECTION 601. DISSOCIATION AS LIMITED PARTNER. 142
SECTION 602. EFFECT OF DISSOCIATION AS LIMITED PARTNER. 147
SECTION 603. DISSOCIATION AS GENERAL PARTNER. 148
SECTION 604. POWER TO DISSOCIATE AS GENERAL PARTNER; WRONGFUL DISSOCIATION. 153
SECTION 605. EFFECT OF DISSOCIATION AS GENERAL PARTNER. 155
SECTION 606. POWER TO BIND AND LIABILITY OF PERSON DISSOCIATED AS GENERAL PARTNER. 157
SECTION 607. LIABILITY OF PERSON DISSOCIATED AS GENERAL PARTNER TO OTHER PERSONS. 159

[ARTICLE] 7

TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

SECTION 701. NATURE OF TRANSFERABLE INTEREST. 161
SECTION 702. TRANSFER OF TRANSFERABLE INTEREST. 161
SECTION 703. CHARGING ORDER. 166
SECTION 704. POWER OF LEGAL REPRESENTATIVE OF DECEASED PARTNER. 170

[ARTICLE] 8

DISSOLUTION AND WINDING UP

SECTION 801. EVENTS CAUSING DISSOLUTION. 171
SECTION 802. WINDING UP. 175
SECTION 803. RESCINDING DISSOLUTION. 178
SECTION 804. POWER TO BIND PARTNERSHIP AFTER DISSOLUTION. 179

SECTION 805. LIABILITY AFTER DISSOLUTION OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER. 181
SECTION 806. KNOWN CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP. 182
SECTION 807. OTHER CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP. 184
SECTION 808. COURT PROCEEDINGS. 185
SECTION 809. LIABILITY OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER WHEN CLAIM AGAINST LIMITED PARTNERSHIP BARRED. 187
SECTION 810. DISPOSITION OF ASSETS IN WINDING UP; WHEN CONTRIBUTIONS REQUIRED. 187
SECTION 811. ADMINISTRATIVE DISSOLUTION. 190
SECTION 812. REINSTATEMENT. 192
SECTION 813. JUDICIAL REVIEW OF DENIAL OF REINSTATEMENT. 193

[ARTICLE] 9

ACTIONS BY PARTNERS

SECTION 901. DIRECT ACTION BY PARTNER. 194
SECTION 902. DERIVATIVE ACTION. 196
SECTION 903. PROPER PLAINTIFF. 196
SECTION 904. PLEADING. 197
SECTION 905. SPECIAL LITIGATION COMMITTEE. 198
SECTION 906. PROCEEDS AND EXPENSES. 200

[ARTICLE] 10

FOREIGN LIMITED PARTNERSHIPS

SECTION 1001. GOVERNING LAW. 201
SECTION 1002. REGISTRATION TO DO BUSINESS IN THIS STATE. 202
SECTION 1003. FOREIGN REGISTRATION STATEMENT. 203
SECTION 1004. AMENDMENT OF FOREIGN REGISTRATION STATEMENT. 204
SECTION 1005. ACTIVITIES NOT CONSTITUTING DOING BUSINESS. 205
SECTION 1006. NONCOMPLYING NAME OF FOREIGN LIMITED PARTNERSHIP. 208
SECTION 1007. WITHDRAWAL DEEMED ON CONVERSION TO DOMESTIC FILING ENTITY OR DOMESTIC LIMITED LIABILITY PARTNERSHIP. 209
SECTION 1008. WITHDRAWAL ON DISSOLUTION OR CONVERSION TO NONFILING ENTITY OTHER THAN LIMITED LIABILITY PARTNERSHIP. 209
SECTION 1009. TRANSFER OF REGISTRATION. 210
SECTION 1010. TERMINATION OF REGISTRATION. 211
SECTION 1011. WITHDRAWAL OF REGISTRATION OF REGISTERED FOREIGN LIMITED PARTNERSHIP. 213
SECTION 1012. ACTION BY [ATTORNEY GENERAL]. 213

[ARTICLE] 11

MERGER, INTEREST EXCHANGE, CONVERSION, AND DOMESTICATION

[PART] 1 GENERAL PROVISIONS

SECTION 1101. DEFINITIONS. 215
SECTION 1102. RELATIONSHIP OF [ARTICLE] TO OTHER LAWS. 229
SECTION 1103. REQUIRED NOTICE OR APPROVAL. 230
SECTION 1105. REFERENCE TO EXTERNAL FACTS. 232
SECTION 1106. APPRAISAL RIGHTS. 232
[SECTION 1107. EXCLUDED ENTITIES AND TRANSACTIONS.] 233

[PART] 2

MERGER

SECTION 1121. MERGER AUTHORIZED. 233
SECTION 1122. PLAN OF MERGER. 234
SECTION 1123. APPROVAL OF MERGER. 236
SECTION 1124. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER. 238
SECTION 1125. STATEMENT OF MERGER; EFFECTIVE DATE OF MERGER. 239
SECTION 1126. EFFECT OF MERGER. 242

[PART] 3

INTEREST EXCHANGE

SECTION 1131. INTEREST EXCHANGE AUTHORIZED. 247
SECTION 1132. PLAN OF INTEREST EXCHANGE. 249
SECTION 1133. APPROVAL OF INTEREST EXCHANGE 250
SECTION 1134. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE 251
SECTION 1135. STATEMENT OF INTEREST EXCHANGE; EFFECTIVE DATE OF INTEREST EXCHANGE 253
SECTION 1136. EFFECT OF INTEREST EXCHANGE. 254

[PART] 4

CONVERSION

SECTION 1141. CONVERSION AUTHORIZED. 257
SECTION 1142. PLAN OF CONVERSION. 258
SECTION 1143. APPROVAL OF CONVERSION. 259
SECTION 1144. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION. 260
SECTION 1145. STATEMENT OF CONVERSION; EFFECTIVE DATE OF CONVERSION. 261
SECTION 1146. EFFECT OF CONVERSION. 264

[PART] 5

DOMESTICATION

SECTION 1151. DOMESTICATION AUTHORIZED. 267
SECTION 1152. PLAN OF DOMESTICATION. 268
SECTION 1153. APPROVAL OF DOMESTICATION. 269
SECTION 1154. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION. 270
SECTION 1155. STATEMENT OF DOMESTICATION; EFFECTIVE DATE OF DOMESTICATION. 272
SECTION 1156. EFFECT OF DOMESTICATION. 274

[ARTICLE] 12

MISCELLANEOUS PROVISIONS

SECTION 1201. UNIFORMITY OF APPLICATION AND CONSTRUCTION. 277
SECTION 1202. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. 277
SECTION 1203. SAVINGS CLAUSE. 277
[SECTION 1204. SEVERABILITY CLAUSE.] 278
SECTION 1205. REPEALS. 278
SECTION 1206. EFFECTIVE DATE. 278

UNIFORM LIMITED PARTNERSHIP ACT (2001)
(Last Amended 2013)

2001 PREFATORY NOTE

The Act's Overall Approach

The new Limited Partnership Act is a "stand alone" act, "de-linked" from both the original general partnership act ("UPA") and the Revised Uniform Partnership Act ("RUPA"). To be able to stand alone, the Limited Partnership incorporates many provisions from RUPA and some from the Uniform Limited Liability Company Act ("ULLCA"). As a result, the new Act is far longer and more complex than its immediate predecessor, the Revised Uniform Limited Partnership Act ("RULPA").

The new Act has been drafted for a world in which limited liability partnerships and limited liability companies can meet many of the needs formerly met by limited partnerships. This Act therefore targets two types of enterprises that seem largely beyond the scope of LLPs and LLCs: (i) sophisticated, manager-entrenched commercial deals whose participants commit for the long term, and (ii) estate planning arrangements (family limited partnerships). This Act accordingly assumes that, more often than not, people utilizing it will want:

- strong centralized management, strongly entrenched, and
- passive investors with little control over or right to exit the entity

The Act's rules, and particularly its default rules, have been designed to reflect these assumptions.

The Decision to "De-Link" and Create a Stand Alone Act

Unlike this Act, RULPA is not a stand alone statute. RULPA was drafted to rest on and link to the UPA. RULPA Section 1105 states that "In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern." UPA Section 6(2) in turn provides that "this Act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith." More particularly, RULPA Section 403 defines the rights, powers, restrictions and liabilities of a "general partner of a limited partnership" by equating them to the rights, powers, restrictions and liabilities of "a partner in a partnership without limited partners."

This arrangement has not been completely satisfactory, because the consequences of linkage are not always clear. *See, e.g., Frye v. Manacare Ltd.*, 431 So.2d 181, 183-84 (Fla. Dist. Ct. App. 1983) (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 Agencies, Inc. v. Car Wash Investments No. 1, Ltd.*, 389 N.E.2d 517, 518-20 (Ohio App. 1978) (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 inappropriate for the fundamentally different relations involved in a limited partnership.

In any event, the promulgation of RUPA unsettled matters. RUPA differs substantially from the UPA, and the drafters of RUPA expressly declined to decide whether RUPA provides a suitable base and link for the limited partnership statute. According to RUPA's Prefatory Note:

Partnership law no longer governs limited partnerships pursuant to the provisions of RUPA itself. First, limited partnerships are not "partnerships" within the RUPA definition. Second, UPA Section 6(2), which provides that the UPA governs limited partnerships in cases not provided for in the Uniform Limited Partnership Act (1976) (1985) ("RULPA") has been deleted. 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.

The linkage question was the first major issue considered and decided by this Act's Drafting Committee. 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. The Drafting Committee therefore had to choose between recommending linkage to the new general partnership act (*i.e.*, RUPA) or recommending de-linking and a stand alone act.

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

- be more convenient, providing a single, self-contained source of statutory authority for issues pertaining to limited partnerships;
- 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
- rationalize future case law, by ending the automatic link between the cases concerning partners in a general partnership and issues pertaining to general partners in a limited partnership.

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.

Availability of LLLP Status

Following the example of a growing number of States, this Act provides for limited liability limited partnerships. In a limited liability limited partnership ("LLLP"), no partner – whether general or limited – is liable on account of partner status for the limited partnership's obligations. 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.

This Act is designed to serve preexisting limited partnerships as well as limited partnerships formed after the Act's enactment. Most of those preexisting limited partnership will not be LLLPs, and accordingly the Act does not prefer or presume LLLP status. Instead, the Act makes LLLP status available through a simple statement in the certificate of limited partnership. *See* Sections 102(9), 201(a)(4) and 404(c).

Liability Shield for Limited Partners

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

Transition Issues

Following RUPA's example, this Act provides (i) an effective date, after which all newly formed limited partnerships are subject to this Act; (ii) an optional period, during which limited partnerships formed under a predecessor statute may elect to become subject to this Act; and (iii) a mandatory date, on which all preexisting limited partnerships become subject to this Act by operation of law.

A few provisions of this Act differ so substantially from prior law that they should not apply automatically to a preexisting limited partnership. Section 1206(c) lists these provisions and states that each remains inapplicable to a preexisting limited partnership, unless the limited partnership elects for the provision to apply.

Comparison of RULPA and this Act

The following table compares some of the major characteristics of RULPA and this Act. In most instances, the rules involved are "default" rules – *i.e.*, subject to change by the partnership agreement.

Characteristic	**RULPA**	**this Act**
relationship to general partnership act	linked, Sections 1105, 403; UPA Section 6(2)	de-linked (but many RUPA provisions incorporated)
permitted purposes	subject to any specified exceptions, "any business that a partnership without limited partners may carry on, " Section 106	any lawful purpose, Section 104(b)
constructive notice via publicly filed documents	only that limited partnership exists and that designated general partners are general partners, Section 208	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)
duration	specified in certificate of limited partnership, Section 201(a)(4)	perpetual, Section 104(c); subject to change in partnership agreement
use of limited partner name in entity name	prohibited, except in unusual circumstances, Section 102(2)	permitted, Section108(a)
annual report	none	required, Section 210

limited partner liability for entity debts	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)	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
limited partner duties	none specified	no fiduciary duties "solely by reason of being a limited partner," Section 305(a); each limited partner is obliged to "discharge duties . . . and exercise rights consistently with the obligation of good faith and fair dealing," Section 305(b)
partner access to information – required records/ information	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)	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) and 407(f)

partner access to information – other information	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	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
general partner liability for entity debts	complete, automatic and formally inescapable, 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)	LLLP status available via a simple statement in the 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)
general partner duties	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)

allocation of profits, losses and distributions	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)
partner liability for distributions	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 and 407, the Act adopts the RMBCA approach to improper distributions, Sections 508 and 509
limited partner voluntary dissociation	theoretically, limited partner may withdraw on six months notice unless partnership agreement specifies a term for the limited partnership or withdrawal events for limited partner, Section 603; practically, virtually every partnership agreement specifies a term, thereby eliminating the right to withdraw (n.b. – due to estate planning concerns, several States have amended RULPA to prohibit limited partner withdrawal unless otherwise provided in the partnership agreement)	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
limited partner involuntary dissociation	not addressed	lengthy list of causes, Section 601(b), taken with some modification from RUPA
limited partner dissociation – payout	"fair value . . . based upon [the partner's] right to share in distributions," Section 604	no payout; person becomes transferee of its own transferable interest, Section 602(3)

general partner voluntary dissociation	right exists unless otherwise provided in partnership agreement, Section 602; power exists regardless of partnership agreement, Section 602	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)
general partner involuntary dissociation	Section 402 lists causes	following RUPA, Section 603 expands the list of causes, including expulsion by court order, Section 603(5)
general partner dissociation – payout	"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	no payout; person becomes transferee of its own transferable interest, Section 605(5)
transfer of partner interest – nomenclature	"Assignment of Partnership Interest," Section 702	"Transfer of Partner's Transferable Interest," Section 702
transfer of partner interest – substance	economic rights fully transferable, but management rights and partner status are not transferable, Section 702	same rule, but Sections 701 and 702 follow RUPA's more detailed and less oblique formulation
rights of creditor of partner	limited to charging order, Section 703	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
dissolution by partner consent	requires unanimous written consent, Section 801(3)	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)

dissolution following dissociation of a general partner	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)	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 and a new general partner is admitted, Section 801(3)(B)
filings related to entity termination	certificate of limited partnership to be cancelled when limited partnership dissolves and begins winding up, Section 203	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
procedures for barring claims against dissolved limited partnership	none	following ULLCA Sections 807 and 808, the Act adopts the RMBCA approach providing for giving notice and barring claims, Sections 806 and 807

conversions and mergers	no provision	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." Section1101(8)
writing requirements	some provisions pertain only to written understandings; *see*, *e.g.*, Sections 401 (partnership agreement may "provide in writing for the admission of 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")	removes virtually all writing requirements; but does require that certain information be maintained in record form, Section 111

PREFATORY NOTE TO 2011 AND 2013 HARMONIZATION AMENDMENTS

From 2009 to 2011, the Uniform Law Conference undertook an intensive effort to harmonize, to the extent possible, all uniform acts pertaining to unincorporated organizations. As part of that effort, the Uniform Limited Partnership Act ("ULPA") underwent four types of changes: substantive, major improvements in language, minor revisions in language for the sake of harmonization; and relocation within this particular "spoke" of provisions that are part of the "HUB" in the new Uniform Business Organizations Code ("UBOC").

Substantive Changes

The most significant substantive changes is the "un-cabining" fiduciary duty; *i.e.*, ceasing to characterize the Act's codification of fiduciary duty as exhaustive, Section 409.

Other substantive changes include: (i) providing a narrow exception to the rule that the amendments to the partnership agreement control the rights of persons previously dissociated as partners and of persons that had previously become transferees, Section 107(b)(2); (ii) eliminating the requirement that a domestic limited partnership designate and maintain an in-state office, Section 201; (iii) requiring that the annual report list the name of at least one general partner, Section 212(a)(4); and (iv) expressly authorizing a limited partnership to provide advancements to a person entitled to indemnification, Section 408(c).

Substantial Improvements to Language

The most significant improvements in language appear in Section 105 (formerly Section 110), the first of three sections addressing the partnership agreement. The structure of Section 105 is far less complicated than the structure of former Section 110.

Harmonization-Based Language Changes

Minor changes in language for the sake of harmonization appear throughout the act. For example, Section 202(b) is revised as follows:

> (b) ~~In order to~~ To amend its certificate of limited partnership, a limited partnership must deliver to the [Secretary of State] for filing an amendment ~~or, pursuant to [Article] 11, articles of merger~~ stating:
>
> (1) the name of the ~~limited~~ partnership;
>
> (2) the date of filing of its initial certificate of limited partnership; and
>
> (3) ~~the changes~~ the amendment ~~makes to the certificate as most recently amended or restated.~~

Relocation and Renumbering of HUB-Based Provisions

The harmonization process included both the harmonization of various stand-alone acts and UBOC, which comprises a "HUB" (somewhat analogous to Article 1 of the Uniform Commercial Code) and various spokes. Each spoke pertains to a different type of organization

(*e.g.*, limited partnership, statutory entity trust). Naturally, spokes in the Code do not repeat the provisions from the HUB. In contrast, each stand-alone act includes provisions that appear in the HUB in the Code.

So that the section numbers this "spoke" correspond with the spoke provisions in the Code, "HUB"-based provisions of this Act have been renumbered to appear at the end of articles. *See, e.g.*, Sections 112 through 122.

The Drafting Committee on Harmonization of Business Entity Acts was greatly assisted in its work by the very substantial and knowledgeable contributions of the following Observers who diligently attended and actively participated in its meetings:

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EXPLANATORY NOTE ON THE REVISED COMMENTS

As part of the Harmonization Project, the Conference substantially revised the comments to the Uniform Limited Partnership Act. Professor Daniel S. Kleinberger was the principal drafter of the revised comments.

To distinguish among the current and prior versions of uniform business organization acts, the Harmonization Comments use the following references.

The phrase "this act" refers to the Harmonized act – *i.e.*, the Uniform Limited Partnership Act (2001) (Last Amended 2013).

"ULPA (2001)" refers to the Uniform Limited Partnership Act as promulgated in 2001.

"ULPA (1976/1985)" refers to the Revised Uniform Limited Partnership Act as promulgated in 1976 and substantially revised in 1985.

"ULPA (1976)" refers to the Revised Uniform Limited Partnership Act as promulgated in 1976.

"ULPA (1916)" refers to the Uniform Limited Partnership Act as promulgated in 1916.

"ULLCA (2006) (Last Amended 2013)" refers to the Revised Uniform Limited Liability Company Act as harmonized.

"ULLCA (2006)" refers to the Revised Uniform Limited Liability Act as promulgated in 2006.

"ULLCA (1996)" refers to the original Uniform Limited Liability Company Act as promulgated in 1996.

"UPA (1997) (Last Amended 2013)" refers to the Uniform Partnership Act (1997) as harmonized.

"UPA (1997)" refers to the version of the Uniform Partnership Act originally promulgated in 1994, with all amendments through 1997.

"UPA (1914)" refers to the original Uniform Partnership Act as promulgated in 1914.

"MBCA" refers to the Model Business Corporation Act.

UNIFORM LIMITED PARTNERSHIP ACT (2001)
(Last Amended 2013)

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. SHORT TITLE. This [act] may be cited as the Uniform Limited Partnership Act.

Comment

This act is drafted to replace a state's current limited partnership statute, whether or not that statute is based on the ULPA (1916), ULPA (1976/1985),or ULPA (2001). Section 112 contains transition provisions.

SECTION 102. DEFINITIONS. In this [act]:

(1) "Certificate of limited partnership" means the certificate required by Section 201. The term includes the certificate as amended or restated.

(2) "Contribution", except in the phrase "right of contribution", means property or a benefit described in Section 501 which is provided by a person to a limited partnership to become a partner or in the person's capacity as a partner.

(3) "Debtor in bankruptcy" means a person that is the subject of:

(A) an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

(B) a comparable order under federal, state, or foreign law governing insolvency.

(4) "Distribution" means a transfer of money or other property from a limited partnership to a person on account of a transferable interest or in the person's capacity as a partner. The term:

(A) includes:

(i) a redemption or other purchase by a limited partnership of a

transferable interest; and

(ii) a transfer to a partner in return for the partner's relinquishment of any right to participate as a partner in the management or conduct of the partnership's activities and affairs or to have access to records or other information concerning the partnership's activities and affairs; and

(B) does not include amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program.

(5) "Foreign limited liability limited partnership" means a foreign limited partnership whose general partners have limited liability for the debts, obligations, or other liabilities of the foreign partnership under a provision similar to Section 404(c).

(6) "Foreign limited partnership" means an unincorporated entity formed under the law of a jurisdiction other than this state which would be a limited partnership if formed under the law of this state. The term includes a foreign limited liability limited partnership.

(7) "General partner" means a person that:

(A) has become a general partner under Section 401 or was a general partner in a partnership when the partnership became subject to this [act] under Section 112; and

(B) has not dissociated as a general partner under Section 603.

(8) "Jurisdiction", used to refer to a political entity, means the United States, a state, a foreign country, or a political subdivision of a foreign country.

(9) "Jurisdiction of formation" means the jurisdiction whose law governs the internal affairs of an entity.

(10) "Limited liability limited partnership", except in the phrase "foreign limited liability

limited partnership" and in [Article] 11, means a limited partnership whose certificate of limited partnership states that the partnership is a limited liability limited partnership.

(11) "Limited partner" means a person that:

(A) has become a limited partner under Section 301 or was a limited partner in a limited partnership when the partnership became subject to this [act] under Section 112; and

(B) has not dissociated under Section 601.

(12) "Limited partnership", except in the phrase "foreign limited partnership" and in [Article] 11, means an entity formed under this [act] or which becomes subject to this [act] under [Article] 11 or Section 112. The term includes a limited liability limited partnership.

(13) "Partner" means a limited partner or general partner.

(14) "Partnership agreement" means the agreement, whether or not referred to as a partnership agreement and whether oral, implied, in a record, or in any combination thereof, of all the partners of a limited partnership concerning the matters described in Section 105(a). The term includes the agreement as amended or restated.

(15) "Person" means an individual, business corporation, nonprofit corporation, partnership, limited partnership, limited liability company, [general cooperative association,] limited cooperative association, unincorporated nonprofit association, statutory trust, business trust, common-law business trust, estate, trust, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(16) "Principal office" means the principal executive office of a limited partnership or foreign limited partnership, whether or not the office is located in this state.

(17) "Property" means all property, whether real, personal, or mixed or tangible or

intangible, or any right or interest therein.

(18) "Record", used as a noun, means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(19) "Registered agent" means an agent of a limited partnership or foreign limited partnership which is authorized to receive service of any process, notice, or demand required or permitted by law to be served on the partnership.

(20) "Registered foreign limited partnership" means a foreign limited partnership that is registered to do business in this state pursuant to a statement of registration filed by the [Secretary of State].

(21) "Required information" means the information that a limited partnership is required to maintain under Section 108.

(22) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(23) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(24) "Transfer" includes:

(A) an assignment;

(B) a conveyance;

(C) a sale;

(D) a lease;

(E) an encumbrance, including a mortgage or security interest;

(F) a gift; and

(G) a transfer by operation of law.

(25) "Transferable interest" means the right, as initially owned by a person in the person's capacity as a partner, to receive distributions from a limited partnership, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

(26) "Transferee" means a person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner. The term includes a person that owns a transferable interest under Section 602(a)(3) or 605(a)(4).

Comment

This section contains definitions for terms used throughout the act, while Section 1011 contains definitions specific to Article 11's provisions on mergers, conversions, interest exchanges, and domestications.

"Certificate of limited partnership" [(1)] – Until the 1985 amendments to the Revised Uniform Limited Partnership Act (1976), the certificate of limited partnership contained significant information about the limited partnership and the relationship among the partners. Consistent with the 1985 amendments and ULPA (2001), under this act the certificate: (i) merely reflects the existence of a limited partnership (rather than being the locus for important governance rules); and (ii) is significantly different from articles of incorporation, which have a substantially greater power to affect *inter se* rules for the corporate entity and its owners. For the relationship between the certificate of limited partnership and the partnership agreement, see Section 107(d).

"Contribution" [(2)] – This definition serves to distinguish capital contributions from other circumstances under which a partner or would-be partner might provide benefits to a limited partnership (*e.g.*, providing services to the partnership as an employee or independent contractor, leasing property to the partnership).

This definition also distinguishes "contributions" from capital raised from transferees who invest; to be a contribution, the property or benefit must be "provided by a person … to become a partner or in the person's capacity as a partner. This distinction is ubiquitous in the law of unincorporated business organizations. *See, e.g.,* N.Y. LTD. LIAB. CO. LAW § 102(f) (McKinney 2013) ("'Contribution' means any cash, property, services rendered, or a promissory

note or other binding obligation to contribute cash or property or to render services that a member contributes to a limited liability company in his or her capacity as a member.").

In contrast, partnership agreements sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. *See* Section 810(b)(1) (referring to distributions to be made "to each person owning a transferable interest that reflects *contributions* made and not previously returned") (emphasis added).

"Distribution" [(4)(A) – redemptions included] – This provision specifically refers to transactions between a limited partnership and one of its partners, which in the corporate context would be labeled a "redemption." This paragraph has subparts because ownership interests in a partnership are conceptually bifurcated into economic rights ("transferable interest) and governance and information rights.

Under Section 503(a), "[a]ny distribution made by a limited partnership before its dissolution and winding up must be shared among the partners on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner…." Since a redemption is a distribution, absent authorization in the partnership agreement a limited partnership may not redeem the interest of one partner or transferee without redeeming (or at least offering to redeem) the interests of all other partners and transferees to a comparable extent.

The law of close corporations has flirted with a similar notion. *See, e.g., Donahue v. Rodd Electrotype Co. of New England, Inc.*, 367 Mass. 578, 598, 328 N.E.2d 505, 518 (1975) (stating, with regard to closely held corporations, "if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price"); *Toner v. Baltimore Envelope Co.*, 304 Md. 256, 273, 498 A.2d 642, 650 (1985) (rejecting the "per se breach of duty" approach); *Wilkes v. Springside Nursing Home, Inc.*, 370 Mass. 842, 850, 353 N.E.2d 657, 663 (1976) (stating that "untempered application of the strict good faith standard enunciated in *Donahue* to … will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned").

A partnership agreement can override Section 503(a)'s proportional treatment requirement without specifically mentioning redemptions.

> EXAMPLE: A limited partnership agreement: (i) includes a list (the "protected list") of decisions or actions that may be taken only with the consent of all the general partners and 2/3 of the interests owned by the limited partners; and (ii) provides that all other decisions and acts may be taken as the general partners determine. The protected list does not include redemptions. The partnership agreement overrides Section 503(a)'s proportional treatment requirement.

[(4)(B) – exclusion] – This exclusion affects the reach of: (i) Section 505's clawback

provisions; and (ii) the charging order remedy under Section 703. The effect on the clawback provision reflects the law in several states, *see, e.g.*, DEL. CODE ANN. tit. 6 § 17-607(a) (2012) and V.A. CODE § 153.210(b) (2012), and makes sense conceptually and as a matter of policy. *See In re Tri-River Trading, LLC*, 329 B.R. 252, 266 (B.A.P. 8th Cir. 2005), *aff'd*. 452 F.3d 756 (8th Cir. 2006) ("We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.").

Affecting the charging order remedy is novel. For further explanation, see Section 703(a), comment.

"Foreign limited partnership" [(6)] – This definition intends a flexible, comparative approach. If a particular type of foreign entity has key legal characteristics that approximate the essential legal characteristics of a domestic limited partnership, that particular type of foreign entity is a foreign limited partnership under this act.

"General partner" [(7)] – A partnership agreement may vary Section 401 and provide a process or mechanism for becoming a general partner that is different from or additional to the rules stated in that section. *See* Section 401(b)(1). For the purposes of this definition, a person who becomes a general partner pursuant to a provision of the partnership agreement "become[s] a general partner under Section 401." After a person has been dissociated as a general partner, Section 603, the term "general partner" continues to apply to the person's conduct while a general partner. *See* Section 605(b).

"Jurisdiction of formation" [(9)] – This definition is not limited to United States jurisdictions.

"Limited liability limited partnership" [(10)] – Typically, a general partnership becomes a limited liability partnership when the filing office files a statement of qualification submitted by the partnership. In contrast, LLLP status results from a statement in a limited partnership's certificate of limited partnership. Section 201(b)(5) requires a limited partnership's certificate of limited partnership to state "whether the limited partnership is a limited liability limited partnership."

The definition makes an exception for Article 11, because in that article the phrase "limited liability limited partnership" encompasses both domestic and foreign LLLPs.

"Limited partner" [(11)] – This definition parallels the definition of "general partner" and the comment to Paragraph 7 applies here as well.

"Limited partnership" [(12)] – This definition makes no reference to a limited partnership having partners upon formation, but Section 201(d) does.

"Partnership agreement" [(14)] – This definition must be read in conjunction with Sections 105 through 107, which further describe the partnership agreement. In particular, although this definition refers to "the agreement … of all the partners," the limited partnership itself is bound by and may enforce the agreement. Section 106(a).

A partnership agreement is a contract, and therefore all statutory language pertaining to the partnership agreement must be understood in the context of the law of contracts.

The definition in Paragraph 14 is very broad and recognizes a wide scope of authority for the partnership agreement: "the matters described in Section 105(a)." Those matters include not only all relations *inter se* the partners and the partnership but also "the activities and affairs of the partnership and the conduct of those activities and affairs." Section 105(a)(2). Moreover, the definition puts no limits on the form of the partnership agreement. To the contrary, the definition contains the phrase "whether oral, implied, in a record, or in any combination thereof."

Unless the partnership agreement itself provides otherwise:

- a partnership agreement may comprise a number of separate documents (or records), however denominated; and
- subject to Section 106(b) (deeming new partners to assent to the then-existing partnership agreement), a document, record, understanding, etc. can be part of the partnership agreement only with the assent of all persons then partners.

An agreement among less than all partners might well be enforceable among those partners as parties, but would not be part of the partnership agreement. However, under Section 105(a)(3), an amendment to a partnership agreement can be made with less than unanimous consent if the partnership agreement itself so provides.

An agreement to form a limited partnership is not itself a partnership agreement. The term "partnership agreement" presupposes "partners," and a person cannot be a partner in a partnership before the partnership exists. However, as soon as a limited partnership comes into existence, it perforce has a partnership agreement. For example, suppose: (i) two persons, Gamma and Lambda, orally and informally agree to join their activities through a limited partnership, in which Gamma will be the general partner and Lambda the limited partner; (ii) an appropriate certification of limited partnership is delivered to the filing office, which files the certificate; (iii) Gamma and Lambda become respectively the general and limited partner; and (iv) the limited partnership is thus formed under Section 201(d). A partnership agreement exists. In the words of Paragraph 14 "all the partners" have agreed who the partners are, that, as "all the partners" they will conduct a business, and that Gamma will be the managing partner and Lambda will be more or less passive. That agreement – no matter how informal or rudimentary – is an agreement "concerning the matters described in Section 105(a)." To the extent the agreement does not provide the *inter se* "rules of the game," the "default rules" of this act "fill in the gaps." Section 105(b).

This act states no rule as to whether the statute of frauds applies to partnership agreements. Case law suggests that the answer is yes:

> Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing [and signed by the party to be bound]; however, a contract establishing a partnership terminable at the will of any partner

> is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside the Statute of Frauds.

Abbott v. Hurst, 643 So.2d 589, 592 (Ala. 1994) (citations omitted). *See also Chase Pratt, LLC v. Aetna Life Ins. Co.*, CV 960560740S, 1999 WL 229214 at *4 (Conn. Super. Ct. Mar. 26, 1999) (recognizing that the one-year provision applies to limited partnership agreements but holding the provision inapplicable to a stated "99-year term," because the agreement permitted dissolution at any time "earlier by mutual consent of the Partners") (quoting the partnership agreement).

Likewise, the land provision of the statute of frauds:

> applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.

Froiseth v. Nowlin, 156 Wash. 314, 316, 287 P. 55, 56 (Wash. 1930) (quoting 27 C.J.S. § 220). *See also E. Piedmont 120 Associates, L.P. v. Sheppard*, 209 Ga. App. 664, 665, 434 S.E.2d 101, 102 (Ga. Ct. App. 1993) (same, stating that "the fact that promises covered by the Statute of Frauds are made in the context of a partnership or joint venture agreement does not render the statute inapplicable"); *Filippi v. Filippi*, 818 A.2d 608, 618 (R.I. 2003) (applying the statute of frauds to an alleged oral agreement to transfer land owned by a limited partnership to one of its partners).

In contrast, the land provision does not apply to a partner's interest in a partnership, no matter how much the partnership owns or deals in real property. Interests in a partnership are personal property and reflect no direct interest in the entity's assets. See Sections 102(24) and 701. Thus, the real property issues pertaining to a partnership ownership of land do not "flow through" to the partners and partnership interests. *See, e.g., Wooten v. Marshall*, 153 F. Supp. 759, 763-764 (S.D.N.Y. 1957) (involving an "oral agreement for a joint venture concerning the purchase, exploitation and eventual disposition of this 160 acre tract" and stating "[t]he real property acquired and dealt with by the venturers takes on the character of personal property as between the partners in the enterprise, and hence is not covered by [the Statute of Frauds]"). *See also Wade v. DeHart*, 26 Ohio N.P. 560 (Ohio Com. Pl. 1926), *aff'd sub nom., Wade v. De Hart*, 26 Ohio App. 177, 159 N.E. 838 (Ohio Ct. App. 1927) (same).

On the question of how far a written (or "in a record") partnership agreement can go to prevent oral or implied-in-fact terms, see Section 105(a)(3), comment. For the effect of a pre-formation agreement, see Section 106(c).

"Property" [(17)] – This definition encompasses every form of property.

"Transfer" [(24)] – The term "transfer" is broadly defined to include all types of conveyances of interests in property. The reference to "transfer by operation of law" is significant in connection with Section 702 (Transfer of Transferable Interest). That section

severely restricts a transferee's rights (absent the consent of the partners), and this definition makes those restrictions applicable, for example, to transfers ordered by a family court as part of a divorce proceeding and transfers resulting from the death of a partner. The restrictions also apply to transfers in the context of a partner's bankruptcy, except to the extent that bankruptcy law supersedes this act.

"Transferable interest" [(25)] – Absent a contrary provision in the partnership agreement or the consent of the partners, a "transferable interest" is the only interest in a limited partnership which can be transferred. *See* Section 702.

This act defines "[t]ransferable interest" as an interest "initially owned by a person in the person's capacity as a partner," because this act does not contemplate a limited partnership directly creating interests that comprise only economic rights. *See* Sections 301 and 401 (addressing how a person becomes a limited and general partner) and 702 (addressing how a person becomes a transferee).

"Transferee" [(26)] – This definition should be read in light of Sections 602(a)(3) and 605(a)(4), which subject to limited exceptions provide that "any transferable interest owned by [a general or limited partner] in the person's capacity as a [general or limited] partner immediately before dissociation is owned by the person solely as a transferee."

SECTION 103. KNOWLEDGE; NOTICE.

(a) A person knows a fact if the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under law other than this [act].

(b) A person has notice of a fact if the person:

(1) has reason to know the fact from all the facts known to the person at the time in question; or

(2) is deemed to have notice of the fact under subsection (c) or (d).

(c) A certificate of limited partnership on file in the office of the [Secretary of State] is notice that the partnership is a limited partnership and the persons designated in the certificate as general partners are general partners. Except as otherwise provided in subsection (d), the certificate is not notice of any other fact.

(d) A person not a partner is deemed to have notice of:

(1) a person's dissociation as a general partner 90 days after an amendment to the certificate of limited partnership which states that the other person has dissociated becomes effective or 90 days after a statement of dissociation pertaining to the other person becomes effective, whichever occurs first;

(2) a limited partnership's:

(A) dissolution 90 days after an amendment to the certificate of limited partnership stating that the limited partnership is dissolved becomes effective;

(B) termination 90 days after a statement of termination under Section 802(b)(2)(F) becomes effective; and

(C) participation in a merger, interest exchange, conversion, or domestication, 90 days after articles of merger, interest exchange, conversion, or domestication under [Article] 11 become effective.

(e) Subject to Section 210(f), a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.

(f) A general partner's knowledge or notice of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership, except in the case of a fraud on the partnership committed by or with the consent of the general partner. A limited partner's knowledge or notice of a fact relating to the partnership is not effective as knowledge of or notice to the partnership.

Comment

Three aspects of this section warrant particular note. First, this section is substantially slimmer than the corresponding provisions of previous uniform acts pertaining to business organizations: UPA (1997), ULLCA (1996), and ULPA (2001). Each of those acts borrowed heavily from the comparable provision of the Uniform Commercial Code. This act relies instead

on generally applicable principles of agency law, see Section 113, although Subsection (f) does provide a rule for attributing to a partnership knowledge or notice possessed by a general partner.

Second, the section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this act than in other circumstances; and (iv) are the subject of considerable attention in the RESTATEMENT (THIRD) OF AGENCY (2006).

Third, this act does not define "notice" to include "knowledge." Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This act follows ordinary usage and therefore contains some references to "knowledge or notice."

Subsection (a)(2) – In this context, the most important source of "law other than this [act]" is the common law of agency.

Subsection (b)(1) – The "facts known to the person at the time in question" include facts the person is deemed to know under Subsection (a)(2).

Subsection (c) – As for the significance of constructive notice "that the partnership is a limited partnership," see *Water, Waste & Land, Inc. v. Lanham*, 955 P.2d 997, 1001 1003 (Colo. 1998) (interpreting a comparable provision of the Colorado LLC statute and holding the provision ineffective to change common law agency principles, including the rules relating to the liability of an agent that transacts business for an undisclosed principal).

As for constructive notice that "the persons designated in the certificate as general partners are general partners," Section 201(b)(4) requires the initial certificate of limited partnership to name each general partner, and Section 202(d) requires a limited partnership to promptly amend its certificate of limited partnership to reflect any change in the identity of its general partners. Nonetheless, it will be possible, albeit improper, for a person to be designated in the certificate of limited partnership as a general partner without having become a general partner as contemplated by Section 401. Likewise, it will be possible for a person to have become a general partner under Section 401 without being designated as a general partner in the certificate of limited partnership. According to the last clause of this subsection, the fact that a person is not listed in the certificate as a general partner is not notice that the person is not a general partner. For further discussion of this point, see Section 401, comment.

If the partnership agreement and the public record are inconsistent, the partnership agreement prevails as to *inter se* matters and the record prevails as to third parties who have reasonably relied on it. Section 107(d). *See also* Sections 202(d) (requiring the limited partnership to amend its certificate of limited partnership to keep accurate the listing of general partners), 202(e) (requiring a general partner to take corrective action when the general partner knows that the certificate of limited partnership contains false information), and 205 (imposing liability for false information in, *inter alia*, the certificate of limited partnership).

Subsection (d) – This subsection provides constructive notice of facts stated in specified filed public records. The subsection works in conjunction with other sections of this act to curtail the power to bind and personal liability of general partners and persons dissociated as general partners. *See* Sections 402, 606, 607, 804, and 805. The constructive notice begins ninety days after the effective date of the filed record. For the act's rules on delayed effective dates, see Section 207.

The 90-day delay applies only to the constructive notice and not to the event described in the filed record.

> EXAMPLE: On March 15, X dissociates as a general partner from XYZ Limited Partnership by giving notice to XYZ. *See* Section 603(1). On March 20, XYZ amends its certificate of limited partnership to remove X's name from the list of general partners. *See* Section 202(d)(2).
>
> X's dissociation is effective March 15. If on March 16 X purports to be a general partner of XYZ and under Section 606(a) binds XYZ to some obligation, X will be liable under Section 606(b) as a "person dissociated as a general partner."
>
> On June 19 (90 days after March 20), the world has constructive notice of X's dissociation as a general partner. Beginning on that date, X will lack the power to bind XYZ. *See* Section 606(a)(2)(B) (providing that a person dissociated as a general partner can bind the limited partnership only if, *inter alia*, "at the time the other party enters into the transaction . . . the other party does not know or have notice of the dissociation").

Constructive notice under this subsection applies to partners and transferees as well as other persons.

Subsection (e) – If a person "notifies" another person of a fact, the other person has "reason to know" the fact and therefore has notice under Subsection (b)(1). However, a person can have "notice" of a fact without having been "notifie[d]" of the fact.

Section 210(f) pertains to delivery of records *by* the filing office.

Subsection (f) – This subsection states the rule for imputing a partner's knowledge or notice to the partnership. Under this subsection and Section 302, information possessed by a person that is only a limited partner is not attributable to the limited partnership. However, information possessed by a person that is both a general partner and a limited partner is attributable to the limited partnership. *See* Section 109 (Dual Capacity). For a discussion of agency law principles analogous to "fraud on the partnership," see RESTATEMENT (THIRD) OF AGENCY § 5.04 cmt. b (2006).

SECTION 104. GOVERNING LAW. The law of this state governs:

(1) the internal affairs of a limited partnership; and

(2) the liability of a partner as partner for a debt, obligation, or other liability of a limited partnership.

Comment

Paragraph (1) – Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the partnership agreement, relations among the partners as partners, and relations between the limited partnership and its partners. *Compare* Section 104, *with* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 cmt. a (1971) (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

"Internal affairs" do not encompass the power *vel non* of a person to bind a limited partnership. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 292(2) (1971) ("The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority."); *Id.* § 295(1) ("Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state selected by application of the rule of § 292."); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 345 cmt. c (1934) (Law Governing Effect of Act of Agent or Partner) ("If … the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for unauthorized conduct of the agent or partner in accordance with the law of that state."). *See also Farm & Ranch Services, Ltd. v. LT Farm & Ranch, LLC*, 779 F. Supp.2d 949, 960 (S.D. Iowa 2011).

The partnership agreement cannot alter this Section. *See* Section 105(c)(1). However, partnership agreement may lawfully incorporate by reference the provisions of another state's limited partnership statute. If done correctly, this incorporation makes the foreign statutory language part of the partnership agreement, and the incorporated terms (together with the rest of the partnership agreement) then govern the partners (and those claiming through the partners) to the extent not prohibited by this act. *See* Section 105. This approach: (i) does not switch the limited partnership's governing law to that of another state; (ii) instead takes the provisions of another state's law and incorporates them by reference into the contract among the partners; (iii) raises complex drafting issues – *e.g.*, how to address subsequent changes to the incorporated law (whether occurring by statutory amendment or court decision); and (iv) thus is rarely, if ever, a good idea.

Paragraph (2) – This paragraph obviously encompasses Sections 303 (the liability shield for limited partners) and 404(c) (the shield for general partners in a limited liability limited partnership), but does not necessarily encompass a claim that a partner is liable to a third party for: (i) having purported to bind a limited partnership to the third party; or (ii) having committed a tort against the third party while acting on a limited partnership's behalf or in the course of the partnership's business. That liability is not by status (*i.e.*, not partner as a partner) but rather

results from function or conduct. *Cf.* § 302(b) (stating that, although this act does not make a limited partner as limited partner the agent of a limited partnership, other law may make a limited partnership liable for the conduct of a limited partner).

"Internal affairs" and the "liability of a partner as a partner" are mentioned separately because it can be argued that the liability of partners to third parties is not an internal affair. *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS, § 307 (1971) (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. *See, e.g., Kalb, Voorhis & Co. v. American Fin. Corp.*, 8 F.3d 130, 132 (2nd Cir. 1993) (holding that the corporation's "primary purpose is to insulate shareholders from legal liability" and therefore "the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away") (quoting *Soviet Pan Am Travel Effort v. Travel Comm., Inc.*, 756 F.Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted).

In any event, most (if not all) limited partnership statutes follow the rule stated in this paragraph. *See* RULPA (1976/1985) § 901 (stating that "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners"); ULPA (2001) § 901 (same, but as to all partners).

Moreover, "[t]he general rule [from the case law] is that a plaintiff's alter ego theory is governed by the law of the state in which the business at issue is organized." *Rual Trade Ltd. v. Viva Trade LLC*, 549 F. Supp. 2d 1067, 1077 (E.D. Wis. 2008). *See also, e.g., In re Gulf Fleet Holdings, Inc.*, 491 B.R. 747, 787 (Bankr. W.D. La. 2013) (stating both conceptual and policy rationales for choosing the law of the state of formation)*; In re Saba Enters.,*421 B.R. 626, 648-51 (Bankr. S.D.N.Y. 2009) (examining the issue in detail and applying the state of formation rule).

SECTION 105. PARTNERSHIP AGREEMENT; SCOPE, FUNCTION, AND LIMITATIONS.

(a) Except as otherwise provided in subsections (c) and (d), the partnership agreement governs:

(1) relations among the partners as partners and between the partners and the limited partnership;

(2) the activities and affairs of the partnership and the conduct of those activities and affairs; and

(3) the means and conditions for amending the partnership agreement.

(b) To the extent the partnership agreement does not provide for a matter described in subsection (a), this [act] governs the matter.

(c) A partnership agreement may not:

(1) vary the law applicable under Section 104;

(2) vary a limited partnership's capacity under Section 111 to sue and be sued in its own name;

(3) vary any requirement, procedure, or other provision of this [act] pertaining to:

(A) registered agents; or

(B) the [Secretary of State], including provisions pertaining to records authorized or required to be delivered to the [Secretary of State] for filing under this [act];

(4) vary the provisions of Section 204;

(5) vary the right of a general partner under Section 406(b)(2) to vote on or consent to an amendment to the certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership;

(6) alter or eliminate the duty of loyalty or the duty of care except as otherwise provided in subsection (d);

(7) eliminate the contractual obligation of good faith and fair dealing under Sections 305(a) and 409(d), but the partnership agreement may prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured;

(8) relieve or exonerate a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law;

(9) vary the information required under Section 108 or unreasonably restrict the duties and rights under Section 304 or 407, but the partnership agreement may impose

reasonable restrictions on the availability and use of information obtained under those sections and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use;

(10) vary the grounds for expulsion specified in Section 603(5)(B);

(11) vary the power of a person to dissociate as a general partner under Section 604(a), except to require that the notice under Section 603(1) be in a record;

(12) vary the causes of dissolution specified in Section 801(a)(6);

(13) vary the requirement to wind up the partnership's activities and affairs as specified in Section 802(a), (b)(1), and (d);

(14) unreasonably restrict the right of a partner to maintain an action under [Article] 9;

(15) vary the provisions of Section 905, but the partnership agreement may provide that the partnership may not have a special litigation committee;

(16) vary the right of a partner to approve a merger, interest exchange, conversion, or domestication under Section 1123(a)(2), 1133(a)(2), 1143(a)(2), or 1153(a)(2);

(17) vary the required contents of a plan of merger under Section 1122(a), plan of interest exchange under Section 1132(a), plan of conversion under Section 1142(a), or plan of domestication under Section 1152(a); or

(18) except as otherwise provided in Sections 106 and 107(b), restrict the rights under this [act] of a person other than a partner.

(d) Subject to subsection (c)(8), without limiting other terms that may be included in a partnership agreement, the following rules apply:

(1) The partnership agreement may:

(A) specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts; and

(B) alter the prohibition in Section 504(a)(2) so that the prohibition requires only that the partnership's total assets not be less than the sum of its total liabilities.

(2) If not manifestly unreasonable, the partnership agreement may:

(A) alter or eliminate the aspects of the duty of loyalty stated in Section 409(b);

(B) identify specific types or categories of activities that do not violate the duty of loyalty;

(C) alter the duty of care, but may not authorize conduct involving bad faith, willful or intentional misconduct, or knowing violation of law; and

(D) alter or eliminate any other fiduciary duty.

(e) The court shall decide as a matter of law whether a term of a partnership agreement is manifestly unreasonable under subsection (c)(7) or (d)(2). The court:

(1) shall make its determination as of the time the challenged term became part of the partnership agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes, activities, and affairs of the limited partnership, it is readily apparent that:

(A) the objective of the term is unreasonable; or

(B) the term is an unreasonable means to achieve its objective.

Comment

The Harmonization Project rewrote this section to conform, for the most part, to the corresponding section of ULLCA (2006) (Last Amended).

Principal Provisions of the Act Concerning the Partnership Agreement

The partnership agreement is pivotal to a limited partnership, and Sections 105 through 107 are pivotal to this act. They must be read together, along with Section 102(14) (defining the partnership agreement).

This Section performs five essential functions. Subsection (a) establishes the primacy of the partnership agreement in establishing relations *inter se* the limited partnership and its partners. Subsection (b) recognizes this act as comprising mostly default rules – *i.e.*, gap fillers for issues as to which the partnership agreement provides no rule. Subsection (c) lists the few mandatory provisions of the act. Subsection (d) lists some provisions frequently found in partnership agreements, authorizing some provisions unconditionally and other provisions so long as "not manifestly unreasonable." Subsection (e) delineates in detail both the meaning of "not manifestly unreasonable" and the information relevant to a determining a claim that a provision of a partnership agreement is manifestly unreasonable.

Section 106 details the effect of a partnership agreement on the limited partnership and on persons becoming partners. Section 107 concerns the effect of a partnership agreement on third parties.

Role and Inevitability of Partnership Agreement

"A limited partnership is a creature of both statute and contract." *Cantor Fitzgerald, L.P. v. Cantor,* CIV.A. 18101, 2001 WL 1456494 at *5 (Del. Ch. Nov. 5, 2001)*; Gottsacker v. Monnier*, 281 Wis. 2d 361, 370, 697 N.W.2d 436, 440 (2005) (stating that "from the partnership form, the LLC borrows … internal governance by contract"), and Section 102(14) delineates a very broad scope for "partnership agreement." As a result, once a limited partnership comes into existence and has at least one general partner and one limited partner, a partnership agreement necessarily exists. *See* Section 102(14), cmt. Accordingly, this act refers to "the partnership agreement" rather than "a partnership agreement." This phrasing should not, however, be read to require a limited partnership or its partners to take any formal action to adopt a partnership agreement.

Subject only to Subsections (c) and (d), the partnership agreement has plenary power to structure and regulate the relations of the partners *inter se*. Although the certificate of limited partnership is a limited partnership's foundational document, among the partners the partnership agreement controls.

The partnership agreement is the exclusive consensual process for modifying this act's various default rules pertaining to relationships *inter se* the partners and between the partners and the limited partnership. Section 105(b). The partnership agreement also has power over "[t]he obligations of a limited partnership and its partners to a person in the person's capacity as a transferee or a person dissociated as a partner." Section 107(b). For the relationship between the partnership agreement and certificate of limited partnership, see Section 107(d).

The Partnership Agreement and the Fiduciary and Other Duties of the General Partner

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization's owners can affect the fiduciary and other duties of those who manage the organization – in the case of a limited partnership, the general partner (or partners). As explained in detail in the comment to Subsection (d)(3), this act rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arm's length association. Within that limitation, however, this section provides substantial power to the partnership agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

Subsection (a) recognizes that the partnership agreement is the map to the parties' deal and that any claim by a partner of managerial misconduct must be assessed first under the relevant terms of the partnership agreement. Subsection (d) specifically validates arrangements commonly used to reshape managerial duties and limit the consequences of breaching those duties. Subsection (c) contains relevant limitations, but those limitations: (i) must be read together with Subsection (d); and (ii) do not preclude the partnership agreement fundamentally redesigning the duties applicable to the general partners. For the act's design of those duties, see Sections 304, 407, and 409.

Subsection (a) – This subsection describes the very broad scope of a limited partnership's partnership agreement, which includes all matters constituting "internal affairs." *Compare* Section 105(a), *with* Section 104(1) (using the phrase "internal affairs" in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in Subsection (c), including the broad restriction stated in Paragraph (c)(18) (concerning the rights of third parties under this act).

Subsection (a)(1) – This paragraph encompasses all the rights and duties of each partner, including rights and duties pertaining to transactions under Article 11.

Subsection (a)(3) – Under this provision, the partnership agreement can control both the quantum of consent required (*e.g.*, majority of partners) and the means by which the consent is manifested (*e.g.*, prohibiting modifications except when consented to in writing). *See also* Section 107(a), cmt.

If the partnership agreement does not address the issue, this act provides the rule. Section 407(b)(4)(C) (requiring the affirmative vote or consent of all the partners) and 407(c)(3)(C) (same). Under Section 111 (supplemental principles of law), the parol evidence rule will apply to a written partnership agreement when appropriate under contract law.

Subsection (b) – To the extent the partnership agreement does not determine an *inter se* matter, this act determines the matter. The partnership agreement may vary any provision of this act pertaining to *inter se* matters, except as provided in Subsections (c) and (d).

Sometimes – but not always – the Comments to this act refer to a variable provision as a "default rule" and a non-waivable provision as "mandatory." These references are merely to

draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this act whose comments lack a comparable reference.

Subsection (c) – This subsection lists provisions of this act whose respective effects cannot be varied or may be varied subject to a stated limitation. For historical reasons, this subsection uses the words "vary" and "alter" interchangeably. No difference in meaning is intended.

If a person claims that a term of the partnership agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.

Subsection (c)(1) – Section 104 states that this act provides the law applicable to: (i) the internal affairs of a limited partnership formed under this act; and (ii) the liability of partners for obligations of the limited partnership. The organizers of a limited partnership make this choice of law by choosing to form a limited partnership under this act. Domestication to another jurisdiction will re-set the choice of law, *see* Sections 1151–56, but the partnership agreement cannot. The partnership agreement may incorporate wholesale and by reference the provisions of another jurisdiction's limited partnership statute, but that approach raises complex drafting issues – *e.g.*, how to address future revisions to that statute – and in any event is subject to the strictures of Section 105(c) and (d). *See also* Section 104(1), cmt.

Subsection (c) contains no parallel prohibition on varying Section 1001 (stating the governing law for foreign limited partnerships), because a prohibition is unnecessary. As a matter of fundamental contract law, an agreement among partners of one limited partnership is powerless to govern the affairs of another limited partnership.

Subsection (c)(2) – Under this act, a limited partnership is emphatically an entity, and the partners lack the power to alter that characteristic.

Subsection (c)(3) – This prohibition is arguably implicit in Subsection (c)(18) (affecting rights of third parties under this act) but is stated expressly to avoid any doubt.

Subsection (c)(4) – This provision means that the partnership agreement cannot affect the right of an "aggrieved" person to seek the court's help when "a person required by this [act] to sign a record or deliver a record to the filing office for filing under this [act] does not do so." Section 204(a).

Subsection (c)(5) – Because deleting the specified statement exposes each general partner to unlimited liability for each debt, liability, or other obligation of the limited partnership accrued after the deletion: (i) Section 406(b)(2) gives each general partner veto power; and (ii) this subsection makes that power non-waivable.

Subsection (c)(6) – This limitation is less powerful than might first appear, because Subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties.

Subsection (c)(7) – Sections 305(a) and 409(d) refer to the "contractual obligation of good faith and fair dealing," which contract law implies in every contract. The partnership agreement cannot eliminate this obligation, neither in whole (*i.e.*, generally) nor in part (*i.e.*, as applicable to specified situations).

However, a partnership agreement may "prescribe the standards … by which the performance of the obligation is to be measured."

> EXAMPLE: The partnership agreement of a limited partnership gives the general partner the discretion to cause the limited partnership to enter into contracts with affiliates of the general partner (so-called "Conflict Transactions"). The agreement further provides: "When causing the Limited Partnership to enter into a Conflict Transaction, the general partner complies with Section 409(d) of [this act] if a disinterested person, knowledgeable in the subject matter, states in writing that the terms and conditions of the Transaction are equivalent to the terms and conditions that would be agreed to by persons at arm's length in comparable circumstances." This provision "prescribe[s] the standards by which the performance of the [Section 409(d)] obligation is to be measured."
>
> EXAMPLE: Same facts as the previous example, except that, during the performance of a Conflict Transaction, the general partner causes the limited partnership to waive material protections under the applicable contract. The standard stated in the previous example is inapposite to this conduct. Section 409(d) therefore applies to the conduct without any direct contractual delineation. (However, other terms of the agreement may be relevant to determining whether the conduct violates Section 409(d). *See* Section 409(d), cmt.)
>
> EXAMPLE: The partnership agreement of a limited partnership gives the general partner "sole discretion" to make various decisions. The agreement further provides: "Whenever this agreement requires or permits a general partner to make a decision that has the potential to benefit one class of partners to the detriment of another class, the general partner complies with Section 409(d) of [this act] if the general partner makes the decision with:
>
> a. the honest belief that the decision:
>
> i. serves the best interests of the Limited Partnership; or
>
> ii. at least does not injure or otherwise disserve those interests; and
>
> b. the reasonable belief that the decision breaches no partner's rights under this agreement."
>
> This provision "prescribe[s] the standards by which the performance of the [Section 409(d)] obligation is to be measured." *Compare* Section 105(c)(7), *with Nemec v. Shrader*, 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the right to call preferred stock and deciding by a 3-2 vote that exercising the call did not breach the implied covenant of good faith and fair dealing).

A partnership agreement that seeks to prescribe standards for measuring the contractual obligation of good faith and fair dealing under Section 409(d) should expressly refer to the

obligation. *See Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013) (distinguishing between the implied contractual covenant and an express contractual obligation of "good faith" as stated in a limited partnership agreement).

For an explanation of the function and role of the covenant of good faith and fair dealing, see Section 409(d), comment. For the rules delimiting the "not manifestly unreasonable" requirement, see Subsection (e).

Subsection (c)(8) – These restrictions are ubiquitous in the law of business entities and, in conjunction with other provisions of this section, control the otherwise very broad power of a partnership agreement to affect fiduciary and other duties. The restrictions are central to the raft of exculpatory provisions that sprung up in corporate statutes in response to *Smith v. Van Gorkum*, 488 A.2d 858 (Del. 1985). Delaware led the response with DEL. CODE ANN. tit. 8, § 102(b)(7), and a number of LLC statutes have similar provisions. *E.g.* GA. CODE ANN. § 14-11-305(4)(A) (2011). For an extreme example, see VA. CODE ANN. § 13.1-1025 (B) (2012). In this context, "conduct" includes both acts and omissions. BLACK'S LAW DICTIONARY (9th ed. 2009) (defining conduct as "[p]ersonal behavior, whether by action or inaction").

The term "bad faith" has multiple meanings, and the context determines which meaning applies. In the context of the duty of loyalty, "bad faith" includes conduct motivated by ill will or other intent purposely to harm another person. The concept also includes conduct from which a person derives an improper personal benefit. *See, e.g., Mroz v. Hoaloha Na Eha, Inc.*, 410 F. Supp. 2d 919, 936-37 (D. Haw. 2005) (denying a motion to dismiss a claim that "the Majority Partners" were personally liable for the partnership's wrongful termination of the plaintiff; quoting the complaint as alleging that "the Majority Partners, individually and as a group, acted with malice and/or ill will, and or with an intent to serve their own personal interests and/or without an intent to serve company interests, and/or outside of the scope of their authority and/or without justification"); *BOGNC, LLC v. Cornelius NC Self-Storage LLC*, 10 CVS 19072, 2013 WL 1867065 at *9 (N.C. Super. [Business Court] May 1, 2013) (noting that "no … [exculpatory] provision may limit a manager's liability for acts known to be in conflict with the interests of the limited liability company, or for acts from which the manager derived an improper personal benefit") (citing N.C. GEN. STAT. § 57C–3–32(b)); *Lasica v. Savers Grp. of Minnesota, LLC*, A12-0092, 2012 WL 3553246 at *2 (Minn. Ct. App. Aug. 20, 2012) (noting that an "individual seeking indemnification [under statute providing for indemnification)] must have acted in good faith and must not have received an improper personal benefit") (citing MINN. STAT. § 322B.69, subds. 2(a)(2), (3) (2010)).

In the context of the duty of care, the concept of bad faith comes primarily from corporate law and means an extreme breach of the duty– *i.e.*, "the failure to exercise "*honest judgment* in the lawful and legitimate furtherance of corporate purposes." *Deblinger v. Sani-Pine Products Co., Inc.*, 107 A.D.3d 659, 661, 967 N.Y.S.2d 394 (2013) (quoting *Auerbach v. Bennett*, 47 N.Y.2d 619, 629, 393 N.E.2d 994 (1979) (emphasis added) (internal quotation marks omitted).

Thus, when a plaintiff alleges bad faith as pertaining to the duty of care, "[t]he burden … is to show irrationality: a plaintiff must demonstrate that no reasonable business person could

possibly authorize the action in good faith. Put positively, the decision must go so far beyond the bounds of reasonable business judgment that its only explanation is bad faith." *In re Tower Air, Inc.*, 416 F.3d 229, 238 (3d Cir. 2005) (discussing then prevailing Delaware law) (citation omitted). *See also KDW Restructuring & Liquidation Servs. LLC v. Greenfield*, 874 F. Supp. 2d 213, 226 (S.D.N.Y. 2012) (referring to a lack of "a rationale corporate purpose" and "a disregard for the duty to examine all available information—*information that was readily at hand*") (emphasis added).

With regard to both the duty of loyalty and the duty of care, "bad faith" is entirely distinct from the meaning of "good faith" in the contractual covenant of good faith and fair dealing. *See* Section 409(d), cmt.

Subsection (c)(8) pertains to indirect as well as direct efforts to "relieve or exonerate" and thus limits how far a partnership agreement can go in providing for indemnification. *See* Section 408(b) (stating a default rule for indemnification).

Although this paragraph does not expressly address contracts between a limited partnership and a general partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

> EXAMPLE: A limited partnership enters into a management contract with its general partner, and the contract provides the general partner exoneration for liability to the limited partnership even for willful and intentional misconduct. Most likely, contract law will treat the provision as against public policy and therefore unenforceable. RESTATEMENT (SECOND) OF CONTRACTS § 195(1) (1981) ("A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy."). If not, a court should hold the provision unenforceable to avoid evisceration of Subsection (c)(8). (Or, the court could invoke the policy expressed in Subsection (c)(8) as grounds for holding the provision unenforceable under contract law.)

Subsection (c)(9) –Although phrased as a restriction, this provision grants substantial power to the partnership agreement.

> EXAMPLE: The partnership agreement of a limited partnership states "No limited partner may have access to information constituting a trade secret of the Partnership." This restriction is reasonable.

The information required under Section 108 is skeletal, and the partnership agreement can impose reasonable limitations on access to and use of other information.

The act also empowers the limited partnership "as a matter within the ordinary course of its activities and affairs [to] impose reasonable restrictions and conditions on access to and use of information" obtained under Section 304 or 407. *See* Sections 304(j) and 407(j), cmts.

In 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. Under this act, 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. Restricting a limited partner's access to or use of the names and addresses of other limited partners is not per se unreasonable.

Subsection (c)(11) – A partnership agreement certainly may make a person's dissociation as a general partner a breach of contract, but eliminating even the *power* to dissociate would contradict the essence of the limited partnership. General partners in a limited partnership are analogous to partners in a general partnership, and the relationship among general partners is at its core a *voluntary* association.

Moreover, general partners in a limited partnership provide services not only as fiduciaries but also pursuant to a contract. *See* Section 105, cmt. (Role and Inevitability of Partnership Agreement). Only in exceptional circumstances does a party to a contract lack the power to breach, and such circumstances do not exist as to general partners of a limited partnership. Indeed, courts will not enjoin a person to remain in an ongoing contractual relationship that involves trust and confidence. E. ALLAN FARNSWORTH, CONTRACTS § 12.7 at 781 (3rd ed. 1999) ("A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal … is based [in part] of the undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.") (footnote omitted).

For two reasons this act treats limited partners quite differently. First, to make possible the act a suitable vehicle for family limited partnerships, "[a] person does not have a right to dissociate as a limited partner before the completion of the winding up of the limited partnership." Section 601(a). *See also* Prefatory Note to 2011 Act*, "The Act's Overall Approach."*

Second, the partnership agreement may eliminate a limited partner's power to dissociate, because limited partners do not resemble contract obligors. Limited partners *qua* limited partners provide no services to the limited partnership, and therefore the analysis stated in the second paragraph of this comment does not apply. Moreover, limited partners have no fiduciary duties, Section 305(b), and therefore the analysis stated in the first paragraph of this comment is inapposite as well.

Subsection (c)(12) – The partnership agreement may not change the stated grounds for judicial dissolution but may determine the forum in which a claim for dissolution under Section 801(a)(6) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in partnership agreements in particular.

The approach of this paragraph differs from the law of Delaware. *See Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898 at *1 and n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" but reserving the question of "[w]hether the parties may, by contract, divest this Court

of its authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires—leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's *Huis Clos*").

Subsection (c)(13) – The cited provisions comprise the non-waivable aspects of winding up a dissolved limited partnership. The other provisions of Section 802 are default rules.

Subsection (c)(14) – Article 9 delineates a partner's rights to bring direct and derivative actions. It would be unreasonable to frustrate these rights but not unreasonable to channel their exercise. For example, the partnership agreement might select a forum, require pre-suit mediation, provide for arbitration of both direct and derivative claims, or override Section 902 and require "universal demand" in all derivative cases. Similarly, it is not unreasonable to provide for liquidated damages consonant with the law of contracts. In contrast, it would be unreasonable for a partnership agreement to both: (i) require a would-be derivative plaintiff to make demand regardless of futility; and (ii) bar taking the claim to court no matter how long the general partners ponder the demand.

Subsection (c)(15) – A partnership agreement may not alter the act's rules for a special litigation committee but may preclude entirely the use of such a committee.

Subsection (c)(16) – Section 1123(a)(1), 1133(a)(1), 1143(a)(1), and 1153(a)(1) each requires the consent or the affirmative vote of all partners. The partnership agreement may modify these requirements. In contrast, under the sections stated in this subsection:

- each partner is protected from being merged, exchanged, converted, or domesticated "into" the status of a partner in a general partnership that is not a limited liability partnership (or a comparable "unshielded" position in some other organization) without the member having *directly* consented to either:
    - the merger, interest exchange, conversion, or domestication; or
    - a partnership agreement provision that permits such transactions to occur with less than unanimous consent of the partners; and
- merely consenting to a partnership agreement provision that permits amendment of the agreement with less than unanimous consent of the partners does not qualify as the requisite direct consent.

Subsection (c)(17) – Because these plans are the basic "deal documents" for each of the organic transactions contemplated in Article 11, the partnership agreement may not vary the contents of these plans.

Subsection (c)(18) – This limitation pertains only to "the rights under this [act] of" third parties other than partners. Moreover, the limitation is subject to two substantial exceptions: Section 106 (pertaining to the partnership agreement's relationship to the limited partnership itself and to persons becoming partners) and Section 107(b) (pertaining to the partnership agreement's power over the rights of transferees).

Subsection (d) – The partnership agreement has plenipotentiary power over the matters

described in Subsection (a), except as specifically limited by Subsections (c). However, for the convenience of practitioners and the courts, Paragraphs 1 and 2 list various terms often found in partnership agreements. No negative inference should be drawn about terms not listed; the listing is provided "without limiting other terms that may be included in a partnership agreement."

Paragraph 2 lists arrangements subject to the "not manifestly unreasonable standard." Subsection (e) delineates that standard. The same standard applies to terms of a partnership agreement which seek to "prescribe the standards … by which the performance of the [contractual] obligation [of good faith and fair dealing] is to be measured." Subsection (c)(7).

Subsection (d)(1)(A) – An arrangement *not* involving "one or more disinterested and independent persons" acting "after full disclosure of all material facts" would "alter … the aspects of the duty of loyalty stated in Section 409(b)" and would therefore be subject to the "not manifestly unreasonable standard" of Subsection (d)(2)(A).

For the meaning of "material" as applied to information, see Section 409(f), comment.

Subsection (d)(1)(B) – Section 504(a)(2) prohibits distributions:

- *not merely* when, after the distribution, "the partnership's total assets would be less than the sum of its total liabilities,"
- *but also* when, after the distribution, the assets would less than the total liabilities "plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to those of persons receiving the distribution."

The second part of the solvency test pertains to preferential rights to distributions, is thus a matter *inter se* the partners and any transferees, and is therefore subject to change in the partnership agreement.

In contrast, the first part of the solvency test protects third parties – creditors of the limited partnership – and therefore cannot be changed by the partnership agreement. Section 105(c)(18). Likewise, the partnership agreement cannot change solvency test stated in Section 504(a)(1) (that "the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's activities and affairs").

Section (d)(2) – This act rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of "freedom of contract" against the dangers that inescapably exist when some have power over the interests of others.

Nonetheless, a properly drafted partnership agreement may substantially alter and even eliminate fiduciary duties. Two important limitations exist. First, arrangements subject to this subsection may not be "manifestly unreasonable." *See* Subsection (e) (delineating this standard).

Second, the partnership agreement may not transform the relationship *inter se* the general partners to the limited partnership and limited partners into an entirely arm's length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty. *See, e.g., Paige Capital Mgmt., LLC v. Lerner Master Fund, LLC*, Civ. A. No. 5502–CS, 2011 WL 3505355 at *31 (Del. Ch. Aug. 8 2011) (stating that, even under a statute that "permits the waiver of fiduciary duties … such waivers must be set forth clearly"); *Kelly v. Blum*, Civ. A. No. 4516-VCP, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) ("Having been granted great contractual freedom by the LLC Act, drafters of or parties to an LLC agreement should be expected to provide ... clear and unambiguous provisions when they desire to expand, restrict or eliminate the operation of traditional fiduciary duties"). It would therefore be manifestly unreasonable for a partnership agreement to negate this rule.

Although Subsection (d)(2) does not expressly address contracts between a limited partnership and general partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

> EXAMPLE: A limited partnership enters into a management contract with its sole general partner, and the contract provides that the duties of loyalty stated in Section 409(b) are entirely eliminated. If the partnership agreement were to so provide, the provision would be subject to the "manifestly unreasonable standard." Section 105(d)(2)(A). Absent the authorization provided by Section 105(d)(2)(A), the management contract's attempt to waive fiduciary duties may be unenforceable as a matter of public policy and contract law. *See Neubauer v. Goldfarb*, 108 Cal. App. 4th 47, 57, 133 Cal. Rptr. 2d 218 (2003) (stating that "waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholders in private close corporations is against public policy and a contract provision in a buy-sell agreement purporting to effect such a waiver is void"). If not, a court should hold the provision unenforceable nonetheless so as to avoid eviscerating Subsection (d)(2).

Subsection (d)(2)(A) – Subject to the "not manifestly unreasonable" standard, this paragraph empowers the partnership agreement to eliminate *all* aspects of the duty of loyalty listed in Section 409(b). The obligation of good faith and fair dealing, Section 409(d), would remain. *See* Subsection (c)(6). As to any other, uncodified aspects of the duty of loyalty, see Subsection (d)(2)(D) (empowering the partnership agreement to "alter or eliminate any other fiduciary duty").

> EXAMPLE: Joint Venture Limited Partnership ("JV") is a limited partnership, with two general partners, Kappa, Inc. ("Kappa") and Lambda, LLC ("Lambda"). The partnership agreement provides that:
>
> - JV is managed by a "board" consisting of one person appointed by Kappa and one person appointed by Lambda;
> - each appointee:
>   - owes fiduciary and any other duties exclusively to the general partner that made the appointment; and
>   - owes no duties to:

- the other general partner;
- the limited partners; and
- the limited partnership itself.

The "not manifestly unreasonable" standard applies to these provisions under Subsection (d)(2)(A) and (D), and the provisions are not manifestly unreasonable. Note that the provisions do not affect the duties of Kappa and Lambda as general partners.

EXAMPLE: ABC Limited Partnership ("ABC") is a limited partnership with three general partners. ABC has two entirely separate lines of business, the Alpha business and the Beta business. Under ABC's partnership agreement:

- General Partner 1's responsibilities pertain exclusively to the Alpha business, while responsibility for:
  - the Beta business is allocated exclusively to General Partner 2; and
  - ABC's overall operations is allocated exclusively to General Partner 3.
- General Partner 2's responsibilities pertain exclusively to the Beta business, while responsibility for:
  - the Alpha business is allocated exclusively to General Partner 1; and
  - ABC's overall operations is allocated exclusively to General Partner 3.
- General Partner 1 has no fiduciary duties pertaining to the Beta business.
- General Partner 2 has no fiduciary duties pertaining to the Alpha business.

The "not manifestly unreasonable" standard applies to these provisions under Subsection (d)(2)(A) and (D), and the provisions are not manifestly unreasonable.

Subsection (d)(2)(B) – Under this paragraph, a partnership agreement might provide that an affiliate of a general partner will provide compensated services to the limited partnership at a price not exceeding market price, or that a general partner may pursue opportunities that otherwise would be partnership opportunities. Such arrangements are commonplace and permissible.

Subsection (d)(2)(C) – In this context, "conduct" includes both acts and omissions. Black's Law Dictionary (9th ed. 2009), conduct (defining conduct as "[p]ersonal behavior, whether by action or inaction"). Subject to the "not manifestly unreasonable" standard and the bedrock requirements stated here and in Subsection (c)(8), the partnership agreement can reduce the duty of care substantially. In particular, the partnership agreement can eliminate the aspects of the duty of care pertaining to gross negligence and recklessness.

This provision replicates in a particular context the general rule stated in Subsection (c)(8). For the meaning of "bad faith" in the context of the duty of care, see Subsection (c)(8), comment.

Subsection (e) – The "not manifestly unreasonable" concept became part of uniform business entity statutes when UPA (1997) imported the concept from the Uniform Commercial Code. (In the current version of the Uniform Commercial Code, the concept appears in Section 1-302(b).)

This subsection provides rules for applying the concept, specifying:

- who decides the issue of "manifestly unreasonable"
  - "the court … as a matter of law," Subsection (e);
- the framework for determining the issue
  - determination to be made "in light of the purposes, activities, and affairs of the limited partnership," Subsection (e)(2);
- the temporal setting for determining the issue
  - "determination [to be made] as of the time the challenged term became part of the partnership agreement," Subsection (e)(1); and
- what information is admissible for determining the issue
  - "only circumstances existing" when "the challenged term became part of the partnership agreement," Subsection (e)(1).

The subsection also provides a very demanding standard for persons claiming that a term of a partnership agreement is "manifestly unreasonable." "The court … may invalidate the term only if, in light of the purposes, activities, and affairs of the limited partnership it is *readily apparent* that: (A) the objective of the term is unreasonable; or (B) the term is an unreasonable means to achieve the term's objective." Subsection (e)(2) (emphasis added).

Subsection (e) is fundamental to this act, because: (i) this act generally defers to the agreement among the partners; and (ii) Subsection (e) safeguards the partnership agreement in at least four ways:

- Determining manifest unreasonableness *inter se* partners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.

- If loosely applied, the concept of "manifestly unreasonable" would permit a court to rewrite the partners' agreement, which would destroy the balance this act seeks to establish between freedom of contract and fiduciary duty.

- Case law has not adequately delineated the concept. *See, e.g., In re Brobeck, Phleger & Harrison LLP*, 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) ("RUPA [UPA (1997)] does not define what is 'manifestly unreasonable' and the parties have not cited, nor can the court locate, a decision that defines the term. Absent case law or even a dictionary definition, the court must rely on its common sense to recognize something as manifestly unreasonable.").

- In the context of statutes permitting stock transfer restrictions unless "manifestly unreasonable," courts have often ignored the word "manifestly." *See, e.g., Brandt v. Somerville*, 692 N.W.2d 144, 152 (N.D. 2005) (stating that "in close corporations, a majority of courts have sustained restrictions that are determined to be reasonable in light of the relevant circumstances"); *Roof Depot, Inc. v. Ohman*, 638 N.W.2d 782, 786 (Minn. Ct. App. 2002) (stating that "the restrictions [on share transfer] are not 'manifestly

unreasonable' because they are reasonable means to ensure that the management and control of the business remains in the group of investors or with people well known to them"); *Castriota v. Castriota*, 268 N.J. Super. 417, 423-24, 633 A.2d 1024, 1027-28 (App. Div. 1993) ("We are obliged to apply the statute in a manner consonant with its essential purpose to permit reasonable restrictions upon alienation.").

Subsection (e)(1) – The significance of the phrase "as of the time the term as challenged became part of the partnership agreement" is best shown by example.

EXAMPLE: When a particular limited partnership comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the limited partnership's sole general partner. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the partnership's start-up. In order to induce the individual to accept the position of sole general partner, the other partners are willing to have the partnership agreement significantly limit the general partner's fiduciary duties. Several years later, when the limited partnership's operations have turned prosaic and the general partner's talents and background are not nearly so crucial, a limited partner challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under Subsection (e)(1) is when the limited partnership began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

EXAMPLE: As initially adopted, a partnership agreement identifies a category of decisions ordinarily subject to the duty of loyalty and provides that "the general partner's sole, reasonable discretion" satisfies the duty. A year later, the agreement is amended to delete the word "reasonable." Later, a partner claims that, without the word "reasonable," the provision is manifestly unreasonable. The relevant time under Subsection (e)(1) is when the agreement was amended, not when the agreement was initially adopted.

Subsection (e)(2) – If a person claims that a term of the partnership agreement is manifestly unreasonable under Subsections (c)(7) or (d)(2), as a matter of ordinary procedural law the person making the claim has the burden of proof.

SECTION 106. PARTNERSHIP AGREEMENT; EFFECT ON LIMITED PARTNERSHIP AND PERSON BECOMING PARTNER; PREFORMATION AGREEMENT.

(a) A limited partnership is bound by and may enforce the partnership agreement, whether or not the partnership has itself manifested assent to the agreement.

(b) A person that becomes a partner is deemed to assent to the partnership agreement.

(c) Two or more persons intending to become the initial partners of a limited partnership may make an agreement providing that upon the formation of the partnership the agreement will become the partnership agreement.

Comment

Subsection (a) – This subsection resolves twin questions that have troubled some courts – namely, whether an unincorporated entity that has not signed its foundational agreement nonetheless is bound by and may enforce the agreement. The questions have been particularly troubling in the context of agreements to arbitrate. *See, e.g., Elkjer v. Scheef & Stone, L.L.P.*, 3:13-CV-1655-K, --- F. Supp.2d ----, 2014 WL 1255844 at *5-6 (N.D. Tex. Mar. 27, 2014) (concluding that a limited liability partnership "is a party to the Partnership Agreement," even though the partnership itself never signed or otherwise assented to the agreement; enforcing arbitration provision to the benefit of the LLP). *Contra Trover v. 419 OCR, Inc.*, 397 Ill. App. 3d 403, 409, 921 N.E.2d 1249, 1255 (2010) (finding that "neither FODG [an LLC] nor the Golf Club [a related LLC] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses therein").

Developments pertaining to the Virginia LLC Act further illustrate the difficulties. In *Mission Residential, LLC v. Triple Net Properties, LLC*, 275 Va. 157, 161-62, 654 S.E.2d 888, 891 (2008), the Virginia Supreme Court held that an LLC member's derivative claim was not subject to the arbitration provision in the operating agreement, because: (i) the LLC was "the real party in interest;" (ii) the LLC had not signed the operating agreement; and (iii) requiring the claim to be arbitrated would "ignore[] the separate existence of Holdings [the LLC]." The Virginia legislature promptly disagreed and amended the LLC act to state: "A limited liability company is bound by its operating agreement whether or not the limited liability company executes the operating agreement." VA. CODE ANN. § 13.1–1023.A.1 (2012). The legislature left open the question of a limited liability company's power to enforce an operating agreement that the company has not executed.

This subsection answers the twin questions, categorically and in the affirmative.

This subsection does not consider whether a limited partnership is an indispensable party to a suit concerning the partnership agreement. That is a question of procedural law, and the answer can determine whether federal diversity jurisdiction exists.

Subsection (b) – Given the possibility of oral and implied-in-fact terms in the partnership agreement, a person becoming a partner of an existing limited partnership should take precautions to ascertain fully the contents of the partnership agreement. *See* Section 105(a)(3), comment.

Subsection (c) – A preformation agreement is not a partnership agreement. A partnership agreement is among "partners," and, under this act, the earliest a person can become a partner is upon the formation of the limited partnership. Section 401.

SECTION 107. PARTNERSHIP AGREEMENT; EFFECT ON THIRD PARTIES AND RELATIONSHIP TO RECORDS EFFECTIVE ON BEHALF OF LIMITED PARTNERSHIP.

(a) A partnership agreement may specify that its amendment requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) The obligations of a limited partnership and its partners to a person in the person's capacity as a transferee or person dissociated as a partner are governed by the partnership agreement. Subject only to a court order issued under Section 703(b)(2) to effectuate a charging order, an amendment to the partnership agreement made after a person becomes a transferee or is dissociated as a partner:

(1) is effective with regard to any debt, obligation, or other liability of the partnership or its partners to the person in the person's capacity as a transferee or person dissociated as a partner; and

(2) is not effective to the extent the amendment imposes a new debt, obligation, or other liability on the transferee or person dissociated as a partner.

(c) If a record delivered by a limited partnership to the [Secretary of State] for filing becomes effective and contains a provision that would be ineffective under Section 105(c) or (d)(2) if contained in the partnership agreement, the provision is ineffective in the record.

(d) Subject to subsection (c), if a record delivered by a limited partnership to the [Secretary of State] for filing becomes effective and conflicts with a provision of the partnership agreement:

(1) the agreement prevails as to partners, persons dissociated as partners, and transferees; and

(2) the record prevails as to other persons to the extent they reasonably rely on the record.

Comment

Subsection (a) – This subsection, derived from DEL. CODE ANN. tit. 6, § 18-302(e), permits the partnership agreement to: (i) accord a non-partner veto rights over amendments to the agreement; and (ii) establish other preconditions for amendments. An amendment made in derogation of a veto right or precondition is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-partner managers.

> EXAMPLE: A non-partner manager enters into a management contract with a limited partnership, and that agreement provides in part that the limited partnership may remove the manager without cause only with the consent of partners holding 2/3 of the profits interests. The partnership agreement contains a parallel provision (the "partnership agreement's quantum provision"), but the non-partner manager is not a party to the partnership agreement. Later, the partners amend the partnership agreement's quantum provision to reduce the quantum to a simple majority of profits interests and thereafter purport to remove the manager without cause. Although the limited partnership has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the limited partnership has the *power* under Section 105(a)(2) to effect the removal – unless the partnership agreement provides the manager a veto right over changes in the partnership agreement's quantum provision.

This subsection does not refer to partner veto rights because, unless otherwise provided in the partnership agreement, the consent of each partner is necessary to effect an amendment. *See* Section 406(b)(1). Because "[a] partnership agreement may specify that its amendment requires … the satisfaction of a condition," a partnership agreement can require that any amendment be made through a writing or a record signed by each partner. *See also* Section 105(a)(3) (empowering the partnership agreement to determine "the means and conditions for amending the partnership agreement").

Subsection (b) – The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization's owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization's economic interests. Such transferees can include the heirs of business founders as well as former owners who are "locked in" as transferees of their own interests. *See* Section 602(a)(3) and 605(a)(4).

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can "freeze the deal" as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

The scant case law in this area clearly favors the remaining partners over former partners and other transferees. *See, e.g.*, *Bauer v. Blomfield Co./Holden Joint Venture*, 849 P2d 1365, 1367 n.2 (Alaska 1993) (holding that a mere assignee "was not entitled to complain about a decision made with the consent of all the partners" and stating "[w]e are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest"); *Bynum v. Frisby*, 73 Nev. 145, 149-50, 311 P.2d 972, 975 (1957) ("[A]n assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners nor require them to resort to dissolution in order to prevent such a relationship from arising. The stranger remains a stranger entitled only to share in the partnership's worth and to demand an accounting upon dissolution.") (applying UPA (1914) § 27, pertaining to rights of an assignee). *See generally* Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 SUFFOLK L. REV. 587 (2009).

This subsection follows *Bauer* and other cases by expressly subjecting transferees (including a person dissociated as a partner) to partnership agreement amendments made after the transfer or dissociation, except amendments that increase obligations on transferees. For example, an amendment might extend the duration of a limited partnership but may not institute a new capital call obligation on transferees.

The question of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation awaits development in the case law. An unreported LLC case suggests the answer might be yes, but the decision rests primarily on the wording of the LLC's operating agreement. In *Kohannim v. Katoli*, 08-11-00155-CV, 2013 WL 3943078 at *10-11 (Tex. App. July 24, 2013), the court: (i) noted an LLC's "Regulations provide[] for the distribution of 'available cash' to members quarterly provided that the available cash is not needed for a reasonable working capital reserve"; (ii) noted that "Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike's transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company's accounts since the mortgage on the property had been paid off in February 2007"; and (iii) concluded that "more than a scintilla of evidence supports the trial court's finding that Jacob failed to make profit distributions to Parvaneh." In essence, the court upheld a finding that Jacob had breached (or caused the LLC to breach) a contractual obligation to make distributions. But the court went further: "We also agree with the trial court's conclusion that the established facts demonstrated Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the company's affairs to the prejudice of Parvaneh." *Id.* at *11.

For the very limited rights of transferees, see Section 702.

Subsection (b)(1) – This provision is inapposite when "a partner or transferee becomes entitled to receive a distribution." Section 503(d). In that circumstance:

- "the partner or transferee has the status of … a creditor of the limited partnership with respect to the distribution," *Id.*; and

- the relevant obligation is not owed to "a person in the person's capacity as a transferee or person dissociated as a partner," Subsection (b), but rather to the person in the person's capacity as a creditor.

Subsection (c) – This provision precludes using the certificate of limited partnership to make an end run around the strictures of Section 105(c) and (d)(2).

Subsection (d) – It will be possible, albeit improvident, for a limited partnership agreement to be inconsistent with the certificate of limited partnership or other public filings pertaining to the partnership. For those circumstances, this subsection provides rules for determining which source of information prevails:

- For partners, persons dissociated as partners, and transferees, the partnership agreement is paramount.

- Third parties may invoke the public record upon a showing of reasonable reliance, which presupposes actual knowledge – *i.e.*, deemed knowledge under Section 103(d) does not suffice.

The mere fact that a term is present in a publicly-filed record and not in the partnership agreement, or *vice versa*, does not automatically establish a conflict. This subsection does not expressly cover a situation in which: (i) one of the specified filed records contains information in addition to, but not inconsistent with, the partnership agreement; and (ii) a person, other than a partner or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation. Moreover, to argue that the partnership agreement prevails over the filed record is to argue that the additional term does conflict with the partnership agreement, at least in effect.

Section 105(a)(3) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the partnership agreement, language in a certificate of limited partnership or other record delivered to the filing office for filing on behalf of the limited partnership might be evidence of the partners' agreement and thereby constitute or at least imply a term of the partnership agreement.

This subsection does not apply to records delivered to the filing office for filing on behalf of a person other than a limited partnership.

SECTION 108. REQUIRED INFORMATION. A limited partnership shall maintain at its principal office the following information:

(1) a current list showing the full name and last known street and mailing address of each partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order;

(2) a copy of the initial certificate of limited partnership and all amendments to and restatements of the certificate, together with signed copies of any powers of attorney under which any certificate, amendment, or restatement has been signed;

(3) a copy of any filed articles of merger, interest exchange, conversion, or domestication;

(4) a copy of the partnership's federal, state, and local income tax returns and reports, if any, for the three most recent years;

(5) a copy of any partnership agreement made in a record and any amendment made in a record to any partnership agreement;

(6) a copy of any financial statement of the partnership for the three most recent years;

(7) a copy of the three most recent [annual] [biennial] reports delivered by the partnership to the [Secretary of State] pursuant to Section 212;

(8) a copy of any record made by the partnership during the past three years of any consent given by or vote taken of any partner pursuant to this [act] or the partnership agreement; and

(9) unless contained in a partnership agreement made in a record, a record stating:

(A) a description and statement of the agreed value of contributions other than money made and agreed to be made by each partner;

(B) the times at which, or events on the happening of which, any additional contributions agreed to be made by each partner are to be made;

(C) for any person that is both a general partner and a limited partner, a specification of what transferable interest the person owns in each capacity; and

(D) any events upon the happening of which the partnership is to be dissolved and its activities and affairs wound up.

Comment

A required information section first appeared in ULPA (1976) § 105, although the notion of information rights traces back to the original uniform limited partnership act, ULPA (1916) § 10.

The partnership agreement cannot vary this section. However, subject to Section 105(c)(9), the agreement can vary Sections 304 and 407, which govern access to and use of the information required by this section.

Paragraph (5) – This requirement applies to both superseded and current agreements and amendments. An agreement or amendment is "made in a record" to the extent the agreement is integrated into a record and consented to in that memorialized form. It is possible for a partnership agreement to be made in part in a record and in part otherwise. *See* Section 102(14), cmt. An oral agreement that is subsequently inscribed in a record (but not consented to as such) was not "made in a record" and is not covered by this paragraph. However, if the limited partnership happens to have such a record, Section 304(b) might and Section 407(a)(2) will provide a right of access.

Paragraph (8) – This paragraph does not require a limited partnership to make a record of consents given and votes taken. However, if the limited partnership has made such a record, this paragraph requires that the limited partnership maintain the record for three years. The requirement applies to any record made by the limited partnership, not just to records made contemporaneously with the giving of consent or voting. The three-year period runs from when the record was made and not from when the consent was given or vote taken.

Paragraph (9) – Information is "contained in a partnership agreement made in a record" only to the extent that the information is integrated into a record and, in that memorialized form, has been consented to as part of the partnership agreement.

This paragraph is not a statute of frauds provision. For example, failure to comply with Paragraph (9)(A) or (B) does not render unenforceable an oral promise to make a contribution. Likewise, failure to comply with Paragraph (9)(D) does not invalidate an oral term of the partnership specifying "events upon the happening of which the limited partnership is to be dissolved and its activities wound up." *See also* Section 801(a).

Conversely, the mere fact that a limited partnership maintains a record in purported compliance with Paragraph (9)(A) or (B) does not prove that a person has actually promised to

make a contribution. Likewise, the mere fact that a limited partnership maintains a record in purported compliance with Paragraph (9)(D) does not prove that the partnership agreement actually includes the specified events as causes of dissolution.

Consistent with the partnership agreement's plenary power to structure and regulate the relations of the partners *inter se*, a partnership agreement can impose "made in a record" requirements which render unenforceable oral promises to make contributions or oral understandings as to "events upon the happening of which the limited partnership is to be dissolved."

Paragraph (9)(A) and (B) – Often a partnership agreement will state in record form the value of contributions made and promised to be made. If not, these provisions require that the value be stated in a record maintained as part of the limited partnership's required information. This act does not authorize the limited partnership or the general partners to set the value of a contribution without the concurrence of the person who has made or promised the contribution, although the partnership agreement itself can grant that authority.

Paragraph (9)(C) – The information required by this provision is essential for determining what happens to the transferable interests of a person that is both a general partner and a limited partner and that dissociates in one of those capacities but not the other. *See* Sections 602(a)(3) and 605(a)(5).

SECTION 109. DUAL CAPACITY. A person may be both a general partner and a limited partner. A person that is both a general and limited partner has the rights, powers, duties, and obligations provided by this [act] and the partnership agreement in each of those capacities. When the person acts as a general partner, the person is subject to the obligations, duties, and restrictions under this [act] and the partnership agreement for general partners. When the person acts as a limited partner, the person is subject to the obligations, duties, and restrictions under this [act] and the partnership agreement for limited partners.

Comment

It may be to the advantage of a general partner to own some of its interests as a limited partner, especially interests connected to voting rights. *See* Section 305(b) (providing that, except for the implied contractual covenant of good faith and fair dealing, "a limited partner does not have any duty to the limited partnership or to any other partner solely by reason of acting as a limited partner").

SECTION 110. NATURE, PURPOSE, AND DURATION OF LIMITED PARTNERSHIP.

(a) A limited partnership is an entity distinct from its partners. A limited partnership is the same entity regardless of whether its certificate states that the limited partnership is a limited liability limited partnership.

(b) A limited partnership may have any lawful purpose, regardless of whether for profit.

(c) A limited partnership has perpetual duration.

Comment

Subsection (a) – The "separate entity" characteristic is fundamental to a limited partnership and is inextricably connected to both the liability shield, Sections 303 and 404(b), and the inability of creditors of a partner or transferee to reach the assets of the limited partnership, absent a "reverse pierce" or a claim of fraudulent transfer. *See, e.g.*, *C.F. Trust, Inc. v. First Flight, L.P.*, 580 S.E.2d 806, 810 (Va. 2003) ("hold[ing] that Virginia does recognize the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership"); *In re Flanagan*, 373 B.R. 216, 223, n.6 (Bankr. D. Conn. 2007) (stating that "[r]everse piercing claims have been recognized as viable causes of action in Connecticut" and "[t]he fact that [an entity] is a limited partnership does not alter the analysis"); *Egle v. Egle*, 817 So. 2d 136, 140 (La. Ct. App. 2002) (allowing plaintiff to proceed with claims that transfers made by her ex-spouse inter alia to an LLC were sham transactions).

Acquiring or relinquishing an LLLP shield changes only the rules governing a general partner's liability for subsequently incurred obligations of the limited partnership. The underlying entity is unaffected.

Subsection (b) – Although some limited partnership statutes continue to require a business purpose, this act follows the current trend and takes a more expansive approach. The phrase "any lawful purpose, regardless of whether for profit" encompasses even charitable activities, but this act does not include any comprehensive protections pertaining to charitable assets and purposes. Section 1104(b) does contain a "nondiversion" provision, but the provision applies only to the organic transactions contemplated by Article 11. Comprehensive protections must be (and typically are) found in other law, although sometimes that "other law" appears within a state's non-profit corporation statute. *See, e.g.,* MINN. STAT. § 317A.811 (2012) (providing restrictions on charitable organizations that seek to "dissolve, merge, or consolidate, or to transfer all or substantially all of their assets" but imposing those restrictions only on "corporations," which are elsewhere defined as corporations incorporated under the non-profit corporation act).

Subsection (c) – The word "perpetual" is a misnomer, albeit one commonplace in limited

partnership and limited liability company statutes. In this context, "perpetual" means merely that the act: (i) does not require a definite term; and (ii) creates no immediate nexus between the dissociation of a partner and the dissolution of the entity.

Moreover, the public record pertaining to a limited partnership will not necessarily reveal whether the limited partnership actually has a perpetual duration or has in fact dissolved, because: (i) this act, like all limited partnership statutes, provides several consent-based methods to dissolve a limited partnership; and (ii) none of those methods involve a public filing. For example, dissolution and winding up of a limited partnership may result from a term specified in the partnership agreement, an event specified in the partnership agreement, or the affirmative vote or consent of all partners. *See* Sections 801 (events causing dissolution) and 802 (winding up required upon dissolution). A partnership agreement is not a publicly-filed document, and a partner vote to dissolve a limited partnership is not a public event. A dissolved limited partnership may deliver to the filing office for filing an amendment to the certificate of limited partnership stating that the partnership is dissolved, Section 802(b)(2)(A), and later a statement of termination, Section 802(b)(2)(F), or both, but the filing of such statements is permissive rather than mandatory. *Id*.

Likewise, the public record will not reveal when (or even whether) a limited partnership has come into existence. *See* Section 201(d) (providing that the formation of a limited partnership requires both that the certificate of limited partnership become effective and that at least two separate persons become partners, with at least one being a general partner and one being a limited partner).

SECTION 111. POWERS. A limited partnership has the capacity to sue and be sued in the name of the partnership and the power to do all things necessary or convenient to carry on the partnership's activities and affairs.

Comment

Continuing the approach initiated in ULPA (2001) § 105, this act omits as unnecessary any detailed list of specific powers.

The partnership agreement cannot vary a limited partnership's capacity to sue and be sued. Section 105(c)(2). A limited partnership's standing to enforce the partnership agreement is a separate matter, which is covered by Section 106(a) (stating, as a default rule, that the limited partnership "may enforce the partnership agreement").

SECTION 112. APPLICATION TO EXISTING RELATIONSHIPS.

(a) Before [all-inclusive date], this [act] governs only:

(1) a limited partnership formed on or after [the effective date of this [act]]; and

(2) except as otherwise provided in subsections (c) and (d), a limited partnership formed before [the effective date of this [act]] which elects, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be subject to this [act].

(b) Except as otherwise provided in subsections (c) and (d), on and after [all-inclusive date] this [act] governs all limited partnerships.

(c) With respect to a limited partnership formed before [the effective date of this [act]], the following rules apply except as the partners otherwise elect in the manner provided in the partnership agreement or by law for amending the partnership agreement:

(1) Section 110(c) does not apply and the limited partnership has whatever duration it had under the law applicable immediately before [the effective date of this [act]].

(2) the limited partnership is not required to amend its certificate of limited partnership to comply with Section 201(b)(5).

(3) Sections 601 and 602 do not apply and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before [the effective date of this [act]].

(4) Section 603(4) does not apply.

(5) Section 603(5) does not apply and a court has the same power to expel a general partner as the court had immediately before [the effective date of this [act]].

(6) Section 801(a)(3) does not apply and the connection between a person's dissociation as a general partner and the dissolution of the limited partnership is the same as existed immediately before [the effective date of this [act]].

(d) With respect to a limited partnership that elects pursuant to subsection (a)(2) to be

subject to this [act], after the election takes effect the provisions of this [act] relating to the liability of the limited partnership's general partners to third parties apply:

(1) before [all-inclusive date], to:

(A) a third party that had not done business with the limited partnership in the year before the election took effect; and

(B) a third party that had done business with the limited partnership in the year before the election took effect only if the third party knows or has been notified of the election; and

(2) on and after [all-inclusive date], to all third parties, but those provisions remain inapplicable to any obligation incurred while those provisions were inapplicable under paragraph (1)(B).

Legislative Note: *Subsection 112(c) presupposes that this act is replacing ULPA (1976) (Last Amended 1985). If this act is replacing a substantially different limited partnership act, the enacting jurisdiction should consider whether: (i) this act makes material changes to the "default" (or "gap filler") rules of the predecessor statute; and (ii) if so, whether Subsection (c) should carry forward any of those rules for pre-existing limited partnerships. In this assessment, the focus is on pre-existing limited partnerships that have left default rules in place, whether advisedly or not. The central question is whether, for such limited partnerships, expanding Subsection (c) is necessary to prevent material changes to the partners' "deal."*

In an enacting jurisdiction that has previously amended its existing limited partnership statute to provide for limited liability limited partnerships (LLLPs), this act should include transition provisions specifically applicable to pre-existing limited liability limited partnerships. The precise wording of those provisions must depend on the wording of the State's previously enacted LLLP provisions. However, the following principles apply generally:

1. In Sections 806(b)(5) and 807(b)(4) (notice by dissolved limited partnership to claimants), the phrase "the limited partnership has been throughout its existence a limited liability limited partnership" should be revised to encompass a limited partnership that was a limited liability limited partnership under the State's previously enacted LLLP provisions.

2. Section 112(d) should provide that, if a pre-existing limited liability limited partnership elects to be subject to this act, this act's provisions relating to the liability of general partners to third parties apply immediately to all third parties, regardless of whether a third party has previously done business with the limited liability limited partnership.

3. A pre-existing limited liability limited partnership that elects to be subject to this act should have to comply with Sections 201(b)(5) (requiring the certificate of limited partnership to state whether the limited partnership is a limited liability limited partnership) and 114(c) (establishing name requirements for a limited liability limited partnership).

4. As for Section 112(b) (providing that, after a transition period, this act applies to all preexisting limited partnerships):

a. if a State's previously enacted LLLP provisions have requirements essentially the same as Sections 201(b)(5) and 114(c), pre-existing limited liability limited partnerships should automatically retain LLLP status under this act.

b. if a State's previously enacted LLLP provisions have name requirements essentially the same as Section 114(c) and provide that a public filing other than the certificate of limited partnership establishes a limited partnership's status as a limited liability limited partnership:

i. that filing can be deemed to an amendment to the certificate of limited partnership to comply with Section 201(b)(5), and

ii. pre-existing limited liability limited partnerships should automatically retain LLLP status under this act.

c. if a State's previously enacted LLLP provisions do not have name requirements essentially the same as Section 114(c), it will be impossible both to enforce Section 114(c) and provide for automatic transition to LLLP status under this act.

It is recommended that the "all-inclusive" date should be at least one year after the effective date of this act, Section 1206, but no more than two years.

Comment

Subsection (c) – For the effective date of this act, see Section 1206.

SECTION 113. SUPPLEMENTAL PRINCIPLES OF LAW. Unless displaced by particular provisions of this [act], the principles of law and equity supplement this [act].

Comment

For this act, the common law rules of contract and agency are among the most important supplemental "principles of law." With regard to transactions under Article 11, noteworthy principles include the rights of creditors following leveraged buyouts, spinoffs, asset purchases, or other similar transactions; and creditors' rights under other laws.

SECTION 114. PERMITTED NAMES.

(a) The name of a limited partnership may contain the name of any partner.

(b) The name of a limited partnership that is not a limited liability limited partnership must contain the phrase "limited partnership" or the abbreviation "LP" or "L.P." and may not contain the phrase "limited liability limited partnership" or the abbreviation "LLLP" or "L.L.L.P.".

(c) The name of a limited liability limited partnership must contain the phrase "limited liability limited partnership" or the abbreviation "LLLP" or "L.L.L.P." and must not contain the abbreviation "LP" or "L.P.".

(d) Except as otherwise provided in subsection (g), the name of a limited partnership, and the name under which a foreign limited partnership may register to do business in this state, must be distinguishable on the records of the [Secretary of State] from any:

(1) name of an existing person whose formation required the filing of a record by the [Secretary of State] and which is not at the time administratively dissolved;

(2) name of a limited liability partnership whose statement of qualification is in effect;

(3) name under which a person is registered to do business in this state by the filing of a record by the [Secretary of State];

(4) name reserved under Section 115 or other law of this state providing for the reservation of a name by the filing of a record by the [Secretary of State];

(5) name registered under Section 116 or other law of this state providing for the registration of a name by the filing of a record by the [Secretary of State]; and

(6) name registered under [this state's assumed or fictitious name statute].

(e) If a person consents in a record to the use of its name and submits an undertaking in a form satisfactory to the [Secretary of State] to change its name to a name that is distinguishable on the records of the [Secretary of State] from any name in any category of names in subsection (d), the name of the consenting person may be used by the person to which the consent was given.

(f) Except as otherwise provided in subsection (g), in determining whether a name is the same as or not distinguishable on the records of the [Secretary of State] from the name of another person, words, phrases, or abbreviations indicating the type of person, such as "corporation", "corp.", "incorporated", "Inc.", "professional corporation", "PC", "P.C.", "professional association", "PA", "P.A.", "Limited", "Ltd.", "limited partnership", "LP", "L.P.", "limited liability partnership", "LLP", "L.L.P.", "registered limited liability partnership", "RLLP", "R.L.L.P.", "limited liability limited partnership", "LLLP", "L.L.L.P.", "registered limited liability limited partnership", "RLLLP", "R.L.L.L.P.", "limited liability company", "LLC", "L.L.C.", "limited cooperative association", "limited cooperative", "LCA", or "L.C.A." may not be taken into account.

(g) A person may consent in a record to the use of a name that is not distinguishable on the records of the [Secretary of State] from its name except for the addition of a word, phrase, or abbreviation indicating the type of person as provided in subsection (f). In such a case, the person need not change its name pursuant to subsection (e).

(h) The name of a limited partnership or foreign limited partnership may not contain the words [insert prohibited words or words that may be used only with approval by an appropriate state agency].

(i) A limited partnership or foreign limited partnership may use a name that is not

distinguishable from a name described in subsection (d)(1) through (6) if the partnership delivers to the [Secretary of State] a certified copy of a final judgment of a court of competent jurisdiction establishing the right of the partnership to use the name in this state.

Comment

This section adopts the "distinguishable on the records" test for name availability and rejects the "deceptively similar" test widely used in the past.

For name requirements for foreign registered limited partnerships, see Section 1003(1).

SECTION 115. RESERVATION OF NAME.

(a) A person may reserve the exclusive use of a name that complies with Section 114 by delivering an application to the [Secretary of State] for filing. The application must state the name and address of the applicant and the name to be reserved. If the [Secretary of State] finds that the name is available, the [Secretary of State] shall reserve the name for the applicant's exclusive use for [120] days.

(b) The owner of a reserved name may transfer the reservation to another person by delivering to the [Secretary of State] a signed notice in a record of the transfer which states the name and address of the person to which the reservation is being transferred.

Comment

This section does not provide for the renewal of a name reservation for successive 120 day periods. A new reservation may be filed upon the expiration of a reservation, but by requiring a new filing this section creates the possibility that another party may timely submit a reservation for the same name. It was considered appropriate to allow for that possibility so that the procedure in this section cannot be used to block a name indefinitely. *Compare* Section 115, *with* Section 116(d) (authorizing a renewable registration of certain names).

SECTION 116. REGISTRATION OF NAME.

(a) A foreign limited partnership not registered to do business in this state under [Article] 10 may register its name, or an alternate name adopted pursuant to Section 1006, if the name is

distinguishable on the records of the [Secretary of State] from the names that are not available under Section 114.

(b) To register its name or an alternate name adopted pursuant to Section 1006, a foreign limited partnership must deliver to the [Secretary of State] for filing an application stating the partnership's name, the jurisdiction and date of its formation, and any alternate name adopted pursuant to Section 1006. If the [Secretary of State] finds that the name applied for is available, the [Secretary of State] shall register the name for the applicant's exclusive use.

(c) The registration of a name under this section is effective for [one year] after the date of registration.

(d) A foreign limited partnership whose name registration is effective may renew the registration for successive [one-year] periods by delivering, not earlier than [three months] before the expiration of the registration, to the [Secretary of State] for filing a renewal application that complies with this section. When filed, the renewal application renews the registration for a succeeding [one-year] period.

(e) A foreign limited partnership whose name registration is effective may register as a foreign limited partnership under the registered name or consent in a signed record to the use of that name by another person that is not an individual.

Comment

Unlike the reservation of a name under Section 115, a registration of a name under this section may be renewed for successive periods thus permitting a name to be protected for a period longer than the initial registration period. Use of the procedure in this section is limited, however, to the names of foreign limited partnerships which are not registered to do business in the state. The purpose of this section is to permit a foreign entity to make sure its name will be available if it chooses to register in the state in the future.

SECTION 117. REGISTERED AGENT.

(a) Each limited partnership and each registered foreign limited partnership shall

designate and maintain a registered agent in this state. The designation of a registered agent is an affirmation of fact by the limited partnership or registered foreign limited partnership that the agent has consented to serve.

(b) A registered agent for a limited partnership or registered foreign limited partnership must have a place of business in this state.

(c) The only duties under this [act] of a registered agent that has complied with this [act] are:

(1) to forward to the limited partnership or registered foreign limited partnership at the address most recently supplied to the agent by the partnership or foreign partnership any process, notice, or demand pertaining to the partnership or foreign partnership which is served on or received by the agent;

(2) if the registered agent resigns, to provide the notice required by Section 119(c) to the partnership or foreign partnership at the address most recently supplied to the agent by the partnership or foreign partnership; and

(3) to keep current the information with respect to the agent in the certificate of limited partnership.

Comment

This section is limited to prescribing the duties of a registered agent under this act. The partnership agreement cannot vary this section. Section 105(c)(3)(A). However, an agent may undertake other responsibilities to a represented limited partnership or foreign limited partnership, such as by contract or course of dealing, but those duties will be determined under other law.

SECTION 118. CHANGE OF REGISTERED AGENT OR ADDRESS FOR REGISTERED AGENT BY LIMITED PARTNERSHIP.

(a) A limited partnership or registered foreign limited partnership may change its

registered agent or the address of its registered agent by delivering to the [Secretary of State] for filing a statement of change that states:

(1) the name of the partnership or foreign partnership; and

(2) the information that is to be in effect as a result of the filing of the statement of change.

(b) The general or limited partners of a limited partnership need not approve the [delivery to the Secretary of State] for filing of:

(1) a statement of change under this section; or

(2) a similar filing changing the registered agent or registered office, if any, of the partnership in any other jurisdiction.

(c) A statement of change under this section designating a new registered agent is an affirmation of fact by the limited partnership or registered foreign limited partnership that the agent has consented to serve.

(d) As an alternative to using the procedure in this section, a limited partnership may amend its certificate of limited partnership.

Comment

A change in the identity of the registered agent of a limited partnership or foreign limited partnership or a change of the office address of a partnership's registered agent are usually routine matters that do not affect the rights of the partners of the represented limited partnership. This section permits those changes to be made without: (i) amendment of the certificate of limited partnership; (ii) formal approval by the general partners; and (iii) any approval by the limited partners. For the registered agent's power to resign, see Section 119. For the registered agent's power to change its name, address, or both, see Section 120.

Subsection (c) – This subsection avoids the need to file with a statement of change consent of the new registered agent being designated.

Subsection (d) – This subsection makes clear that the procedures in this section are not exclusive. A common way in which a limited partnership changes its registered agent is to include the change in an amendment of its certificate of limited partnership or in its

annual/biennial report. *See* Section 212(e).

SECTION 119. RESIGNATION OF REGISTERED AGENT.

(a) A registered agent may resign as an agent for a limited partnership or registered foreign limited partnership by delivering to the [Secretary of State] for filing a statement of resignation that states:

(1) the name of the partnership or foreign partnership;

(2) the name of the agent;

(3) that the agent resigns from serving as registered agent for the partnership or foreign partnership; and

(4) the address of the partnership or foreign partnership to which the agent will send the notice required by subsection (c).

(b) A statement of resignation takes effect on the earlier of:

(1) the 31st day after the day on which it is filed by the [Secretary of State]; or

(2) the designation of a new registered agent for the limited partnership or registered foreign limited partnership.

(c) A registered agent promptly shall furnish to the limited partnership or registered foreign limited partnership notice in a record of the date on which a statement of resignation was filed.

(d) When a statement of resignation takes effect, the registered agent ceases to have responsibility under this [act] for any matter thereafter tendered to it as agent for the limited partnership or registered foreign limited partnership. The resignation does not affect any contractual rights the partnership or foreign partnership has against the agent or that the agent has against the partnership or foreign partnership.

(e) A registered agent may resign with respect to a limited partnership or registered foreign limited partnership whether or not the partnership or foreign partnership is in good standing.

Comment

Resignation under this section may be accomplished solely by action of the registered agent and does not require the cooperation or consent of the represented limited partnership or registered foreign limited partnership. Whether a resignation violates a contract between the registered agent and the partnership is beyond the scope of this act, and Subsection (d) preserves whatever claims a represented partnership may have against its registered agent for a wrongful termination. Even if a resignation were to violate such a contract, the resignation would still be effective if the provisions of this section were followed.

Subsection (b) – This subsection delays the effectiveness of a statement of resignation for thirty one days to allow the notice of the resignation that must be sent under Subsection (c) to reach the represented limited partnership or registered foreign limited partnership and to allow the partnership to arrange for a substitute registered agent.

Subsection (e) – This subsection makes clear that a registered agent may resign with respect to limited partnership or registered foreign limited partnership that is not in good standing and supersedes the contrary administrative practice in some states of refusing to accept any filings with respect to an entity that is not in good standing until the problem with the entity's standing is cured.

SECTION 120. CHANGE OF NAME OR ADDRESS BY REGISTERED AGENT.

(a) If a registered agent changes its name or address, the agent may deliver to the [Secretary of State] for filing a statement of change that states:

(1) the name of the limited partnership or registered foreign limited partnership represented by the registered agent;

(2) the name of the agent as currently shown in the records of the [Secretary of State] for the partnership or foreign partnership;

(3) if the name of the agent has changed, its new name; and

(4) if the address of the agent has changed, its new address.

(b) A registered agent promptly shall furnish notice to the represented limited partnership

or registered foreign limited partnership of the filing by the [Secretary of State] of the statement of change and the changes made by the statement.

Legislative Note: *Many registered agents act in that capacity for many entities, and the Model Registered Agents Act (2006) (Last Amended 2013) provides a streamlined method through which a commercial registered agent can make a single filing to change its information for all represented entities. The single filing does not prevent an enacting state from assessing filing fees on the basis of the number of entity records affected. Alternatively the fees can be set on an incremental sliding fee or capitated amount based upon potential economies of costs for a bulk filing.*

Comment

This section permits a registered agent to change the name and address of the agent that appears in the registered agent filing of a limited partnership or foreign limited partnership represented by the agent. This act does not provide for commercial registered agents. *Cf.* UBOC (2011) (Last Amended 2013) §§ 1-405, 1-406, 1-409. As a result, a registered agent will need to make a separate filing under this section for each limited partnership and foreign limited partnership represented by the agent, unless, if authorized by rule or administrative policy, the filing office establishes procedures for a bulk filing with one filing listing the names of all the registered agent's represented entities.

SECTION 121. SERVICE OF PROCESS, NOTICE, OR DEMAND.

(a) A limited partnership or registered foreign limited partnership may be served with any process, notice, or demand required or permitted by law by serving its registered agent.

(b) If a limited partnership or registered foreign limited partnership ceases to have a registered agent, or if its registered agent cannot with reasonable diligence be served, the partnership or foreign partnership may be served by registered or certified mail, return receipt requested, or by similar commercial delivery service, addressed to the partnership or foreign partnership at its principal office. The address of the principal office must be as shown in the partnership's or foreign partnership's most recent [annual] [biennial] report filed by the [Secretary of State]. Service is effected under this subsection on the earliest of:

(1) the date the partnership or foreign partnership receives the mail or delivery by the commercial delivery service;

(2) the date shown on the return receipt, if signed by the partnership or foreign partnership; or

(3) five days after its deposit with the United States Postal Service, or with the commercial delivery service, if correctly addressed and with sufficient postage or payment.

(c) If process, notice, or demand cannot be served on a limited partnership or registered foreign limited partnership pursuant to subsection (a) or (b), service may be made by handing a copy to the individual in charge of any regular place of business or activity of the partnership or foreign partnership if the individual served is not a plaintiff in the action.

(d) Service of process, notice, or demand on a registered agent must be in a written record.

(e) Service of process, notice, or demand may be made by other means under law other than this [act].

Comment

Subsection (b) – This subsection offers three alternative methods for establishing the date service is effected, a date important for determining the time within which a limited partnership or registered foreign limited partnership must respond to the process, notice, or demand served. Under Subsection (b)(1), service is effected on the date or receipt by the partnership of the mail or commercial delivery. Under Subsection (b)(2), service is effected on the date shown on the return receipt, if signed on behalf of the partnership. Under Subsection (b)(3), service is effected five days after it is deposited with the Postal Service or with a similar commercial delivery service, if correctly addressed and with correct postage or payment. Service is effective at the earliest of the three listed circumstances.

However, for the party effecting service there are difficulties of proof under the first two circumstances. Under Subsection (b)(1) the exact date of the receipt by the limited partnership or registered foreign limited partnership of mail or commercial delivery is peculiarly within the knowledge of the limited partnership. Under Subsection (b)(2) the return receipt must be signed on behalf of the partnership. That requirement is designed to assure that the service is actually received by the partnership, but the signature on the return receipt may not always show unambiguously that the signer was acting for the partnership and was authorized to do so. As a practical matter, therefore, parties effecting service under Subsection (b) may find it most convenient to rely on Subsection (c) and to maintain their own records so that the date of deposit in the mails or with a commercial delivery service can easily be established.

Subsection (c) – This subsection provides a means for serving process on a limited partnership or foreign limited partnership that cannot be served under Subsection (a) or (b). Some limited partnership statutes require or permit service of process in that circumstance be made on the filing office.

Subsection (e) – *See, e.g.,* Fed. R. Civ. P. 4(h)(1)(B) (authorizing service on "a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name" to be made on "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process").

SECTION 122. DELIVERY OF RECORD.

(a) Except as otherwise provided in this [act], permissible means of delivery of a record include delivery by hand, mail, conventional commercial practice, and electronic transmission.

(b) Delivery to the [Secretary of State] is effective only when a record is received by the [Secretary of State].

Comment

Subsection (a) – Permissible means of delivery are not limited to those listed in this subsection, because this subsection by its terms is a non-exclusive list. Conventional commercial practice includes the use of private delivery or courier services. What constitutes conventional commercial practice may change over time.

Subsection (b) – This section lists permissible means of delivery but, except for delivery to the filing office, does not determine when delivery occurs. Delivery to the filing office is effective only upon actual receipt.

SECTION 123. RESERVATION OF POWER TO AMEND OR REPEAL. The [legislature of this state] has power to amend or repeal all or part of this [act] at any time, and all limited partnerships and foreign limited partnerships subject to this [act] are governed by the amendment or repeal.

Comment

Provisions similar to this section have their genesis in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat) 518 (1819), which held that the United States Constitution prohibited the application of newly enacted statutes to existing corporations while suggesting the efficacy of a reservation of power similar to this section. This section is a generalized form of the type of provision found in many entity organic laws, the purpose of which is to avoid any

possible argument that an entity has contractual or vested rights in any specific statutory provision of its organic law and to ensure that the state may in the future modify its entity statutes as it deems appropriate and require existing entities to comply with the statutes as modified.

This section applies to changes in mandatory provisions of this act; the section does not pertain to changes in default rules.

> EXAMPLE: Having enacted this act, State A later amends Section 401(b)(3) (affirmative vote or consent of all partners required for a person to become a general partner) to reduce, as a default rule, the necessary quantum of consent to consent from partners owning in the aggregate at least two-third of the interests in current profits owned by partners at the time of the consent. XYZ, LP is a limited partnership formed under State A's act before the amendment. XYZ's partnership agreement is silent on this issue, leaving in place the act's default rule. Whether the act's amended default rule applies depends on whether the partners initially: (i) agreed (whether expressly or implicitly) to accept the then-applicable default rule requiring unanimous consent; (ii) agreed (whether expressly or implicitly) to adopt whatever rule the act provided; or (iii) never considered the issue. In short, the change in a default rule occasions an inquiry into the partners' express or implied agreement as to the role of the default rule in their mutual understanding. In the first instance, the old rule would continue in effect. In the second and third instances, the new rule would apply.

[ARTICLE] 2

FORMATION; CERTIFICATE OF

LIMITED PARTNERSHIP AND OTHER FILINGS

SECTION 201. FORMATION OF LIMITED PARTNERSHIP; CERTIFICATE OF LIMITED PARTNERSHIP.

(a) To form a limited partnership, a person must deliver a certificate of limited partnership to the [Secretary of State] for filing.

(b) A certificate of limited partnership must state:

(1) the name of the limited partnership, which must comply with Section 114;

(2) the street and mailing addresses of the partnership's principal office;

(3) the name and street and mailing addresses in this state of the partnership's registered agent;

(4) the name and street and mailing addresses of each general partner; and

(5) whether the limited partnership is a limited liability limited partnership.

(c) A certificate of limited partnership may contain statements as to matters other than those required by subsection (b), but may not vary or otherwise affect the provisions specified in Section 105(c) and (d) in a manner inconsistent with that section.

(d) A limited partnership is formed when:

(1) the certificate of limited partnership becomes effective;

(2) at least two persons have become partners;

(3) at least one person has become a general partner; and

(4) at least one person has become a limited partner.

Comment

For a limited partnership to be formed (*i.e.*, to come into existence), four conditions must be met: (i) a certificate of limited partnership must become effective; (ii) at least two persons must become a partners; (iii) at least one person must become a general partner; and (iv) at least one person must become a limited partner.

By definition, the earliest a person can become a limited partner is when the certificate of limited partnership takes effect. *See* Section 102(11) (defining "limited partner" as a person that "has become a limited partner under Section 301"). However, a certificate of limited partnership can take effect long before any person becomes a limited partner, and the act does not require any public filing to indicate that a person has become a limited partner. Therefore, the public record will not reflect when (and even whether) a limited partnership has come into existence. *See also* Section 211, cmt.

Subsection (b) – Consistent with the modern trend, this act requires only the most "bare bones" of disclosure.

Subsection (b)(4) – The requirement to identify all general partners dates back to 1916. ULPA (1916) § 2. When a person dissociates as a general partner or a person becomes a new general partner, the certificate must be amended. *See* Section 202(d). However, a person can become a general partner for many purposes without being listed as such on the certificate. *See* Section 401, cmt.

Section (b)(5) – This act permits a limited partnership to be a limited liability limited partnership ("LLLP"), and this provision requires the certificate of limited partnership to state

whether the limited partnership is an LLLP. The requirement is intended to force the organizers of a limited partnership to decide whether the limited partnership is to be an LLLP.

Subject to Sections 406(b)(2) and 105(c)(5), a limited partnership may amend its certificate of limited partnership to add or delete a statement that the limited partnership is a limited liability limited partnership. An amendment deleting such a statement must be accompanied by an amendment stating that the limited partnership is *not* a limited liability limited partnership. Section 201(b)(5) does not permit a certificate of limited partnership to be silent on this point, except for pre-existing partnerships that become subject to this act under Section 112. *See* Section 112(c)(2).

Subsection (c) – This provision permits the certificate of limited partnership to contain information beyond that required in Subsection (b). A limited partnership should have good reason, however, before choosing to include additional information. Such information: (i) is available to the public (including competitors); (ii) increases the chances of a conflict between the certificate of limited partnership and the partnership agreement, *see* Section 107(d); (iii) permits the argument that the additional information is part of the partnership agreement, *see* Section 102(14), cmt. (stating that "[t]he partnership agreement may comprise a number of separate documents (or records), however denominated, unless the partnership agreement itself provides otherwise"); and (iv) can be confusing to the extent the information appears to delineate the power of persons to act for the limited partnership. In any event, placing additional information in the certificate of limited partnership does not enable a limited partnership to "end run" the provisions of Section 105(c) and (d) (limiting the power of the partnership agreement to vary specified provisions of this act).

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE OF LIMITED PARTNERSHIP.

(a) A certificate of limited partnership may be amended or restated at any time.

(b) To amend its certificate of limited partnership, a limited partnership must deliver to the [Secretary of State] for filing an amendment stating:

(1) the name of the partnership;

(2) the date of filing of its initial certificate; and

(3) the text of the amendment.

(c) To restate its certificate of limited partnership, a limited partnership must deliver to the [Secretary of State] for filing a restatement, designated as such in its heading.

(d) A limited partnership shall promptly deliver to the [Secretary of State] for filing an

amendment to a certificate of limited partnership to reflect:

(1) the admission of a new general partner;

(2) the dissociation of a person as a general partner; or

(3) the appointment of a person to wind up the limited partnership's activities and affairs under Section 802(c) or (d).

(e) If a general partner knows that any information in a filed certificate of limited partnership was inaccurate when the certificate was filed or has become inaccurate due to changed circumstances, the general partner shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the [Secretary of State] for filing a statement of change under Section 118 or a statement of correction under Section 209.

Comment

Like other provisions of the act requiring records to be delivered to the filing officer for filing, this section is not subject to change by the partnership agreement. *See* Section 105(c)(3). Except for Subsection (d), this section is essentially mechanical.

Subsection (d) – This subsection lists changes in circumstances which require an amendment to the certificate. Neither a statement of change, Section 118, nor the annual/biennial report, Section 212, suffice to report the addition or deletion of a general partner or the appointment of a person to wind up a limited partnership that has no general partner.

Acquiring or relinquishing LLLP status also requires an amendment to the certificate. *See* Sections 105(c)(5), 201(b)(5), 406(b)(2).

This subsection states an obligation of the limited partnership. However, so long as the limited partnership has at least one general partner, the general partner or partners are responsible for managing the limited partnership's activities. Section 406(a). That management responsibility includes maintaining accuracy in the limited partnership's public record. Moreover, Subsection (e) imposes direct responsibility on any general partner that knows that the filed certificate of limited partnership contains false information.

Subsection (e) – This subsection imposes an obligation directly on the general partners rather than on the limited partnership. A general partner's failure to meet the obligation can expose the general partner to liability to third parties under Section 205(a)(2) and might

constitute a breach of the general partner's duties under Section 409(c). In addition, an aggrieved person may seek a remedy under Sections 204 (Signing and Filing Pursuant to Judicial Order) and 205(Liability for Inaccurate Information in Filed Record).

SECTION 203. SIGNING OF RECORDS TO BE DELIVERED FOR FILING TO [SECRETARY OF STATE].

(a) A record delivered to the [Secretary of State] for filing pursuant to this [act] must be signed as follows:

(1) An initial certificate of limited partnership must be signed by all general partners listed in the certificate.

(2) An amendment to the certificate of limited partnership adding or deleting a statement that the limited partnership is a limited liability limited partnership must be signed by all general partners listed in the certificate.

(3) An amendment to the certificate of limited partnership designating as general partner a person admitted under Section 801(a)(3)(B) following the dissociation of a limited partnership's last general partner must be signed by that person.

(4) An amendment to the certificate of limited partnership required by Section 802(c) following the appointment of a person to wind up the dissolved limited partnership's activities and affairs must be signed by that person.

(5) Any other amendment to the certificate of limited partnership must be signed by:

(A) at least one general partner listed in the certificate;

(B) each person designated in the amendment as a new general partner; and

(C) each person that the amendment indicates has dissociated as a general

partner, unless:

(i) the person is deceased or a guardian or general conservator has been appointed for the person and the amendment so states; or

(ii) the person has previously delivered to the [Secretary of State] for filing a statement of dissociation.

(6) A restated certificate of limited partnership must be signed by at least one general partner listed in the certificate, and, to the extent the restated certificate effects a change under any other paragraph of this subsection, the certificate must be signed in a manner that satisfies that paragraph.

(7) A statement of termination must be signed by all general partners listed in the certificate of limited partnership or, if the certificate of a dissolved limited partnership lists no general partners, by the person appointed pursuant to Section 802(c) or (d) to wind up the dissolved limited partnership's activities and affairs.

(8) Any other record delivered by a limited partnership to the [Secretary of State] for filing must be signed by at least one general partner listed in the certificate of limited partnership.

(9) A statement by a person pursuant to Section 605(a)(3) stating that the person has dissociated as a general partner must be signed by that person.

(10) A statement of negation by a person pursuant to Section 306 must be signed by that person.

(11) Any other record delivered on behalf of a person to the [Secretary of State] for filing must be signed by that person.

(b) Any record delivered for filing under this [act] may be signed by an agent. Whenever

this [act] requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.

(c) A person that signs a record as an agent or legal representative thereby affirms as a fact that the person is authorized to sign the record.

Comment

Subsection (a) – Section 102(22) defines "sign" broadly, including "an electronic symbol, sound, or process."

Subsection (b) – The filing office will not check the bona fides of a person purporting to have signed a record in a representative capacity. This subsection expressly authorizes taking action through an agent so as to provide context for Subsection (c) and for the avoidance of doubt. No negative inference should be drawn about using agents to take other action under this act.

Subsection (c) – As a matter of agency law, a person who signs in a representative capacity gives a "warranty of authority." RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006) (Agent's Implied Warranty of Authority). This subsection also has criminal law implications. Under Section 205(b), "[a]n individual who signs a record authorized or required to be filed under this [act] affirms under penalty of perjury that the information stated in the record is accurate."

SECTION 204. SIGNING AND FILING PURSUANT TO JUDICIAL ORDER.

(a) If a person required by this [act] to sign a record or deliver a record to the [Secretary of State] for filing under this [act] does not do so, any other person that is aggrieved may petition [the appropriate court] to order:

(1) the person to sign the record;

(2) the person to deliver the record to the [Secretary of State] for filing; or

(3) the [Secretary of State] to file the record unsigned.

(b) If a petitioner under subsection (a) is not the limited partnership or foreign limited partnership to which the record pertains, the petitioner shall make the partnership or foreign partnership a party to the action.

(c) A record filed under subsection (a)(3) is effective without being signed.

Comment

This section gives the court the flexibility to order either that a record be signed or that the record be filed by the filing office unsigned. The latter circumstance may arise, for example, in a situation where the person who should sign the record is not subject to the jurisdiction of the court. This section also makes clear that the court may order a person with control over a record that has been signed to deliver the record to the filing office for filing.

SECTION 205. LIABILITY FOR INACCURATE INFORMATION IN FILED RECORD.

(a) If a record delivered to the [Secretary of State] for filing under this [act] and filed by the [Secretary of State] contains inaccurate information, a person that suffers loss by reliance on the information may recover damages for the loss from:

(1) a person that signed the record, or caused another to sign it on the person's behalf, and knew the information to be inaccurate at the time the record was signed; and

(2) a general partner if:

(A) the record was delivered for filing on behalf of the partnership; and

(B) the general partner knew or had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the general partner reasonably could have:

(i) effected an amendment under Section 202;

(ii) filed a petition under Section 204; or

(iii) delivered to the [Secretary of State] for filing a statement of change under Section 118 or a statement of correction under Section 209.

(b) An individual who signs a record authorized or required to be filed under this [act] affirms under penalty of perjury that the information stated in the record is accurate.

Comment

Subsection (a) – This subsection relates to liability to third parties for inaccurate information in a filed record. Paragraph 1 requires actual knowledge because the paragraph can inculpate a person who is not a general partner. Under Paragraph 2(B), notice suffices, because: (i) the provision applies only to general partners; (ii) by status these persons have overall management authority; and (iii) therefore it is reasonable to impose liability when a person either knows or "has reason to know … from all the facts known to the person at the time in question." Section 103(b)(1) (defining notice). For the same reason, Paragraph 1 applies only to "information [known] to be inaccurate at the time the record was signed," while Paragraph 2 applies whenever a "general partner knew or had notice of the inaccuracy for a reasonably sufficient time before the information was relied upon so that, before the reliance, the general partner reasonably could have [taken corrective action]." Paragraph (2)(B).

Subsection (a)(2) – Although this act establishes the avoidance of gross negligence as the standard of care for general partners viz-a-viz the limited partnership, this provision encompasses liability to third parties. Accordingly, the standard here is more demanding. The phrases "reasonably sufficient time" and "reasonably could have" indicate a standard of ordinary care. "[N]otice of the inaccuracy" involves "reason to know." Section 103(b)(1)

Subsection (b) – This subsection provides criminal liability. The elements of perjury are a matter for the criminal law of the jurisdiction of formation.

SECTION 206. FILING REQUIREMENTS.

(a) To be filed by the [Secretary of State] pursuant to this [act], a record must be received by the [Secretary of State], must comply with this [act], and satisfy the following:

(1) The filing of the record must be required or permitted by this [act].

(2) The record must be physically delivered in written form unless and to the extent the [Secretary of State] permits electronic delivery of records.

(3) The words in the record must be in English, and numbers must be in Arabic or Roman numerals, but the name of an entity need not be in English if written in English letters or Arabic or Roman numerals.

(4) The record must be signed by a person authorized or required under this [act] to sign the record.

(5) The record must state the name and capacity, if any, of each individual who

signed it, either on behalf of the individual or the person authorized or required to sign the record, but need not contain a seal, attestation, acknowledgment, or verification.

(b) If law other than this [act] prohibits the disclosure by the [Secretary of State] of information contained in a record delivered to the [Secretary of State] for filing, the [Secretary of State] shall file the record if the record otherwise complies with this [act] but may redact the information.

(c) When a record is delivered to the [Secretary of State] for filing, any fee required under this [act] and any fee, tax, interest, or penalty required to be paid under this [act] or law other than this [act] must be paid in a manner permitted by the [Secretary of State] or by that law.

(d) The [Secretary of State] may require that a record delivered in written form be accompanied by an identical or conformed copy.

(e) The [Secretary of State] may provide forms for filings required or permitted to be made by this [act], but, except as otherwise provided in subsection (f), their use is not required.

(f) The [Secretary of State] may require that a cover sheet for a filing be on a form prescribed by the [Secretary of State].

Comment

The filing office's duty under this section is ministerial, Section 210(a), and the office's assessment of a record delivered for filing is limited to conformity with this section. The filing office *must* file a record delivered for filing if the record contains the information required by this act and is accompanied by the required filing fee. The filing office is authorized to provide forms but not require their use, and, as a result, may not reject records delivered for filing on the basis of form (except to the very limited extent permitted by Subsections (d) and (f)).

In view of the very limited discretion granted to the filing office under this section and Section 210(a), "[t]he filing of … a record does not create a presumption that the information contained in the record is correct…." Section 210(e).

Subsection (a) – The first requisite for having a record filed is to cause the record actually to be received by the filing office. Section 122(b) reiterates this point.

Subsection (a)(2) – A record delivered for filing must be in typewritten or printed form

unless the filing office permits delivery by electronic transmission. The types of electronic transmission that may be used will be determined by the filing office and is intended to include the evolving methods of electronic delivery, including facsimile transmissions, electronic transmissions between computers and filings through delivery of storage media.

Subsection (a)(3) – The text of an entity filing must be in the English language, except to the limited extent permitted by this paragraph.

Subsection (a)(4) – To be filed a record must be signed by the appropriate person. For a description of the manner in which a record may be "signed," see Section 102(22) (defining "sign"). Who is an appropriate person is determined under Section 203, but the filing office will not check to determine whether a person purportedly authorized to sign is in fact authorized.

The requirement in some state statutes that records delivered for filing on behalf of an entity must be acknowledged or verified as a condition for filing has been rejected. These requirements serve little purpose in connection with entity filings. On the other hand, many organizations, like lenders or title companies, may desire that specific records include acknowledgements, verifications, or seals; Subsection (a)(4) does not prohibit the addition of these forms of execution and their use does not affect the eligibility of the record for filing.

Subsection (b) – Under this subsection, a confidentiality obligation does not affect the filing office's duty to file, and the filing office is authorized but not required to redact. This act does not affect any confidentiality-related obligations the filing office may have under other law.

SECTION 207. EFFECTIVE DATE AND TIME. Except as otherwise provided in Section 208 and subject to Section 209(d), a record filed under this [act] is effective:

(1) on the date and at the time of its filing by the [Secretary of State], as provided in Section 210(b);

(2) on the date of filing and at the time specified in the record as its effective time, if later than the time under paragraph (1);

(3) at a specified delayed effective date and time, which may not be more than 90 days after the date of filing; or

(4) if a delayed effective date is specified, but no time is specified, at 12:01 a.m. on the date specified, which may not be more than 90 days after the date of filing.

Comment

Records accepted for filing become effective at the date and time of filing as recorded by the filing office, or at another specified time on that date, unless a permissible delayed effective date is stated in the record.

Section 210(b) requires the filing office to maintain some means of recording the date and time of delivery of a record and requires that office to record that date and time as the date and time of filing. That provision gives express statutory authority to the common practice of most filing offices of ignoring processing time and treating a record as filed as of the date and time it is delivered for filing even though it may not be reviewed and accepted for filing until several days after delivery. That section contemplates that time of delivery, as well as the date, will be routinely recorded.

Paragraph (1) – In the absence of provision for a delayed effective date, a record delivered for filing becomes effective on the date and time of filing by the filing office. Since under 210(b) the date and time of filing is the recorded date and time of delivery of the record to the filing office (which under Section 210(b) is the date and time of actual receipt), together these provisions eliminate any doubt about situations involving same-day transactions in which a record, for example, a statement of merger, is delivered for filing on the morning of the day the merger is to become effective.

Paragraph (3) – This paragraph does not authorize or contemplate the retroactive establishment of an effective date before the date of filing.

Paragraphs (3) and (4) – A record that states an effective date beyond the 90-day limit is not a record that "satisfies this [act]," Section 210(a), and will properly be rejected by the filing office.

SECTION 208. WITHDRAWAL OF FILED RECORD BEFORE EFFECTIVENESS.

(a) Except as otherwise provided in Sections 1124, 1134, 1144, and 1154, a record delivered to the [Secretary of State] for filing may be withdrawn before it takes effect by delivering to the [Secretary of State] for filing a statement of withdrawal.

(b) A statement of withdrawal must:

(1) be signed by each person that signed the record being withdrawn, except as otherwise agreed by those persons;

(2) identify the record to be withdrawn; and

(3) if signed by fewer than all the persons that signed the record being withdrawn, state that the record is withdrawn in accordance with the agreement of all the persons that signed the record.

(c) On filing by the [Secretary of State] of a statement of withdrawal, the action or transaction evidenced by the original record does not take effect.

Comment

Only records that have not yet taken effect may be withdrawn under this section. If a record has taken effect, it may be corrected under Section 209 if the requirements of that section are satisfied. Otherwise, the record must be amended in accordance with this act or, if the record is a certificate of limited partnership, the resulting limited partnership may be dissolved and terminated in accordance with Article 8.

Subsection (b)(1) – This provision is subject to Section 203(b) ("Whenever this [act] requires a particular individual to sign a record and the individual is deceased or incompetent, the record may be signed by a legal representative of the individual.").

SECTION 209. CORRECTING FILED RECORD.

(a) A person on whose behalf a filed record was delivered to the [Secretary of State] for filing may correct the record if:

(1) the record at the time of filing was inaccurate;

(2) the record was defectively signed; or

(3) the electronic transmission of the record to the [Secretary of State] was defective.

(b) To correct a filed record, a person on whose behalf the record was delivered to the [Secretary of State] must deliver to the [Secretary of State] for filing a statement of correction.

(c) A statement of correction:

(1) may not state a delayed effective date;

(2) must be signed by the person correcting the filed record;

(3) must identify the filed record to be corrected;

(4) must specify the inaccuracy or defect to be corrected; and

(5) must correct the inaccuracy or defect.

(d) A statement of correction is effective as of the effective date of the filed record that it corrects except for purposes of Section 103(d) and as to persons relying on the uncorrected filed record and adversely affected by the correction. For those purposes and as to those persons, the statement of correction is effective when filed.

Comment

This section permits making corrections in filed records without re-submitting the entire record.

Subsection (a)(1) and (2) – A filed record may be corrected because it contains an inaccuracy or because it was defectively executed (including defects in optional forms of execution that do not affect the eligibility of the original record for filing).

Subsection (a)(3) – In addition, a filed record may be corrected if its electronic transmission was defective – *i.e.*, where an electronic delivery is made but, due to a defect in transmission, the filed record is later discovered to be inconsistent with the record intended to be filed. If no delivery is made because of a defect in transmission, a statement of correction may not be used to effect a retroactive filing. Therefore, a limited partnership making an electronic delivery should take steps to confirm that the transmission was received by the filing office.

Subsection (c) – A provision in a filed record setting an effective date may be corrected under this section, but the corrected effective date must comply with Section 207, which limits delayed effective dates to within ninety days after filing. A corrected effective date is thus measured from the date of the original filing of the record being corrected, *i.e.*, it cannot be before the date of filing of the record or more than ninety days thereafter.

Subsection (d) – The correction relates back to the original effective date of the record being corrected, except as to persons relying on the original entity filing and adversely affected by the correction. As to these persons, the effective date of the statement of correction is the date the statement is filed.

SECTION 210. DUTY OF [SECRETARY OF STATE] TO FILE; REVIEW OF REFUSAL TO FILE; DELIVERY OF RECORD BY [SECRETARY OF STATE].

(a) The [Secretary of State] shall file a record delivered to the [Secretary of State] for

filing which satisfies this [act]. The duty of the [Secretary of State] under this section is ministerial.

(b) When the [Secretary of State] files a record, the [Secretary of State] shall record it as filed on the date and at the time of its delivery. After filing a record, the [Secretary of State] shall deliver to the person that submitted the record a copy of the record with an acknowledgment of the date and time of filing.

(c) If the [Secretary of State] refuses to file a record, the [Secretary of State] shall, not later than [15] business days after the record is delivered:

(1) return the record or notify the person that submitted the record of the refusal; and

(2) provide a brief explanation in a record of the reason for the refusal.

(d) If the [Secretary of State] refuses to file a record, the person that submitted the record may petition [the appropriate court] to compel filing of the record. The record and the explanation of the [Secretary of State] of the refusal to file must be attached to the petition. The court may decide the matter in a summary proceeding.

(e) The filing of or refusal to file a record does not:

(1) affect the validity or invalidity of the record in whole or in part; or

(2) create a presumption that the information contained in the record is correct or incorrect.

(f) Except as otherwise provided by Section 121 or by law other than this [act], the [Secretary of State] may deliver any record to a person by delivering it:

(1) in person to the person that submitted it;

(2) to the address of the person's registered agent;

(3) to the principal office of the person; or

(4) to another address the person provides to the [Secretary of State] for delivery.

Comment

Subsection (a) – Under this subsection the filing office is required to file a record if it "satisfies this [act]." The purpose of this language is to limit the discretion of the filing office to a ministerial role in reviewing the contents of records. If the record submitted is in the form prescribed, contains the information required by this act, and the appropriate filing fee is tendered, the filing office must file the record. Consistent with this approach, this subsection states explicitly that the filing duty of the filing office is ministerial. *See also* Subsection (e) (pertaining to presumptions not created).

Subsection (b) – This subsection provides that when the filing office files a record, the filing office records it as filed on the date and time of delivery to the filing office, retains the original record for the office's records, and delivers a copy of the record to the person who delivered the record for filing with an acknowledgement of the date and time of filing.

In the case of a record transmitted electronically to the filing office, that office may make delivery by electronic transmission. The copy returned will be the exact or conformed copy if one has been required by the filing office, or will be a copy made by the filing office if an exact or conformed copy was not required.

Under this subsection the acceptance of a filing is evidenced merely by the filing office's delivery of a copy of the record with an acknowledgment of the date and time of filing. The act does not provide for the filing office to issue a formal certificate of filing. A copy of the filed record together with an acknowledgment of the date and time of filing should sufficiently indicate that the filing has been accepted for filing and been filed.

Subsection (c) – Because of the simplification of formal filing requirements and the limited discretion granted to the filing office by this act, it is probable that rejection of records delivered to the filing office for filing will occur only rarely. This subsection provides that if the filing office does reject a record delivered for filing, the filing office must return the record to the person that submitted the filing within fifteen days together with a brief written explanation of the reason for rejection. In the case of a record delivered by electronic transmission, rejection of the record may be made electronically by the filing office or by a mailing to the person that submitted the record.

Subsection (e) – This subsection provides that the filing of a record by the filing office does not affect the validity or invalidity of any provision contained in the record and does not create any presumption with respect to any information in the record. Likewise, the refusal of the filing office to file a record creates no presumption that any of the information in the record is incorrect. Persons adversely affected by a statement in a filed record may contest the statement in a proceeding appropriate for that purpose, including a damage action under Section 205.

SECTION 211. CERTIFICATE OF GOOD STANDING OR REGISTRATION.

(a) On request of any person, the [Secretary of State] shall issue a certificate of good standing for a limited partnership or a certificate of registration for a registered foreign limited partnership.

(b) A certificate under subsection (a) must state:

(1) the limited partnership's name or the registered foreign limited partnership's name used in this state;

(2) in the case of a limited partnership:

(A) that a certificate of limited partnership has been filed and has taken effect;

(B) the date the certificate became effective;

(C) the period of the partnership's duration if the records of the [Secretary of State] reflect that its period of duration is less than perpetual; and

(D) that:

(i) no statement of administrative dissolution, or statement of termination has been filed;

(ii) the records of the [Secretary to State] do not otherwise reflect that the partnership has been dissolved or terminated; and

(iii) a proceeding is not pending under Section 811;

(3) in the case of a registered foreign limited partnership, that it is registered to do business in this state;

(4) that all fees, taxes, interest, and penalties owed to this state by the limited partnership or the foreign partnership and collected through the [Secretary of State] have been

paid, if:

(A) payment is reflected in the records of the [Secretary of State]; and

(B) nonpayment affects the good standing or registration of the partnership or foreign partnership;

(5) that the most recent [annual] [biennial] report required by Section 212 has been delivered to the [Secretary of State] for filing; and

(6) other facts reflected in the records of the [Secretary of State] pertaining to the limited partnership or foreign limited partnership which the person requesting the certificate reasonably requests.

(c) Subject to any qualification stated in the certificate, a certificate issued by the [Secretary of State] under subsection (a) may be relied on as conclusive evidence of the facts stated in the certificate.

Comment

This section establishes a procedure by which anyone may obtain a conclusive certificate from the filing office that, among other things, the records of the filing office either (i) do not indicate that a particular domestic limited partnership has ceased to exist; or (ii) indicate that a particular foreign limited partnership is registered to do business in the state. The certificate will probably be a standardized form. The filing office is to make those determinations from public records only and is neither expected nor permitted to make a more extensive investigation.

Thus, the certificate of good standing will state whether a certificate has been filed and become effective but not that the limited partnership has been formed. For two reasons, a certificate concerning a domestic limited partnership can never conclusively indicate whether the limited partnership has actually been formed and, if formed, whether the limited partnership has been dissolved. Formation depends in part on the occurrence of an act "not of record." *See* Section 201(d) (providing that a limited partnership is formed only when the certificate of limited partnership becomes effective *and* the requisite number of persons have become partners, general partners, and limited partners). Similarly, causes of dissolution are typically "not of record." *See* Section 801. A dissolved limited partnership may deliver for filing an amendment to the certificate of limited partnership stating that the partnership is dissolved, Section 802(b)(2)(A), and the filing of such an amendment would preclude the issuance of a certificate of good standing, Subsection (b)(2)(D)(ii). However, such an amendment is permissive as is a statement of termination. *See* Section 802(b)(2)(F). Thus, the public record might not reflect

either the dissolution or termination of a limited partnership.

Subsection (b)(4) – This provision refers only to fees, taxes, interest, and penalties collected by the filing office. In some states other agencies may report to the filing office that franchise or other taxes have been paid; in those states, this information may be included in the certificate. In states where this procedure does not unduly delay the issuance of certificates, this section may be revised appropriately. Subsection (b)(4)(B) limits the scope of the statement in the certificate that all fees, taxes, interest, and penalties have been paid to those where nonpayment affects the existence or authorization to do business of the entity.

Subsection (b)(2)(D)(ii) – The most likely application of this provision is an amendment to a "certificate of limited partnership to state that the partnership is dissolved." Section 802(b)(2)(A).

SECTION 212. [ANNUAL] [BIENNIAL] REPORT FOR [SECRETARY OF STATE].

(a) A limited partnership or registered foreign limited partnership shall deliver to the [Secretary of State] for filing [an annual] [a biennial] report that states:

(1) the name of the partnership or foreign partnership;

(2) the name and street and mailing addresses of its registered agent in this state;

(3) the street and mailing addresses of its principal office;

(4) the name of at least one general partner; and

(5) in the case of a foreign partnership, its jurisdiction of formation and any alternate name adopted under Section 1006(a).

(b) Information in the [annual] [biennial] report must be current as of the date the report is signed by the limited partnership or registered foreign limited partnership.

(c) The first [annual] [biennial] report must be delivered to the [Secretary of State] for filing after [January 1] and before [April 1] of the year following the calendar year in which the limited partnership's certificate of limited partnership became effective or the registered foreign limited partnership registered to do business in this state. Subsequent [annual] [biennial] reports

must be delivered to the [Secretary of State] for filing after [January 1] and before [April 1] of each [second] calendar year thereafter.

(d) If [an annual] [a biennial] report does not contain the information required by this section, the [Secretary of State] promptly shall notify the reporting limited partnership or registered foreign limited partnership in a record and return the report for correction.

(e) If [an annual] [a biennial] report contains the name or address of a registered agent which differs from the information shown in the records of the [Secretary of State] immediately before the report becomes effective, the differing information is considered a statement of change under Section 118.

Comment

In some states, an annual or biennial report by a limited partnership or registered foreign limited partnership will be a new requirement.

Subsection (a)(4) – The requirement that the report include the name of at least one general partner will be a new requirement in some states. There has been increasing pressure from law enforcement agencies for access to more information about the ownership and control of legal entities. This requirement will enable law enforcement to contact a person with some knowledge about the affairs of the limited partnership. Members of the public will also have that ability.

This requirement is separate from the requirement that the certificate of limited partnership always list all current general partners. *See* Sections 201(b)(4), 202(d), 401, cmt.

[ARTICLE] 3

LIMITED PARTNERS

SECTION 301. BECOMING LIMITED PARTNER.

(a) Upon formation of a limited partnership, a person becomes a limited partner as agreed among the persons that are to be the initial partners.

(b) After formation, a person becomes a limited partner:

(1) as provided in the partnership agreement;

(2) as the result of a transaction effective under [Article] 11;

(3) with the affirmative vote or consent of all the partners; or

(4) as provided in Section 801(a)(4) or (a)(5).

(c) A person may become a limited partner without:

(1) acquiring a transferable interest; or

(2) making or being obligated to make a contribution to the limited partnership.

Comment

Subsection (b)(3) – A limited partnership being in part a creature of contract, consent is determined on an objective basis (*i.e.*, contract law's "reasonable person" standard). Depending on the terms of a limited partnership agreement, the partners' manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the partnership agreement might reduce the quantum of consent necessary or shift the consent exclusively to the general partners.

Given that a limited partnership is a voluntary association, a person cannot become a partner of a limited partnership without manifesting consent to do so. That consent also is judged objectively.

Under Section 106(b), "[a] person that becomes a partner is deemed to assent to the partnership agreement," and the agreement binds the partner regardless of whether the partner has actually indicated assent in any way.

Subsection (d) – To accommodate business practices and also because a limited partnership need not have a business purpose, this subsection permits so-called "non-economic partners."

SECTION 302. NO AGENCY POWER OF LIMITED PARTNER AS LIMITED PARTNER.

(a) A limited partner is not an agent of a limited partnership solely by reason of being a limited partner.

(b) A person's status as a limited partner does not prevent or restrict law other than this [act] from imposing liability on a limited partnership because of the person's conduct.

Comment

Subsection (a) – In this respect a limited partner is analogous to a shareholder in a corporation; in each case, status as owner provides neither the right to manage nor a reasonable appearance of that right. The phrase "solely by reason of being a limited partner" conforms to Subsection (b).

Subsection (b) – The phrase "as a limited partner" indicates that: (i) this section does not disable a general partner that also owns a limited partner interest; (ii) the partnership agreement may as a matter of contract allocate managerial rights to one or more limited partners; and (iii) a separate agreement can empower and entitle a person that is a limited partner to act for the limited partnership in another capacity, *e.g.*, as an agent. *See* Section 305(a), cmt.

The fact that a limited partner *qua* limited partner has no power to bind the limited partnership means that, subject to Section 109 (Dual Capacity), information possessed by a limited partner is not attributed to the limited partnership. *See* Section 103(f).

This act specifies various circumstances in which limited partners have consent rights, including:

- admission of a limited partner, Section 301(b)(3)
- admission of a general partner, Section 401(b)(3)
- 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 usual and regular course of its activities and affairs, 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)
- causing dissolution by consent, Section 801(a)(2)
- causing dissolution by consent following the dissociation of a general partner, when at least one general partner remains, Section 801(a)(3)(A)
- avoiding dissolution and appointing a successor general partner, following the dissociation of the sole general partner, Section 801(a)(3)(B)(i)
- appointing a person to wind up the limited partnership when there is no general partner, Section 802(c)
- rescinding dissolution, Section 803(b)(1)
- approving, amending or abandoning a plan of:
    - merger, Sections 1123–24;
    - interest exchange, Sections 1133–34;
    - conversion, Sections 1143–44; and
    - domestication, Sections 1153–54.

SECTION 303. NO LIABILITY AS LIMITED PARTNER FOR LIMITED PARTNERSHIP OBLIGATIONS.

(a) A debt, obligation, or other liability of a limited partnership is not the debt, obligation, or other liability of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the partnership solely by reason of being or acting as a limited partner, even if the limited partner participates in the management and control of the limited partnership. This subsection applies regardless of the dissolution of the partnership.

(b) The failure of a limited partnership to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a limited partner for a debt, obligation, or other liability of the partnership.

Comment

Elimination of the "Control Rule"

ULPA (2001) eliminated the so-called "control rule," which had impaired the liability protection accorded limited partners and had become an anachronism in a world with LLPs, LLCs and, most importantly, LLLPs.

The "control rule" first appeared in a uniform act in 1916, although the concept is much older. Section 7 of the original Uniform Limited Partnership Act provided that "a limited partner shall not become liable as a general partner [*i.e.*, for the obligations of the limited partnership] unless ... he takes part in the control of the business."

ULPA (1976) "carrie[d] over the basic test from former Section 7," but recognized "the difficulty of determining when the control line has been overstepped." ULPA (1976) § 303, cmt. Accordingly, ULPA (1976) tried to buttress the limited partner's shield by: (i) providing a safe harbor for a lengthy list of activities deemed not to constitute participating in control, Section 303(b); and (ii) limiting a limited partner's "control rule" liability "only to persons who transact business with the limited partnership with actual knowledge of [the limited partner's] participation in control," Section 303(a). However, these protections were complicated by a countervailing rule which made a limited partner generally liable for the limited partnership's obligations "if the limited partner's participation in the control of the business is . . . substantially the same as the exercise of the powers of a general partner." Section 303(a).

The 1985 amendments to ULPA (1976) further buttressed the limited partner's shield, removing the "substantially the same" rule, expanding the list of safe harbor activities and limiting "control rule" liability "only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner." ULPA (1976/1985) § 303(a).

ULPA (2001) took the logical next step, bringing limited partners into parity with corporate shareholders, LLC members, and LLP partners.

Subsection (a) – This subsection provides a corporate-like liability shield for limited partners, protecting them against the debts, obligations and other liabilities of the limited partnership – *i.e.*, against vicarious liability for the obligations of the entity. Because a dissolved limited partnership is nonetheless an entity formed under this act, dissolution has no effect on the liability shield.

For further comments on the nature of the shield, see Section 404(c), comment.

Subsection (b) – For an explanation of this subsection, see Section 404(d), comment.

SECTION 304. RIGHTS TO INFORMATION OF LIMITED PARTNER AND PERSON DISSOCIATED AS LIMITED PARTNER.

(a) On 10 days' demand, made in a record received by the limited partnership, a limited partner may inspect and copy required information during regular business hours in the limited partnership's principal office. The limited partner need not have any particular purpose for seeking the information.

(b) During regular business hours and at a reasonable location specified by the limited partnership, a limited partner may inspect and copy information regarding the activities, affairs, financial condition, and other circumstances of the limited partnership as is just and reasonable if:

(1) the limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;

(2) the limited partner makes a demand in a record received by the limited partnership, describing with reasonable particularity the information sought and the purpose for

seeking the information; and

(3) the information sought is directly connected to the limited partner's purpose.

(c) Not later than 10 days after receiving a demand pursuant to subsection (b), the limited partnership shall inform in a record the limited partner that made the demand of:

(1) what information the partnership will provide in response to the demand and when and where the partnership will provide the information; and

(2) the partnership's reasons for declining, if the partnership declines to provide any demanded information.

(d) Whenever this [act] or a partnership agreement provides for a limited partner to vote on or give or withhold consent to a matter, before the vote is cast or consent is given or withheld, the limited partnership shall, without demand, provide the limited partner with all information that is known to the partnership and is material to the limited partner's decision.

(e) Subject to subsection (j), on 10 days' demand made in a record received by a limited partnership, a person dissociated as a limited partner may have access to information to which the person was entitled while a limited partner if:

(1) the information pertains to the period during which the person was a limited partner;

(2) the person seeks the information in good faith; and

(3) the person satisfies the requirements imposed on a limited partner by subsection (b).

(f) A limited partnership shall respond to a demand made pursuant to subsection (e) in the manner provided in subsection (c).

(g) A limited partnership may charge a person that makes a demand under this section

reasonable costs of copying, limited to the costs of labor and material.

(h) A limited partner or person dissociated as a limited partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the partnership agreement or under subsection (j) applies both to the agent or legal representative and to the limited partner or person dissociated as a limited partner.

(i) Subject to Section 704, the rights under this section do not extend to a person as transferee.

(j) In addition to any restriction or condition stated in its partnership agreement, a limited partnership, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

Comment

This section balances two countervailing concerns relating to information: the need of limited partners and former limited partners for access versus the limited partnership's need to protect confidential business data and other intellectual property. The balance must be understood in the context of fiduciary duties. The general partners are obliged through their duties of care and loyalty to protect information whose confidentiality is important to the limited partnership or otherwise inappropriate for dissemination. *See* Section 409 (general standards of general partner conduct). A limited partner, in contrast, "does not have any [fiduciary] duty to the limited partnership or to any other partner solely by reason of acting as a limited partner." Section 305(b).

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 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; and
- providing access rights for former limited partners.

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. This act's statement of fiduciary duties is not exhaustive. *See* Section 409(a), cmt., and some cases characterize owners' information rights as reflecting a fiduciary duty of those with management power. *E.g.*, *Fate v. Owens*, 130 N.M. 503, 511, 27 P.3d 990, 998 (2001) (stating that "[a] partner, as a fiduciary, is required to fully disclose material facts and information relating to partnership affairs to the other partners," including limited partners); *Konover Dev. Corp. v. Zeller*, 228 Conn. 206, 218-19, 635 A.2d 798, 804-05 (1994) (stating that "the general partner of a limited partnership has the fiduciary duty of rendering true accounts and full information about anything which affects the partnership") (quoting *Williams v. Bartlett*, 189 Conn. 471, 482 n. 8, 457 A.2d 290 (1983) (internal quotations omitted). Also, the rights stated in this section are in addition to whatever discovery rights a party has in a civil suit.

In contrast, the rights of transferees are limited to those stated in this section and Subsection 702(c); general partners do not owe fiduciary duties to transferees.

The rights stated in this section are personal to limited partners and transferees, and are enforceable through a direct action. *See* Section 901(b), cmt.

Subsection (a) – The phrase "required information" is a defined term. *See* Sections 102(21) and 108. This subsection's broad right of access is subject not only to reasonable limitations in the partnership agreement, Section 105(c)(9), but also to the power of the limited partnership to impose reasonable limitations on use, Subsection (j). Unless the partnership agreement provides otherwise, general partners have the authority to use that power. *See* Section 406(a).

Subsection (b) – The language describing the information to be provided comes essentially verbatim from ULPA (1976/1985) § 305 (2)(i) and (iii). The procedural requirements derive from the Model Business Corporation Act section 16.02(c) (2011). This subsection does not itself impose a requirement of good faith because Section 305(a) contains a generally applicable obligation of good faith and fair dealing for limited partners. *But see* Subsection (e)(2) (establishing a duty of good faith applicable to a former limited partner).

Subsection (d) – The duty stated in this subsection is at the core of the duties owed by a

limited partnership and its general partners to the limited partners, and imposes an affirmative duty to volunteer information. The obligation is limited to information which is both material and known by the limited partnership.

"Knowledge" is viewed subjectively – *i.e.*, actual knowledge. Section 103(a)(1). A limited partnership will "know" what its general partners know. Under Section 103(f), "[a] general partner's knowledge … of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership." As to others acting or reasonably appearing to act on behalf of the limited partnership, common law agency rules will apply. RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006) (Imputation of Notice of Fact to Principal).

In contrast, materiality is viewed objectively. Thus, this subsection applies to known, material information, even if the limited partnership does not know that the information is material.

If a violation of this subsection causes harm to a limited partner, the limited partnership is answerable in damages. In appropriate circumstances, a violation might cause a court to enjoin or even rescind an action of a limited partnership, especially when the violation has interfered with an approval or veto mechanism involving limited partner consent. *E.g., Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 279-280 (N.Y. App. Div. 2002) (invoking partnership law precedent as reflecting a duty of full disclosure and holding that "[a]bsent such full disclosure, the transaction is voidable"), abrogated on other grounds by *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 952 N.E.2d 995 (N.Y. 2011). In addition, a limited partnership's violation of this paragraph could give rise to a claim for damages against a general partner who, through the breach of a duty stated in Section 409, causes or suffers the limited partnership to violate this paragraph. *See Anthony v. Padmar, Inc.*, 465 S.E.2d 745, 755 (S.C. Ct. App. 1995) (finding general partners made a defective disclosure prior to a vote and were therefore liable for resulting pecuniary damages to limited partners).

Subsection (e) – Codifying the information rights of former partners began with UPA (1997) § 403(b). Access is limited and subject to conditions.

> EXAMPLE: A person dissociated as a limited partner seeks access to information pertaining to the period during which the person was a limited partner and to which the person would have access while a limited partner. The person makes a bald demand, merely stating a desire to review the information at the limited partnership's principal office. In particular, the demand does not describe "with reasonable particularity the information sought and the purpose for seeking the information." *See* Subsection (b)(2). The limited partnership is not obliged to allow access. The person must first comply with Subsection (e), which incorporates by reference the requirements of Subsection (b).

See also Subsection (i) (pertaining to information rights of the legal representative of a deceased limited partner).

Subsection (e)(2) – A duty of good faith is needed here because a person claiming access under this subsection is no longer a limited partner and is no longer subject to Section 305(a).

See Section 602(a)(2) (dissociation as a limited partner terminates duty of good faith as to subsequent events). *But see id.*, cmt (noting that the common law implied covenant will continue to be relevant if the partnership agreement provides continuing rights and obligations for a person dissociated as a limited partner).

As for the meaning of "good faith" in this context, see Section 407(e)(2), cmt.

Subsection (h) – Some old cases involved conflicts over whether a shareholder could exercise inspection rights through another person. *White v. Coeur D'Alene Big Creek Mining Co.*, 55 P.2d 720, 723 (Idaho 1936) (stating that "[t]he refusal to permit respondent [shareholder] to appoint his own attorney or agent to make the examination [of the corporation's books] was in effect a denial of his right" of inspection); *State v. Monida & Yellowstone Stage Co.*, 124 N.W. 971, 972 (Minn. 1910) (upholding a trial court's mandamus order, "which shall provide that [the shareholder complainant], or such attorney or agent as he may select, … shall be allowed to inspect the books, records, and papers of the defendant [corporation]"). In light of that history, for the avoidance of doubt, this subsection expressly authorizes taking action through an agent. No negative inference should be drawn about using agents to take other action under this act.

Subsection (i) – This section provides no information rights to a person as transferee. Transferee status brings only the very limited information rights stated in Section 702(c). However, a transferee that is a person dissociated as a limited partner has rights in the latter capacity under Subsection (e).

Subsection (j) – This subsection permits the limited partnership – as distinguished from the partnership agreement – to impose access and use limitations. *See* Section 105(c)(9) (providing that the partnership agreement may impose reasonable restrictions). Under Section 406(a), it will be the general partners that decide whether the limited partnership will impose access and use restrictions.

The limited partnership bears the burden of proving the reasonableness of any restriction imposed under this subsection. In 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 the restriction seeks to avoid and the purpose for which information is sought, the restriction is reasonably tailored. Restricting use of the names and addresses of limited partners is not *per se* unreasonable.

SECTION 305. LIMITED DUTIES OF LIMITED PARTNERS.

(a) A limited partner shall discharge any duties to the partnership and the other partners under the partnership agreement and exercise any rights under this [act] or the partnership agreement consistently with the contractual obligation of good faith and fair dealing.

(b) Except as otherwise provided in subsection (a), a limited partner does not have any

duty to the limited partnership or to any other partner solely by reason of acting as a limited partner.

(c) If a limited partner enters into a transaction with a limited partnership, the limited partner's rights and obligations arising from the transaction are the same as those of a person that is not a partner.

Comment

Subsection (a) – 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. *See, e.g., Lichtyger v. Franchard Corp.*, 223 N.E.2d 869, 873 (N.Y. 1966) ("the limited partner is in a position analogous to that of a corporate shareholder, an investor who likewise has limited liability and no voice in the operation of an enterprise") (internal quotation omitted).

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. *E.g., DV Realty Advisors LLC v. Policemen's Annuity & Ben. Fund of Chicago*, 75 A.3d 101, 111 (Del. 2013) (pertaining to a limited partnership agreement that allowed the limited partners to remove the general partner). The proper limit on such contract-based power is the contract itself (including the implied obligation of good faith and fair dealing), not fiduciary duty, unless the partnership agreement itself: (i) expressly imposes a fiduciary duty; or (ii) creates a role for a limited partner which, as a matter of other law, gives rise to a fiduciary duty. For example, if the partnership agreement makes a limited partner an agent for the limited partnership as to particular matters, the law of agency will impose fiduciary duties on the limited partner with respect to the limited partner's role as agent.

This subsection refers to the "contractual obligation of good faith and fair dealing" to emphasize that the obligation is not an invitation to re-write agreements among the partners. At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – *i.e.*, duties and rights "under this [act]." However, for the most part those duties and rights apply to relationships *inter se* the partners and the limited partnership and function only to the extent not displaced by the partnership agreement. Those statutory default rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

For a detailed discussion of the implied contractual obligation of good faith and fair dealing, see Section 409(d), comment. As to the power of the partnership agreement to affect the obligation, see Section 105(c)(7) (prohibiting elimination but allowing the agreement to "prescribe the standards, if not manifestly unreasonable, by which the performance of the

obligation is to be measured").

SECTION 306. PERSON ERRONEOUSLY BELIEVING SELF TO BE LIMITED PARTNER.

(a) Except as otherwise provided in subsection (b), a person that makes an investment in a business enterprise and erroneously but in good faith believes that the person has become a limited partner in the enterprise is not liable for the enterprise's obligations by reason of making the investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person:

(1) causes an appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered to the [Secretary of State] for filing; or

(2) withdraws from future participation as an owner in the enterprise by signing and delivering to the [Secretary of State] for filing a statement of negation under this section.

(b) A person that makes an investment described in subsection (a) is liable to the same extent as a general partner to any third party that enters into a transaction with the enterprise, believing in good faith that the person is a general partner, before the [Secretary of State] files a statement of negation, certificate of limited partnership, amendment, or statement of correction to show that the person is not a general partner.

(c) If a person makes a diligent effort in good faith to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership, amendment, or statement of correction to be signed and delivered to the [Secretary of State] for filing, the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) even if the withdrawal would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise.

Comment

This section deals with the somewhat rare situation in which a person intending in good faith to be a limited partner invests in an enterprise, but:

- the enterprise is not a limited partnership (*i.e.*, no certificate of limited partnership has become effective); or
- the certificate of limited partnership has become effective but lists the person as a general partner.

Subsection (a) – In this subsection, "good faith" does not refer to the implied contractual covenant under Section 409(d). By hypothesis, a person invoking this section is not a partner under this act. In this context, "good faith" is properly understood as referring to the notion of "clean heart, [even if] empty head." Thus, the good faith standard here is entirely subjective, pertaining to the person's actual state of mind regardless of whether that statement of mind is objectively reasonable.

Subsection (a)(2) – The requirement that a person "withdraw[] from future participation as an owner in the enterprise" means, in part, that the person refrain from taking any further profit from the enterprise. However, the person is not required to return previously obtained profits or forfeit the investment.

[ARTICLE] 4

GENERAL PARTNERS

SECTION 401. BECOMING GENERAL PARTNER.

(a) Upon formation of a limited partnership, a person becomes a general partner as agreed among the persons that are to be the initial partners.

(b) After formation of a limited partnership, a person becomes a general partner:

(1) as provided in the partnership agreement;

(2) as the result of a transaction effective under [Article] 11;

(3) with the affirmative vote or consent of all the partners; or

(4) as provided in Section 801(a)(3)(B).

(c) A person may become a general partner without:

(1) acquiring a transferable interest; or

(2) making or being obligated to make a contribution to the partnership.

Comment

A person's status as a general partner is not dependent on the person being so designated in the certificate of limited partnership. If a person does become a general partner under this section without being so designated:

- the limited partnership is obligated to promptly and appropriately amend the certificate of limited partnership, Section 202(d)(1);
- each general partner that knows of the discrepancy is personally obligated to cause the certificate to be promptly and appropriately amended, Section 202(e)(1), and is subject to liability for failing to do so, Section 205(a)(2);
- the "non-designated" general partner has no right to sign records which are to be filed on behalf of the limited partnership under this act, Section 203(a), except the right to sign an amendment to the certificate of limited partnership in the capacity of a person newly designated as a general partner, *see* Section 203(a)(5)(B);
- the "non-designated" general partner has nonetheless:
    - the powers of a general partner to bind the limited partnership under Sections 402 and 403; and
    - the rights and duties of a general partner viz-a-viz the limited partnership and the other partners.

A limited partnership's liability under Section 402 does not depend on the "act of a general partner" being the act of a general partner designated in the certificate of limited partnership. Moreover, the notice provided by Section 103(c) does not undercut any appearance of authority. Section 402 refers only to notice under Section 103(d) and, in any event, according to the second sentence of Section 103(c), the fact that a person is not listed as in the certificate as a general partner is not notice that the person is not a general partner.

> EXAMPLE: By consent of the partners of XYZ Limited Partnership, Partner G is admitted as a general partner. However, XYZ's certificate of limited partnership is not amended accordingly. Later, Partner G – acting without actual authority – purports to bind XYZ to a transaction with Third Party. Third Party does not review the filed certificate of limited partnership before entering into the transaction. XYZ will be bound under Section 402, assuming that Partner G's action is "for apparently carrying on in the ordinary course the partnership's activities and affairs or activities and affairs of the kind carried on by the partnership."

> EXAMPLE: Same facts, except that Third Party does review the certificate of limited partnership before entering into the transaction. The result might still 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, Third Party's review of the certificate does not mean that Third Party knew, had received a notification or had notice that Partner G lacked authority. At most, XYZ could argue that, because Third Party knew that Partner G was not listed in the certificate, a transaction entered into by Partner G

could not reasonably appear to Third Party to be for apparently carrying on the limited partnership's activities in the ordinary course. For a discussion of the reasonableness requirement, see Section 402(a), comment.

Subsection (b)(3) – A limited partnership being in part a creature of contract, consent is determined on an objective basis (*i.e.,* contract law's "reasonable person" standard). Depending on the terms of the partnership agreement, the partners' manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the partnership agreement might reduce the quantum of consent necessary or shift the consent right to the general partners.

A limited partnership being a voluntary association, a person cannot become a partner without manifesting consent to do so. That consent also is judged objectively.

Under Section 106(b), "[a] person that becomes a partner is deemed to assent to the partnership agreement," and the agreement binds the partner regardless of whether the partner has actually indicated assent in any way.

Subsection (c)(1) – To accommodate business practices and also because a limited partnership need not have a business purpose, this provision permits so-called "non-economic partners."

SECTION 402. GENERAL PARTNER AGENT OF LIMITED PARTNERSHIP.

(a) Each general partner is an agent of the limited partnership for the purposes of its activities and affairs. An act of a general partner, including the signing of a record in the partnership's name, for apparently carrying on in the ordinary course the partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership, unless the general partner did not have authority to act for the partnership in the particular matter and the person with which the general partner was dealing knew or had notice that the general partner lacked authority.

(b) An act of a general partner which is not apparently for carrying on in the ordinary course the limited partnership's activities and affairs or activities and affairs of the kind carried on by the partnership binds the partnership only if the act was actually authorized by all the other partners.

Comment

Derivation – ULPA (2001) derived this section from UPA (1997) § 301(1), which was derived from UPA (1914) § 9. For further information on the derivation, see UPA (1997) (Last Amended 2013) § 301, comment.

At common law, a general partner was considered a general agent of the partnership. JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP § 101 at 153 (2nd ed. 1850); RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958), and the mere status of a general partner "clothes" a person with apparent authority to carry on the partnership business. *Stockwell v. U.S.*, 80 U.S. 531, 567 (1871); *Lincoln Nat. Bank v. Schoen*, 56 Mo. App. 160, 1894 WL 1879 (1894); *Kansallis Finance Ltd. v. Fern*, 659 N.E.2d 731, 733, 740 (Mass. 1996). In 1914, the Uniform Partnership Act codified this principle, UPA (1914) § 9 (Partner Agent of Partnership as to Partnership Business), and "statutory apparent authority" has been part of uniform partnerships acts ever since. *See* UPA (1997) § 301 (Partner Agent of Partnership; ULPA (2001) § 402 (General Partner Agent of Limited Partnership).

This section's principal purpose is to delineate a general partner's statutory apparent authority. The partnership agreement and Section 406 govern the rights of the partners among themselves, including the right to restrict a general partner's actual authority.

Subsection (a) – This subsection reflects the basic common law principles, as first codified in UPA (1914) § 9(1) and later in UPA (1997) § 301(1). In effect, the subsection characterizes a general partner as a general managerial agent of the limited partnership. Such agents have both actual and apparent authority, and this section delineates the apparent authority. For a discussion of the scope of actual authority, see Section 406(a) and (b), cmt.

The agency law origins of statutory apparent authority have informed courts' application of UPA (1914) § 9(1), and that case law is equally applicable under this act. For example, although the statutory language does not appear to require that the appearance of authority be reasonable, the case law does so routinely. *See, e.g.*, *In re Fox Hill Office Invs., Ltd.*, 101 B.R. 1007, 1019 (Bankr. W.D. Mo. 1989) (stating a third-party lender in possession of a copy of a limited partnership's partnership agreement was on notice of the general partner's lack of authority and therefore should have inquired as to the partner's authority), *aff'd*, 926 F.2d 752 (8th Cir. 1991); *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 789 (N.C. 1987) (stating that "in order to hold the [partnership] liable, [a third party] must show that in the exercise of reasonable care under the circumstances, it was justified in believing that the principal had conferred . . . authority to [act] on behalf of the partnership"); *First Interstate Bank of Oregon, N.A. v. Bergendahl*, 723 P.2d 1005, 1010 (Or. Ct. App. 1986) (stating that bank in possession of management agreement was on notice of general partner's restricted authority and could not rely on a theory of apparent authority).

Likewise, per the law of apparent authority, a general partner can bind a partnership under this section even if the partner intends to take and does take the resulting benefits for the partner's own benefit. *See Wolfe v. Harms*, 413 S.W.2d 204, 216 (Mo. 1967) (stating that partnership is liable for partner's acts "even if the predominant motive of the partner was to

benefit himself or third persons"); *Rouse v. Pollard*, 18 A.2d 5, 7 (N.J. Eq. 1941) ("All the partners are responsible for the act of one of their number as agent, even though he acts for some secret purpose of his own, and not really for the benefit of the [partnership]."), *aff'd*, 21 A.2d 801 (N.J. Eq. 1941); *Investors Title Ins. Co. v. Herzig*, 360 S.E.2d 786, 788 (N.C. 1987) (stating that the mere fact that the partner's act was for personal gain was not enough to justify summary judgment for the partnership on the subject of the partnership's liability for the act).

The fact that a person is not listed in the certificate of limited partnership as a general partner is not notice that the person is not a partner and is not notice that the person lacks authority to act for the limited partnership. *See* Section 103(c) and Section 401, cmt. In contrast, several filings under Section 103(d) may provide notice "to the world" that a person lacks authority to bind a limited partnership.

> EXAMPLE: For the past ten years, Partner X has been a general partner of XYZ Limited Partnership and has regularly conducted the limited partnership's business with Third Party. However, 100 days ago the limited partnership expelled Partner X as a general partner and the next day delivered for filing an amendment to XYZ's certificate of limited partnership which stated that Partner X was no longer a general partner. On that same day, the filing officer filed the amendment.
>
> Today Partner X approaches Third Party, purports still be to a general partner of XYZ and purports to enter into a transaction with Third Party on XYZ's behalf. Third Party is unaware that Partner X has been expelled and has no reason to doubt Partner X's bona fides. Nonetheless, XYZ is not liable on the transaction. Under Section 103(d)(1), Third Party has notice that Partner X is dissociated and perforce has notice that Partner X is not a general partner authorized to bind XYZ because Third Party is deemed to have notice ninety days after the amendment became effective.

The reference to "signing of a record in the partnership's name" encompasses records that purport to convey title to realty.

Subsection (b) – Under this provision, a general partner that lacks both actual and statutory apparent authority entirely lacks the power to bind the entity. *Accord* RESTATEMENT (THIRD) OF AGENCY, ch. 2, Introductory Note (2006) (stating that "this Restatement… does not use the concept of inherent agency power"). *But see* Section 403, cmt. (explaining that, under that section, a general partner may bind a limited partnership by unauthorized and wrongful conduct as to which the apparent authority *vel non* is irrelevant).

Agency law determines whether a general partner has actual authority in any particular situation. *See* RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006) (Creation of Actual Authority). For delineation of a general partner's actual authority when this act's default management rules remain in effect, see Section 406(a),(b), cmt. However, the partnership agreement will typically be the primary source of a general partner's actual authority.

This subsection does not affect a limited partnership's power to ratify a general partner's unauthorized act. *See* RESTATEMENT (THIRD) OF AGENCY (2006), Chapter 4 (Ratification).

SECTION 403. LIMITED PARTNERSHIP LIABLE FOR GENERAL PARTNER'S ACTIONABLE CONDUCT.

(a) A limited partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a general partner acting in the ordinary course of activities and affairs of the partnership or with the actual or apparent authority of the partnership.

(b) If, in the course of a limited partnership's activities and affairs or while acting with actual or apparent authority of the partnership, a general partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the partnership is liable for the loss.

Comment

Subsection (a) – This provision is derived from UPA (1914) § 13 (Partnership Bound by Partner's Wrongful Act) as modernized by UPA (1997) § 305(a) (Partnership Liable for Partner's Actionable Conduct) and for the most part parallels the agency law doctrine of *respondeat superior*. *See* RESTATEMENT (SECOND) OF AGENCY § 14A cmt. a (1958) ("When one of the partners is in active management of the business or is otherwise regularly employed in the business, he is a servant of the partnership."). The liability is vicarious and without regard to the fault of those managing the partnership. For more information on the historical development of this section, see UPA (1997) (Last Amended 2013) 305(a), comment.

To successfully invoke this provision, a plaintiff must show: (i) "a wrongful act or omission, or other actionable conduct" by a general partner; (ii) that caused "loss or injury"; and (iii) that at the relevant moment, the general partner was acting with actual authority, apparent authority (if relevant), or within "the ordinary course of activities and affairs of the partnership." Extrapolating from agency law, apparent authority is relevant only when the appearance of authority augments the impact of the wrongful act. *See* RESTATEMENT (THIRD) OF AGENCY, § 7.08 (2006) ("A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.").

An act or omission may be "in the ordinary course of activities and affairs of the partnership" even though the act is wrongful. Any other interpretation would vitiate the "ordinary course" element. "The proper question … is not whether the specific wrongful act is 'ordinary course' …, but rather whether that type of act, if done rightfully, would be." DANIEL S. KLEINBERGER,

AGENCY, PARTNERSHIP AND LLCS: EXAMPLES AND EXPLANATIONS § 10.5.1 at 350 (4th ed., Wolters Kluwer, 2012) (emphasis omitted).

However, in *Jackson v. Jackson*, 20 N.C.App. 406, 408, 201 S.E.2d 722, 724 (N.C.App. 1974), the North Carolina Court of Appeals stated that, while "[a]dvising the initiation of a criminal prosecution is clearly within the normal range of activities for a typical law partnership, ... taking such action maliciously and without probable cause is quite a different matter." The court held that "[i]n view of [ethics] rules, which clearly forbid any attempt by a lawyer to prosecute a person without cause, it cannot be held that malicious prosecution is within the ordinary course of business of a law partnership." *Id.* It is difficult to identify a reasonable limit to this approach. Presumably, at least, a partner's "plain vanilla" malpractice is within a law firm's ordinary course of business despite the ethical rules requiring lawyers to act zealously and competently.

In any event, Subsection (a) refers to "the ordinary course of activities and affairs of the *partnership*" (emphasis added); thus the proper question is whether the conduct is in the ordinary course for the partnership and not whether the particular general partner ordinarily plays a role in that part of the partnership's business. *See In Moren ex. rel. Moren v. JAX Rest.*, 679 N.W.2d 165, 167-168 (Minn. Ct. App. 2004) (stating, as part of its analysis under UPA (1997) § 305, that "[i]t is undisputed that one of the cooks scheduled to work that evening [at the partnership's restaurant] did not come in, and that [one] partner asked [another partner] to help in the kitchen … [and] that [the other partner] was making pizzas for the partnership when" her negligence injured the plaintiff); *Vanacore v. Kennedy*, 86 F. Supp. 2d 42, 51 (D. Conn. 1998), *aff'd sub nom., Vanacore v. Space Realty, Inc.*, 208 F.3d 204 (2d Cir. 2000) (stating that "Kennedy [a partner] committed his misdeeds, which led directly to plaintiff's injuries, within the ordinary course of the business of E & K [the partnership]"); *Sheridan v. Desmond,* 697 A.2d 1162, 1166 (Conn. App. Ct. 1997) (stating that to be considered "in ordinary course of the business," a partner's action must be "the kind of thing *a* . . . partner would do") (emphasis added).

Subsection (b) – This provision is derived from UPA (1914) § 14 (Partnership Bound by Partner's Breach of Trust) and UPA (1997) § 305(b) (Partnership Liable for Partner's Actionable Conduct). It is not necessary that the general partner "receiv[ing] or caus[ing] the partnership to receive money or property" do so wrongfully. Culpability is necessary at the second phase – ***i.e.,*** when "the money or property is misapplied by a general partner."

SECTION 404. GENERAL PARTNER'S LIABILITY.

(a) Except as otherwise provided in subsections (b) and (c), all general partners are liable jointly and severally for all debts, obligations, and other liabilities of the limited partnership unless otherwise agreed by the claimant or provided by law.

(b) A person that becomes a general partner is not personally liable for a debt, obligation, or other liability of the limited partnership incurred before the person became a general partner.

(c) A debt, obligation, or other liability of a limited partnership incurred while the partnership is a limited liability limited partnership is solely the debt, obligation, or other liability of the limited liability limited partnership. A general partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation, or other liability of the limited liability limited partnership solely by reason of being or acting as a general partner. This subsection applies:

(1) despite anything inconsistent in the partnership agreement that existed immediately before the vote or consent required to become a limited liability limited partnership under Section 406(b)(2); and

(2) regardless of the dissolution of the partnership.

(d) The failure of a limited liability limited partnership to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a general partner for a debt, obligation, or other liability of the partnership.

(e) An amendment of a certificate of limited partnership which deletes a statement that the limited partnership is a limited liability limited partnership does not affect the limitation in this section on the liability of a general partner for a debt, obligation, or other liability of the limited partnership incurred before the amendment became effective.

Comment

Derivation – ULPA (2001) derived this section from UPA (1997) § 306, which was also the source for ULLCA (2006) § 304. The Harmonization Project brought the two partnership acts and the limited liability company act into accord to the extent the three acts overlap.

Subsection (a) – Until the advent of limited liability partnerships and limited liability limited partnerships, one hallmark of general partner status was strict, vicarious liability for the debts, obligations, and other liabilities of the partnership. This subsection states a modern version of that venerable rule. The Harmonization Project made no substantive changes to this subsection.

Subsection (b) – UPA (1997) continued the approach of UPA (1914) §§ 17 and 41(7) to the vicarious liability of an incoming partner, but used a simpler and clearer formulation. ULPA (2001) followed UPA (1997), and the Harmonization Project made no substantive changes to this subsection.

With regard to when a limited partnership incurs a debt, obligation, or other liability, the case law is scant and concerns contractual and similar obligations. The leading case is *Conklin Farm v. Leibowitz,* 140 N.J. 417, 658 A.2d 1257 (1995), which holds that: (i) obligations on a loan, whether for interest or principal, are incurred when the loan is made, not when each particular payment is due; and (ii) obligations for lease payments are incurred when each rental payment is due, not when the lease is made.

Conklin concerned a partnership loan obligation that was: (i) entered into before a particular partner joined the partnership; but (ii) for the most part, was payable afterwards. The court held that "interest is part of the contractual debt, and the obligation to pay interest on a loan *arises,* if at all, at the time that the parties execute the note or other debt instrument." *Conklin*, 140 N.J. at 423,425, 658 A.2d at 1261 (emphasis in original). The court indicated that the same analysis applies to the obligation to repay principal. 140 N.J. at 429, 658 A.2d at 1263 (stating that "the decisive issue before this court … [is that] [p]ayment of interest, like repayment of advances, is an obligation that arises at the time the debt instrument is executed").

Conklin discussed the lease issue in response to the creditor's argument that "just as a rent obligation arises for current use of property, an interest obligation arises for current use of principal." *Conklin*, 140 N.J. at 425, 658 A.2d at 1261. Rejecting that argument, the court: (i) noted "the *common-law* obligation to pay rent based on current tenancy [which]... arises with each period of tenancy, and ... arises even in the absence of a lease"; (ii) described "the common-law obligation to pay rent [as] entirely independent of the contractual obligation under the lease"; and (iii) held that, for purposes of partnership law, the rule for "incurring" a lease obligation rests on the common law duty in tenancy and not on the lease as a contract. *Conklin*, 140 N.J. at 426, 658 A.2d at 1262 (citing *Ellingson v. Walsh, O'Connor & Barneson,* 15 Cal. 2d 673, 104 P.2d 507, 508 (1940)). *Conklin* involved a general partnership but, in this context, that difference is immaterial.

As to when a partnership incurs a tort liability, the answer might be found by analogy to statute of limitation rules, another area of law concerned with when claims arise. "Although the courts have not been consistent … the interpretation of [when] a … statute [of limitations begins to run] as applied to torts has been such that the statute does not usually begin to run until the tort is complete.... A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff." RESTATEMENT (SECOND) OF TORTS § 899 cmt c. (1979); *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1078, 195 Cal. Rptr. 576 (Ct. App. 1983). By analogy, a limited partnership would incur liability for a tort when the harm occurs. *See, e.g., Jones v. Cox*, 828 P.2d 218, 224 (Colo. 1992) ("A cause of action has commonly been understood to 'accrue' when a suit may be maintained thereon.") (quoting BLACK'S LAW DICTIONARY 19 (5th ed. 1979)); *Loehr v. Ventura Cnty. Cmty. Coll. Dist.*, 147 Cal. App. 3d 1071, 1078, 195 Cal. Rptr. 576 (Ct. App. 1983).

However, a policy argument exists to the contrary. Vicarious liability for a limited partnership's torts should be confined to persons who are general partners when the wrongful conduct occurs. It is the conduct, not the consequences, that is wrongful; therefore, the occurrence of the wrongful conduct should determine which set of general partners are liable for the conduct's consequences.

For further discussion of the "incurred" issue, see Subsection (c), comment (The Temporal Nexus –When Claim Incurred).

Subsection (c) – This subsection provides a corporate/LLC-like liability shield for general partners, protecting them from (and only from) the debts, obligations and liabilities of the limited partnership – *i.e.*, against a partner's alleged vicarious liability for the obligations of the entity. .

Shield Applicable Regardless of the Identity of the Plaintiff

What makes the shield relevant is the nature of the claim. If the complaint seeks to hold a partner vicariously liability for the LLLP's obligations, the shield applies. If not, not. Thus, there is no distinction among a claim arising from an LLLP's debt to a commercial creditor, a partner's claim that the LLLP has failed to return a contribution as required by the partnership agreement, and a claim by a former partner that the LLLP has failed to follow through on a buy-out agreement. *See Rappaport v. Gelfand*, 197 Cal. App. 4th 1213, 1230-1232, 129 Cal. Rptr. 3d 670, 682-84 (Cal.App. 2 Dist. 2011) (involving a claim by a former partner). *Accord Ederer v. Gursky*, 9 N.Y.3d 514, 526, 881 N.E.2d 204, 212-213 (N.Y. 2007) (Smith, J., dissenting).

Shield Inapposite for Claims Arising from a Partner's Own Conduct

Because the partner liability at issue is solely vicarious, the LLLP shield is irrelevant to claims seeking to hold a partner directly liable on account of the partner's own conduct. Case law on this issue comes from the analogous context of limited liability companies, and in that context a few judges have failed to understand this point. *See* ULLCA (2006) (Last Amended 2013) § 304(a), cmt. (Shield Inapposite for Claims Arising from a Member's or Manager's Own Conduct). However, the overwhelming weight of case law is contrary, as are the actual words of shield provisions (immunizing only for obligations of the entity and making no reference to direct obligations of an owner or manager) and public policy (which recoils from the idea of immunizing a person's misconduct solely because the person acts on behalf of an organization).

> EXAMPLE: A general partner personally guarantees a debt of a limited liability limited partnership. Subsection (c) is irrelevant to the general partner's liability as guarantor.

> EXAMPLE: A general partner purports to bind a limited liability limited partnership while lacking any agency law power to do so. The LLLP is not bound, but the partner is liable for having breached the "warranty of authority" (an agency law doctrine). Subsection (c) does not apply. The liability is not *for* a debt, obligation, or other liability of the LLLP, but is rather the partner's own, direct liability. Indeed, the liability exists because the LLLP is *not* indebted, obligated or liable. RESTATEMENT (THIRD) OF AGENCY

§ 6.10 (2006).

EXAMPLE: A general partner of a limited liability limited partnership defames a third party in circumstances that render the LLLP vicariously liable under Section 403(a). Under Subsection (c), the third party cannot hold the partner accountable for the *partnership's* liability, but that protection is immaterial. The partner is the tortfeasor and in that role is directly liable to the third party.

EXAMPLE: An LLLP provides professional services, and one of its general partners commits malpractice. The liability shield is irrelevant to the partner's direct liability in tort. However, if the partner's malpractice liability is attributed to the partnership under Section 403(a), the liability shield will protect the other general partners against a claim that they must make good on the LLLP's liability. The same analysis applies if the plaintiff also successfully claims that another general partner was negligent in supervising the first partner.

Subsection (c) pertains only to claims based on the LLLP's liability and is irrelevant to claims by a limited liability limited partnership or a partner against a general partner and *vice versa*. *See* Sections 409 (pertaining to management duties) and 901 (pertaining to direct claims by a partner).

Shield Inapposite to Role Liability Claims

Provisions of regulatory law may impose liability on a general partner of an LLLP due to a role the general partner plays in the limited partnership. *See, e.g., Food Team Intern., Ltd. v. Unilink, LLC*, 872 F. Supp. 2d 405, 424 (E.D. Pa. 2012) (holding several individuals "subject to secondary individual liability under PACA [Perishable Agricultural Commodities Act]" because their roles within a limited liability company enabled them to control the relevant assets) (citing *Bear Mountain Orchards, Inc. v. Mich–Kim, Inc.*, 623 F.3d 163, 172 (3d Cir. 2010)). Subsection (c) does not affect this "role liability."

The Temporal Nexus – When Claim Incurred

The LLLP shield functions only with respect to obligations incurred while the partnership is a limited liability limited partnership. The shield does not protect general partners from vicarious liability for partnership obligations incurred before a partnership becomes an LLLP or after the partnership ends its LLLP status. Sections 201(b)(5) and 406(b)(2).

For a preliminary discussion of when a partnership obligation is incurred, see Subsection (b), comment. It could well be argued that "incurred" under Subsection (c) has the same meaning as "incurred" under Subsection (b). *IBP, Inc. v. Alvarez*, 546 U.S. 21, 34, 126 S.Ct. 514, 523 (2005) (referring to "the normal rule of statutory interpretation that identical words used in different parts of the same statute are generally presumed to have the same meaning"); *Timberline Air Serv., Inc. v. Bell Helicopter-Textron, Inc.*, 125 Wash. 2d 305, 313, 884 P.2d 920, 925 (1994) (stating that "[w]hen the same words are used in different parts of the same statute, it is presumed that the Legislature intended that the words have the same meaning").

However, the argument should yield if the subsections' different contexts raise different

issues of policy. 1A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 45:12 (7th ed.) (stating that "departure from the literal construction of a statute is justified when such a construction would produce an absurd and unjust result and would clearly be inconsistent with the purposes and policies of the act in question"). *See, e.g., S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) ("[W]e have held that a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. We have not applied this rule without exception, however, and have sometimes held that an action does not accrue until the plaintiff knew or in the exercise of reasonable diligence should have known of the wrongful act and resulting injury.") (citations omitted).

The case law concerning contractual obligations (incurred when the contract is made) applies appropriately in the context of the LLLP shield. However, the lease case law is problematic. If an obligation is incurred each time rent is due, subsection(c) is a trap for the unwary landlord.

> EXAMPLE: Ordinary limited partnership enters into a lease with a commercial landlord. Knowing that each general partner is automatically liable for the partnership's debt, the landlord does not obtain personal guarantees. Subsequently, the partnership becomes an LLLP. If future rent payments are incurred when due, and not as of when the lease was made, the landlord loses a very important part of the bargain.

Thus, for the purposes of Subsection (c), lease obligations should be treated as contractual obligations, incurred when the contract is made.

A similar issue exists with regard to tort liability. Courts must look to when the conduct causing the injury takes place and not to when actual injury occurs. Otherwise, a limited partnership could: (i) engage in wrongful conduct that does not cause immediate injury; (ii) come to realize that the conduct has occurred; (iii) subsequently amend its certificate of limited partnership to become a limited liability limited partnership; and (iv) thereby eliminate the vicarious liability of its general partners for all harm subsequently arising from the misconduct. *Cf. Savini v. Univ. of Hawaii*, 113 Haw. 459, 465, 153 P.3d 1144, 1150 (2007) (addressing the question of when a statute of limitations begins to run for bodily injury, when another statute precludes bringing a claim until the amount of damages has reach a specified threshold).

In general, courts should determine the "incurred" question under Subsection (c) so that the LLLP shield protects the general partners of an LLLP to the same extent that the corporate and LLC shields protect corporate shareholders and LLC members. From that perspective, LLLP status obtained after a limited partnership commits a wrongful act should provide no greater protection for the general partners than the protection a sole proprietor obtains by forming an LLC after committing a wrongful act – *i.e.*, none. *See, e.g., Foxchase, LLP v. Cliatt*, 562 S.E. 2d 221, 224 (Ga. Ct. App. 2002) (holding that a partnership's liability shield did not protect partners from claims of property damage caused by the construction of a golf course, where the jury could have found that the "damage ... occurred when they, not the partnership, owned the course").

Subsection (c)(2) – *The Shield and Dissolution*. The rule stated here is inherent in the nature of partnership dissolution. "[D]issolution does not end a limited partnership's existence but rather changes the purpose of that existence." Section 801, cmt. "A dissolved limited partnership shall wind up its business and… continues after dissolution … for the purpose of winding up." Section 802(a). Put another way: dissolution and winding up are part of the life cycle of a limited liability limited partnership – sometimes the most complicated part. There is no logical reason to remove the shield during the last part of a LLLP's partnership's life cycle.

This subsection makes this point expressly, because it is possible to misinterpret some outlying LLP cases as holding to the contrary. *See, e.g., Carolina Cas. Ins. Co. v. L.M. Ross Law Grp., LLP*, 151 Cal. Rptr. 3d 628, 635 (2012) (affirming the trial court's decision to hold an LLP's named partner liable for a judgment against his limited ability partnership; noting that "[c]entral to the decision to amend the judgment to add Ross [the named partner] as a judgment debtor … is the trial court's finding that Ross Law Group dissolved"; recognizing, however, that, before the partnership incurred the liability, Ross had signed and filed with the California Secretary of State a form stating that the law firm had "cease[d] to be a registered limited liability partnership and is hereby filing this notice with the California Secretary of State that [it] is no longer a registered limited partnership") (quotation marks omitted).

The Shield and Termination. This subsection does not expressly provide that, when a limited liability limited partnership's existence terminates, the liability shield remains in place as to any debt, obligation, or other liability of the partnership incurred before the termination. However, the point follows ineluctably from this subsection, which adopts an "occurrence" rather than a "claims made" basis for determining whether the shield applies. See the comment to Subsection (c), above (The Temporal Nexus –When Claim Incurred).

Moreover, any other result would: (i) create huge holes in the shield; (ii) put the law of unincorporated businesses at odds with the law of corporations; (iii) render surplus this act's distribution recapture provision, Section 407; (iv) render meaningless the exception to the notice requirement as stated in Sections 806b)(5) and 807(b)(4); and (v) render nonsensical the otherwise logical extension of the equitable trust fund theory to limited liability limited partnerships. *Cf. Velasquez v. Franz*, 589 A.2d 143, 146 (N.J. 1991) (explaining that "the trust-fund doctrine… renders shareholders who receive distributed assets of the corporation liable as 'trustees' for claims of the corporation's creditors").

Subsection (d) – This subsection was added during the Harmonization Project and pertains to the equitable doctrine of "piercing the veil" – *i.e.*, conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of "piercing the corporate veil" is well-established, and courts should apply the doctrine to limited liability limited partnership for the same reasons that courts have regularly (and sometimes almost reflexively) applied the doctrine to limited liability companies. *Cf. Axtmann v. Chillemi*, 2007 ND 179, 740 N.W.2d 838, 847 (stating that "the shield of a limited liability partnership may be pierced under 'the case law that states the conditions and circumstances under which the corporate veil or limited liability shield of a corporation may be pierced under North Dakota law....'") (quoting N.D.C.C. § 45-22-09(1)).

However, LLLP piercing involves one important distinction from the corporate realm.

While under corporate law "disregard of corporate formalities" is a key piercing factor, that factor is inapposite in the law of unincorporated organizations. Corporate formalities reflect statutory mandates. LLLP formalities derive for the most part from the agreement among the partners. From a policy perspective, disregarding formalities adopted by agreement differs substantially from disregarding formalities imposed by law.

Moreover, because the terms of a partnership agreement may be "implied," Section 102(14), an LLLP's ongoing disregard of formalities may well constitute an amendment to the partnership agreement. If so, disregard equals amendment, and the concept of "disregard of formalities" makes no sense.

In contrast, this subsection is inapposite to another key piercing factor – disregard of the separateness between entity and owner. *Cf. Vanderford Co. v. Knudson*, 165 P.3d 261, 271 (Idaho 2007) (noting that managing member and "his accountant testified that the LLC's checking account was so confusing that the accountant could not be sure whose money was in the account at what times"); *Utzler v. Braca*, 972 A.2d 743 (Conn. App. 2009) (holding that veil piercing was appropriate under alter-ego theory when owner deposited LLC funds into a commingled bank account from which he made withdrawals for personal needs and unrelated projects).

> EXAMPLE: The sole general partner of a limited liability limited partnership uses a car titled in the partnership's name for personal purposes and writes checks on the partnership's account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not Subsection (b) formalities.

This subsection addresses claims to "impos[e] liability on a general partner for a debt, obligation, or other liability of the partnership" – *i.e.*, for what is sometimes termed a "direct pierce." Whether the same approach should apply to claims for a "reverse pierce" is a question for the courts. *See Comm'r of Envtl. Prot. v. State Five Indus. Park, Inc.*, 304 Conn. 128, 140, 37 A.3d 724, 732-33 (2012) (stating that "[a]lthough some courts have adopted reverse veil piercing with little distinction as a logical corollary of traditional veil piercing, because the two share the same equitable goals, others wisely have recognized important differences between them").

This subsection has no relevance to a partner's claim that the disregard of agreed-upon formalities is a breach of the limited partnership agreement.

Subsection (e) – The rule stated here is implicit in Subsection (c) but is stated expressly for the avoidance of doubt.

SECTION 405. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.

(a) To the extent not inconsistent with Section 404, a general partner may be joined in an action against the limited partnership or named in a separate action.

(b) A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against a partnership may not be satisfied from a general partner's assets unless there is also a judgment against the general partner.

(c) A judgment creditor of a general partner may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership, unless the partner is personally liable for the claim under Section 404 and:

(1) a judgment based on the same claim has been obtained against the limited partnership and a writ of execution on the judgment has been returned unsatisfied in whole or in part;

(2) the partnership is a debtor in bankruptcy;

(3) the general partner has agreed that the creditor need not exhaust partnership assets;

(4) a court grants permission to the judgment creditor to levy execution against the assets of a general partner based on a finding that partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of assets is excessively burdensome, or that the grant of permission is an appropriate exercise of the court's equitable powers; or

(5) liability is imposed on the general partner by law or contract independent of the existence of the partnership.

Comment

Subsection (a) – If a debt, obligation, or other liability is incurred against a limited liability limited partnership, joining a general partner would be improper. Likewise, if a debt, obligation, or other liability against an ordinary limited partnership is incurred before a person becomes a general partner, it would be improper to join that person. As for when a claim is incurred, see Section 404(b) and (c), comments.

The reference to "not inconsistent with Section 404" is the procedural analog to the substantive protections of Section 404(b) (incoming general partner not liable for pre-existing

limited partnership obligations) and (c) (general partner not liable for partnership obligations incurred by an LLLP). When a general partner has personally guaranteed a limited partnership obligation, naming that general partner in a suit against the limited partnership is "not inconsistent with Section 404." *See* Section 404, cmt. (Shield Inapposite for Claims Arising from a Partner's Conduct). *Cf. Bank of Boston Connecticut v. Schlesinger*, 220 Conn. 152, 157-58, 595 A.2d 872, 875 (1991) (upholding pre-judgment attachment of a partner's assets, where the partner had personally guaranteed the partnership's obligations).

Subsection (b) – Reflecting the entity construct, Section 110(a), this subsection provides that a judgment against the limited partnership: (i) is not, standing alone, a judgment against the general partners; and (ii) cannot be satisfied from a general partner's personal assets absent a judgment against the general partner.

This act leaves to the law of judgments to determine the collateral effects to be accorded a prior judgment for or against the limited partnership in a subsequent action against a general partner individually. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 60 (1982) and cmts. *E.g.*, *Detrio v. U.S.*, 264 F.2d 658 (5th Cir. 1959); *Brunsoman v. Seltz*, 414 N.W.2d 547 (Minn. App. 1987) (Lansing, J.). *Contra Evanston Ins. Co. v. Dillard Dep't Stores, Inc.*, 602 F.3d 610, 618 (5th Cir. 2010) (disregarding *sub silentio* the separateness of partner and partnership, overlooking therefore the issue of collateral estoppel, discussing with approval a bankruptcy case in which "the trustee sought to enforce the partnership judgment against [partners] simply by virtue of their status as partner"; and quoting with approval that case's holding that "[o]nce the liability of the partnership became fixed, the only issue remaining was whether the Defendants are partners of [the partnership]") (quoting *In re Jones*, 161 B.R. 180, 183-184 (Bankr. N.D. Tex. 1993)) (second brackets in original).

This subsection and Subsection (c) combine to create a trap for the unwary. For statute of limitations purposes, a creditor's claim against the general partners accrues simultaneously with the claim against the limited partnership. If a creditor chooses not to sue the general partners in its suit against the limited partnership, the statute of limitations may run before the creditor commences suit against the general partners. *Am. Star Energy & Minerals Corp. v. Stowers*, 405 S.W.3d 905, 907 (Tex. App. 2013) (holding that the partnership creditor "was obligated to sue the partners of S & J … within the same limitations period it had to sue S & J, the partnership" and that "[b]ecause, [the creditor] did not, the trial court correctly held that limitations ran"); *Sunseri v. Proctor*, 487 F. Supp. 2d 905, 908 (E.D. Mich. 2007), *aff'd*, 286 F. App'x 930 (6th Cir. 2008) ("While the plaintiff may use collateral estoppel to prevent the partner from relitigating the issue of liability, the plaintiff must still bring suit within the applicable limitations period for the underlying wrong.").

Subsection (c) – Subject to the five listed exceptions, this subsection prevents a general partner's assets from being the first recourse for a judgment creditor of the limited partnership, even if the partner is liable for the judgment debt under Section 404.

Although this subsection is silent with respect to pre-judgment remedies, as a matter of policy the subsection should guide courts as they apply the law of pre-judgment remedies. *Compare Sec. Pac. Nat. Bank v. Matek,* 175 Cal. App. 3d 1071, 1077, 223 Cal. Rptr. 288 (Ct.

App. 1985) (granting a pre-judgment remedy against a partner because there is "no distinction between those sued individually as partners and those sued as sole proprietors"), *with Bank of Boston Connecticut v. Schlesinger*, 220 Conn. 152, 157-58, 595 A.2d 872, 875 (1991) (upholding pre-judgment attachment of a partner's assets, because the partner had personally guaranteed the partnership's obligations).

SECTION 406. MANAGEMENT RIGHTS OF GENERAL PARTNER.

(a) Each general partner has equal rights in the management and conduct of the limited partnership's activities and affairs. Except as otherwise provided in this [act], any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners.

(b) The affirmative vote or consent of all the partners is required to:

(1) amend the partnership agreement;

(2) amend the certificate of limited partnership to add or delete a statement that the limited partnership is a limited liability limited partnership; and

(3) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited partnership's property, with or without the good will, other than in the usual and regular course of the limited partnership's activities and affairs.

(c) A limited partnership shall reimburse a general partner for an advance to the partnership beyond the amount of capital the general partner agreed to contribute.

(d) A payment or advance made by a general partner which gives rise to a limited partnership obligation under subsection (c) or Section 408(a) constitutes a loan to the limited partnership which accrues interest from the date of the payment or advance.

(e) A general partner is not entitled to remuneration for services performed for the limited partnership.

Comment

Subsection (a) – As explained in the Prefatory Note to ULPA (2001), this act assumes that, more often than not, people utilizing the act will want: (i) strong centralized management, strongly entrenched; and (ii) passive investors with little control over the entity. Section 302 essentially excludes limited partners from the ordinary management of a limited partnership's activities and affairs, unless the partnership agreement provides otherwise.

This subsection states affirmatively the general partners' commanding role. Only the partnership agreement and the express provisions of this act can limit that role.

The authority granted by this subsection includes the authority to delegate. Delegation does not relieve the delegating general partner or partners of their duties under Section 409. However, the fact of delegation is a fact relevant to any breach of duty analysis.

> 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 409(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 409(c). The office manager's gross negligence is not automatically attributed to the general partner. Under Section 409(c), the question is whether the general partner was grossly negligent (or worse) in selecting the office manager, delegating insurance renewal matters to the office manager, and supervising the office manager after the delegation.

The partnership agreement may also provide for delegation and, subject to Section 105(c)(6)-(8) and (d)(2), may modify a general partner's duties under Section 409.

For limited partnerships that have more than one general partner, this act provides that in most circumstances a "matter relating to the activities and affairs of the partnership is decided … by a majority of the general partners." However, unlike corporate statutes, this act does not provide a rule for the quantum of participation necessary to constitute "a majority." *Cf., e.g.*, MINN. STAT. § 302A.237 (2014) (providing rules for determining the votes need to constitute "an act of the board"). If a limited partnership has more than one general partner, the partnership agreement should consider what "a majority" means in the event a general partner position is vacant. Note also that for some decisions this act requires the affirmative vote or consent of all partners. *See* Section 406(b), cmt.

Subsection (b) – Other provisions of this act also contain default rules providing for unanimous consent. *E.g.*, Sections 301(b)(3) (for a person to become a limited partner after

formation of the limited partnership), 401(b)(3) (same as to becoming a general partner), and 502(3) (for compromising a person's obligation to make a contribution). In addition, the transactions authorized under Article 11 each have a default unanimous consent requirement.

Subsections (a) and (b) – These subsections have important implications for a partner's actual authority to act on behalf of the partnership. The actual authority of a general partner is a question of agency law, *see* RESTATEMENT (THIRD) OF AGENCY § 3.01 (2006) (Creation of Actual Authority), and depends fundamentally on the contents of the partnership agreement. If, however, the partnership agreement is silent on the issue, this subsection helps delineate that actual authority. Acting individually, a general partner:

- has no actual authority to commit the limited partnership to any matter for which this act require requires the affirmative vote or consent of all partners;
- has the actual authority to commit the limited partnership to usual and customary matters, unless the general partner has reason to know that: (i) other general partners might disagree; or (ii) for some other reason consultation with fellow general partners is appropriate; and
- has no actual authority to take unusual or non-customary actions that will have a substantial effect on the limited partnership.

The first point follows self-evidently from the language of this act. Where this act requires unanimity of all partners, no general partner could reasonably believe to the contrary (unless the partnership agreement provided otherwise).

The second point follows because:

- Subsection (a) serves as the gap-filler manifestation from the limited partnership to its general partners and does <u>not</u> require partners to act <u>only</u> in concert or after consultation. To the contrary, subject to the partnership agreement, this subsection expressly provides that "[e]ach general partner has equal rights in the management and conduct of the limited partnership's activities and affairs."
- It would be impractical to require collective action on even the smallest of decisions.
- However, to the extent a general partner has reason to know of a possible difference of opinion among the general partners, this subsection requires a decision by "a majority of the general partners."

A third point is a matter of common sense. The more serious the matter, the less likely it is that a general partner has actual authority to act unilaterally. *Cf.* RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an individual has "an unusual degree of unilateral authority over a matter fraught with enduring consequences for the institution" and stating that "[t]he gravity of the matter from the standpoint of the organization is relevant to whether a third party could reasonably believe that the manager has authority to proceed unilaterally").

Subsection (e) – In a limited partnership, winding up is one of the tasks for which the limited partners depend on the general partner. There is no reason for this act to single out this

particular task as giving rise to compensation.

SECTION 407. RIGHTS TO INFORMATION OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER.

(a) A general partner may inspect and copy required information during regular business hours in the limited partnership's principal office, without having any particular purpose for seeking the information.

(b) On reasonable notice, a general partner may inspect and copy during regular business hours, at a reasonable location specified by the limited partnership, any record maintained by the partnership regarding the partnership's activities, affairs, financial condition, and other circumstances, to the extent the information is material to the general partner's rights and duties under the partnership agreement or this [act].

(c) A limited partnership shall furnish to each general partner:

(1) without demand, any information concerning the partnership's activities, affairs, financial condition, and other circumstances which the partnership knows and is material to the proper exercise of the general partner's rights and duties under the partnership agreement or this [act], except to the extent the partnership can establish that it reasonably believes the general partner already knows the information; and

(2) on demand, any other information concerning the partnership's activities, affairs, financial condition, and other circumstances, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(d) The duty to furnish information under subsection (c) also applies to each general partner to the extent the general partner knows any of the information described in subsection (b).

(e) Subject to subsection (j), on 10 days' demand made in a record received by a limited partnership, a person dissociated as a general partner may have access to the information and records described in subsections (a) and (b) at the locations specified in those subsections if:

(1) the information or record pertains to the period during which the person was a general partner;

(2) the person seeks the information or record in good faith; and

(3) the person satisfies the requirements imposed on a limited partner by Section 304(b).

(f) A limited partnership shall respond to a demand made pursuant to subsection (e) in the manner provided in Section 304(c).

(g) A limited partnership may charge a person that makes a demand under this section the reasonable costs of copying, limited to the costs of labor and material.

(h) A general partner or person dissociated as a general partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a legal representative. Any restriction or condition imposed by the partnership agreement or under subsection (j) applies both to the agent or legal representative and to the general partner or person dissociated as a general partner.

(i) The rights under this section do not extend to a person as transferee, but if:

(1) a general partner dies, Section 704 applies; and

(2) an individual dissociates as a general partner under Section 603(6)(B) or (C), the legal representative of the individual may exercise the rights under subsection (c) of a person dissociated as a general partner.

(j) In addition to any restriction or condition stated in its partnership agreement, a limited

partnership, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

Comment

Subsection (a) – The phrase "required information" is a defined term. *See* Sections 102(21) and 108. This subsection's broad right of access is subject both to reasonable limitations in the partnership agreement, Section 105(c)(9), and also the power of the limited partnership to impose reasonable limitations on use, Subsection (j). However, limiting a general partner's access to this information or any other information would be quite unusual.

Subsection (b) – This subsection states the rule pertaining to information memorialized in "any record maintained by the partnership." Except in unusual circumstances (*e.g.*, a back-up general partner with no ongoing responsibilities), all of the information encompassed by this provision will be "material to the general partner's rights and duties under the partnership agreement or this [act]." For further discussion of the meaning of "material" as applied to information, see Section 409(f), comment.

Subsection (c) – Because a limited partnership is an entity, this subsection imposes a duty on the partnership, not the partners. However, the general partners are typically responsible for seeing that the limited partnership fulfills this obligation. For the limited partnership, breaching this obligation is a matter of strict liability (analogous to breaching a contract). In contrast, Section 409 provides the standard for evaluating a general partner's conduct in this context. Subsection (d) establishes a separate duty for the general partners.

A general partner's right to information under this subsection is personal to the general partner and enforceable under Section 901(a). These rights are in addition to whatever discovery rights a party has in a civil suit.

Subsection (c)(1) – This provision imposes an affirmative duty to volunteer information. However, given the assumption that each general partner will be active in management, the obligation ceases "to the extent the partnership can establish that it reasonably believes the general partner already knows the information."

In any event, the obligation is limited to information which is both material and known by the limited partnership. "Knowledge" is viewed subjectively – *i.e.,* actual knowledge. Section 103(a)(1). Materiality is viewed objectively. Thus, the duty applies to known, material information, even if the limited partnership does not know that the information is material.

A limited partnership will "know" what its general partners know. Under Section 103(f), "[a] general partner's knowledge … of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership." As to others acting or reasonably appearing to act on behalf of the limited partnership, common law agency rules will apply. RESTATEMENT (THIRD) OF AGENCY § 5.03 (2006) (Imputation of Notice of Fact to Principal).

Typically a general partner's duties are continuous, and therefore a general partner's right to information is not just transaction-specific. Ongoing managerial responsibilities require ongoing information – both periodically and *ad hoc* when a situation warrants.

For the meaning of "material" as applied to information, see Section 409(f), comment.

Subsection (c)(2) – Other law determines which party has the burden of proof as to the stated exception.

Subsection (d) – This subsection imposes a duty directly on each general partner. The duty is both narrower and more demanding than the duty placed on general partners as the typically responsible parties under Subsection (c). The duty is narrower because the relevant information is confined to "the information [pertaining to records] described in subsection (b)," rather than the wide scope of "any information" delineated by Subsection (c). The duty is more demanding because it applies directly to the general partners, is therefore in the nature of a contractual obligation, and its breach is a matter of strict liability. For example, it is no defense for a general partner under this section to assert that, although the partner failed to furnish required information, the failure did not amount to gross negligence under Section 409(c).

> EXAMPLE: A limited partnership has two general partners: each of which is regularly engaged in conducting the limited partnership's activities; both of which are aware of and have regular access to all significant limited partnership records; and neither of which has special responsibility for or knowledge of any particular aspect of those activities or the relevant partnership records. Most likely, neither general partner is obliged to draw the other general partner's attention to information apparent in the limited partnership's records.

> EXAMPLE: Although a limited partnership has three general partners, one is the managing partner with day-to-day responsibility for running the limited partnership's activities. The other two meet periodically with the managing general partner, and together with that partner function in a manner analogous to a corporate board of directors. Most likely, the managing general partner has a duty to draw the attention of the other general partners to important information, even if that information would be apparent from a review of the limited partnership's records.

As with Subsection (c), a general partner's right to information under this subsection is personal to the general partner and enforceable under Section 901(a). These rights are in addition to whatever discovery rights a party has in a civil suit.

Subsection (e) – Codifying the information rights of former owners began with RUPA

(1997) § 403(b). Access is limited and subject to conditions, most of which are drawn from Section 304 (pertaining to the information rights of limited partners). *See also* Subsection (i) (providing information rights to the legal representative of a deceased general partner); Section 704 (providing additional information rights to the legal representative of the deceased partner).

Subsection (e)(1) – A person dissociated as a general partner has information rights in that capacity only as to the period during which the person was a general partner. To the extent that further information is accessible under Section 704(2) (providing access to the legal representative of a deceased partner's estate), that access is limited both in purpose ("for purposes of settling the estate") and in scope ("the rights of a current limited partner under Section 304").

Subsection (e)(2) – A duty of good faith is needed here, because a person claiming access under this subsection is no longer a general partner and no longer subject to a general partner's duties and obligations under Section 409. Section 605(a)(2) (dissociation as a partner terminates duty of good faith as to subsequent events). *But see id.*, cmt (noting that the common law implied covenant will continue to be relevant if the partnership agreement provides continuing rights and obligations for a person dissociated as a general partner).

In the context of Subsection (e)(2), "good faith" is properly understood to mean an honest belief that the request is made for a proper purpose. *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 285 (Tex. 1998) (holding that "'good faith' in the surety agreement before us refers to conduct which is honest in fact, free of improper motive or wilful ignorance of the facts at hand"); Andrews v. Bible, 812 S.W.2d 284, 288 (Tenn. 1991) (describing "subjective good faith" as "[a] pure heart but an empty head") (quoting *Whittington v. Ohio River Co.*, 115 F.R.D. 201, 209 (E.D.Ky.1987)). Willful ignorance includes being an ostrich. "While 'honesty' may require no more than a pure heart, it is questionable that a pure heart can co-exist with closed eyes. It is not honest to close one's eyes so as to maintain an empty head." *J.R. Hale Contracting Co. v. United New Mexico Bank at Albuquerque*, 799 P.2d 581, 591 (NM 1990). *See also* UPA (1914) § (3)(1) ("A person has 'knowledge' of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.").

Subsection (e)(3) – Applying the limited partner standard Section 304(b) to a person dissociated as a general partner makes sense, because the person has no further management role. Theoretically, an even stricter standard might apply, because limited partners have at least some governance role. However, this act already has several different standards applicable to information rights. *See* Sections 304(b) (limited partner), Section 304(e) (person dissociated as a limited partner), 407(b), (c)(2) (general partner), 407(e) (person dissociated as a general partner). This act applies Section 304(b) to a person dissociated as a general partner to avoid having to create another standard.

Subsection (h) – Some old cases involved conflicts over whether a shareholder could exercise inspection rights through another person. *White v. Coeur D'Alene Big Creek Mining Co.*, 55 P.2d 720, 723 (Idaho 1936) (stating that "[t]he refusal to permit respondent [shareholder] to appoint his own attorney or agent to make the examination [of the corporation's books] was in

effect a denial of his right" of inspection); *State v. Monida & Yellowstone Stage Co.*, 124 N.W. 971, 972 (Minn. 1910) (upholding a trial court's mandamus order, "which shall provide that [the shareholder complainant], or such attorney or agent as he may select, … shall be allowed to inspect the books, records, and papers of the defendant [corporation]"). In light of that history, for the avoidance of doubt, this subsection expressly authorizes taking action through an agent. No negative inference should be drawn about using agents to take other action under this act.

Subsection (i) – This section provides no information rights to a person as transferee. Transferee status brings only the very limited information rights stated in Section 702(c). However, a transferee that is a person dissociated as a limited partner has rights in the latter capacity under Subsection (e).

Subsection (j) – This subsection provides fallback protection for gaps in the partnership agreement. For example, the general partners may protect trade secrets from disclosure and prohibit various misuses of confidential information even if the partnership agreement omits to do so.

Strictly speaking, the reference to "ordinary course" is unnecessary. *See* Section 406(a) (providing generally that "any matter relating to the activities and affairs of the partnership is decided exclusively" by the general partners). The phrase is included merely for the avoidance of doubt.

The limited partnership bears the burden of proving the reasonableness of any restriction imposed under this subsection. In 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.

The burden of persuasion under this subsection contrasts with the burden of persuasion under Section 105(c)(9) (prohibiting unreasonable limitations on the information rights provided by this section). Under that paragraph, as a matter of ordinary procedural law the burden is on the person making the claim.

SECTION 408. REIMBURSEMENT; INDEMNIFICATION; ADVANCEMENT; AND INSURANCE.

(a) A limited partnership shall reimburse a general partner for any payment made by the general partner in the course of the general partner's activities on behalf of the partnership, if the general partner complied with Sections 406, 409, and 504 in making the payment.

(b) A limited partnership shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation, or other liability incurred by the

person by reason of the person's former or present capacity as a general partner, if the claim, demand, debt, obligation, or other liability does not arise from the person's breach of Section 406, 409, or 504.

(c) In the ordinary course of its activities and affairs, a limited partnership may advance reasonable expenses, including attorney's fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a general partner, if the person promises to repay the partnership if the person ultimately is determined not to be entitled to be indemnified under subsection (b).

(d) A limited partnership may purchase and maintain insurance on behalf of a general partner against liability asserted against or incurred by the general partner in that capacity or arising from that status even if, under Section 105(c)(8), the partnership agreement could not eliminate or limit the person's liability to the partnership for the conduct giving rise to the liability.

Comment

Subsections (a) and (b) – These subsections apply only to general partners. A limited partnership's obligation, if any, to reimburse or indemnify others (*e.g.,* employees, independent contractors, other agents) is a question for other law, including the law of agency, contract and restitution. The fact a person has dissociated as a partner does not affect any obligations incurred by the partnership under these subsections for conduct occurring before the dissociation.

To the extent a partnership agreement modifies or displaces the default rules stated in Sections 406 and 409, the agreement should also address these sections. For example, if the partnership agreement establishes a duty of ordinary care (modifying Section 409(c)), the agreement should specify which level of care is necessary to satisfy Subsections (a) and (b). It is not necessary that the levels of care be the same, only that the partnership agreement make the situation clear and thereby avoid difficult issues of interpretation.

Subsection (a) – The reimbursement obligation stated here is a default rule and roughly parallels a rule of agency law. RESTATEMENT (THIRD) OF AGENCY § 8.14(2)(a) (2006) (stating that "[a] principal has a duty to indemnify an agent … when the agent makes a payment (i) within the scope of the agent's actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously in making the payment").

Subsection (b) – This subsection provides for indemnification but only as a default rule. Subject only to Section 105(c)(8), the partnership agreement can relax these preconditions substantially. The agreement can also impose stricter preconditions.

The rule's eligibility requirements correspond to the default rules on management duties, which is appropriate because otherwise the statutory default rule on indemnification could undercut or even vitiate the statutory default rules on duty.

Although referring broadly to any "person," this subsection is actually limited to present and former general partners. The indemnification obligation applies to only to a "debt, obligation, or other liability incurred by the person by reason of the person's former or present capacity as a general partner." Thus, by its terms this subsection does not apply to a person in the capacity of an officer, manager, CEO, etc.

Of course, the partnership agreement may mandate indemnification to officers, managers, employees, and other persons providing services to or acting for the limited partnership. Within the limitations stated in Section 105(c)(8), a limited partnership agreement may obligate a limited partnership to indemnify a person even when the person has breached a managerial duty or the partnership agreement itself.

Subsection (c) – This subsection authorizes but does not require a limited partnership to provide advances to cover expenses. *Cf. Majkowski v. American Imaging Mgmt. Servs., LLC*, 913 A.2d 572, 589 (Del. Ch. 2006) ("Because rights to indemnification and advancement differ in important ways, our courts have refused to recognize claims for advancement not granted in specific language clearly suggesting such rights."). The phrase "hold harmless" likewise does not encompass advances. *Id.* The authorization applies only to those persons eligible for indemnification under Subsection (b), but the partnership agreement certainly can authorize a broader scope and even make advances obligatory.

The reference to "ordinary course" pertains to Section 406(a) (stating that "any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners.")

Subsection (d) – This subsection's language is very broad and authorizes a limited partnership to purchase insurance to cover, *e.g.*, a general partner's intentional misconduct. It is unlikely that such insurance would be available. This authorization comes from the act, not the partnership agreement, and therefore is not subject to restrictions stated in Section 105(c)(8) (precluding the partnership agreement from "reliev[ing] or exonerat[ing] a person from liability for conduct involving bad faith, willful or intentional misconduct, or knowing violation of law").

SECTION 409. STANDARDS OF CONDUCT FOR GENERAL PARTNERS.

(a) A general partner owes to the limited partnership and, subject to Section 901, the other partners the duties of loyalty and care stated in subsections (b) and (c).

(b) The fiduciary duty of loyalty of a general partner includes the duties:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner:

(A) in the conduct or winding up of the partnership's activities and affairs;

(B) from a use by the general partner of the partnership's property; or

(C) from the appropriation of a partnership opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership's activities and affairs as or on behalf of a person having an interest adverse to the partnership; and

(3) to refrain from competing with the partnership in the conduct or winding up of the partnership's activities and affairs.

(c) The duty of care of a general partner in the conduct or winding up of the limited partnership's activities and affairs is to refrain from engaging in grossly negligent or reckless conduct, willful or intentional misconduct, or knowing violation of law.

(d) A general partner shall discharge the duties and obligations under this [act] or under the partnership agreement and exercise any rights consistently with the contractual obligation of good faith and fair dealing.

(e) A general partner does not violate a duty or obligation under this [act] or under the partnership agreement solely because the general partner's conduct furthers the general partner's own interest.

(f) All the partners of a limited partnership may authorize or ratify, after full disclosure of all material facts, a specific act or transaction by a general partner that otherwise would violate the duty of loyalty.

(g) It is a defense to a claim under subsection (b)(2) and any comparable claim in equity or at common law that the transaction was fair to the limited partnership.

(h) If, as permitted by subsection (f) or the partnership agreement, a general partner enters into a transaction with the limited partnership which otherwise would be prohibited by subsection (b)(2), the general partner's rights and obligations arising from the transaction are the same as those of a person that is not a general partner.

Comment

ULPA (2001) derived this section from UPA (1997) § 404. The 2011 and 2013 Harmonization amendments made one major substantive change; they "un-cabined" fiduciary duty. UPA (1997) § 404 had deviated substantially from UPA (1914) by purporting to codify all fiduciary duties owed by partners. This approach had a number of problems. Most notably, the exhaustive list of fiduciary duties left no room for the fiduciary duty owed by partners to each other – *i.e.*, "the punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928). Although UPA (1997) § 404(b) purported to state "[a] partner's duty of loyalty to the partnership *and the other partners*" (emphasis added), the three listed duties each protected the partnership and not the partners.

The 2011 and 2013 Harmonization amendments "un-cabined" fiduciary duty in both partnership acts, thereby harmonizing them to ULLCA (2006). As harmonized, this section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section are subject to the limited partnership agreement, but Section 105(c) and (d) contain important limitations on the power of the partnership agreement to affect fiduciary and other duties and the obligation of good faith and fair dealing.

For the effect of dissociation on a person's duties under this section, see Sections 602(a)(2) (limited partners) and 605(a)(2) (general partners).

Subsection (a) – This subsection recognizes two core managerial duties but, unlike UPA (1997) and ULPA (2001), does not purport to be exhaustive. For example, many cases characterize a manager's duty to disclose as a fiduciary duty. *E.g., Lonergan v. EPE Holdings, LLC* , 5 A.3d 1008, 1023 (Del. Ch. 2010) (stating that "in the limited partnership context, absent contractual modification, a general partner owes fiduciary duties that include a duty of full disclosure") (quotation marks and citation omitted); *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1298 (5th Cir. 1993) ("Under Alaska law, a general partner stands in a fiduciary relationship with the limited partnership and thereby owes 'a fiduciary duty ... to disclose information concerning partnership affairs.'") (quoting *Parker v. Northern Mixing Co.*, 756 P.2d 881, 894 (Alaska 1988)).

Subsection (b) – This subsection states three core aspects of the fiduciary duty of loyalty: (i) not "usurping" partnership opportunities or otherwise wrongly benefiting from the limited partnership's operations or property; (ii) avoiding conflict of interests in dealing with the limited partnership (whether directly or on behalf of another); and (iii) refraining from competing with the limited partnership. Essentially the same duties exist in agency law and under the law of all types of business organizations.

The duties apply beginning with "the conduct of the partnership's activities and affairs," which by definition cannot exist before the partnership does; thus the stated duties do not apply to pre-formation activities.

The duties stated in this subsection comprise a default rule. Under Section 105(d)(3)(A): "If not manifestly unreasonable, the partnership agreement may … alter or eliminate the aspects of the duty of loyalty stated in Section 409(b)."

Subsection (b)(1) – The phrase "hold as trustee" dates back to UPA (1914) § 21 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information. *Cf.* Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) § 506 ("A trustee [of a statutory trust]… is not liable to the trust or to a beneficial owner for breach of any duty, *including a fiduciary duty*, to the extent the breach results from reasonable reliance on: (1) a term of the governing instrument; (2) a record of the statutory trust; or (3) an opinion, report, or statement of another person that the person to which the opinion, report, or statement is made or delivered reasonably believes is within the other person's professional or expert competence and is made or delivered to the trustee.") (emphasis added).

Subsection (b)(1)(A) – This provision is consistent with a basic principle of agency law – namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. RESTATEMENT (THIRD) OF AGENCY § 8.06, cmt. c. (2006). Typically, however, the limited partnership agreement legitimizes particular benefits – *e.g.*, a management fee paid to a general partner in addition to that partner's share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(B) – For the expansive meaning of "property," see Section 102(17). The term includes confidential information.

Subsection (b)(1)(C) – This act does not specify what constitutes "a partnership opportunity," but ample case law exists. *See, e.g.*, *In re Monetary Grp.,*, 159 B.R. 964 (M.D. Fla. 1990) (discussing the usurpation of a limited partnership opportunity"), *aff'd in part, rev'd in part*, 2 F.3d 1098 (11th Cir. 1993); *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 223 N.E.2d 869, 873 (1966) ("There is no basis or warrant for distinguishing the fiduciary relationship of corporate director and shareholder from that of general partner and limited partner.")

In the context of winding up, the scope of partnership opportunities inevitably narrows.

In most, if not all, situations, usurping a partnership opportunity also breaches the duty not to compete, Paragraph (b)(3), but not *vice versa*.

Subsection (b)(2) – In this context, the phrase "adverse interest" is a term of art, meaning "to be on the other side of the table" in some dealing with the limited partnership. Absent informed consent by the limited partnership, this duty is breached by the mere existence of the conflict of interest; the limited partnership need not prove that the outcome of the dealing was adverse to the partnership. *But see* Subsection (g) (permitting the defense of fairness).

Subsection (b)(3) – Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees.

Subsection (c) – This act no longer refers to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable only in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission.

The change in label is consistent with the RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006), which refers to the agent's "fiduciary duty" to act loyally, but eschews the word "fiduciary" when stating the agent's duties of "care, competence, and diligence." *Id.* § 8.08. However, the label change is merely semantics; no change is the law is intended.

The partnership agreement can raise the standard of care, or subject to Sections 105(c)(8) and (d)(2)(C), lower it. A person's practical exposure for breaching the duty of care involves not only the standard of care but also any partnership agreement provision that: (i) exonerates the person from liability for breach of the duty of care, Section 105(c)(8); or (ii) entitles the person to indemnification despite such breach, Section 408(b), comment.

Subsection (d) – This subsection refers to the "*contractual* obligation of good faith and fair dealing" (emphasis added) and thereby invokes the implied obligation that exists in every contract. *See* RESTATEMENT (SECOND) CONTRACTS § 205 (1981) ("Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."). The adjective ("contractual") should help avoid decisions like *Phelps v. Frampton*, 2007 MT 263, 339 Mont. 330, 342-43, 170 P.3d 474, 483 (2007) (holding that Montana's version of UPA (1997) creates a statutory obligation of good faith and fair dealing separate from the implied contractual covenant).

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – *i.e.*, duties and rights "under this [act]." However, for the most part those duties and rights apply to relationships *inter se* the partners and the limited partnership and function only to the extent not displaced by the partnership agreement. Those statutory default rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

The contractual obligation of "good faith" has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware's

famous corporate law exoneration provision; and (ii) that provision's exception "for acts or omissions not in good faith." DEL. CODE ANN. tit. 8, § 102(b)(7) (2012). In that context, good faith is an aspect of the duty of loyalty. *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the "utmost good faith" sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. *See, e.g., Meinhard v. Salmon*, 249 N.Y. 458, 477, 164 N.E. 545, 551 (1928) ("[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship."); *Donahue v. Rodd Electrotype Co. of New England, Inc.,* 367 Mass. 578, 593, 328 N.E.2d 505, 515 (1975) ("[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty.") (footnotes omitted) (citations omitted) (internal quotations omitted).

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a general partner from acting in the general partner's own self-interest:

> "Fair dealing" is not akin to the fair process component of entire fairness, *i.e.*, whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care … It is rather a commitment to deal "fairly" in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise "good faith" does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.

Gerber v. Enter. Products Holdings, LLC, 67 A.3d 400, 418-19 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440–42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (footnotes omitted) (citations omitted) (internal quotations omitted). *See also* Subsection (e).

Courts should not use the contractual obligation to change *ex post facto* the parties' or this act's allocation of risk and power. To the contrary, 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 general partner, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a general partner may properly exercise discretion even though another partner (whether general or limited) 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:

> An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but *rather what the parties would have agreed to themselves had they considered the issue in their original bargaining positions at the time of contracting*.

Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 418 (Del. 2013) (quoting *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440–42 (Del. Ch. 2012), *aff'd in part, rev'd in part on other grounds*, 68 A.3d 665 (Del. 2013)) (emphasis added) (footnotes omitted) (citations omitted) (internal quotations omitted by *Gerber*).

In sum, the purpose of the contractual 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.

As to the power of the partnership agreement to affect the contractual obligation of good faith and fair dealing, see Section 105(c)(7) (prohibiting elimination but allowing the agreement to "prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured"). For examples, see Section 105(c)(7), comment. As to whether the obligation stated in this subsection applies to the benefit of transferees, see Section 107(b), comment.

Subsection (e) – A general partner in a limited partnership has at least two different roles: (i) as a party to the limited partnership agreement, with rights and obligations under that agreement; and (ii) as manager or co-manager of the enterprise. This provision pertains to the first role. A general partner's exercise of rights under the partnership agreement is subject to the obligation of good faith and fair dealing, Subsection (d), but a general partner does not breach that contractual obligation "solely because the general partner's conduct furthers the general partner's own interest." In contrast, this provision is ineffective with regard to a general partner's duties as manager or co-manager. For example, a general partner's liability under Section 409(b)(3) (prohibiting competition) is not "solely because the general partner's conduct furthers the general partner's own interest." Rather, the liability results from the breach of a specific obligation – *i.e.*, the codified aspect of the duty of loyalty that prohibits competition.

Subsection (f) – Here and elsewhere in this act, information "is material if there is a substantial likelihood that a reasonable [decision maker] would consider it important in deciding how to vote" or take other action under this act or the partnership agreements. *See TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 2132 (1976).

The partnership agreement can provide additional or different methods of authorization

or ratification, subject to the strictures of Section 105(c)(5), (d)(1), and (d)(3)(A)(B) and (D).

Subsection (g) – This subsection codifies judge-made law applicable to all business entities. *See, e.g.*, *Lonergan v. EPE Holdings, LLC*, 5 A.3d 1008, 1019 (Del. Ch. 2010) (discussing "entire fairness" in the context of a limited partnership"); *Gottsacker v. Monnier*, 281 Wis. 2d 361, 379, 697 N.W.2d 436, 444 (Wisc. 2005) (referring to "a willful failure to deal fairly with the LLC or its other members"); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1116 (Del. 1994) (discussing "entire fairness" in the context of a corporation's merger with an affiliate).

Subsection (h) – This subsection is the modern, reformulated version of a language that sought to overturn the now-defunct notion that debts to partners were categorically inferior to debts to non-partner creditors. *See, e.g.*, ULPA (2001) § 112 ("A partner may lend money to and transact other business with the limited partnership and has the same rights and obligations with respect to the loan or other transaction as a person that is not a partner."). The reformulation makes clear that this provision has nothing to do with the fiduciary duty pertaining to conflict of interests. *See BT-I v. Equitable Life Assurance Soc'y of the United States*, 75 Cal. App. 4th 1406, 1415, 89 Cal. Rptr. 2d 811 (1999) (examining the prior formulation, explaining its history and stating "[w]e cannot discern anything in the purpose of [the prior formulation] that suggests an intent to affect a general partner's fiduciary duty to limited partners").

This subsection states a default rule. The partnership agreement may provide that debt to a general partner (or general partners generally) is subordinate to other partnership obligations. The agreement that creates the debt may do likewise.

[ARTICLE] 5

CONTRIBUTIONS AND DISTRIBUTIONS

Introductory Comment

With the exception of Section 505, this Article applies in the same way to both general and limited partners.

SECTION 501. FORM OF CONTRIBUTION. A contribution may consist of property transferred to, services performed for, or another benefit provided to the limited partnership or an agreement to transfer property to, perform services for, or provide another benefit to the partnership.

Comment

This section is intentionally quite broad, encompassing past, present, and promised benefits. Comparable language exists in most, if not all, limited partnership statutes, and case

law recognizes the intended broadness of this approach. *See, e.g., Rival 1981-IV Drilling Program, Ltd. v. Guar. Bank & Trust*, 732 P.2d 1233, 1234 (Colo. Ct. App. 1986) (letter of credit as contribution); *Rehfuss v. Moore,* 19 A. 756, 757 (Pa. 1890) (patent rights); *Belgard v. Manchac Technologies, LLC*, 92 So.3d 660, 664 (La. Ct. App. 3d Cir. 2012) (establishing a line of credit).

This act does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to the limited partnership would be subject to the statute of frauds pertaining to land transfers. *See Gunsorek v. Hearland Bank,* 707 N.E.2d 557, 564 (Ohio 1997) (holding that where terms of oral partnership agreement required limited partner to contribute real property, statute of frauds barred enforceability of the agreement). Likewise, a promise that by its terms requires performance that extends beyond one year from the making of the contract would be subject to the one-year provision of the statute of frauds. *See* Section 102(14), cmt.

SECTION 502. LIABILITY FOR CONTRIBUTION.

(a) A person's obligation to make a contribution to a limited partnership is not excused by the person's death, disability, termination, or other inability to perform personally.

(b) If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited partnership to contribute money equal to the value, as stated in the required information, of the part of the contribution which has not been made.

(c) The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the partners. If a creditor of a limited partnership extends credit or otherwise acts in reliance on an obligation described in subsection (a) without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.

Comment

Subsection (a) – Under common law principles of impracticability, an individual's death or incapacity will sometimes discharge a duty to render performance. RESTATEMENT (SECOND) OF CONTRACTS §§ 261 (Discharge by Supervening Impracticability), 262 (Death or Incapacity of Person Necessary For Performance). (1981). This subsection overrides those principles. Moreover, the reference to "perform personally" is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

Subsection (b) – This subsection is a statutory liquidated damage provision, exercisable

at the option of the limited partnership, with the damage amount set according to the value of the promised, non-monetary contribution.

> EXAMPLE: In order to become a partner, a person promises to contribute to the limited partnership various assets which the partnership agreement values at $150,000. In return for the person's promise, and in light of the agreed value, the limited partnership admits the person as a partner with a right to receive 25% of the limited partnership's distributions.
>
> The promised assets are subject to a security agreement, but the partner promises to contribute them "free and clear." Before the partner can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the actual fair market value of the assets, under this subsection the limited partnership has a claim against the partner for "money equal to the value . . . of the part of the contribution which has not been made" – *i.e.*, $150,000.

> EXAMPLE: Same facts as the previous example, except that the public sale brings $225,000. The limited partnership is neither obliged to invoke this subsection nor limited to the $150,000 valuation. The limited partnership may instead sue for breach of the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss suffered as a result of the breach.

Subsection (c) – The unanimity requirement expressed in the first sentence might indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may be varied by the partnership agreement. The right of each partner to consent is not a "right[] under this [act] of a person other than a partner." *See* Section 105(c)(18) (preventing the partnership agreement from affecting such rights). In contrast, the creditor right stated in the second sentence fits squarely within Section 105(c)(18) and therefore may not be varied by the partnership agreement.

SECTION 503. SHARING OF AND RIGHT TO DISTRIBUTIONS BEFORE DISSOLUTION.

(a) Any distribution made by a limited partnership before its dissolution and winding up must be shared among the partners on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner, except to the extent necessary to comply with a transfer effective under Section 702 or charging order in effect under Section 703.

(b) A person has a right to a distribution before the dissolution and winding up of a limited partnership only if the partnership decides to make an interim distribution. A person's

dissociation does not entitle the person to a distribution.

(c) A person does not have a right to demand or receive a distribution from a limited partnership in any form other than money. Except as otherwise provided in Section 810(f), a partnership may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person's share of distributions.

(d) If a partner or transferee becomes entitled to receive a distribution, the partner or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution. However, the partnership's obligation to make a distribution is subject to offset for any amount owed to the partnership by the partner or a person dissociated as a partner on whose account the distribution is made.

Comment

Past uniform unincorporated entity acts and many current limited partnership acts provide default rules for allocation of profits, and UPA (1997) even provided a default structure for maintaining capital accounts. For the following reasons, this act, incorporating changes made by the Harmonization Project, provides a default rule only for rights to share in distributions:

- Capital accounts are maintained for one purpose, to determine how distributions will be made to partners. The rules for maintenance of capital accounts can be very complex. Generally, however, profits increase capital account balances (and increase the amounts that will be distributed to the partners) and losses reduce capital account balances (and reduce the amounts that will be distributed to the partners). If the statute has a simple default rule for how distributions are to be made to the partners, providing an additional set of default profit and loss allocation provisions and capital account rules will be, at best, duplicative and, at worse, inconsistent with the distribution rules.

- Some argue that capital account rules and profit and loss allocation provisions are necessary to comply with tax requirements. Tax income or loss is allocated to partners according to the partners' economic interests in the partnership, and these interests are based on distributions that would be made to partners on liquidation of the partnership. By including default distribution provisions, the act includes the information necessary to make these tax determinations. To the extent the tax law allows partners to make further tax elections or satisfy alternative safe harbors, the partners may look to the tax law for guidance and include necessary provisions in their agreements.

Subsection (a) – The rule stated applies to redemptions as well as operating distributions but is a default rule in both contexts. *See* 102(4)(A), cmt**.**

Subsection (b) – The second sentence of this subsection accords with Section 602(a)(3) – upon dissociation a partner is treated as a mere transferee of the partner's own transferable interest. Like most *inter se* rules in this act, this one is subject to the limited partnership agreement. *See* Section 602(a)(3), cmt, and 605(a)(3).

Subsection (d) – *See also* Section 504(d) (pertaining to the rights of partners and transferees that receive a distribution in the form of indebtedness) and 504(e) (pertaining to solvency testing for payments on indebtedness issued to redeem an interest).

SECTION 504. LIMITATIONS ON DISTRIBUTIONS.

(a) A limited partnership may not make a distribution, including a distribution under Section 810, if after the distribution:

(1) the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's activities and affairs; or

(2) the partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to the rights of persons receiving the distribution.

(b) A limited partnership may base a determination that a distribution is not prohibited under subsection (a) on:

(1) financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances; or

(2) a fair valuation or other method that is reasonable under the circumstances.

(c) Except as otherwise provided in subsection (e), the effect of a distribution under subsection (a) is measured:

(1) in the case of a distribution as defined in Section 102(4)(A), as of the earlier of:

(A) the date money or other property is transferred or debt is incurred by the limited partnership; or

(B) the date the person entitled to the distribution ceases to own the interest or right being acquired by the partnership in return for the distribution;

(2) in the case of any other distribution of indebtedness, as of the date the indebtedness is distributed; and

(3) in all other cases, as of the date:

(A) the distribution is authorized, if the payment occurs not later than 120 days after that date; or

(B) the payment is made, if the payment occurs more than 120 days after the distribution is authorized.

(d) A limited partnership's indebtedness to a partner or transferee incurred by reason of a distribution made in accordance with this section is at parity with the partnership's indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

(e) A limited partnership's indebtedness, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(f) In measuring the effect of a distribution under Section 810, the liabilities of a

dissolved limited partnership do not include any claim that has been disposed of under Section 806, 807, or 808.

Comment

Both this section and Section 505 were derived essentially from the Model Business Corporation Act section 6.40. Both sections are necessary and appropriate because a limited partnership provides its limited partners a corporate-like liability shield and a limited liability limited partnership provides the shield to general partners as well. With the exception noted in the comment to Subsection (a)(2), the provisions of this section are non-waivable. Section 105(c)(18).

"Distribution" does not include "amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." Section 102(4)(B).

Subsection (a) – Insolvency is a fundamental issue under this section, and this subsection provides two tests of insolvency. The tests are disjunctive; a distribution violates this section if after the distribution the limited partnership fails either of the tests. The subsection applies both to interim and liquidating distributions.

Solvency is also a fundamental issue under bankruptcy and fraudulent transfer law, which provide their own respective definitions of the concept.

Subsection (a)(2) – The reference to "preferential rights upon dissolution and winding up" is a default rule, because removing this protection for preferred partners or transferees is an *inter se* matter. *See* Section 105(d)(1)(B). The rest of the section is not subject to change in the partnership agreement. Section 105(c)(18).

Subsection (b) – This subsection states a standard of ordinary care, in contrast with the generally-applicable standard stated in Section 409(c) (gross negligence).

Subsection (b)(2) – This alternative valuation provision is likely to be both useful and fair when the limited partnership has appreciated assets but for accounting purposes these assets are valued at book value less depreciation.

Subsection (c) – This subsection provides three alternative rules for determining the point(s) in time of as which to apply the Subsection (a) solvency tests. The timing depends on which of three categories encompasses a distribution: (i) a distribution in the nature of a redemption (regardless of whether the distribution includes a distribution of indebtedness); (ii) any distribution of indebtedness other than a distribution in the nature of a redemption; and (iii) any distribution that involves neither a redemption nor a distribution of indebtedness. A requirement for additional solvency testing pertaining to distributions of indebtedness appears in Subsection (e).

Subsection (c)(1) – Section 102(4)(A) encompasses distributions in the nature of a redemption.

Subsection (c)(1)(A) and (B) – Under Subparagraph (A), any beginning of payment activity triggers to the rule and sets the date as of when to apply the solvency tests. Under Subparagraph (B), the limited partnership's complete acquisition of the rights is necessary to trigger the rule.

Subsection (c)(2) – This provision states the general rule for distributions that are in the form of debt and which are not connected with a redemption.

Subsection (c)(3) – This provision states alternative rules for all distribution of money or property (*i.e.*, not debt). The measuring date depends on the length of time between the authorization and payment of the distribution.

Subsection (d) – *Compare* Subsection (d), *with* Section 503(d) (characterizing as a creditor a person who has become entitled to receive a distribution).

Subsection (e) – This subsection contains two rules pertaining to indebtedness issued as part of a distribution and the solvency tests of Subsection (a). The first sentence states the sensible rule that indebtedness that is essentially subordinated to the solvency requirement – *i.e.*, not payable if making payment would transgress that requirement - is not counted in determining liabilities for purposes of the solvency tests. The second sentence applies the solvency tests to each payment of principal and interest on any indebtedness issued as a distribution, in addition to any previous testing required by Subsection (c)(1)(A) or (c)(2).

> EXAMPLE: A limited partnership and one of its partners agree that the limited partnership will buy out the partner's entire ownership interest in the partnership in return for a promissory note from the partnership, payable in installments. Under the redemption agreement, the partner yields up all its interests and rights on January 15 and the partnership signs and delivers the note to the dissociated partner on February 15. Under the note, payment of interest is due monthly beginning March 15, with a balloon payment of the principal due December 30.
>
> Under Subsection (c)(1)(B), the solvency tests are applied as of January 15. Under Subsection (e), the solvency tests are again applied on the March 15, April 15, etc., and again on December 30.

Subsection (f) – The cited sections provide methods for extinguishing or limiting the debts of a limited partnership that is winding up its affairs and activities and thus any debt affected by any of the cited sections is irrelevant for purposes of solvency testing.

SECTION 505. LIABILITY FOR IMPROPER DISTRIBUTIONS.

(a) If a general partner consents to a distribution made in violation of Section 504 and in consenting to the distribution fails to comply with Section 409, the general partner is personally

liable to the limited partnership for the amount of the distribution which exceeds the amount that could have been distributed without the violation of Section 504.

(b) A person that receives a distribution knowing that the distribution violated Section 504 is personally liable to the limited partnership but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 504.

(c) A general partner against which an action is commenced because the general partner is liable under subsection (a) may:

(1) implead any other person that is liable under subsection (a) and seek to enforce a right of contribution from the person; and

(2) implead any person that received a distribution in violation of subsection (b) and seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (b).

(d) An action under this section is barred unless commenced not later than two years after the distribution.

Comment

This section and Section 504 were derived essentially from Model Business Corporation Act section 6.40. As with Section 504, this section is appropriate and necessary due to the liability shield of a limited partnership. The provisions of this section are non-waivable. Section 105(c)(18).

This section contemplates two categories of liability: liability of those who have authorized improper distributions, Subsection (a), and the liability of those who have received improper distributions, Subsection (c). Liability that has accrued under this section is not affected by a person subsequently ceasing to be a partner or transferee.

The liability is to the entity, not to the creditors of an insolvent entity. *See Hullett v. Cousin*, 63 P.3d 1029, 1036 (Ariz. 2003) (holding that where limited partners had no intent to defraud creditors, and had no reason to know the partnership was insolvent at the time, return of the partners' contributions was not an improper distribution and could not be used to satisfy

creditor's claim against the partnership). However, some cases accord a creditor standing to invoke the statute. *See, e.g., Henkels & McCoy, Inc. v. Adochio,* 906 F.Supp. 244, 249–50 (E.D. Pa. 1995), *aff'd,* 138 F.3d 491, 503–04 (3d Cir. 1998) (holding limited partners liable to creditor where general partner knew or should have known the distributions were in violation of partnership agreement).

This section does not preclude or interfere with claims for fraudulent transfer. *See* Subsection (d), cmt.

Subsection (a) – The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in Section 409. To the extent those duties have been permissibly revised by the partnership agreement, the revised standards apply to this subsection. *See also* Section 504(b)(1) (permitting reasonable reliance on specified financial information).

Subsection (b) – Actual knowledge is necessary to impose liability. Reason to know does not suffice. *Compare* Subsection (b), *with* Section 103(a)-(b).

Subsections (b) and (c)(2) – Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a general partner.

Subsection (e) – When the distribution is in the form of indebtedness, the distribution may occur on several different dates. *See* Section 504(e), cmt.

This statute of limitations applies only to actions "under this section" and does not affect claims under other applicable law, which most often is fraudulent transfer law. For a different approach, see DEL. CODE ANN. tit. 6, § 18-607(c) (West 2013) (applying a 3-year statute of limitations to claims "under this chapter or other applicable law"); N.Y. PTR. LAW § 121-607 (c) (same). *But see, e.g., In re The Heritage Org., LLC*, 413 BR 438, 461 (Bankr. ND Tex. 2009) (invoking the Texas Uninform Fraudulent Act [TUFTA] to recover distributions made by a Delaware LLC headquartered in Texas; rejecting DEL. CODE ANN. tit. 6, § 18-607(c) on choice of law grounds; stating that "the Delaware legislature cannot limit the reach of TUFTA").

[ARTICLE] 6

DISSOCIATION

SECTION 601. DISSOCIATION AS LIMITED PARTNER.

(a) A person does not have a right to dissociate as a limited partner before the completion of the winding up of the limited partnership.

(b) A person is dissociated as a limited partner when:

(1) the limited partnership knows or has notice of the person's express will to withdraw as a limited partner, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date;

(2) an event stated in the partnership agreement as causing the person's dissociation as a limited partner occurs;

(3) the person is expelled as a limited partner pursuant to the partnership agreement;

(4) the person is expelled as a limited partner by the affirmative vote or consent of all the other partners if:

(A) it is unlawful to carry on the limited partnership's activities and affairs with the person as a limited partner;

(B) there has been a transfer of all the person's transferable interest in the partnership, other than:

(i) a transfer for security purposes; or

(ii) a charging order in effect under Section 703 which has not been foreclosed;

(C) the person is an entity and:

(i) the partnership notifies the person that it will be expelled as a limited partner because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or the equivalent has been revoked, or the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) not later than 90 days after the notification, the statement of

dissolution or the equivalent has not been withdrawn, rescinded, or revoked, the person has not been reinstated, or the person's charter or the equivalent or right to conduct business has not been reinstated; or

(D) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being would up;

(5) on application by the limited partnership or a partner in a direct action under Section 901, the person is expelled as a limited partner by judicial order because the person:

(A) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership's activities and affairs;

(B) has committed willfully or persistently, or is committing willfully and persistently, a material breach of the partnership agreement or the contractual obligation of good faith and fair dealing under Section 305(a); or

(C) has engaged or is engaging in conduct relating to the partnership's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a limited partner;

(6) in the case of an individual, the individual dies;

(7) in the case of a person that is a testamentary or inter vivos trust or is acting as a limited partner by virtue of being a trustee of such a trust, the trust's entire transferable interest in the limited partnership is distributed;

(8) in the case of a person that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the limited partnership is distributed;

(9) in the case of a person that is not an individual, the existence of the person terminates;

(10) the limited partnership participates in a merger under [Article] 11 and:

(A) the partnership is not the surviving entity; or

(B) otherwise as a result of the merger, the person ceases to be a limited partner;

(11) the limited partnership participates in an interest exchange under [Article] 11 and, as a result of the interest exchange, the person ceases to be a limited partner;

(12) the limited partnership participates in a conversion under [Article] 11;

(13) the limited partnership participates in a domestication under [Article] 11 and, as a result of the domestication, the person ceases to be a limited partner; or

(14) the limited partnership dissolves and completes winding up.

Comment

Subsection (a) – This provision states a default rule.

Subsection (b) – This subsection states default rules, which the partnership agreement may vary. However, it would be nonsensical to vary some of the rules – *e.g.*, to provide that the death of a partner who is an individual does not cause the individual's dissociation as a partner, Subsection (b)(6), or that an entity remains a partner even after the existence of the entity has terminated, Subsection (b)(9).

Subsection (b)(1) – The partnership agreement may vary this provision, even to the extent of eliminating a person's power to dissociate as a limited partner. Section 105(c)(11) prohibits the limited partnership agreement from eliminating the power to dissociate of a person as a *general* partner, but neither Section 105(c) nor (d) preserve as mandatory the power of a person to dissociate as a *limited* partner.

Subsection (b)(4)(B) – This provision permits expulsion when a limited partner no longer has any "skin in the game." Under this subparagraph (unless the limited partnership agreement provides otherwise), a limited partner's transferee can protect itself from the vulnerability of "bare naked transferee" status by obligating the partner/transferor to retain a 1% interest and exercise the partner's contract and governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

Subsection (b)(5) – By its terms, this provision does not permit a partner to bring a direct action for expulsion even if the partner could establish standing under Section 901(b). Dealing with a misbehaving limited partner is a management duty, properly reserved to the general partners. *Cf.* Section 603(5) (permitting an "application by the limited partnership or a partner in a direct action under Section 901" for a judicial order expelling a general partner).

Although the partnership agreement can revise or eliminate the possibility of judicial expulsion, doing so requires careful planning. *Cf. Huatuco v. Satellite Healthcare*, CV 8465-VCG, 2013 WL 6460898, at *1, n.2 (Del. Ch. Dec. 9, 2013) (stating that "the right to judicial dissolution is a default right which the parties may eschew by contract" while reserving the question of "[w]hether the parties may, by contract, divest this Court of its authority to order a dissolution in all circumstances, even where it appears manifest that equity so requires—leaving, for instance, irreconcilable members locked away together forever like some alternative entity version of Sartre's Huis Clos").

For examples of conduct warranting an expulsion order in various contexts, see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (discussing a pattern of conduct); *Sherwood Park Bus. Ctr., L.L.C. v. Taggart*, 323 P.3d 551, 561 (Or. Ct. App. 2014) (upholding expulsion of a member who "had stolen a large amount of money from [the limited liability company], had intentionally failed to provide financial information, and had made himself unavailable to carry on the business"); *CCD, L.C. v. Millsap,* 116 P.3d 366, 373 (Utah 2005) (holding that a member's "misappropriat[ion of] trust account funds totaling at least $11,540.06 for his personal use" warranted expulsion, where the member's "misconduct continued the pattern of behavior that [had previously] resulted in losses to the company of $625,000[, where the new misconduct] . . . took place after [the member's] prior wrongdoing had been discovered and after [the limited liability company] had assented to permit [the member] to atone for his misdeeds by fulfilling the terms of the amended operating agreement").

For an analysis that helps distinguish Paragraph (5)(C) from Paragraphs (5)(A) and (B), see *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510, at *15 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the "not reasonably practicable standard" does not require a showing of wrongful conduct). *Cf. Dunnagan v. Watson*, 204 S.W.3d 30, 40 (Tex. Ct. App. 2006) (same issue in the context of dissolution). Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 830 N.W.2d 191, 201–02 (Neb. 2013) (discussing analogous provisions of UPA (1997)). "[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution." *Brennan v. Brennan Assocs.*, 977 A.2d 107, 121 (Conn. 2009) (general partnership).

Subsection (b)(7) and (8) – A change in trustee or personal representative does not cause dissociation.

Subsection (b)(9) – This provision is the entity analog to Subsection (b)(6) (death of an individual). Although in theory the partnership agreement could change this rule, doing so would be nonsensical. *See* Section 803(a), cmt. (noting that a terminated limited liability company cannot rescind its dissolution because "a 'dead' entity lacks both the capacity and

power to bring itself back from the dead"). *See also* Subsection (b)(14).

Subsection (b)(10)(A) – If a limited partnership disappears as part of a merger, no person can continue as a partner of the limited partnership. When the merger takes effect, the partners of the disappearing entity are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving limited partnership. In those circumstances, the merger will have dissociated them from one limited partnership and admitted them into partnership in the surviving entity. *See* Section 301(b)(2).

Subsection (b)(10)(B) – It is possible for a plan of merger to "shuffle the equity" of the surviving entity, even to the extent of "taking out" some or all of the owners of the surviving entity. A reverse triangular merger involving a limited partnership as the surviving entity would dissociate all the pre-merger partners of the partnership.

Subsection (b)(12) – By definition, a limited partnership that converts ceases to be a limited partnership. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will "shuffle the equity" and "take out" some of the partners of the converting limited partnership.

Subsection (b)(13) – Domestication does not by itself dissociate a partner, because the domesticated entity remains both a limited partnership and "the same entity without interruption as the domesticating company." Section 1156(a)(1)(B). However, an "equity shuffle" could dissociate a partner.

SECTION 602. EFFECT OF DISSOCIATION AS LIMITED PARTNER.

(a) If a person is dissociated as a limited partner:

(1) subject to Section 704, the person does not have further rights as a limited partner;

(2) the person's contractual obligation of good faith and fair dealing as a limited partner under Section 305(a) ends with regard to matters arising and events occurring after the person's dissociation; and

(3) subject to Section 704 and [Article] 11, any transferable interest owned by the person in the person's capacity as a limited partner immediately before dissociation is owned by the person solely as a transferee.

(b) A person's dissociation as a limited partner does not of itself discharge the person

from any debt, obligation, or other liability to the limited partnership or the other partners which the person incurred while a limited partner.

Comment

Subsection (a) – This provision makes no reference to power-to-bind matters, because the act provides that a limited partner *qua* limited partner has no power to bind the limited partnership. Section 302(a).

Subsection (a)(2) – This provision does not determine the effect of a person's dissociation as a limited partner on the person's future obligations or rights under the partnership agreement. Some contractual obligations typically extend beyond dissociation – *e.g.*, buyout arrangements. To the extent provisions of the partnership agreement continue to apply, the common law obligation of good faith continues to apply as well. *See* 409(d), cmt. (explaining that the subsection "invokes the implied obligation that exists in every contract" as a matter of common law).

Subsection (a)(3) – This paragraph accords with Section 503(b) – dissociation does not entitle a person to any distribution, even if dissociation takes the form of expulsion. *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012).

Like most *inter se* rules in this act, this one is subject to the partnership agreement. For example, the partnership agreement has the power to provide for the buyout of a person's transferable interest in connection with the person's dissociation.

SECTION 603. DISSOCIATION AS GENERAL PARTNER. A person is dissociated as a general partner when:

(1) the limited partnership knows or has notice of the person's express will to withdraw as a general partner, but, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date;

(2) an event stated in the partnership agreement as causing the person's dissociation as a general partner occurs;

(3) the person is expelled as a general partner pursuant to the partnership agreement;

(4) the person is expelled as a general partner by the affirmative vote or consent of all the other partners if:

(A) it is unlawful to carry on the limited partnership's activities and affairs with the person as a general partner;

(B) there has been a transfer of all the person's transferable interest in the partnership, other than:

(i) a transfer for security purposes; or

(ii) a charging order in effect under Section 703 which has not been foreclosed;

(C) the person is an entity and:

(i) the partnership notifies the person that it will be expelled as a general partner because the person has filed a statement of dissolution or the equivalent, the person has been administratively dissolved, the person's charter or the equivalent has been revoked, or the person's right to conduct business has been suspended by the person's jurisdiction of formation; and

(ii) not later than 90 days after the notification, the statement of dissolution or the equivalent has not been withdrawn, rescinded, or revoked, the person has not been reinstated, or the person's charter or the equivalent or right to conduct business has not been reinstated; or

(D) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being would up;

(5) on application by the limited partnership or a partner in a direct action under Section 901, the person is expelled as a general partner by judicial order because the person:

(A) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership's activities and affairs;

(B) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or a duty or obligation under Section 409; or

(C) has engaged or is engaging in conduct relating to the partnership's activities and affairs which makes it not reasonably practicable to carry on the activities and affairs of the limited partnership with the person as a general partner;

(6) in the case of an individual:

(A) the individual dies;

(B) a guardian or general conservator for the individual is appointed; or

(C) a court orders that the individual has otherwise become incapable of performing the individual's duties as a general partner under this [act] or the partnership agreement;

(7) the person:

(A) becomes a debtor in bankruptcy;

(B) executes an assignment for the benefit of creditors; or

(C) seeks, consents to, or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all the person's property;

(8) in the case of a person that is a testamentary or inter vivos trust or is acting as a general partner by virtue of being a trustee of such a trust, the trust's entire transferable interest in the limited partnership is distributed;

(9) in the case of a person that is an estate or is acting as a general partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the limited partnership is distributed;

(10) in the case of a person that is not an individual, the existence of the person terminates;

(11) the limited partnership participates in a merger under [Article] 11 and:

(A) the partnership is not the surviving entity; or

(B) otherwise as a result of the merger, the person ceases to be a general partner;

(12) the limited partnership participates in an interest exchange under [Article] 11 and, as a result of the interest exchange, the person ceases to be a general partner;

(13) the limited partnership participates in a conversion under [Article] 11;

(14) the limited partnership participates in a domestication under [Article] 11 and, as a result of the domestication, the person ceases to be a general partner; or

(15) the limited partnership dissolves and completes winding up.

Comment

This section mostly states default rules, which the limited partnership agreement may vary. However, it would make no sense to vary some of the rules – *e.g.*, to provide that death does *not* cause an individual's dissociation, Paragraph (6)(A), or that person (other than an individual) remains a general partner even *after* "the existence of the person terminates." Paragraph (10).

Paragraph (1) – Limited partnership agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation. The agreement cannot eliminate the power of a general partner to dissociate by express will, Section 105(c)(11) but can eliminate the right and thereby make the dissociation wrongful.

Paragraph (3) – Many partnership agreements provide for "no cause" expulsion, and courts considering such provisions have taken somewhat different approaches. *Compare Gelder Med. Grp. v. Webber*, 41 N.Y.2d 680, 684, 363 N.E.2d 573, 576 (1977) *with Winston & Strawn v. Nosal*, 279 Ill. App. 3d 231, 240, 664 N.E.2d 239, 245 (Ill. App. Ct. 1996). *See also* Section 409(d) and cmt. (stating and explaining the implied contractual covenant of good faith and fair dealing).

Paragraph (4)(B) – This paragraph permits expulsion when a general partner no longer has any "skin in the game." Under this paragraph (unless the partnership agreement provides otherwise), a general partner's transferee can protect itself from the vulnerability of "bare naked assignee" status, Section 107(b), cmt., by obligating the general partner/transferor to retain a 1%

interest and exercise the partner's governance rights (including the right to bring a derivative suit) to protect the transferee's interests.

Paragraph (5) – The reference to "a direct action under Section 901" reflects the "separate entity" nature of a limited partnership. Section 901 limits a partner's standing to bring a direct action to circumstances in which the partner can "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."

> EXAMPLE: General Partner Alpha breaches the limited partnership agreement by purporting to oust General Partner Beta from General Partner Beta's role in managing the limited partnership. General Partner Beta has a direct claim against General Partner Alpha, not only for breach of contract, but also for expulsion under Paragraph 5.

> EXAMPLE: General Partner Alpha breaches the limited partnership agreement (and also Section 409(c)) through grossly negligent conduct which harms the profitability of the limited partnership. Depending on the terms of the limited partnership agreement and the allocation of power among the partners, General Partner Beta may be able to cause the limited partnership to invoke Paragraph 5 and seek General Partner Alpha's expulsion. But General Partner Beta has no standing individually to seek General Partner Alpha's expulsion, except through a derivative claim. (The same is true for a claim of breach of contract. *See* Section 901(b), cmt.)

Paragraph (5)(C) – This provision has an analog among the causes for dissolution. *See* Section 801(a)(6)(B). For examples of conduct warranting an expulsion order, see *Della Ratta v. Dyas*, 183 Md. App. 344, 365-66, 961 A.2d 629, 642 (2008), aff'd, 414 Md. 556, 996 A.2d 382 (2010) (noting that "[t]he trial court expressly found that [two major capital] calls 'were issued in bad faith'… [and the] court also found that, '[by] another improper accounting movement' in [the partnership], $580,000 was taken 'for executive office expenses which was improper'") (third bracket in original); *Brennan v. Brennan Associates*, 293 Conn. 60, 76-77, 977 A.2d 107, 117-18 (2009) (referring to the expelled partner's "moral turpitude and criminal fraud, and failure to be honest in court as to the extent of his criminal wrongdoing" and "his baseless claims of fraud" against a fellow partner; stating "he has rung the bell and it cannot be unrung").

For an analysis that helps distinguish Paragraph (5)(C) from Paragraphs (5)(A) and (B), see *All Saints Univ. of Med. Aruba v. Chilana,* A-2628-09T1, 2012 WL 6652510 at *15 (N.J. Super. Ct. App. Div. Dec. 24, 2012) (interpreting predecessor law and noting that the "not reasonably practicable standard" does not require a showing of wrongful conduct). *Cf. Dunnagan v. Watson*, 204 S.W.3d 30, 40 (Tex. App. 2006) (same issue in the context of dissolution).

Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. *Robertson v. Jacobs Cattle Co.*, 285 Neb. 859, 870-72, 830 N.W.2d 191, 201-02 (2013) (discussing analogous provisions of UPA (1997)). "[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution." *Brennan v. Brennan Associates*, 293 Conn. 60, 83, 977 A.2d 107, 121 (2009) (general partnership).

Paragraph (6)(B) and (C) – No comparable provisions appear in Section 601 (dealing with the dissociation of a limited partner), because, given the limited rights and duties of limited partners, the stated occurrences do not necessarily justify dissociation.

Paragraph 7(A) – This provision is subject to bankruptcy law. *See, e.g.,* 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Paragraphs (8) and (9) – A change in trustee or personal representative does not cause dissociation.

Paragraph (10) – This provision is the entity analog to Paragraph (7)(A) (death of an individual). Although in theory the partnership agreement could change this rule, doing so would be nonsensical. *See* Section 803(a), cmt. (noting that a terminated limited partnership cannot rescind its dissolution because "a 'dead' entity lacks both the capacity and power to bring itself back from the dead"). *See also* Paragraph (15).

Paragraph (11)(A) – If a limited partnership disappears as part of a merger, no person can continue as a partner of the partnership. When the merger takes effect, the partners of the disappearing partnership are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving limited partnership. In those circumstances, the merger will have dissociated them from one limited partnership and admitted them into partnership in the surviving limited partnership. *See* Section 401(b)(2).

Paragraph (11)(B) – It is possible for a plan of merger to "shuffle the equity" of the surviving entity, even to the extent of "taking out" some or all of the owners of the surviving entity. A reverse triangular merger involving a limited partnership as the surviving entity would dissociate all the pre-merger partners of the limited partnership.

Paragraph (13) – By definition, a limited partnership that converts ceases to be a limited partnership. *See* Section 1146. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will "shuffle the equity" and "take out" some of the partners of the converting LLC.

Paragraph (14) – Domestication does not by itself dissociate a partner, because the domesticated entity remains both a limited partnership and "the same entity without interruption as the domesticating company." Section 1156(a)(1)(B). However, an "equity shuffle" could dissociate a general partner.

SECTION 604. POWER TO DISSOCIATE AS GENERAL PARTNER; WRONGFUL DISSOCIATION.

(a) A person has the power to dissociate as a general partner at any time, rightfully or

wrongfully, by withdrawing as a general partner by express will under Section 603(1).

(b) A person's dissociation as a general partner is wrongful only if the dissociation:

(1) is in breach of an express provision of the partnership agreement; or

(2) occurs before the completion of the winding up of the limited partnership, and:

(A) the person withdraws as a general partner by express will;

(B) the person is expelled as a general partner by judicial order under Section 603(5);

(C) the person is dissociated as a general partner under Section 603(7); or

(D) in the case of a person that is not a trust other than a business trust, an estate, or an individual, the person is expelled or otherwise dissociated as a general partner because it willfully dissolved or terminated.

(c) A person that wrongfully dissociates as a general partner is liable to the limited partnership and, subject to Section 901, to the other partners for damages caused by the dissociation. The liability is in addition to any debt, obligation, or other liability of the general partner to the partnership or the other partners.

Comment

Subsection (a) – The limited partnership agreement may not eliminate this power. *See* Section 105(c)(11). In this respect, a general partner in a limited partnership is analogous to a general partner in general partnership. *See* UPA (1997) (Last Amended 2013) § 105(c)(9).

Subsection (b) – This subsection list exhaustively ("only if") the dissociations that are "wrongful," but the list is a default rule. The limited partnership agreement can expand the list; *e.g.,* by making wrongful a dissociation that beaches the implied contractual covenant of good faith and fair dealing. In theory, the partnership agreement can provide for liquidated damages (subject to the requirements of contract law) and, in theory, can also contract or even eliminate the list of wrongful dissociations.

Subsection (b)(1) – The reference to "an express provision of the partnership agreement" means that a person's dissociation as a general partner in breach of the obligation of good faith and fair dealing is not wrongful dissociation for the purposes of this section. The breach might

be actionable on other grounds.

Subsection (b)(2) – The reference to "before the termination of the limited partnership" reflects the expectation that each general partner will shepherd the limited partnership through winding up. *See* Section 406(f), cmt. A person's obligation to remain as general partner through winding up continues even if another general partner dissociates and even if that dissociation leads to the limited partnership's premature dissolution under Section 801(3)(A).

Subsection (b)(2)(C) – This subsection refers to Section 603(7), which involves *inter alia* dissociation on account of bankruptcy, which in turn is subject to bankruptcy law. *See, e.g.,* 11 U.S.C.A. § 365(e) (invalidating "ipso facto" clauses, subject to some exceptions).

Subsection (c) – A person who prematurely dissociates as a general partner risks liability for any resulting damages. For example, the limited partnership might incur substantial expenses in replacing the general partner's expertise, reputation, or creditworthiness.

In effect, this subsection equates wrongful dissociation with breach of contract. Accordingly, courts should look to contract law to determine what consequential damages are recoverable. *See Hadley v. Baxendale*, 9 Exch. 341 (1854); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981); *see also Williams v. Hildebrand*, 247 S.W.2d 356, 358 (Ark. 1952) (interpreting UPA (1914) § 38(2)(a)(II), pertaining to wrongful dissolution, and stating that "the measure of damages, when the partnership was to have continued for a fixed term, is the profits that the injured partner would have received").

The language "subject to Section 901" is intended to preserve the distinction between direct and derivative claims.

SECTION 605. EFFECT OF DISSOCIATION AS GENERAL PARTNER.

(a) If a person is dissociated as a general partner:

(1) the person's right to participate as a general partner in the management and conduct of the limited partnership's activities and affairs terminates;

(2) the person's duties and obligations as a general partner under Section 409 end with regard to matters arising and events occurring after the person's dissociation;

(3) the person may sign and deliver to the [Secretary of State] for filing a statement of dissociation pertaining to the person and, at the request of the limited partnership, shall sign an amendment to the certificate of limited partnership which states that the person has dissociated as a general partner; and

(4) subject to Section 704 and [Article] 11, any transferable interest owned by the person in the person's capacity as a general partner immediately before dissociation is owned by the person solely as a transferee.

(b) A person's dissociation as a general partner does not of itself discharge the person from any debt, obligation, or other liability to the limited partnership or the other partners which the person incurred while a general partner.

Comment

Subsection (a)(1) – Once a person dissociates as a general partner, the person loses all management rights as a general partner regardless of what happens to the limited partnership. This rule contrasts with UPA (1997) (Last Amended 2011) Section 603(b)(1), which permits a dissociated general partner to participate in winding up in some circumstances.

Subsection (a)(2) – This provision establishes a dividing line, separating out "matters arising and events occurring after the person's dissociation." If the limited partnership has continuing projects with clients, ongoing relationships with clients, or both, the dividing line requires special attention with regard to non-competition and partnership opportunities duties. *See* Section 409(b)(1) and (3).

Disputes involving law firms have generated much of the relevant case law. *See, e.g., Meehan v. Shaughnessy*, 404 Mass. 419, 422, 535 N.E.2d 1255, 1257 (1989); *Jewel v. Boxer*, 156 Cal. App. 3d 171, 175, 203 Cal. Rptr. 13, 15 (Ct. App. 1984). To a large extent, a well-drawn partnership agreement can delineate the parties' respective rights and responsibilities and thereby avoid problems. However, if the partnership becomes insolvent, the bankruptcy court may well scrutinize the partners' *inter se* arrangements. *See Geron v. Robinson & Cole LLP*, 476 B.R. 732, 743 (S.D.N.Y. 2012) (considering whether a law firm had "fraudulently transferred … assets when its partners adopted the Jewel Waiver [releasing rights recognized by *Jewel v. Boxer*] on the eve of dissolution without consideration").

This provision does not determine the effect of a person's dissociation as a general partner on the person's future obligations or rights under the partnership agreement. Some contractual obligations typically extend beyond dissociation – *e.g.*, non-competition provisions, buyout arrangements. To the extent provisions of the partnership agreement continue to apply, the common law obligation of good faith continues to apply as well. *See* 409(d), cmt. (explaining that the subsection "invokes the implied obligation that exists in every contract" as a matter of common law).

Subsection (a)(3) – Both records covered by this provision have the same effect under Section 103(d) – namely, to give constructive notice that the person has dissociated as a general partner. The notice benefits the person by curtailing any further personal liability under Sections

607, 805, and 1111. The notice benefits the limited partnership by curtailing any lingering power to bind under Sections 606, 804, and 1112.

The limited partnership is in any event obligated to amend its certificate of limited partnership to reflect the dissociation of a person as general partner. *See* Section 202(d)(2). In most circumstances, the amendment requires the signature of the person that has dissociated. Section 203(a)(5)(C). If that signature is required and the person refuses or fails to sign, the limited partnership may invoke Section 204 (Signing and Filing Pursuant to Judicial Order).

Subsection (a)(4) – As provided in Section 503(b), dissociation does not result in a distribution. In general, when a person dissociates as a general partner, the person's rights as a general partner disappear and, subject to Section 109 (Dual Capacity), the person's status degrades to that of a mere transferee – even when the dissociation comes in the form of expulsion. *All Saints Univ. of Med. Aruba v. Chilana*, A-2628-09T1, 2012 WL 6652510 at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012). On distinguishing between a person's rights of a general partner and as a limited partners, see Section 108(9)(C) (providing that, for any person that is both a general partner and a limited partner, the required information must state which transferable interest is owned in which capacity).

Like most *inter se* rules in this act, this one is subject to the partnership agreement. For example, the limited partnership agreement might provide for the buyout of a person's transferable interest in connection with the person's dissociation.

Section 704 provides additional information rights when an individual's death has caused dissociation. Article 11 covers organic transactions such as mergers and conversions.

Subsection (b) – A general partner's obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the partner learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation.

SECTION 606. POWER TO BIND AND LIABILITY OF PERSON DISSOCIATED AS GENERAL PARTNER.

(a) After a person is dissociated as a general partner and before the limited partnership is merged out of existence, converted, or domesticated under [Article] 11, or dissolved, the partnership is bound by an act of the person only if:

(1) the act would have bound the partnership under Section 402 before the dissociation; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not know or have notice of the dissociation and reasonably believes that the person is a general partner.

(b) If a limited partnership is bound under subsection (a), the person dissociated as a general partner which caused the partnership to be bound is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation incurred under subsection (a); and

(2) if a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the liability.

Comment

A person's dissociation as a general partner ends immediately the person's actual authority to act for the partnership. *See* Section 605(a)(1). However, the person's apparent authority may linger.

This section does not affect a person's power to bind a partnership in another capacity – *e.g.*, as an employee with actual authority.

Subsection (a) – This subsection codifies and constrains the lingering apparent authority of a person dissociated as a general partner. The constraint is in the phrase "only if."

The provision applies until the limited partnership dissolves or under [Article] 11 ceases to be governed by this act. Once a limited partnership dissolves, Section 804 applies.

Subsection (a)(1) – Section 402 states a general partner's statutory apparent authority. This provision causes the apparent authority to linger.

Subsection (a)(2)(A) – In any event, any lingering apparent authority ends two years after the dissociation.

Subsection (a)(2)(B) – A person might have notice under Section 103(d)(1) (statement of dissociation) as well as under Section 103(b)(1) (person "ha[ving] reason to know the fact from all the facts known to the person at the time in question").

Subsection (b) – The liability stated in this subsection is not exhaustive. For example, if

a person dissociated as a general partner causes a limited partnership to be bound under Subsection (a) and, due to a guaranty, some other person – not a general partner nor dissociated as a general partner – is liable on the resulting obligation, that other person may have a claim under other law against the person dissociated as a general partner.

SECTION 607. LIABILITY OF PERSON DISSOCIATED AS GENERAL PARTNER TO OTHER PERSONS.

(a) A person's dissociation as a general partner does not of itself discharge the person's liability as a general partner for a debt, obligation, or other liability of the limited partnership incurred before dissociation. Except as otherwise provided in subsections (b) and (c), the person is not liable for a partnership obligation incurred after dissociation.

(b) A person whose dissociation as a general partner results in a dissolution and winding up of the limited partnership's activities and affairs is liable on an obligation incurred by the partnership under Section 805 to the same extent as a general partner under Section 404.

(c) A person that is dissociated as a general partner without the dissociation resulting in a dissolution and winding up of the limited partnership's activities and affairs is liable on a transaction entered into by the partnership after the dissociation only if:

(1) a general partner would be liable on the transaction; and

(2) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not have knowledge or notice of the dissociation and reasonably believes that the person is a general partner.

(d) By agreement with a creditor of a limited partnership and the partnership, a person dissociated as a general partner may be released from liability for a debt, obligation, or other liability of the partnership.

(e) A person dissociated as a general partner is released from liability for a debt,

obligation, or other liability of the limited partnership if the partnership's creditor, with knowledge or notice of the person's dissociation as a general partner but without the person's consent, agrees to a material alteration in the nature or time of payment of the debt, obligation, or other liability.

Comment

To the extent a limited partnership has been a limited liability limited partnership throughout its existence, the liability rules stated in this section are moot. *See, e.g.*, subsection (c)(1).

Subsection (a) – A person's dissociation as a general partner does not categorically preclude the person being liable as a general partner for subsequently incurred obligations of the limited partnership. If the dissociation results in dissolution, Subsection (b) applies and the person will be liable as a general partner on any partnership obligation incurred under Section 805. If the dissociation does not result in dissolution, Subsection (c) applies.

The phrase "liability as a general partner for an obligation of the limited partnership" refers to liability under Section 404. As stated in Section 404(b) and (c), comments, other law determines when a partnership obligation is "incurred."

Subsection (b) – In these circumstances, a person's dissociation as a general partner has no effect on the person's liability exposure, even if any or all of the following occur:

- The certificate of limited partnership is amended to state that the person has dissociated as a general partner, as required by Section 202(d)(2).
- The person has filed a statement of dissociation, as permitted by Section 605(a)(3).
- The person was the sole general partner, and the limited partnership is wound up by someone else under Section 802(c) or (d).

However, amending the certificate of limited partnership to indicate dissolution would protect the person to the same extent as the amendment would protect the remaining general partners. *See* Sections 802(b)(2)(A) and 804.

Subsection (c) – The rule stated here for the "lingering liability" of a person dissociated as a general partner parallels the rule stated in Section 606 for the lingering apparent authority of a person dissociated as a general partner.

Subsection (c)(2)(B) – A person might have notice under Section 103(d)(1) as well as under Section 103(b)(1).

Subsections (c) and (d) – These provisions trace back to UPA (1914) § 36(2), (3).

[ARTICLE] 7

TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

SECTION 701. NATURE OF TRANSFERABLE INTEREST. A transferable interest is personal property.

Comment

For the definition of transferable interest, see Section 102(25). Absent a contrary provision in the partnership agreement or the consent of the partners, a "transferable interest" is the only interest in a limited partnership that can be transferred to a person not already a partner. *See* Section 702. As to whether a partner may transfer governance rights to a fellow partner, the question is moot absent a provision in the partnership agreement changing the default rule. *See* Section 406(a) (allocating general partner governance rights *per capita*) and 406(b) (requiring unanimous agreement of all partners to take specified action) . In the default mode, a general partner's transfer of governance rights to another general partner: (i) does not increase the transferee's governance rights; (ii) eliminates the transferor's governance rights; and (iii) thereby changes the denominator but not the numerator in calculating governance rights

> EXAMPLE: LCN Company is a limited partnership with three general partners, Laura, Charles, and Nora. The partnership agreement does not displace this act's default rule on the allocation of governance rights among general partners. Thus, each general partner has 1/3 of those rights. Laura transfers her entire ownership interest to Charles. The transfer does not increase Charles's governance rights but does eliminate Laura's. After the transfer, Laura has no governance rights (regardless of whether Charles and Nora agree to expel Laura under Section 603(4)(B)). As a result, Charles and Nora each have 1/2 of the governance rights.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in those Articles.

SECTION 702. TRANSFER OF TRANSFERABLE INTEREST.

(a) A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause a person's dissociation as a partner or a dissolution and winding up of the limited partnership's activities and affairs; and

(3) subject to Section 704, does not entitle the transferee to:

(A) participate in the management or conduct of the partnership's

activities and affairs; or

(B) except as otherwise provided in subsection (c), have access to required information, records, or other information concerning the partnership's activities and affairs.

(b) A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) In a dissolution and winding up of a limited partnership, a transferee is entitled to an account of the partnership's transactions only from the date of dissolution.

(d) A transferable interest may be evidenced by a certificate of the interest issued by a limited partnership in a record, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) A limited partnership need not give effect to a transferee's rights under this section until the partnership knows or has notice of the transfer.

(f) A transfer of a transferable interest in violation of a restriction on transfer contained in the partnership agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

(g) Except as otherwise provided in Sections 601(b)(4)(B) and 603(4)(B), if a general or limited partner transfers a transferable interest, the transferor retains the rights of a general or limited partner other than the transferable interest transferred and retains all the duties and obligations of a general or limited partner.

(h) If a general or limited partner transfers a transferable interest to a person that becomes a general or limited partner with respect to the transferred interest, the transferee is liable for the transferor's obligations under Sections 502 and 505 known to the transferee when the transferee becomes a partner.

Comment

One of the most fundamental characteristics of limited partnership law is its fidelity to the "pick your partner" principle. *See, e.g.*, *Bynum v. Frisby*, 73 Nev. 145, 149-50, 311 P.2d 972, 975 (Nev. 1957) (stating: (i) "the assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners"; and (ii) absent consent by the remaining partners "[t]he stranger remains a stranger" with no rights to management or even information).

This section is the core of the act's provisions reflecting and protecting that principle. The provisions of this section apply regardless of whether the interest pertains to a general partner or a limited partner. A partner's rights in a limited partnership are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the partnership agreement otherwise provides, a partner acting without the consent of all other partners lacks both the power and the right to: (i) bestow partnership on a non-partner, Sections 301(b)(3), 401(b)(3); or (ii) transfer to a non-partner anything other than some or all of the partner's transferable interest, Section 702(a)(3). The rights of a mere transferee are quite limited – *i.e.*, to receive distributions), Section 702(b), and, if the limited partnership dissolves and winds up, to receive specified information pertaining to the limited partnership from the date of dissolution. Section 702(c).

This section applies regardless of whether the transferor is a partner, a transferee of a partner, a transferee of a transferee, etc. *See* Section 102(25) (defining "transferable interest" in terms of a right "initially owned by a person in the person's capacity as a partner" regardless of "whether or not the person remains a partner or continues to own any part of the right").

This section does not directly consider whether a partner may transfer governance rights to another partner without obtaining consent from all the other partners. As noted above, Section 701, cmt., the question is moot under this act's default rule for allocating governance rights.

However, the question can be pivotal when the partnership agreement displaces the default rule on governance rights but does not determine whether transfer restrictions (whether contractual, statutory, or both) apply to transfers of governance rights from one partner to another. Case law is scant and pertains to LLCs. Nonetheless, the case law suggests that this act does not protect partners from control shifts that result from transfers among partners (as distinguished from transfers to non-partners who seek thereby to become partners).). *Blythe v. Bell*, No. 11 CVS 933. 2012 WL 7807800, at ¶ 6 (N.C. Dist. Dec. 10, 2012) (holding in a case of "first impression in North Carolina" that "in the absence of articles of incorporation or an operating agreement to the contrary . . . the assignment of control [(*i.e.*, governance)] interests between members is effective without unanimous member consent"); *Achaian, Inc. v. Leemon Family L.L.C.*, 25 A.3d 800, 810 (Del. Ch. 2011) (Strine, Ch.) (holding that the terms of the LLC agreement did not preclude one member of a three-member LLC from transferring the member's entire interest (including governance rights) to a second member without first having the consent of the third member; stating that the third member's "argument relies on a very thinly sliced version of [the 'pick-your-partner principle, the strained version being] . . . that once one chooses

his initial co-members, one continues to hold a veto over how much additional voting power they may acquire'; explaining that '[t]he problem for [the third member] is that nothing in the LLC Agreement supports [that member's] reading of it that would require an already admitted Member, like [the acquirer (*i.e.*, the second member)], to be become once, twice (or even three times) a Member each and every time that Member acquires an additional block of Interests'").

Other law may affect the applicability of this section. *See* 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate regardless of restrictions on transfer); UCC §§ 9-406, 9-408 (overriding specified restrictions on assignment in specified circumstances, regardless of whether state law or a contract impose the restrictions).

In any event, this section does not apply to the transfer of ownership interests in a partner that is an entity.

> EXAMPLE: ABC, LP has three partners: one general partner—Ralph (an individual); and two limited partners—Alice, Inc. ("Alice"), and Norton, LLC ("Norton"). Section 702 applies to any attempt by Ralph, Alice, or Norton to transfer their respective partnership interest in ABC. Section 702 is inapplicable, however, to a change in control of Alice or Norton, or even a complete change in their respective ownership.

Subsection (a)—The definition of "transfer," Section 102(24), and this subsection's reference to "in whole or in part" combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones. Thus, for example, a charging order under Section 703 effects a transfer of part of the judgment debtor's transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a partner's rights to distribution.

Subsection (a)(2)—The phrase "by itself" contemplates Sections 601(b)(4)(B) and 603(4)(B); each create a risk of dissociation via expulsion when a partner transfers all of the partner's transferable interest.

Subsection (a)(3)—Mere transferees have no right to participate in management or otherwise intrude as the partners carry on the affairs of the limited partnership and their activities as partners.

Because Section 102(24) defines "transfer" to include "a transfer by operation of law," this section affects the power of other law to effect transfers of a partner's ownership interest. For example, a divorce court lacks the power to award a partner's spouse anything beyond the partner's transferable interest. Nor does the partner have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the partner's complete ownership interest (*i.e.*, the transferable interest as enhanced by the management and information rights and the standing to sue) and: (i) if possible, award the partner's spouse marital property of equal value; or (ii) if not possible, award the partner's spouse a money judgment and a charging order

to enforce the judgment.

Granting the non-partner any part of the partner's transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the partner's ex-spouse the entire transferable interest is rarely a viable alternative. If the partner is an active participant in the limited partnership, the approach is impossible. The partner's transferable interest will typically constitute much or all of the partner's remuneration for the partner's activity. Even if the partner is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a "bare naked assignee." *See* Section 107(b), cmt.

When a partner dies, subject to the limited partnership agreement other law may effect a transfer of the partner's transferable interest to the partner's estate or personal representative. However, for the reasons just stated, other law lacks the power to transfer anything more than a transferable interest. (Section 704 does provide extra information rights for the purposes of settling the estate of the deceased partner.)

Subsection (a)(3)(B)—*See* Sections 304(i) and 407(i) (providing that the information rights stated in those sections do not apply to transferees).

Subsection (b)—Amounts due under this subsection are of course subject to offset for any amount owed to the limited partnership by the partner or person dissociated as a partner on whose account the distribution is made. Section 503(d). As to whether a limited partnership may properly offset for claims against a transferor that was never a partner is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c)—This very limited grant of information rights encompasses only transactions occurring at or after the date of the limited partnership's dissolution. The transferee has only the right to information as to the allocation of net assets among the limited partnership's creditors, partners, and transferees—and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a partner-transferor to require the partner-transferor to disclose further information to the transferee. Whether such an agreement would breach the limited partnership agreement, the implied contractual obligation of good faith and fair dealing, Section 409(d), or a fiduciary duty depends on the circumstances.

If a dissolved limited partnership rescinds its dissolution, Section 803, this subsection no longer applies.

Subsection (d)—The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

Subsection (f)—This provision originated as UPA (1997) § 503(e), was then consistent with UCC section 9-318(3), and is now consistent with UCC section 9-406(a) (stating that "an account debtor . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the

amount due or to become due has been assigned and that payment is to be made to the assignee").

The term "notice" includes "reason to know," Section 103(b)(1), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the limited partnership agreement.

Subsection (g)—Under this subsection, a partner (whether general or limited) remains as such (with all attendant rights and obligations) even after permanently transferring the entirety of the transferable interest, unless: (i) the other partners opt for expulsion under Section 601(4)(B); or (ii) as otherwise provided in the partnership agreement.

SECTION 703. CHARGING ORDER.

(a) On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited partnership to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

(b) To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:

(1) appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(2) make all other orders necessary to give effect to the charging order.

(c) Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a partner, and is subject to Section 702.

(d) At any time before foreclosure under subsection (c), the partner or transferee whose transferable interest is subject to a charging order under subsection (a) may extinguish the

charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(e) At any time before foreclosure under subsection (c), a limited partnership or one or more partners whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(f) This [act] does not deprive any partner or transferee of the benefit of any exemption law applicable to the transferable interest of the partner or transferee.

(g) This section provides the exclusive remedy by which a person seeking in the capacity of a judgment creditor to enforce a judgment against a partner or transferee may satisfy the judgment from the judgment debtor's transferable interest.

Comment

The charging order concept dates back to the English Partnership Act of 1890 and in the United States has been a fundamental part of law of unincorporated business organizations since 1914. *See* UPA (1914) § 28. As much a remedy limitation as a remedy, the charging order is the sole method by which a person acting as judgment creditor of a partner or transferee can extract value from the partner's or transferee's ownership interest in a limited partnership. *See* Subsection (g), cmt.

Under this section, the judgment creditor of a partner or transferee is entitled to a charging order against the relevant transferable interest. While in effect, that order entitles the judgment creditor to whatever distributions would otherwise be due to the partner or transferee whose interest is subject to the order. However, the judgment creditor has no say in the timing or amount of those distributions. The charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise interfere with the management and activities of the limited partnership.

This section applies regardless of whether the transferable interest at issue is owned by a person in the capacity of a general partner, limited partner, or transferee. The partnership agreement has no power to alter the provisions of this section to the prejudice of third parties. Section 105(c)(18).

By its terms, this section does not apply to foreign limited partnerships. *See* Section 102(12) (defining "[l]imited partnership" to mean "an entity *formed under this [act] or which*

becomes subject to this [act]") (emphasis added); *see also Fannie Mae v. Heather Apartments Ltd. P'ship*, A13-0562, 2013 WL 6223564, at *6 (Minn. Ct. App. Dec. 2, 2013) (considering the remedies available to a judgment creditor with respect to the judgment debtor's interest in a Cook Islands LLC; rejecting the debtor's argument that the creditor's "only remedy is to obtain a charging order under" [the Minnesota LLC statute]; explaining that "this argument fails because that statute only applies to Minnesota limited liability companies," which that statute "defines . . . as 'a limited liability company, other than a foreign limited liability company, *organized or governed by this chapter*'") (emphasis added) (statutory citations omitted).

Subsection (a)—The phrase "judgment debtor" encompasses both partners and transferees. The lien pertains only to a distribution, which excludes "amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program." Section 102(4)(B). A judgment creditor that wishes to levy on such amounts should use the appropriate creditor's remedy, such as garnishment (which may be subject to exemptions or exclusions not relevant to a charging order). *Cf. PB Real Estate, Inc. v. Dem II Props.*, 719 A.2d 73, 76 (Conn. 1998) (rejecting the contention of an LLC's two members that "payments of $28,000 to each of them" should be treated "as expenses for wages" rather than as distributions).

Whether an application for a charging order must be served on the limited partnership, the judgment debtor, or both is a matter for other law; principally, the law of remedies and civil procedure. The order itself must be served on the limited partnership. Whether the order must also be served on the judgment debtor is a matter for other law.

If a distribution consists of rights to acquire interests in a limited partnership, the charging order applies only to those rights within the definition of transferable interest. *See* Section 102(25) (defining transferable interest).

Subsection (b)—Paragraph (2) refers to "other orders" rather than "additional orders." Therefore, given appropriate circumstances, a court may invoke Paragraph (1), Paragraph (2), or both.

Subsection (b)(1)—The receiver contemplated here is emphatically not a receiver for the limited partnership, but rather a receiver for the distributions subject to the charging order. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than "the extent necessary to effectuate the collection of distributions pursuant to a charging order." For a correctly narrow reading of this provision, see *Wells Fargo Bank, Nat'l Ass'n v. Continuous Control Solutions, Inc.*, No. 11–1285, 2012 WL 3195759 (Iowa Ct. App. Aug. 8, 2012).

Subsection (b)(2)—This paragraph must be understood in the context of: (i) the very limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not a judgment creditor of the limited partnership, has no claim on the limited partnership's assets, and has no right to interfere in the activities, affairs, and management of the limited partnership. In particular, the court's power to make "all other orders" is limited to "orders necessary to give effect to the charging order."

EXAMPLE: A judgment creditor with a charging order believes that the limited partnership should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited partnership to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

EXAMPLE: A judgment creditor with a judgment for $10,000 against a partner obtains a charging order against the partner's transferable interest. Having been properly served with the order, the limited partnership nonetheless fails to comply and makes a $3000 distribution to the partner. The court has the power to order the limited partnership to pay $3000 to the judgment creditor to "give effect to the charging order."

Under Subsection (b)(2), the court has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order.

EXAMPLE: General Partner A of ABC, LP has for some years received distributions form the limited partnership. However, when a judgment creditor of General Partner A obtains a charging order against General Partner A's transferable interest, the limited partnership ceases to make distributions to General Partner A and instead provides a salary to General Partner A equivalent to former distributions. A court might deem this salary a disguised distribution. (In any event, however, the salary will be subject to garnishment.)

This act has no specific rules for determining the fate or effect of a charging order when the limited partnership undergoes a merger, conversion, interest exchange, or domestication under [Article] 11. In the proper circumstances, such an organic change might trigger an order under Subsection (b)(2).

Subsection (c)—The phrase "that distributions under the charging order will not pay the judgment debt within a reasonable period of time" comes from case law. *See, e.g.*, *Nigri v. Lotz,* 453 S.E.2d 780, 783 (Ga. Ct. App. 1995). *Stewart v. Lanier Park Med. Office Bldg., Ltd.,* 578 S.E.2d 572, 574 (Ga. Ct. App. 2003) ("Judicial sale may be appropriate where . . . it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable amount of time."). A purchaser at a foreclosure sale obtains only the very limited rights of a mere transferee under Section 702 and is in some ways more vulnerable and less powerful than the holder of a charging order. After foreclosure and sale, Subsection (b) no longer applies. More generally, the court is no longer involved in the matter. For the vulnerability of a transferee, see Section 107(b), comment.

Subsection (d)—This provision allows the judgment debtor to end the charging order without need for a hearing.

Subsection (e)—Traditionally, charging order provisions referred to the possibility of "redeeming" an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This act substitutes a far simpler approach, contemplating the

limited partnership or its partners buying the underlying judgment and thereby dispensing with any interference the judgment creditor might seek to inflict on the partnership.

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the limited partnership or the other partners might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor's consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the limited partnership.

Whether a limited partnership should invoke this provision is a question for the general partners. Section 406(a). If the charging order pertains to the transferable interest of a general partner, subject to the partnership agreement, that partner should not be involved in deciding the question. *See* Section 409(b)(2).

Subsection (f)—This subsection preserves otherwise applicable exemptions but does not create any. *In re Foos*, 405 B.R. 604, 609 (Bankr. N.D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating that "it is clear that [the provision] does not create an exemption").

Subsection (g)—This subsection does not override Uniform Commercial Code, Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a "reverse pierce" where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. *Cf. Trust, Inc. v. First Flight L.P.*, 580 S.E.2d 806, 810 (Va. 2003) (stating that "Virginia does recognize the concept of outsider reverse piercing and that this concept can be applied to a Virginia limited partnership"); *In re Burwell*, 391 B.R. 831, 837 (B.A.P. 8th Cir. 2008) (applying Minnesota law). Likewise, this subsection does not supplant fraudulent transfer law.

SECTION 704. POWER OF LEGAL REPRESENTATIVE OF DECEASED PARTNER. If a partner dies, the deceased partner's legal representative may exercise:

(1) the rights of a transferee provided in Section 702(c); and

(2) for the purposes of settling the estate, the rights of a current limited partner under Section 304.

Comment

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the legal representative of the estate. Sections 304 and 702(c) pertain only to information rights.

[ARTICLE] 8

DISSOLUTION AND WINDING UP

SECTION 801. EVENTS CAUSING DISSOLUTION.

(a) A limited partnership is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following:

(1) an event or circumstance that the partnership agreement states causes dissolution;

(2) the affirmative vote or 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 vote or consent is to be effective;

(3) after the dissociation of a person as a general partner:

(A) if the partnership has at least one remaining general partner, the affirmative vote or consent to dissolve the partnership not later than 90 days after the dissociation by partners owning a majority of the rights to receive distributions as partners at the time the vote or consent is to be effective; or

(B) if the partnership does not have a remaining general partner, the passage of 90 days after the dissociation, unless before the end of the period:

(i) consent to continue the activities and affairs of the 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

(ii) at least one person is admitted as a general partner in accordance with the consent;

(4) the passage of 90 consecutive days after the dissociation of the partnership's last limited partner, unless before the end of the period the partnership admits at least one limited partner;

(5) the passage of 90 consecutive days during which the partnership has only one partner, unless before the end of the period:

(A) the partnership admits at least one person as a partner;

(B) if the previously sole remaining partner is only a general partner, the partnership admits the person as a limited partner; and

(C) if the previously sole remaining partner is only a limited partner, the partnership admits a person as a general partner;

(6) on application by a partner, the entry by [the appropriate court] of an order dissolving the partnership on the grounds that:

(A) the conduct of all or substantially all the partnership's activities and affairs is unlawful; or

(B) it is not reasonably practicable to carry on the partnership's activities and affairs in conformity with the certificate of limited partnership and partnership agreement; or

(7) the signing and filing of a statement of administrative dissolution by the [Secretary of State] under Section 811.

(b) If an event occurs that imposes a deadline on a limited partnership under subsection (a) and before the partnership has met the requirements of the deadline, another event occurs that imposes a different deadline on the partnership under subsection (a):

(1) the occurrence of the second event does not affect the deadline caused by the first event; and

(2) the partnership's meeting of the requirements of the first deadline does not extend the second deadline.

Comment

"Dissolution" has been a term of art in the law of unincorporated business organizations since at least the time of Roman law. JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP § 266, at 408 (2d ed. 1850) ("The Roman law . . . declared, that partnership might be dissolved in various ways . . . ."). Dissolution does not end a limited partnership's existence but rather changes the purpose of that existence: "A dissolved limited partnership shall wind up its activities and affairs and . . . the partnership continues after dissolution only for the purpose of winding up." Section 802(a). The partnership may, but need not, amend its certificate of limited partnership to state that dissolution has occurred. Section 802(b)(2)(A). The limited partnership terminates when winding up is complete. The partnership may, but need not, file a statement of termination. Section 802(b)(2)(F).

Except for Paragraphs (a)(6) and (7), this section comprises default rules. Paragraph 7 is fully mandatory, Section 105(c)(3)(B); Paragraph 6 is mandatory only with regard to the stated grounds for dissolution. *See* Section 105(c)(12), cmt. Moreover, a partnership agreement can provide additional causes of dissolution. *See* Subsection (a)(1). Variations to the statutory causes of dissolution are commonplace.

Section 803 permits rescission of dissolution in some circumstances. In some circumstances, an amendment to the limited partnership agreement might avert dissolution – *e.g.,* by revising an agreed-upon deadline for selling the partnership assets and winding up the business. A retroactive amendment may also be possible. *See Kindred Ltd. P'ship v. Screen Actors Guild, Inc.*, CV082220PSGPJWX, 2009 WL 279080, at *5–6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 802(b) permitted a partnership to rescind dissolution).

Subsection (a)(2)—Although most actions involving limited partner consent require unanimous consent (*e.g.*, Section 406(b)), this provision requires only the specified majority consent. Rights to receive distributions owned by a person that is both a general and a limited partner figure into the limited partner determination only to the extent those rights are owned in the person's capacity as a limited partner. *See* Section 108(9)(C).

Example: XYZ is a limited partnership with three general partners, each of whom is also a limited partner, and five other limited partners. Rights to receive distributions are allocated as follows:

Partner #1 as general partner—3%

Partner #2 as general partner—2%
Partner #3 as general partner—1%
Partner #1 as limited partner—7%
Partner #2 as limited partner—3%
Partner #3 as limited partner—4%
Partner #4 as limited partner—5%
Partner #5 as limited partner—5%
Partner #6 as limited partner—5%
Partner #7 as limited partner—5%
Partner #8 as limited partner—5%

Several non-partner transferees, in the aggregate—55%

Distribution rights owned by persons as limited partners amount to 39% of total distribution rights. A majority is therefore anything greater than 19.5%. If only Partners 1, 2, 3, and 4 consent to dissolve, the limited partnership is not dissolved. Together these partners own as limited partners 19% of the distribution rights owned by persons as limited partners—just short of the necessary majority. For purposes of this calculation, distribution rights owned by non-partner transferees are irrelevant. So, too, are distribution rights owned by persons as general partners. (However, dissolution under this provision requires "the consent of all general partners.")

Subsection (a)(3)—Historically, the dissociation of any general partner from a limited partnership could lead to dissolution (subject of course to the partnership agreement). This provision continues that concept, albeit while modernizing the consent mechanisms.

Subsection (a)(3)(A)—Unlike Subsection (a)(2), this provision makes no distinction between distribution rights owned by persons as general partners and distribution rights owned by persons as limited partners. Distribution rights owned by non-partner transferees are irrelevant.

Subsection (a)(4) and (5)—These provisions reflect the number and type of partners required for a limited partnership to come into existence. Section 201(d).

Subsection (a)(6)—The partnership agreement cannot vary the causes of dissolution stated in this provision. However, the partnership agreement may contain a forum selection clause or change the forum from "the appropriate court" to binding arbitration. Section 105(c)(12), cmt.

As to whether the court of another jurisdiction can properly order dissolution of a limited partnership formed under this act, the majority rule is clearly no. "[T]he courts of several states have held that jurisdiction to dissolve a corporation rests only in the courts of the state of incorporation." *In re Blixseth*, 484 B.R. 360, 370 (B.A.P. 9th Cir. 2012) (citing cases, including a case involving an LLC). *But see In re Mercantile Guar. Co.*, 48 Cal. Rptr. 589, 591–93 (Cal. Ct. App. 1965) (explaining that "[w]e are . . . required to determine whether the courts of a state in which a foreign corporation has done business and in which its assets are there located have jurisdiction to wind up its affairs, even though the corporation was organized in another state,"

stating that "the question is not one of jurisdiction or power in the court of the state which is not the legal domicile of a foreign corporation, but it is a question . . . of the balance of convenience, of whether considerations of public policy, efficiency, expedience and justice to all parties interested demand that jurisdiction be retained in the foreign court, or that it be declined under the rule of forum non conveniens," and holding that "[t]he circumstances of the case at bench require a holding that the California courts assume jurisdiction of the winding up of [a Delaware corporation's] affairs preparatory to a dissolution").

Subsection (a)(6)(B)—For an analytic framework for applying this provision, see *Roth v. Laurus U.S. Fund, L.P.*, CIV.A. 5566-VCN, 2011 WL 808953, at *3(Del. Ch. Feb. 25, 2011); *see also Mandell v. Centrum Frontier Corp.*, 407 N.E.2d 821, 829 (Ill. App. Ct. 1980) (upholding a decree dissolving a limited partnership ("[b]ecause the partnership had a negative cash flow during 15 months of the 17 months prior to filing this suit" and "find[ing] that the trial court properly decreed dissolution . . . on the ground that [the limited partnership] could only be carried on at a loss").

SECTION 802. WINDING UP.

(a) A dissolved limited partnership shall wind up its activities and affairs and, except as otherwise provided in Section 803, the partnership continues after dissolution only for the purpose of winding up.

(b) In winding up its activities and affairs, the limited partnership:

(1) shall discharge the partnership's debts, obligations, and other liabilities, settle and close the partnership's activities and affairs, and marshal and distribute the assets of the partnership; and

(2) may:

(A) amend its certificate of limited partnership to state that the partnership is dissolved;

(B) preserve the partnership activities, affairs, and property as a going concern for a reasonable time;

(C) prosecute and defend actions and proceedings, whether civil, criminal, or administrative;

(D) transfer the partnership's property;

(E) settle disputes by mediation or arbitration;

(F) deliver to the [Secretary of State] for filing a statement of termination stating the name of the partnership and that the partnership is terminated; and

(G) perform other acts necessary or appropriate to the winding up.

(c) If a dissolved limited partnership does not have a general partner, a person to wind up the dissolved partnership's activities and affairs may be appointed by the affirmative vote or consent of limited partners owning a majority of the rights to receive distributions as limited partners at the time the vote or consent is to be effective. A person appointed under this subsection:

(1) has the powers of a general partner under Section 804 but is not liable for the debts, obligations, and other liabilities of the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the dissolved partnership's activities and affairs; and

(2) shall deliver promptly to the [Secretary of State] for filing an amendment to the partnership's certificate of limited partnership stating:

(A) that the partnership does not have a general partner;

(B) the name and street and mailing addresses of the person; and

(C) that the person has been appointed pursuant to this subsection to wind up the partnership.

(d) On the application of a partner, the [appropriate court] may order judicial supervision of the winding up of a dissolved limited partnership, including the appointment of a person to wind up the partnership's activities and affairs, if:

(1) the partnership does not have a general partner and within a reasonable time

following the dissolution no person has been appointed pursuant to subsection (c); or

(2) the applicant establishes other good cause.

Comment

Under the default rules of this act, dissolution does not change governance arrangements. However, dissolution does change the context for determining for the purposes of Section 406(b)(3) whether to "sell, lease, exchange, or otherwise dispose of all, or substantially all, of the limited partnership's property, with or without the good will" is "other than in the usual and regular course of the limited partnership's activities and affairs."

Subsection (a)—*See* Section 801(a)(2), cmt.

Subsection (b)—The particular circumstances determine how long winding up may continue without giving "good cause" for court intervention under Section 702(d)(2). There is no "hard and fast" rule. *See, e.g.*, *Mathis v. Meyeres*, 574 P.2d 447, 450 (Alaska 1978) (stating that we are aware of [no authority] requiring that deadlines be set in the winding up of a partnership"); *8182 Md. Assocs., Ltd. P'ship v. Sheehan*, 14 S.W.3d 576, 581 (Mo. 2000) ("The Uniform Partnership Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time . . . .") (quoting *Schoeller v. Schoeller*, 497 S.W.2d 860, 867 (Mo. Ct. App. 1973)).

"Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners." *Gibson v. Deuth*, 270 N.W.2d 632, 635 (Iowa 1978). "Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible." *Doting v. Trunk*, 856 P.2d 536, 540 (Mont. 1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary. *Lebanon Trotting Ass'n v. Battista*, 306 N.E.2d 769, 772 (Ohio Ct. App. 1972) ("[I]f the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the value of such asset can continue to inure to the benefit of the partners through the continuation of the partnership after dissolution.").

Subsection (b)(2)(A) and (F)—For the constructive notice effect of the specified amendment and a statement of termination, see Sections 103(d)(2)(A) and (B).

Subsection (c)—Section 409 does not apply to a person appointed under this section. Such person will inevitably be an agent of the dissolved limited partnership, acting pursuant to a contract. Thus, agency and contract law will determine the person's duties.

Subsection (d)—Section 409 does not apply to a person appointed under this section. The applicable standards of conduct might come from any or all of these sources: the court order,

the state law pertaining to receiverships, agency law, and contract law.

SECTION 803. RESCINDING DISSOLUTION.

(a) A limited partnership may rescind its dissolution, unless a statement of termination applicable to the partnership has become effective, [the appropriate court] has entered an order under Section 801(a)(6) dissolving the partnership, or the [Secretary of State] has dissolved the partnership under Section 811.

(b) Rescinding dissolution under this section requires:

(1) the affirmative vote or consent of each partner; and

(2) if the limited partnership has delivered to the [Secretary of State] for filing an amendment to the certificate of limited partnership stating that the partnership is dissolved and:

(A) the amendment has not become effective, delivery to the [Secretary of State] for filing of a statement of withdrawal under Section 208 applicable to the amendment; or

(B) the amendment has become effective, delivery to the [Secretary of State] for filing of an amendment to the certificate of limited partnership stating that dissolution has been rescinded under this section.

(c) If a limited partnership rescinds its dissolution:

(1) the partnership resumes carrying on its activities and affairs as if dissolution had never occurred;

(2) subject to paragraph (3), any liability incurred by the partnership after the dissolution and before the rescission has become effective is determined as if dissolution had never occurred; and

(3) the rights of a third party arising out of conduct in reliance on the dissolution before the third party knew or had notice of the rescission may not be adversely affected.

Comment

The Harmonization Project added this section.

Subsection (a)—The first exclusion results inevitably from the effect of a statement of termination – *i.e.*, the limited partnership ceases to exist as an entity. A "dead" entity lacks both the capacity and power to bring itself back from the dead.

The second and third exclusions pertain to dissolutions effected by outsiders – *i.e.*, the court and the filing office.

Subsections (b)(1)—The requirement of unanimous consent protects any vested rights of or reliance by partners. However, the partnership agreement may vary this provision.

Subsection (c)(3)—This paragraph protects third parties. *E.g.*, *Neurobehavorial Assocs., P.A. v. Cypress Creek Hosp., Inc.*, 995 S.W.2d 326, 331 (Tex. Ct. App. 1999) ("If the Hospital had the right to terminate the Agreement when it did because the Association was then dissolved, then even though the Association can revoke articles of dissolution and have that relate back to the date of dissolution, it would be grossly unfair to let the Association assert its *ex post facto* change as a defense. Surely the Association would be estopped from doing so, having created the very conditions that gave the Hospital the correct impression that it was then dissolved.").

SECTION 804. POWER TO BIND PARTNERSHIP AFTER DISSOLUTION.

(a) A limited partnership is bound by a general partner's act after dissolution which:

(1) is appropriate for winding up the partnership's activities and affairs; or

(2) would have bound the partnership under Section 402 before dissolution if, at the time the other party enters into the transaction, the other party does not know or have notice of the dissolution.

(b) A person dissociated as a general partner binds a limited partnership through an act occurring after dissolution if:

(1) at the time the other party enters into the transaction:

(A) less than two years has passed since the dissociation; and

(B) the other party does not know or have notice of the dissociation and reasonably believes that the person is a general partner; and

(2) the act:

(A) is appropriate for winding up the partnership's activities and affairs; or

(B) would have bound the partnership under Section 402 before

dissolution and at the time the other party enters into the transaction the other party does not know or have notice of the dissolution.

Comment

This section provides the "power to bind" rules applicable once dissolution occurs. The section originated in UPA (1997), which significantly departed from the approach of UPA (1914). ULPA (2001) accepted the UPA (1997) construct but revised the language for stylistic reasons. The Harmonization Project accepted the ULPA (2001) language.

In general, this section parallels Section 606 (power to bind of a person dissociated as general partner when dissolution does not result from the dissociation). However, one significant difference exists. Section 606(a)(2)(A) contains a provision analogous to a statute of repose. A person's power to bind the partnership terminates two years after the date of dissociation. Subsection (b) contains a comparable provision, but Subsection (a) does not.

Subsections (a) and (b)—Subsection (a) states the power-to-bind rules for persons still general partners when dissolution occurs. Subsection (b) pertains to persons dissociated as a general partner before dissolution, including a general partner whose dissociation results in dissolution.

Subsection (a)(1)—This paragraph states a rule of inherent agency power. *See* RESTATEMENT (SECOND) OF AGENCY § 8A (1958) defining "inherent agency power" as "the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent"). Thus, a general partner might act without actual or apparent authority and still bind the limited partnership. The partnership agreement cannot change the stated rule, because the rule pertains to the rights of third parties under this act. *See* Section 105(c)(18).

If a general partner's words or conduct trigger this paragraph, thereby binding the limited partnership, and the general partner lacks the actual authority to do so, the general partner breaches an agent's duty to act within authority, and is liable to the limited partnership for any resulting damages. RESTATEMENT (THIRD) OF AGENCY § 8.09(1) (2006) ("An agent has a duty to take action only within the scope of the agent's actual authority"). The general partner might also be liable for breach of the partnership agreement.

Subsection (a)(2)—A person might have notice under Section 103(d)(2)(A) (amendment of certificate of limited partnership to indicate dissolution) as well as under Section 103(b)(1) (reason to know).

Subsection (b)—This subsection deals with the post-dissolution power to bind of a person dissociated as a general partner. For the most part: (i) Paragraph 1 replicates Section 606, pertaining to the pre-dissolution power to bind of a person dissociated as a general partner; and (ii) Paragraph 2 replicates Subsection (a) of this section, which states the post-dissolution power to bind of a person who is still a general partner.

For a person dissociated as a general partner to bind a dissolved limited partnership:

- the person's dissociation must have:
  - been rightful; and
  - resulted in dissolution; and
- the person's act must satisfy both Paragraphs 1 and 2.

Subsection (b)(1)(B)—A person might have notice under Section 103(d)(1) (amendment to certificate of limited partnership indicating dissociation or statement of dissociation) as well as under Section 103(b)(1).

Subsection (b)(2)(B)—A person might have notice under Section 103(d)(2)(A) (amendment of certificate of limited partnership to indicate dissolution) as well as under Section 103(b)(1).

SECTION 805. LIABILITY AFTER DISSOLUTION OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER.

(a) If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under Section 804(a) by an act that is not appropriate for winding up the partnership's activities and affairs, the general partner is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation; and

(2) if another general partner or a person dissociated as a general partner is liable for the obligation, to that other general partner or person for any damage caused to that other general partner or person arising from the liability.

(b) If a person dissociated as a general partner causes a limited partnership to incur an obligation under Section 804(b), the person is liable:

(1) to the partnership for any damage caused to the partnership arising from the

obligation; and

(2) if a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the obligation.

Comment

This section parallels Section 606(b). It is possible for more than one person to be liable under this section on account of the same limited partnership obligation. This act does not provide any rule for apportioning liability in that circumstance.

Subsection (a)(2)—If the limited partnership is not a limited liability limited partnership, the liability created by this paragraph includes liability under Sections 404(a), 607(b), and 607(c). The paragraph also applies when a partner or person dissociated as a general partner suffers damage due to a contract of guaranty.

Other law determines liability (if any) to a person that is neither a general partner nor dissociated as a general partner.

SECTION 806. KNOWN CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP.

(a) Except as otherwise provided in subsection (d), a dissolved limited partnership may give notice of a known claim under subsection (b), which has the effect provided in subsection (c).

(b) A dissolved limited partnership may in a record notify its known claimants of the dissolution. The notice must:

(1) specify the information required to be included in a claim;

(2) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;

(3) state the deadline for receipt of a claim, which may not be less than 120 days after the date the notice is received by the claimant;

(4) state that the claim will be barred if not received by the deadline; and

(5) unless the partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner which is based on Section 404.

(c) A claim against a dissolved limited partnership is barred if the requirements of subsection (b) are met and:

(1) the claim is not received by the specified deadline; or

(2) if the claim is timely received but rejected by the partnership:

(A) the partnership causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the partnership to enforce the claim not later than 90 days after the claimant receives the notice; and

(B) the claimant does not commence the required action not later than 90 days after the claimant receives the notice.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

Comment

Sections 806, 807, and 808 provide rules under which a dissolved limited partnership may achieve finality with regard to claims.

Source: This section is derived almost verbatim from Model Business Corporation Act section 14.06.

Subsection (b)(5)—*See* Section 809, cmt.

SECTION 807. OTHER CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP.

(a) A dissolved limited partnership may publish notice of its dissolution and request persons having claims against the partnership to present them in accordance with the notice.

(b) A notice under subsection (a) must:

(1) be published at least once in a newspaper of general circulation in the [county] in this state in which the dissolved limited partnership's principal office is located or, if the principal office is not located in this state, in the [county] in which the office of the partnership's registered agent is or was last located;

(2) describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent;

(3) state that a claim against the partnership is barred unless an action to enforce the claim is commenced not later than three years after publication of the notice; and

(4) unless the partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner which is based on Section 404.

(c) If a dissolved limited partnership publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership not later than three years after the publication date of the notice:

(1) a claimant that did not receive notice in a record under Section 806;

(2) a claimant whose claim was timely sent to the partnership but not acted on;

and

(3) a claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) A claim not barred under this section or Section 806 may be enforced:

(1) against the dissolved limited partnership, to the extent of its undistributed assets;

(2) except as otherwise provided in Section 808, if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, whichever is less, but a person's total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution; and

(3) against any person liable on the claim under Sections 404 and 607.

Comment

Source: This section is derived almost verbatim from Model Business Corporation Act section 14.07.

Subsection (b)(4)—*See* Section 809, cmt.

Subsection (d)(2)—Liability under this paragraph extends to those who have received distributions under a charging order. *See* Section 702(a), cmt. (explaining that the beneficiary of a charging order is a transferee). Unlike Section 505(b) (recapture of improper interim distributions), this paragraph contains no "knowledge" element.

SECTION 808. COURT PROCEEDINGS.

(a) A dissolved limited partnership that has published a notice under Section 807 may file an application with [the appropriate court] in the [county] where the partnership's principal office is located or, if the principal office is not located in this state, where the office of its

registered agent is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are contingent, have not been made known to the partnership, or are based on an event occurring after the date of dissolution but which, based on the facts known to the partnership, are reasonably expected to arise after the date of dissolution. Security is not required for any claim that is or is reasonably anticipated to be barred under Section 807.

(b) Not later than 10 days after the filing of an application under subsection (a), the dissolved limited partnership shall give notice of the proceeding to each claimant holding a contingent claim known to the partnership.

(c) In a proceeding brought under this section, the court may appoint a guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must be paid by the dissolved limited partnership.

(d) A dissolved limited partnership that provides security in the amount and form ordered by the court under subsection (a) satisfies the partnership's obligations with respect to claims that are contingent, have not been made known to the partnership, or are based on an event occurring after the date of dissolution, and such claims may not be enforced against a partner or transferee on account of assets received in liquidation.

Comment

Source: This section is derived almost verbatim from Model Business Corporation Act section 14.08.

SECTION 809. LIABILITY OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER WHEN CLAIM AGAINST LIMITED PARTNERSHIP BARRED. If a claim against a dissolved limited partnership is barred under Section 806, 807, or 808, any corresponding claim under Section 404 or 607 is also barred.

Comment

A general partner's liability under Sections 404 and 607 is vicarious liability—liability solely by status and solely for the "debts, obligations, and other liabilities of the limited partnership." To the extent a claim pertaining to the underlying debt, obligation, or other liability is barred, a claim pertaining to the corresponding vicarious liability should likewise be barred.

SECTION 810. DISPOSITION OF ASSETS IN WINDING UP; WHEN CONTRIBUTIONS REQUIRED.

(a) In winding up its activities and affairs, a limited partnership shall apply its assets, including the contributions required by this section, to discharge the partnership's obligations to creditors, including partners that are creditors.

(b) After a limited partnership complies with subsection (a), any surplus must be distributed in the following order, subject to any charging order in effect under Section 703:

(1) to each person owning a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

(2) among persons owning transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership.

(c) If a limited partnership's assets are insufficient to satisfy all of its obligations under subsection (a), with respect to each unsatisfied obligation incurred when the partnership was not a limited liability limited partnership, the following rules apply:

(1) Each person that was a general partner when the obligation was incurred and that has not been released from the obligation under Section 607 shall contribute to the

partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those persons when the obligation was incurred.

(2) If a person does not contribute the full amount required under paragraph (1) with respect to an unsatisfied obligation of the partnership, the other persons required to contribute by paragraph (1) on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those other persons when the obligation was incurred.

(3) If a person does not make the additional contribution required by paragraph (2), further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) A person that makes an additional contribution under subsection (c)(2) or (3) may recover from any person whose failure to contribute under subsection (c)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person's liability under this subsection may not exceed the amount the person failed to contribute.

(e) All distributions made under subsections (b) and (c) must be paid in money.

Comment

In some circumstances, this act requires a partner to make payments to the limited partnership. *See, e.g.*, Sections 502(b), 505(a), 505(b), 810(c). In other circumstances, this act requires a partner to make payments to other partners. *See, e.g.*, Sections 505(c), 810(d). In no circumstances does this act require a partner to make a payment for the purpose of equalizing or otherwise reallocating capital losses incurred by partners.

EXAMPLE: XYZ Limited Partnership ("XYZ") has one general partner and four limited partners. As indicated by its name, XYZ is not a limited liability limited partnership. According to XYZ's required information, the value of each partner's contributions to XYZ are:

General partner—$5,000
Limited partner #1—$10,000
Limited partner #2—$15,000
Limited partner #3—$20,000
Limited partner #4—$25,000

XYZ is unsuccessful and eventually dissolves without ever having made a distribution to its partners. XYZ lacks any assets with which to return to the partners the value of their respective contributions. No partner is obliged to make any payment either to the limited partnership or to fellow partners to adjust these capital losses. These losses are not part of "the limited partnership's obligations to creditors." Section 810(a).

EXAMPLE: Same facts, except that Limited Partner #4 loaned $25,000 to XYZ, and XYZ lacks the assets to repay the loan. The general partner must contribute to the limited partnership whatever funds are necessary to enable XYZ to satisfy the obligation owned to Limited Partner #4 on account of the loan. Section 810(a) and (c).

Subsection (a)—This subsection is non-waivable as to creditors who are not partners. *See* Section 105(c)(18) (stating that the partnership agreement may not "restrict the rights under this [act] of a person other than a partner "). However, if a creditor is willing, a dissolved limited partnership may certainly make agreements with the creditor specifying the terms under which the limited partnership will "discharge the partnership's obligations to" the creditor.

Subsection (b)—For the most part, this subsection states default rules. For example, partnership agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under these subsections (or otherwise under the partnership agreement) are subject to charging orders, Section 703. As to the extent the partnership agreement can be amended to affect the distribution rights of persons already transferees, see Section 107(b).

Subsection (c)—This section applies obligation by obligation, because a person—*qua* general partner or person dissociated as a general partner—is required to contribute to the limited partnership to satisfy a partnership obligation only if, when the obligation was incurred: (i) the person was a general partner; and (ii) the limited partnership was not an LLLP. *See* Section 404(b), (c). As for when a limited partnership obligation is incurred, see Section 404(b) and (c), comments.

The partnership agreement can change the allocation *inter se* general partners and persons dissociated as general partners but cannot prejudice the rights of non-partner creditors.

EXAMPLE: The A-B Limited Partnership (the "Partnership") owes Creditor $150, an

obligation incurred when General Partners A and B were the only general partners, sharing distributions equally, and the Limited Partnership was not an LLLP. The Partnership has no funds to pay Creditor. Although Subsection (c)(1) would require Partners A and B each to contribute equally (*i.e.*, $75), the A-B Partnership Agreement provides that General Partner A has the entire contribution obligation and General Partner B has none. As between General Partners A and B, General Partner A is obligated to contribute $150 and General Partner B nothing. However, as to Creditor, General Partner B still has a contribution obligation of $75.

This formal distinction will have practical consequences only if General Partner A does not contribute the full $150. Also, Creditor may have problems establishing standing. *Cf.* Section 505, cmt.

Subsection (c)(2) and (3)—These provisions are analogous to buy-sell provisions that: (i) provide that an owner's effort to sell the ownership interest triggers an option to purchase allocated among all the other owners; (ii) make the option conditional on the entire interest being purchased; and (iii) provide for successive allocations to take up any previous allocations that were not unexercised.

Subsection (e)—If a limited partnership has been a limited liability limited partnership throughout the partnership's existence, this subsection is consistent with this act's approach to loss sharing. If a partnership has been a limited liability limited partnership during only part of the partnership's existence, the issue of loss sharing upon dissolution: (i) can be exceedingly complicated, varying radically depending on the circumstances; (ii) is therefore not amenable to a statutory "gap filler"; and (iii) thus should always be addressed in the partnership agreement.

However, in case the partnership agreement does not address the issue, this act must provide a default rule. *See* Section 105(b), cmt. ("To the extent the partnership agreement does not determine an inter se matter, this act determines the matter."). This subsection applies to fill the gap. This approach has the virtues of simplicity and certainty but in no way resembles what "typical" partners might agree if they were to consider the matter *ab initio*, especially if the partnership was never a LLLP. *Cf.* Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 448 (1987) ("[T]he various norms established by the Act, applicable in the absence of agreements to the contrary, represent the supposed understandings partners most likely reach if they choose to bargain on the various issues.").

SECTION 811. ADMINISTRATIVE DISSOLUTION.

(a) The [Secretary of State] may commence a proceeding under subsection (b) to dissolve a limited partnership administratively if the partnership does not:

(1) pay any fee, tax, interest, or penalty required to be paid to the [Secretary of State] not later than [six months] after it is due;

(2) deliver [an annual] [a biennial] report to the [Secretary of State] not later than

[six months] after it is due; or

(3) have a registered agent in this state for [60] consecutive days.

(b) If the [Secretary of State] determines that one or more grounds exist for administratively dissolving a limited partnership, the [Secretary of State] shall serve the partnership with notice in a record of the [Secretary of State's] determination.

(c) If a limited partnership, not later than [60] days after service of the notice under subsection (b), does not cure or demonstrate to the satisfaction of the [Secretary of State] the nonexistence of each ground determined by the [Secretary of State], the [Secretary of State] shall administratively dissolve the partnership by signing a statement of administrative dissolution that recites the grounds for dissolution and the effective date of dissolution. The [Secretary of State] shall file the statement and serve a copy on the partnership pursuant to Section 121.

(d) A limited partnership that is administratively dissolved continues in existence as an entity but may not carry on any activities except as necessary to wind up its activities and affairs and liquidate its assets under Sections 802, 806, 807, 808, and 810, or to apply for reinstatement under Section 812.

(e) The administrative dissolution of a limited partnership does not terminate the authority of its registered agent.

Comment

Many failures to comply with statutory requirements that may give rise to administrative dissolution occur because of oversight or inadvertence and are usually corrected promptly when brought to the entity's attention. Subsections (b) and (c) therefore provide a mandatory notice by the filing office to each limited partnership subject to administrative dissolution and a sixty-day grace period following the notice before the statement of administrative dissolution may be filed.

In most instances, the issue whether the limited partnership is subject to administrative dissolution will not be controverted. If a limited partnership is administratively dissolved, it may petition the filing office for reinstatement under Section

812 and, if reinstatement is denied, the company may appeal to the courts under Section 813.

As a practical matter, administrative dissolution permits the filing office to clear the record of "dead wood" and free up names.

SECTION 812. REINSTATEMENT.

(a) A limited partnership that is administratively dissolved under Section 811 may apply to the [Secretary of State] for reinstatement [not later than [two] years after the effective date of dissolution]. The application must state:

(1) the name of the partnership at the time of its administrative dissolution and, if needed, a different name that satisfies Section 114;

(2) the address of the principal office of the partnership and the name and street and mailing addresses of its registered agent;

(3) the effective date of the partnership's administrative dissolution; and

(4) that the grounds for dissolution did not exist or have been cured.

(b) To be reinstated, a limited partnership must pay all fees, taxes, interest, and penalties that were due to the [Secretary of State] at the time of the partnership's administrative dissolution and all fees, taxes, interest, and penalties that would have been due to the [Secretary of State] while the partnership was administratively dissolved.

(c) If the [Secretary of State] determines that an application under subsection (a) contains the required information, is satisfied that the information is correct, and determines that all payments required to be made to the [Secretary of State] by subsection (b) have been made, the [Secretary of State] shall:

(1) cancel the statement of administrative dissolution and prepare a statement of reinstatement that states the [Secretary of State's] determination and the effective date of reinstatement; and

(2) file the statement of reinstatement and serve a copy on the limited partnership.

(d) When reinstatement under this section has become effective, the following rules apply:

(1) The reinstatement relates back to and takes effect as of the effective date of the administrative dissolution.

(2) The limited partnership resumes carrying on its activities and affairs as if the administrative dissolution had not occurred.

(3) The rights of a person arising out of an act or omission in reliance on the dissolution before the person knew or had notice of the reinstatement are not affected.

Comment

Some states require that reinstatement be sought within two years of administrative dissolution. Other states provide a longer time, or do not impose any time limit. Imposing no limit risks abuse by unscrupulous people seeking to reinstate and appropriate for improper ends a dormant limited partnership that has been abandoned by its partners. On the other hand, reinstatement is intended as a safety net for the inattentive (*i.e.*, for people in charge of a limited partnership who have neglected to file an annual report or otherwise subjected the limited partnership to administrative dissolution). If the deadline comes too soon, the safety net may be gone before the inattentive even learn that administrative dissolution has occurred.

Subsection (a)(1)—This provision will apply if, before the limited partnership is reinstated, another entity has taken the company's name. *See* Section 114(d).

Subsection (d)(3)—This paragraph provides an exception to the retroactive effect provided by this subsection's Paragraphs (1) and (2). The exception could preclude a reinstated limited partnership's use of its own name. *See* Section 114(d)(1) (indirectly permitting a limited partnership to use the name of a limited partnership that has been administratively dissolved). Comparable provisions exist in other uniform acts pertaining to entities. *E.g.*, UPA (1997) (Last Amended 2013) § 902(c)(2).

SECTION 813. JUDICIAL REVIEW OF DENIAL OF REINSTATEMENT.

(a) If the [Secretary of State] denies a limited partnership's application for reinstatement following administrative dissolution, the [Secretary of State] shall serve the partnership with a notice in a record that explains the reasons for the denial.

(b) A limited partnership may seek judicial review of denial of reinstatement in [the appropriate court] not later than [30] days after service of the notice of denial.

Comment

Because the grounds for administrative dissolution under Section 811 are limited and straight-forward, it is unlikely there will be a dispute about whether a limited partnership has corrected the reasons for its administrative dissolution. If a dissolved limited partnership disagrees with a determination by the filing office to deny the partnership's application for reinstatement, this section gives the partnership a limited right to seek judicial review of the denial of reinstatement.

[ARTICLE] 9

ACTIONS BY PARTNERS

SECTION 901. DIRECT ACTION BY PARTNER.

(a) Subject to subsection (b), a partner may maintain a direct action against another partner or the limited partnership, with or without an accounting as to the partnership's activities and affairs, to enforce the partner's rights and otherwise protect the partner's interests, including rights and interests under the partnership agreement or this [act] or arising independently of the partnership relationship.

(b) A partner maintaining a direct action under this section must 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.

(c) A right to an accounting on a dissolution and winding up does not revive a claim barred by law.

Comment

Subsection (a)—A partner's rights under this subsection are subject to the rule of standing stated in Subsection (b). The phrase "otherwise protect the partner's interests" pertains to remedies and creates no additional causes of action.

The last phrase of this subsection ("or arising independently . . . ") does not create any

new rights, obligations, or remedies, and is included merely to emphasize that a person being a partner in a limited partnership does not preclude the person from enforcing rights existing "independently of the partnership relationship" (*e.g.*, as a creditor).

Subsection (b)—This subsection codifies the rule of standing that predominates in entity law. *See, e.g.*, *Mallia v. PaineWebber, Inc.*, 889 F. Supp. 277, 282 (S.D. Tex. 1995) ("[T]o bring a direct representative action against a general partner, a limited partner must demonstrate either direct injury or an injury that exists independently of the partnerships."); *JonesH. F. Ahmanson & Co.*, 460 P.2d 464, 470 (Cal. 1969) (stating that "the action is derivative, *i.e.*, in the corporate right, if the gravamen of the complaint is injury to the corporation, or to the whole body of its stock or property without any severance or distribution among individual holders, or if it seeks to recover assets for the corporation or to prevent the dissipation of its assets" (quoting *Gagnon Co., Inc. v. Nevada Desert Inn*, 289 P.2d 466, 471 (Cal. 1955) (internal quotation marks omitted)); *Litman v. Prudential-Bache Properties, Inc.*, 611 A.2d 12, 17 (Del. Ch. 1992) (stating that direct action by holders of interest in partnership is not permitted for indirect injuries from general partners' misconduct); *Tzolis v. Wolff*, 884 N.E.2d 1005, 1008 (N.Y. 2008) (holding that derivative actions exist under New York LLC law and referring to "the traditional line between direct and derivative claims"); *see also CML V, LLC v. Bax* 6 A.3d 238, 245 (Del. Ch. 2010) (noting that issues of standing viz-a-viz direct and derivative claims are comparable regardless of whether the entity is a limited partnership, a limited liability company, or a corporation), *aff'd*, 28 A.3d 1037 (Del. 2011).

The distinction between direct and derivative claims protects the partnership agreement. If any partner can sue directly over any management issue, the mere threat of suit can interfere with the partners' agreed-upon arrangements.

Although 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 different circumstances typically exist. A partner does not have a direct claim against a general partner merely because the general partner has breached the partnership agreement. Likewise a general 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.

> EXAMPLE: Through grossly negligent conduct, in violation of Section 409(c), the general partner of a limited partnership reduces the net assets of the limited partnership by fifty percent, which in turns decreases the value of Limited Partner A's investment by $3,000,000. A has no standing to bring a direct claim; the damage is merely derivative of the damage first suffered by the limited partnership. The partner may, however, bring a derivative claim. Sections 902—906.
>
> EXAMPLE: Same facts, except in addition to violating Section 409(c), the general partner's conduct breaches an express provision of the partnership agreement to which Limited Partner A is a signatory. The analysis and the result are the same.

EXAMPLE: A partnership agreement defines "distributable cash" and requires the limited partnership to periodically distribute that cash among all partners. The limited partnership's general partner fails to distribute the cash. Each partner has a direct claim against the general partner and the limited partnership.

The reference to "threatened injury" is to encompass potential claims for preventative relief, such as a temporary restraining order or preliminary injunction.

This section's standing rule is subject to reasonable alterations by the partnership agreement. *See* Section 105(c)(14), cmt.

Subsection (c)—This subsection originated as UPA (1997) § 405(c) and reversed the rule stated in UPA (1914) § 43. This subsection inevitably implies that other law governs the accrual of a claim under Subsection (b) as well as the statute of limitations applicable to those claims. As a result, partners must take care not to "to sit on their claims" waiting for the partnership to dissolve. *Veloski v. State Farm Mut. Auto Ins. Co.*, 719 N.E.2d 574, 576 (Ohio Ct. App. 1998).

SECTION 902. DERIVATIVE ACTION. A partner may maintain a derivative action to enforce a right of a limited partnership if:

(1) the partner first makes a demand on the general partners, requesting that they cause the partnership to bring an action to enforce the right, and the general partners do not bring the action within a reasonable time; or

(2) a demand under paragraph (1) would be futile.

Comment

By its terms, this section permits a general partner as well as a limited partner to bring a derivative action, subject of course to Section 903.

Paragraph (1)—The demand requirement recognizes that, presumptively at least, the decision to cause a limited partnership to bring suit is a business decision, to be made by those who manage the business. Deborah A. DeMott, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 5.9 (Westlaw, Nov. 4, 2012) (Demand on directors—Rationales for demand).

Paragraph (2)—Some jurisdictions have a "universal demand" requirement, but the approach stated here is by far the majority one. Deborah A. Demott, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE § 5.12 (Westlaw, Nov. 4, 2012).

SECTION 903. PROPER PLAINTIFF. A derivative action to enforce a right of a limited partnership may be maintained only by a person that is a partner at the time the action is

commenced and:

(1) was a partner when the conduct giving rise to the action occurred; or

(2) whose status as a partner devolved on the person by operation of law or pursuant to the terms of the partnership agreement from a person that was a partner at the time of the conduct.

Comment

The rule stated here is conventional in both the law of unincorporated entities and corporate law. Persons dissociated as partners have no standing to bring a derivative action. *A fortiori*, mere transferees have no standing. *See* Sections 107(b), cmt., 702.

Paragraph (2)—This paragraph will be inapposite if the limited partnership has only two partners, one of whom is the derivative plaintiff. In that limited circumstance, the plaintiff's death would cause the derivative action to abate. The "pick your partner" principal enshrined in Section 702 would prevent the decedent's heirs from succeeding to plaintiff status in the derivative action (except in the unlikely event that the remaining partner consents to the heirs becoming partners). The analysis and result will be the same if the derivative plaintiff is an entity whose existence terminates.

This act takes no position on whether:

- the death of partner abates a direct claim against the limited partnership or a fellow partner; and
- bringing a direct claim precludes a person from being a proper plaintiff for a derivative claim.

As to the latter issue, see, *e.g.*, *Cordts-Auth v. Crunk, L.L.C.*, 815 F. Supp. 2d 778, 793–94 (S.D.N.Y. 2011) (discussing the potential conflict of interest), *aff'd*, 479 F. App'x 375 (2d Cir. 2012).

SECTION 904. PLEADING. In a derivative action, the complaint must state with particularity:

(1) the date and content of plaintiff's demand and the response to the demand by the general partner; or

(2) why demand should be excused as futile.

Comment

This section parallels Section 902. The pleading requirement first appeared in a uniform act in 1976. ULPA (1976) § 1003.

SECTION 905. SPECIAL LITIGATION COMMITTEE.

(a) If a limited partnership is named as or made a party in a derivative proceeding, the partnership may appoint a special litigation committee to investigate the claims asserted in the proceeding and determine whether pursuing the action is in the best interests of the partnership. If the partnership appoints a special litigation committee, on motion by the committee made in the name of the partnership, except for good cause shown, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation. This subsection does not prevent the court from:

(1) enforcing a person's right to information under Section 304 or 407; or

(2) granting extraordinary relief in the form of a temporary restraining order or preliminary injunction.

(b) A special litigation committee must be composed of one or more disinterested and independent individuals, who may be partners.

(c) A special litigation committee may be appointed:

(1) by a majority of the general partners not named as parties in the proceeding; or

(2) if all general partners are named as parties in the proceeding, by a majority of the general partners named as defendants.

(d) After appropriate investigation, a special litigation committee may determine that it is in the best interests of the limited partnership that the proceeding:

(1) continue under the control of the plaintiff;

(2) continue under the control of the committee;

(3) be settled on terms approved by the committee; or

(4) be dismissed.

(e) After making a determination under subsection (d), a special litigation committee shall file with the court a statement of its determination and its report supporting its determination and shall serve each party with a copy of the determination and report. The court shall determine whether the members of the committee were disinterested and independent and whether the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof. If the court finds that the members of the committee were disinterested and independent and that the committee acted in good faith, independently, and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall dissolve the stay of discovery entered under subsection (a) and allow the action to continue under the control of the plaintiff.

Comment

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. An "SLC" can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of partners who are neither plaintiffs nor defendants (if any), and bring the benefits of a specially tailored business judgment to any judicial decision.

This section's approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited partnership. Use of an SLC is optional. A partnership agreement can preclude the use of SLCs, rendering this section inapplicable, but cannot otherwise vary this section. *See* Section 105(c)(15).

Subsection (a)(1)—Sections 304 and 407 pertain to information rights. On the availability of these remedies pending the SLC's investigation, *compare* Section 410, *with Kaufman v. Computer Assoc. Int'l, Inc.*, No. Civ.A. 699-N, 2005 WL 3470589, at *1 (Del. Ch. Dec. 21, 2005) (presenting "the question of whether to stay a books and records action under 8 Del. C. § 220 at the request of a special litigation committee when a derivative action encompassing substantially the same allegations of wrongdoing filed by different plaintiffs is pending in another jurisdiction"; concluding "[f]or reasons that have much to do with the light burden imposed by the plaintiff's demand in this case . . . that the special litigation committee's

motion to stay the books and records action should be denied").

Subsection (e)—The standard stated for judicial review of the SLC determination follows *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979) rather than *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), because the latter's reference to a court's business judgment has generally not been followed in other states. In essence, an SLC is intended to function as a surrogate decision-maker, allowing the limited partnership to make what is fundamentally a business decision. If a court determines that "the members of the committee were disinterested and independent and [that] . . . the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, with the committee having the burden of proof," it makes no sense to substitute the court's legal judgment for the business judgment of the SLC.

Houle v. Low, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court's role in reviewing an SLC decision:

> The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. . . . [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff's derivative suit. . . . The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof—the [entity].

For a discussion of how a court should approach the question of independence, see *Einhorn v. Culea*, 612 N.W.2d 78, 91 (Wis. 2000).

SECTION 906. PROCEEDS AND EXPENSES.

(a) Except as otherwise provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise, or settlement, belong to the limited partnership and not to the plaintiff; and

(2) if the plaintiff receives any proceeds, the plaintiff shall remit them immediately to the partnership.

(b) If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees and costs, from the recovery

of the limited partnership.

(c) A derivative action on behalf of a limited partnership may not be voluntarily dismissed or settled without the court's approval.

Comment

Subsection (c)—This provision is intended to prevent collusion.

[ARTICLE] 10

FOREIGN LIMITED PARTNERSHIPS

SECTION 1001. GOVERNING LAW.

(a) The law of the jurisdiction of formation of a foreign limited partnership governs:

(1) the internal affairs of the partnership;

(2) the liability of a partner as partner for a debt, obligation, or other liability of the partnership; and

(3) the liability of a series of the partnership.

(b) A foreign limited partnership is not precluded from registering to do business in this state because of any difference between the law of its jurisdiction of formation and the law of this state.

(c) Registration of a foreign limited partnership to do business in this state does not authorize the foreign partnership to engage in any activities and affairs or exercise any power that a limited partnership may not engage in or exercise in this state.

Comment

Subsection (a)—This subsection provides that the laws of the jurisdiction of formation of a foreign limited partnership, rather than the laws of this state, govern both the internal affairs of the limited partnership and the liability of its partners for the obligations of the limited partnership. A partnership agreement cannot change this provision. Section 105(c)(18).

This subdivision parallels Section 104 (pertaining to the governing law for domestic

limited partnerships). *See* Section 104, cmt.

Subsection (a)(3)—This act does not provide for series of the asset-partitioning type (as contemplated by Del. Code. Ann. tit. 6, § 17-218 (West 2014)). However, under this provision, the law of this state will respect the "internal shields" created under the series provisions of another jurisdiction's limited partnership statute. This provision does *not* address the myriad of other unsettled issues pertaining to series.

For an explanation of how the asset-partitioning concept of series differs from the traditional concept, see Section 1131, comment.

Subsections (b) and (c)—These sections together make clear that, although a foreign entity may not be denied registration simply because of a difference between the laws of its jurisdiction of formation and the laws of this state, the foreign limited partnership "may not engage in any activity or exercise any power that a limited partnership may not engage in or exercise in this state." Subsection (c).

SECTION 1002. REGISTRATION TO DO BUSINESS IN THIS STATE.

(a) A foreign limited partnership may not do business in this state until it registers with the [Secretary of State] under this [article].

(b) A foreign limited partnership doing business in this state may not maintain an action or proceeding in this state unless it is registered to do business in this state.

(c) The failure of a foreign limited partnership to register to do business in this state does not impair the validity of a contract or act of the partnership or preclude it from defending an action or proceeding in this state.

(d) A limitation on the liability of a general partner or limited partner of a foreign limited partnership is not waived solely because the partnership does business in this state without registering to do business in this state.

(e) Section 1001(a) and (b) applies even if the foreign limited partnership fails to register under this [article].

Comment

Subsection (a)—Following a long-established tradition, this act does not state what

constitutes "do[ing] business in this state." Instead, Section 1005 provides a non-exhaustive list of "[a]ctivities of a foreign limited partnership which do not constitute doing business in this state."

Subsection (b)—The purpose of this subsection is to induce foreign limited partnerships to register without imposing harsh or erratic sanctions. Often the failure to register is a result of inadvertence or bona fide disagreement as to the scope of Section 1005, which is necessarily imprecise. Thus, the imposition of harsh sanctions in those situations is inappropriate. The sanction of closing the courts of the state to suits brought by foreign limited partnerships that should have registered is not a punitive one. If a foreign limited partnership should have registered and failed to do so, it may still enforce its contractual and other rights simply by registering.

However, if a court dismisses a case under this subsection rather than staying the proceedings pending the foreign limited partnership's registration, a statute of limitations problem may occur. *See Corco, Inc. v. Ledar Transport, Inc.*, 946 P.2d 1009, 1010 (Kan. Ct. App. 1997) ("[T]he proper remedy was to dismiss [the unregistered entity's] counterclaim without prejudice rather than with prejudice. This would leave [the entity] the opportunity to comply with the statutes and then reassert its claim against [the defendant]. On the other hand, it would also leave the risk that the statute of limitations might run against [the entity].").

This subsection does not prevent a foreign limited partnership that has failed to register from "defending" an action or proceeding. The distinction between "maintaining" an action or proceeding under this subsection and "defending" an action or proceeding under Subsection (c) is determined on the basis of whether affirmative relief is sought. A nonregistered foreign limited partnership may interpose any defense or permissive or mandatory counterclaim to defeat a claimed recovery, but may not obtain an affirmative judgment based on the counterclaim without first registering.

Subsection (c)—In addition to permitting a non-registered foreign limited partnership doing business in this state to defend (but not maintain) an action or proceeding, this section makes clear that failure to register does not impair the validity of a foreign limited partnership's acts.

Subsection (d)—This subsection preserves the effectiveness of a foreign limited partnership's liability shield applicable under the limited partnership's governing law.

SECTION 1003. FOREIGN REGISTRATION STATEMENT. To register to do business in this state, a foreign limited partnership must deliver a foreign registration statement to the [Secretary of State] for filing. The statement must state:

(1) the name of the partnership and, if the name does not comply with Section 114, an alternate name adopted pursuant to Section 1006(a);

(2) that the partnership is a foreign limited partnership;

(3) the partnership's jurisdiction of formation;

(4) the street and mailing addresses of the partnership's principal office and, if the law of the partnership's jurisdiction of formation requires the partnership to maintain an office in that jurisdiction, the street and mailing addresses of the required office; and

(5) the name and street and mailing addresses of the partnership's registered agent in this state.

Comment

The foreign registration statement provides certain basic information about the foreign limited partnership to ensure that citizens of the state have access to that information in their dealings with the foreign limited partnership. The statement also facilitates making the foreign limited partnership subject to the jurisdiction of the courts of the state.

Once registered, a foreign limited partnership must file an annual/biennial report. Section 212.

SECTION 1004. AMENDMENT OF FOREIGN REGISTRATION STATEMENT. A registered foreign limited partnership shall deliver to the [Secretary of State] for filing an amendment to its foreign registration statement if there is a change in:

(1) the name of the partnership;

(2) the partnership's jurisdiction of formation;

(3) an address required by Section 1003(4); or

(4) the information required by Section 1003(5).

Comment

This section works in tandem with the annual/biennial report required by Section 212 to keep up to date the information of record in the office of the filing office about a registered foreign limited partnership.

SECTION 1005. ACTIVITIES NOT CONSTITUTING DOING BUSINESS.

(a) Activities of a foreign limited partnership which do not constitute doing business in this state under this [article] include:

(1) maintaining, defending, mediating, arbitrating, or settling an action or proceeding;

(2) carrying on any activity concerning its internal affairs, including holding meetings of its partners;

(3) maintaining accounts in financial institutions;

(4) maintaining offices or agencies for the transfer, exchange, and registration of securities of the partnership or maintaining trustees or depositories with respect to those securities;

(5) selling through independent contractors;

(6) soliciting or obtaining orders by any means if the orders require acceptance outside this state before they become contracts;

(7) creating or acquiring indebtedness, mortgages, or security interests in property;

(8) securing or collecting debts or enforcing mortgages or security interests in property securing the debts and holding, protecting, or maintaining property;

(9) conducting an isolated transaction that is not in the course of similar transactions;

(10) owning, without more, property; and

(11) doing business in interstate commerce.

(b) A person does not do business in this state solely by being a partner of a foreign

limited partnership that does business in this state.

(c) This section does not apply in determining the contacts or activities that may subject a foreign limited partnership to service of process, taxation, or regulation under law of this state other than this [act].

Comment

This act does not attempt to formulate an inclusive definition of what constitutes doing business in a state. Rather, the concept is defined in a negative fashion by Subsections (a) and (b), which state that certain activities do not constitute doing business.

In general terms, any conduct more regular, systematic, or extensive than that described in Subsection (a) constitutes doing business and requires the foreign limited partnership to register to do business. Typical conduct requiring registration includes maintaining an office to conduct local intrastate business, selling personal property not in interstate commerce, entering into contracts relating to the local business or sales, and owning or using real estate for general purposes. But the passive owning of real estate for investment purposes does not constitute doing business. *See* Subsection (a)(10).

The test of "doing business" defined in a negative way in Subsections (a) and (b) applies only to the question of whether a foreign limited partnership's contacts with the state are such that it must register under this section. The test is not applicable to other questions such as whether the foreign limited partnership is amenable to service of process under state "long-arm" statutes or liable for state or local taxes. A foreign limited partnership that has registered (or is required to register) will generally be subject to suit and state taxation in the state, while a foreign limited partnership that is subject to service of process or state taxation in a state will not necessarily be required to register.

Subsection (a)—The list of activities set forth in this subsection is not exhaustive.

Subsection (a)(1)—A foreign limited partnership is not "doing business" solely because it resorts to the courts of the state to recover an indebtedness, enforce an obligation, recover possession of personal property, obtain the appointment of a receiver, intervene in a pending proceeding, bring a petition to compel arbitration, file an appeal bond, or pursue appellate remedies. Similarly, a foreign limited partnership is not required to register merely because it files a complaint with a governmental agency or participates in an administrative proceeding within the state.

Subsection (a)(2)—A foreign limited partnership does not "do business" within a state under this section merely because some of its internal affairs occur within a state. Thus, a foreign limited partnership may hold meetings of its partners within a state without first registering. A foreign limited partnership also may maintain offices or agencies within a state relating solely to the transfer, exchange or registration of its interests without registering. Other activities relating

to the internal affairs of the foreign limited partnership that do not constitute doing business under this section include having officers or representatives who reside within or are physically present in the state; while there, the officers or representatives may make executive decisions relating to the internal affairs of the foreign limited partnership without imposing on the foreign limited partnership the requirement that it register, if these activities are not so regular and systematic as to cause the residence to be viewed as a business office.

Subsection (a)(5)—Under this paragraph, a foreign limited partnership need not register if it sells goods in the state through independent contractors. These transactions are viewed as transactions by the independent contractors, not by the foreign limited partnership itself even though the foreign limited partnership sets some limits or ground rules for its contractors. If these controls are sufficiently pervasive, however, the foreign limited partnership may be deemed to be selling for itself in intrastate commerce, and not through the independent contractors and therefore engaged in doing business in the state.

Subsection (a)(7) and (8)—The mere act of making a loan by a foreign limited partnership that is not in the business of making loans does not constitute doing business in the state in which the loan is made. On the same theory, a foreign limited partnership may obtain security for the repayment of a loan, and foreclose or enforce the lien or security interest to collect the loan, without being deemed to be doing business. Similarly, a refunding or "roll over" of a loan or its adjustment or compromise does not involve doing business.

Subsection (a)(9)—The concept of "doing business" involves regular, repeated, and continuing business contacts of a local nature. A single agreement or isolated transaction within a state does not constitute doing business if there is no intention to repeat the transaction or engage in similar transactions. This act does not impose the limitation found in some statutes, such as section 15.01(b)(10) of the Model Business Corporation Act, that the isolated transaction be completed within thirty days. A foreign limited partnership should not be required to register simply because it engages in an isolated transaction that takes longer than thirty days to complete.

Subsection (a)(11)—A foreign limited partnership is not "doing business" within the meaning of this section if it is transacting business in interstate commerce. *See* Subsection (a)(6) (stating that soliciting or obtaining orders that must be accepted outside the state before they become contracts is not "doing business" within the meaning of this section).

These exclusions reflect the provisions of the United States Constitution that grant to the United States Congress exclusive power over interstate commerce, and preclude states from imposing restrictions or conditions upon this commerce. This subsection should be construed in a manner consistent with judicial decisions under the United States Constitution. Under those decisions, a foreign entity is not required to register even though it sells goods within the state if they are shipped to the purchasers in interstate commerce. Thus, a foreign limited partnership need not register even if it also does work and performs acts within the state incidental to the interstate business (*e.g.*, if it takes or enforces a security interest incidental to these transactions). Nor is it required to register merely because it sends traveling salespeople or solicitors into a state so long as contracts are not made within the state. Similarly, an office may be maintained

by a foreign limited partnership in this state without registering if the office's functions relate solely to interstate commerce. Purchases of goods may of course be in interstate commerce as readily as sales. Thus, the purchase of personal property in this state by a foreign limited partnership for shipment in interstate commerce out of the state does not require the entity to register.

SECTION 1006. NONCOMPLYING NAME OF FOREIGN LIMITED PARTNERSHIP.

(a) A foreign limited partnership whose name does not comply with Section 114 may not register to do business in this state until it adopts, for the purpose of doing business in this state, an alternate name that complies with Section 114. A partnership that registers under an alternate name under this subsection need not comply with [this state's assumed or fictitious name statute]. After registering to do business in this state with an alternate name, a partnership shall do business in this state under:

(1) the alternate name;

(2) the partnership's name, with the addition of its jurisdiction of formation; or

(3) a name the partnership is authorized to use under [this state's assumed or fictitious name statute].

(b) If a registered foreign limited partnership changes its name to one that does not comply with Section 114, it may not do business in this state until it complies with subsection (a) by amending its registration to adopt an alternate name that complies with Section 114.

Comment

A foreign limited partnership must register under its true name if that name satisfies the requirements of Section 114. If the true name unavailable because it is not distinguishable upon the records of the filing office from a name already in use or reserved or registered, the foreign limited partnership may use an alternate name.

A foreign limited partnership that registers to do business in the state may do business under a fictitious name to the same extent as a domestic entity.

SECTION 1007. WITHDRAWAL DEEMED ON CONVERSION TO DOMESTIC FILING ENTITY OR DOMESTIC LIMITED LIABILITY PARTNERSHIP. A registered foreign limited partnership that converts to a domestic limited liability partnership or to a domestic entity whose formation requires delivery of a record to the [Secretary of State] for filing is deemed to have withdrawn its registration on the effective date of the conversion.

Comment

When a registered foreign limited partnership has converted to a domestic "filing entity" or domestic limited liability partnership, information about the entity in its capacity as a domestic entity will continue to be of record in the office of the filing office. At that point, there is no further reason for the entity to be registered as a foreign limited partnership, and this section automatically treats its prior registration as withdrawn.

SECTION 1008. WITHDRAWAL ON DISSOLUTION OR CONVERSION TO NONFILING ENTITY OTHER THAN LIMITED LIABILITY PARTNERSHIP.

(a) A registered foreign limited partnership that has dissolved and completed winding up or has converted to a domestic or foreign entity whose formation does not require the public filing of a record, other than a limited liability partnership, shall deliver a statement of withdrawal to the [Secretary of State] for filing. The statement must state:

(1) in the case of a partnership that has completed winding up:

(A) its name and jurisdiction of formation;

(B) that the partnership surrenders its registration to do business in this state; and

(2) in the case of a partnership that has converted:

(A) the name of the converting partnership and its jurisdiction of formation;

(B) the type of entity to which the partnership has converted and its

jurisdiction of formation;

(C) that the converted entity surrenders the converting partnership's registration to do business in this state and revokes the authority of the converting partnership's registered agent to act as registered agent in this state on behalf of the partnership or the converted entity; and

(D) a mailing address to which service of process may be made under subsection (b).

(b) After a withdrawal under this section has become effective, service of process in any action or proceeding based on a cause of action arising during the time the foreign limited partnership was registered to do business in this state may be made pursuant to Section 121.

Comment

When a registered foreign limited partnership has dissolved and completed winding up, or has converted to a "nonfiling entity" other than a limited liability partnership, there is no further reason for information about the entity to appear in the records of the filing office. This section thus requires delivery of a statement of withdrawal for the purpose of removing the foreign limited partnership from the rolls of registered foreign entities.

Subsection (a)—The exclusion of limited liability partnerships from this provision is merely technical; Section 1007 covers conversion to a domestic LLP.

SECTION 1009. TRANSFER OF REGISTRATION.

(a) When a registered foreign limited partnership has merged into a foreign entity that is not registered to do business in this state or has converted to a foreign entity required to register with the [Secretary of State] to do business in this state, the foreign entity shall deliver to the [Secretary of State] for filing an application for transfer of registration. The application must state:

(1) the name of the registered foreign limited partnership before the merger or conversion;

(2) that before the merger or conversion the registration pertained to a foreign limited partnership;

(3) the name of the applicant foreign entity into which the foreign limited partnership has merged or to which it has been converted and, if the name does not comply with Section 114, an alternate name adopted pursuant to Section 1006(a);

(4) the type of entity of the applicant foreign entity and its jurisdiction of formation;

(5) the street and mailing addresses of the principal office of the applicant foreign entity and, if the law of the entity's jurisdiction of formation requires the entity to maintain an office in that jurisdiction, the street and mailing addresses of that office; and

(6) the name and street and mailing addresses of the applicant foreign entity's registered agent in this state.

(b) When an application for transfer of registration takes effect, the registration of the foreign limited partnership to do business in this state is transferred without interruption to the foreign entity into which the partnership has merged or to which it has been converted.

Comment

The purpose of this section is to clarify the status of the foreign limited partnership in the public records of the state. A filing under this section has the two-fold effect of canceling the authority of the foreign limited partnership to do business in the state while at the same time reregistering the former foreign limited partnership as the new type of foreign entity. If the reregistered foreign entity subsequently wishes to cancel its registration to do business in the state, it may do so under the statute of this state pertaining the registration of the new type of foreign entity.

SECTION 1010. TERMINATION OF REGISTRATION.

(a) The [Secretary of State] may terminate the registration of a registered foreign limited partnership in the manner provided in subsections (b) and (c) if the partnership does not:

(1) pay, not later than [60] days after the due date, any fee, tax, interest, or penalty required to be paid to the [Secretary of State] under this [act] or law other than this [act];

(2) deliver to the [Secretary of State] for filing, not later than [60] days after the due date, [an annual] [a biennial] report required under Section 212;

(3) have a registered agent as required by Section 117; or

(4) deliver to the [Secretary of State] for filing a statement of a change under Section 118 not later than [30] days after a change has occurred in the name or address of the registered agent.

(b) The [Secretary of State] may terminate the registration of a registered foreign limited partnership by:

(1) filing a notice of termination or noting the termination in the records of the [Secretary of State]; and

(2) delivering a copy of the notice or the information in the notation to the partnership's registered agent or, if the partnership does not have a registered agent, to the partnership's principal office.

(c) The notice must state or the information in the notation must include:

(1) the effective date of the termination, which must be at least [60] days after the date the [Secretary of State] delivers the copy; and

(2) the grounds for termination under subsection (a).

(d) The authority of the registered foreign limited partnership to do business in this state ceases on the effective date of the notice of termination or notation under subsection (b), unless before that date the partnership cures each ground for termination stated in the notice or notation. If the partnership cures each ground, the [Secretary of State] shall file a record so stating.

Comment

This section is analogous to the procedures for administrative dissolution under Section 811.

SECTION 1011. WITHDRAWAL OF REGISTRATION OF REGISTERED FOREIGN LIMITED PARTNERSHIP.

(a) A registered foreign limited partnership may withdraw its registration by delivering a statement of withdrawal to the [Secretary of State] for filing. The statement of withdrawal must state:

(1) the name of the partnership and its jurisdiction of formation;

(2) that the partnership is not doing business in this state and that it withdraws its registration to do business in this state;

(3) that the partnership revokes the authority of its registered agent to accept service on its behalf in this state; and

(4) an address to which service of process may be made under subsection (b).

(b) After the withdrawal of the registration of a foreign limited partnership, service of process in any action or proceeding based on a cause of action arising during the time the partnership was registered to do business in this state may be made pursuant to Section 121.

Comment

The statement of withdrawal must set forth an address where service of process may be made on the foreign limited partnership pursuant to Section 121. There is no limit on how long the withdrawn entity must keep that address up to date.

SECTION 1012. ACTION BY [ATTORNEY GENERAL]. The [Attorney General] may maintain an action to enjoin a foreign limited partnership from doing business in this state in violation of this [article].

Comment

The authority stated here has been part of corporate law for more than a century and has been carried over into the law of unincorporated business entities. Nowadays, the authority is rarely if ever invoked in either realm of entity law.

[ARTICLE] 11

MERGER, INTEREST EXCHANGE, CONVERSION, AND DOMESTICATION

Introductory Comment

This article deals comprehensively with both same-type and cross-type mergers and interest exchanges and with conversions and domestications. For this article to apply, at least one participant organization must be a domestic limited partnership. For a foreign organization to be involved, its organic law must permit the organization's participation.

Part 1 contains definitions specific to this article as well as provisions applicable to all transactions authorized by this article.

Part 2 governs mergers and is an amalgamation of existing entity law, both unincorporated and incorporated.

Part 3 governs interest exchanges, previously a feature only of corporate law. Part 3 is derived from the share exchange provisions in chapter 11 of the Model Business Corporation Act.

Part 4 governs conversions, a one-step procedure by which an entity changes from one type of entity to another type while nonetheless continuing in existence as the same legal entity.

Part 5 governs domestications, a procedure by a domestic limited partnership can become a foreign limited partnership or vice versa, in each instance with the company remaining the same legal entity.

Part 2 sets the paradigm for Parts 3, 4, and 5, because mergers are long established, and merger rules and concepts are familiar to business lawyers. Moreover, conversions and domestications could formerly be accomplished via mergers (with a new entity), and an interest exchange produces the same result as a triangular merger. The comments to Part 2 are thus relevant to understanding Parts 3, 4, and 5. This article contemplates transactions in which the surviving entity is neither a filing entity nor otherwise of record in the filing office (*e.g.*, the merger of a limited partnership into a non-LLP general partnership). As a result, a filing under this article may be the first time that a filing office takes cognizance of an entity's existence.

[PART] 1

GENERAL PROVISIONS

SECTION 1101. DEFINITIONS. In this [article]:

(1) "Acquired entity" means the entity, all of one or more classes or series of interests of which are acquired in an interest exchange.

(2) "Acquiring entity" means the entity that acquires all of one or more classes or series of interests of the acquired entity in an interest exchange.

(3) "Conversion" means a transaction authorized by [Part] 4.

(4) "Converted entity" means the converting entity as it continues in existence after a conversion.

(5) "Converting entity" means the domestic entity that approves a plan of conversion pursuant to Section 1143 or the foreign entity that approves a conversion pursuant to the law of its jurisdiction of formation.

(6) "Distributional interest" means the right under an unincorporated entity's organic law and organic rules to receive distributions from the entity.

(7) "Domestic", with respect to an entity, means governed as to its internal affairs by the law of this state.

(8) "Domesticated limited partnership" means the domesticating limited partnership as it continues in existence after a domestication.

(9) "Domesticating limited partnership" means the domestic limited partnership that approves a plan of domestication pursuant to Section 1153 or the foreign limited partnership that approves a domestication pursuant to the law of its jurisdiction of formation.

(10) "Domestication" means a transaction authorized by [Part] 5.

(11) "Entity":

(A) means:

(i) a business corporation;

(ii) a nonprofit corporation;

(iii) a general partnership, including a limited liability partnership;

(iv) a limited partnership, including a limited liability limited partnership;

(v) a limited liability company;

[(vi) a general cooperative association;]

(vii) a limited cooperative association;

(viii) an unincorporated nonprofit association;

(ix) a statutory trust, business trust, or common-law business trust; or

(x) any other person that has:

(I) a legal existence separate from any interest holder of that person; or

(II) the power to acquire an interest in real property in its own name; and

(B) does not include:

(i) an individual;

(ii) a trust with a predominantly donative purpose or a charitable trust;

(iii) an association or relationship that is not an entity listed in subparagraph A and is not a partnership under the rules stated in [Section 202(c) of the Uniform Partnership Act (1997) (Lasted Amended 2013)] [Section 7 of the Uniform Partnership Act (1914)] or a similar provision of the law of another jurisdiction;

(iv) a decedent's estate; or

(v) a government or a governmental subdivision, agency, or instrumentality.

(12) "Filing entity" means an entity whose formation requires the filing of a public organic record. The term does not include a limited liability partnership.

(13) "Foreign", with respect to an entity, means an entity governed as to its internal affairs by the law of a jurisdiction other than this state.

(14) "Governance interest" means a right under the organic law or organic rules of an unincorporated entity, other than as a governor, agent, assignee, or proxy, to:

(A) receive or demand access to information concerning, or the books and records of, the entity;

(B) vote for or consent to the election of the governors of the entity; or

(C) receive notice of or vote on or consent to an issue involving the internal affairs of the entity.

(15) "Governor" means:

(A) a director of a business corporation;

(B) a director or trustee of a nonprofit corporation;

(C) a general partner of a general partnership;

(D) a general partner of a limited partnership;

(E) a manager of a manager-managed limited liability company;

(F) a member of a member-managed limited liability company;

[(G) a director of a general cooperative association;]

(H) a director of a limited cooperative association;

(I) a manager of an unincorporated nonprofit association;

(J) a trustee of a statutory trust, business trust, or common-law business trust; or

(K) any other person under whose authority the powers of an entity are exercised and under whose direction the activities and affairs of the entity are managed pursuant to the organic law and organic rules of the entity.

(16) "Interest" means:

(A) a share in a business corporation;

(B) a membership in a nonprofit corporation;

(C) a partnership interest in a general partnership;

(D) a partnership interest in a limited partnership;

(E) a membership interest in a limited liability company;

[(F) a share in a general cooperative association;]

(G) a member's interest in a limited cooperative association;

(H) a membership in an unincorporated nonprofit association;

(I) a beneficial interest in a statutory trust, business trust, or common-law business trust; or

(J) a governance interest or distributional interest in any other type of unincorporated entity.

(17) "Interest exchange" means a transaction authorized by [Part] 3.

(18) "Interest holder" means:

(A) a shareholder of a business corporation;

(B) a member of a nonprofit corporation;

(C) a general partner of a general partnership;

(D) a general partner of a limited partnership;

(E) a limited partner of a limited partnership;

(F) a member of a limited liability company;

[(G) a shareholder of a general cooperative association;]

(H) a member of a limited cooperative association;

(I) a member of an unincorporated nonprofit association;

(J) a beneficiary or beneficial owner of a statutory trust, business trust, or common-law business trust; or

(K) any other direct holder of an interest.

(19) "Interest holder liability" means:

(A) personal liability for a liability of an entity which is imposed on a person:

(i) solely by reason of the status of the person as an interest holder; or

(ii) by the organic rules of the entity which make one or more specified interest holders or categories of interest holders liable in their capacity as interest holders for all or specified liabilities of the entity; or

(B) an obligation of an interest holder under the organic rules of an entity to contribute to the entity.

(20) "Merger" means a transaction authorized by [Part] 2.

(21) "Merging entity" means an entity that is a party to a merger and exists immediately before the merger becomes effective.

(22) "Organic law" means the law of an entity's jurisdiction of formation governing the internal affairs of the entity.

(23) "Organic rules" means the public organic record and private organic rules of an

entity.

(24) "Plan" means a plan of merger, plan of interest exchange, plan of conversion, or plan of domestication.

(25) "Plan of conversion" means a plan under Section 1142.

(26) "Plan of domestication" means a plan under Section 1152.

(27) "Plan of interest exchange" means a plan under Section 1132.

(28) "Plan of merger" means a plan under Section 1122.

(29) "Private organic rules" means the rules, whether or not in a record, that govern the internal affairs of an entity, are binding on all its interest holders, and are not part of its public organic record, if any. The term includes:

(A) the bylaws of a business corporation;

(B) the bylaws of a nonprofit corporation;

(C) the partnership agreement of a general partnership;

(D) the partnership agreement of a limited partnership;

(E) the operating agreement of a limited liability company;

[(F) the bylaws of a general cooperative association;]

(G) the bylaws of a limited cooperative association;

(H) the governing principles of an unincorporated nonprofit association; and

(I) the trust instrument of a statutory trust or similar rules of a business trust or a common-law business trust.

(30) "Protected agreement" means:

(A) a record evidencing indebtedness and any related agreement in effect on [the effective date of this [act]];

(B) an agreement that is binding on an entity on [the effective date of this [act]];

(C) the organic rules of an entity in effect on [the effective date of this [act]]; or

(D) an agreement that is binding on any of the governors or interest holders of an entity on [the effective date of this [act]].

(31) "Public organic record" means the record the filing of which by the [Secretary of State] is required to form an entity and any amendment to or restatement of that record. The term includes:

(A) the articles of incorporation of a business corporation;

(B) the articles of incorporation of a nonprofit corporation;

(C) the certificate of limited partnership of a limited partnership;

(D) the certificate of organization of a limited liability company;

[(E) the articles of incorporation of a general cooperative association;]

(F) the articles of organization of a limited cooperative association; and

(G) the certificate of trust of a statutory trust or similar record of a business trust.

(32) "Registered foreign entity" means a foreign entity that is registered to do business in this state pursuant to a record filed by the [Secretary of State].

(33) "Statement of conversion" means a statement under Section 1145.

(34) "Statement of domestication" means a statement under Section 1155.

(35) "Statement of interest exchange" means a statement under Section 1135.

(36) "Statement of merger" means a statement under Section 1125.

(37) "Surviving entity" means the entity that continues in existence after or is created by a merger.

(38) "Type of entity" means a generic form of entity:

(A) recognized at common law; or

(B) formed under an organic law, whether or not some entities formed under that organic law are subject to provisions of that law that create different categories of the form of entity.

Comment

This section defines the terms that are used in this article. Many of the definitions describe attributes that are significant in some forms of entity and not in others. For example, the concept of separate "distributional" and "governance" interests are inherent in unincorporated entities but have no counterpart in corporations. In addition, because some statutes use different terms to describe the same transaction, the definitions are intended to be broad enough to encompass those similar transactions, regardless of how described. *See, e.g.*, Paragraph 10 (defining domestication).

"Acquired entity" [(1)]—This definition recognizes that an interest exchange may involve only the acquisition of a particular "class" or "series" of interests in an entity. Model Business Corporation Act section 6.01 does not expressly define "classes" or "series." Because the interests of members in an unincorporated business organization often tend to be distinctive, it may be that each member's interest will comprise a separate class or series. For an explanation of a new and different meaning of the word "series," see Section 1131, introductory comment. The term "acquired entity" does not encompass series under that new meaning.

"Acquiring entity" [(2)]—An "acquiring entity" is an entity that acquires the interests of the acquired entity in an interest exchange governed by Part 3 of this article.

"Conversion" [(3)]—The term "conversion" means a transaction authorized by Part 4 pursuant to which an entity of one type is converted into an entity of another type. As used in this act, the term "conversion" does not include a transaction in which an entity changes the jurisdiction in which it is organized but does not change to a different form of entity; that type of transaction is referred to in this act as a "domestication" and is governed by Part 5.

"Converted entity" [(4)]—This term is used in Part 4 to describe the entity that results from a conversion.

"Converting entity" [(5)]—A converting entity is the entity that becomes the converted entity under Part 4.

"Distributional interest" [(6)]—This term is similar to the concept of a "transferable interest" found in this act and the organic laws of several other types of unincorporated entities, but has a broader meaning because the scope of this act includes entities in addition to those whose organic law uses the term "transferable interest."

"Domestic" [(7)]—The term "domestic", when used in this article with respect to an entity, refers to an entity whose internal affairs are governed by the organic laws of this state. Except in the case of general partnerships and unincorporated nonprofit associations, this will mean an entity that is formed, organized, or incorporated under domestic law. In the case of a general partnership organized under UPA (1997) (Last Amended 2013), the term will mean a general partnership whose governing law under UPA (1997) § 104 is the law of the adopting state. Under that section, the governing law is determined by the location of the partnership's principal office, except for limited liability partnerships whose governing law is the law of the state where the LLP's statement of qualification is filed. It is a factual question whether the activities and organization of an unincorporated nonprofit association make it a domestic or foreign entity.

"Domesticated limited partnership" [(8)]—This term is used in Part 5 and means the entity that is domesticated pursuant to Part 5. By the nature of the transaction, the domesticated entity will be of the same type as the domesticating entity (*i.e.*, a limited partnership).

"Domesticating limited partnership" [(9)]—This term is used in Part 5 and means the entity that is domesticated pursuant to Part 5.

"Domestication" [(10)]—The term "domestication" means a transaction of the kind authorized by Part 5 pursuant to which an entity may change its *jurisdiction* of formation *but not its type* so long as the laws of the foreign jurisdiction permit the domestication. The legal effect of the domestication of a limited partnership out of this state will be governed by the laws of both this state and the foreign jurisdiction. Some statutes include what is described in this act as "domestication" in their definition of a "conversion." *See, e.g.*, COLO. REV. STAT. § 7-90-201. It is intended that the domestication provisions of this act will apply to a transaction that may be characterized under another act as a "conversion" if the transaction meets the definition of "domestication" under this act.

"Entity" [(11)]—This definition determines the overall scope of the act because only an "entity" may participate in the transactions authorized by Parts 2 (mergers), 3 (interest exchanges), 4 (conversions), and 5 (domestications). *See* Sections 1121 (authorization of mergers), 1131(authorization of interest exchanges), 1141(authorization of conversions), 1151(authorization of domestications).

Subparagraph (A)(x) is a "catch-all" provision that includes within the definition of "entity" any type of organization recognized under the law of this state, which is not listed specifically in the preceding paragraphs of this definition. Subparagraph (A)(x) is intended to include all forms of private organizations, regardless of whether organized for profit, and artificial legal persons other than those excluded by Subparagraph (B). This definition does not exclude regulated entities such as public utilities, banks, and insurance companies. Should a state desire to exclude certain types of regulated entities or any of the entities listed in Subparagraph (A)(i)–(x) from participating in transactions permitted by this act for policy reasons, that may be done by listing those types of entities in Section 1107(a), or by permitting those type of entities to engage in transactions under this act generally but prohibiting certain types of transactions by listing those transactions in Section 1107(b).

Unincorporated nonprofit associations are treated as a type of entity in Subparagraph (A)(viii) because section 5 of the Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013) specifically states that an unincorporated nonprofit association is an entity. In many states, the status of a nonprofit association may not be clear. Nevertheless, in most states a nonprofit association has the power to acquire an interest in real property in its own name and therefore would qualify as an "entity" under Subparagraph (A)(x). See Section 6 of the UUNAA, which gives an unincorporated nonprofit association the power to acquire in its own name an interest in real property.

Subparagraph (B)(i) of this definition excludes a sole proprietorship from the concept of an "entity."

Trusts with a predominately donative purpose, such as inter vivos and testamentary trusts and charitable trusts, are treated in many states as having a separate legal existence, but they have been excluded from the definition of "entity" (and thus are not within the scope of this article) under Subparagraph (B)(ii) because they should not be able to engage in transactions under this act as a matter of public policy. Trusts that carry on a business, however, such as business and statutory entity trusts, are "entities." *See* Subparagraph (A)(ix).

Subparagraph (B)(iii) of this definition excludes from the concept of an "entity" any form of co-ownership of property or sharing of returns from property that is not listed in Subparagraph (A) and is not a partnership under UPA (1997). In that connection, Section 202(c) of that act provides in part:

> In determining whether a partnership is formed, the following rules apply:
>
> (1) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.
>
> (2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

Limited liability partnerships and limited liability limited partnerships are "entities" because they are general partnerships and limited partnerships respectively that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general or limited partnership that has elected limited liability partnership status. Thus, for example, the election of a general partnership to become a limited liability partnership is not a conversion subject to Article 4.

Under Subparagraph (B)(iv), decedent's estates are excluded from the definition of an entity for the same policy reason as trusts with a predominately donative purpose and charitable trusts.

This same public policy rationale is the justification for the exclusion of governmental subdivisions, agencies, or instrumentalities in Subparagraph (B)(v).

"Filing entity" [(12)]—Whether an entity is a filing entity is determined by reference to whether its legal existence requires the filing of a document with the state filing officer. To fit within this definition, the filing must be necessary but need not be sufficient to form the entity. *See, e.g.*, Section 201(d) ("A limited partnership is formed when the certificate of limited partnership becomes effective [*and*] at least two persons have become partners," one of them becoming a general partner and the other a limited partner) (emphasis added); ULLCA (2006) (Last Amended) § 201(d).

While the statute refers to the "formation" of an entity, the term is intended to encompass corporations that are "incorporated," as well as other filing entities whose statutes refer to them as being "organized." Business trusts present a special problem. In some states, a business trust could be a filing entity or a common law relationship, while in other states business trusts are only recognized at common law. A statutory trust entity formed under the Uniform Statutory Trust Entity Act (2009) (Last Amended 2013) section 201(a) is a filing entity, because a statutory trust entity is formed by the filing office filing a certificate of trust pertaining to the entity.

The term "filing entity" does not include a limited liability partnership because, while a filed document is a precondition to LLP status, that document (a statement of qualification under UPA (1997) (Last Amended 2013) § 901) does not form the underlying entity. A limited liability limited partnership, on the other hand, is a filing entity because the underlying limited partnership is formed by filing a certificate of limited partnership. ULPA (2001) (Last Amended 2013) § 201(a).

"Foreign" [(13)]—The term "foreign entity" includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the entity is governed by the laws of the state of filing. A nonfiling foreign entity is governed by the laws governing its internal affairs. It is a factual question whether a general partnership whose internal affairs are governed by UPA (1914) is a domestic or foreign partnership. A UPA (1914) partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of partnerships under the UPA (1997) (Last Amended 2013) that have not become limited liability partnerships will be governed by Section 104(2) ("the law of the jurisdiction in which the partnership has its principal office") or the partnership agreement. (Section 104(2) is a default rule.)

"Governance interest" [(14)]—A governance interest is typically only part of the interest that a person will hold in an unincorporated entity and is usually coupled with a distributional interest (or economic rights). Memberships in some nonprofit corporations and unincorporated nonprofit associations consist solely of governance interests and memberships in other nonprofit entities may not include either governance interests or distributional interests. In some unincorporated business entities, including partnerships, there is a more limited right to transfer governance interests than there is to transfer distributional interests. An interest holder in such an unincorporated business entity who transfers only a distributional interest and retains the governance interest will also retain the status of an interest holder. Whether a transferee who acquires only a distributional interest will acquire the status of an interest holder is determined by the definition of "interest holder."

Governors of an entity have the kinds of rights listed in the definition of "governance interest" by reason of their position with the entity. For a governor to have a "governance interest," however, requires that the governor also have those rights for a reason other than the governor's status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will have a governance interest arising from the ownership of a membership interest.

"Governor" [(15)]—This term has been chosen to provide a way of referring to a person who has the authority under an entity's organic law to make management decisions regarding the entity that is different from any of the existing terms used in connection with particular types of entities. Depending on the type of entity or its organic rules, the governors of an entity may have the power to act on their own authority, or they may be organized as a board or similar group and only have the power to act collectively, and then only through a designated agent. In other words, a person having only the power to bind the organization pursuant to the instruction of the governors is not a governor. Under the organic rules, particularly those of unincorporated entities, most or all of the management decisions may be reserved to the members or partners. Thus, if a manager of a limited liability company were limited to having authority to execute management decisions made by the members and did not have any authority to make independent management decisions, the manager would not be a governor under this definition.

"Interest" [(16)]—In the usual case, the interest held by an interest holder will include both a governance interest and a distributional interest. Members in nonprofit corporations or unincorporated nonprofit associations generally do not have any distributional interest because they do not receive distributions, but they nonetheless may hold a governance interest in which case they would have the status of interest holders under this article.

"Interest exchange" [(17)]—The term "interest exchange" means a transaction authorized by Part 3 pursuant to which an entity may acquire interests in another entity. The consideration that may be provided to the interest holders whose interests are being acquired in an exchange may consist in whole or part of interests in a third party that is not one of the two parties to the exchange itself. *See* Section 1131(a).

"Interest holder" [(18)]—This act does not refer to "equity" interests or "equity" owners or holders because the term "equity" could be confusing in the case of a nonprofit entity whose members do not have an interest in the assets or results of operations of the entity but have only a right to vote on its internal affairs.

"Interest holder liability" [(19)]—This term is used to describe the vicarious liability of an interest holder, by virtue of being an interest holder, for liabilities of the entity. The term includes only personal liability of an interest holder for a debt of the entity imposed on the interest holder either by statute or by the organic rules to the extent authorized pursuant to the organic law. Liabilities that an interest holder incurs in any other fashion are not interest holder liabilities for purposes of this act. Thus, for example, if a state's business corporation law makes shareholders personally liable for unpaid wages because of their status as shareholders, that liability would be an "interest holder liability." If, on the other hand, a shareholder were to guarantee payment of an obligation of a corporation, that liability would not be an "interest

holder liability" because it is a direct liability and not based on the status of being a shareholder. Similarly, the liability to return an improper distribution is not an interest holder liability because it is a direct liability of the interest holder based on receipt of the distribution.

"Merger" [(20)]—The term means a transaction in which two or more entities are combined into a single entity pursuant to a filing with the filing office. The term "merger" in this act includes the transaction known as a consolidation in which a new entity results from the combination of two or more pre-existing entities.

"Merging entity" [(21)]—The term "merging entity" refers to each entity that is in existence immediately before a merger and is a party to the merger. It will include the surviving entity if the surviving entity exists before the merger becomes effective. It does not include an entity that provides consideration to be received by interest holders if that entity is not a party to the merger.

"Organic law" [(22)]—Organic law means statutes that govern the internal affairs of an entity. For example, this act is the organic law of a limited partnership formed under this act.

Entity laws in a few states purport to require that some of their internal governance rules applicable to a domestic entity also apply to a foreign entity with significant ties to the state. *See, e.g.*, CAL. CORP. CODE § 2115 (Foreign Corporations); N.Y. NOT-FOR-PROFIT CORP. §§ 1318-21 (Liabilities of Directors and Officers of Foreign Corporations); 15 PA. CONS. STAT. § 6145 (Applicability of Certain Safeguards to Foreign Corporations). Such a "sticky fingers" law is not included within the definition of "organic law" for purposes of this act because those laws are not part of the law of the entity's jurisdiction of formation.

"Organic rules" [(23)]—The term "organic rules" means an entity's public organic record and the private organic rules. The organic rules, together with this act, the organic law, and the common law, provide the rules governing the internal affairs of the entity. For example, this act and the partnership agreement comprise the organic rules of a limited partnership formed under this act.

"Plan" [(24)]—The term "plan" is a short-hand way of referring to the plan of merger, interest exchange, conversion, or domestication, as the case may be, depending on which form of transaction is taking place. *See* Sections 1122 (plan of merger), 1132 (plan of interest exchange), 1142 (plan of conversion), 1152 (plan of domestication).

"Private organic rules" [(29)]—The term private "organic rules" is intended to include all governing rules of an entity that are binding on all of its interest holders, whether or not in record form, except for the provisions of the entity's public organic record, if any. The term is intended to include agreements in "record" form such as corporate bylaws, as well as oral partnership agreements and oral operating agreements among LLC members.

"Protected agreement" [(30)]—The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest holders that are unpaid or executory in whole or in part on the effective date of the act. Thus, a revolving line

of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of the act. Likewise, a partnership agreement in effect under this act or a predecessor to this act is a "protected agreement."

If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions. *See* Sections 1131(c) (interest exchange), 1141(c) (conversion), 1151(c) (domestication).

"Public organic record" [(31)]—A "public organic record" is a record that is filed publicly to form, organize, incorporate, or otherwise create an entity. The term does not include a statement of authority filed under UPA (1997) (Last Amended 2013) § 303 or any of the other statements that may be filed under that act since those statements do not create a new entity. The same is true for statements filed under this act.

For the same reason, a statement of qualification filed under UPA (1997) (Last Amended 2013) § 1001 is not a "public organic record." The limited liability partnership that results from the filing is the same entity as the partnership that delivered the statement to the filing office. Similarly, the term does not include a statement of authority filed under section 7 of the Revised Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013), a statement appointing a registered agent filed under section 31 of that act, or any of the various statements filed under ULLCA (2006) (Last Amended 2013).

In those states where a deed of trust or other instrument is publicly filed to create a business trust, that filing will constitute a public organic record. But in those states where a business trust is not created by a public filing, the deed of trust or similar record will be part of the private organic rules of the business trust.

Where a public organic document has been amended or restated, the term means the public organic document as last amended or restated.

"Registered foreign entity" [(32]—This term refers to a foreign entity that is registered to transact business in this state pursuant to a public filing.

"Surviving entity" [(37)]—The term "surviving entity" refers to either a merging entity that survives the merger or the new entity created by the merger.

"Type of entity" [(38]—The term "type of entity" has been developed in an attempt to distinguish different legal forms of entities. It is sometimes difficult to decide whether one is dealing with a different form of entity or a variation of the same form. For example, a limited partnership, although it has long been characterized or even defined as a partnership, is a different type of entity from a general partnership, while a limited liability partnership is not a different type of entity from a general partnership. In some states cooperatives are categories of business corporations or nonprofit corporations, while in other states cooperatives are a separate type of entity.

SECTION 1102. RELATIONSHIP OF [ARTICLE] TO OTHER LAWS.

(a) This [article] does not authorize an act prohibited by, and does not affect the application or requirements of, law other than this [article].

(b) A transaction effected under this [article] may not create or impair a right, duty, or obligation of a person under the statutory law of this state relating to a change in control, takeover, business combination, control-share acquisition, or similar transaction involving a domestic merging, acquired, converting, or domesticating business corporation unless:

(1) if the corporation does not survive the transaction, the transaction satisfies any requirements of the law; or

(2) if the corporation survives the transaction, the approval of the plan is by a vote of the shareholders or directors which would be sufficient to create or impair the right, duty, or obligation directly under the law.

Comment

This section preserves existing regulatory law in an adopting state in general terms. Adopting states should consider more carefully integrating this act with their various regulatory laws. For example, in some states certain professions are limited in their use of limited liability entities. *See* Section 1103.

Laws other than this act that will apply to transactions under the act include, for example, uniform fraudulent transfer and fraudulent conveyance acts, state insolvency statutes, federal bankruptcy law, and Articles 8 and 9 of the Uniform Commercial Code.

Subsection (b)—Many states have enacted "antitakeover" statutes intended to make it more difficult to acquire control of a publicly traded corporation. Those statutes often provide that their application to a particular corporation cannot be changed unless the corporation obtains certain specified approvals, such as a vote of disinterested directors or a supermajority vote by the shareholders. The purpose of the special requirements in this subsection on varying the application of an antitakeover statute is to protect against a hostile acquirer or group of shareholders seeking to use the act to avoid the application of the antitakeover statute.

This subsection protects the application of antitakeover statutes from being affected by a transaction under this act by requiring that the transaction be approved in a manner that would be sufficient to approve changing the application of the antitakeover statute. If a transaction is

approved in that manner, there is no policy reason to prohibit the application of the antitakeover statute from being varied by a transaction under this act. If the application of an antitakeover statute cannot be varied by action of an entity subject to it, then a transaction under this act will be permissible only if the antitakeover provision continues to apply after the transaction or the transaction itself is permissible under the antitakeover statute.

SECTION 1103. REQUIRED NOTICE OR APPROVAL.

(a) A domestic or foreign entity that is required to give notice to, or obtain the approval of, a governmental agency or officer of this state to be a party to a merger must give the notice or obtain the approval to be a party to an interest exchange, conversion, or domestication.

(b) Property held for a charitable purpose under the law of this state by a domestic or foreign entity immediately before a transaction under this [article] becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised, or otherwise transferred unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the entity obtains an appropriate order of [the appropriate court] [the Attorney General] specifying the disposition of the property.

(c) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance which is made to a merging entity that is not the surviving entity and which takes effect or remains payable after the merger inures to the surviving entity.

(d) A trust obligation that would govern property if transferred to a nonsurviving entity applies to property that is transferred to the surviving entity under this section.

Legislative Note: *As an alternative to enacting Subsection (a), a state may identify each of its regulatory laws that requires prior approval for a merger of a regulated entity, decide whether regulatory approval should be required for an interest exchange, conversion, or domestication, and make amendments as appropriate to those laws.*

As with Subsection (a), an adopting state may choose to amend its various laws with respect to the nondiversion of charitable property to cover the various transactions authorized by this act as an alternative to enacting Subsection (b).

Comment

Subsection (a)—Because at least some of the provisions of this act will be new in most states, it is likely that existing state laws that require regulatory approval of transactions by businesses such as banks, insurance companies, or public utilities may not be worded in a fashion that will include at least some of the transactions authorized by this act. The purpose of this subsection is to ensure that transactions under this act will be subject to the same regulatory approval as mergers. This subsection is based on whether a merger by a regulated entity requires prior approval because the transactions authorized by this act may be effectuated indirectly in many cases under existing law by establishing a wholly owned subsidiary of the desired type and then merging into it.

The consequence of violating this subsection should be the same as in the case of a merger consummated without the required approval.

Subsection (b)—This act applies generally to nonprofit corporations and unincorporated nonprofit associations. As in the case of laws regulating particular industries, a state's laws governing the nondiversion of charitable property to other uses may not cover some of the transactions authorized by this act. To prevent the procedures in this act from being used to avoid restrictions on the use of property held by nonprofit entities, this subsection requires approval of the effect of transactions under this act by the appropriate arm of government having supervision of nonprofit entities.

An approval or order obtained under this section may impose conditions or specify the disposition of assets or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this act specifying the effects of a transaction. *See* Sections 1126 (effect of merger), 1136 (effect of interest exchange), 1146 (effect of conversion), 1156 (effect of domestication).

Subsection (c)—This subsection clarifies the legal effect of a merger on bequests, etc. that were originally made to an entity that does not survive the merger. This issue does not arise in an interest exchange, conversion, or domestication transaction because the entity to which the bequest, etc. was made survives in some form after the transaction.

SECTION 1104. NONEXCLUSIVITY. The fact that a transaction under this [article] produces a certain result does not preclude the same result from being accomplished in any other manner permitted by law other than this [article].

Comment

This section allows a transaction that has the same end result as one of the transactions governed by this act, but that is accomplished in a manner not within the scope of this act, to be exempt from this act. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities can be accomplished

pursuant to statutory provisions pertaining to sale of assets rather than under Part 2 of this article, even though the end result of the transaction is essentially the same as if the two entities had merged into a third entity.

SECTION 1105. REFERENCE TO EXTERNAL FACTS. A plan may refer to facts ascertainable outside the plan if the manner in which the facts will operate upon the plan is specified in the plan. The facts may include the occurrence of an event or a determination or action by a person, whether or not the event, determination, or action is within the control of a party to the transaction.

Comment

This section is based on, but more concise than, section 1.20(k) of the Model Business Corporation Act.

SECTION 1106. APPRAISAL RIGHTS. An interest holder of a domestic merging, acquired, converting, or domesticating limited partnership is entitled to contractual appraisal rights in connection with a transaction under this [article] to the extent provided in:

(1) the partnership agreement; or

(2) the plan.

Comment

In corporate law, appraisal rights developed when corporate statutes were amended to permit mergers with less than unanimous consent of the shareholders. This article provides no appraisal rights, because, as a default rule, transactions under this article require the consent or affirmative vote of all the partners. Where the limited partnership agreement changes this default rule, parties may wish to consider contractual appraisal rights.

This subsection validates the grant of such contractual appraisal rights. *Cf.* 6 Del. Code §§ 15-120 (general partnerships), 17-212 (limited partnerships), 18-210 (limited liability companies) (validating "contractual appraisal rights"); MBCA § 13.02(5) (permitting the articles of incorporation, bylaws, or a resolution of the board of directors to confer appraisal rights in contexts in which they would otherwise not be available). Legislative authorization in this subsection of the grant of contractual appraisal rights removes any question as to whether a court would have jurisdiction to hear a case in which the parties were attempting to create jurisdiction in the court by private agreement.

In this section, the term "appraisal rights" refers to any arrangement, either in the limited partnership agreement or the plan, providing for the buy-out of partners that object to a transaction under this article.

[SECTION 1107. EXCLUDED ENTITIES AND TRANSACTIONS.

(a) The following entities may not participate in a transaction under this [article]:

(1)

(2).

(b) This [article] may not be used to effect a transaction that:

(1)

(2).]

Legislative Note: *Subsection (a) may be used by states that have special statutes restricted to the organization of certain types of entities. A common example is banking statutes that prohibit banks from engaging in transactions other than pursuant to those statutes.*

Nonprofit entities may participate in transactions under this act with for-profit entities, subject to compliance with Section 1103. If a state desires, however, to exclude entities with a charitable purpose or to exclude other types of entities from the scope of this act, that may be done by referring to those entities in Subsection (a).

Subsection (b) may be used to exclude certain types of transactions governed by more specific statutes. A common example is the conversion of an insurance company from mutual to stock form. There may be other types of transactions that vary greatly among the states.

[PART] 2

MERGER

SECTION 1121. MERGER AUTHORIZED.

(a) By complying with this [part]:

(1) one or more domestic limited partnerships may merge with one or more domestic or foreign entities into a domestic or foreign surviving entity; and

(2) two or more foreign entities may merge into a domestic limited partnership.

(b) By complying with the provisions of this [part] applicable to foreign entities, a

foreign entity may be a party to a merger under this [part] or may be the surviving entity in such a merger if the merger is authorized by the law of the foreign entity's jurisdiction of formation.

Comment

The merger transaction authorized by this act involves the combination of one or more domestic limited partnerships with or into one or more other domestic or foreign entities. It also contemplates the consolidation of two or more foreign entities into a single domestic limited partnership. Upon the effective date of the merger, all the assets and liabilities of the constituent entities vest in the surviving entity as a matter of law. As such, mergers require the existence of at least two separate entities before the transaction and only one entity may survive the merger. If independent existence of the constituent entities is desired following the conclusion of the transaction, a restructuring transaction other than a merger must be used to accomplish the transfer of assets and liabilities.

This act authorizes a merger for state entity law purposes. Federal law and other state law will independently determine how a merger transaction will be taxed.

Subsection (a)(1)—This paragraph states the general rule that subject to Subsection (b) one or more domestic limited partnerships may merge with or into a domestic or foreign surviving entity.

Subsection (a)(2)—This paragraph provides that two or more foreign entities may merge into a domestic surviving limited partnership so long as the requirements of Subsection (b) are met.

Subsection (b)—This subsection provides that a foreign entity may be a party to a merger or may be the surviving entity in a merger only if the merger is authorized by the laws of the foreign entity's jurisdiction of formation.

SECTION 1122. PLAN OF MERGER.

(a) A domestic limited partnership may become a party to a merger under this [part] by approving a plan of merger. The plan must be in a record and contain:

(1) as to each merging entity, its name, jurisdiction of formation, and type of entity;

(2) if the surviving entity is to be created in the merger, a statement to that effect and the entity's name, jurisdiction of formation, and type of entity;

(3) the manner of converting the interests in each party to the merger into

interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) if the surviving entity exists before the merger, any proposed amendments to:

(A) its public organic record, if any; and

(B) its private organic rules that are, or are proposed to be, in a record;

(5) if the surviving entity is to be created in the merger:

(A) its proposed public organic record, if any; and

(B) the full text of its private organic rules that are proposed to be in a record;

(6) the other terms and conditions of the merger; and

(7) any other provision required by the law of a merging entity's jurisdiction of formation or the organic rules of a merging entity.

(b) In addition to the requirements of subsection (a), a plan of merger may contain any other provision not prohibited by law.

Comment

Subsection (a)—This subsection states the requirements for the plan of merger. They are similar to plan of merger provisions in corporation statutes. *See* MBCA§ 11.02(c). The requirements stated in this subsection are mandatory. *See* Section 105(c)(16).

Subsection (a)(1)—This paragraph requires that the plan of merger identify the parties to the merger. The name of a merging entity as it appears in the plan of merger will be its name in its jurisdiction of formation.

Subsection (a)(3)—The language of this paragraph is similar to Model Business Corporation Act section 11.02(c)(3). What may be done under this paragraph with respect to providing for continuing interests in the surviving entity for some holders of interests of a class or series of a party to the merger while paying some other form of consideration to other holders of the same class or series of interests in that entity will vary depending on the type of entity involved and the extent to which its organic rules provide for non-uniform treatment of interest holders in a manner that is permissible under its organic law. Similarly, the ability to use a merger to reorganize the capital structure of the surviving entity will vary depending on the type

of entity involved and whether the entity has appropriately adopted relevant provisions in its organic rules.

If the organic law and organic rules of an unincorporated entity permit a non-uniform "equity shuffle" to be accomplished in a merger involving the unincorporated entity, the minority owners of the unincorporated entity will not necessarily be entitled to the statutory appraisal rights currently afforded to minority stockholders in merging corporate entities. Any perceived unfairness in the shuffle would be addressed either: (i) under principles of fiduciary duties and the contractual obligations of good faith and fair dealing, assuming, of course, that such duties and obligations have not been contractually modified or eliminated to the extent permitted by the applicable organic law; or (ii) by the exercise of whatever rights the minority owners may have to veto the transaction or to withdraw or to dissociate and be paid the value of their interests.

The Model Business Corporation Act generally requires that shares of the same class or series be treated in the same manner in a merger unless the corporation has adopted an applicable provision of its articles of incorporation pursuant to section 6.01(e) of that act providing for variations in the treatment of holders of the same class or series of shares. Thus, a determination of what may be done by way of an equity shuffle in the case of a corporation will require reference to its organic law and organic rules.

The consideration paid to the interest holders of the merging parties may be supplied in whole or part by a person who is not a party to the merger.

Subsection (b)—This subsection provides the statutory authority for a merging party to include a provision in a plan of merger that is not specifically listed in Subsection (a). One such possibility is contractual appraisal rights as provided in Section 1106(2).

SECTION 1123. APPROVAL OF MERGER.

(a) A plan of merger is not effective unless it has been approved:

(1) by a domestic merging limited partnership, by all the partners of the partnership entitled to vote on or consent to any matter; and

(2) in a record, by each partner of a domestic merging limited partnership which will have interest holder liability for debts, obligations, and other liabilities that are incurred after the merger becomes effective, unless:

(A) the partnership agreement of the partnership provides in a record for the approval of a merger in which some or all of its partners become subject to interest holder liability by the affirmative vote or consent of fewer than all the partners; and

(B) the partner consented in a record to or voted for that provision of the partnership agreement or became a partner after the adoption of that provision.

(b) A merger involving a domestic merging entity that is not a limited partnership is not effective unless the merger is approved by that entity in accordance with its organic law.

(c) A merger involving a foreign merging entity is not effective unless the merger is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

Comment

Subsection (a)—In the uniform acts pertaining to unincorporated business organizations, unanimity is the default rule for approving a merger. The limited partnership agreement certainly can change this rule, but care should be taken in doing so. For example, a merger can revise the partnership agreement. Section 1122(a)(4). Thus, if a merger requires less-than-unanimous consent, the partnership agreement is subject to amendment by the same quantum of consent. "Exit rights" also require consideration. This act does not provide appraisal rights, because such rights are inapposite when unanimous consent is required. *See* Section 1106, cmt.

Subsection (a)(2)—This provision is not a default rule, Section 105(c)(16), and deals with the situation in which a partner of a limited partnership that is a party to a merger will have vicarious liability for the liabilities of the surviving entity that are incurred after the merger has become effective. The special approval requirement in Subsection (a)(2) will be applicable; for example, to partners of a limited partnership that merges into a general partnership that is not a limited liability partnership if the partners become general partners of the surviving general partnership.

The consent of a partner required by Subsection (a)(2)(B) may be given either by: (i) signing or agreeing generally to the terms of a partnership agreement that includes the required provision permitting less than unanimous approval of a merger in which partners become subject to "interest holder liability"; or (ii) voting for or consenting to an amendment to the partnership agreement to add such a provision.

Subsection (b)—Where a domestic entity other than a limited partnership is a party to a merger under this act, this subsection defers to that entity's organic law for the requirements for approval of the merger by that entity.

Subsection (c)—Where a foreign entity is a party to a merger under this act, this subsection defers to the laws of the foreign jurisdiction for the requirements for approval of the merger by the foreign entity. Those laws will include the organic law of the foreign entity and other applicable laws. The laws of the foreign jurisdiction will also control the application of any

special approval requirements found in the organic rules of the foreign entity.

SECTION 1124. AMENDMENT OR ABANDONMENT OF PLAN OF MERGER.

(a) A plan of merger may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic merging limited partnership may approve an amendment of a plan of merger:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its partners in the manner provided in the plan, but a partner that was entitled to vote on or consent to approval of the merger is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by the interest holders of any party to the plan;

(B) the public organic record, if any, or private organic rules of the surviving entity that will be in effect immediately after the merger becomes effective, except for changes that do not require approval of the interest holders of the surviving entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the partner in any material respect.

(c) After a plan of merger has been approved and before a statement of merger becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic merging limited partnership may abandon the plan in the same manner as the plan was

approved.

(d) If a plan of merger is abandoned after a statement of merger has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by a party to the plan, must be delivered to the [Secretary of State] for filing before the statement of merger becomes effective. The statement of abandonment takes effect on filing, and the merger is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of each party to the plan of merger;

(2) the date on which the statement of merger was filed by the [Secretary of State]; and

(3) a statement that the merger has been abandoned in accordance with this section.

Comment

This section sets out the requirements for amending or abandoning the plan of merger. They are similar to provisions for amending or abandoning mergers found in existing corporation merger statutes. *See* MBCA §§ 11.02(e), 11.08.

SECTION 1125. STATEMENT OF MERGER; EFFECTIVE DATE OF MERGER.

(a) A statement of merger must be signed by each merging entity and delivered to the [Secretary of State] for filing.

(b) A statement of merger must contain:

(1) the name, jurisdiction of formation, and type of entity of each merging entity that is not the surviving entity;

(2) the name, jurisdiction of formation, and type of entity of the surviving entity;

(3) a statement that the merger was approved by each domestic merging entity, if any, in accordance with this [part] and by each foreign merging entity, if any, in accordance with the law of its jurisdiction of formation;

(4) if the surviving entity exists before the merger and is a domestic filing entity, any amendment to its public organic record approved as part of the plan of merger;

(5) if the surviving entity is created by the merger and is a domestic filing entity, its public organic record, as an attachment; and

(6) if the surviving entity is created by the merger and is a domestic limited liability partnership, its statement of qualification, as an attachment.

(c) In addition to the requirements of subsection (b), a statement of merger may contain any other provision not prohibited by law.

(d) If the surviving entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed.

(e) A plan of merger that is signed by all the merging entities and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of merger and on filing has the same effect. If a plan of merger is filed as provided in this subsection, references in this [article] to a statement of merger refer to the plan of merger filed under this subsection.

(f) If the surviving entity is a domestic limited partnership, the merger becomes effective when the statement of merger is effective. In all other cases, the merger becomes effective on the later of:

(1) the date and time provided by the organic law of the surviving entity; and

(2) when the statement is effective.

Comment

The filing of a statement of merger makes the transaction a matter of public record.

Subsection (a)—This subsection pertains to all merging entities involved in a merger, not merely any merging domestic limited partnership. Other filings may be required by the organic law of other entities participating in the merger.

Subsection (b)(1) and (2)—The names of foreign entities set forth in the statement of merger will generally be their names in their jurisdiction of formation, except that if a foreign entity has been required to adopt a different name in order to register to do business in this state, the foreign qualification statute will likely require that, when the entity does business in this state, the entity must use the name adopted for the purposes of registering to do business. Engaging in a merger under this act will be part of the business done by the entity in this state and the name of the entity set forth in the statement of merger will thus need to be the name under which the entity has registered to do business. Use of the name under which the entity has registered to do business will allow the records in the filing office to associate the registration of the entity to do business with the statement of merger.

Subsection (b)(3)—*See* Subsection (f), cmt.

Subsection (b)(4)—The statement in this paragraph that the plan of merger was approved by each entity in accordance with this article necessarily presupposes that the plan was approved in accordance with any valid, special requirements in the organic rules of each merging entity.

Subsection (b)(5) and (6)—The public organic record of a domestic surviving entity created by the merger that is attached to the statement of merger becomes the original, officially filed text of the public organic record of the surviving entity when the statement of merger takes effect. It is not necessary, or appropriate, to make any other filing to create the surviving entity.

Similarly, a statement of qualification for a domestic limited liability partnership created by the merger that is attached to the statement of merger does not need to be filed separately.

Subsection (d)—Organic laws typically require that an initial filing that creates an entity be signed by the person serving as the incorporator or other organizer. This subsection, however, provides that the public organic record of the surviving entity does not need to be signed since the record is attached to a signed record.

This subsection also permits the public organic record of the surviving entity to omit any provision that is not required to be included in a restatement of the public organic record. Pursuant to this provision, for example, the public organic record of a business corporation created as the surviving entity in the merger would not need to state the name and address of each incorporator even though that information would be required by section 2.02(a)(4) of the Model Business Corporation Act if the corporation were being incorporated outside the context

of the merger.

Subsection (e)—A plan of merger that contains all the information required in the statement of merger may be filed instead of the statement of merger. The plan must be in a record and signed by each merging party.

Subsection (f)—A merger in which the surviving entity is a domestic limited partnership takes effect when the statement of merger takes effect. A merger in which the surviving entity is a foreign entity will usually also take effect when the statement of merger takes effect because the practice is to coordinate the filings that need to be made when a merger involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time.

However, when the surviving limited partnership is a foreign limited partnership, it is possible that the filing in the foreign jurisdiction will take effect at a different time. For that reason, this subsection provides that the merger will take effect at the later of: (i) when the statement of merger takes effect; and (ii) when the merger takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the merger will take effect in this state before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the merging domestic limited partnership would cease to appear as an active entity on the records of this state before the records of the foreign jurisdiction reflect a completed merger.

It is only necessary for the filing office to record the effective date of the statement of merger and the filing office does not need to be concerned with the effective date of the merger itself. Persons wishing to determine the effective date of a merger involving both a domestic and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

SECTION 1126. EFFECT OF MERGER.

(a) When a merger becomes effective:

(1) the surviving entity continues or comes into existence;

(2) each merging entity that is not the surviving entity ceases to exist;

(3) all property of each merging entity vests in the surviving entity without transfer, reversion, or impairment;

(4) all debts, obligations, and other liabilities of each merging entity are debts, obligations, and other liabilities of the surviving entity;

(5) except as otherwise provided by law or the plan of merger, all the rights,

privileges, immunities, powers, and purposes of each merging entity vest in the surviving entity;

(6) if the surviving entity exists before the merger:

(A) all its property continues to be vested in it without transfer, reversion, or impairment;

(B) it remains subject to all its debts, obligations, and other liabilities; and

(C) all its rights, privileges, immunities, powers, and purposes continue to be vested in it;

(7) the name of the surviving entity may be substituted for the name of any merging entity that is a party to any pending action or proceeding;

(8) if the surviving entity exists before the merger:

(A) its public organic record, if any, is amended to the extent provided in the statement of merger; and

(B) its private organic rules that are to be in a record, if any, are amended to the extent provided in the plan of merger;

(9) if the surviving entity is created by the merger, its private organic rules become effective and:

(A) if it is a filing entity, its public organic record becomes effective; and

(B) if it is a limited liability partnership, its statement of qualification becomes effective; and

(10) the interests in each merging entity which are to be converted in the merger are converted, and the interest holders of those interests are entitled only to the rights provided to them under the plan of merger and to any appraisal rights they have under Section 1106 and the merging entity's organic law.

(b) Except as otherwise provided in the organic law or organic rules of a merging entity, the merger does not give rise to any rights that an interest holder, governor, or third party would have upon a dissolution, liquidation, or winding up of the merging entity.

(c) When a merger becomes effective, a person that did not have interest holder liability with respect to any of the merging entities and becomes subject to interest holder liability with respect to a domestic entity as a result of the merger has interest holder liability only to the extent provided by the organic law of that entity and only for those debts, obligations, and other liabilities that are incurred after the merger becomes effective.

(d) When a merger becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic merging limited partnership with respect to which the person had interest holder liability is subject to the following rules:

(1) The merger does not discharge any interest holder liability under this [act] to the extent the interest holder liability was incurred before the merger became effective.

(2) The person does not have interest holder liability under this [act] for any debt, obligation, or other liability that is incurred after the merger becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the merger had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the partnership agreement of the domestic merging limited partnership with respect to any interest holder liability preserved under paragraph (1) as if the merger had not occurred.

(e) When a merger becomes effective, a foreign entity that is the surviving entity may be served with process in this state for the collection and enforcement of any debts, obligations, or

other liabilities of a domestic merging limited partnership as provided in Section 121.

(f) When a merger becomes effective, the registration to do business in this state of any foreign merging entity that is not the surviving entity is canceled.

Comment

With the exception of Subsections (c) and (d), this section is similar to statutory provisions on the effect of a merger of a corporation with a corporation. *See* MBCA § 11.07.

Subsection (a)—This subsection states the general understanding that in a merger the assets and liabilities of the merging entities automatically vest in the surviving entity. The surviving entity becomes the owner of all real and personal property of the merged entities and is subject to all debts, obligations, and liabilities of the merging entities. A merger does not constitute a transfer, assignment, or conveyance of any property held by the merging entities before the merger. A merger also does not give rise to a claim that a contract with a merging entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a merger. The contract rights that are vested in the surviving entity include the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the merger. *See* Section 1103(c) (dealing with the surviving entity's rights in trust obligations of a nonsurviving party in a merger and transactions such as bequests made to a nonsurviving party to a merger that take effect after the merger).

After a merger becomes effective, the law of the surviving entity's jurisdiction of formation governs the surviving entity.

Sections 1103(a) and (b)modify the provisions of this section with respect to the effects of a merger to the extent a regulatory law provides otherwise or any of the parties holds property committed to charitable purposes.

Subsection (a)(2)—A merger cannot have the effect of making an interest holder of a domestic merging entity subject to interest holder liability for the debts, obligations, or other liabilities of any other person or entity unless the interest holder has signed a separate written consent to become subject to such liability or previously agreed to the effectuation of a transaction having that effect without the interest holder's consent. The partnership agreement cannot change this provision. Section 105(c)(16).

Subsection (a)(7)—All pending proceedings involving either the survivor or a party whose separate existence ceased as a result of the merger are continued. Under this paragraph, the name of the survivor may be, but need not be, substituted in any pending proceeding for the name of a party to the merger whose separate existence ceased as a result of the merger. The substitution may be made whether the survivor is a complainant or a respondent, and may be made at the instance of either the survivor or an opposing party. Such a substitution has no substantive effect because, whether or not the survivor's name is substituted, the survivor

succeeds to the claims, and is subject to the liabilities, of any party to the merger whose separate existence ceased as a result of the merger.

Subsection (a)(8)(B)—The private organic rules of an unincorporated entity typically may be either oral or written. The plan of merger is not required to set forth amendments to oral provisions of the private organic rules of the surviving entity, and thus this provision is limited in scope to amendments to the private organic rules that are to be in a record, if any.

Subsection (a)(10)—*See* Section 1106, cmts.

Subsections (c) and (d)—These subsections set forth rules for two circumstances that typically do not exist in a merger where all the entities involved are corporations. Subsection (c) deals with the situation where an interest holder that does not have vicarious liability for the obligations of a merging entity before the merger has interest holder liability after the merger. An example would be a corporate shareholder who agrees to be the general partner in a limited partnership that is the surviving entity in a merger between a corporation and a limited partnership that is not a limited liability limited partnership. Subsection (d) deals with the situation where an interest holder has vicarious liability for the obligations of one of the merging parties before the merger but ceases to have any interest holder liability for the obligations of the surviving entity after the merger has become effective. An example would be a general partner in a general partnership that merges into a corporation.

The effects of Subsections (c) and (d) will depend on when a liability is incurred, which is determined by other law. For a discussion of the issue, see Section 404(c), cmt. (The Temporal Nexus – When Claim Incurred).

These subsections apply not only to merging domestic limited partnerships but also to any other domestic entity involved in the merger.

Subsection (c)—This subsection sets forth the general rule that an interest holder that was not liable for the liabilities of a merging entity before the merger but will have personal liability for the obligations of the surviving entity after the merger will be personally liable only for the liabilities of a domestic surviving entity that are incurred after the effective date of a merger.

Subsection (d)—This subsection provides four rules with respect to an interest holder who ceases to have interest holder liability after the effective date of the merger:

(1) the interest holder remains personally liable for any obligations that were incurred before the effective date of the merger;

(2) the interest holder does not have any personal liability for obligations of the surviving entity;

(3) the pre-existing personal liability of the interest holder is enforced against the interest holder on the same basis as if the merger had not taken place; and

(4) the interest holder has the same rights of contribution from other interest holders of the merging entity as the interest holder would have had if the merger had not occurred.

See Section 1146(d), cmt.

Subsection (e)—When a merger becomes effective, this subsection provides that a foreign entity that is the surviving entity may be served with process in this state. The proceedings covered by this subsection include a proceeding to enforce the rights of any interest holders of each domestic merging entity who are entitled to and exercise appraisal rights. One of the liabilities that a foreign surviving entity succeeds to is the obligation of a merging entity to pay the amount, if any, to which its interest holders who assert appraisal rights are entitled.

[PART] 3

INTEREST EXCHANGE

SECTION 1131. INTEREST EXCHANGE AUTHORIZED.

(a) By complying with this [part]:

(1) a domestic limited partnership may acquire all of one or more classes or series of interests of another domestic entity or a foreign entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing; or

(2) all of one or more classes or series of interests of a domestic limited partnership may be acquired by another domestic entity or a foreign entity in exchange for interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing.

(b) By complying with the provisions of this [part] applicable to foreign entities, a foreign entity may be the acquiring or acquired entity in an interest exchange under this [part] if the interest exchange is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic limited partnership but does not refer to an interest exchange, the provision applies to an interest

exchange in which the domestic limited partnership is the acquired entity as if the interest exchange were a merger until the provision is amended after [the effective date of this [act]].

Comment

An interest exchange is the same type of transaction as the share exchange provided for in section 11.03 of the Model Business Corporation Act. The effect of an interest exchange is that: (i) the separate existence of the acquired entity is not affected; and (ii) the acquiring entity acquires all of the interests of one or more classes of the acquired entity. An interest exchange also allows an indirect acquisition through the use of consideration in the exchange that is not provided by the acquiring entity (*e.g.*, consideration from another or related entity).

Neither share exchanges nor interest exchanges are universally recognized in either corporation or unincorporated entity laws. The effect of an interest exchange can be achieved through a triangular merger in which the acquiring entity forms a new subsidiary and the acquired entity is then merged into the new subsidiary. Part 3 allows the interest exchange to be accomplished directly in a single step, rather than indirectly through the triangular merger route.

The "series" referenced in Subsection (a) are not the series contemplated by the Uniform Statutory Entity Trust Act §§ 401-405 and some LLC statutes. *See, e.g.*,Del. Code Ann. tit. 6, § 18-215 (2012); 805 ILL. COMP. STAT. 180/37-40 (2012). Instead, in this context "series" refers to a subset of a class, which is a meaning commonly found in corporation law. *See, e.g.,* MBCA § 6.02. Specific provisions authorizing classes and series are less common in unincorporated entity law but do exist. *See, e.g.*, MINN. STAT. § 322B.155 (2012). In any event, a partnership agreement certainly has the power to create classes and series as contemplated by this section.

Subsection (a)—For this section to apply, a domestic limited partnership must be either the acquiring or acquired entity.

The acquiring entity is not required to acquire all of the interests in the acquired entity. For example, assume that a limited partnership with three classes of limited partner interests enters into an interest exchange with an acquiring entity. The acquiring entity need only acquire all of the ownership interests of one or more classes of the limited partner interests.

Subsection (b)—This subsection allows a foreign entity to effectuate an interest exchange with a domestic limited partnership if the interest exchange is authorized by the organic law of the foreign entity.

Subsection (c)—This subsection deals with rights of parties to protected agreements (defined in Section 1101(30)) when an interest exchange takes place. Because the concept of an interest exchange is relatively new, a person contracting with a domestic limited partnership or loaning it money who drafted and negotiated special rights relating to the transaction before the enactment of this article should not be charged with the consequences of not having dealt with the concept of an interest exchange in the context of those special rights. Similarly, when the governance structure of an entity has been negotiated before the enactment of this act, the

concept of an interest exchange may not have been reflected in any special governance arrangements; for example, special approval rights may have been provided for fundamental transactions, but those rights fail to include language that would make them applicable to an interest exchange.

Accordingly, this subsection provides a transitional rule that is intended to protect such special rights. If, for example, a limited partnership is a party to a contract that provides that the entity cannot participate in a merger without the consent of the other party to the contract, the requirement to obtain the consent of the other party will also apply to an interest exchange in which the entity is the acquired entity. If the limited partnership fails to obtain the consent, the result will be that the other party will have the same rights it would have had if the entity were to participate in a merger without the required consent.

The transitional rule in this subsection ceases to make sense at such time as the provisions of the agreement giving rise to the special rights are first amended after the effective date of this article because at that time the provision may be amended to address expressly an interest exchange. The transitional rule will continue to apply, however, if a provision other than the specific provisions giving rise to the special rights is amended.

SECTION 1132. PLAN OF INTEREST EXCHANGE.

(a) A domestic limited partnership may be the acquired entity in an interest exchange under this [part] by approving a plan of interest exchange. The plan must be in a record and contain:

(1) the name of the acquired entity;

(2) the name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) the manner of converting the interests in the acquired entity into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) any proposed amendments to:

(A) the certificate of limited partnership of the acquired entity; and

(B) the partnership agreement of the acquired entity that are, or are proposed to be, in a record;

(5) the other terms and conditions of the interest exchange; and

(6) any other provision required by the law of this state or the partnership agreement of the acquired entity.

(b) In addition to the requirements of subsection (a), a plan of interest exchange may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of interest exchange, which must be approved by the acquired entity in accordance with Section 1131. The content of the plan of interest exchange is similar to the content of a plan of merger. *See* Section 1122.

The plan of interest exchange may, but need not, be filed instead of the statement of interest exchange, Section 1135, so long as the plan contains all the information required to be in the statement and is delivered to the filing office for filing after the plan has been adopted and approved. *See* Section 1135(d).

Subsection (a)—The requirements stated in this subsection are mandatory. *See* Section 105(c)(16).

Subsection (a)(3)—Under this paragraph, interest holders in the acquired entity may receive interests or securities of the acquiring entity or of a party other than the acquiring entity, obligations, rights to acquire interests or securities, cash, or other property. *See* Section 1122(a)(3), cmt.

Subsection (b)—This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 1133. APPROVAL OF INTEREST EXCHANGE.

(a) A plan of interest exchange is not effective unless it has been approved:

(1) by all the partners of a domestic acquired limited partnership entitled to vote on or consent to any matter; and

(2) in a record, by each partner of the domestic acquired limited partnership that will have interest holder liability for debts, obligations, and other liabilities that are incurred after the interest exchange becomes effective, unless:

(A) the partnership agreement of the partnership provides in a record for

the approval of an interest exchange or a merger in which some or all its partners become subject to interest holder liability by the affirmative vote or consent of fewer than all of the partners; and

(B) the partner consented in a record to or voted for that provision of the partnership agreement or became a partner after the adoption of that provision.

(b) An interest exchange involving a domestic acquired entity that is not a limited partnership is not effective unless it is approved by the domestic entity in accordance with its organic law.

(c) An interest exchange involving a foreign acquired entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

(d) Except as otherwise provided in its organic law or organic rules, the interest holders of the acquiring entity are not required to approve the interest exchange.

Comment

This section sets forth the required approval of an interest exchange. An interest exchange transaction governed by this article only requires approval by the acquired entity, unless the applicable organic law or the organic rules of the acquiring entity otherwise provide, Subsection (d), a condition that rarely exists.

Subsection (a)(2)—For an explanation of this interest holder liability provision, see Section 1123(a)(2), comment.

SECTION 1134. AMENDMENT OR ABANDONMENT OF PLAN OF INTEREST EXCHANGE.

(a) A plan of interest exchange may be amended only with the consent of each party to the plan, except as otherwise provided in the plan.

(b) A domestic acquired limited partnership may approve an amendment of a plan of interest exchange:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its partners in the manner provided in the plan, but a partner that was entitled to vote on or consent to approval of the interest exchange is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the partners of the acquired partnership under the plan;

(B) the certificate of limited partnership or partnership agreement of the acquired partnership that will be in effect immediately after the interest exchange becomes effective, except for changes that do not require approval of the partners of the acquired partnership under this [act] or the partnership agreement; or

(C) any other terms or conditions of the plan, if the change would adversely affect the partner in any material respect.

(c) After a plan of interest exchange has been approved and before a statement of interest exchange becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic acquired limited partnership may abandon the plan in the same manner as the plan was approved.

(d) If a plan of interest exchange is abandoned after a statement of interest exchange has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the acquired limited partnership, must be delivered to the [Secretary of State] for filing before the statement of interest exchange becomes effective. The statement of abandonment takes effect on filing, and the interest exchange is abandoned and does

not become effective. The statement of abandonment must contain:

(1) the name of the acquired partnership;

(2) the date on which the statement of interest exchange was filed by the [Secretary of State]; and

(3) a statement that the interest exchange has been abandoned in accordance with this section.

Comment

This section parallels provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* Sections 1124 (mergers), 1144 (conversions), 1154 (domestications).

SECTION 1135. STATEMENT OF INTEREST EXCHANGE; EFFECTIVE DATE OF INTEREST EXCHANGE.

(a) A statement of interest exchange must be signed by a domestic acquired limited partnership and delivered to the [Secretary of State] for filing.

(b) A statement of interest exchange must contain:

(1) the name of the acquired limited partnership;

(2) the name, jurisdiction of formation, and type of entity of the acquiring entity;

(3) a statement that the plan of interest exchange was approved by the acquired limited partnership in accordance with this [part]; and

(4) any amendments to the acquired limited partnership's certificate of limited partnership approved as part of the plan of interest exchange.

(c) In addition to the requirements of subsection (b), a statement of interest exchange may contain any other provision not prohibited by law.

(d) A plan of interest exchange that is signed by a domestic acquired limited partnership and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for

filing instead of a statement of interest exchange and on filing has the same effect. If a plan of interest exchange is filed as provided in this subsection, references in this [article] to a statement of interest exchange refer to the plan of interest exchange filed under this subsection.

(e) An interest exchange becomes effective when the statement of interest exchange is effective.

Comment

This section applies only when the acquired entity is a domestic limited partnership. The filing makes the transaction a matter of public record.

This act has no filing requirement when the only domestic limited partnership involved is the acquiring entity.

Subsection (b)—This subsection states the requirements for a statement of interest exchange, which are essentially the same as the requirements for a statement of merger under Section 1125(b).

Subsection (d)—A plan of interest exchange can be used as a substitute for the statement of interest exchange so long as the plan satisfies the requirements in Subsection (b).

Subsection (e)—This subsection applies when the acquiring entity is a domestic limited partnership, and Section 207 determines when a record delivered for filing under this act becomes effective. A statement of interest exchange may specify a delayed effective time and date, subject to the ninety-day limit stated in Section 207(3) and (4).

If the acquiring entity is not a domestic limited partnership, the effectiveness of the interest exchange will occur when provided by the law of the jurisdiction of formation of the acquiring entity.

SECTION 1136. EFFECT OF INTEREST EXCHANGE.

(a) When an interest exchange in which the acquired entity is a domestic limited partnership becomes effective:

(1) the interests in the acquired partnership which are the subject of the interest exchange are converted, and the partners holding those interests are entitled only to the rights provided to them under the plan of interest exchange and to any appraisal rights they have under

Section 1106;

(2) the acquiring entity becomes the interest holder of the interests in the acquired partnership stated in the plan of interest exchange to be acquired by the acquiring entity;

(3) the certificate of limited partnership of the acquired partnership is amended to the extent provided in the statement of interest exchange; and

(4) the provisions of the partnership agreement of the acquired partnership that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange.

(b) Except as otherwise provided in the certificate of limited partnership or partnership agreement of a domestic acquired limited partnership, the interest exchange does not give rise to any rights that a partner or third party would have upon a dissolution, liquidation, or winding up of the acquired partnership.

(c) When an interest exchange becomes effective, a person that did not have interest holder liability with respect to a domestic acquired limited partnership and becomes subject to interest holder liability with respect to a domestic entity as a result of the interest exchange has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that are incurred after the interest exchange becomes effective.

(d) When an interest exchange becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic acquired limited partnership with respect to which the person had interest holder liability is subject to the following rules:

(1) The interest exchange does not discharge any interest holder liability under this [act] to the extent the interest holder liability was incurred before the interest exchange became effective.

(2) The person does not have interest holder liability under this [act] for any debt, obligation, or other liability that is incurred after the interest exchange becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the interest exchange had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the partnership agreement of the domestic acquired partnership with respect to any interest holder liability preserved under paragraph (1) as if the interest exchange had not occurred.

Comment

This section applies only when the *acquired* entity is a domestic limited partnership, and this part states no rule for the effect of an interest exchange when the only domestic limited partnership involved is the *acquiring* entity. For that situation, the other provisions of this act must be consulted, because this act is the organic law of the acquiring entity.

Subsection (a)—In contrast to a merger, an interest exchange does not in and of itself affect the separate existence of the parties, vest in the acquiring entity the assets of the acquired entity, or render the acquiring entity liable for the liabilities of the acquired entity. Thus, Subsection (a) is significantly simpler than Section 1126(a) with respect to the effects of a merger.

When an interest exchange becomes effective: (i) the interests of the acquired domestic limited partnership are exchanged, converted, or canceled as provided in the plan; (ii) the only rights of the former partners and transferees of the acquired limited partnership whose interests are affected by the interest exchange are those rights related to the exchange, conversion, or cancellation; (iii) the acquiring entity becomes the owner of the acquired limited partnership's interests as provided in the plan; (iv) the certificate of limited partnership of the acquired limited partnership is amended as provided in the statement of interest exchange, thus obviating the need for repetitive filings (*i.e.*, a filing as to the entity interest exchange and another filing to reflect amendments to certificate); and (v) the provisions of the partnership agreement of the acquired limited partnership that are to be in a record, if any, are amended to the extent provided in the plan of interest exchange.

Subsection (c)—This subsection provides the rule for future interest holder liability pertaining to domestic entities and parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* Section 1126, cmt.

Subsection (d)—This subsection provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 4 (conversions), and 5 (domestications). *See* Sections 1126(d), cmt., 1146(d), cmt.

[PART] 4

CONVERSION

SECTION 1141. CONVERSION AUTHORIZED.

(a) By complying with this [part], a domestic limited partnership may become:

(1) a domestic entity that is a different type of entity; or

(2) a foreign entity that is a different type of entity, if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(b) By complying with the provisions of this [part] applicable to foreign entities, a foreign entity that is not a foreign limited partnership may become a domestic limited partnership if the conversion is authorized by the law of the foreign entity's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic limited partnership but does not refer to a conversion, the provision applies to a conversion of the partnership as if the conversion were a merger until the provision is amended after [the effective date of this [act]].

Comment

This part of Article 11 permits an entity to change to a different type of entity. A transaction in which an entity changes its jurisdiction of organization but does not change its type is a domestication and is the subject of Part 5.

Subsection (a)(2)—For this provision to apply, this type of conversion must be authorized by the law of the foreign jurisdiction. If this is not the case, it may be possible to achieve the same result by forming an entity of the type desired in the foreign jurisdiction and then merging the domestic entity into the new foreign entity under Part 2 of Article 11.

Subsection (b)—This subsection allows a foreign entity to effectuate a conversion into a domestic limited partnership, but only if the conversion is permitted by the laws of the foreign entity's jurisdiction of formation. When a foreign entity becomes a domestic limited partnership

pursuant to this part of Article 11, the effect of the conversion will be as provided in Section 1146. The procedures by which the conversion is approved, however, will be determined by the laws of the foreign entity's jurisdiction of formation. *See* Section 102(9) (defining "jurisdiction of formation").

Subsection (c)—*See* Section 1131(c), cmt.

SECTION 1142. PLAN OF CONVERSION.

(a) A domestic limited partnership may convert to a different type of entity under this [part] by approving a plan of conversion. The plan must be in a record and contain:

(1) the name of the converting limited partnership;

(2) the name, jurisdiction of formation, and type of entity of the converted entity;

(3) the manner of converting the interests in the converting limited partnership into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed public organic record of the converted entity if it will be a filing entity;

(5) the full text of the private organic rules of the converted entity which are proposed to be in a record;

(6) the other terms and conditions of the conversion; and

(7) any other provision required by the law of this state or the partnership agreement of the converting limited partnership.

(b) In addition to the requirements of subsection (a), a plan of conversion may contain any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of conversion, which must be approved by the converting entity in accordance with Section 1143. The content of a plan of conversion is similar to the content of a plan of merger. *See* Section 1122.

Subsection (a)—The requirements stated in this subsection are mandatory. *See* Section 105(c)(16).

Subsection (a)(3)—Interest holders in the converting entity may receive interests or other securities of the converted entity or of any other person, obligations, rights to acquire interests or other securities, cash, or other property. *See* Sections 1122(a)(3) (mergers), 1132(a)(3) (interest exchanges), 1152(a)(3) (domestications).

Subsection (b)—This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 1143. APPROVAL OF CONVERSION.

(a) A plan of conversion is not effective unless it has been approved:

(1) by a domestic converting limited partnership, by all the partners of the limited partnership entitled to vote on or consent to any matter; and

(2) in a record, by each partner of a domestic converting limited partnership which will have interest holder liability for debts, obligations, and other liabilities that are incurred after the conversion becomes effective, unless:

(A) the partnership agreement of the partnership provides in a record for the approval of a conversion or a merger in which some or all of its partners become subject to interest holder liability by the affirmative vote or consent of fewer than all the partners; and

(B) the partner voted for or consented in a record to that provision of the partnership agreement or became a partner after the adoption of that provision.

(b) A conversion involving a domestic converting entity that is not a limited partnership is not effective unless it is approved by the domestic converting entity in accordance with its organic law.

(c) A conversion of a foreign converting entity is not effective unless it is approved by the foreign entity in accordance with the law of the foreign entity's jurisdiction of formation.

Comment

Subsection (a)(1)—This provision is a default rule, subject to change in the partnership agreement.

Subsection (a)(2)—This provision is not a default rule. Section 105(c)(16). For an explanation of this interest holder liability provision, see Section 1123(a)(2), comment.

SECTION 1144. AMENDMENT OR ABANDONMENT OF PLAN OF CONVERSION.

(a) A plan of conversion of a domestic converting limited partnership may be amended:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its partners in the manner provided in the plan, but a partner that was entitled to vote on or consent to approval of the conversion is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the partners of the converting partnership under the plan;

(B) the public organic record, if any, or private organic rules of the converted entity which will be in effect immediately after the conversion becomes effective, except for changes that do not require approval of the interest holders of the converted entity under its organic law or organic rules; or

(C) any other terms or conditions of the plan, if the change would adversely affect the partner in any material respect.

(b) After a plan of conversion has been approved by a domestic converting limited partnership and before a statement of conversion becomes effective, the plan may be abandoned

as provided in the plan. Unless prohibited by the plan, a domestic converting limited partnership may abandon the plan in the same manner as the plan was approved.

(c) If a plan of conversion is abandoned after a statement of conversion has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the converting entity, must be delivered to the [Secretary of State] for filing before the statement of conversion becomes effective. The statement of abandonment takes effect on filing, and the conversion is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the converting limited partnership;

(2) the date on which the statement of conversion was filed by the [Secretary of State]; and

(3) a statement that the conversion has been abandoned in accordance with this section.

Comment

This section parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Sections 1124 (mergers), 1134 (interest exchanges), 1154 (domestications).

SECTION 1145. STATEMENT OF CONVERSION; EFFECTIVE DATE OF CONVERSION.

(a) A statement of conversion must be signed by the converting entity and delivered to the [Secretary of State] for filing.

(b) A statement of conversion must contain:

(1) the name, jurisdiction of formation, and type of entity of the converting entity;

(2) the name, jurisdiction of formation, and type of entity of the converted entity;

(3) if the converting entity is a domestic limited partnership, a statement that the plan of conversion was approved in accordance with this [part] or, if the converting entity is a foreign entity, a statement that the conversion was approved by the foreign entity in accordance with the law of its jurisdiction of formation;

(4) if the converted entity is a domestic filing entity, its public organic record, as an attachment; and

(5) if the converted entity is a domestic limited liability partnership, its statement of qualification, as an attachment.

(c) In addition to the requirements of subsection (b), a statement of conversion may contain any other provision not prohibited by law.

(d) If the converted entity is a domestic entity, its public organic record, if any, must satisfy the requirements of the law of this state, except that the public organic record does not need to be signed.

(e) A plan of conversion that is signed by a domestic converting limited partnership and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of conversion and on filing has the same effect. If a plan of conversion is filed as provided in this subsection, references in this [article] to a statement of conversion refer to the plan of conversion filed under this subsection.

(f) If the converted entity is a domestic limited partnership, the conversion becomes effective when the statement of conversion is effective. In all other cases, the conversion becomes effective on the later of:

(1) the date and time provided by the organic law of the converted entity; and

(2) when the statement is effective.

Comment

This section applies regardless of whether a domestic limited partnership is the converting or converted entity. A foreign entity seeking to convert to a domestic limited partnership must therefore comply with this section.

If either the converting or converted entity is a foreign entity, the organic law of the foreign entity's jurisdiction must also be consulted.

The filing of a statement of conversion makes the transaction a matter of public record.

Subsection (b)—This subsection sets forth the requirements for a statement of conversion. They are essentially the same as the requirements for a statement of merger in Section 1125.

Subsection (e)—A plan of conversion can be used as a substitute for the statement of conversion so long as the plan satisfies the requirements in Subsection (b).

Subsection (f)—Section 207 determines when a record delivered for filing under this act becomes effective. A statement of conversion may specify a delayed effective time and date, subject to the ninety-day limit stated in Section 207(3) and (4).

When the statement of conversion becomes effective under this subsection, the conversion transaction occurs if the converted entity is a domestic limited partnership. A conversion in which the converted entity is a foreign entity will usually also take effect when the statement of conversion takes effect because the best practice will be to coordinate the filings that need to be made when a conversion involves both a domestic entity and also a foreign entity so that the filings in each jurisdiction take effect at the same time.

However, when the converting limited partnership is a foreign limited partnership, it is possible that the filing in the foreign jurisdiction will take effect at a different time. For that reason, this subsection provides that the conversion will take effect at the later of: (i) when the statement of conversion takes effect; and (ii) when the conversion takes effect under the law of the foreign jurisdiction. This rule avoids the possibility that the conversion will take effect in this state before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the converting domestic limited partnership would cease to appear as an active entity on the records of this state before appearing as its active, converted self on the records of the foreign jurisdiction.

It is only necessary for the filing office to record the effective date of the statement of conversion and the filing office does not need to be concerned with the effective date of the conversion itself. Persons wishing to determine the effective date of a conversion involving both a domestic limited partnership and a foreign entity will be able to do so by consulting the records of the filing offices in each jurisdiction.

SECTION 1146. EFFECT OF CONVERSION.

(a) When a conversion becomes effective:

(1) the converted entity is:

(A) organized under and subject to the organic law of the converted entity; and

(B) the same entity without interruption as the converting entity;

(2) all property of the converting entity continues to be vested in the converted entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the converting entity continue as debts, obligations, and other liabilities of the converted entity;

(4) except as otherwise provided by law or the plan of conversion, all the rights, privileges, immunities, powers, and purposes of the converting entity remain in the converted entity;

(5) the name of the converted entity may be substituted for the name of the converting entity in any pending action or proceeding;

(6) the certificate of limited partnership of the converted entity becomes effective;

(7) the provisions of the partnership agreement of the converted entity which are to be in a record, if any, approved as part of the plan of conversion become effective; and

(8) the interests in the converting entity are converted, and the interest holders of the converting entity are entitled only to the rights provided to them under the plan of conversion and to any appraisal rights they have under Section 1106.

(b) Except as otherwise provided in the partnership agreement of a domestic converting limited partnership, the conversion does not give rise to any rights that a partner or third party

would have upon a dissolution, liquidation, or winding up of the converting entity.

(c) When a conversion becomes effective, a person that did not have interest holder liability with respect to the converting entity and becomes subject to interest holder liability with respect to a domestic entity as a result of the conversion has interest holder liability only to the extent provided by the organic law of the entity and only for those debts, obligations, and other liabilities that are incurred after the conversion becomes effective.

(d) When a conversion becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic converting limited partnership with respect to which the person had interest holder liability is subject to the following rules:

(1) The conversion does not discharge any interest holder liability under this [act] to the extent the interest holder liability was incurred before the conversion became effective.

(2) The person does not have interest holder liability under this [act] for any debt, obligation, or other liability that is incurred after the conversion becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

(4) The person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the organic rules of the converting entity with respect to any interest holder liability preserved under paragraph (1) as if the conversion had not occurred.

(e) When a conversion becomes effective, a foreign entity that is the converted entity may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities as provided in Section 121.

(f) If the converting entity is a registered foreign entity, its registration to do business in

this state is canceled when the conversion becomes effective.

(g) A conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

Comment

A converted entity is the same entity as it was before the conversion; the entity just has a different legal form.

Subsection (a)—This subsection states the principal legal effects of a conversion. The converted entity remains the owner of all real and personal property and remains subject to all the liabilities, actual or contingent, of the converted entity. A conversion is not a conveyance, transfer, or assignment. A conversion does not give rise to: (i) claims of reverter or impairment of title based on a prohibited conveyance or transfer; or (ii) to a claim that a contract with the converting entity is no longer in effect on the ground of nonassignability, unless the contract specifically provides that it does not survive a conversion. The contract rights that remain in the converted entity include, without limitation, the right to enforce subscription agreements for interests and obligations to make capital contributions entered into or incurred before the conversion.

When a conversion becomes effective, the internal affairs of the converting entity are no longer governed by its former organic law but instead by the organic law of the converted entity. As a result, filings that may have been made under the organic law of the converting entity, such as the following, will no longer be effective: a statement of qualification as a limited liability partnership under UPA (1997) (Last Amended 2013) § 901, a statement of partnership authority under section 303 of that act, a statement of authority under Section of the ULLCA (2006) (Last Amended 2013) § 302, or under Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2013) § 7.

Subsection (a)(5)—All pending proceedings involving the converting entity are continued. The name of the converted entity may be, but need not be, substituted in any pending proceeding for the name of the converting entity.

Subsection (c)—This subsection provides the rule for future interest holder liability and parallels provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Section 1126(c), cmt.

Subsection (d)—Subsection (d) provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 5 (domestications). *See* Section 1126(d), cmt.

Subsection (e)—For this provision to apply, the converting entity must have been a domestic limited partnership. When a domestic limited partnership becomes a foreign entity as a result of a conversion, some mechanism is needed to facilitate the enforcement of claims by the

creditors and interest holders of the converting limited partnership. This subsection, which parallels analogous provisions in Parts 2 (mergers) and 5 (domestications), authorizes service of process for all such claims in this state.

Subsection (g)—When a conversion takes effect, the entity continues to exist—simply in a different form. This subsection thus makes clear that the conversion does not require the entity to wind up its affairs and does not constitute or cause the dissolution of the entity.

[PART] 5

DOMESTICATION

SECTION 1151. DOMESTICATION AUTHORIZED.

(a) By complying with this [part], a domestic limited partnership may become a foreign limited partnership if the domestication is authorized by the law of the foreign jurisdiction.

(b) By complying with the provisions of this [part] applicable to foreign limited partnerships, a foreign limited partnership may become a domestic limited partnership if the domestication is authorized by the law of the foreign limited partnership's jurisdiction of formation.

(c) If a protected agreement contains a provision that applies to a merger of a domestic limited partnership but does not refer to a domestication, the provision applies to a domestication of the limited partnership as if the domestication were a merger until the provision is amended after [the effective date of this [act]].

Comment

A domestication authorized by Part 5 of Article 11 differs from a conversion in that a domestication requires that the domesticating entity be the same type of entity as the domesticated entity. In a conversion, by contrast, the converting entity changes its type.

As with a conversion, all rights and privileges, debts, obligations and other liabilities, and actions or proceedings of a domesticating entity vest unimpaired in the domesticated entity. A domestication is not a sale, transfer, assignment, or conveyance and does not give rise to a claim of reverter or impairment of title. *See* Section 1146(a), cmt.

Part 5 of Article 11 governs the legal effect of a foreign limited partnership domesticating

in this state. On the other hand, the organic laws of the foreign jurisdiction, and not Part 5, will govern the legal effect of most aspects of a domestication of a domestic limited partnership in another jurisdiction. In the latter scenario, Part 5 authorizes the domestication of the domestic entity in the foreign jurisdiction, but Part 5 does not create a right in the domestic entity to be received in the foreign jurisdiction. Similarly, this section does not provide a right on the part of a foreign limited partnership to become a domestic limited partnership if the domestication is not authorized by the laws of the foreign jurisdiction. If the foreign jurisdiction does not authorize a domestication transaction, the same results can be accomplished by forming a new limited partnership in this state and merging the existing foreign limited partnership into the new domestic limited partnership.

Subsection (c)—*See* Section 1131(c).

SECTION 1152. PLAN OF DOMESTICATION.

(a) A domestic limited partnership may become a foreign limited partnership in a domestication by approving a plan of domestication. The plan must be in a record and contain:

(1) the name of the domesticating limited partnership;

(2) the name and jurisdiction of formation of the domesticated limited partnership;

(3) the manner of converting the interests in the domesticating limited partnership into interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing;

(4) the proposed certificate of limited partnership of the domesticated limited partnership;

(5) the full text of the provisions of the partnership agreement of the domesticated limited partnership, that are proposed to be in a record;

(6) the other terms and conditions of the domestication; and

(7) any other provision required by the law of this state or the partnership agreement of the domesticating limited partnership.

(b) In addition to the requirements of subsection (a), a plan of domestication may contain

any other provision not prohibited by law.

Comment

This section sets forth the requirements for the plan of domestication for a domestic limited partnership seeking to become a limited partnership existing under the law of another jurisdiction. For a foreign limited partnership seeking to become a domestic limited partnership, the organic law of the foreign limited partnership governs the requirements for a plan of domestication. The content of a plan of domestication is similar to the content of a plan of merger. *See* Section 1122.

Subsection (a)—The requirements stated in this subsection are mandatory. *See* Section 105(c)(16).

Subsection (a)(3)—Interest holders in the domesticating limited partnership may receive interests or other securities of the domesticated limited partnership or any other entity, obligations, rights to acquire interests or other securities, cash, or other property. *See* Section 1122(a)(3), cmt.

Subsection (b)—This subsection authorizes the plan to contain any other provision the parties wish to include, unless the provision is prohibited by law.

SECTION 1153. APPROVAL OF DOMESTICATION.

(a) A plan of domestication of a domestic domesticating limited partnership is not effective unless it has been approved:

(1) by all the partners entitled to vote on or consent to any matter; and

(2) in a record, by each partner that will have interest holder liability for debts, obligations, and other liabilities that are incurred after the domestication becomes effective, unless:

(A) the partnership agreement of the domesticating partnership in a record provides for the approval of a domestication or merger in which some or all of its partners become subject to interest holder liability by the affirmative vote or consent of fewer than all the partners; and

(B) the partner voted for or consented in a record to that provision of the

partnership agreement or became a partner after the adoption of that provision.

(b) A domestication of a foreign domesticating limited partnership is not effective unless it is approved in accordance with the law of the foreign limited partnership's jurisdiction of formation.

Comment

Subsection (a)(1)—This provision is a default rule, subject to change in the partnership agreement.

Subsection (a)(2)—This provision is mandatory. Section 105(c)(16). For an explanation of the provision, see Section 1123(a)(2), comment.

Subsection (b)—In the case of a foreign limited partnership that is domesticating in this state, this subsection provides that the required approval is determined by the laws of the foreign limited partnership's jurisdiction of formation.

SECTION 1154. AMENDMENT OR ABANDONMENT OF PLAN OF DOMESTICATION.

(a) A plan of domestication of a domestic domesticating limited partnership may be amended:

(1) in the same manner as the plan was approved, if the plan does not provide for the manner in which it may be amended; or

(2) by its partners in the manner provided in the plan, but a partner that was entitled to vote on or consent to approval of the domestication is entitled to vote on or consent to any amendment of the plan that will change:

(A) the amount or kind of interests, securities, obligations, money, other property, rights to acquire interests or securities, or any combination of the foregoing, to be received by any of the partners of the domesticating limited partnership under the plan;

(B) the certificate of limited partnership or partnership agreement of the

domesticated limited partnership that will be in effect immediately after the domestication becomes effective, except for changes that do not require approval of the partners of the domesticated limited partnership under its organic law or partnership agreement; or

(C) any other terms or conditions of the plan, if the change would adversely affect the partner in any material respect.

(b) After a plan of domestication has been approved by a domestic domesticating limited partnership and before a statement of domestication becomes effective, the plan may be abandoned as provided in the plan. Unless prohibited by the plan, a domestic domesticating limited partnership may abandon the plan in the same manner as the plan was approved.

(c) If a plan of domestication is abandoned after a statement of domestication has been delivered to the [Secretary of State] for filing and before the statement becomes effective, a statement of abandonment, signed by the domesticating limited partnership, must be delivered to the [Secretary of State] for filing before the statement of domestication becomes effective. The statement of abandonment takes effect on filing, and the domestication is abandoned and does not become effective. The statement of abandonment must contain:

(1) the name of the domesticating limited partnership;

(2) the date on which the statement of domestication was filed by the [Secretary of State]; and

(3) a statement that the domestication has been abandoned in accordance with this section.

Comment

This section parallels provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* Sections 1124 (mergers), 1134 (interest exchanges), 1144 (conversions).

SECTION 1155. STATEMENT OF DOMESTICATION; EFFECTIVE DATE OF DOMESTICATION.

(a) A statement of domestication must be signed by the domesticating limited partnership and delivered to the [Secretary of State] for filing.

(b) A statement of domestication must contain:

(1) the name and jurisdiction of formation of the domesticating limited partnership;

(2) the name and jurisdiction of formation of the domesticated limited partnership;

(3) if the domesticating limited partnership is a domestic limited partnership, a statement that the plan of domestication was approved in accordance with this [part] or, if the domesticating limited partnership is a foreign limited partnership, a statement that the domestication was approved in accordance with the law of its jurisdiction of formation; and

(4) the certificate of limited partnership of the domesticated limited partnership, as an attachment.

(c) In addition to the requirements of subsection (b), a statement of domestication may contain any other provision not prohibited by law.

(d) The certificate of limited partnership of a domesticated domestic limited partnership must satisfy the requirements of this [act], but the certificate does not need to be signed.

(e) A plan of domestication that is signed by a domesticating domestic limited partnership and meets all the requirements of subsection (b) may be delivered to the [Secretary of State] for filing instead of a statement of domestication and on filing has the same effect. If a plan of domestication is filed as provided in this subsection, references in this [article] to a

statement of domestication refer to the plan of domestication filed under this subsection.

(f) If the domesticated entity is a domestic limited partnership, the domestication becomes effective when the statement of domestication is effective. If the domesticated entity is a foreign limited partnership, the domestication becomes effective on the later of:

(1) the date and time provided by the organic law of the domesticated entity; and

(2) when the statement is effective.

Comment

Regardless of whether a domestic limited partnership is the domesticating or domesticated entity:

- This section applies and, therefore, a foreign limited partnership seeking to domesticate and thereby become a domestic limited partnership must comply with this section.
- The organic law of the foreign limited partnership's jurisdiction must also be consulted.

The filing of a statement of domestication makes the transaction a matter of public record.

Subsection (b)—This subsection sets forth the requirements for a statement of domestication. They are essentially the same as the requirements for a statement of merger in Section 1125.

Subsection (e)—A plan of domestication can be used as a substitute for the statement of domestication so long as the plan satisfies the requirements in Subsection (b).

Subsection (f)—Section 207 determines when a record delivered for filing under this act becomes effective. A statement of domestication may specify a delayed effective time and date, subject to the ninety-day limit stated in Section 207(3) and (4).

When the statement of domestication becomes effective under this subsection, the domestication transaction occurs if the domesticated entity is a domestic limited partnership. A domestication in which the domesticated entity is a foreign limited partnership will usually also take effect when the statement of domestication takes effect because the best practice will be to coordinate the filings that need to be made in each jurisdiction so that they take effect at the same time.

However, when the domesticated limited partnership is a foreign limited partnership, it is possible that the filing in the foreign jurisdiction will take effect at a different time. For that reason, this subsection provides that the domestication will take effect at the later of: (i) when the statement of domestication takes effect; and (ii) when the domestication takes effect under the

law of the foreign jurisdiction. This rule avoids the possibility that the domestication will take effect in this state before it takes effect in the foreign jurisdiction, which would produce the undesirable result that the domesticating domestic limited partnership would cease to appear as an active entity on the records of this state before appearing as its active, domesticated self on the records of the foreign jurisdiction.

It is only necessary for the filing office to record the effective date of the statement of domestication and the filing office does not need to be concerned with the effective date of the domestication itself. Persons wishing to determine the effective date of a domestication will be able to do so by consulting the records of the filing offices in each jurisdiction.

SECTION 1156. EFFECT OF DOMESTICATION.

(a) When a domestication becomes effective:

(1) the domesticated entity is:

(A) organized under and subject to the organic law of the domesticated entity; ; and

(B) the same entity without interruption as the domesticating entity;

(2) all property of the domesticating entity continues to be vested in the domesticated entity without transfer, reversion, or impairment;

(3) all debts, obligations, and other liabilities of the domesticating entity continue as debts, obligations, and other liabilities of the domesticated entity;

(4) except as otherwise provided by law or the plan of domestication, all the rights, privileges, immunities, powers, and purposes of the domesticating entity remain in the domesticated entity;

(5) the name of the domesticated entity may be substituted for the name of the domesticating entity in any pending action or proceeding;

(6) the certificate of limited partnership of the domesticated entity becomes effective;

(7) the provisions of the partnership agreement of the domesticated entity that are

to be in a record, if any, approved as part of the plan of domestication become effective; and

(8) the interests in the domesticating entity are converted to the extent and as approved in connection with the domestication, and the partners of the domesticating entity are entitled only to the rights provided to them under the plan of domestication and to any appraisal rights they have under Section 1106.

(b) Except as otherwise provided in the organic law or partnership agreement of the domesticating limited partnership, the domestication does not give rise to any rights that an partner or third party would have upon a dissolution, liquidation, or winding up of the domesticating partnership.

(c) When a domestication becomes effective, a person that did not have interest holder liability with respect to the domesticating limited partnership and becomes subject to interest holder liability with respect to a domestic limited partnership as a result of the domestication has interest holder liability only to the extent provided by this [act] and only for those debts, obligations, and other liabilities that are incurred after the domestication becomes effective.

(d) When a domestication becomes effective, the interest holder liability of a person that ceases to hold an interest in a domestic domesticating limited partnership with respect to which the person had interest holder liability is subject to the following rules:

(1) The domestication does not discharge any interest holder liability under this [act] to the extent the interest holder liability was incurred before the domestication became effective.

(2) A person does not have interest holder liability under this [act] for any debt, obligation, or other liability that is incurred after the domestication becomes effective.

(3) This [act] continues to apply to the release, collection, or discharge of any

interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(4) A person has whatever rights of contribution from any other person as are provided by this [act], law other than this [act], or the partnership agreement of the domestic domesticating limited partnership with respect to any interest holder liability preserved under paragraph (1) as if the domestication had not occurred.

(e) When a domestication becomes effective, a foreign limited partnership that is the domesticated partnership may be served with process in this state for the collection and enforcement of any of its debts, obligations, and other liabilities as provided in Section 121.

(f) If the domesticating limited partnership is a registered foreign entity, the registration of the partnership is canceled when the domestication becomes effective.

(g) A domestication does not require a domestic domesticating limited partnership to wind up its affairs and does not constitute or cause the dissolution of the partnership.

Comment

Subsection (a)(1)—The domesticated entity is the same entity as the domesticating entity; it has merely changed its jurisdiction of formation.

Subsection (a)(2)—A domestication is not a sale, conveyance, transfer, or assignment and does not give rise to claims of reverter or impairment of title that may be based on a prohibition on transfer, assignment, or conveyance.

Subsection (a)(4)—All pending proceedings involving the domesticating entity are continued. The name of the domesticated entity may be, but need not be, substituted in any pending proceeding for the name of the domesticating entity.

Subsection (a)(8)—The interests of the domesticating limited partnership are reclassified into whatever rights were negotiated in the domestication and the partners and transferees of the domesticating limited partnership are only entitled to those rights. Paragraph 8, on its face, allows for certain partners of the domesticating limited partnership to be entitled to a continuing equity interest in the domesticated limited partnership whereas other partners of the domesticating limited partnership may be cashed out as a result of the transaction.

Subsection (c)—This subsection provides the rule for future interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions).

See Section 1126(c), cmt.

Subsection (d)—This subsection provides the rule for past interest holder liability and parallels analogous provisions in Parts 2 (mergers), 3 (interest exchanges), and 4 (conversions). *See* Sections 1126(d), cmt., 1146(d), cmt.

Subsection (e)—When a domestic domesticating limited partnership becomes a foreign limited partnership as a result of a domestication, some mechanism is needed to facilitate the enforcement of claims by the creditors and interest holders of the domesticating limited partnership. This subsection, which parallels analogous provisions in Parts 2 (mergers) and 4 (conversions), authorizes service of process for all such claims in this state.

Subsection (g)—When a domestication takes effect, the entity continues to exist—simply as a domestic entity under the laws of a different state. This subsection thus makes clear that the domestication does not require the limited partnership to wind up its affairs and does not constitute or cause the dissolution of the limited partnership.

[ARTICLE] 12

MISCELLANEOUS PROVISIONS

SECTION 1201. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 1202. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b).

Comment

This section responds to specific language of the Electronic Signatures in Global and National Commerce Act and is designed to avoid preemption of state law under that federal legislation.

SECTION 1203. SAVINGS CLAUSE. This [act] does not affect an action

commenced, proceeding brought, or right accrued before [the effective date of this [act]].

Comment

This section continues prior law after the effective date of this act with respect to rights accrued and proceedings. But for this section, the new law of this act would displace the old laws in some circumstances. The power of a new act to displace the old statute with respect to conduct occurring before the new act's enactment is substantial. Millard H. Ruud, *The Savings Clause—Some Problems in Construction and Drafting*, 33 TEX. L. REV. 285, 286–93 (1955). A court generally applies the law that exists at the time it acts.

Eventually, this act will apply all to pre-existing limited partnerships—whether by choice under Section 112(a)(2) (permitting an early opt-in), or without choice on the "all-inclusive date." Section 112(b). In this context, the phrase "before [the effective date of this [act]]" should be understood as referring to the date upon which this act becomes applicable to the particular limited partnership at issue.

[SECTION 1204. SEVERABILITY CLAUSE. If any provision of this [act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [act] which can be given effect without the invalid provision or application, and to this end the provisions of this [act] are severable.]

Legislative Note: *Include this section only if this state lacks a general severability statute or decision by the highest court of this state stating a general rule of severability.*

SECTION 1205. REPEALS. The following are repealed:

(1) [the state limited partnership act as [amended, and as] in effect immediately before [the effective date of this [act]].

(2) . . . .

(3) . . . .

SECTION 1206. EFFECTIVE DATE. This [act] takes effect ….

Comment

For the effect of the act's effective date on pre-existing limited partnerships, see Section 112.