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**THE FINANCIAL PROVISIONS OF THE REVISED
UNIFORM LIMITED PARTNERSHIP ACT:
ARTICLES 5 AND 6**

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Article 5 makes some important changes from the prior uniform law. The contribution of services and promises to contribute cash, property or services are now explicitly permitted as contributions. Those who fail to perform promised services are required, in the absence of an agreement to the contrary, to pay the value of the services stated in the certificate of limited partnership. In addition, a number of changes from the prior uniform law are made in article 6, which concerns distributions from and the withdrawal of partners from the partnership.

—Brockenbrough Lamb, Jr.

The financial provisions of the revised Uniform Limited Partnership Act are contained in articles five and six. An analysis of the changes of the 1916 Uniform Limited Partnership Act (ULPA 1916) and possible consequences will be helpful in understanding the content of the revised Act.

Section 501 of the revised ULPA changes the rule contained in section 4 ULPA (1916) which permitted contributions of the limited partner to be “cash or other property, but not services.”¹ The new section 501 permits “cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to

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1. UNIFORM LIMITED PARTNERSHIP ACT, reprinted in 6 UNIFORM LAWS ANNOTATED 516 (1969) [hereinafter cited as ULPA (1916)]. In *Silvola v. Rowlett*, 272 P.2d 287 (Colo. 1954), decided under a statute similar to ULPA § 4 (1916), the Colorado Supreme Court held that the requirement of the comparable statute was limited to contributions made by the limited partner at the time of the partnership's formation. *Id.* at 290. The performance of services by the limited partner who had contributed cash at the time the partnership was formed did not alone violate the limitation of not contributing services nor did it charge the limited partner with the liability of a general partner for partnership debts. *Id.* at 290.

perform services."² The comment to this section recognizes that contribution of services expands the law in this area.

The services which are now a permissible form of contribution may be either services rendered or future services.³ This expansion seems logical, but there are several relevant points to consider. A problem may arise if past services are performed without any expectation of payment, or if the payment due for the services is the obligation of an insolvent entity or individual. In those cases, such services do not appear to be sufficient consideration to support a contract⁴ and a serious question is presented as to whether they are a sufficient "contribution" to create a limited partnership. Pursuant to section 19 of the Model Business Corporations Act (MBCA), however, "services actually performed for the corporation" constitute valid consideration for issuance of shares of stock.⁵ This type of contribution is distinguishable from promissory notes or future services which do not amount to payment for the issuance of shares under the MBCA.⁶ In contrast, section 501 allows both promissory notes and future services to constitute valid contributions.⁷

Certainly there is no reason why the MBCA requirement should govern the law of limited partnership, but the similarities between limited partnerships and corporations make the comparison between the two valuable.⁸ The MBCA approach may be fairly criticized as unduly conservative and restrictive on the flexibility of business arrangements. While the expansion in section 501 is desirable because of its flexibility, the inconsistency still should be noted.

2. UNIFORM LIMITED PARTNERSHIP ACT, reprinted in 6 UNIFORM LAWS ANNOTATED (Supp. 1977). [hereinafter cited as ULPA (1976)].

3. *Id.* Section 501 does not use the phrase "future services" though the phrase "or other obligation . . . to perform services," obviously encompasses future services. *Id.*

4. *Feinberg v. Pfeiffer Co.*, 322 S.W.2d 163, 167 (Mo. Ct. App. 1959); *Perreault v. Hall*, 49 A.2d 812, 813 (N.H. 1946); 1 S. WILLISTON, CONTRACTS § 142, at 622-23 (3d ed. 1957).

5. AMERICAN BAR FOUNDATION, MODEL BUSINESS CORPORATION ACT § 19, at 435 (2d ed. 1970).

6. *Id.* Compare *Bryan v. Northwest Beverages, Inc.*, 285 N.W. 689 (N.D. 1939) (promotional services valid consideration) and *Hackney v. York*, 18 S.W.2d 923 (Tex. Civ. App.—Beaumont 1929, no writ) (legal services valid consideration) with *Rice & Hutchins, Inc. v. Triplex Shoe Co.*, 147 A. 317 (Del. Ch. 1929), (future services not payment for shares) *aff'd*, 152 A. 342 (Del. 1930) and *Cahall v. Lofland*, 114 A.224 (Del. Ch. 1921) (promissory note not payment for shares).

7. ULPA § 501 (1976).

8. See *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965); *Ruzicka v. Rager*, 111 N.E.2d 878, 881 (N.Y. 1953). See generally *Riviera Congress Assoc. v. Yassky*, 277 N.Y.S.2d 386, 223 N.E.2d 876 (1966).

Because section 501 permits a promissory note or “other obligation to contribute cash or property”⁹ to be a form of contribution, a question arises whether this will be construed to mean that an obligation to contribute property is not itself a form of property. If this is so, section 501 could be greatly improved from the standpoint of clarity in drafting, for it leaves open the possibility that an obligation to contribute property twenty years in the future is a permissible form of contribution by a limited partner. While section 501, on balance, is probably a desirable expansion of the prior uniform law, the lack of clarity and the expansive definition in the section itself compared to the more limited explanation of its effect in the comment creates unnecessary confusion.

Subject to the partnership agreement, section 502(a) obligates a partner to fulfill any promise to contribute cash, property, or services to the limited partnership.¹⁰ These obligations continue even though the partner is unable to perform for any reason, including death or disability.¹¹ Under the normal rules of contract, the hiring of a substitute is not permitted because personal services are considered unique,¹² but section 502(a) appears to change this rule by subjecting the estate of the deceased limited partner to liability for damages.¹³

Section 502(a) further provides that if the required contribution of property or services is not made by a partner, he may be obligated to pay cash at the option of the limited partnership.¹⁴ The cash payment is to be equal to the unpaid portion of the partner’s contribution stated in the certificate of limited partnership.¹⁵ This provision raises the question of what options the partnership actually has

9. ULPA § 501 (1976).

10. *Id.* § 502(a).

11. *Id.*

12. See *Walter E. Heller & Co. v. American Flyers Airline Corp.*, 459 F.2d 896, 900 (2d Cir. 1972); *Mullen v. Wafer*, 480 S.W.2d 332, 334 (Ark. 1972). When from the very nature of the contract itself, it is apparent that the parties contracted on the basis of the continued existence of the person or thing to which the contract relates, the “subsequent perishing of the person or thing will excuse the performance.” *J.S. Potts Drug Co. v. Benedict*, 104 P.432, 437 (Cal. 1909); *cf. Gulf & S.I.R. Co. v. Horn*, 100 So. 381, 382 (Miss. 1924)(event not reasonably contemplated by the parties at the time of the contract).

13. The hypothetical case that comes to mind is that of an employment contract. Suppose that a limited partner agrees to contribute his services to the limited partnership for a certain period of time. If he dies before the end of the term, the contract is normally considered terminated. Under § 502(a) the deceased’s estate is liable to the partnership for damages.

14. ULPA § 502(a)(1976).

15. *Id.*

available.¹⁶ It does not seem that specific enforcement of the obligation is an option for that seems at odds with the analogous situation in partnership law in which a partner may dissolve a partnership for an agreed term, though he becomes liable in money damages for doing so.¹⁷ The analogy certainly would argue against specific enforcement of a contract for personal services,¹⁸ but, in the case of an obligation to contribute unique real property, specific enforcement would be available,¹⁹ and the limited partnership should not be made to accept the unsatisfactory option of cash value.

The same question arises when a limited partner who has agreed to contribute his services dies. Can the partnership choose specific enforcement or is the option merely a choice between terminating the obligation or obtaining the cash value? Termination may be fair if the deceased limited partner has received no profits or other benefit from the limited partnership; otherwise, it is not. Where the limited partner has received substantial profits from the partnership, it seems that the partnership could opt for equivalent services rather than cash value. Section 502(a) does not answer these questions, and perhaps it is unfair to demand that it should. Nonetheless, they are problems that may arise when it is enacted into law.

Section 502(b) provides that subject to contrary agreement "the obligation of a partner to make a contribution or return money, or other property paid or distributed in violation of this Act may be compromised only by consent of all the partners."²⁰ If such an obligation is compromised, however, a creditor of the limited partnership may still enforce the original obligation if he extended credit after the filing of the certificate of limited partnership or amendment which reflects the obligation.²¹ Section 502(b), which is derived from the prior law,²² further specifies which liabilities may be

16. *See id.*

17. *See* UNIFORM PARTNERSHIP ACT § 38, reprinted in 6 UNIFORM LAWS ANNOTATED 456-57 (1969) [hereinafter cited as UPA (1914)]. This rule is carried over into the Uniform Limited Partnership Act § 602 (1976).

18. *KFOX, Inc. v. United States*, 510 F.2d 1365, 1375 (Ct. Cl. 1975); *Millcarek v. Miami Herald Publishing Co.*, 388 F. Supp. 1002, 1005 (S.D. Fla. 1975); *Nassau Sports v. Peters*, 352 F. Supp. 870, 875 (E.D.N.Y. 1972).

19. *Suchan v. Rutherford*, 410 P.2d 434, 438 (Idaho 1966); *Jesseman v. Aurelio*, 214 A.2d 743, 746 (N.H. 1965); *Gulf Oil Corp. v. Rybicki*, 149 A.2d 877, 879 (N.H. 1959); *see Monclava v. Arnett*, 145 N.Y.S. 2d 759, 760 (Sup. Ct. 1955), *aff'd on other grounds* 143 N.E.2d 375, 376, 163 N.Y.S.2d 652, 654 (N.Y. 1957)(specific performance of contract to enter partnership because contribution unique).

20. ULPA § 502(b)(1976).

21. *Id.*

22. *See* ULPA § 17(3)(1916).

compromised with the partners' consent.²³

Section 503 provides the rules for sharing profits and losses of a limited partnership.²⁴ In general, profits and losses are to be allocated among the partners according to the partnership agreement.²⁵ Almost every limited partnership agreement should have a provision to allocate profits and losses, but where such a provision is lacking, section 503 provides that "profits and losses shall be allocated on the basis of the value . . . of the contributions made by each partner."²⁶ This section provides a sensible manner of sharing profits and losses in the absence of agreement and is a helpful change in the law. If this specific provision had not been included, the Uniform Partnership Act (UPA) would have governed, resulting in an equal sharing of profits and losses even though contributions to the partnership may have been quite unequal.²⁷ Since a careful attorney filing the requisite certificate of limited partnership²⁸ would always specify the manner of sharing profits and losses, section 503 will not have a substantial practical impact.

Article 6 concerns "withdrawals" and "distributions."²⁹ Neither of these terms, however, are defined within the article itself. Since many of the sections within article 6 are new,³⁰ some difficulty in interpretation may result. A related definition in the revised Act, which may shed some light on the intended meaning of the term withdrawal, involves the status of a general partner in the event of withdrawal.³¹ In addition, as the comment to section 402 indicates the revised Act expands the prior uniform law by providing additional instances which will be treated as withdrawals, thus clarifying the meaning of the term.³²

23. Compare ULPA § 502(b)(1976) with ULPA § 17(3) (1916). It could be argued that the revised section extends the liabilities covered in ULPA § 17(1) (1916) to include "money returned, or other property paid or distributed in violation of this Act." ULPA § 502(b) (1976). The comment, however, leads one to believe there may not be an extension because it states that § 502(b) "is derived" from § 17(3) of the prior law. ULPA § 502 (1976), Comment.

24. ULPA § 503 (1976).

25. *Id.*

26. *Id.* The value of the contributions made by each partner is that stated in the certificate of limited partnership taking into account any amounts received by the partner as returns. *Id.*

27. ULPA § 1105 (1976); see UPA § 18(a)(1914).

28. ULPA § 2 (1916).

29. ULPA art. 6 (1976).

30. See *Id.* §§ 601, 602, 604, 606, Comments.

31. *Id.* § 101(3)(1976). This section refers to withdrawal as "an event that causes a person to cease to be a general partner as provided in Section 402." *Id.*

32. ULPA § 402, Comment (1976). Compare ULPA § 402 (1976) (ten circumstances

Section 601 provides for very limited interim distributions to a *partner* prior to the withdrawal of that partner or dissolution.³³ It is probable that the section applies to both limited and general partners since the Act defines a "partner" as a limited or general partner³⁴ and section 602 concerns the withdrawal of a general partner from the limited partnership.³⁵ Pursuant to this section, a general partner may withdraw from the partnership by providing the other partners with notice of withdrawal.³⁶ This may be accomplished at any time unless the withdrawal violates the limited partnership agreement,³⁷ in which case the partnership can recover any damages for the breach of the agreement and apply that amount to offset any distributions owed to the breaching partner.³⁸ The comment following section 602 alludes to the fact that although the section is new, its underpinnings are found in section 38 of the UPA.³⁹ If section 602 is compared with section 38, however, it is apparent that the two are similar only in one respect. The similarity concerns recovery of damages by the partnership from a wrongfully withdrawing partner.⁴⁰ Perhaps the authors of section 602 were trying to bring the ULPA into parity with the more orderly withdrawal procedures found in the UPA.⁴¹ Because of the lack of an explanatory comment for section 602 this is not clear, but the inclusion of the section is a definite improvement over the prior act which did not contain such a provision.

As can be seen from the above discussion passing references to the UPA in article 6 of the revised ULPA without explanation will create unnecessary confusion because article 6 fails to follow the terminology of the UPA. The UPA defines dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."⁴² The comment to section 29 states that dissolution

which will precipitate withdrawal) with ULPA § 20 (1916) (dissolution due to death, insanity, or retirement).

33. ULPA § 601 (1976).

34. *Id.* § 101(8).

35. *Id.* § 602.

36. *Id.* § 602.

37. *Id.* § 602.

38. *Id.* UPA § 38(2) (1914) also provides the right to recover damages from the breaching partner.

39. ULPA § 602, Comment (1976).

40. Compare ULPA § 602 (1976) with UPA § 38(2) (1914).

41. UPA §§ 29-43 (1914) (dissolution and winding up). See generally Bromberg, *Partnership Dissolution—Causes, Consequences, and Cures*, 43 TEXAS L. REV. 631 (1965).

42. UPA § 29 (1914).

is the cessation of the carrying on of the business by the partners together; termination occurs when all the partnership business is wound up; and winding up is the process of settling partnership business between dissolution and termination.⁴³ Article 6 of the revised ULPA does not specifically change any of these rules and for the most part they continue to apply.⁴⁴ The major difficulty is that the revised ULPA still relies too heavily on the UPA for general rules of dissolution. Additionally one cannot really understand the full impact of article 6 without referring to article 8. For example, the last sentence of section 603 permits a limited partner to withdraw on six months' notice,⁴⁵ but the true effect of withdrawal is not apparent unless one also reads article 8 of the ULPA.⁴⁶ Upon such reading, it appears that while the limited partner has the right to withdraw, the limited partnership itself would not be dissolved,⁴⁷ but the withdrawal of a general partner will cause dissolution, unless otherwise agreed.⁴⁸ Section 603⁴⁹ provides that limited partners may withdraw only at the times "specified in the certificate of limited partnership and in accordance with the partnership agreement."⁵⁰ If no time is specified, written notice must be given to each general partner at least six months prior to withdrawal.⁵¹

In absence of an agreement among the partners, section 604 provides that any partner withdrawing from the partnership is entitled to receive the "fair value of his interest in the limited partnership."⁵² This fair value is determined as of the date of withdrawal and is based on the withdrawing partner's right to share in the distributions of the partnership.⁵³

Under the prior uniform law a withdrawing partner had no right to demand any distribution in any form other than cash.⁵⁴ The re-

43. *Id.* § 29, Comment.

44. ULPA § 1105 (1976). When a term is not defined in the ULPA the definitions of the UPA will apply to the extent that inconsistency will not result. UPA § 6(2) (1914); Bromberg, *Partnership Dissolution—Causes, Consequences, and Cures*, 43 TEXAS L. REV. 631, 633 (1965).

45. ULPA § 603 (1976).

46. *Id.* § 801.

47. *Id.* § 801(3).

48. *Id.* § 801(3).

49. *Id.* § 603.

50. *Id.* § 603.

51. *Id.* This section is derived from ULPA § 16 (1916).

52. ULPA § 604 (1976).

53. *Id.* It should be noted that the distributions described in §§ 601 and 604 will be paid only after payment is made to other creditors including partners who are creditors. *Id.* § 804 (1976).

54. ULPA § 16(3)(1916).

vised Act retains this basic idea and attempts to protect a limited partner against forced receipt of an in kind distribution of more than his share of particular assets. The second sentence of section 605 is a new addition which provides that a partner may not be compelled to accept an in kind distribution of any asset in excess of "the percentage in which he shares in distributions from the limited partnership."⁵⁵ This section would only be applied where these circumstances are not covered in the partnership agreement.⁵⁶

Under the revised Act, when a partner becomes entitled to receive a distribution from the partnership, the partner has all the rights and remedies available to a creditor of the partnership.⁵⁷ This provision, section 606, is new and according to the comment, is intended to show clearly that the partner's right to receive a distribution "is not subject to the equity risks of the enterprise" at least as far as the other partners are concerned.⁵⁸ Section 606 dealing with the partner's right of distribution is an improvement over section 16(4)(a) of the prior uniform law⁵⁹ which granted a partner who was unsuccessful in demanding the return of his contribution the right to seek dissolution of the partnership.⁶⁰ This harsh remedy is no longer necessary for the partner now has the more appropriate remedy of suing for judgment as an ordinary creditor.

In construing articles 5 and 6, it is important to remember that the revised ULPA expressly incorporates the UPA "in any case not provided for in this Act."⁶¹ This provision, section 1105 is no change from section 6(2) of the UPA, but it is certainly desirable for this to be stated in the revised ULPA itself.

To illustrate the interrelationships between articles of the revised ULPA, consider the following. Section 801 of the Act provides that a limited partnership is dissolved and its affairs shall be wound up when certain events occur.⁶² One of those events is the withdrawal of a general partner.⁶³ Section 402, entitled "Events of Withdrawal" states that a person ceases to be a general partner of a limited partnership upon the happening of certain events, one of which is

55. ULPA § 605 (1976); see § 605, Comment.

56. *Id.* § 605.

57. *Id.* § 606.

58. *Id.* § 606, Comment.

59. ULPA § 16(4)(a)(1916).

60. *Id.*

61. ULPA § 1105 (1976).

62. *Id.* § 801.

63. *Id.* § 801.

the withdrawal of the general partner from the "limited partnership as provided in Section 602."⁶⁴ Thus, in order to reach the conclusion that a general partner can dissolve a partnership by his express will, it is necessary to read three sections, 402, 602, and 801. Note that section 801(3) does not necessarily mandate dissolution after withdrawal of a general partner.⁶⁵ There are at least two methods of avoiding that result. First, if "at the time there is at least one other general partner and the certificate of limited partnership permits the business to be carried on by the remaining general partner, and that partner does so,"⁶⁶ dissolution of the partnership does not occur. Second, "the limited partnership is not dissolved and is not required to be wound up by reason of any event of withdrawal, if within 90 days after the withdrawal, all partners agree in writing to continue the business of the limited partnership"⁶⁷ Regardless of whether the partnership is dissolved or not, the withdrawing partner may have to pay damages.⁶⁸

The revisions accomplished by articles 5 and 6 follow the general tenor of the special committee's intent in revising the ULPA. The revised financial provisions increase the flexibility of a limited partnership. The articles also clarify some areas which were not addressed in the 1916 version of the act. A period of adjustment to the new Act however will be required. As currently drafted, some areas will require significant judicial construction to clarify their precise meaning. The revision, however, is a significant improvement of the prior Uniform Act and will facilitate a greater understanding of the limited partnership vehicle.

64. *Id.* § 402(1).

65. *Id.* § 801(3).

66. *Id.* § 801(3).

67. *Id.* § 801(3).

68. *Id.* § 602.