



9-1-1978

An Examination of Articles 3, 4 and 9 of the Revised Uniform Limited Partnership Act Symposium - Limited Partnership Act.

W. Edward Sell

Follow this and additional works at: <https://commons.stmarytx.edu/thestmaryslawjournal>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

W. Edward Sell, *An Examination of Articles 3, 4 and 9 of the Revised Uniform Limited Partnership Act Symposium - Limited Partnership Act.*, 9 ST. MARY'S L.J. (1978).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol9/iss3/5>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Law Journal by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact egoode@stmarytx.edu, sfowler@stmarytx.edu.

AN EXAMINATION OF ARTICLES 3, 4 AND 9 OF THE REVISED UNIFORM LIMITED PARTNERSHIP ACT

W. EDWARD SELL*

Dean Sell discusses article 3, which deals with the single most difficult issue facing lawyers who use the limited partnership form of organization: the powers and potential liabilities of limited partners. The provisions relating to general partners are collected in article 4.

One of the thorniest questions for those who operate limited partnerships in more than one state has been the status of the partnership in a state other than the state of organization. Article 9 addresses this problem by providing for registration of foreign limited partnerships and specifying choice-of-law rules.

—Brockenbrough Lamb, Jr.

ARTICLE 3—LIMITED PARTNERS

The Revised Uniform Limited Partnership Act,¹ in setting the provisions in articles divided largely along functional lines, has one article devoted to limited partners, their rights and liabilities generally.²

Section 301 of the revised Act covers the admission of additional limited partners. A person may be admitted as a new limited partner upon compliance with the partnership agreement, where the person is acquiring the interest directly from the limited partnership. If the partnership agreement does not provide for the admission of additional limited partners, the written consent of all partners is required. The comments indicate that the purpose of this provision is to make explicit that unanimous consent of all partners

* A.B., Washington and Jefferson College; J.D., Yale University; Distinguished Service Professor of Law and former Dean, University of Pittsburgh School of Law.

1. UNIFORM LIMITED PARTNERSHIP ACT (1976) [hereinafter cited as ULPA (1976)]. As stated in the Supplement, this Act is subject to revision. The finished text, with style changes, prefatory note and complete comments has not yet been published. 6 UNIFORM LAWS ANNOTATED 586 (Supp. 1977).

2. ULPA art. 3 (1976).

is required unless the agreement otherwise provides. Section 8 of the ULPA (1916)³ provides that after formation, new limited partners may be admitted upon the filing of an amendment to the original certificate, pursuant to the requirements of section 25. Section 25(1)(b) requires the certificate to be "signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner."⁴ Thus, the revised Act effects no change except to eliminate the need to read two sections of the act together, as must be done now.

The second subsection of section 301(a) provides that where an assignee of a partnership interest receives his interest from a partner who has the power to make the assignee a limited partner, the assignee will "become a limited partner upon the exercise of that power and compliance with any conditions limiting the grant or exercise of the said power."⁵ It should be noted that the revised Act abandons the term "substituted limited partner" which was utilized in the ULPA (1916) to designate an assignee.⁶ Subsection (b) of section 301 states: "In each case under subsection (a), the person acquiring the partnership interest becomes a limited partner only upon amendment of the certificate of limited partnership reflecting that fact."⁷

The language of section 301(b) raises a question for interpretation as to the status of the assignee of a limited partner's interest where the certificate of limited partnership has not been amended.⁸ Either

3. UNIFORM LIMITED PARTNERSHIP ACT § 8 (1916) [hereinafter cited as ULPA (1916)], reprinted in 6 UNIFORM LAWS ANNOTATED 586 (1969).

4. ULPA § 25 (1916). The Act implicitly recognizes that the partnership agreement may allow admission of new limited partners without the unanimous consent of all members. See ULPA § 2(1)(a) X (1916) (certificate may allow assignment of limited partnership rights); *id.* § 2(1)(a) XI (certificate may allow partners to admit additional limited partners); *id.* § 25(4) (may judicially compel amendment of the certificate without signature of all members); *cf.* *Riviera Congress Assocs. v. Yassky*, 277 N.Y.S.2d 386, 392, 223 N.E.2d 876, 880 (N.Y. 1966) (partners may include any agreement they wish in partnership articles). See generally Coleman & Weatherbie, *Special Problems in Limited Partnership Planning*, 30 Sw. L.J. 887, 890 (1976).

5. ULPA § 301(a)(2) (1976).

6. ULPA § 19 (1916); see ULPA § 301, Comment (1976).

7. ULPA § 301(b) (1976).

8. The liability of an assignee who after amendment of the certificate becomes a limited partner is governed by section 704(b). He is subject to all the liabilities of a limited partner and also is subject to the liability of his assignor to make or return contribution. ULPA §

the assignee will be liable as a general partner or merely as an assignee entitled to the rights of his assignor. The latter would seem the probable interpretation. Of course, if the assignee participates in the business beyond the limits permitted for limited partners, he will incur the liability of a general partner, but this liability should not be based on failure to amend the certificate of limited partnership to reflect the assignment.

Section 302 is a new provision which recognizes the reasonably common practice of granting limited partners some voting rights.⁹ Since the original act contained no such provisions, the revision clarifies the issue by specifically permitting the agreement to grant voting rights to limited partners.¹⁰ Limited partners cannot, however, be granted an unrestricted right to vote without incurring liability as a general partner on the ground of participation in the business.¹¹ Although the point at which this liability attaches is not defined, section 303(b)(5) enumerates matters on which a limited

704(b) (1976). His obligation, however, does not extend to liabilities of which he was unaware and "which could not be ascertained from the certificate of limited partnership." *Id.* His assignor remains liable for false statements in the certificate, as provided in section 207, and for his specified obligation for contribution of property or services. *Id.* § 502.

9. In fact, some states require some voting rights for limited partners on issues involving (i) the election or removal of general partners, (ii) the termination of the partnership, (iii) amendment of the partnership agreement, and (iv) sale of all or substantially all of the partnership's assets. See CAL. CORP. CODE § 15507 (West Supp. 1977); OR. REV. STAT. § 69.280(2) (1974). See generally Coleman & Weatherbie, *Special Problems in Limited Partnership Planning*, 30 Sw. L.J. 887, 906-09 (1976).

10. ULPA § 302, Comment (1976). Section 7 of the original act forbids a limited partner from taking part in the control of the partnership business. See ULPA § 7 (1916); ULPA § 1, Comment (1916). In determining the question of whether the limited partner has exercised sufficient control to incur liability, the courts usually have given consideration to two factors: (i) whether creditors reasonably rely on the liability of the limited partner; or (ii) whether the limited partner's acts caused the partnership to be liable. Augustine, Fass, Lester, & Robinson, *The Liability of Limited Partners Having Certain Statutory Voting Rights Affecting the Basic Structure of the Partnership*, 31 Bus. Law. 2087, 2102-03 (1976). Applying these factors, the right to vote alone should not give rise to general liability. Cf. Weil v. Diversified Properties, 319 F. Supp. 778, 782 (D.D.C. 1970) (not precluded from giving general advice to general partners); *Trans-Am Builders, Inc. v. Woods Mill, Ltd.*, 210 S.E.2d 866, 869 (Ga. Ct. App. 1974) (unreasonable to hold that limited partner may not advise general partner and visit partnership business in face of severe financial crisis); *Rathke v. Griffith*, 218 P.2d 757, 764 (Wash. 1954) (plaintiff must show he relied on limited partner's liability).

11. When liability is found, the limited partners have usually been engaged in extensive control of the business. See *Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543, 545 (Tex. 1975) (limited partners were controlling officers of corporate general partner); *Holzman v. De Escamilla*, 195 P.2d 833, 834 (Cal. Ct. App. 1948) (limited partners controlled operation of business). See generally Augustine, Fass, Lester, & Robinson, *The Liability of Limited Partners Having Certain Statutory Voting Rights Affecting the Basic Structure of the Partnership*, 31 Bus. Law. 2087, 2102-07 (1976).

partner may vote and remain immune from liability as a general partner. The granting of voting rights beyond these specified instances could subject such voting limited partners to the status of general partners.¹² The "safe harbor" powers which may be granted are the right to vote on:

- (i) the dissolution and winding up of the limited partnership; (ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business; (iii) the incurrance of indebtedness by the limited partnership other than the ordinary course of its business; (iv) a change in the nature of the business; or (v) the removal of a general partner.¹³

This new provision is a positive addition; the silence of the original act on the question of voting by limited partners created an area of significant doubt, now removed by sections 302 and 303(b)(5).¹⁴

THE PROBLEM OF CONTROL

One of the very important changes effected by the revised Act is the addition of section 303. The ULPA (1916) contains, in section 7, a one-sentence pronouncement covering the liability of limited partners: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."¹⁵ Generally, under the ULPA (1916), the limited partner who takes part in the control of the business becomes liable as a general partner.¹⁶ The exemption from personal liability of the limited partners is the basis for the requirement that there be at least one general partner in a limited partnership. This reflects the policy that there should be some person or persons personally liable for the acts of the limited partnership.

12. See ULPA § 303(c) (1976).

13. *Id.* § 303(b)(5)(i-v) (1976).

14. The silence created confusion as to how far limited partners' voting rights could go. See note 8 *supra*.

15. ULPA § 7 (1916).

16. See, e.g., *Donroy Ltd. v. United States*, 301 F.2d 200, 201-02 (9th Cir. 1962); *Holzman v. De Escamilla*, 195 P.2d 833, 834 (Cal. Ct. App. 1948); *Millard v. Newmark & Co.*, 266 N.Y.S.2d 254, 259 (App. Div. 1966). See generally Rowley, *The Influence of Control in the Determination of Partnership Liability*, 26 MICH. L. REV. 290 (1928); Note, *Modern Tendency of the Law of Limited Partnership Liability*, 14 GEO. L.J. 209 (1926); *Liability of Limited Partner*, 7 ANNUAL SURVEY OF MASS. LAW (Boston College) 67 (1960); Note, *Activities Making a Limited Partner Liable as a General Partner*, 56 MICH. L. REV. 285 (1957).

The major difficulty under the ULPA (1916) lies in determining just how much advice, review, management selection, or veto power a limited partner may enjoy without being deemed to have taken part in "control" and hence become liable as a general partner. That uncertainty created by the one sentence in section 7 has detracted from a greater use of the limited partnership form. Section 7 was much too broad. It has been suggested that a limited partner should be held liable as a general partner only with respect to those specific partnership business matters arising during the period in which he is found to have participated in the business in violation of section 7.¹⁷ The reasoning behind section 7 is that active participation in the business by the limited partner may lead those who know or do business with it to believe that the person is actually a general partner. Assuming such belief is a valid justification for destroying the limitation on personal liability of the limited partner, there is no good reason to move to the opposite extreme and treat the limited partner as a general partner to all third parties.

It is here that section 303 makes a very significant change. The second sentence of subsection 303(a) specifically differentiates the liability of a limited partner who "takes part in the control of the business" from that of a general partner. It is *not* the same as the liability of a general partner unless the limited partner's participation in the control of the business is "substantially the same as the exercise of powers of a general partner, [otherwise] he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control."¹⁸

This new provision represents a noteworthy improvement, for the third party can assert rights against the limited partner who has taken part in the control of the business only to the extent that the third party can show he had *actual* knowledge of the participation.¹⁹ Some decisions under section 7 of the ULPA (1916) have seemed to indicate that before a creditor can hold a limited partner liable for a partnership obligation, he must show that he actually relied on his reasonable belief that the limited partner was a general partner.²⁰

17. Feldman, *The Limited Partner's Participation in the Control of the Partnership Business*, 50 CONN. B.J. 168, 179 (1976).

18. ULPA § 303 (1976).

19. *Id.* § 303(d) (1976).

20. *See, e.g.,* *Western Camps, Inc. v. Riverway Ranch Enterprises*, 138 Cal. Rptr. 918, 926-27 (Ct. App. 1977); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 544 P.2d 781, 785 (Wash. Ct. App. 1975), *aff'd*, 562 P.2d 244 (Wash. 1977); *Rathke v. Griffith*, 218 P.2d 757, 764 (Wash. 1954). *Contra, Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543, 545 (Tex. 1975).

The new provision fails to answer specifically whether the participating limited partner is liable only for the period in which the limited partner was actually taking a part in the control of the business. Suppose for four months the limited partner leaves the "safe harbor" and takes part in the control of the business. Clearly any third person who knows of this participation and, in reliance thereon, transacts business with the partnership can sue the limited partner as though he were a general partner. But, when the limited partner ceases that participation, it is uncertain whether he reverts to the status of a limited partner as to those with knowledge of his earlier participation or remains a general partner. The most logical resolution of this problem would seem to be that giving *actual* notice, to such third persons, that the limited partner is no longer participating in the control of the business should eliminate any further liability for the limited partner.

Another valuable addition made by section 303 is an enumeration of some activities which, in addition to the voting provision mentioned above, do not constitute participation in the control of the business. These are:

- (1) being a contractor for or an agent or employee of the limited partnership or of a general partner;²¹ (2) consulting with and advising a general partner with respect to the business of the limited partnership;²² (3) acting as surety for the limited partnership; and (4) approving or disapproving an amendment to the partnership agreement²³

The immunity given by section 303(b)(1) to limited partners acting as employees or agents of the corporation is potentially very significant. In *Delaney v. Fidelity Lease Limited*,²⁴ the limited partners were held personally liable when they entered into a lease contract for the limited partnership while acting as officers of the corporate general partner.²⁵ The court held that the limited partners took part in the control of the business within the meaning of section 8

See generally Feld, *The "Control" Test for Limited Partnerships*, 82 HARV. L. REV. 1471, 1479-80 (1969); Note, *Activities Making a Limited Partner Liable as a General Partner*, 56 MICH. L. REV. 285 (1957).

21. See *Silvola v. Rowlett*, 272 P.2d 287 (Colo. 1954), noted in 27 ROCKY MT. L. REV. 98 (1955). See also *Gast v. Petsinger*, 323 A.2d 371 (Pa. Super. Ct. 1974).

22. See *Trans-Am Builders, Inc. v. Woods Mill, Ltd.*, 210 S.E.2d 866, 868-69 (Ga. Ct. App. 1974).

23. ULPA § 303(b)(1-4) (1976) (footnotes added).

24. 526 S.W.2d 543 (Tex. 1975).

25. *Id.* at 546.

of the Texas Limited Partnership Act.²⁶ Other jurisdictions have refused to find a limited partner personally liable in similar situations.²⁷ These courts have emphasized the fact that the limited partners were acting as agents of the corporation and not as individuals; a fact of which the party seeking to hold the limited partner liable was fully aware.²⁸ Whatever the proper determination under the old act, the latter result is clearly correct under the new section 303(b)(1).

Section 303(b) is intended to provide a "safe harbor" by setting forth activities which do not constitute participation in the control of the business.²⁹ However, subsection (c) makes it clear that the enumerated activities are not an exclusive list, and the possession or exercise of any other power by a limited partner does not necessarily mean that the limited partner is participating in the control of the business.

Subsection (d) presents a refinement of section 5(2) of the ULPA (1916) which made a limited partner whose name appeared in the partnership name liable as a general partner to creditors who were ignorant of his true status as a limited partner and relied on his full liability. While the new section generally follows this rule, it adds the requirement that the limited partner must have "knowingly" permitted his name to be so used.³⁰

Section 304 covers the situation where a person erroneously believes he is a limited partner. Section 11 of ULPA (1916) provides that one who contributed capital to a partnership believing that he would have limited liability would in fact enjoy such limited liability if he immediately renounced his interest in the profits of the

26. *Id.* at 545. TEX. REV. CIV. STAT. ANN. art. 6132a, § 8 (Vernon 1970) is identical to section 7 of the ULPA (1916). The opinion expressed concern that a finding of immunity would encourage inadequately capitalized corporate general partners to the detriment of parties contracting with the limited partnership. *Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543, 546 (Tex. 1975).

27. *Western Camps, Inc. v. Riverway Ranch Enterprises*, 138 Cal. Rptr. 918, 927 (Ct. App. 1977) (limited partner negotiated lease as one of three officers, directors and shareholders of corporate general partner); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 562 P.2d 244, 247 (Wash. 1977) (limited partners contracted with plaintiff as officers, directors and shareholders of general partner).

28. *Western Camps, Inc. v. Riverway Ranch Enterprises*, 138 Cal. Rptr. 918, 927 (Ct. App. 1977); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 562 P.2d 244, 247 (Wash. 1977).

29. ULPA art. 3 (1976).

30. Compare ULPA § 303(d) (1976) with ULPA § 5(2) (1916). For an example of such an addition, see the Alabama statute which substitutes "who knew of the use of his surname," ALA. CODE tit. 10, § 10-9-23 (1977), for "whose name appear," ULPA § 5(2) (1916).

business on discovering his mistake. The revised Act refines the circumstance under which such person escapes liability, by adding a "good faith" requirement.³¹ Upon ascertaining the mistake, the person has alternative courses of action: an appropriate certificate of limited partnership or a certificate of amendment can be executed and filed, or the person can withdraw from future equity participation in the enterprise.³² This second alternative clarifies a problem that exists under the ULPA (1916). Section 11 provides that upon ascertaining the mistake, the mistaken individual must renounce "his interest in the profits of the business, or other compensation by way of income."³³ Such renunciation had to be filed promptly.³⁴ Questions arose under this provision as to whether the person was required to renounce *all* interest in the profits, including those which he currently held or which had accrued to that time.³⁵ Section 304(a)(2) clarifies that point by the addition of the word "future" before the term "equity participation."

Subsection (b) states a general proposition which has its origin in other areas of the law, including corporation law. Withdrawal from the enterprise cannot work to extinguish liabilities which have accrued prior to the withdrawal. Hence, a creditor dealing with a general partner who erroneously believes himself to be a limited partner will not have his cause of action extinguished by the withdrawal of that partner. Such person, incurring the liability of a general partner, should have, however, an action against those who erroneously led him to believe he was a limited partner in a valid limited partnership.

The final section in the new article dealing with limited partners relates to the information a limited partner is entitled to receive. Section 10 of the ULPA (1916) gives the limited partner the right to have the partnership books kept at the principal place of business

31. At least one court has recognized the "good faith" issue under section 11 of the original act. See *J.C. Wattenbarger & Sons v. Sanders*, 13 Cal. Rptr. 92, 94 (Cal. Ct. App. 1961); cf. *Giles v. Vette*, 263 U.S. 553, 564 (1924) (creditors must show they suffered by reliance upon statement in certificate).

32. ULPA § 304(a) (1976).

33. ULPA § 11 (1916); see *Gilman Paint & Varnish Co. v. Legum*, 80 A.2d 906 (Md. 1951).

34. *Vidricksen v. Grover*, 363 F.2d 372, 373 (9th Cir. 1966) (investor who learned of problem in March but did not renounce his interest until September did not renounce promptly).

35. The term "renounce" was interpreted in *Gilman Paint & Varnish Co. v. Legum*, 80 A.2d 906, 910 (Md. 1951) as meaning giving up a right or claim, and not "return." The court said the statute was intended to put the creditor in the position he would have occupied had there been no limited partnership at the time their debts were contracted. *Id.* at 910.

of the partnership and to inspect and copy any of them, and on demand, to have, true and full information of all things affecting the partnership, as well as a formal account of partnership affairs whenever circumstances render it just and reasonable.³⁶ Section 305, while restating the general proposition of section 10, goes further in specifying the information which can be obtained by the limited partner. The limited partner has a right to inspect any of the records which are required to be kept under section 105 of the revised Act. Those records are:

- (1) a current list of the full name and last-known business address of each partner set forth in alphabetical order, (2) a copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed, (3) copies of the limited partnership's federal, state, and local tax returns and reports, if any, for the 3 most recent years, and (4) copies of any then effective written partnership agreements and of any financial statements of the limited partnership for the 3 most recent years.³⁷

Additionally each limited partner has the right to obtain from the general partners from time to time, upon reasonable demand, true and full information concerning the state of the business and the limited partnership's financial condition, a copy of the limited partnership's federal, state, and local tax returns for each year, and any other information regarding the affairs of the limited partnership as is just and reasonable. With respect to the last of these items, namely, other information, it would appear that the limited partner seeking such information would need to show that it was just and reasonable, should it be challenged.

ARTICLE 4—GENERAL PARTNERS

Section 401 of the revised Act is derived from section 9(1)(e) of the ULPA (1916). This provision states that without the written

36. The limited partner is given the right to full and free access not only to information contained in the partnership books but to all things affecting the partnership, as well as the right to formal accounting. *Millard v. Newmark & Co.*, 266 N.Y.S.2d 254, 258 (App. Div. 1966). However, unlike a corporate shareholder, the limited partner has no right to counsel fees if he prevails in his action to obtain an accounting or access to information concerning the limited partnership. The limited partner has a right to a formal accounting when such is deemed just and reasonable under the circumstances. *Riviera Congress Assocs. v. Yassky*, 268 N.Y.S.2d 854, *aff'd*, 277 N.Y.S.2d 386, 223 N.E.2d 876 (1966).

37. ULPA § 105 (1976).

consent or ratification by all of the limited partners, a general partner or all of the general partners have no authority to admit a person as a general partner. This cannot be waived by the partnership agreement.³⁸ The written consent must specifically identify the general partner involved.³⁹

Section 402 sets forth the events which shall constitute or cause a person to cease to be a general partner of a limited partnership. As the comment indicates, the section expands considerably upon the simple statement in section 20 of the ULP (1916) that the retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners pursuant to a right granted in the certificate or by the consent of all members of the limited partnership.⁴⁰

Subsection (1) concerns the withdrawal of a general partner pursuant to section 602 which recognizes that a general partner in a limited partnership has the same withdrawal privileges as a partner in a general partnership. Of course, where there is a contract for a certain period of time and the general partner withdraws before the agreed time, he may be liable for a breach of the agreement. In such instance, he has the power, but not the right to withdraw.⁴¹ If he does withdraw in breach of the agreement and damages are established, they can offset the amount he is otherwise entitled to receive as his distributable share.

Under subsection (2), he ceases to be a general partner when he assigns his interest in the limited partnership pursuant to section 702 of the revised Act, which permits assignments of an interest unless prohibited by the partnership agreement. The last sentence of section 702 states: "Except as otherwise provided in the partnership agreement, a partner ceases to be a partner upon assignment

38. *See id.* § 401, Comment (1976).

39. *Id.* § 401, Comment (1976).

40. In *Lowe v. Arizona Power & Light Co.*, 427 P.2d 366 (Ariz. Ct. App. 1967) the limited partnership certificate recited that in the event of death, incapacity or withdrawal of either of the two general partners, the partnership should be continued with the remaining general partner and the limited partner. After withdrawal of one general partner, the remaining partners executed a "certificate of partnership," which failed to indicate whether a limited or general partnership was intended. The court held this certificate superseded the prior certificate and subjected the prior limited partner to liability for partnership obligations as a general partner. *Id.* at 368-69.

41. *Burnstine v. Geist*, 15 N.Y.S.2d 48, 50-51 (App. Div. 1939) (wrongful dissolution gives innocent party right to damages); *Duncan v. Bruce*, 43 N.Y.S.2d 447, 449 (Sup. Ct. 1943) (partner who attempts to dissolve partnership before end of term agreed is liable for breach of contract).

of all his partnership interest."⁴² There would appear to be a discrepancy here when one reads section 402(2) together with section 702. Section 402(2) states that except when "approved by the specific written consent of all partners at the time . . . a general partner ceases to be a member of the limited partnership as provided in section 702."⁴³ Since the last sentence of section 702, quoted above, contains the phrase, "except as otherwise provided in the partnership agreement," a question is raised where the partnership agreement expressly provides that a partner does not cease to be a partner upon assigning his interest. Assuming that the remaining partners do not give specific written approval at the time of the assignment, a serious question exists as to whether he is a partner thereafter. It can be argued that section 702 limits the general provision in section 402(2). A general partner, however, clearly ceases to be a partner when he has been removed in accordance with the provisions of the partnership agreement.

Subsections (4) and (5) of section 402 are reasonable statements of a general policy that limited partners should have the power to remove a general partner who has fallen into a financial condition that is incompatible with his functioning as a general partner in the limited partnership.⁴⁴

Subsection (6) covers the death or declaration of incompetency of a natural person who is serving as a general partner and partially replaces section 20 of the original act concerning the death or insanity of the general partner. The Uniform Partnership Act, section 31(4), states that the death of any partner causes dissolution. A court, on application by or for a partner, shall decree a dissolution of a general partnership where "a partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind."⁴⁵

Subsections (7), (8), (9), and (10) of the revised ULPA cover situations where the general partner is other than a natural person. Under subsection (7), where the general partner is a trustee acting on behalf of a trust, the termination of the trust effects a withdrawal of the general partner. It should be noted, however, that a change of trustees will not so affect the limited partnership, since the trustee is a mere agent of the trust, the principal. Where the

42. ULPA § 702 (1976).

43. *Id.* § 702 (1976).

44. The Uniform Partnership Act § 31(5) (1916) states that one of the causes of dissolution of a partnership is the bankruptcy of any partner or the partnership.

45. ULPA § 402(7) (1976).

general partner is itself a partnership, the dissolution of the partnership works a withdrawal of the general partner, under subsection (8). In the case where the general partner is a corporation, the general partner is deemed to have withdrawn when the corporation files a certificate of dissolution or its equivalent or the corporation has its charter revoked for any reason. Finally, where the general partner is an estate, the distribution by the fiduciary of the estate's interest in the limited partnership works a withdrawal of the general partner, under subsection (10).

Section 403 sets forth a general statement of the powers and liabilities of a general partner. As a rule, the general partner has all the powers that a partner has in a general partnership. Section 9(1) of the ULPA (1916) gave the general partner the same powers as a general partner in a partnership under the Uniform Partnership Act, with certain exceptions that required the written consent or ratification of all of the limited partners. Section 9(1)(a) of the ULPA (1916) prohibited any conduct which violated the provisions of the certificate,⁴⁶ or made it impossible to carry on the ordinary business of the partnership.⁴⁷ Section 9(2) of the Uniform Partnership Act generally covers the same prohibition, although the language is not explicit. Additionally other specifically prohibited acts⁴⁸ are also contained in section 9(2) of the Uniform Partnership Act.

Section 404 is derived from section 12 of the original ULPA which permits a person to be both a general partner and a limited partner in a limited partnership. Subsection (2) states that a person who is both a general partner and a limited partner "shall have the rights against the other members which he would have had if he were not also a general partner."⁴⁹ Section 404 clarifies this provision by the direct statement that unless the agreement otherwise provides, he shall have all the powers and be subject to all the restrictions of a limited partner, where he is participating as both a general and limited partner. This section does not change the law in this respect but merely makes it clear that he is not denied the rights of other

46. ULPA § 9(1)(a) (1916).

47. *Id.* at § 9(1)(b).

48. *Id.* at § 9(1)(c-g). These other specifically prohibited acts include: (i) confessing a judgment, (ii) possessing or assigning partnership property for other than a partnership purpose, (iii) admitting a new general partner, (iv) admitting a new limited partner in absence of authority from the certificate, (v) continuing the business after death, retirement, or insanity of a general partner in absence of authority from the certificate. *Id.* § 9(1)(c)-9(i)(g).

49. *Id.* § 12(2).

limited partners merely because he is also a general partner.

Of course, where the individual in the limited partnership is both a limited and general partner, the third persons can hold such individual fully liable.⁵⁰ The fact that he or she is also a limited partner has no effect on limiting liability to third parties. However, this provision insures that, to the extent he or she is also a limited partner, the treatment with respect to this limited partner vis-a-vis the other limited partners will be unaffected, merely because he is also a general partner as to third parties.

The last section of article 4, section 405 is new and is intended to clarify the question of voting rights of limited partners, pointing out that limited partners have no right to vote as a separate class unless the agreement gives them such right. Thus, where voting rights are given, they vote with the general partners on a per capita basis or any other basis set forth in the partnership agreement.

ARTICLE 9—FOREIGN LIMITED PARTNERSHIPS

One of the great weaknesses of the ULPA (1916) is its failure to deal with the limited partnership engaged in multistate operations.⁵¹ It has been only recently that attention has been focused on this area which presents many problems.⁵²

The ULPA (1916) has no provision for the recognition of a limited partnership by one state where the certificate was filed in another state. Very few states have enacted procedures for the recognition of foreign limited partnerships.⁵³ It has been suggested that the most formidable obstacle is determining (1) when there has been substantial compliance with the 1916 Act in the forming of a limited partnership and (2) under what circumstances the limited partner will be deemed to have participated in "control" of the business, thus

50. *Van Arsdale v. Claxton*, 391 F. Supp. 538, 540 (D.C. Cal. 1975); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 544 P.2d 781, 785 (Wash. Ct. App. 1975). See generally Feld, *The "Control" Test for Limited Partnerships*, 82 HARV. L. REV. 1471, 1479 (1969).

51. See Kratovil and Werner, *Fixing Up the Old Jalopy—The Modern Limited Partnership Under the ULPA*, 50 ST. JOHN'S L. REV. 51, 66 (1975).

52. See Comment, *Foreign Limited Partnerships: A Proposed Amendment to the Uniform Limited Partnership Act*, 47 S. CAL. L. REV. 1174, 1182 (1974).

53. These states include California, Florida, Hawaii, Kansas, Kentucky, New Hampshire, Oregon, and Texas. See CAL. CORP. CODE § 15700 (Deering Supp. 1974); FLA. STAT. ANN. §§ 620.40-.49 (West 1977); HAWAII REV. STAT. §§ 425-71 to 77 (Supp. 1975); KAN. STAT. ANN. §§ 56-123(b) to 123(c) (Supp. 1976); KY. REV. STAT. § 362.095 (Supp. 1976); N.H. REV. STAT. ANN. §§ 305-A:1 to A:8 (1966); OR. REV. STAT. §§ 69.440, .450 (1971); 1977 Tex. Sess. Law Serv., ch. 408, § 32, at 1107-08 (Vernon).

incurring general liability.⁵⁴

Some courts have recognized foreign limited partnerships through the application of choice of law rules.⁵⁵ In such cases, the court looks to the law of the state where the limited partnership was found. If validly constituted there, the court then accords it recognition. However, it is just as likely that a court will hold that failure to file in the forum state will render it a general partnership, even though its state of inception, where a filing took place, will consider it to be a limited partnership. Hence, multiple filing has been the only procedure which will assure limited partnership status in all jurisdictions where business is done.

The ULPA (1976) amply deals with this problem in article 9 on Foreign Limited Partnerships which has no counterpart in the ULPA (1916). Examining the provisions of the new article reveals significant parallels with general corporation law. While corporate statutes vary in detail, they do contain provisions on the admission of foreign corporations. These parallels may become significant in the interpretation and application of the new ULPA provisions. The Model Business Corporation Act⁵⁶ reflects the mainstream of practice in this area.

Section 901 of the revised ULPA states that a foreign limited partnership is governed by the laws of the state where it is organized. Of course, this is always subject to the constitution and public policy of the state where the foreign limited partnership seeks to operate. This section, however, makes a significant point in stating that a foreign limited partnership may not be denied registration merely because differences exist between the laws of the state of formation and the laws of the state where registration is being sought. Most state corporation laws contain a similar provision with respect to the qualification of a foreign business corporation to do business in the state. The Model Business Corporation Act, in section 106, provides that:

54. See Comment, *Foreign Limited Partnerships: A Proposed Amendment to the Uniform Limited Partnership Act*, 47 S. CAL. L. REV. 1174, 1187 (1974).

55. See, e.g., *Cheyenne Oil Corp. v. Oil & Gas Ventures, Inc.*, 204 A.2d 743, 746 (Del. 1964) (New Jersey limited partnership permitted to sue in Delaware with court stating that the loss of limited liability is the only sanction under the Uniform Limited Partnership Act for failure to file); *Gilman Paint & Varnish Co. v. Legum*, 80 A.2d 906, 907-08 (Md. 1951) (whether partner was limited or general decided according to where partnership agreement was made and not where partnership was doing business); *King v. Sarria*, 69 N.Y. 24, 30-31 (1877) (law of state where partnership agreement was made controlled question of whether partner was limited or general).

56. AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT (2d ed. 1971).

A foreign corporation shall not be denied a certificate of authority by reason of the fact that the laws of the state or country under which such corporation is organized governing its organization and internal affairs differ from the laws of this State, and nothing in this Act contained shall be construed to authorize this State to regulate the organization or the internal affairs of such corporation.⁵⁷

Section 902 of the revised ULPA prescribes a detailed procedure for registration as a foreign limited partnership. Application for registration is submitted in duplicate, signed and sworn to by a general partner, and sets forth certain items.

Florida partnership law, which contains a similar provision for foreign limited partnerships, requires the foreign limited partnership to file a duly authenticated copy of its certificate with the Department of State.⁵⁸ The certificate must contain fourteen separate items.⁵⁹ If any of the enumerated items are not included in the certificate, they must be contained in an accompanying affidavit which also names the applicant's principal place of business in Florida.⁶⁰

The parallel provision in the Model Business Corporation Act is found in section 110, Application for Certificate of Authority. The type of information required for a corporation is somewhat similar to the requirements of the revised ULPA.

Under section 903, if the Secretary of State finds that an application for registration conforms to law and all requisite fees have been paid, he shall endorse on the application the month, day and year of the filing. One of the two duplicate originals shall be filed in the Secretary's office, whereupon he shall issue a certificate of registration to transact business in the state. Thereafter, the certificate of registration and the other duplicate original will be returned to the person who filed the application or his designated representative.

A foreign limited partnership is entitled to register with the Secretary of State under any name that includes the words "limited partnership" and that could be registered by a domestic limited partnership. A similar provision is contained in the Florida statute⁶¹

57. *Id.* at § 106.

58. FLA. STAT. ANN. § 620.41(1) (West 1977).

59. *Id.* § 620.42(1).

60. *Id.* § 620.42(2).

61. *Id.* § 620.43 provides:

Upon the filing of such copy the Department of State shall, if the objects of the limited partnership are such as are not prohibited by the laws of the state, issue a permit allowing such foreign limited partnership to transact business in this state and

as well as in the corporate statutes. The Model Business Corporation Act provides that:

Upon the issuance of a certificate of authority by the Secretary of State, the corporation shall be authorized to transact business in this State for those purposes set forth in its application, subject, however, to the right of this State to suspend or to revoke such authority as provided in this Act.⁶²

Section 904 makes it clear that the name under which the partnership is registered in a particular state need not be the same name under which it is registered in the state of its organization. The Florida statute has no separate provision regarding name but would seem to require the registration of a foreign limited partnership under the same name as contained in its certificate. Section 620.42(1)(a) of the Florida statute states that the certificate must reflect the name of the limited partnership, which name must comply with section 620.05 of the statute. That section governs the name of a limited partnership generally. Hence, in Florida, one cannot register a foreign limited partnership in other than its original name, as reflected in its certificate. Further, it cannot use a name which would not be available to a domestic limited partnership.

Similarly, section 108 of the Model Business Corporation Act has a detailed provision governing the name of a foreign corporation seeking authority to transact business within the state.

Section 905 of the revised ULPA provides that where the application contains any false information or where the arrangements or facts have changed since the registration, the foreign limited partnership shall promptly file a corrected certificate in the office of the Secretary of State, signed and sworn to by a general partner. The requirement that any false information filed should be corrected reiterates what would obviously be required under general principles of law to prevent liability on the part of those responsible for the filing. Further, the requirement that any amendments to the original certificate be filed, merely restates the requirements of general principles of law. The Florida statute contains a provision⁶³ which requires the filing within sixty days after any amendment to the limited partnership certificate.

such partnership shall thereupon be empowered to exercise all and be limited to the same rights, powers, and privileges as like partnerships organized under the laws of this state.

62. AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT (2d ed. 1971).

63. FLA. STAT. ANN. § 620.45 (West 1977).

Several provisions in the Model Business Corporation Act deal with amendments to the charter of the foreign corporation or changes in its operation. Section 109 covers the change of name by a foreign corporation. Section 114 applies whenever the foreign corporation changes its registered office or its registered agent within the state. Under section 116, whenever the foreign corporation amends its articles of incorporation, it shall file a duly authenticated copy of the amendment with the office of the Secretary of State within thirty days after such amendment becomes effective.

Section 906 of the revised ULPA allows a foreign limited partnership to cancel its registration at any time by filing a certificate to that effect with the Secretary of State. This statement must be signed and sworn to by a general partner. The provision also states that though a cancellation certificate has been filed, the Secretary of State is still authorized to accept service of process on the foreign limited partnership when the cause of action has arisen out of transactions of business in the state by the limited partnership prior to the cancellation. The revised Act, however, makes no provision for the cancellation of the permit or registration by the Secretary of State.

It is interesting to note that the Florida statute makes no provision for the voluntary withdrawal and cancellation of the permit.⁶⁴ Obviously, a foreign limited partnership should be permitted to withdraw from the state by surrendering its permit. Such withdrawal cannot affect causes of action which arose out of transactions of business by the foreign limited partnership in the state prior to such withdrawal or cancellation of permit.

A registered foreign business corporation can effect a withdrawal from a state by procuring a certificate of withdrawal. This is obtained by filing an application for withdrawal with the Secretary of State.⁶⁵

Section 907 of the revised Act covers the transaction of business by a foreign limited partnership which has not registered with the

64. *Id.* § 620.46 (West 1977) empowers the Department of State to revoke a permit of any foreign limited partnership which fails to file any report or pay any tax required. Even this provision does not specifically empower the Department of State to cancel the permit where, for example, the foreign limited partnership is operating beyond the limits of its certificate. It is submitted, however, that the state has the inherent power to cancel in such event, even absent specific statutory authority so to do.

65. AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT § 119 (2d ed. 1971); see PA. STAT. ANN. tit. 15, § 2015 (Purdon 1967) (procedure is "surrender of certificate of authority" rather than "filing a certificate of withdrawal").

state. It provides that: "A foreign limited partnership transacting business in this State [without registration] may not maintain any action, suit, or proceeding in any court of this State until it has registered."⁶⁶ The Florida statute contains a similar provision as do the corporate statutes.⁶⁷

Failure to register does not affect the validity of any contracts or acts of the foreign limited partnership and does not prevent the unregistered limited partnership from defending any action, suit or proceeding in the courts of the state.⁶⁸ The Florida statute contains a similar provision governing the validity of the contracts⁶⁹ but is silent on the issue of defending any action in the state by an unregistered foreign limited partnership. It could be inferred from the first part of the section that if the failure to register does not affect the validity of the contract, the foreign limited partnership should be entitled to defend.

A parallel provision in the corporate field is found in section 124 of the Model Business Corporation Act. The second paragraph of that section states:

The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action, suit or proceeding in any court of this State.⁷⁰

To eliminate any question about the effect on the liability of the limited partner's failure to register, subsection (c) specifically prevents the limited partner from becoming liable as a general partner merely by reason of the partnership transacting business in the state without registration. This provision is contrary to the treatment accorded limited partners by Florida in the case of the unregistered foreign limited partnership. Section 620.48 of the Florida statute states:

The members of any foreign limited partnership, whether general or special partners, who shall violate the provisions of this part prescribing the terms and conditions upon which foreign limited partner-

66. ULPA § 907(a) (1976).

67. Compare FLA. STAT. ANN. § 620.47 (West 1977) with AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT § 124 (2d ed. 1971).

68. ULPA § 907(b) (1976).

69. FLA. STAT. ANN. § 620.47 (West 1977).

70. AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT § 124 (2d ed. 1971).

ships for profit may transact business or acquire, hold, or dispose of property in this state shall be held liable for the debts of the limited partnership as general partners.⁷¹

Thus, the revised Act does not convert the liability of a limited partner into that of a general partner solely on the basis of lack of registration.

Many states today have enacted general long-arm statutes covering services of process on nonresidents in certain situations. These provisions are applied to foreign corporations or partnerships doing business within the state without having obtained proper authorization to do so. Section 907(d) of the revised Act provides: "A foreign limited partnership, by transacting business in this State without registration, appoints the Secretary of State as its agent for service of process with respect to [claims for relief and causes of action] arising out of the transaction of business in this State."⁷² The parallel provision in the corporate field likewise authorizes service of process on the Secretary of State.⁷³

Finally, section 908, a one-sentence section, provides that the appropriate official may bring an action to enjoin a foreign limited partnership from transacting business in the state in violation of article 9 of the revised Act. In the Florida statute on foreign limited partnerships, no provision exists which is comparable to section 908. It appears that a state should have the inherent right to enjoin such activity where prohibited by its own statutes in the absence of registration. Section 908 makes clear that such activity in violation of the statute can be restrained.

71. FLA. STAT. ANN. § 620.48 (West 1977).

72. The statutory provision in Florida is as follows:

Service of process may be had on any general partner found in Florida and shall be valid as if served on each individual member of the partnership. In the event no general partner can be found in Florida, service of process may be effected by service upon the Department of State as agent of said limited partnership as provided for in § 48.181.

Id. § 620.49. Section 48.181 of the Florida Statute is a general provision covering service of process on nonresidents engaging in business in the state. This provision covers foreign individuals, partnerships and corporations. It is a typical long-arm statute now in effect in many states. See CAL. CORP. CODE § 15700 (Deering Supp. 1974); DEL. CODE ANN. tit. 6 § 1702 (Supp. 1976).

73. AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT § 115 (2d ed. 1971). For an example, examine the Texas long-arm statute. See TEX. REV. CIV. STAT. ANN. art. 2031b (Vernon 1964).

CONCLUSION

The examination of articles 3, 4 and 9 of the Uniform Limited Partnership Act (1976) indicates that they represent an important refinement and improvement over the original act. The division of the sections into articles, alone, is an improvement. But substantively, the revised Act clarifies many of the provisions of the original act and removes areas of doubt produced by that earlier effort.