DRAFT

FOR DISCUSSION ONLY

REVISION OF UNIFORM LIMITED PARTNERSHIP ACT (1976) WITH 1985 AMENDMENTS

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

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REVISION OF UNIFORM LIMITED PARTNERSHIP ACT (1976) WITH 1985 AMENDMENTS

With Prefatory Note and Reporter's Notes

The ideas and conclusions set forth in this draft, including the proposed statutory language and any comments or reporter's notes, have not been passed upon by the National Conference of Commissioners on Uniform State Laws or the Drafting Committee. They do not necessarily reflect the views of the Conference and its Commissioners and the Drafting Committee and its Members and Reporters. Proposed statutory language may not be used to ascertain the intent or meaning of any promulgated final statutory proposal.

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Table of Contents

Prefatory Note

Re-RULPA's Overall Approach

Re-RULPA is a "stand alone" act, "de-linked" from the general partnership act. To be able to stand alone, Re-RULPA incorporates many provisions from RUPA and some from ULLCA. As a result, Re-RULPA is far longer and more complex than RULPA.

Re-RULPA is being drafted for a business world in which limited liability partnerships and limited liability companies can meet many of the needs formerly met by limited partnerships. Re-RULPA 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). Re-RULPA accordingly assumes that, more often than not, people utilizing the act will want:

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

Re-RULPA's rules, and particularly its default rules, have been designed to reflect these assumptions.

Noteworthy Differences Between Draft #5 and Draft #4

1. Picking an organizational structure and eliminating temporary section numbers.

At its March, 1999 meeting, the Drafting Committee directed the Reporter to develop a Draft with its own coherent structure. Accordingly, Draft #5 relocates many sections and abandons the temporary section numbers used by prior Drafts. Unlike Draft #4 (and prior Drafts), Draft #5 does not preserve RULPA's section numbers. As much as possible, however, Draft #5 continues RULPA's delineation of articles.

2. Centralizing provisions relating to constructive notice.

Following RUPA, Re-RULPA provides that certain publicly filed documents give constructive notice to the world. In prior Drafts, these constructive notice provisions were scattered throughout the act. Draft #5 centralizes these provisions in the section dealing with knowledge and notice.

3. Deleting provisions providing constructive notice of authority to transfer real property.

At its March, 1999 meeting, the Drafting Committee decided to delete provisions that had permitted the certificate of limited partnership to include statements granting or limiting the authority of a general partner to transfer real property belonging to the limited partnership. Draft #5 implements that decision.

4. Returning to ULLCA's approach for the designated office and agent for service of process.

Draft #5 reverses an earlier decision of the Drafting Committee and returns to ULLCA's approach for designating an in-state office and agent for service of process and for updating those designations.

5. Consolidating the provisions relating to liability for filing or failing to correct an inaccurate record.

At past meetings, the Drafting Committee struggled with this issue. Draft #5 consolidates the relevant provisions in one section and proposes a comprehensive approach.

6. Handling discrepancies between the information in an annual report and the information in previously filed records.

Prior Drafts did not consider this problem. Draft #5 handles the problem by providing that, as to certain important information, the annual report will officially update the public record.

7. Increasing the informational rights of the estate of a deceased partner.

Prior Drafts treated the estate of a deceased partner as a mere transferee of the decedent's transferable interest. As decided by the Drafting Committee at its March, 1999 meeting, Draft #5 increases the estate's informational rights. For the purpose of administering the decedent's estate, the personal representative/executor has the informational rights of limited partner.

8. Deleting the provision for liability of a purported general partner.

Draft #4 included a byzantine provision, adapted from RUPA, for the liability of a person purporting to be a general partner in a limited partnership and for others who acquiesced in that representation. Draft #5 deletes the provision as unnecessary.

9. Elimination of the abstruse concept of "return of contribution."

RULPA's definition of this term is difficult to decipher, and the term has become unnecessary given Re-RULPA's approach to profit and loss allocation, sharing of distributions and recapture of distributions.

10. Rationalizing the provisions connecting dissociation as a general partner, dissolution of the limited partnership, the lingering power to bind of a person dissociated as a general partner and the lingering personal liability of a person dissociated as a general partner.

Draft #5 clarifies how dissociation as a general partner and the dissolution *vel non* of the limited partnership affect a person's power to bind the limited partnership and personal liability for the obligations of the partnership.

11. Revising the article dealing with foreign limited partnerships.

Prior Drafts had left Article 9 of RULPA untouched, pending the Drafting Committee's decision on the overall structure of Re-RULPA. Draft #5 modernizes Article 9, borrowing heavily from ULLCA.

12. Providing that a general partner may bring a derivative action.

After spirited discussion at its March, 1999 meeting, the Drafting Committee decided that a general partner should have the right to bring a derivative action. Draft #5 implements that decision.

13. Revising fundamentally the provisions relating to mergers and including comprehensive provisions relating to conversions.

Draft #5 provides comprehensively for cross-entity conversions and mergers and includes sections (i) detailing the lingering power to bind and personal liability of general partners following a conversion or merger, (ii) creating a veto power for any person who, on account of owner status, will be personally liable for the obligations of the converted or surviving entity, and (iii) protecting transferees who are not partners from confiscatory conversions and mergers.

14. Providing transition provisions.

Borrowing from both RUPA and from RULPA, Draft #5 provides for the phase in of Re-RULPA.

[ARTICLE] 1

GENERAL PROVISIONS

SECTION 101. DEFINITIONS. As used in this [Act], unless the context otherwise requires:

(1) "Business" means any lawful activity, whether or not carried on for profit.

(2) "Certificate of limited partnership" means the certificate referred to in Section 201, and the certificate as amended or restated.

(3) "Contribution" means any benefit provided by a person to a limited partnership in order to become a partner or in the person's capacity as a partner.

(4) "Debtor in bankruptcy" means a person who is the subject of:

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

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

(5) “Designated office” means:

(i) with regard to a limited partnership, the office that Section 113 requires the limited partnership to maintain; and

(ii) with regard to a foreign limited partnership, its principal office.

(6) "Distribution" means a transfer of money or other property from a limited partnership to a partner in the partner's capacity as a partner or to a transferee on account of a transferable interest owned by the transferee.

(7) "Entity" means a person other than an individual.

(8) "Foreign limited partnership" means a partnership formed under the laws of any state other than this State and required by those laws to have as partners one or more general partners and one or more limited partners, and includes a foreign limited liability limited partnership.

(9) “Foreign limited liability limited partnership” means a foreign limited partnership whose general partners are protected, under a provision similar to Section 404(c), from liability for the obligations of the foreign limited partnership.

(10) "General partner" means a person who has been admitted to a limited partnership as a general partner as provided in Section 401.

(11) "Limited liability limited partnership" means a limited partnership whose certificate of limited partnership states that the limited partnership is a limited liability limited partnership.

(12) "Limited partner" means a person who has been admitted to a limited partnership as a limited partner as provided in Section 301.

(13) "Limited partnership" and "domestic limited partnership" mean an entity formed under this [Act] and include a limited liability limited partnership.

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

(15) "Partnership agreement" means any valid agreement, written, or oral, of the partners as to the affairs of a limited partnership and the conduct of its business.

(16) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental

subdivision, agency, or instrumentality, or any other legal or commercial entity.

(17) “Principal office” means the office, whether or not in this State, where the principal executive office of a domestic or foreign limited partnership is located.

(18) "Record" 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) "Required records" means the records that Section 105 requires a limited partnership to maintain.

(20) "Sign" means to identify a record, whether in writing, electronically or otherwise, by means of a signature, mark, or other symbol, with intent to authenticate the record.

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

(22) "Transfer" includes an assignment, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, and gift.

(23) "Transferable interest" means a partner's share of the profits and losses of the limited partnership and the partner's right to receive distributions.

(24) "Transferee" means a person to whom has been transferred all or part of a transferable interest, whether or not the transferor is a partner.

Reporter’s Notes

Issues for Consideration at October, 1999 Meeting: whether the definition of “business” should be revised, so that the definition better comports with common usage (see Reporter’s Notes to paragraph (1), below); whether “signing” should require some written method of authentication.

"Business" [(1)] – At its October, 1998 meeting, the Drafting Committee decided not to

confine limited partnerships to “business” activities and to permit a limited partnership to pursue any lawful purpose. The word “business” appears throughout RULPA, and at its March, 1999 meeting the Committee adopted this definition of “business” to allow the word to encompass whatever activities a limited partnership may undertake. So, for example, Section 104(b) provides that, subject to an exception not relevant here, “a limited partnership has the same powers as an individual to do all things necessary or convenient to carry on its business.” Earlier drafts had followed RUPA § 101(1), stating: “‘Business’ includes every trade, occupation, and profession.” *Compare* ULLCA § 101(3))(defining "business" to include "every trade, occupation, profession, and other lawful purpose, whether or not carried on for profit.")

The Reporter respectfully disagrees with the Committee’s decision. The term "business" connotes *economic* activity. *See* BLACK’S LAW DICTIONARY (“Employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. Enterprise in which person engaged shows willingness to invest time and capital on future outcome. That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest or for livelihood or profit.”) (citations omitted). A defined term should not contradict common usage, because a Humpty Dumpty definition makes trouble for the non-expert reader. “Definitions should not be too artificial. For example–'dog' includes a cat is asking too much of the reader; 'animal' means a dog or a cat would be better." Memorandum on Drafting of Acts of Parliament and Subordinate Legislation (1951), Department of Justice, Ottawa, Canada, quoted in Ritchie, Alice Through the Statutes, 21 McGill L.J. 685 (1975) and in In re Elbridge, 61 B.R. 484, 489 (Bankr. E.D.Mich. 1986). *See also* TVA v. Hill, 437 U.S. 153, 98 S.Ct. 2279, 2291 n. 18 (1978) (decrying a Humpty Dumpty approach to defining a term).

“Certificate” [2] – RULPA § 101(2), unchanged.

"Contribution" [(3)] – RULPA’s definition has been changed to replace a list of items with a more general term ("benefit") that encompasses those items and to avoid using the word "contribute" as part of the definition of the term "contribution." The word "benefit" comes from Section 501 (Form of contribution), which in turn is taken, per the Committee's instruction, from ULLCA § 401. Some earlier drafts used "consideration" rather than "benefit." Changes from RULPA § 201(2) are as follow:

> "Contribution" means any ~~cash, property, services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, which a partner contributes~~ benefit provided by a person to a limited partnership in order to become a partner or in ~~his~~ the person's capacity as a partner.

"Debtor in bankruptcy" [(4)] – Source: RUPA § 101(2).

“Designated office” [(5)] – Defining this term makes for easier drafting of certain provisions that relate both to foreign and domestic limited partnerships.

"Distribution" [(6)] – Derived from RUPA § 101(3). Changes from RUPA are as follows:

> "Distribution" means a transfer of money or other property from a limited partnership to a partner in the partner's capacity as a partner or to ~~the partner's~~ a transferee on account of a transferable interest owned by the transferee.

Aside from referring to the partnership as "a limited partnership," the Re-RULPA provision differs from RUPA § 101(3) in two ways. First, RUPA §101(3) refers to "the partner's transferee" rather than "a transferee." Re-RULPA's Section 101(24) defines "transferee," making inappropriate a reference to "the partner's transferee." The difference is primarily but not exclusively stylistic. Consider payments to the transferee of a "partner's transferee." Suppose that a partner transfers part of its transferable interest to a non-partner, and that person later re-transfers that interest to a third person. Are payments to that third person distributions? Under Re-RULPA, they clearly are. Under RUPA, the question appears to depend on whether RUPA §101(3) considers the third person to be "the partner's transferee."

The second substantive difference between Re-RULPA and RUPA is the definition's concluding phrase. The phrase does not appear in RUPA § 103 and was added (to Draft #2) based on a suggestion made at the Committee's July, 1997 meeting.

"Entity" [(7)] – Source: ULLCA § 101(7). "Entity" is somewhat of a misnomer, because the term encompasses legal persons that might still be thought of as aggregates, or part aggregate/part entity (i.e., UPA general partnerships).

"Event of withdrawal" [deleted; formerly RULPA § 101(3)] – This definition is no longer needed because this draft follows RUPA and uses the term "dissociation." At its July, 1997 meeting, the Committee directed the Reporter to consider providing a definition of "dissociation." After reviewing UPA, RUPA, and ULLCA, the Reporter decided that Re-RULPA should not define "dissociation." Accordingly, Draft #2 did not define the term. Draft #3 preserved Draft#2's approach and produced no objection at the October, 1998 meeting.

The Reporter's rationale is fealty to RUPA and ULLCA. UPA § 29 defines dissolution in a way that gave rise to the RUPA/ULLCA concept of dissociation: "Dissolution . . . is 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." However, neither RUPA nor ULLCA define "dissociation." Instead, those statutes list events causing "dissociation" and explain the meaning of the term through a Comment. Each Comment essentially mirrors UPA § 29. See RUPA § 601, Comment 1, first paragraph; ULLCA § 601, Comment, first sentence. In this instance, the Reporter sees no reason for Re-RULPA to deviate from the pattern established by RUPA and ULLCA.

"Foreign limited partnership" [(8)] – RULPA § 101(4), changed slightly to correct an inaccuracy. The RULPA provision defines a foreign limited partnership as “having as partners one or more general partners and one or more limited partners.” A limited partnership does not

cease being a limited partnership merely because it ceases to have at least one general and one limited partner. A dissolved limited partnership continues in existence through winding up and until termination.

"Foreign limited liability limited partnership" [(9)] – This definition is new in Draft #5 and is used both in Section 107 (Name) and Section 902 (Application for certificate of authority).

"General partner" [(10)] – RULPA § 101(5) provides: "'General partner' means a person who has been admitted to a limited partnership as a general partner in accordance with the partnership agreement and named in the certificate of limited partnership as a general partner." There are two reasons for the change. First, Re-RULPA changes the rules on how a person becomes a general partner. Second, putting those rules in the definition section would make for a very cumbersome definition.

"Limited partnership and domestic limited partnership" [(11)] – Changed from RULPA § 101(11) for the reasons stated in the Reporter's Notes to paragraph (8).

"Partner" [(14)] – RULPA § 101(8), without change.

"Partnership agreement" [(15)] – RULPA § 101(9), without change. Earlier drafts proposed adding "implied from conduct." At its October, 1998 meeting, the Drafting Committee rejected the proposed addition.

"Partnership interest" [deleted; formerly RULPA § (10)] – In a modified form this concept now appears in the definition of "Transferable interest."

"Person" [(16)] – Source: ULLCA § 101(14). ULLCA § 101(14) adds "limited liability company" to the list contained in RUPA § 110(10). RULPA § 101(11) listed few examples: "'Person' means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation."

"Principal office" [(17)] – This term appears in several places, and previous Drafts inadvertently omitted the definition. The definition comes, essentially verbatim, from ULLCA § 101(15).

"Record" [(18)] – Source: ULLCA § 101(16). ULLCA moved into, or at least into contemplation of, the brave new world in which documentation no longer requires documents. Beginning with Draft #2, Re-RULPA has followed suit. See Section 206(a). ULLCA § 101(16) portends more than it commands. ULLCA § 206(a) requires the [Secretary of State] to determine what media are permissible for filing, and in general "[o]ther law must be consulted to determine admissibility in evidence, the applicability of statute of frauds, and other questions regarding the use of records." ULLCA § 101, Comment.

"Sign" [(20)] – Derived from ULLCA § 101(17). The phrase "whether in writing,

electronically or otherwise" has been added to make clear that signing may occur electronically. This definition will be re-visited in light of the continuing work of the Drafting Committee for the Uniform Electronic Transactions Act ("UETA"). With regard to each instance in which Re-RULPA requires someone to "sign" something, the question is whether Re-RULPA means to require some written method of authentication

"State" [(21)] – Source: RUPA § 101(12). Replicated in ULLCA § 101(18).

"Transfer" [(22)] – Source: ULLCA § 101(20), which states more examples than the comparable RUPA provision, RUPA § 101(14). Draft #3 used the RUPA provision but added a reference to "transfer by operation of law." This reference prompted concerns about unintended effects. The key reason for referring to operation of law is to buttress Article 7's limitations on transferability. Draft #4 deleted the reference to operation of law.

"Transferable interest" [(23)] – Source: RUPA § 502. This definition appears here, rather than later in the statute (as in RUPA), because the term is used throughout the statute.

"Transferee" [(24)] – The last phrase ("whether or not the transferor is a partner" was added at the October, 1998 drafting meeting.

SECTION 102. KNOWLEDGE AND NOTICE.

(a) A person knows a fact if the person has actual knowledge of it.

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

(1) knows of it;

(2) has received a notification of it;

(3) has reason to know it exists from all of the facts known to the person at the time in question; or

(4) has notice as provided in subsections (c) and (d).

(c) Subject to subsection (d), the fact that a certificate of limited partnership is on file in the office of the [Secretary of State] is notice that the partnership is a limited partnership

and the persons designated in the certificate as general partners are general partners.

(d) A person has notice of:

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

(2) a limited partnership's dissolution, 90 days after the effective date of an amendment to the certificate of limited partnership stating that the limited partnership is dissolved;

(3) a limited partnership's termination, 90 days after the effective date of a statement of termination;

(4) a limited partnership's conversion under Article 11, 90 days after the effective date of the articles of conversion;

(5) a merger under Article 11, 90 days after the effective date of the articles of merger.

(e) A person notifies or gives a notification to another by taking steps reasonably required to inform the other person in ordinary course, whether or not the other person learns of it.

(f) A person receives a notification when the notification:

(1) comes to the person's attention; or

(2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

(g) Except as otherwise provided in subsection (h), an entity knows, has notice, or

receives a notification of a fact for purposes of a particular transaction when the individual conducting the transaction for the entity knows, has notice, or receives a notification of the fact, or in any event when the fact would have been brought to the individual's attention if the entity had exercised reasonable diligence. An entity exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the individual conducting the transaction for the entity and there is reasonable compliance with the routines. Reasonable diligence does not require an individual acting for the entity to communicate information unless the communication is part of the individual's regular duties or the individual has reason to know of the transaction and that the transaction would be materially affected by the information.

(h) A general partner's knowledge, notice, or receipt of a notification of a fact relating to the limited partnership is effective immediately as knowledge by, notice to, or receipt of a notification by the limited partnership, except in the case of a fraud on the limited partnership committed by or with the consent of that general partner.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether new subsections (c) and (d) appropriately state and centralize the constructive notice provisions; whether subsection (c) should continue to follow RULPA § 208 and provide constructive "notice that the partnership is a limited partnership"; whether subsection (h) should expressly state that information possessed by a limited partner is not attributed to the limited partnership.

Source: RUPA § 102, except for subsections (c) and (d), which are new, subsection (g) which follows ULLCA in using "entity," and subsection (h), which confines the information attribution rule to general partners.

Subsection (c) – This subsection is new in Draft #5, and, together with subsection (d), centralizes the Act's constructive notice provisions. The first sentence is taken verbatim from RULPA § 208.

In one respect subsection (c) departs from a decision on constructive notice made by the Drafting Committee at its March, 1999 meeting. At that meeting, the Committee decided to

provide constructive notice of all information required to be included in the certificate. However, as explained in the Reporter's Notes to Section 113, Draft #5 has essentially emptied that "other required information" category. In particular, Draft #5 does not require the certificate to include a limited partnership's current in-state office and registered agent. What would be the purpose of providing constructive notice of: the name of the limited partnership, the business address of each general partner, the location of the initial in-state office and registered agent? Constructive notice serves to undercut a claim by a party "on notice." What claims would be undercut by notice of this information?

Indeed, it is even unclear why RULPA § 208 provides 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 that the provision neither changes common law agency principles nor provides "constructive notice of the company's limited liability status, without regard to whether any part of the company's name or even the fact of its existence has been disclosed"). To the extent a limited partnership has a liability shield, that shield functions because the statute establishes it – not because third parties have constructive notice of the shield.

Subsection (d) — Subsection (d) will work in conjunction with several sections to curtail the power to bind and personal liability of general partners and dissociated general partners. Following RUPA (in substance, although not in form), the constructive notice has a 90-day delay. The 90 days will run from the date of filing, unless the filed record states a later effective date. See Section 206(c).

Subsection (h) – RUPA merely refers to a "partner's knowledge," etc., and the Comment to RUPA § 102 states in part: "It is anticipated that RULPA will address the issue of whether notice to a limited partner is imputed to a limited partnership." Under this Draft, limited partner status does not cause information possessed by a limited partner to be attributed to the limited partnership. Attribution is an aspect of agency power, and in the default mode limited partners have neither the right to manage the limited partnership nor the power to bind it. Sections 302 and 304. Of course, a limited partner who acts in a different capacity viz a viz the limited partnership might have agency power in that capacity.

SECTION 103. NATURE AND DURATION OF ENTITY.

(a) A limited partnership is an entity distinct from its partners. A partner is not a proper party to a proceeding by or against a limited partnership except when:

(1) the object of the proceeding is to determine or enforce a partner's right against or liability to the limited partnership;

(2) the proceeding includes a claim that the partner is personally liable under Section 404 or 405 or on some basis not dependent on the partner's status as partner; or

(3) the partner is bringing a derivative action pursuant to Article 10.

(b) A limited partnership remains the same entity regardless of whether it becomes or ceases to be a limited liability limited partnership.

(c) A limited partnership has a perpetual term.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether the partnership agreement should be able to vary the perpetual term or whether that change should be reserved to the certificate of limited partnership.

Subsection (a), first sentence – Source: RUPA § 201. ULLCA § 201 contains essentially the same provision. In prior Drafts, this sentence appeared as part of Section 200.

Subsection (a), remainder of provision – In prior Drafts, this language appeared as Section 403C-2. The language applies to limited as well as general partners and therefore does not belong in Article 4. This subsection seems a proper location, because the "not a proper party" rule follows conceptually from the status of a limited partnership as "an entity distinct from its partners."

Subsection (a)(3) – In Draft #4, this provision referred only to limited partners. For an explanation of the change, see Reporter's Notes to Section 1002.

Subsection (b) – A similar provision appears at RUPA § 201(b).

Subsection (c) – In prior Drafts, this subsection appeared as part of Section 200. Draft #3 required that changes in the default term be made in the certificate of limited partnership. At its October, 1998 meeting, the Drafting Committee decided that the partnership agreement could change the default. This decision puts Re-RULPA at odds with ULLCA and the RMBCA. *See* ULLCA § 203(a)(5) (requiring a limited liability company's articles of organization to state "whether the company is to be a term company and, if so, the term specified") and RMBCA § 3.02 (providing that "[u]nless its articles of incorporation provide otherwise, every corporation has perpetual duration").

SECTION 104. PURPOSE AND POWERS.

(a) A limited partnership may be organized under this [Act] for any lawful purpose.

(b) Except as stated in subsection (c), a limited partnership has the same powers as an individual to do all things necessary or convenient to carry on its business, including power to:

(1) sue and be sued and defend in its own name, including an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership;

(2) purchase, receive, lease, or otherwise acquire, and own, hold, improve, use, and otherwise deal with real or personal property, or any legal or equitable interest in property, wherever located;

(3) sell, convey, mortgage, grant a security interest in, lease, exchange, and otherwise encumber or dispose of all or any part of its property;

(4) purchase, receive, subscribe for, or otherwise acquire, own, hold, vote, use, sell, mortgage, lend, grant a security interest in, or otherwise dispose of and deal in and with, ownership interests in or obligations of any other entity;

(5) make contracts and guarantees, incur liabilities, borrow money, issue its notes, bonds, and other obligations, which may be convertible into or include the option to purchase other securities of the limited partnership, and secure any of its obligations by a mortgage on or a security interest in any of its property, franchises, or income;

(6) lend money, invest and reinvest its funds, and receive and hold real and personal property as security for repayment;

(7) be a promoter, partner, member, associate, or manager of any partnership, joint venture, trust, or other entity;

(8) conduct its business, locate offices, and exercise the powers granted by this [Act] within or without this State;

(9) appoint officers, employees, and agents of the limited partnership, define their duties, fix their compensation, and lend them money and credit;

(10) pay pensions and establish pension plans, pension trusts, profit sharing plans, bonus plans, option plans, and benefit or incentive plans for any or all of its current or former partners, officers, employees, and agents;

(11) make donations for the public welfare or for charitable, scientific, or educational purposes; and

(12) make payments or donations, or do any other act, not inconsistent with law, that furthers the business of the limited partnership.

(c) The certificate of limited partnership may limit the powers of a limited partnership except the power of a limited partnership to sue, be sued, and defend in its own name.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether, in the absence of an *ultra vires* provision, the certificate should be able to limit a limited partnership's powers;

Subsection (a) – In prior Drafts, this subsection appeared as Section 106(a). At its October, 1998 meeting, the Drafting Committee decided not to confine limited partnerships to "business" activities and to permit a limited partnership to pursue any lawful purpose. This subsection differs from ULLCA § 112(a) in omitting that provision's concluding phrase ("subject to any law of this State governing or regulating business"). The Committee deleted that phrase at the October, 1998 meeting as both redundant and under inclusive. As to redundancy – if some other law prohibits a limited partnership from engaging in a particular activity, pursuing that

activity would not be a "lawful purpose." As to under inclusiveness – the reference to "any law of this State governing or regulating business" appears too limited because a limited partnership is not restricted to business activities.

Subsection (b) – Derived from ULLCA § 112, which in turn appears to have relied heavily on RMBCA § 3.02. In prior Drafts, this subsection appeared as Section 106(b).

Subsection (b)(1) – The last phrase ("including . . .") comes from RUPA § 405(a).

Subsection (b)(4) – ULLCA § 112(b)(4) refers to "shares or other interests." That reference derives verbatim from RMBCA § 3.02(6). In a limited partnership act there is no reason to give special mention to corporate ownership interests.

Subsection (b)(7) – ULLCA did not mention limited liability companies, but perhaps Re-RULPA should.

Subsection (b)(10) – In prior Drafts, this provision referred to "general" partners. At its October, 1998 meeting, the Drafting Committee deleted the word "general." (RMBCA § 3.02(12) and ULLCA § 112(10) differ as to whether the entity has the power to provide pensions for a mere passive owner. The RMBCA provision does not mention shareholders, while the ULLCA provision refers to members. The ULLCA provision therefore appears to allow pensions for members in manager-managed LLC. Perhaps ULLCA's approach reflects the statutory default mode of member management.)

Earlier versions of subsection (b) included the following additional provision: "(13) transact any lawful business that will aid governmental policy." That provision appears at RMBCA § 3.02(14) but not in ULLCA. At its October, 1998 meeting, the Drafting Committee decided to follow ULLCA.

Subsection (c) – The power of the publicly-filed document to alter the entity's powers derives from ULLCA § 112(b), but is separately stated to make mandatory the power of a limited partnership to sue and be sued in its own name. This power is of the essence of a limited partnership's nature as a legal entity. Moreover, any change in this power would significantly affect the rights of nonpartners.

This nonwaivable power does not affect a limited partnership's right to assign a cause of action or to sue or be sued under an assumed name.

At its October, 1998 meeting, the Drafting Committee suggested that then Section 101B(b) [now Section 109(b)] (provisions not waivable by the partnership agreement) refer to the mandatory nature of a limited partnership's power to sue and be sued in its own name. That reference seems unnecessary, because this section provides that a limited partnership has the listed powers "[e]xcept as stated in subsection (c)" and subsection (c) only mentions the certificate of limited partnership as altering the listed powers. Moreover, the reference seems inconsistent with

ULLCA. *See* ULLCA §§ 112(b) (listing an LLC's powers "[u]nless its articles of organization provide otherwise") and 103(b) (listing provisions not waivable by the operating agreement and not mentioning the list of an LLC's powers).

This issue aside, the notion of limitation through a public document is problematic for ULLCA and doubly problematic for Re-RULPA. If a statute authorizes restrictions on an entity's normal powers, the statute should also contemplate what will happen if restrictions exist and the entity transgresses them. *See, e.g.*, RMBCA §§ 3.02 (allowing the articles of incorporation to restrict a corporation's powers) and 3.04 (dealing with ultra vires acts). ULLCA contemplates restrictions but not transgressions.

Re-RULPA has an additional problem. A certificate of limited partnership is not precisely analogous to an LLC's articles of organization or a corporation's articles of incorporation. Although all three documents function to create an entity, certificates of limited partnership typically play a far weaker role in governing the entity's structure and operations. Indeed, at its July, 1997 meeting the Committee rejected Draft #1's attempt to strengthen the certificate's role, deleting provisions that would have made the certificate dispositive in determining the identity of general partners.

In light of the weak role of a certificate of limited partnership, it seems anomalous to empower the certificate to restrict a limited partnership's powers. The Reporter therefore favors deleting the language allowing the certificate to restrict a limited partnership's powers. If a limited partnership wishes to restrict its operations, it should indicate so in its partnership agreement. Whether those restrictions will bind third parties will depend on Sections 402 (general partner agent of limited partnership) and 403 (limited partnership liable for general partner's actionable conduct).

An entity power restriction contained in the certificate could still undermine a general partner's power to bind the limited partnership, due to the Act's provisions on power to bind. See Section 402A(a)(1) (negating a general partner's power to bind when "the general partner had no authority to act for the limited partnership . . . and the person with whom the general partner was dealing knew . . . that the general partner lacked authority"). Arguably, a person who knows that a limited partnership lacks the power to do an act knows that no general partner has the power to bind the limited partnership to do that act. A person does <u>not</u> have constructive notice of a power limitation stated in the certificate. See Section 102(c).

SECTION 105. GOVERNING LAW.

The law of this State governs relations among the partners and between the partners and the limited partnership and the liability of partners for an obligation of a limited partnership.

Reporter's Notes

Derived from RUPA § 106. In prior Drafts, this material appeared as Section 101D.

RUPA provides two different choice-of-law rules, one applicable to ordinary general partnerships and one applicable to LLPs. As to the former, RUPA provides, *as a default rule*, that the partnership's internal affairs are governed by "the law of the jurisdiction in which a partnership has its chief executive office." RUPA § 106(a). RUPA does not indicate which law governs the liability of partners for an obligation of an ordinary general partnership. As to LLPs, RUPA provides that "[t]he law of this State" governs both an LLP's internal affairs and "the liability of partners for an obligation of a limited liability partnership." The partnership agreement cannot change this rule. RUPA § 103(b)(9).

At first glance it might seem that the presence of a liability shield transforms RUPA's choice-of-law rule from a default rule to a mandatory rule. However, the most recent Comments to RUPA § 106 indicate otherwise. "Unlike a general partnership which may be formed without any filing, a partnership may only become a limited liability partnership by filing a statement of qualification. Therefore, the situs of its organization is clear. Because it is often unclear where a general partnership is actually formed, the decision to file a statement of qualification in a particular State constitutes a choice-of-law for the partnership which cannot be altered by the partnership agreement."

The rationale for the mandatory rule thus seems to be as follows: where the situs of organization is clear, the choice of that situs constitutes a nonwaivable decision as to choice-of-law. Since the situs of organization is always clear for a limited partnership, Section 105 states a nonwaivable rule applicable to all limited partnerships. (The term "limited partnership" includes limited liability limited partnerships. See Section 101(13).)

Like RUPA § 106(b), Section 105 chooses the law applicable both to a partnership's internal affairs and to "the liability of partners for an obligation of" the organization. Unlike RUPA § 106(b), Section 105 applies that choice even for a limited partnership that has not elected "limited liability" status. Even an ordinary limited partnership has a shield, and general choice of law principles suggest that the law of the state of organization should govern the interpretation and application of that shield.

SECTION 106. SUPPLEMENTAL PRINCIPLES OF LAW.

(a) Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].

(b) If an obligation to pay interest arises under this [Act] and the rate is not specified, the rate is that specified in [applicable statute].

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: determining what, if any, guidance to give courts as they seek to determine how de-linking affects (i) existing, "settled" limited partnership case law, and (ii) the applicability of general partnership cases to limited partnership disputes.

In prior Drafts, this material appeared as Section 101C.

Source: RUPA § 104 (ULLCA § 104 replicates RUPA § 104 verbatim.) RULPA addresses this topic at § 1105, but both RUPA and ULLCA will condition readers to look for this provision in this location. At its October, 1998 meeting, the Drafting Committee deleted proposed new language that sought to more explicitly protect the partnership agreement from judicial re-writing. The Committee also deleted proposed new language that sought to "de-link" general partnership case law and to guide courts in the use of that case law.

SECTION 107. NAME.

(a) The name of a limited partnership must contain "limited partnership" or the abbreviation "L.P."or "LP" and may contain the name of any partner. The name of a limited liability limited partnership must include "limited liability limited partnership" or the abbreviation "LLLP" or "L.L.L.P.". Subject to Section 905, the same requirements apply to the name of a foreign limited partnership authorized to transact business in this State.

(b) Except as authorized by subsections (c) and (d), the name of a limited partnership and, subject to Section 905, of a foreign limited partnership authorized to transact business in this State, must be distinguishable upon the records of the [Secretary of State] from:

(1) the name of any entity incorporated, organized or authorized to transact business in this State; and

(2) any name reserved or registered under Section 108, Section 906, or [insert citations to other State laws allowing the reservation or registration of business names, including fictitious name statutes].

(c) A domestic or foreign limited partnership may apply to the [Secretary of State] for authorization to use a name that is not distinguishable upon the records of the [Secretary of State] from one or more of the names described in subsection (b). The [Secretary of State] shall authorize use of the name applied for if, as to each conflicting name:

(1) the present user, registrant, or owner of the conflicting name consents to the use in a signed record and submits an undertaking in form satisfactory to the [Secretary of State] to change the conflicting name to a name that is distinguishable upon the records of the [Secretary of State] from the name applied for and from all of the names described in subsection (b); or

(2) the applicant delivers to the [Secretary of State] a certified copy of the final judgment of a court of competent jurisdiction establishing the applicant's right to use in this State the name applied for.

(d) A domestic or foreign limited partnership may use a name, including a fictitious name, shown upon the records of the [Secretary of State] as being used by another entity if the domestic or foreign limited partnership proposing to use the name has:

(1) merged with the other entity;

(2) been formed by reorganization with the other entity;

(3) been converted from the other entity; or

(4) acquired substantially all of the assets, including the name, of the other

entity.

Reporter's Notes

This section has been substantially rewritten, reflecting more modern attitudes toward permissible names. The advent of LLLPs requires that a choice be made as to the use of a partner's name in the name of the limited partnership. Either general partners' names must be prohibited from the name of a LLLP or limited partners' names should be includable in the name of both ordinary limited partnerships and LLLPs.

At its October, 1998 meeting, the Drafting Committee choose the latter approach. That choice makes sense. RULPA's approach derives from the 1916 Uniform Limited Partnership Act. In 1916, most business organizations were either unshielded (i.e., general partnerships) or partially shielded (i.e., limited partnerships), and it was reasonable for third parties to believe that an individual whose own name appeared in the name of a business would "stand behind" the business. Today most businesses have a full shield (e.g., corporations, limited liability companies, most limited liability partnerships), and corporate, LLC and LLP statutes generally pose no barrier to the use of an owner's name in the name of the entity.

Subsection (a) does require particular phrases or abbreviations to signify the limited partnership's status. Permitting abbreviations is new but is certainly consistent with current views. *See, e.g.*, ULLCA § 105(a) and RMBCA § 4.01(a)(1). Subsection (a) arguably permits fewer abbreviations than ULLCA. ULLCA § 105(a) allows both initials (e.g., LLC) and partial abbreviations (Ltd. and Co.)

As to the location of the specified signifiers within the limited partnership's name, subsection(a) follows current law and does <u>not</u> require that the signifiers appear at the end of the limited partnership's name. *Accord* ULLCA § 105(a) (requiring signifiers but omitting any "end with" requirement) and RMBCA § 4.01(a)(1) (same). *Compare* RUPA §§ 1002 (requiring the name of an LLP to "end with" specified signifiers) and 1102(a)(1) (requiring a foreign LLP to file a statement of foreign qualification containing the foreign LLP's name "which . . . ends with" specified signifiers.)

Subsections (b), (c) and (d) are derived from ULLCA § 105(b). At its October, 1998 meeting, the Drafting Committee decided to replace ULLCA's list of other entities with a more generic term.

<u>Applicability to foreign limited partnerships</u> – To streamline the provisions relating to certificates of authority for foreign limited partnerships, Draft #5 makes this section applicable both to domestic and foreign limited partnerships. Subsections (a) and (b) refer to Section 905. That section permits a foreign limited partnership to obtain a certificate of authority under a fictitious name if the foreign limited partnership’s actual name does not comply with this Section.

<u>Subsection (b)(2)</u> – This provision does not appear in ULLCA.

Subsection (c) – derived from ULLCA § 105(c). Subsection (c)'s reference to "authorization to use a name" (emphasis added) comes verbatim from ULLCA § 105(c), pertains only to the limited role of the [Secretary of State] and implies nothing about other areas of law such as intellectual property law.

Subsection (c)(1) – This provision differs from ULLCA § 105(c)(1) in four respects: (i) ULLCA refers only to "reserved name," but that reference appears under inclusive. Subsection (b) also encompasses other names, i.e. names in use. So long as the owner of the conflicting name agrees to change it, why shouldn't the applicant have a right to the formerly conflicting name? (ii) ULLCA does not require the record of consent to be signed. (iii) ULLCA does not include the phrase "and from all of the names described in subsection (b)." The phrase "an undertaking in form satisfactory to the [Secretary of State]" is arguably inadequate to express the substantive requirement that the new name "be distinguishable" from other names "upon the records of the [Secretary of State]." (iv) This provision applies both to domestic and foreign limited partnerships.

Subsection (c)(2) – This provision differs from ULLCA § 105(c)(2) in the placement of "in this State." ULLCA places the phrase at the end of the provision. That placement makes the provision arguably ambiguous, since the name has been applied for "in this State."

Subsection (d) – Derived from ULLCA § 105(d). The differences are as follow:

> (d) A domestic or foreign limited ~~liability company~~ partnership may use the name, including a fictitious name, shown upon the records of the [Secretary of State] as being used by [A]~~of~~ another ~~domestic or foreign company~~ entity ~~which is used in this State if the other company is organized or authorized to transact business in this State and the company~~[B] if the domestic or foreign limited partnership proposing to use the name has:
>
> (1) merged with the other ~~company~~ entity;
>
> (2) been formed by reorganization with the other ~~company~~ entity;
>
> (3) has been converted from the other entity; or
>
> (~~3~~4) acquired substantially all of the assets, including the name, of the other company.

[A]The reference to the records of the Secretary of State is added because this provision is part of a set of rules that enable the Secretary of State to determine whether a limited partnership's name is acceptable. As to possible conflicts with other names, the Secretary of State's exclusive reference is to the Secretary of State's records. The added language makes that situation explicit.

[B]This language differs from ULLCA § 105(d) by: (i) broadening the referred-to entities that might be using a conflicting name; and (ii) deleting ULLCA's reference to entities "organized or authorized to transact business in this State." The added reference to the records of the [Secretary of State] make that precondition unnecessary.

SECTION 108. RESERVATION OF NAME.

(a) The exclusive right to the use of a name may be reserved by:

(1) any person intending to organize a limited partnership under this [Act] and to adopt that name;

(2) any domestic limited partnership or any foreign limited partnership authorized to transact business in this State which, in either case, intends to adopt that name;

(3) any foreign limited partnership intending to obtain a certificate of authority to transact business in this State and adopt that name; and

(4) any person intending to organize a foreign limited partnership and intending to have it obtain a certificate of authority to transact business in this State and adopt that name.

(b) The reservation shall be made by filing with the [Secretary of State] an application, signed by the applicant, to reserve a specified name. If the [Secretary of State] finds that the name is available for use by a domestic or foreign limited partnership, the [Secretary of State] shall reserve the name for the exclusive use of the applicant for a period of 120 days. Once having so reserved a name, the same applicant may reserve the same name for additional 120-day periods. A person with a current reservation for a name may not file for another 120-day period pertaining to the same name until 90 days have elapsed in the current reservation. The right to the exclusive use of a reserved name may be transferred to any other person by filing in the office of the [Secretary of State] a notice of the transfer, signed by the applicant for whom the name was reserved and specifying the name and address of the person to whom the transfer was made.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to use ULLCA rather than RULPA language for this section; whether the ability to reserve for successive 120-day periods makes Section 906 (registration of name by foreign limited partnership) unnecessary.

ULLCA § 106 essentially derives from the RULPA language in this section. Consistent with the Drafting Committee's instructions to preserve current RULPA language absent good cause to do otherwise, this draft follows RULPA rather than ULLCA. The Reporter wonders, however, whether those instructions still make sense. It now appears that Re-RULPA will incorporate substantial amounts of ULLCA's language while preserving little of RULPA's language. It might make better sense, therefore, for Re-RULPA to follow ULLCA rather than RULPA, absent a policy reason to the contrary.

In any event, there is a substantive difference between RULPA and ULLCA worth noting. Under RULPA § 103, when a reservation expires the registrant must wait 61 days before re-applying for the same name. ULLCA § 106(a) states merely that a reservation is for "a nonrenewable 120-day period." It is unclear whether that language means that: (i) once the first reservation expires the same applicant can never apply for the same name, or (ii) once a 120-day period actually expires the same applicant can apply for the same name immediately, with the application being considered a new application rather than as a renewal. See also RMBCA § 4.02(a) (apparently the source for ULLCA § 106(a); uses the same language).

At its October, 1998 meeting, the Drafting Committee decided to explicitly allow reservations for successive 120-day periods. The Committee did not decide how far in advance of the expiration of one 120-period a person can apply for next 120-day period. Some limitation must exist; otherwise a person could effectively eliminate the 120-day limit by filing simultaneously reservations for several successive periods. Draft #4 created a 30-day window at the end of each 120-day period, and at the March, 1999 meeting no one objected to that approach. That approach is therefore preserved in Draft #5.

SECTION 109. EFFECT OF PARTNERSHIP AGREEMENT; NONWAIVABLE PROVISIONS.

(a) Except as otherwise provided in subsection (b), the partnership agreement governs relations among the partners and between the partners and the partnership. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) The partnership agreement may not:

(1) vary the law applicable to a limited partnership under Section 105;

(2) vary the rights and duties under Section 204;

(3) unreasonably restrict the right to information under Sections 305 and 407;

(4) eliminate the duty of loyalty under Section 408, but:

(i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; and

(ii) specify the number or percentage of partners or disinterested general partners that may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(5) unreasonably reduce the duty of care under Section 408(c);

(6) eliminate the obligation of good faith and fair dealing under Sections 306(c) and 408(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

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

(8) vary the right of a court to expel a partner in the events specified in Sections 601(5) and 603(b)(5);

(9) vary the right of a court to decree dissolution in the circumstances specified in section 802;

(10) vary the requirement to wind up the partnership business as specified

in Section 803(a);

(11) restrict the right to bring a derivative action under Article 10;

(12) restrict rights of a third party under this [Act].

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether, in light of Re-RULPA's "target audience" (see Prefatory Note), a Re-RULPA partnership agreement should have more power than a RUPA partnership agreement – in particular, more power to affect the rules relating to fiduciary duty; whether the Act identifies with sufficient clarity which statutory sections are subject to change by the partnership agreement; whether subsection (b)(4)(ii) adequately handles approval of conflict of interest situations – in particular, whether the Act should define the key term "disinterested" and impose a disinterestedness requirement on approval by limited as well as general partners; whether, as is currently the case, the partnership agreement should be able to deprive a limited partner of the power to dissociate, even though a dissociating limited partner has no right to any payout; whether the partnership agreement should be able to provide for a limited partnership's continued existence even though the limited partnership falls permanently below the one general/one limited minimum; whether the partnership agreement should be able to impose reasonable restrictions on derivative actions.

In prior Drafts, this material appeared as Section 101B.

Source: RUPA § 103. At its October, 1998 meeting the Drafting Committee deleted proposed variations from RUPA § 103(a), including a reference to implied-in-fact agreements, an express authorization for a partnership agreement to "exclude [alternate language: preclude] oral agreements and . . . specify the extent, if any, that the conduct of the partners and the partnership are to be considered in determining and interpreting the partnership agreement," and an express authorization for a partnership agreement to be executed before the limited partnership is formed. Following the Drafting Committee's instructions, the Section 304(b)(1) now contains the rule on amending the partnership agreement.

The Reporter remains concerned as to whether it is sufficiently clear which statutory provisions are outside the domain of "relations among the partners" (and therefore not susceptible to change by the partnership agreement). For example, may the partnership agreement change Section 113's requirement that the limited partnership maintain an in-state office?

As discussed at the Committee's July, 1997 meeting, the Reporter believes that the Committee should eventually review each section of the Act in light of subsection (a). The Committee will be far more familiar with the Act than the typical attorney or judge. If the Committee has difficulty determining which provisions of the Act are subject to change by the partnership agreement, *a fortiori* attorneys and judges will be confused.

Subsection (a) – The first sentence deviates from RUPA so as to substitute the active for the passive voice.

Subsection (b)(1) – Source: RUPA § 103(9). Understanding this provision requires understanding RUPA's approach to choice of law. See the Reporter's Notes to Section 105.

Subsection (b)(2) – Source: RUPA § 103(b)(1). The referenced section describes who must sign various documents.

Subsection (b)(3) – This provision is derived from RUPA § 103(b)(2), which imposes this standard viz a viz "access to books and records." The first section refers to a limited partner's right of access and the second to a general partner's right. At its October, 1998 meeting, the Drafting Committee significantly changed the information rights of limited partners.

Subsection (b)(4) – Paragraph (i) is taken verbatim from RUPA § 103(b)(3)(i). At its October, 1998 meeting, the Drafting Committee decided to follow ULLCA rather than RUPA and use "and" instead of "or" between paragraphs (i) and (ii) and use in paragraph (ii) ULLCA's reference to "disinterested managers" [in Re-RULPA: disinterested general partners].

Following ULLCA, paragraph (ii) does not define the term "disinterested." *Compare* RMBCA §§ 8.62 and 8.63 (dealing with corporate director conflicts of interest and defining in detail the concept of disinterestedness for directors and shareholders). Moreover, again following ULLCA, paragraph (ii) leaves unexplained why general partner disinterest is essential but limited partner disinterest is not. Suppose, for example, that a person serves as the general partner of a limited partnership, while also owning a majority of the limited partner interests. The partnership agreement could not provide for that person *qua* general manager to ratify its own loyalty conflicts but could permit ratification through the consent of persons owning a majority of profit interests owned by persons as limited partners.

Subsection (b)(7) – Previous drafts applied this exception to the power to dissociate of limited as well as general partners. At its October, 1998 meeting, the Drafting Committee decided that a partnership agreement can prevent a limited partner from voluntarily dissociating. The Committee made this decision despite that fact that, in the default mode, a limited partner's dissociation merely means that the limited partner becomes a transferee of its own transferable interest; i.e., dissociation means the abandonment of all nonfinancial rights. Even if the dissociating limited partner is the only limited partner, the general partner(s) can avoid dissolution by admitting a new limited partner. See Section 801(4). An anomaly can result if the limited partnership agreement purports to preclude dissociation even of a limited partner who dies. The same issue exists under RUPA. RUPA § 601(7)(i) lists the death of an individual as an event of dissociation, and RUPA § 103 does not make § 601(7)(i) nonwaivable.

Subsection (b)(8) – Source: RUPA § 103(b)(7). As discussed at the October, 1998 meeting, this provision could be read to limit a partnership agreement's power to provide for arbitration. That is, an agreement to arbitrate all disputes – including expulsion disputes – could

be seen as an attempt to "vary the right of a court expel a partner." Such a reading would put this statute at odds with federal law. *See Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the Federal Arbitration Act preempts state statutes that seek to invalidate agreements to arbitrate) and *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995) (same). A Comment will indicate that an agreement to arbitrate expulsion disputes is permissible.

Subsection (b)(9) – At its October, 1998 meeting, the Drafting Committee decided to add this provision to the list of nonwaivable provisions. The caveat concerning arbitration applies here as well.

Subsection (b)(11) – This subsection is new in Draft #5. ULLCA § 103 has no corresponding provision. However, derivative suits were originally equitable in nature; they originated without statutory sanction to protect passive owners against management abuses. *See* Bishop & Kleinberger, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW, para. 10.07[2], nn. 233 and 234. This Act should not permit a partnership agreement to eviscerate the derivative remedy. (RUPA has no provisions relating to derivative suits.)

SECTION 110. REQUIRED RECORDS.

(a) A limited partnership shall maintain at its designated office the following required records:

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

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

(3) copies of any plan or filed articles of conversion or merger, if the merger or conversion has become effective and the limited partnership is the converted or surviving entity;

(4) copies of the limited partnership's federal, state, and local income tax

returns and reports, if any, for the three most recent years;

(5) copies of any written partnership agreements and any written amendments to any of those agreements and of any financial statements of the limited partnership for the three most recent years;

(6) copies of the three most recent annual reports delivered by the limited partnership to the [Secretary of State] pursuant to section 210;

(7) copies of any record made by the limited partnership during the past three years of any consents given by or votes taken of any partner pursuant to this Act or the partnership agreement; and

(8) unless contained in a written partnership agreement, a writing setting out:

(i) the amount of cash and a description and statement of the agreed value of the other benefits contributed by each partner and which each partner has agreed to contribute;

(ii) 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;

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

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

(b) Sections 305 and 407 govern access to the records required by this Section.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to replace subsection (a)(5)'s reference to "written" agreements and amendments with the more modern concept of a "record"; whether to retain Section 110(8)(iv).

Source: RULPA § 105. In prior Drafts, this material appeared at Section 105. Changes from RULPA are stylistic except as stated below.

Subsection (a)(2) – It can be confusing to have the same word – certificate – refer both to an original document and to the documents that amend that original document. Re-RULPA therefore refers to "amendments" rather than "certificates of amendments."

Subsection (a)(5) — RULPA § 105(4) does not mention amendments.

Subsection (a)(6) — RULPA does not require annual reports, so RULPA § 105 does not include this requirement.

Subsection (a)(7) – This provision reflects a decision made by the Drafting Committee at its October, 1998 meeting. The provision does not require a limited partnership to make a record but does create a retention requirement for those records the limited partnership does create. The three years runs from the date the record is created, not from the date the consent or vote occurs.

Subsection (a)(8)(i) — RULPA § 105(7)(i) refers to "other property or services" rather than to "other benefits." The change is to correspond with Re-RULPA's broader definition of "contribution." See Section 101(3).

Subsection (a)(8)(iii) — In RULPA § 105(a)(7), this provision refers to "any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution." For the reasons stated in the Reporter's Notes to Section 503, Draft 5 eschews the concept of "a return of contribution." The new provision relates to information needed when a "dual capacity" partner dissociates. See Sections 602 and 606. The former provides that, upon a person's dissociation as a limited partner, "any transferable interest owned by the person immediately before dissociation *in the person's capacity as a limited partner* is owned by the person as a mere transferee." (Emphasis added.) The latter states the parallel rule for a person dissociated as a general partner.

Subsection (a)(8)(iv)— This is a curious provision, albeit taken verbatim from RULPA § 105(7)(iv). Can the required records alone make an occurrence an event of dissolution? Or does this provision mean that, for dissolution to occur under an oral agreement, the required records must memorialize that agreement? The provision was added in the 1985 amendments to RULPA. The official Comment explains:

> In view of the passive nature of the limited partner's position, it has been widely felt that limited partners are entitled to access to certain basic documents and information, including the certificate of limited partnership ~~and~~, any partnership

agreement, and a writing setting out certain important matters which, under the 1916 and 1976 Acts, were required to be set out in the certificate of limited partnership. (Underlining and strikeouts indicate changes from the text of the 1976 Comment.)

Subsection (b) — RULPA § 105(b) states simply: "Records kept under this section are subject to inspection and copying at the reasonable request and at the expense of any partner during ordinary business hours." Re-RULPA provides more elaborate access provisions.

SECTION 111. BUSINESS TRANSACTIONS OF PARTNER WITH PARTNERSHIP.

A partner may lend money to and transact other business with the limited partnership and, subject to other applicable law, has the same rights and obligations with respect thereto as a person who is not a partner.

Reporter's Notes

Source: RULPA § 107. In prior Drafts, this material appeared as Section 107.

To the uninitiated, this section appears to conflict with Section 408(b)(2) (general partner's loyalty duty includes refraining from acting as or for an adverse party). However, this section has no connection with the duty of loyalty and is intended only to deal with claims by creditors of the limited partnership. The unartful formulation is retained for historical reasons and because including language that differs substantially from RUPA and ULLCA would exacerbate rather than ameliorate the confusion.

N.b. – both RUPA and ULLCA locate this provision elsewhere, within the section dealing with fiduciary duty. *See* RUPA § 404(f) and ULLCA § 409(f). Re-RULPA keeps the provision here, because it applies both to limited and general partners.

SECTION 112. DUAL CAPACITY. A person may be both a general partner and a limited partner. A person who is both a general and limited partner has the rights, powers, duties and obligations provided by this [Act] and the partnership agreement for each of those capacities.

When that person acts as a general partner, that act is subject to the obligations and restrictions provided by this [Act] and the partnership agreement for general partners. When that person acts as a limited partner, that act is subject to the obligations and restrictions provided by this [Act] and the partnership agreement for limited partners.

Reporter's Notes

Derived from RULPA § 404, but redrafted for reasons of style and clarity. RULPA § 404 provides:

> A general partner of a limited partnership may make contributions to the partnership and share in the profits and losses of, and in distributions from, the limited partnership as a general partner. A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his [or her] participation in the partnership as a limited partner.

In prior Drafts, this material appeared at Section 404. Draft #5 relocates the section here, because the section concerns both limited and general partners.

The second sentence of the Re-RULPA version originally referred only to "rights and powers." Draft #4 changed the phrase to "the rights, powers, duties and obligations," so as to clearly encompass sins of omission.

SECTION 113. OFFICE AND AGENT FOR SERVICE OF PROCESS.

(a) A limited partnership shall designate and continuously maintain in this State:

(1) an office, which need not be a place of its business in this State; and

(2) an agent for service of process on the limited partnership.

(b) A foreign limited partnership shall designate and continuously maintain in this State an agent for service of process.

(c) An agent for service of process must be an individual resident of this State, a domestic entity, or a foreign entity authorized to do business in this State.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to adopt the proposed approach for updating a limited partnership's designation of office and agent for service of process; whether to require a foreign limited partnership to maintain an in-state agent for service of process (in addition to the Secretary of State); whether to require a foreign limited partnership to maintain an in-state office.

In prior Drafts, this material appeared at Section 104. Draft #3 revised this section to conform to ULLCA § 108. That conformity was necessary, because Draft #3 incorporated ULLCA §§ 109 – 111 and those sections depend on the revised language. However, at its October, 1998 meeting, the Drafting Committee decided to return to RULPA's approach.

That decision also entailed deleting Section 104A, Change of Designated Office or Agent for Service of Process. Derived from ULLCA § 109, Section 104A allowed a limited partnership to "change its designated office or agent for service of process by delivering to the [Secretary of State] for filing a statement of change." However, Re-RULPA continued to include former Section 211 [now Section 210] (Annual Report for [Secretary of State]). In Draft #5, Section 210(2) requires a limited partnership to report annually, *inter alia*, "the address of its designated office and the name and address of its agent for service of process in this State."

Following the March, 1999 meeting, the Reporter discovered a problem with Re-RULPA's halfway adoption of ULLCA's approach – namely, what happens if a limited partnership's annual report states an office or agent that varies from the office or agent stated in the certificate of limited partnership? The Act does not expressly authorize the [Secretary of State] to reject an annual report for that reason, so the possibility exists of having an inconsistent public record.

Moreover, upon reflection the Reporter sees no reason to require an amendment to the certificate of limited partnership in order to change either the required in-state office or the agent for service of process. *See* RMBCA § 5.02 (allowing such changes without amendment to the articles of incorporation) and Official Comment (stating that, in the corporate realm, such changes should not require action by the board of directors).

The Reporter therefore believes that Re-RULPA should follow ULLCA and go one step further: adopt the "statement of change" approach (per ULLCA) and further provide that an annual report automatically updates a limited partnership's designation of its in-state office and agent for service of process. See Section 210(e).

Subsection (a) – The initial designation occurs pursuant to Section 201 (certificate of

limited partnership). A limited partnership can change the designation in any of three ways: an amendment to the certificate (Section 202), a statement of change (Section 114), and the annual report (Section 210).

Subsection (b) — This subsection reflects a compromise between RULPA and ULLCA. RULPA requires neither an in-state agent nor an in-state office for a foreign limited partnership. ULLCA requires both. Compare RULPA § 902 with ULLCA § 108. A State may well prefer that the [Secretary of State] not be agent of first resort, but why require an in-state office for a foreign entity? The initial designation will occur in the application for a certificate of authority. See Section 902. Updating will occur via a statement of change. See Section 114.

Subsection (c) — This subsection goes beyond both RULPA and ULLCA in the types of entities permitted to act as agents for service of process.

SECTION 114. CHANGE OF DESIGNATED OFFICE OR AGENT FOR SERVICE OF PROCESS. A limited partnership or foreign limited partnership may change its designated office, agent for service of process, or the address of its agent for service of process, by delivering to the [Secretary of State] for filing a statement of change which sets forth:

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

(2) the street address of its current designated office;

(3) if the current designated office is to be changed, the street address of the new designated office;

(4) the name and address of its current agent for service of process; and

(5) if the current agent for service of process or street address of that agent is to be changed, the new address or the name and street address of the new agent for service of process.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether the statutory apparatus is adequate for updating and correcting records filed by a foreign limited partnership; whether this section's inclusion of foreign limited partnerships should be deleted in favor of RULPA § 905.

Derived from ULLCA § 109. The ULLCA provision refers only to domestic entities. *But see* ULLCA § 1006(a)(1)(iv) (grounds for revoking a foreign limited partnership's certificate of authority include failing to "file a statement of a change in the name or business address of the agent as required by this [article]"). Also, the reference to changing "the address of its agent for service of process" does not appear in ULLCA's lead-in phrase. However, ULLCA § 109(5) contemplates that type of change.

ULLCA's approach differs from RULPA's. Under RULPA § 201(a)(2), the certificate of limited partnership must include "the address of the office and the name and address of the agent for service of process." Changing that information therefore requires an amendment to the certificate. RULPA § 202(c). In contrast, ULLCA requires an LLC's articles of organization only to include only "the address of the initial designated office" and "the name and street address of the initial agent for service of process." ULLCA § 203(a)(2) and (3) (emphasis added). ULLCA does not specifically state who has the authority to file a statement of change on behalf of an LLC.

This provision appeared in Draft #3 as Section 104A but was deleted in Draft #4. For an explanation of the provision's resurrection, see the Reporter's Notes to Section 113.

Correcting/updating records filed by foreign limited partnerships – Draft #5 mostly follows ULLCA's approach to records required to be filed by the foreign counterpart entity. ULLCA relies on the following records to update information previously filed by a foreign LLC: a statement of change, the annual report, a statement of correction. There are two potential gaps in ULLCA's approach. First, it is unclear whether a statement of correction can be used to correct a record that was accurate when filed. See Reporter's Notes to Section 207. Second, ULLCA does not require the updating of all the information contained in the application for a certificate of authority. See ULLCA § 1006(a).

RULPA § 905, which has no analog in ULLCA, takes a more centralized approach to the issue and requires updating of all information:

> SECTION 905. CHANGES AND AMENDMENTS. If any statement in the application for registration of a foreign limited partnership was false when made or any arrangements or other facts described have changed, making the application inaccurate in any respect, the foreign limited partnership shall promptly file in the office of the Secretary of State a certificate, signed and sworn to by a general partner, correcting such statement.

SECTION 115. RESIGNATION OF AGENT FOR SERVICE OF PROCESS.

(a) An agent for service of process of a limited partnership or foreign limited

partnership may resign by delivering to the [Secretary of State] for filing a record of the statement of resignation.

(b) After filing a statement of resignation, the [Secretary of State] shall mail a copy to the designated office and another copy to the limited partnership at its principal office if the address of that office appears in the records of the [Secretary of State].

(c) An agency is terminated on the 31st day after the statement is filed in the office of the [Secretary of State].

Reporter's Notes

Issues for Consideration at the October, 1999 Meeting: whether to preserve the mandatory delayed effective date for an agent's resignation; whether to apply this provision to the resignation of an agent of a foreign limited partnership.

Source: ULLCA § 110, which applies only to agents of domestic limited liability companies. In prior Drafts, this material appeared as Section 104B and, following ULLCA, referred only to agents of domestic limited partnerships.

Subsection (b) – The reference to a limited partnership's principal office is from ULLCA § 110(b). Under ULLCA, a *foreign* limited liability company's application for a certificate of authority must designate the principal office. As to a *domestic* limited liability company, the [Secretary of State] must glean the information from the annual report. *See* ULLCA § 211(a)(3). Because the annual report is not due upon formation, ULLCA § 211(c), for some months after an LLC's organization the [Secretary of State] does not know the LLC's principal office and therefore cannot strictly comply with ULLCA § 110(b). The same anomaly exists under this Draft. To recognize the anomaly, this Draft adds the phrase "if the address of that office appears in the records of the [Secretary of State]."

Subsection (c) – The delayed effective date follows ULLCA § 110(c) but is at odds with the general law of agency. Moreover, if the would-be resigning agent fails to forward documents during the 30-day interim, the appointing limited partnership or foreign limited partnership might be significantly prejudiced. It might be better to allow an immediate effective date and provide for service on the [Secretary of State] if a resignation leaves the appointing partnership without an agent for service of process.

SECTION 116. SERVICE OF PROCESS.

(a) An agent for service of process appointed by a limited partnership or a foreign limited partnership is an agent of the limited partnership or foreign limited partnership for service of any process, notice, or demand required or permitted by law to be served upon the limited partnership or foreign limited partnership.

(b) If a limited partnership or foreign limited partnership fails to appoint or maintain an agent for service of process in this State or the agent for service of process cannot with reasonable diligence be found at the agent's address, the [Secretary of State] is an agent of the limited partnership or foreign limited partnership upon whom process, notice, or demand may be served.

(c) Service of any process, notice, or demand on the [Secretary of State] may be made by delivering to and leaving with the [Secretary of State], the [Assistant Secretary of State], or clerk having charge of the limited partnership department of the [Secretary of State's] office duplicate copies of the process, notice, or demand. If the process, notice, or demand is served on the [Secretary of State], the [Secretary of State] shall forward one of the copies by registered or certified mail, return receipt requested, to the limited partnership or foreign limited partnership at its designated office. Service is effected under this subsection at the earliest of:

(1) the date the limited partnership or foreign limited partnership receives the process, notice, or demand;

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

(3) five days after its deposit in the mail, if mailed postpaid and correctly addressed.

(d) The [Secretary of State] shall keep a record of all processes, notices, and demands served pursuant to this section and record the time of and the action taken regarding the service.

(e) This section does not affect the right to serve process, notice, or demand in any manner otherwise provided by law.

Reporter's Notes

Source: ULLCA § 111. Requiring a foreign limited partnership to name an agent for service of process is a change from RULPA. *See* RULPA § 902(3).

Subsection (c) – ULLCA § 108(a)(1) requires both domestic and foreign LLCs to "maintain in this State . . . an office." RULPA does not require an "out-of-state" limited partnership to have an "in-state" office. RULPA § 902(5). Neither does Re-RULPA. Section 902.

[ARTICLE] 2

FORMATION; CERTIFICATE OF LIMITED PARTNERSHIP AND OTHER FILINGS

SECTION 201. CERTIFICATE OF LIMITED PARTNERSHIP.

(a) In order to form a limited partnership, a certificate of limited partnership must be executed and filed in the office of the Secretary of State. The certificate must include:

(1) the name of the limited partnership;

(2) the address of the initial designated office and the name and address of the initial agent for service of process;

(3) the name and the business address of each general partner;

(4) if the limited partnership is a limited liability limited partnership, a statement to that effect; and

(5) any additional information required by Article 11.

(b) A certificate of limited partnership may also contain any other matters, except that a certificate may not vary the nonwaivable provisions of [this Act] listed in Section 109.

(c) Subject to subsection (b), if any provision of a partnership agreement is inconsistent with the certificate of limited partnership or with a filed statement of dissociation, termination or change:

(1) the partnership agreement controls as to partners and transferees; and

(2) the certificate of limited partnership, statement of dissociation, termination or change controls as to persons, other than partners and transferees, who reasonably rely on the filed record to their detriment.

(d) A limited partnership is formed at the time of the filing of the certificate of limited partnership in the office of the [Secretary of State] or, subject to Section 206(d), at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether the partnership agreement should be able to vary the perpetual term or whether that change should be reserved to the certificate of limited partnership

Subsection (a)(2) – ULLCA allows updating of this information without formal amendment to the formation document. ULLCA § 203(a)(2). Draft #3 conformed Re-RULPA to that approach, but at the October, 1998 meeting the Drafting Committee decided to return to RULPA. Draft #5 returns to the ULLCA approach, for reasons explained in the Reporter's Notes to Section 113.

Former subsection (a)(4) – The reference to the limited partnership's term is deleted, following the Drafting Committee's decision at the October, 1998 meeting.

Former subsection (a)(5) – The reference to optional matters is relocated to subsection

(b).

Former subsection (b) – At its March, 1999 meeting, the Drafting Committee deleted provision that had been a much slimmed-down version of RUPA's statement of authority. *Compare* RUPA § 303.

Subsection (b) – The exception is derived from ULLCA § 203(c), which refers a bit inaccurately (albeit more succinctly) to "the nonwaivable provisions of Section . . . ."

Subsection (c) – Source: ULLCA § 203(c). At its October, 1998 meeting, the Drafting Committee directed the deletion of ULLCA's introductory phrase "As to all other matters" and the placement of this conflict provision in a separate subsection. The new introductory phrase ("subject to . . .") makes clear that the conflict rules cannot override the list of nonwaivable provisions. Thus, for example, if the certificate purports to change a nonwaivable provision and a third party relies on the certificate, the certificate does not prevail. (Arguably, no person could "reasonably" rely on a certificate provision that violates subsection (b), but ULLCA saw fit to make this point directly.)

Draft #5 expands the conflict provision to include " a filed statement of dissociation, termination or change." A third party should be able to reasonably rely on these publicly filed records. Indeed, with regard to statements of dissociation and termination, third parties (as well as partners) are subject to constructive notice. See Section 102(d). If the information in those records can be held against a person, a person should certainly be able to reasonably rely on the information.

Subsection (d) – Section 206(d) limits the delay period to 90 days.

SECTION 202. AMENDMENT OR RESTATEMENT OF CERTIFICATE.

(a) A certificate of limited partnership is amended by filing an amendment in the office of the [Secretary of State] or as provided in [Article] 11. An amendment and a filing made as provided in [Article] 11 shall each set forth:

(1) the name of the limited partnership;

(2) the date of filing the certificate; and

(3) the changes the amendment makes to the certificate.

(b) A limited partnership shall file an amendment to a certificate of limited

partnership reflecting the occurrence of any of these events:

(1) the admission of a new general partner;

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

(3) the appointment of a person to wind up the limited partnership's business under Section 803(b) or (c).

(c) A general partner who becomes aware that any statement in a certificate of limited partnership was false when made or that any arrangements or other facts described have changed, making the certificate inaccurate in any respect, shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, file a statement of change pursuant to Section 114 or a statement of correction pursuant to Section 207.

(d) A certificate of limited partnership may be amended at any time for any other proper purpose the general partners determine.

(e) A restated certificate of limited partnership may be filed in the same manner as an amendment.

Reporter's Notes

Source: RULPA § 202.

Caption – The 1986 amendments to RULPA added subsection (f) [now (e)], providing for restated certificates. Re-RULPA changes the caption to reflect that addition.

Subsection (a) – Re-RULPA does not use the term "certificate" to refer to amendments. It is confusing to use the same term to refer both to an initial document (i.e., the certificate of limited partnership) and subsequent documents that amend the initial document.

Subsection (b) – This subsection differs from its RULPA counterpart both stylistic and substantively. The stylistic change is to switch from the passive to active voice. The substantive change, made at the October, 1998 meeting, is to delete the 30-day time period allowed to make

the amendment.

ULLCA contains no provision comparable to subsection (b), relying instead on ULLCA §§ 207 (permitting but not expressly requiring the correction of a filed record) and 209 (liability for false statement in filed record).

Subsection (b)(2) – In RULPA this provision refers to “withdrawal,” rather than “dissociation.” “Withdrawal” is no longer the term of art. "Dissociation" is.

Subsection (b)(3) – Earlier drafts deleted RULPA language referring to “the continuation of the business under Section 801 after an event of withdrawal of a general partner” and required that the certificate be amended to indicate "the dissolution of the limited partnership." However, at its October, 1998 meeting, the Drafting Committee decided to delete the "dissolution" language.

That decision creates serious problems for limited partners and for non-controlling general partners. Amending the certificate to indicate dissolution serves a constructive notice function. That notice aids the limited partners by curtailing the power to bind of the general partners and aids non-controlling general partners by curtailing not only the power to bind but also the general partners' lingering personal liability. If amending the certificate is merely permissive (as decided by the Drafting Committee), aggrieved partners cannot use Section 205 (Filing by Judicial Act). That section applies only “[i]f a person *required* . . . to sign any record fails or refuses to do so.” (Emphasis added).

If the Committee does not reconsider this point, it will be necessary at minimum to revise Section 202(c). That subsection requires amendments in the event of known inaccuracies. Since dissolution has significant legal effects on third parties, it is arguably "inaccurate" for a certificate to omit the fact of dissolution.

Subsection (c) – This subsection differs from the RULPA provision in three respects: (i) “knows of ” has replaced “becomes aware that,” (ii) the requirement is to “cause” an appropriate amendment rather than to actually amend, and (iii) subsection recognizes that, in appropriate circumstances, other filings can correct the public record. The first difference merely implements a defined term. The second recognizes that in some circumstances an amendment requires a signature from more than one general partner. See Section 204. Section 205 (Filing by Judicial Act) is available to a general partner who cannot convince fellow general partners to sign. The third difference encompasses statements of change and statements of correction.

What if the partnership agreement places all responsibility and power to amend the certificate on one general partner and another partner becomes aware of an inaccuracy? Does the agreement relieve the second partner of responsibility under this provision? Presumably not – the certificate is not squarely within the domain of the partnership agreement, because inaccuracies in the certificate have an effect on third parties. Moreover, Section 208 imposes personal liability on general partners for failure to correct the public record. If there is doubt on this point, however,

perhaps this provision should be included in the list of nonwaivable provisions.

Former subsection (e) [personal liability for inaccuracies] – The Drafting Committee dwelled on this subsection at the October, 1998 meeting, initially deciding to delete the provision and then deciding to reinstate it. Draft #5 relocates the provision to Section 208.

That section now provides extensive rules on liability for inaccuracies in filed records. N.b. — those rules do not relate to the liability of the limited partnership itself. Suppose, for example, that (i) the certificate of limited partnership states that X is a general partner with the power to bind the limited partnership to transactions involving amounts less than $100,000, (ii) X has dissociated as a general partner but the remaining general partner has not caused the certificate to be appropriately amended and X has not filed a statement of dissociation, (iii) X purports to commit the limited partnership to a third party through a contract involving $50,000, and (iv) that third party reasonably relies on the unamended certificate in entering into the contract. The limited partnership is bound on the contract. See Section 606. Section 208 is irrelevant to that outcome but will apply to determine whether the remaining general partner is liable to the limited partnership for any harm suffered by the limited partnership as a result of the contract.

Subsection (e) – This subsection comes almost verbatim from RULPA § 202(f) and in prior Drafts appeared as subsection (f). Re-RULPA omits RULPA's reference to execution of documents. As a matter of organization, that reference belongs in Section 204, which deals with signing requirements. Also, moving the reference will make it easier to correct the current rule's simplistic approach. Who must sign a restated certificate depends on the nature of the changes reflected in the restated certificate. Some changes might require a single general partner's signature, while others might require two or more.

SECTION 203. STATEMENT OF TERMINATION.

(a) A dissolved limited partnership that has completed winding up may file in the [office of the Secretary of State] a statement of termination that sets forth:

(1) the name of the limited partnership;

(2) the date of filing of its original certificate of limited partnership;

(3) the effective date (which shall be a date certain and shall be subject to Section 206(d)) of termination if the statement is not to be effective upon filing; and

(4) any other information the general partners filing the statement

determine.

(b) The existence of a limited partnership is terminated upon the filing of a statement of termination, or, subject to Section 206(d), at a later date specified in that statement. Termination of a limited partnership does not of itself discharge any person's liability under Section 404 for a limited partnership obligation incurred before termination or affect the application of Sections 803B, 803C and 803D (barring of claims).

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether to provide that a limited partnership continues in existence for some period after the filing of a statement of termination, for the purposes of being sued.

Derived from RULPA § 203, which is captioned “Cancellation of Certificate” and mandates the filing of a certificate of cancellation “upon the dissolution and the commencement of winding up of the partnership or at any other time there are no limited partners.”

Re-RULPA switches the focus from dissolution to termination. Canceling the certificate upon dissolution (current law) is misleading because a dissolved limited partnership is not terminated. However, given past usage it would be confusing to apply the word "cancellation" to a document filed to indicate the termination of a limited partnership's existence. Re-RULPA therefore uses "statement of termination" for that purpose. (Prior Drafts referred to a “declaration of termination.”)

Re-RULPA also makes the filing permissive rather than mandatory. The Drafting Committee took this position at its October, 1998 meeting. At the same meeting the Committee deleted a provision requiring a limited partnership to amend its certificate to indicate dissolution.

Subsection (a)(2) – Re-RULPA adds “original” to RULPA's language, to distinguish any restated certificates.

Subsection (a)(3) – Section 206(d) limits the delay period to 90 days.

Subsection (b) – In earlier Drafts this provision was Section 805. Draft #4 relocated the provision here. The last sentence's reference to general partner discharge is new in Draft#5.

The termination of a limited partnership means that the entity ceases to exist and cannot be sued. It would be improper to file a statement of termination while the limited partnership still faces any unbarred known claims. In those circumstances the “limited partnership . . . has [not] completed

winding up."

SECTION 204. SIGNING OF RECORDS.

(a) Each record pertaining to a domestic or foreign limited partnership and filed pursuant to this Act in the office of the [Secretary of State] must be signed in the following manner:

(1) an original certificate of limited partnership must be signed by all general partners listed in the certificate;

(2) an amendment causing a limited partnership to become or cease to be a limited liability limited partnership must be signed by all general partners listed in the certificate;

(3) an amendment designating as general partner a person admitted under Section 801(3)(ii) following the dissociation of a limited partnership's last general partner must be signed by that person;

(4) an amendment required by Section 803(b) or 803(d) following the appointment of a person to wind up the dissolved limited partnership's business must be signed by that person;

(5) any other amendment must be signed by:

(i) at least one general partner listed in the certificate,

(ii) each other person designated in the amendment as a new general partner, and

(iii) by each person whom the amendment indicates has dissociated as a general partner, unless the person is deceased and the amendment so states or person has previously filed 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 or, if the certificate of a dissolved limited partnership lists no general partners, then by the person appointed under section 803(b) or 803(c) to wind up the dissolved limited partnership's business;

(8) articles of conversion must be signed by each general partner listed in the certificate of limited partnership;

(9) articles of merger must be signed as provided in Section 1108(a);

(10) any other record signed by or on behalf of a limited partnership must be signed by at least one general partner listed in the certificate;

(11) a statement by a person pursuant to Section 605(4) stating that the person has dissociated as a general partner must be signed by that person;

(12) a statement of withdrawal by a person pursuant to Section 307 must be signed by that person;

(13) a record signed by or on behalf of a foreign limited partnership must be signed by at least one general partner of the foreign limited partnership.

(b) Any person may sign by an attorney-in-fact any record to be filed pursuant to this Act.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether "signing" should require some written method of authentication.

Subsection (a) – ULLCA § 205 (Signing of records) refers to "a record to be filed by or on behalf of a limited liability company." This draft omits that language because paragraph (a)(9) contemplates a dissociated general partner filing a record on his, her or its own behalf. Departing from ULLCA, Re-RULPA states a signing requirement for records filed by or on behalf of foreign limited partnerships (e.g., annual reports, applications for a certificate of authority).

Subsection (a)(1) – At its July, 1997 meeting, the Committee decided that a person can be a general partner even though not listed in the certificate. This phrase "listed in the certificate" reflects that decision.

Subsection (a)(2) – Per Section 304(b), in the default mode *as among the partners* this change requires the consent of all partners. However, execution of the necessary publicly-filed document remains the province of the general partners.

Subsection (a)(3) – At its October, 1998 meeting, the Drafting Committee directed the Reporter to consider the "interloper" problem – i.e., whether this provision allows a stranger to the limited partnership to muddle the public record with a false filing. The Reporter recognizes the problem but believes this provision should remain as drafted. A false filing risks both criminal and civil liability. Section 208. Moreover, no simple solution exists. For example, requiring the signature of at least one limited partner does not help, because the public record does not identify limited partners. ULLCA suffers from a comparable problem. Any member may execute a record on behalf of a member-managed LLC, ULLCA § 205(a)(2), but the public record does not identify an LLC's members. ULLCA §§ 203(a) (stating the information required in the articles of organization and omitting the identity of members) and 211(a) (same as to the contents of the LLC's annual report).

Subsection a(4) – This subsection has the same "interloper" problem as exists under subsection a(3).

Subsection (a)(5)(iii) – This provision is new in Draft #5. Both the limited partnership and the dissociated general partner have reasons for wanting the public record to reflect the dissociation. If a person dissociated as a general partner fails or refuses to sign an amendment to the certificate, the limited partnership can invoke Section 205 (Filing By Judicial Act). If the limited partnership fails to amend the certificate, the person dissociated as a general partner can file a statement of dissociation. Section 605(4).

Subsection (a)(7) – In early Drafts this subsection's alternative provision applied if "the dissolved limited partnership has no general partners." Draft #4 added language to recognize that a person can be a general partner without being listed in the certificate. Such persons may have rights and obligations despite their unlisted status, but they cannot act as general partners for the purpose of affecting the public record.

Although the Drafting Committee did not expressly decide this point at the October, 1998 meeting, the result is implied in a decision the Committee did make. Subsection (a) contains various references to records requiring the signature of a general partner. The Committee instructed the Reporter to qualify those references with the phrase "listed in the certificate." That qualification suggests that under this Section only certificate-listed general partners may sign records on behalf of a limited partnership.

Subsection(a)(8) – If articles of conversion are filed, the limited partnership will be converting to some other type of business organization. If some other type of business organization is converting to a limited partnership, the converting business organization will file a certificate of limited partnership containing the additional information required by Section 1104.

Subsection (a)(10) – This subsection applies, e.g., to annual reports, Section 211, and articles of correction, Section 206A. The signature of one general partner is sufficient to sign articles of correction, even if the record being corrected required additional signatures. A general partner who uses articles of correction to make a substantive change to a record will run afoul of Section XXX.

Former subsection (a)(10) – At its October, 1998 meeting, the Drafting Committee deleted a proposed paragraph (10), which referred to " a statement by a person pursuant to Section **[TBD]** declaring that the person is not and has not been a general partner must be signed by that person." Two remedies remain. If the person has invested in the limited partnership, the person can file a declaration of withdrawal under Section 307. In any event, the person can sue under Section 205 (Filing by Judicial Act) to force a correction.

Subsection (a)(13) – This provision is new in Draft #5, has no analog in ULLCA, and is derived from RULPA §§ 902, 905 and 906.

Subsection (b) – At its October, 1998 meeting, the Drafting Committee adopted a minimalist approach to this provision. *Compare* ULLCA § 205(c) (stating that a power-of-attorney need not be filed but must be retained by the LLC).

Former subsection (c) – This provision has been relocated to Section 208(b).

SECTION 205. FILING BY JUDICIAL ACT. If a person required by [this Act] to sign any record fails or refuses to do so, any other person who is adversely affected by the failure or refusal may petition the [designate the appropriate court] to direct the signing of the record. If the court finds that it is proper for the record to be signed and that any person so designated has

failed or refused to sign the record, it shall order the [Secretary of State] to file an appropriate record, which shall be effective without being signed.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether the current language (present in both RULPA and ULLCA) requires a petitioner to make two motions – one seeking an order compelling a signature and another, if the first order fails to produce the desired result, directing the [Secretary of State] to file an unsigned record; whether the Act should permit a petitioner to file a statement with the [Secretary of State], indicating that a petition has been filed under this Section and thereby affecting the reasonableness of a third party's reliance on the contested information.

Derived from RULPA § 205. This section differs from RULPA § 205 in two ways. First, following ULLCA, Re-RULPA uses "sign" as a defined term. Second, at the request of the representative of the International Association of Corporate Administrators, the section deletes as inappropriate RULPA's mandate that the [Secretary of State] sign a record.

RUPA contains another approach, allowing various persons to file documents to correct the public record. *See* RUPA §§ 304 (authorizing a person "named as a partner in a filed statement of partnership authority" to file "a statement of denial"); 704 (authorizing a dissociated partner to file a statement of dissociation); and 805(a) (authorizing a partner who has not wrongfully dissociated to file a statement of dissolution).

It makes sense for Re-RULPA to differ from RUPA in this respect. RUPA assumes decentralized management, so decentralizing the power to affect the entity's public record is consistent with RUPA's overall paradigm. Re-RULPA, however, assumes centralized management. The general partners run the business and, it can be argued, should have exclusive authority and responsibility to maintain the limited partnership's public record. So far the only exceptions relate to a person dissociated as a general partner, Sections 204(a)(11) and 605(4), and a person who has invested in the business and has been erroneously listed as a general partner, Sections 204(a)(12) and 307(a)(2). (The latter two provisions apply in other situations as well.)

At its October, 1998 meeting, the Drafting Committee decided to make permissive rather than mandatory an amendment to the certificate indicating dissolution. That decision probably makes this section inapplicable to such amendments. Suppose, for example, the limited partnership dissolves, the general partner declines to amend the certificate and a limited partner wishes to curtail the general partner's power to bind the dissolved partnership. The limited partnership is not "required" to file the amendment.

SECTION 206. FILING IN OFFICE OF [SECRETARY OF STATE].

(a) A record authorized to be filed under this [Act] must be in a medium permitted by the [Secretary of State] and must be delivered to the office of the [Secretary of State]. Unless the [Secretary of State] determines that a record fails to comply as to form with the filing requirements of this [Act], and if all filing fees have been paid, the [Secretary of State] shall file the record and:

(1) for a statement of dissociation, send:

(i) a receipt for the statement and the fees to the person whom the statement indicates has dissociated as a general partner, and

(ii) a copy of the statement and receipt to the limited partnership;

(2) for a statement of withdrawal, send:

(i) a receipt for the statement and the fees to the person on whose behalf the record was filed, and

(ii) if the statement refers to an existing limited partnership, a copy of the statement and receipt to the limited partnership; and

(3) for all other records, send a receipt for the record and the fees to the person on whose behalf the record was filed.

(b) Upon request and payment of a fee, the [Secretary of State] shall send to the requester a certified copy of the requested record.

(c) Except as otherwise provided in subsection (d), a record accepted for filing by the [Secretary of State] is effective:

(1) at the time of filing on the date it is filed, as evidenced by the [Secretary of State's] date and time endorsement on the record; or

(2) at the time specified in the record as its effective time on the date it is filed.

(d) A record may specify a delayed effective time and date, and if it does so the record becomes effective at the time and date specified. If a delayed effective date but no time is specified, the record is effective at the close of business on that date. If a delayed effective date is later than the 90th day after the record is filed, the record is effective on the 90th day.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether subsection (c) should refer to "filed by the [Secretary of State]" instead of "accepted for filing"; whether subsection (d) takes the correct position in providing for a truncated delayed effective date rather than requiring the [Secretary of State] to reject a record which seeks a delay of more than 90 days; whether the official action should be referred to as "filing" and, if so, whether the private act should be referred to as "delivering to the [Secretary of State] for filing.

This Section has been completely revised, following ULLCA § 206 mostly verbatim.

Subsection (a)(1) and (2) – These provisions have no analog in ULLCA.

Subsection (c) – "[A]ccepted for filing" does not precisely correspond with the language in subsection (a). Perhaps the phrase should read "filed by the [Secretary of State]."

Subsection (c)(1) – At its October, 1998 meeting, the Drafting Committee decided to deviate from ULLCA and delete the word "original," which in ULLCA § 206(c)(1) appears immediately before the word "record."

Subsection (d) – This subsection is taken verbatim from ULLCA § 206(d). At its October, 1998 meeting, the Drafting Committee discussed whether the truncating provision in the subsection's last sentence is good policy or whether the subsection should provide instead for rejection of a record that seeks to delay its effective date more than 90 days. The Committee postponed a decision on this issue. ULLCA § 206(c) and (d) appear to have been taken, essentially verbatim, from RMBCA § 1.23. The RMBCA does not have a truncating provision.

SECTION 207. CORRECTING FILED RECORD.

(a) A limited partnership or foreign limited partnership may correct a record filed

by the [Secretary of State] if the record contains false or erroneous information or was defectively signed.

(b) A record is corrected by :

(1) preparing a statement of correction that:

(i) describes the record, including its filing date, or attaches a copy of it to the statement of correction;

(ii) specifies the incorrect information and the reason it is incorrect or the manner in which the signing was defective; and

(iii) corrects the incorrect information or defective signing; and

(2) delivering the corrected record to the [Secretary of State] for filing.

(c) A statement of correction is effective retroactively on the effective date of the record the statement corrects, except that the statement is effective when filed

(1) for the purposes of Section 102(c) and (d), and

(2) as to persons relying on the uncorrected record and adversely affected by the correction.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether, in light of subsection (c), this section can be used to correct a record that was accurate when filed but has become inaccurate due to subsequent events; whether a statement of correction should have retroactive effect for purposes of constructive notice; whether the reliance referred to in subsection (c)(2) should be reasonable reliance.

This Section is derived mostly verbatim from ULLCA § 207, which in turn derives mostly verbatim from RMBCA § 1.24. In prior Drafts, this material appeared as Section 206A.

The ULLCA provision has no Comment. The RMBCA Comment explains that:

This correction procedure has two advantages: (1) filing articles of correction may

be less expensive than refiling the document or filing articles of amendment, and (2) articles of correction do not alter the effective date of the underlying document being corrected.

ULLCA § 207 refers to "articles of correction." In Draft #5, Re-RULPA uses "statement of correction" and replaces ULLCA's references to inaccurate "statements" with references to inaccurate information.

Subsection (c)(1) – This provision makes clear that, for the purposes of constructive notice, a statement of correction carries its own 90 day delay. The provision does not exist in ULLCA.

SECTION 208. LIABILITY FOR FALSE INFORMATION IN RECORD.

(a) If a record authorized or required to be filed under this [Act] contains false information, one who suffers loss by reliance on the information may recover damages for the loss from:

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

(2) a general partner who has notice that the information is false within a sufficient time before the information was relied upon to have reasonably enabled that general partner to effect an amendment under Section 202 or file a statement of change pursuant to Section 114, a petition pursuant to Section 205 or a statement of correction pursuant to Section 207.

(b) The signing of a record authorized or required to be filed under this [Act] constitutes an affirmation under the penalties of perjury that the facts stated in the record are true.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to retain this Section's rules (which mostly follow RULPA) or choose ULLCA's far narrower approach.

Derived from RULPA §§ 207 and 204(e). In prior Drafts, this material appeared as Section 207.

General Background – At its October, 1998 meeting, the Drafting Committee struggled with this section, initially deciding to delete it and then deciding to reinstate it. Draft #4 did some "clean up" work on the section, and the Committee made no changes during its March, 1999 meeting.

Draft #5 further refines Re-RULPA's approach. The following redlined version shows the variations from RULPA § 207:

SECTION ~~207~~ 208. LIABILITY FOR FALSE ~~STATEMENT~~ INFORMATION IN ~~CERTIFICATE~~ RECORD.

(a) If ~~any certificate of limited partnership or certificate of amendment or cancellation~~ a record authorized or required to be filed under this [Act] contains ~~a~~ false ~~statement~~ information, one who suffers loss by reliance on the ~~statement~~ information may recover damages for the loss from:

(1) ~~any~~ a person who ~~executes the certificate~~ signed the record, or ~~causes~~ caused another to ~~execute~~ sign it on ~~his~~ the person's behalf, and knew~~, and any general partner who knew or should have known,~~ the statement to be false at the time the ~~certificate was executed~~ record was signed; and

(2) ~~any~~ a general partner who has notice that the information is false ~~knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any respect~~ within a sufficient time before the ~~statement~~ information was relied upon ~~reasonably~~ to have reasonably enabled that general partner to ~~cancel or amend the certificate~~ effect an amendment under Section 202, ~~or to~~ file a petition ~~for its cancellation or amendment~~ under Section 205 or file a statement of correction under Section 207.

(b) The signing of a record authorized or required to be filed under this [Act] constitutes an affirmation under the penalties of perjury that the facts stated in the record are true.

Technical changes from RULPA – Several technical points warrant attention in this revision:

- "Sign" replaces "execute," and "record" replaces "certificate." These changes conform to terminology changes made throughout Re-RULPA.

- The defined term "has notice" replaces the "knows or has reason to know" formulation.

- "Information" replaces "statement," because the latter is a term of art in this [Act].

Substantive differences with RULPA – Two substantive points also warrant attention:

- The 30-day grace period from RULPA § 202(e) is not preserved. The "sufficient time" provision adequately protects general partners.

- A general partner's liability extends to circumstances omitted by RULPA §207 – namely, a general partner who after the signing of a record gains notice of an initially false statement.

Liability of the limited partnership – The October, 1998 meeting raised but did not resolve the issue of whether the limited partnership should itself be liable for loss suffered in reliance on a false statement. ULLCA does not create any such liability for an LLC. The Reporter believes that the liability of the limited partnership should depend on other provisions of the Act. See Reporter's Notes to Section 202, Former subsection (e). This section can, however, create liability *to* the limited partnership.

Overarching policy issue (ULLCA vs. RULPA) – In addition to these narrower points, the Drafting Committee must reconcile Re-RULPA with ULLCA. Section 208 reaches much further than the comparable ULLCA provision. ULLCA § 209 provides:

> If a record authorized or required to be filed under this [Act] contains a false statement, one who suffers loss by reliance on the statement may recover damages for the loss from a person who signed the record or caused another to sign it on the person's behalf and knew the statement to be false at the time the record was signed.

ULLCA omits personal liability for those who learn of a misstatement, have the authority to correct it but fail to do so. ULLCA also omits liability for those who merely have reason to know of the misstatement.

It is difficult to justify Re-RULPA and ULLCA having such radically different approaches. In particular, it is difficult to justify imposing a more demanding standard on those who manage a limited partnership than on those who manage an LLC. It is true that general partners have personal liability for the entity's debts and LLC members and managers do not. However, Section 208 liability is not liability for the entity's debt; it is liability for mismanaging the public record. How does the existence of the former type of liability justify imposing the latter?

Reporter's Notes to Former Sections 208 (Scope of Notice) and 209 (Delivery of Certificates to Limited Partners)

Former Section 208 has been subsumed into Section 102(c). Section 209 was deleted by the Drafting Committee at its October, 1998 meeting.

SECTION 209. CERTIFICATE OF EXISTENCE OR AUTHORIZATION.

(a) A person may request the [Secretary of State] to furnish a certificate of existence for a limited partnership or a certificate of authorization for a foreign limited partnership.

(b) A certificate of existence for a limited partnership must set forth:

(1) the limited partnership's name;

(2) that it is duly formed under the laws of this State and the date of formation;

(3) whether all fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law have been paid;

(4) whether its most recent annual report required by Section 210 has been filed with the [Secretary of State];

(5) that no statement of termination has been filed; and

(6) other facts of record in the office of the [Secretary of State] which may be requested by the applicant.

(c) A certificate of authorization for a foreign limited partnership must set forth:

(1) the foreign limited partnership's name and any alternate name adopted under Section 905(a) for use in this State;

(2) that it is authorized to transact business in this State;

(3) whether all fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law have been paid;

(4) whether its most recent annual report required by Section 210 has been filed with the [Secretary of State];

(5) that a certificate of cancellation has not been filed; and

(6) other facts of record in the office of the [Secretary of State] which may be requested by the applicant.

(d) Subject to any qualification stated in the certificate, a certificate of existence or authorization issued by the [Secretary of State] may be relied upon as conclusive evidence that the domestic or foreign limited partnership is in existence or is authorized to transact business in this State.

Reporter's Notes

Source: ULLCA § 208. In prior Drafts, this material appeared at Section 210.

Subsection (b)(2) – At its October, 1998 meeting the Drafting Committee decided that certificate of limited partnership need not refer to a limited partnership's term. The Committee therefore deleted from the end of this provision the phrase "and the limited partnership's specified term."

Subsection (b)(3) – In previous Drafts, this provision followed ULLCA essentially verbatim and stated:

> (3) if payment is reflected in the records of the [Secretary of State] and if nonpayment affects the existence of the limited partnership, that all fees, taxes, and penalties owed to this State have been paid

The current version reflects a decision made on Section 803E(1) [now Section 809(1)] by the Drafting Committee at its March, 1999 meeting. Following ULLCA, Section 803E(1) provided for administrative dissolution for nonpayment of fees, taxes and penalties "imposed by this [Act] or other law." The Committee decided to restrict the provision to "any fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law."

Subsection (a)(5) – If the Committee decides to require a limited partnership to amend its certificate of limited partnership to state that the limited partnership is dissolved, see Reporter's Notes to Section 103, this provision should be expanded to encompass such amendments and also declarations of dissolution. See Section 810 (administrative dissolution).

Subsection (c)(3) – Changed from Draft #4 (and from ULLCA) for the reasons stated above, in the Notes to subsection (b)(3).

SECTION 210. ANNUAL REPORT FOR [SECRETARY OF STATE].

(a) A limited partnership, and a foreign limited partnership authorized to transact business in this State, shall deliver to the [Secretary of State] for filing an annual report that sets forth:

(1) the name of the limited partnership or foreign limited partnership (including any alternate name adopted under Section 905(a)) and the State or country under whose law the domestic or foreign limited partnership is formed;

(2) the address of its designated office and the name and address of its agent for service of process in this State; and

(3) in the case of a limited partnership, the address of its principal office.

(b) Information in an annual report must be current as of the date the annual report is signed on behalf of the limited partnership.

(c) The first annual report must be delivered to the [Secretary of State] between [January 1 and April 1] of the year following the calendar year in which a limited partnership was formed or a foreign limited partnership was authorized to transact business. Subsequent annual reports must be delivered to the [Secretary of State] between [January 1 and April 1] of the ensuing calendar years.

(d) If an annual report does not contain the information required in subsection (a), the [Secretary of State] shall promptly notify the reporting limited partnership or foreign limited partnership and return the report to it for correction. If the report is corrected to contain the information required in subsection (a) and delivered to the [Secretary of State] within 30 days after the effective date of the notice, it is timely filed.

(e) If a filed annual report contains an address of a designated office or the name or address of an agent for service of process that differs from the information shown upon the records of the [Secretary of State] immediately before the filing, the annual report's differing information shall be considered a statement of change under Section 114.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether an annual report will be allowed to update information concerning the designated office and agent for service of process [new subsection (e)]

Derived from ULLCA § 211. In prior Drafts, this material appeared at Section 211.

Subsection (a)(2) – At its October, 1998 meeting, the Drafting Committee rejected ULLCA's concept of a "designated" in-state office for domestic and foreign limited partnerships. Accordingly, Draft #4 removed a reference to a "designated office" and substituted appropriate cross-references. For the reasons stated in the Reporter's Notes to Section 114, Draft #5 returns to ULLCA's concept of a "designated office."

Subsection (a)(3) – For a foreign limited partnership, the designated office is the principal office. See Section 101(5).

Former subsection (a)(4) – This provision, referring to "the names and business addresses of its general partners," has been deleted to avoid possible conflicts between the information provided in the annual report and the information stated in the certificate of limited partnership. No comparable problem exists under ULLCA, even though ULLCA § 211(a)(4) requires the annual report to include "the names and business addresses of any managers." ULLCA requires the articles of organization to include only "the name and address of each initial manager." ULLCA § 203(a)(6). Re-RULPA, in contrast, requires the certificate of limited partnership to list the general partners and requires the certificate to be amended to keep the list up to date. Sections 201(a)(3) and 202(b)(1) and (2).

Subsection (e) – This subsection is new in Draft #5 and is included for the reasons stated in the Reporter's Notes to Section 114.

[ARTICLE] 3

LIMITED PARTNERS

SECTION 301. ADMISSION OF LIMITED PARTNERS. A person becomes a limited partner:

(1) at the time the limited partnership is formed, if the person has entered into a partnership agreement which takes effect when the limited partnership is formed and provides that the person is a limited partner; and

(2) after formation of the limited partnership, as provided in the partnership agreement, with the consent of all the partners, or as the result of a conversion or merger under [Article] 11.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to adopt the alternative version (below); whether to combine this Section and Section 401 into a single section (to be included in Article 1) on the admission of partners.

Derived loosely from RULPA § 301.

Alternative Version – The following alternate version furthers the process of simplification and removes the formal distinction between obtaining membership pre- and post-formation. Ordinary contract law principles permit a partnership agreement to be signed prior to formation, to be effective upon formation.

A person becomes a limited partner as provided in the partnership agreement, with the consent of all the partners, or as the result of a merger or conversion under [Article] 11.

For the sake of contrast, Section 401 (Admission of General Partners) uses the alternative formulation.

SECTION 302. NO RIGHT OR POWER AS LIMITED PARTNER TO BIND THE LIMITED PARTNERSHIP. A limited partner has neither the right nor the power as a limited partner to act for or bind the limited partnership.

Reporter's Notes

In prior Drafts, this material appeared as Section 302(e). The concept is so fundamental to Re-RULPA's vision of a limited partnership, however, that Draft #5 gives the provision a section of its own. As for "the vision thing," see the Prefatory Note.

The phrase "as a limited partner" means that: (i) this provision does not disable a general partner that also owns a limited partner interest, and (ii) a separate agreement can empower and entitle a person who is a limited partner to act for the limited partnership in another capacity; e.g., as an agent.

The fact that a limited partner has no power to bind the limited partnership means that information possessed by a limited partner is not attributed to the limited partnership. Attribution of information is an aspect of the power to bind.

SECTION 303. NO LIABILITY AS LIMITED PARTNER TO THIRD PARTIES. A limited partner is not liable for a debt, obligation, or other liability of the limited partnership solely by reason of being a limited partner, even if the limited partner participates in the management and control of the limited partnership.

Reporter's Notes

In prior Drafts, this material appeared at Section 303.

This section eliminates the RULPA rule that makes a "limited partner [who] participates in the control of the business . . . liable . . . 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." RULPA § 303(a). This Section also eliminates RULPA's lengthy list of safe harbors. RULPA § 303(b).

This section establishes a liability shield for limited partners which will be analogous to the corporate shield for shareholders. Nothing in the limited partner's shield affects claims for which limited partner status is not an element. Thus, this section does not prevent a limited partner from being liable as a result of the limited partner's own conduct to the extent that the same conduct would result in liability for a person who is not a limited partner. Moreover, this section does not eliminate a limited partner's liability for promised contributions, Section 502, and improper distributions. Section 510. That liability is not on account of a person's status as a limited partner.

The Drafting Committee has not yet discussed whether Re-RULPA should address the concept of "piercing the veil." The concept is an equitable doctrine and presumably applies to limited partnerships through Section 105.

SECTION 304. MANAGEMENT RIGHTS OF LIMITED PARTNERS.

(a) A limited partner has no right to participate in the management of the limited partnership, except for:

(1) the amendment to the partnership agreement under subsection (b);

(2) the authorization or ratification under Section 109(b)(3)(ii) of acts or transactions that would otherwise violate the duty of loyalty;

(3) a decision under subsection (b) to authorize the limited partnership to become or cease to be a limited liability limited partnership;

(4) access to the required records and other information under Section 305;

(5) the admission of a new partner under Sections 301(b), 401 or 801(3)(ii);

(6) a decision under Section 502(c) to compromise a claim against a partner;

(7) the expulsion of a limited partner under Section 601(b)(4) or a general partner under Section 603(4);

(8) a decision under Section 703(c)(3) to use limited partnership property to redeem an interest subject to a charging order;

(9) a decision under Section 801(2) whether to dissolve the limited partnership;

(10) a decision under Section 801(3)(i)(B) whether to dissolve the limited partnership following the dissociation of a general partner;

(11) a decision under Section 801(3)(ii) whether to continue the limited partnership and appoint a new general partner following the dissociation of the limited partnership's last general partner;

(12) a decision under Section 803(b) to appoint a person to wind up the dissolved limited partnership's business;

(13) application to a court pursuant to Section 803(c) for the appointment of a person to wind up the dissolved limited partnership's business;

(14) the bringing of a derivative action under Article 10; and

(15) approval under [Article] 11 of a plan of conversion or merger.

(b) The consent of each partner is necessary to:

(i) amend the partnership agreement; and

(ii) to authorize a limited partnership to become or cease to be a limited liability limited partnership.

(c) Action requiring the consent or vote of limited partners under this [Act] may

be taken without a meeting.

(d) A limited partner may appoint a proxy to vote or otherwise act for the limited partner by signing an appointment instrument, either personally or by the limited partner's attorney-in-fact.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether sale of substantially all of the assets of the business should require approval of the limited partners; whether to relocate subsections (c) and (d) to Article 1 where they would avoid duplication by referring to both limited and general partners.

In prior Drafts, this material appeared at Section 302.

Subsection (a) – Draft #1 first listed various nonfinancial rights of a limited partner and then stated that a limited partner had no other management rights. At the Committee's direction, all subsequent drafts have begun with the restrictive language.

ULLCA contains a comparable list. *See* ULLCA § 404(c) (management of limited liability company). For Re-RULPA there are two plausible locations for the list: here, in the section dealing with limited partners, or Section 406, dealing with the management rights of general partners. Draft #5 continues the approach of Drafts ##1-4 and locates the list here. Accordingly, Section 406 refers to this section.

This list was re-styled in Draft #2, to follow the style of ULLCA § 404(c). The following items appear in ULLCA 404(c) but not in this Draft: the making of interim distributions; waiver of the right to have the company's business wound up (inapposite); the sale, lease, exchange, etc. of all of the company's property. Draft #2 did not reserve such sale, lease, exchange, etc. to a vote of the limited partners, thereby implicitly authorizing the general partners to take such action on their own.

That approach was continued in Draft #3 and is consistent with a decision the Committee made in its July, 1997 meeting. Draft #1, former Section 403(c) prohibited general partners from taking "any action outside the ordinary course or the proper winding up of the limited partnership's business" and an endnote suggested that, except during winding up, disposition of substantially all of a limited partnership's assets would typically be outside the ordinary course. The Committee deleted Section former 403(c).

Subsection (a)(4) – Draft #1 included the phrase "and other information regarding the limited partnership's business, affairs and financial condition". Draft #2 deleted that phrase, because at the July, 1997 meeting the Drafting Committee deleted provisions requiring the limited

partnership to compile that additional information. At its October, 1998 meeting, the Committee partially reversed itself and added language requiring the limited partnership to provide information beyond the required records. Accordingly, Draft #4 inserted the words “and other information,” and Draft #5 preserves that insertion

There has been some discussion as to whether access to records properly fits with the caption of "management rights" and concept of "participat[ing] in . . . management."

Subsection (a)(5) – The first cross reference is to the generally applicable provision on admitting limited partners. The second cross reference is to the generally applicable provision on admitting general partners. The third cross reference is to the provision allowing the admission of a new general partner following the dissociation of the limited partnership's last general partner. In the default mode, the first two of the cross referenced provisions require unanimous partner consent. The third requires consent from limited partners owning a majority of profits interests.

Subsection (a)(14) – There has been some discussion as to whether bringing a derivative action properly fits with the caption of "management rights" and concept of "participat[ing] in . . . management." However, courts addressing the demand futility question routinely state that the bringing of litigation is ordinarily a matter of business judgment, to be decided by the company's management.

Subsection (c) – Source: ULLCA § 404(d). The same provision appears in Section 406. The repetition follows from Re-RULPA's bifurcated approach to limited and general partners. Re-RULPA could avoid the repetition by relocating the provision to Article 1. See, e.g., Section 111 (Business Transactions of Partner with Partnership).

Subsection (d) – Source: ULLCA § 404(e). The same provision appears in Section 403. The repetition follows from Re-RULPA's bifurcated approach to limited and general partners. Using Article 1 would avoid the repetition.

Former subsection (e) – This provision has been relocated to Section 302.

Draft #1 contained an additional subsection, which stated: "This section does not prevent a limited partner from bringing a direct action to enforce rights personal to that limited partner. A limited partner may bring a direct action with or without an accounting." The Committee directed that those issues be addressed elsewhere. See Section 1001.

SECTION 305. LIMITED PARTNER'S AND FORMER LIMITED PARTNER'S RIGHT TO INFORMATION.

(a) On 10 days written demand to the limited partnership, a limited partner may

inspect and copy the required records during regular business hours in the limited partnership's designated office. A partner making demand pursuant to this subsection need not demonstrate, state, or have any particular purpose for seeking the information.

(b) A limited partner may, during regular business hours and at a reasonable location specified by the limited partnership, obtain from the limited partnership and inspect and copy true and full information regarding the state of the business and financial condition of the limited partnership and other information regarding the affairs 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 written demand on 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) Within 10 days of receiving a demand pursuant to subsection (b), the limited partnership shall in writing inform the limited partner who made the demand:

(1) what information the limited partnership will provide in response to the demand;

(2) when and where the limited partnership will provide that information; and

(3) if the limited partnership declines to provide any demanded

information, the limited partnership's reasons for declining.

(d) Subject to subsection (f), a person dissociated as a limited partner may inspect and copy a required record during regular business hours in the limited partnership’s designated office if:

(1) the record 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 meets the requirements stated in paragraphs (1) to (3) of subsection (b).

(e) The limited partnership shall respond to a demand made pursuant to subsection (d) in the same manner as provided in subsection (c).

(f) If an individual who is a limited partner dies, Section 704 applies.

(g) The limited partnership may impose reasonable limitations on the use of information under this Section. A partnership agreement may impose reasonable limitations on the availability and use of information under this Section and may define appropriate remedies (including liquidated damages) for a breach of any reasonable use limitation. In any dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(h) A limited partnership may charge a limited partner or person dissociated as a limited partner who makes a demand under this section reasonable costs of copying, limited to the costs of labor and material.

(i) A limited partner or person dissociated as a limited partner may exercise the

rights stated in this section through an attorney or other agent. In that event, any availability and use limitations under subsection (g) apply both to the limited partner or person and to the attorney or other agent. The rights stated in this section extend to the legal representative of a person under legal disability who is a limited partner or person dissociated as a limited partner. The rights stated in this section do not apply to a transferee, except that subsection (d) creates rights for a person dissociated as a limited partner and subsection (f) recognizes the rights of the executor or administrator of a deceased limited partner.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to relocate to section 109 (Effect of Partnership Agreement) the language in subsection (g) relating to restrictions imposed by the partnership agreement on the right of access; whether to preserve the language in subsection (g) that gives a limited partnership the unilateral right to impose use restrictions; whether to delete as unnecessary the language in subsection (g) which authorizes the partnership agreement to provide for liquidated damages; whether to relocate Section 704 (Power of Estate of Deceased Partner) as a subsection of this section.

At its October, 1998 meeting, the Drafting Committee made substantial changes to this Section, in accordance with the Committee's rejection of the two-tiered approach to required records. See Reporter's Notes to Section 110. The Committee decided to retain Draft #3's corporate-like provisions relating to process but to change the substance of the information accessible for cause.

Specifically, the Committee decided to use the language from RULPA § 305(a)(2)(i) and (iii). Those paragraphs require the limited partnership to provide, on proper demand, "true and full information regarding the state of the business and financial condition of the limited partnership and other information regarding the affairs of the limited partnership as is just and reasonable." *Compare* RUPA § 403(a) and ULLCA § 408(b) (giving access *inter alia* to "other information concerning the [entity's] business or affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances") and RMBCA § 16.02 (limiting access to specified records).

In its July, 1997 meeting, the Drafting Committee deleted from Draft #1 the following provision as unduly burdensome and expansive:

> 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 taken or the

consent given or withheld the limited partnership shall, without demand, provide the limited partner with all information which the general partners possess or have access to and which is material to the limited partner's decision.

The deleted provision derived from ULLCA § 408(b), which provides comparable rights to LLC members even in a manager-managed LLC. Discussion at the July, 1997 meeting suggested that the applicability of ULLCA § 408(b) to manager-managed LLCs was an "oversight."

Subsection (b) – The language describing the information to be provided comes verbatim from RULPA § 305(a)(2)(i) and (iii). Earlier drafts had deleted this language as imposing too open-ended a burden on the limited partnership. At its October, 1998 meeting, the Drafting Committee reinstated the RULPA language.

As to the location where the information is made available, Draft #1 referred to "the limited partnership's in-state office." The Committee deleted that reference in favor of the current language, which is taken from RMBCA § 16.02.

Subsection (b)(1) – Derived from RMBCA, § 16.02(c). That provision refers to "proper purpose." This draft substitutes for that phrase the explanation given in the RMBCA Comment. Draft #1 followed RMBCA § 16.02(c)(1) in imposing a "good faith" requirement. Subsequent Drafts have omitted that specific requirement as redundant, given a limited partner's generally-applicable duty of good faith.

Subsection (c)(3) – In a dispute concerning demanded information, general principles of civil procedure will impose the burden of proof on the party seeking relief; i.e. the person making demand.

Subsection (d) – For the notion that former owners should have access rights, see ULLCA 408(a). The reference to subsection (f) is new and is explained below.

Subsection (f) – This subsection is new and has been added consonant with a decision made by the Drafting Committee at its March, 1999 meeting. Reviewing Section 705 of Draft #4 [now Section 704], the Committee decided to reinstate RULPA's language as to the estate of a deceased partner. That decision gives the estate considerably more informational rights than those enjoyed by other dissociated limited partners. See Section 704.

Subsection (g) – Following discussion at the October, 1998 meeting, this subsection was revised to authorize the partnership agreement to restrict availability (as well as use) of information. The subsection has several noteworthy aspects:

i. It provides specific authority to the partnership agreement rather than relying on the general authority stated in Section 108(a). The main consequence seems to be an oblique effect on Section 109(b)(2) (prohibiting unreasonable restrictions on the

right of access). Because subsection (g) specifically authorizes access and use restrictions, such restrictions cannot be deemed *categorically* to violate Section 109(b)(2).

ii. It permits the general partners to impose use limitations, even if the partnership agreement is silent. The Committee adopted this position at its the July, 1997 meeting.

iii. It imposes on the limited partnership the burden of proving the reasonableness of any restriction.

Also as a result of the July, 1997 meeting, the subsection expressly authorizes the partnership agreement to provide for liquidated damages. This authorization seems unnecessary; liquidated damages are an ordinary phenomenon in agreements.

Subsection (h) – At its October, 1998 meeting, the Drafting Committee directed the Reporter to consider expanding this subsection to encompass costs a limited partnership incurs in generating information under subsection (b). In fealty to RUPA and ULLCA, the subsection is not expanded. *See* RUPA § 403(b) and ULLCA § 408(a) (charges limited to copying costs). The phrase "limited to the costs of labor and material" has been added, following ULLCA. (The RUPA provision refers to "covering the costs . . .")

Subsection (i) – At the Committee's March, 1998 meeting the Reporter was directed to refer to ULLCA § 408(b) and provide comparable protections for the estate of a deceased partner. New subsection (f) takes care of that issue.

SECTION 306. LIMITED DUTIES OF LIMITED PARTNERS.

(a) Except as stated in subsection (b), a limited partner does not owe any fiduciary duty to the limited partnership or to any other partner.

[two alternative versions of subsection (b) follow]

***Version #1 (pro tanto; from ULLCA)* –** (b) A limited partner who pursuant to the limited partnership agreement exercises some or all of the rights of a general partner in the management and conduct of the limited partnership's business is held to the standards of conduct for a general partner to the extent that the limited partner exercises the managerial authority

vested in a general partner by this [Act].

Version #2 (pro tanto) (inspired by RMBCA) – (b) To the extent the partnership agreement vests the discretion or powers of a general partner in a limited partner, that limited partner has the duties of a general partner with respect to the vested discretion or powers.

(c) A limited partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing. The obligation stated in this subsection displaces any common law or other obligation of good faith and fair dealing.

(d) A limited partner does not violate a duty or obligation under this [Act] merely because the limited partner's conduct furthers the limited partner's own interest.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to approve Version #1 or #2 of subsection (b); whether to delete or revise the second sentences of subsection (c); whether to relocate subsections (c) and (d) to Article 1 where they would avoid duplication by referring to both limited and general partners.

In prior Drafts, this material appeared as Section 302A.

Subsection (a) – Draft #1 included the phrase "on account of that status" following the word "not." The Drafting Committee deleted that phrase as unnecessary. A limited partner can assume fiduciary obligations on account of some other relationship to the limited partnership. For example, a limited partner who acts as a broker or attorney for the limited partnership will owe the limited partnership fiduciary duties in that role. See also Section 112 (Dual Capacity).

Subsection (b), Version #1 – Derived from ULLCA § 409(h)(3). Like the ULLCA provision, this provision could be read to omit nonfeasance; i.e. a limited partner who is given rights but fails to exercise them would not be liable. In any event, this rule does not apply if the limited partner exercises powers under a separate agreement.

Re-RULPA does provide some protection against the "separate agreement" problem. A general partner is relieved from fiduciary duty only when a delegation occurs via the partnership agreement. See Section 408(f). When a separate agreement delegates power to a limited partner, that delegation will not discharge the general partner's fiduciary duty.

Of course, a limited partner who enters a separate agreement will have whatever contractual duties that agreement provides. Morever, if the agreement reflects or establishes a fiduciary relationship (e.g., an agency), that relationship will impose fiduciary duties as well.

Subsection (b), Version #2 – Derived (loosely) from RMBCA § 7.32(e). The "separate agreement" problem exists under this version as well.

Alternative to Subsections (a) and (b) – The Reporter's notes indicate that at the July, 1997 meeting there was some support for the following alternative:

> A limited partner does not owe any fiduciary duty to the limited partnership or to any other partner, even if in accordance with the partnership agreement or other agreement the limited partner possesses and exercises some or all of the rights of a general partner in the management and conduct of the limited partnership's business.

Subsection (c) – The first sentence comes from RUPA § 404 (d). The second sentence follows the Committee's instructions.

Professor Ribstein has suggested that the second sentence will prevent courts from using common law cases to interpret the very vague concept of good faith and fair dealing. Larry E. Ribstein, "Limited Partnerships Revisited," work in progress, draft of March 19, 1999. In any event, the second sentence adds significance to the following proposed Comment on good faith. (In Drafts ##1and 4 this Comment appeared following Section 302A. In Drafts ## 2 and 3 the Comment appeared following Section 101. Underlining and strikeouts indicate changes to the proposed Comment made in Draft #3 and continued in Drafts ##4 and 5).

> *Draft Comment on Good Faith and Dealing*: The obligation of good faith and fair dealing is *not* a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner's own self-interest. Courts should not use the obligation to change *ex post facto* the parties' or this [Act's] allocation of risk and power. To the contrary, 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 more open-ended is a grant of power or discretion, the less plausible is a claim of breach of the obligation of good faith and fair dealing.
>
> The partnership agreement or this [Act] may grant discretion to a partner, and that partner may properly exercise that discretion even though another partner suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur. The exercise of discretion constitutes a breach only when the party claiming breach shows that the conduct has no ~~genuine,~~ legitimate, honestly-held ~~business~~ purpose. Once such a purpose appears, courts should not second guess a party's choice of method in serving that purpose, unless the party invoking the

obligation of good faith and fair dealing shows that the choice of method itself lacks any ~~genuine,~~ legitimate, honestly-held ~~business~~ purpose.

Subsection (c) also appears in Section 406, pertaining to general partners. Relocating the subsection to Article 1 would avoid the repetition.

Subsection (d) – Source: RUPA § 404(e). This provision also appears in Section 406, pertaining to general partners. Relocating the provision to Article 1 would avoid the repetition. Draft #1 contained the following statement, which the Committee deleted as more appropriate for a Comment: "This section does not prevent a limited partner from assuming fiduciary or other duties in some capacity other than limited partner."

SECTION 307. PERSON ERRONEOUSLY BELIEVING HIMSELF [OR HERSELF OR ITSELF] LIMITED PARTNER.

(a) Except as provided in subsection (b), a person who makes an investment in a business enterprise and erroneously but in good faith believes that he [or she or it] has become a limited partner in the enterprise is not bound by its 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 filed; or

(2) withdraws from future equity participation in the enterprise by signing and filing in the office of the Secretary of State a statement of withdrawal under this section.

(b) A person who makes an investment of the kind described in subsection (a) is liable to the same extent as a general partner to any third party who transacts business with the enterprise (i) before the person withdraws and an appropriate statement of withdrawal is filed, or (ii) before an appropriate certificate, amendment or statement of correction is filed to show that

the person is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

(c) If a person makes a good faith and diligent effort to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership or amendment to be executed and filed, the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) even if otherwise the withdrawal would breach an agreement with others who are or have agreed to become co-owners of the enterprise.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether Re-RULPA should include a "defective formation" provision to protect a general partner who starts an enterprise erroneously believing the enterprise to be an LLLP; whether this section should be rewritten in a more modern, straightforward style.

Source: RULPA § 304. In prior Drafts, this material appeared at Section 304.

Style issue – This is an elliptically drafted provision. Its components function to produce the desired result, but the reader has to work through the details before seeing the big picture. To state the rule directly would, however, require a much longer provision. In light of the rare use of the current provision and the need to keep the statute to a manageable length, this draft makes no substantial revisions.

Defective formation of LLLPs – Neither this provision nor any other in this Draft protects a general partner who starts an enterprise erroneously believing the enterprise to be an LLLP. This issue can be labeled "defective formation" and only arises with regard to full shield entities. With an ordinary limited partnership, the general partner is always liable for the business' debts and so the niceties of formation have little impact.

Corporate law has dealt with this issue in various ways, including: MBCA § 146 (persons assuming to act when de jure corporation not yet formed); RMBCA § 2.04 (liability for preincorporation transactions); the doctrines of de facto incorporation and corporation by estoppel. ULLCA does not address the subject.

If the Committee wishes, the next Draft can include a provision immunizing general partners who in good faith but erroneously believe themselves to be general partners of an LLLP. It can be argued that such people are indistinguishable from "persons purporting to act as or on behalf of a corporation [not] knowing there was no incorporation." RMBCA § 2.04. However,

in deciding this point it is well to consider that a LLLP resembles an LLC at least as much as a corporation and that ULLCA is a very recent Uniform Act. Absent a good reason to the contrary, why not follow ULLCA rather than the RMBCA?

Changes from RULPA § 304 – The following redlined version shows how this section differs from RULPA § 304:

SECTION ~~304~~ 309. PERSON ERRONEOUSLY BELIEVING HIMSELF [OR HERSELF OR ITSELF] LIMITED PARTNER.

(a) Except as provided in subsection (b), a person who makes ~~a contribution to~~ an investment in a business enterprise and erroneously but in good faith believes that he [or she or it] has become a limited partner in the enterprise ~~is not a general partner in the enterprise and~~ is not bound by its obligations by reason of making the ~~contribution~~ investment, receiving distributions from the enterprise, or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, ~~he [or she]~~ the person:

(1) causes an appropriate certificate of limited partnership or ~~a certificate of~~ amendment to be ~~executed~~ signed and filed; or

(2) withdraws from future equity participation in the enterprise by ~~executing~~ signing and filing in the office of the Secretary of State a ~~certificate declaring~~ statement of withdrawal under this section.

(b) A person who makes ~~a contribution~~ an investment of the kind described in subsection (a) is liable to the same extent as a general partner to any third party who transacts business with the enterprise (i) before the person withdraws and an appropriate ~~certificate~~ statement is filed to show withdrawal, or (ii) before an appropriate certificate, amendment or statement of correction is filed to show that ~~he [or she]~~ the person is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.

(c) If a person makes a good faith and diligent effort to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership or amendment to be executed and filed, the person has the right to withdraw from the enterprise pursuant to subsection (a)(2) even if otherwise the withdrawal would breach an agreement with others who are or have agreed to become co-owners of the enterprise.

Subsection (a) – "Investment" replaces "contribution," because in this Draft "contribution" is a defined term and relates to an investment in a de jure limited partnership. This provision is not limited to that situation. As to the phrase "business enterprise" – even though the Committee has decided that a limited partnership need not have a "business" purpose, the word "business" should probably remain here. This provision addresses the vicarious liability that arises from co-ownership of a would-be profit-making enterprise.

The deleted phrase "is not a general partner" is redundant to the extent the phrase is intended to protect the would-be limited partner from vicarious liability to third parties. Moreover, the phrase may be confusing in relation to Section 402 (General Partner Agent of Limited Partnership). If this section is intended to override Section 401, this section should say so explicitly. If not (which the Reporter thinks is and should be the case) the phrase "is not a general partner" does not belong here.

The addition of "or appropriate to" is intended to cover situations in which no certificate of limited partnership is on file and therefore no limited partnership has come into existence. In those circumstances, a person cannot have the rights of a limited partner because no limited partner interests can yet exist.

Subsection (a)(2) – This change is intended to aid clarity by reserving the term "certificate" for the certificate of limited partnership.

Subsection (b) – The phrase "to the same extent" is added to accommodate LLLPs. If at the relevant moment the limited partnership is a LLLP, no personal liability results.

Subsection (c) – This rule is perhaps implicit in the current language, but seems worth stating directly, especially in light of the new approach to limited partner withdrawal. The provision's purpose is to protect the withdrawing person from claims from other partners or would-be partners but not, for example, to give the withdrawing person a statutory right to avoid a personal guarantee made to a lender.

[ARTICLE] 4
GENERAL PARTNERS

SECTION 401. ADMISSION OF GENERAL PARTNERS.

A person becomes a general partner as provided in the partnership agreement, with the consent of all the partners, under Section 801(3)(ii) following the dissociation of a limited partnership's last general partner, or as the result of a conversion or merger under [Article] 11.

Reporter's Notes

Style issue – Compare this Section's language with Section 301 (Admission of Limited Partners).

General Partner Status and the Certificate of Limited Partnership – At its July, 1997 meeting, the Committee decided that a person could be a general partner without being so designated in the certificate of limited partnership. Therefore, if a person is a general partner according to the partnership agreement but not according to the certificate, that person has:

- all the rights and duties of a general partner as to the limited partnership and the other partners;

- the powers of a general partner to bind the limited partnership under Section 402 and 403

- no power to sign records on behalf of the limited partnership for filing with the [Secretary of State] (see Comment to Section 204(a)(7))

The certificate of limited partnership is consequently a far less powerful document that envisioned in Draft #1. With regard to the status of general partners, the certificate merely serves as notice that those persons so listed are general partners. See Section 102 (c) and (d). The absence of a name is not affirmatively significant. Suppose, for example, that a third party believes X to be a general partner, but the certificate of limited partnership does not list X as a general partner. That omission does not dispositively undercut X's bona fides in the eyes of the third party – even if the third party has reviewed the certificate. (It might be argued, however, that such a third party has at least a duty to inquire further.)

At its March, 1999 meeting, the Drafting Committee deleted provisions that gave the certificate power over the authority of general partners to transfer real property.

SECTION 402. GENERAL PARTNER AGENT OF LIMITED PARTNERSHIP.

(a) Each general partner is an agent of the limited partnership for the purpose of its business. An act of a general partner, including the execution of an instrument in the partnership name, for apparently carrying on in the ordinary course the limited partnership business or business of the kind carried on by the limited partnership binds the limited partnership, unless the general partner had no authority to act for the limited partnership in the particular matter and the person with whom the general partner was dealing knew, had received a notification, or had notice under section 102(d) 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 business or business of the kind carried on by the limited partnership binds the limited partnership only if the act was authorized by the other partners.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether subsection (a) appropriately balances the interests of limited partners and third parties by negating a general partner's apparently/usual power when the third party "knew, had received a notification, or had notice under section 102(d) that the general partner lacked authority;" whether subsection (a) will continue to use the vague concept of "authority."

Source: RUPA § 301. In prior Drafts, this material appeared at Section 403A.

Location of constructive notice provisions – Prior Drafts made this section subject to former Section 208 (Effect of Information Contained in Certificate of Limited Partnership). Draft #5 has centralized all constructive notice provisions in Section 102. See the Reporter's Notes to Section 102. Subsection (a) now refers not only to knowledge and "notification" (as in RUPA) but also to "notice under Section 102(d)."

Authority to transfer real estate – Like RUPA, prior Drafts specifically contemplated statements granting or restricting a general partner's authority to transfer real property and gave special legal effect to those statements. See Draft #4, Sections 201(b) (authorizing the certificate of limited partnership to contain such statements) and 208 (b) and (c) (detailing the effect of such statements). At its March, 1999 meeting, the Drafting Committee decided that a limited partnership's tightly centralized management structure made such statements unnecessary.

Like prior Drafts, Draft #5 follows ULLCA in omitting any parallel to RUPA § 302, Transfer of Partnership Property. RUPA § 302 derives from UPA § 10, and both those sections address issues arising from the former aggregate aspect of *general* partnerships.

Allocating the risk of a general partner's unauthorized acts – When a general partner acts in an apparently/usual manner but without actual authority, both the third party and the entity are at risk. The entity's risk essentially devolves on the entity's owners, even those who benefit from a shield (e.g., limited partners, general partners in an LLP). Unauthorized conduct endangers their equity.

The law must allocate the risk between the third party and the owners, and RUPA chose to favor strongly the third party. Under RUPA § 301(1), a general partner's apparently/usual act binds the general partnership unless "the person with whom the partner was dealing knew or had received a notification that the partner lacked authority." Even if the third party "has reason to know [of the lack of authority] from all of the facts known to the [third party] at the time in question," the partnership is bound. The quoted language is from RUPA's definition of "notice." RUPA § 102(b)(3).)

RUPA thus tilts further toward the third party than did the UPA. *See* J. Dennis Hynes, "Notice and Notification under the Revised Uniform Partnership Act: Some Suggested Changes," 2 J. SMALL & EMERGING BUS. L. 299. UPA § 9(1) negates a general partner's apparently/usual power if "the person with whom [the partner] is dealing has knowledge of the fact that [partner] has no . . . authority." UPA § 3(1) states that "[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."

Professor Hynes argues that RUPA is mistaken on this issue. *Id.* Whether or not RUPA is correct, on this point RULPA should not follow RUPA. The equities are different. In a general partnership, absent a contrary agreement "each partner has equal rights in the management and conduct of the partnership business." RUPA § 401(f). Therefore, arguably at least:

- the general partners collectively are better positioned than a third party to determine whether an individual general partner is acting without authority;
- general partners are thus always "on notice" of the need to monitor their fellow partners; and
- it is fair to bind the general partnership even when the third party has "notice" of the lack of authority.

With a limited partnership, the situation is quite different. A general partner' unauthorized act puts the limited partners at risk, and they have less ability than the typical third party to oversee individual acts by the general partner. A third party can always demand evidence of the general partner's authority, but limited partners have no significant "right to participate in the management of the limited partnership," Section 304(a), and no say over most "matter[s] relating to the business of the limited partnership." Section 406(a).

The Reporter therefore recommends that the last clause of subsection (a) be revised to read "the person with whom the general partner was dealing ad notice that the general partner lacked authority."

Ambiguous and conflicting meanings for "authority" – Draft #1 substituted the phrase "the general partner had actual authority for the act or the limited partnership ratified the act" for RUPA § 301(2)'s phrase "authorized by the other partners." An endnote to Draft #1 explained the substitution as follows:

> The Comment to RUPA § 301 explains what RUPA means by "authority" in this context. This draft merely takes RUPA's explanation and puts that explanation into the statute.

Draft #2 returned to the RUPA language, in accordance with the Drafting Committee's instructions at the July, 1997 meeting, and of course subsequent Drafts have continued that approach.

The Reporter continues to urge the Committee to return to Draft #1's approach in this instance and notes that RUPA Comments ascribe various meanings to the word "authority." *See* RUPA §§ 301, Comment 3 (interpreting RUPA § 301(2), which contemplates an act "not

apparently for carrying on in the ordinary course" as being "authorized by the other partners;" stating that the subsection "makes clear that the partnership is bound by a partner's actual authority, even if the partner has no apparent authority"); 305, Comment, third paragraph (explaining that the phrase "with the authority of the partnership" in § 305(a) "is intended to include a partner's apparent, as well as actual, authority"); 305, Comment, fifth paragraph (interpreting, without quoting, the phrase "with authority of the partnership" in § 305(b) and indicating that the phrase refers to "the scope of the partner's actual authority").

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 business of the limited partnership or with authority of the limited partnership.

(b) If, in the course of the limited partnership's business or while acting with authority of the limited partnership, a general partner receives or causes the limited partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the limited partnership is liable for the loss.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether this section will continue to use the vague concept of "authority."

Source: RUPA § 305. In prior Drafts, this material appeared at Section 403B.

Subsection (a) – For the sake of clarity, Draft #1 included immediately before the word "authority" the phrase "actual or apparent." RUPA § 305(a) is the source of this subsection, and the Comment to RUPA § 305(a) states "[t]his is intended to include a partner's apparent, as well as actual, authority." Remarkably, the Comment to RUPA § 305(b) interprets the phrase "acting with the authority of the partnership" to refer only to "the scope of the partner's actual authority." To avoid confusion, Draft #1 inserted the applicable adjective into the text of the statute.

In accordance with the Committee's instructions at the July, 1997 meeting, Draft #2 returned to the RUPA language, and of course subsequent drafts have continued that approach. The Reporter continues to urge the Committee to return to the Draft #1 language.

Subsection (b) – ULLCA omits this provision. Subsection (a) would suffice to cover subsection (b), except that – according to the RUPA comments – subsection (a) includes apparent authority while subsection (b) does not. According to the Comment to RUPA § 305(b), that subsection's phrase "acting with authority of the partnership" refers only to "the scope of the partner's actual authority." As to various meanings RUPA Comments ascribe to the word authority, see the Reporter's Notes to subsection (a), above.

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 obligations of the limited partnership unless otherwise agreed by the claimant or provided by law.

(b) A person admitted as a general partner into an existing limited partnership is not personally liable for any limited partnership obligation incurred before the person's admission as a partner.

(c) An obligation of a limited partnership incurred while the limited partnership is a limited liability limited partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the limited partnership. A general partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or acting as a general partner. This subsection applies despite anything inconsistent in the partnership agreement that existed immediately before the vote required to become a limited liability limited partnership under Section 304(b).

Reporter's Notes

Source: RUPA § 306. In prior Drafts, this material appeared at Section 403C.

Subsection (a) – Draft #1 included within the exception "Section 401F (discharged [now 'dissociated'] partner's liability to other persons"). Draft #2 omitted that reference because, strictly speaking, Section 401F [now Section 607] does not refer to a general partner's liability. Sections 606 and 805 govern the personal liability of a *dissociated* partner.

Subsection (c) – The Committee needs to consider what, if anything, the Act should say about the doctrine of "piercing the [corporate] veil." The doctrine has little relevance for ordinary limited partnerships, because, except in the most extraordinary circumstances, the general partner's management control and personal liability render the doctrine moot. (Piercing remains relevant, as a matter of corporate law, with regard to the shareholders of a corporate general partner.)

Piercing is, however, an important issue with regard to LLLPs, because an LLLP has a full, corporate-like liability shield. Following ULLCA, this draft does not directly mention piercing. However, following ULLCA, RUPA and UPA, Section 106(a) of this draft provides that "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." Piercing is an equitable doctrine.

Former Section 403C-3 (Liability of Purported Partner) – Draft #5 omits this provision as unwarranted, because:

- a third party can use the public record to check assertions that a person is a general partner in a limited partnership; and

- doctrines such as apparent authority, agency by estoppel and warranty of authority will suffice to protect third parties.

SECTION 405. ACTIONS BY AND AGAINST PARTNERSHIP AND PARTNERS.

(a) An action may be brought against the limited partnership and, to the extent not inconsistent with Sections 103(a) and 404, any or all of the general partners in the same action or in separate actions.

(b) A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against a limited 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 limited partnership is a debtor in bankruptcy;

(3) the general partner has agreed that the creditor need not exhaust limited 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 limited partnership assets subject to execution are clearly insufficient to satisfy the judgment, that exhaustion of limited partnership 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 limited partnership.

Reporter's Notes

Derived from RUPA § 307. In Draft #4, this section appeared at Section 403C-2.

Former subsection (a) – This provision stated "A limited partnership may sue and be sued in the name of the limited partnership." Section 103(d)(1) (power of a limited partnership to sue and be sued in its own name) handles this point.

Former subsection (b) [partner not a proper party] – This provisions now appears as part of Section 103(a). For an explanation of the relocation, see the Reporter's Notes to Section 103(a).

SECTION 406. MANAGEMENT RIGHTS OF GENERAL PARTNERS.

(a) Each general partner has equal rights in the management and conduct of the limited partnership's business. Except for matters listed in Section 304(a) (rights of limited partners), any matter relating to the business of the limited partnership may be exclusively decided by the general partner, or, if there is more than one general partner, by a majority of the general partners.

(b) Action requiring the consent or vote of general partners under this [Act] may be taken without a meeting.

(c) A general partner may appoint a proxy to vote or otherwise act for the general partner by signing an appointment instrument, either personally or by the general partner's attorney-in-fact.

(d) A limited partnership shall reimburse a general partner for payments made and indemnify a general partner for liabilities incurred by the general partner in the ordinary course of the business of the partnership or for the preservation of its business or property.

(e) A limited partnership shall reimburse a general partner for an advance to the limited partnership beyond the amount of capital the general partner agreed to contribute.

(f) A payment or advance made by a general partner which gives rise to a limited partnership obligation under subsection (d) or (e) constitutes a loan to the limited partnership which accrues interest from the date of the payment or advance.

(g) A general partner is not entitled to remuneration for services performed for the partnership.

Reporter's Notes

Derived from ULLCA § 404 and RUPA § 401. In prior Drafts, this material appeared at Section 403.

Subsection (a) – At its July, 1997 meeting, the Committee decided to use ULLCA's language for this provision. Accordingly, this paragraph follows ULLCA § 404(b)(1) and (2) essentially verbatim. ULLCA does not specifically address deadlock, i.e., when the decision-makers split 50-50 on an issue. In that situation, any proposed decision will fail, because a majority is more than 50%. The consequences of deadlock will depend on the seriousness of the situation. If the deadlock involves a crucial issue, a court might order dissolution under Section 802(a).

At its March, 1999 meeting, the Drafting Committee discussed (but did not decide) whether one of several general partners has the authority to commence and prosecute a lawsuit in the name of the limited partnership. The discussion arose during the Committee's review of Article 10, and in particular with regard to the question of whether a *general* partner may bring a derivative lawsuit. For an analysis of that particular issue, see the Reporter's Notes to Section 1002.

As for the broader question, Re-RULPA's provisions essentially follow RUPA's, with some complex results. That is:

- Section 402 determines whether a general partner has the *power* viz a viz third parties (including the court and other parties to the suit) to institute and prosecute the lawsuit.

- Section 406(a) determines whether a general partner has the *right* viz a viz the limited partnership to institute and prosecute the lawsuit. Common law doctrines of actual authority supplement this subsection. See Section 106. According to those doctrines, if: (i) the limited partnership has more than one general partner, and (ii) one of those general partners is contemplating initiating a suit but has reason to believe that other general partners may disagree, then (iii) the one general partner lacks the right to bring the suit without first receiving the approval of a majority of the general partners.

Of course, a partnership agreement may provide that a general partner has the right to bring suit without first receiving approval from, or even consulting, fellow general partners.

Due to the interplay between the *power* and the *right* to prosecute a lawsuit, a general partner who initially has the power may subsequently lose it. Suppose, for example, that:

~ One of three general partners initiates a lawsuit in the name of the limited partnership against one of the limited partnership's suppliers.

~ The lawsuit fits within Section 402's apparently/usual rubric. Therefore, when the summons and complaint are served and filed, the one general partner has the apparently/usual power to bring the suit.

~ When the other two general partners learn of the suit, they voice their strong disapproval and then vote to withdraw the suit. The first general partner disagrees and vows to continue the suit.

~ The other two general partners make the circumstances known to the defendant and the court and seek on the limited partnership's behalf to voluntarily dismiss the lawsuit.

Assuming that the rules of civil procedure allow voluntary dismissal, the court should dismiss the lawsuit. Under Section 406(a) and common law principles, the first general partner lacks the right to continue the suit. Because this lack of "authority" is known to the court and defendant, under Section 402(a) the first general partner lacks the power as well. As to whether the first general partner could prosecute the suit as a derivative action, see Section 1002.

Under this analysis, a minority general partner lacks the actual authority to cause a limited partnership to initiate a lawsuit against another general partner or an affiliate of another general partner. Obviously, the minority partner will have reason to believe that the other general partner will disagree. Except in the most extraordinary circumstances, a minority general partner who uses the apparently/usual power to begin such a suit will be engaging in vexatious litigation. The appropriate course is a derivative lawsuit. See Section 1002.

Subsection (b) – Source: ULLCA § 404(d). The same provision appears in Section 304(c). The repetition follows from Re-RULPA's bifurcated approach to limited and general partners. Perhaps this provision should be expanded to include action under the partnership agreement.

Subsection (c) – Source: ULLCA § 404(e). The same provision appears in Section 304(d). The repetition follows from Re-RULPA's bifurcated approach to limited and general partners.

Subsection (d) – Source: RUPA § 401(c). The draft does not include any parallel provision for limited partners, because they are assumed to be passive. To the extent a limited partner has authority to act on behalf of the limited partnership, agency law principles will apply to create an indemnity obligation. In other situations, principles of restitution might apply.

Subsection (e) – Source: RUPA § 401(d).

Subsection (f) – Source: RUPA § 401(e).

Subsection (g) – Derived from RUPA § 401(h), but this draft omits RUPA's exception

"for reasonable compensation for services rendered in winding up the business of the partnership." In a limited partnership, winding up is a foreseeable consequence of being a general partner.

Former subsection (h) – At its July, 1997 meeting, the Committee decided to delete subsection (h). That section, taken from RUPA § 401(k), provided: "This section does not affect the obligations of a limited partnership to other persons under Section 403A." An endnote to subsection (h) questioned that subsection's accuracy, noting that some provisions of this section do affect a general partner's actual authority and therefore can affect a limited partnership's obligations to third parties.

SECTION 407. GENERAL PARTNER'S AND FORMER GENERAL PARTNER'S RIGHT TO INFORMATION.

(a) Without having to demonstrate, state, or have any particular purpose for seeking the information, a general partner may during regular business hours inspect and copy:

(1) in the limited partnership's required office, the required records; and

(2) at a reasonable location specified by the limited partnership any other records maintained by the limited partnership regarding the limited partnership's business, affairs, and financial condition.

(b) Each general partner and the limited partnership shall furnish to a general partner:

(1) without demand, any information concerning the limited partnership's business and affairs reasonably required for the proper exercise of the general partner's rights and duties under the partnership agreement or this [Act]; and

(2) on demand, any other information concerning the limited partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances.

(c) Subject to subsection (e), on ten days written demand to the limited partnership, a person dissociated as a general partner may have access to a record described in subsection (a) at the location stated in subsection (a) if:

(1) the record pertains to the period during which the person was a general partner;

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

(3) the person meets the requirements stated in paragraphs (1) to (3) of Section 305(b).

(d) The limited partnership shall respond to a demand made pursuant to subsection (c) in the same manner as provided in Section 305(c).

(e) If an individual who is a general partner dies, Section 704 applies.

(f) The limited partnership may impose reasonable limitations on the use of information under this Section. A partnership agreement may impose reasonable limitations on the availability and use of information under this Section and may define appropriate remedies (including liquidated damages) for a breach of any reasonable use limitation. In any dispute concerning the reasonableness of a restriction under this subsection, the limited partnership has the burden of proving reasonableness.

(g) A limited partnership may charge a person dissociated as a general partner who makes a demand under this section 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 stated in this section through an attorney or other agent. In that event, any availability and

use limitations under subsection (f) apply to the attorney or other agent as well as to the general partner or person dissociated as a general partner. The rights stated in this section extend to the legal representative of a person who has dissociated as a general partner due to death or legal disability. The rights stated in this section do not apply to a transferee, except that subsection (c) creates rights for a dissociated general partner and subsection (e) recognizes the rights of the executor or administrator of a deceased limited partner.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether this section and Section 305 should be combined and relocated to Article 1.

In prior Drafts, this material appeared as Section 403E.

This Section and Section 305 have substantial overlap, which could be reduced by combining the sections. The combined section might be captioned "Access to Required Records and Other Information" and follow the section listing required records, i.e. Section 110. In that event, current subsection (b), obligating a general partner to volunteer information to other general partners, could be relocated to Section 408 (General Standards of General Partner Conduct).

Draft #4 revised this Section in light of the revisions made in Section 305, and for the same reason Draft #5 added subsection (e). For detailed explanation, see the Reporter's Notes to Section 305.

Subsection (a) – In contrast to Draft #3, Draft #4 stated explicitly that a general partner need have no particular purpose to examine or copy existing records. At the March, 1999 meeting, no one objected to this language. Draft #5 therefore preserves it.

Subsection (b) – Source: RUPA § 403(c). The RUPA provision also requires disclosure "to the legal representative of a deceased partner or partner under legal disability." See Reporter's Notes to Section 305(f).

Subsection (b) states a very broad disclosure obligation. If the partnership agreement authorizes a general partner to compete with the limited partnership, it would be wise to explicitly protect from mandated disclosure confidential information generated in that competing enterprise.

Subsection (b)(1) – Like RUPA, Re-RULPA leaves unclear the relation between information available from the entity's records and a general partner's obligation under this

subsection. Does a general partner who knows of material information in the limited partnership's records have an affirmative obligation to disseminate that information to fellow general partners, or does each general partner have an individual obligation to keep up to date on the information in those records? Probably no categorical answer exists, but arguably in most circumstances it is not "reasonably necessary" to furnish to a fellow general partner information apparent in the limited partnership's records.

Subsection (b)(2) – The exception seems very vaguely stated, but it appears in both in RUPA § 403(c) and ULLCA § 408(b)(2).

Subsection (c) – This provision mirrors Section 305's approach to former limited partners.

Subsection (e) – For an analysis of this language, see the Reporter's Notes to Section 305(f).

Subsection (g) – No charge is allowed for current general partners, because in almost all cases they would be entitled to reimbursement under Section 406(d).

Subsection (h) – At the Committee's March, 1998 meeting the Reporter was directed to refer to ULLCA § 408(b) and provide comparable protections for the estate of a deceased partner. See Reporter's Notes to Section 305.

SECTION 408. GENERAL STANDARDS OF GENERAL PARTNER'S CONDUCT.

(a) The only fiduciary duties a general partner owes to the limited partnership and the other partners are the duty of loyalty and the duty of care stated in subsections (b) and (c).

(b) A general partner's duty of loyalty to the limited partnership and the other partners is limited to the following:

(1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership business or derived from a use by the general partner of limited partnership property, including the appropriation of a limited partnership opportunity;

(2) to refrain from dealing with the limited partnership in the conduct or winding up of the limited partnership business as or on behalf of a party having an interest adverse to the limited partnership; and

(3) to refrain from competing with the limited partnership in the conduct of the limited partnership business before the dissolution of the limited partnership.

(c) A general partner's duty of care to the limited partnership and the other partners in the conduct and winding up of the limited partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.

(d) A general partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing. The obligation stated in this subsection displaces any common law or other 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 merely because the general partner's conduct furthers the general partner's own interest.

(f) A general partner is relieved of liability imposed by law for violation of the standards prescribed by subsections (b) through (e) to the extent of the managerial authority delegated to one or more of the limited partners by the partnership agreement.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether subsection (a)'s restrictive approach to fiduciary duty is appropriate, in light of the limited partners' dependence on the general partners; whether a general partner's non-compete obligation should end at dissolution, in light of the limited partners' dependence on the general partners; whether the second sentence of

subsection (d) should be retained; whether the language added to subsection (f) properly clarifies that provision; whether subsection (f) should also apply when the delegation is to one or more *general* partners.

Source: RUPA § 404. In prior Drafts, this material appeared at Section 403D.

Subsection (a) – In general, the extent of a person's fiduciary duties tends to correspond with the amount of power that person has over the interests of the person to whom the duties are owed. Given the availability of LLP status, a general partner in a general partnership has less power over the interests of fellow partner than does a general partner in a limited partnership. In a general partnership, absent a contrary agreement all the partner have equal management rights, RUPA § 401(f), and therefore the ability to monitor and even control their co-partners. In contrast, limited partners are passive and general partners have correspondingly greater power. See Sections 304 and 406. Arguably, therefore, RUPA's approach is too narrow for Re-RULPA.

The reference to "the other partners" is not intended to blur the distinction between direct and derivative claims. See Section 1001(b).

Subsection (b)(3) – This provision comes essentially verbatim from RUPA, but the Reporter questions whether RUPA's permissive approach – ending the non-compete duty when the partnership dissolves – fits a limited partnership. When a general partnership dissolves, absent a contrary agreement each partner who has not wrongfully dissociated has an equal right to participate in winding up. RUPA § 803(a). If one partner chooses to compete with the partnership during winding up, the other partners can look out for the interests of the partnership. With a limited partnership, in contrast, the limited partners are passive and consequently more vulnerable.

Subsection (d) – The second sentence is new in Draft #5 and is added to correspond with Section 306(c). For a discussion of that language and the concept of good faith, see the Reporter's Notes to that section.

Subsection (f) – Source: ULLCA § 409(h)(4). The phrase "one or more of" is new in Draft #5 and does not appear in ULLCA. The added language makes clear that the subsection applies whether the delegation is to limited partners collectively, to one or more classes of limited partners, or to one or more particular limited partners.

Query: if delegation to limited partners relieves a general partner of liability, shouldn't the same result follow when the limited partnership has more than one general partner and the partnership agreement reserves certain responsibilities to one of general partners?

RUPA § 404(f) has been omitted, because Section 111 covers the topic. RUPA § 404(f) provides:

> A general partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the general partner are the same as those of a person who is not a partner, subject to other applicable law.

RUPA § 404(g) has also been omitted. That subsection provides:

> This section applies to a person winding up the partnership business as the personal or legal representative of the last surviving partner as if the person were a partner.

In this draft, Section 803(b)(1) covers the issue addressed by RUPA § 404(g).

[ARTICLE] 5

CONTRIBUTIONS, PROFITS AND DISTRIBUTIONS

SECTION 501. FORM OF CONTRIBUTION.

A contribution of a partner may consist of tangible or intangible property or other benefit to the limited partnership, including money, promissory notes, services performed, or other agreements to contribute cash or property, or contracts for services to be performed.

Reporter's Notes

Per the Committee's instructions at its March, 1998 meeting, this language (added in Draft #3) is taken, essentially verbatim, from ULLCA § 401. RULPA § 501 provides: "The contribution of a partner may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services." Both RULPA's language and the new language partially overlap Section 101(3)'s definition of "contribution." That overlap is present in RULPA as well.

SECTION 502. LIABILITY FOR CONTRIBUTION.

(a) A partner's obligation to contribute money, property, or other benefit to, or to perform services for, a limited partnership is not excused by the member's death, disability, or

other inability to perform personally.

(b) If a partner does not make a promised contribution of property or services, the partner is obligated at the option of the limited partnership to contribute money equal to that portion of the value, as stated in the required records, of the stated contribution which has not been made.

(c) 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 partners. A creditor of a limited partnership who extends credit or otherwise acts in reliance on an obligation described in subsection (a), and without notice of any compromise under this subsection, may enforce the original obligation.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether subsection (b) should be expanded to apply to a person who has promised to make a contribution, whose admission as a partner is contingent on making that contribution and who fails to make the contribution.

Subsection (a) – At its March, 1998 meeting, the Drafting Committee decided to delete the writing requirement contained in RULPA's subsection (a). That requirement was added to RULPA in 1985, but ULLCA contains no comparable provision. ULLCA § 402.

That deletion "promoted" some of what had been subsection (b) into subsection (a). Per the Committee's instructions, given at the March, 1998 meeting, that promoted language was revised to follow ULLCA, which in turns derives from the RULPA language being modified here.

Deleting the writing requirement will make more open-ended litigation about allegedly promised contributions. *See, e.g., Wilson v. Friedberg*, 473 S.E.2d 854, 857, n. 3 (S.C.App. 1996; *cert. granted June 4, 1997*) (invoking the writing requirement of current law and rejecting limited partners' claim that general partner had breached an oral promise to contribute).

Subsection (b) – At its March, 1998 meeting, the Committee decided to begin a new subsection here. The separation makes clear that the obligation to pay money applies whenever, and for whatever reason, the partner fails to make a required in-kind contribution. The reference to required records does not appear in ULLCA, because ULLCA has no required records provision.

Following ULLCA § 402(a), this subsection does not by its terms apply to a person who has promised to make a contribution, whose admission as a partner is contingent on making that contribution and who fails to make the contribution.

Subsection (c) – At its March, 1998 meeting the Committee decided to use the approach taken by ULLCA §§ 402(b) and 404(c)(4). These revisions implement that decision. The revised language is taken essentially verbatim from ULLCA § 402(b).

SECTION 503. ALLOCATION OF PROFITS AND LOSSES. The profits and losses of a limited partnership shall be allocated among the partners on the basis of the value, as stated in the required records, of the contributions made by each partner to the extent those contributions have been received by the limited partnership.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether the revised language does, as the Reporter asserts, produce the same results as the more complicated formulation of current law.

Draft #5 states a much simpler formulation than RULPA and previous Drafts of Re-RULPA. Draft #5 allocates according to contributions received *without reference to the return of contributions.* Both RULPA and ULLCA use the concept of returned contributions, but RULPA's definition of the concept is, at best, abstruse and ULLCA provides no definition. *See* RULPA § 608(c) and ULLCA § 806(b).

Re-RULPA's reformulation is not substantive. So long as a limited partnership applies the default rules on distributions, Section 504, the profit allocations under Draft #5 will be identical to the allocations under the far more complex formulation of the current law and prior Drafts.

At its March, 1998 meeting, the Committee discussed substituting the phrase "in proportion to" for the phrase "on the basis of" in the first sentence in order to handle situations in which all contributions have been returned. The Reporter does not recall a decision having been reached on this point. The point is now moot.

SECTION 504. SHARING OF DISTRIBUTIONS. Any distributions made by a limited partnership shall be in proportion to the partners' allocation of profits and losses in effect

when the limited partnership decides to make the distribution.

Reporter's Notes

Re-RULPA differs from RULPA in directly linking the distribution allocation to the profit and loss allocation. The result is the same under RULPA, absent some contrary agreement, because RULPA states identical rules for allocating profits and losses and sharing distributions. See RULPA §§ 503 and 504. Under Re-RULPA, any change in the default rule on profit and loss allocation will automatically change the distribution sharing rule.

Draft #2 included language establishing a formal mechanism by which a limited partnership would announce distributions. At its March, 1998 meeting, the Committee rejected that language. In Drafts ##3 and 4, the Section referred to the declaration of a distribution. Draft #5 removes the concept of declaration.

SECTION 505. INTERIM DISTRIBUTIONS. A partner has no right to any distribution before the dissolution and winding up of the limited partnership, unless the limited partnership decides to make an interim distribution.

Reporter's Notes

In prior drafts, this material appeared at Section 601.

Re-RULPA's major change from RULPA § 601 is the elimination of any reference to a partner's "put" right. In the default mode that right no longer exists. Other changes are stylistic or to conform with this Draft's approach to the powers of a partnership agreement.

Although it will be the limited partnership that actually makes any interim distributions, it will be the general partners who decide whether interim distributions will be made. See Section 406(a).

SECTION 506. NO DISTRIBUTION ON ACCOUNT OF DISSOCIATION. A person has no right to receive any distribution on account of dissociation.

Reporter's Notes

In prior Drafts, this material appeared at Section 604. (In Draft #2 this provision read: "A partner's dissociation does not entitle that partner to any distribution." The change reflects a

style suggestion made by a Committee member at the March, 1998 meeting.)

Under Sections 602 (Effect of Dissociation as a Limited Partner) and 605 (Effect Dissociation as a General Partner), the person's status degrades to that of a transferee.

SECTION 507. DISTRIBUTION IN KIND. A partner has no right to demand or receive any distribution from a limited partnership in any form other than cash. A limited partnership may distribute an asset in kind, subject to Section 813(b) and only to the extent that each partner receives a percentage of the asset equal to the partner's share of distributions.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether the section's second sentence accurately restates the second sentence of RULPA § 605.

Derived from RULPA § 605. In prior Drafts, this material appeared at Section 605.

The second sentence is new in Draft #5. The second sentence of RULPA § 605 states:

> A partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to the partner exceeds a percentage of that asset which is equal to the percentage in which the partner shares in distributions from the limited partnership.

Draft #5 revises that language so as to accommodate Section 813(b) (which requires liquidating distributions to be made in cash) and to express more directly and explicitly the restrictions of RULPA § 605's second sentence.

SECTION 508. RIGHT TO DISTRIBUTION.

At the time a partner becomes entitled to receive a distribution, the partner has the status of, and is entitled to all remedies available to, a creditor of the limited partnership with respect to the distribution, except that the limited partnership's obligation to make a distribution is subject to offset for any amount owed to the limited partnership by the partner or dissociated partner on

whose account the distribution is made.

Reporter's Notes

Source: RULPA § 606. The last clause ("except . . .") does not appear in RULPA. In prior drafts, this material appeared at Section 606.

The reference to "dissociated partner" encompasses circumstances in which the partner is gone and all that remains are that dissociated partner's transferable interests.

SECTION 509. LIMITATIONS ON DISTRIBUTION.

(a) A limited partnership may not make a distribution in violation of the partnership agreement.

(b) A limited partnership may not make a distribution if after the distribution:

(1) the limited partnership would not be able to pay its debts as they become due in the ordinary course of business; or

(2) the limited partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the limited partnership were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up, and termination of partners whose preferential rights are superior to those receiving the distribution.

(c) A limited partnership may base a determination that a distribution is not prohibited under subsection (b) on financial statements prepared on the basis of accounting practices and principles that are reasonable in the circumstances or on a fair valuation or other method that is reasonable in the circumstances.

(d) Except as otherwise provided in subsection (g), the effect of a distribution

under subsection (b) is measured:

(1) in the case of distribution by purchase, redemption, or other acquisition of a transferable interest in the limited partnership, as of the date money or other property is transferred or debt incurred by the limited partnership; and

(2) in all other cases, as of the date:

(i) the distribution is authorized, if the payment occurs within 120 days after that date; or

(ii) the payment is made, if payment occurs after that 120 days.

(e) A limited partnership's indebtedness to a partner incurred by reason of a distribution made in accordance with this section is at parity with the limited partnership's indebtedness to its general, unsecured creditors.

(f) A limited partnership's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of determinations under subsection (b) if the terms of the indebtedness provide that payment of principal and interest are made only to the extent that a distribution could then be made to partners under this section.

(g) If indebtedness is issued as a distribution, each payment of principal or interest on the indebtedness is treated as a distribution, the effect of which is measured on the date the payment is made.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether to retain the "reasonable" care standard in subsection (c)

This section is derived mostly from ULLCA § 406, which appears to have derived, almost

verbatim, from RMBCA § 6.40. In prior Drafts, this material appeared at Section 607.

Subsection (a) – ULLCA § 406 does not include this provision, but ULLCA § 407 (Liability for Unlawful Distributions) establishes personal liability for anyone "who votes for or assents to a distribution made in violation of . . . the articles of organization, or the operating agreement." Similarly, RULPA § 608(b) imposes consequences for receiving a return of contribution "in violation of the partnership agreement." It makes for cleaner drafting to directly prohibit distributions that violate the partnership agreement.

Subsection (b)(1) – Source: ULLCA § 406(a)(1).

Subsection (b)(2) – Source: ULLCA § 406(a)(2).

Subsection (c) – Source: ULLCA § 406(b). N.b. – this subsection imposes a more rigorous standard of care than the "gross negligence" standard applicable under Section 408(c). For further discussion on this point, see Reporter's Notes to Section 510(a).

Subsection (d) – Source: ULLCA § 406(c).

Subsection (d)(1) – The RMBCA has an alternate date, if earlier – when the owner being redeemed ceases to be an owner. The Comment to ULLCA § 406 does not explain why ULLCA omits the alternate date.

Subsection (d)(2) – The RMBCA has another category – distributions of indebtedness not involved in a redemption. The Comment to ULLCA § 406 does not explain why ULLCA omits this additional category.

Subsection (e) – This subsection and Section 508 refer to different things. This subsection refers to indebtedness issued as a distribution. Section 508 refers to the obligation that exists when a limited partnership has declared but not yet made a distribution. In contrast to Section 508, this subsection contains no explicit set-off right. Such a right might interfere with negotiability.

Subsection (g) – This provision is stated as a separate subsection, to make clear that "indebtedness" is not limited to the types of indebtedness referred to in the immediately preceding sentence – i.e., "indebtedness [whose terms] provide that payment of principal and interest are made only to the extent that a distribution could then be made to partners under this section."

SECTION 510. LIABILITY FOR IMPROPER DISTRIBUTIONS.

(a) A general partner who votes for or assents to a distribution made in violation

of Section 509 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 if it is established that in voting for or assenting to the distribution the general partner failed to comply with Section 509(c) or Section 408.

(b) A partner or transferee who knew a distribution was made in violation of Section 509 is personally liable to the limited partnership, but only to the extent that the distribution received by the partner or transferee exceeded the amount that could have been properly paid under Section 509.

(c) A general partner against whom an action is brought under subsection (a) may implead in the action any:

(1) other person who as a general partner voted for or assented to the distribution in violation of subsection (a) and may compel contribution from that person; and

(2) person who received a distribution in violation of subsection (b) and may compel contribution from that person in the amount that person received in violation of subsection (b).

(d) A proceeding under this section is barred unless it is commenced within two years after the distribution.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether transferees should be subject to recapture liability; whether to adopted to proposed reformulation of subsection (c).

Re-RULPA replaces RULPA's antiquated "clawback" provisions with a more modern approach derived from RMBCA § 8.33(a) and ULLCA § 407(a). (The ULLCA provision closely follows the RMBCA provision.) In prior Drafts, this material appeared at Section 608.

Caption – RMBCA § 8.33 and ULLCA § 407 both refer to "Unlawful" distributions, but that term fits poorly with liability imposed for distributions that merely breach the partnership agreement or some comparable document (e.g., a corporation's articles of incorporation, an LLC's articles of organization or operating agreement).

Subsection (a) – Section 408 contains the general duties of general partners. Section 509(c) imposes a separate duty with regard to reliance on financial statements, accounting principles, etc.

N.b. – section 509(c) imposes a higher standard of care than does Section 408. This anomaly does not exist under the RMBCA (from which both this draft and ULLCA derive their respective provisions on liability for improper distributions). The RMBCA's general standard of care is ordinary care, RMBCA § 8.30(a)(2), not the mere avoidance of gross negligence. ULLCA does not *expressly* contain this anomaly. The ULLCA provision on "Limitations on distributions" states a reasonableness standard with regard to reliance on financial statements, accounting principles, etc., ULLCA § 406(b), but the ULLCA provision on "Liability for unlawful distributions" makes no reference to that standard. ULLCA § 407.

The Reporter views that approach as anomalous, and, moreover, believes that the reasonableness standard is appropriate in a provision aimed at protecting creditors. Therefore Draft #5 (like previous drafts) deviates from ULLCA in this regard.

Subsection (b) – Draft #5 makes transferees subject to liability.

Subsection (c) – This subsection does not allow a limited partner to implead anyone else, because a limited partner's liability is limited to the amount by which the limited partner's distribution exceeded the permissible amount. Following ULLCA, Draft #2 referred to "this section." At its March, 1998 meeting, the Committee approved the narrower reference to subsection (a).

Subsection (c)(2) – Source: ULLCA § 407(c). Consistent with Draft #5's change to subsection (b), this paragraph now encompasses transferees.

The ULLCA language is a bit imprecise. For example, strictly speaking, subsection (b) does not establish a prohibition that can be violated; it states a remedy. The implied prohibition is against receiving an improper distribution while knowing that the distribution is improper.

Moreover, § 407(c)(2) refers first to "members" and then to "the member." It is important to make clear that the limitation applies to each member severally, not to all members jointly.

The following alternative language makes that point and also makes clear that any funds paid by a recipient in a separate action (i.e., under subsection (b)) count against the recipient's contribution limit:

(c) A general partner against whom an action is brought under subsection (a) may implead in the action and obtain contribution from any:

(1) other person dissociated who could be held liable under subsection (a) for the improper distribution; and

(2) person who could be held liable under subsection (b),

but a person's total liability under this paragraph and subsection (b) with respect to any distribution is limited to the total amount for which the person could be liable under subsection (b) for that distribution.

Subsection (d) – This subsection follows ULLCA § 407(d), which differs from the RMBCA. Under RMBCA § 8.33(c) the clock runs from "the date on which the effect of the distribution [is] measured" under the provision limiting distributions. The Comments to ULLCA do not explain ULLCA's departure from the RMBCA.

[ARTICLE] 6

DISSOCIATION

SECTION 601. DISSOCIATION AS A LIMITED PARTNER.

(a) A person has no right to dissociate as a limited partner before the termination of the limited partnership.

(b) A person is dissociated from a limited partnership as a limited partner upon the occurrence of any of the following events:

(1) the limited partnership's having notice of the person's express will to withdraw as a limited partner or on a later date specified by the person;

(2) an event agreed to in the partnership agreement as causing the person's dissociation as a limited partner;

(3) the person's expulsion as a limited partner pursuant to the partnership agreement;

(4) the person's expulsion as a limited partner by the unanimous vote of the other partners if:

(i) it is unlawful to carry on the limited partnership business with that person as a limited partner;

(ii) there has been a transfer of all of the person's transferable interest in the limited partnership, other than a transfer for security purposes, or a court order charging the person's interest, which has not been foreclosed;

(iii) the person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a limited partner because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(iv) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the limited partnership, the person's expulsion as a limited partner by judicial determination because:

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

(ii) the person willfully or persistently committed a material breach of the partnership agreement or of the obligation of good faith and fair dealing under Section 306(c); or

(iii) the person engaged in conduct relating to the limited

partnership business which makes it not reasonably practicable to carry on the business with the person as limited partner;

(6) in the case of a person who is an individual, the person's death;

(7) in the case of a person that is a trust or is acting as a limited partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee;

(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, distribution of the estate's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative;

(9) termination of a limited partner who is not an individual, partnership, limited liability company, corporation, trust, or estate;

(10) the limited partnership participates in a merger or conversion under [Article] 11 and:

(i) is not the converted or surviving entity; or

(ii) is the converted or surviving entity but as a result of the conversion or merger or the person ceases to be a limited partner.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to create a separate Article for provisions relating to partner dissociation; whether to revise subsection (b)(4)(iii).

In prior Drafts, this material appeared at Section 603.

Organizational issue – The causes of limited partner dissociation substantially overlap the causes of general partner dissociation. That overlap could be avoided (or, rather, exploited) by having one section captioned "Partner Dissociation." That section would list separately events

that cause dissociation of any partner and events that cause dissociation only for general partners.

Substantive issues – As decided by the Drafting Committee at its March, 1998 meeting, Re-RULPA adopts the RUPA dissociation provision essentially verbatim, except for the omission of provisions inappropriate to limited partners. At its October, 1998 meeting, the Committee discussed whether limited partners should lack the power as well as the right to withdraw by express will. To the best of the Reporter's recollection, the Committee decided to preserve that power in the default mode but to allow the partnership agreement to negate the power. *See* Section 109(b)(6).

Subsection (b)(4)(iii) – Suppose a corporate limited partner is dissolved and terminated, but the other partners cannot muster a unanimous vote to expel. Does the limited partnership continue with a non-existent limited partner? Are the remaining partners forced to seek dissolution under Section 802?

Subsection (5) – Following RUPA, this provision originally included the phrase "or another partner." The Reporter recommended deleting the phrase, out of concern that the phrase would invite confusion as to the distinction between direct and derivative claims and undermine the limited partner's authority to manage the business. At its March, 1998 meeting, the Committee accepted the Reporter's recommendation.

Subsection (b)(5)(iii) – In RUPA the concluding phrase is "carry on the business in partnership with the partner." Given the possible dual status of a general partner in a limited partnership, RUPA's phrase "in partnership with the partner" would be overbroad in Re-RULPA.

In contrast to the Re-RULPA provision on dissociation as a general partner, this provision does not provide for dissociation on account of bankruptcy or insolvency.

Subsection (b)(6) – In contrast to the provision on dissociation as a general partner, this provision does not provide for dissociation on account of an individual's incompetency.

Subsection (b)(9) – This paragraph is not as necessary here as in the provision on dissociation as a general partner. The paragraph appears here to avoid confusion likely to result from an absence of parallelism.

SECTION 602. EFFECT OF DISSOCIATION AS A LIMITED PARTNER.

Upon a person's dissociation as a limited partner,

(1) subject to section 704, the person has no further rights as a limited partner;

(2) the person's obligation of good faith and fair dealing as a limited partner under Section 306(c) continues only as to matters arising and events occurring before the dissociation;

(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 as a mere transferee; and

(4) the dissociation does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a limited partner.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether this section should contain a rule to parallel Section 604(c) (stating that a general partner who dissociates before the termination of the limited partnership is liable to the limited partnership and to other partners for any damages caused by the dissociation).

In prior Drafts, this material appeared at Section 603A.

Paragraph (1) – Derived from RUPA § 603(b)(1). At its October, 1998 meeting, the Drafting Committee directed that this paragraph be subject to the rights of the estate of a deceased partner. Section 704 states those rights.

Paragraph (2) – Section 605 (Effect of Dissociation as a General Partner) has no parallel provision, because RUPA § 603(b)(3) does not refer to the duty of good faith and fair dealing.

Paragraph (3) – Section 605(4) contains parallel language pertaining to a person's dissociation as a general partner. The Reporter's Notes to that provision explain the language in detail.

Paragraph (4) – Discussion at the Committee's March, 1998 meeting suggested the need for this type of provision with regard to limited partners. The language is included in Section 605 as well, to preclude any misunderstanding that might result from a lack of parallel treatment. The word "discharge" is derived from RUPA § 703(a).

In Draft #4 this provision referred to any obligation "which pertains to the time during

which the person was a general partner." That language seems ambiguous, and Draft #5 has substituted the concept of incurring an obligation. The latter concept is used elsewhere in the [Act].

At its March, 1998 meeting, the Committee voted to delete subsection (b), which had provided:

> (b) A limited partner who dissociates before the termination of the limited partnership is liable to the limited partnership and to other partners for any damages caused by the dissociation.

Compare Section 605(c)(stating the rule for persons who dissociate as general partners).

SECTION 603. DISSOCIATION AS A GENERAL PARTNER. A person is dissociated from a limited partnership as a general partner upon the occurrence of any of the following events:

(1) the limited partnership's having notice of the person's express will to withdraw as a general partner or on a later date specified by the person;

(2) an event agreed to in the partnership agreement as causing the person's dissociation as a general partner;

(3) the person's expulsion as a general partner pursuant to the partnership agreement;

(4) the person's expulsion as a general partner by the unanimous vote of the other partners if:

(i) it is unlawful to carry on the limited partnership business with that person as a general partner;

(ii) there has been a transfer of all or substantially all of the person's transferable interest in the limited partnership, other than a transfer for security purposes, or a

court order charging the person's interest, which has not been foreclosed;

(iii) the person is a corporation and, within 90 days after the limited partnership notifies the person that it will be expelled as a general partner because it has filed a certificate of dissolution or the equivalent, its charter has been revoked, or its right to conduct business has been suspended by the jurisdiction of its incorporation, there is no revocation of the certificate of dissolution or no reinstatement of its charter or its right to conduct business; or

(iv) the person is a limited liability company or partnership that has been dissolved and whose business is being wound up;

(5) on application by the limited partnership, the person's expulsion as a general partner by judicial determination because:

(i) the person engaged in wrongful conduct that adversely and materially affected the limited partnership affairs;

(ii) the person willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 408; or

(iii) the person engaged in conduct relating to the limited partnership business which makes it not reasonably practicable to carry on the affairs of the limited partnership with the person as a general partner;

(6) the person's:

(i) becoming a debtor in bankruptcy;

(ii) executing an assignment for the benefit of creditors;

(iii) seeking, consenting to, or acquiescing in the appointment of a trustee,

receiver, or liquidator of that partner or of all or substantially all of that general partner's property; or

(iv) failing, within 90 days after the appointment, to have vacated or stayed the appointment of a trustee, receiver, or liquidator of the general partner or of all or substantially all of the person's property obtained without the person's consent or acquiescence, or failing within 90 days after the expiration of a stay to have the appointment vacated;

(7) in the case of a person who is an individual:

(i) the person's death;

(ii) the appointment of a guardian or general conservator for the person; or

(iii) a judicial determination that the person has otherwise become incapable of performing the person's duties as a general partner under the partnership agreement;

(8) in the case of a person that is a trust or is acting as a general partner by virtue of being a trustee of a trust, distribution of the trust's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor trustee;

(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, distribution of the estate's entire transferable interest in the limited partnership, but not merely by reason of the substitution of a successor personal representative;

(10) termination of a general partner who is not an individual, partnership, limited liability company, corporation, trust, or estate;

(11) the limited partnership participates in a merger or conversion under [Article] 11 and:

(i) is not the converted or surviving entity; or

(ii) is the converted or surviving entity but as a result of the conversion or merger or the person ceases to be a general partner.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to combine this section with the section on dissociation as a limited partner; whether paragraph (4)'s reference to "vote" should be changed to "consent"; whether expulsion by unanimous consent should exclude from the vote/consent any partner who is an affiliate of the general partner being expelled; whether paragraph (4)'s expulsion provision should be retained; whether paragraph (4)(iii) is correct in requiring a unanimous vote to expel a corporate general partner whose existence has terminated.

Source: RUPA § 601. In prior Drafts, this material appeared as Section 602.

Strictly speaking, general partner dissociation involves the dissociation of a person *as a general partner* rather than the dissociation *of a general partner*. This distinction, adopted at the Committee's March, 1998 meeting, is important because a person may be simultaneously a general and limited partner. *See* Section 112 (Dual Capacity). Dissociation therefore applies to the capacity rather than to the person.

Paragraph (1) – This provision could be problematic if a limited partnership has a sole general partner and no employees or other agents of its own. Whom does the would-be withdrawing general partner notify? Telling every limited partner will not suffice, because "[t]he fact that a limited partner has no power to bind the limited partnership means that information possessed by a limited partner is not attributed to the limited partnership." Section 302, Reporter's Notes. The same problem might exist under ULLCA § 601(1) when the LLC has one manager, who is a member, and that member-manager wishes to dissociate as a member.

Paragraph (4) **–** At its March, 1998 meeting, the Committee discussed but did not decide whether affiliates of the would-be expelled person should be excluded from the vote. Query – should "vote" be changed to "consent"? Given that Section 406(b) provides that "Acting requiring the consent or vote of general partners under this [Act] may be taken without a meeting," what is the difference between "consent" and "vote"?

Paragraph (4)(iii) – Suppose a corporate general partner is dissolved and terminated, but the other partners cannot muster a unanimous vote to expel. Does the limited partnership continue with a non-existent general partner? Are the remaining partners forced to seek dissolution under Section 802?

Paragraph (5) – Following RUPA, this provision originally permitted the application to come either from the limited partnership "or another partner." The Reporter recommended

deleting the latter reference, out of concern that the reference would invite confusion as to the distinction between direct and derivative claims and undermine the general partner's authority to manage the business. At its March, 1998 meeting, the Committee accepted the Reporter's recommendation.

Paragraph (5)(iii) – In RUPA the concluding phrase is "carry on the business in partnership with the partner." Given the possible dual status of a general partner in a limited partnership, RUPA's phrase "in partnership with the partner" would be overbroad in Re-RULPA.

Paragraph (7)(ii) – In this respect, in the default mode a general partner has fewer rights than a limited partner. If a guardian or general conservator is appointed for a limited partner, the limited partner is not dissociated and the guardian or conservator may exercise the limited partner's rights *ad infinitum*. For a general partner, in contrast, the appointment causes dissociation, which in turns relegates the dissociated general partner to a mere transferee of the transferable interest associated with the general partnership interest.

Paragraph (8) – RUPA's approach, replicated here, might seem anomalous when compared with the status of a general partner who transfers "all or substantially all of that partner's transferable interest in the partnership." RUPA § 601(4)(ii), incorporated in Re-RULPA as section 602(4)(ii). In that latter event, dissociation occurs only upon "the unanimous vote of the other partners." Why should a harsher rule apply to a trust, especially if the distribution of the trust's transferable interest was foreseeable (e.g., ordained by the terms of the trust) at the time the trust became a general partner? At the March, 1998 meeting, Committee members explained this approach as beneficial to the trust, since the trustee will not wish to remain a general partner once that trust has no further economic interest in the limited partnership.

SECTION 604. PERSON'S POWER TO DISSOCIATE AS A GENERAL PARTNER; WRONGFUL DISSOCIATION.

(a) A person has the power to dissociate as a general partner at any time, rightfully or wrongfully, by express will pursuant to Section 603(1).

(b) A person's dissociation as a general partner is wrongful only if:

(1) it is in breach of an express provision of the partnership agreement; or

(2) it occurs before the termination of the limited partnership, and:

(i) the person withdraws as a general partner by express will;

(ii) the person is expelled as a general partner by judicial determination under Section 603(5);

(iii) the person is dissociated as a general partner by becoming a debtor in bankruptcy; or

(iv) in the case of a person who is not an individual, trust other than a business trust, or estate, the person is expelled or otherwise dissociated as a general partner because it willfully dissolved or terminated.

(c) A person who wrongfully dissociates as a general partner is liable to the limited partnership and, subject to Section 1001, to the other partners for damages caused by the dissociation. The liability is in addition to any other obligation of the general partner to the limited partnership or to the other partners.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether subsection (b)(1) should be revised so that a dissociation that breaches the duty of good faith is wrongful.

In prior Drafts, this material appeared at 602A.

Subsection (b)(1) – This language, taken verbatim from RUPA, limits and may even preclude remedies if a general partner's dissociation "merely" breaches the partner's obligation of good faith. Consider subsection (c), under which wrongful dissociation gives rise to a remedy, in light of the interpretative maxim of *expressio unius est exclusio alterius*.

Arguably at least, RUPA's approach does not fit limited partnerships, because general and limited partnerships differ both as the presumed balance of negotiating power at formation and in the assumed allocation of management power during operations. It seems implicit in RUPA that the typical general partnership involves an arrangement among co-equals. Indeed, RUPA's default rules are "set" at that expectation. See RUPA § 401(h).

Re-RULPA, in contrast, envisions a very different situation. As to ongoing operations, the presumption for limited partners is passivity. See Sections 302, 304 and 406. As to formation, discussions at past meetings of the Drafting Committee suggest that – more often than not (but, of course, not always) – the general partner will be "driving the deal." Thus, in most

limited partnerships the general partner(s) will have far greater influence over the drafting of the "express provision[s] of the partnership agreement" and far greater control over the circumstances that become the context in which those express provisions operate. In short, a general partner's opportunity for sharp dealing through premature dissociation seems greater in a limited partnership than in a general partnership.

Therefore, when it comes to determining the wrongfulness of general partner dissociation in a limited partnership, perhaps Re-RULPA should not only enforce the "express provision[s] of the partnership agreement" but also " protect [the limited partners' interests in the] agreed-upon arrangements from conduct [by a dissociating general partner] that is manifestly beyond what a reasonable person could have contemplated when the [express] arrangements were made." Section 306, Reporter's Notes (proposed Comment on good faith). In sum, perhaps subsection (b)(1) should be revised to read: "it is in breach of an express provision of the partnership agreement or the person's obligations of good faith under Section 408(d)."

Subsection (b)(2) – The roughly analogous passage of RUPA, § 602(2), states: "in the case of a partnership for a definite term or particular undertaking, before the expiration of the term or the completion of the undertaking." Draft #5's different language (which originated in Draft #3) reflects a different assumption about the partners' deal – namely, that in a limited partnership, absent a contrary agreement, the general partner is expected to shepherd the limited partnership through winding up.

Under this Draft, 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)(i). The obligation also continues if for some other reason dissolution occurs before the expiration of the limited partnership's term. Other default rules are certainly plausible, but would require more complicated language. *See, e.g.*, RUPA § 602(b)(2). This Draft's approach seems at least equally plausible and has the virtue of greater simplicity.

Following the dissociation of a person as general partner, each remaining general partner has the power to dissolve the limited partnership by "express will." Section 801(3)(i). A remaining general partner can exercise that power without thereby dissociating as a general partner. The "express will" to dissolve is different from the "express will" to dissociate.

Subsection (b)(2)(i) – RUPA uses "withdrawal." For the sake of internal consistency, the Reporter would prefer "dissociates." The analogous RUPA passage continues: "unless the withdrawal follows within 90 days after another partner's dissociation by death or otherwise under Section 601(6) through (10) or wrongful dissociation under this subsection." RUPA § 601(6) through (10) provide for automatic dissociation in the event of, e.g., bankruptcy, death, distribution of a trust's entire transferable interest in the partnership. It is unclear whether that default rule is appropriate for a limited partnership. Where a limited partnership has more than one general partner, absent a contrary agreement the limited partners might expect each general partner to "stay the course" at least for the purposes of winding up, regardless of whether the

other general partners do.

Subsection (b)(2)(iii) – Why not also include the events that Section 602(5), following RUPA 601(5), considers comparable or tantamount to becoming a debtor in bankruptcy?

Subsection (c) – Source: RUPA § 602(c). The language "subject to Section 1001" was new in Draft #3 (where it referred to former Section 1005) and was inserted in accord with discussions at the March, 1998 meeting. The language is intended to preserve the distinction between direct and derivative claims and to make clear that a partner seeking to claim damages under Section 604(c) has to prove some harm independent of harm suffered by the limited partnership.

SECTION 605. EFFECT OF DISSOCIATION AS A GENERAL PARTNER.

Upon a person's dissociation as a general partner:

(1) the person's right to participate as a general partner in the management and conduct of the partnership business terminates;

(2) the person's duty of loyalty as a general partner under Section 408(b)(3) terminates;

(3) the person's duty of loyalty as a general partner under Section 408(b)(1) and (2) and duty of care under Section 408(c) continue only with regard to matters arising and events occurring before the person's dissociation as a general partner;

(4) the person shall sign, at the request of the limited partnership, an amendment to the certificate of limited partnership which states that the person has dissociated, and may sign and file a statement of dissociation pertaining to the person;

(5) subject to Section 704 and Article 11, any transferable interest owned by the person immediately before dissociation in the person's capacity as a general partner is owned by the person as a mere transferee; and

(6) the dissociation does not of itself discharge the person from any obligation to the limited partnership or the other partners which the person incurred while a general partner.

Reporter's Notes

Source: RUPA § 603(b), except for paragraphs (4) and (5), which are new. In prior Drafts, this material appeared at Section 602B.

Paragraph (1) – This paragraph differs from its RUPA analog in two respects. First, the paragraph adds the phrase "as a general partner" to cover circumstances in which a person dissociates as a general partner but remains as a limited partner. Second, this clause omits RUPA's exception for winding up. Unlike a dissociated RUPA general partner, a dissociated Re-RULPA general partner has no rights to participate in winding up.

Paragraph (3) – The RUPA provision continues certain duties if the dissociated person participates in winding up. RUPA § 603(b)(3). For the reasons stated in the Reporter's Notes to Paragraph (1), this Draft eschews that approach.

Following RUPA, this section does not refer to the duty of good faith and fair dealing. Compare section 602(2) (stating how limited partner dissociation affects that duty).

Paragraph (4) – This provision is new in Draft #5.

Paragraph (5) – As decided at the March, 1998 meeting, Paragraph (5) refers only to transferable interests owned by the dissociated person in the capacity of a general partner rather than to all of the person's transferable interests. Comparable language appears in Section 602(3), in connection with a person's dissociation as a limited partner. Draft #5 has added language to Section 110 so that "for any person who is both a general partner and a limited partner, [the limited partnership's records must include] a specification of what transferable interest the person owns in each capacity." Section 110(8)(iii).

The reference to Section 704 is to the power of the estate of a deceased individual general partner. The reference to "subject to Article 11" encompasses mergers and conversions. If a person dissociates as a general partner through a merger or conversation, Paragraph (4) will not apply if:

- the limited partnership survives but the person is bought out, in which case the person no longer owns a transferable interest in any capacity, or
- the limited partnership does not survive, in which case no transferable interest of the limited partnership will exist to be owned by anybody.

Paragraph (6) – Discussion at the Committee's March, 1998 meeting suggested the need for this type of provision with regard to *limited* partners. See Section 602(4). The language has been included here, as well, to preclude any misunderstanding that might result from a lack of parallel treatment. The word "discharge" is derived from RUPA § 703(a).

In Draft #4 this provision referred to any obligation "which pertains to the time during which the person was a general partner." That language seems ambiguous, and Draft #5 has substituted the concept of incurring an obligation. The latter concept is used elsewhere in the [Act].

SECTION 606. DISSOCIATED GENERAL PARTNER'S POWER TO BIND AND LIABILITY TO PARTNERSHIP (PRE-DISSOLUTION).

(a) After a person is dissociated as a general partner and before the limited partnership is dissolved, converted under [Article] 11 or merged out of existence under [Article 11], the limited partnership is bound by an act of the person only if:

(1) the act would have bound the limited partnership under Section 402 before the dissociation; and

(2) at the time the other party enters into the transaction:

(i) less than two years has passed since the dissociation; and

(ii) the other party does not have notice of the dissociation and reasonably believes that the person is still a general partner.

(b) If a limited partnership incurs an obligation under subsection (a), the person dissociated as a general partner is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from that obligation, and

(2) if a general partner or other person dissociated as a general partner is

liable for that obligation, then to that general partner or other person for any damage caused to that general partner or other person arising from that liability.

Reporter's Notes

Derived from RUPA § 702. In prior Drafts, this material appeared at Section 602C. This Draft differs from Draft #4 in four ways.

Expression of the section's scope – This section applies only before dissolution. In prior Drafts, subsection(c) expressed that scope: "This section is subject to Section 803A." This Draft states its scope directly, in the first sentence, and omits former subsection (c).

Expression of the 90-day window – Prior drafts ended the lingering power to bind after "90 days have passed since the certificate of limited partnership was amended to state that person is dissociated as a general partner." Draft #4, Section 602(a)(2)(ii). Draft #5 provides constructive notice of such amendments and of statements of dissociation, Section 102(d), so the 90-day window is subsumed into the "does not have notice of the dissociation" provision.

Deletion of reference to statements restricting the authority to transfer real property – Drafts ## 3 and 4 negated the lingering power to bind when the third party "is . . . deemed to have had knowledge under Section 208(c) of any relevant limitation." At its March, 1999 meeting, the Drafting Committee deleted Section 208(c). See Reporter's Notes to Section 201.

Provision for liability when person dissociated as a general partner causes harm to general partners and other persons dissociated as general partners – If a limited partnership incurs an obligation under subsection (a), general partners and persons dissociated as general partners may be liable on that obligation. Subsection (b)(2) is new in Draft #5, addresses that possibility and applies not only to liability under Sections 404 and 413 but also to liability arising from other sources (e.g., personal guarantees).

SECTION 607. DISSOCIATED GENERAL PARTNER'S LIABILITY 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 limited partnership obligation incurred before dissociation. The person is not liable for a limited partnership obligation incurred after dissociation, except as otherwise provided in subsections (b) and (c).

(b) A person who has dissociated as a general partner with that dissociation resulting in a dissolution and winding up of the limited partnership business is liable to the same extent as a general partner under Section 404 on an obligation incurred by the limited partnership under Section 804.

(c) A person who has dissociated as a general partner without that dissociation resulting in a dissolution and winding up of the limited partnership business is liable to the same extent as a general partner under Section 404 on a transaction entered into after the dissociation by the limited partnership, only if:

(1) a general partner would be liable on the transaction; and

(2) at the time the other party enters into the transaction:

(i) less than two years has passed since the dissociation; and

(ii) the other party does not have notice of the dissociation and reasonably believes that the person is still a general partner.

(d) By agreement with the limited partnership creditor and the limited partnership, a person dissociated as a general partner may be released from liability for a limited partnership obligation.

(e) A person dissociated as a general partner is released from liability for a limited partnership obligation if a limited partnership creditor, with 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 a limited partnership obligation.

Reporter's Notes

Derived from RUPA § 703. In prior Drafts, this material appeared at Section 602D.

Subsection (a) – The second sentence of this subsection varies from its RUPA analog to make clear that a different rule applies when the person's dissociation does result in dissolution. The *rule* is the same under RUPA. The deviation from RUPA's *language* is a follows:

> The person is not liable for a limited partnership obligation incurred after dissociation, except as otherwise provided in subsection (b) and subsection (c).

Subsection (b) – This provision is new and makes explicit a point left implicit in RUPA.

Subsection (c) – This provision is taken from RUPA, with changes made in the lead-in language to indicate more clearly or succinctly that (i) the subsection applies even after dissolution occurs *if* the dissolution did *not* result from the person's dissociation as a general partner, (ii) a different rule applies when the person's dissociation does result in dissolution, and (iii) a dissociated person is only liable under this subsection only if a general partner would be liable. The *rule* is the same under RUPA. The deviation from RUPA's *language* is a follows:

> A partner who dissociates without that dissociation resulting in a dissolution and winding up of the partnership business is liable to the same extent as a partner under Section 404 to the other party in a transaction entered into by the partnership~~, or a surviving partnership under [Article] 9~~ . . . .

A detailed comparison of RUPA and Re-RULPA on this issue was posted in June, 1999 on the Drafting Committee's list serv and is available from the Reporter.

Subsection (c)(2) – This provision has been changed in the same manner and for the same reasons as Section 606(a).

Subsection (d) – RUPA § 703(c) reads: "the partners continuing the business." Re-RULPA's differing language reflects the Draft's entity view of limited partnerships.

[ARTICLE] 7

TRANSFERABLE INTERESTS AND RIGHTS OF TRANSFEREES AND CREDITORS

SECTION 701. PARTNER'S TRANSFERABLE INTEREST. The only transferable interest of a partner is the partner's allocation of the profits and losses of the partnership and the

partner's right to receive distributions. The interest is personal property.

Reporter's Notes

Source: RUPA § 502. Section 508 provides that a partner's right to distributions is subject to offset.

SECTION 702. TRANSFER OF PARTNER'S TRANSFERABLE INTEREST.

(a) A transfer, in whole or in part, of a partner's transferable interest in the limited partnership:

(1) is permissible;

(2) does not by itself cause the partner's dissociation or a dissolution and winding up of the limited partnership business; and

(3) does not, as against the other partners or the limited partnership, entitle the transferee, during the continuance of the limited partnership, to participate in the management or conduct of the limited partnership business, to require access to information concerning limited partnership transactions, or to inspect or copy the limited partnership books or records.

(b) A transferee of a partner's transferable interest in the limited partnership has a right:

(1) to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled; and

(2) to receive upon the dissolution and winding up of the limited partnership business, in accordance with the transfer, the net amount otherwise distributable to the transferor.

(c) In a dissolution and winding up, a transferee is entitled to an account of limited

partnership transactions only from the date of dissolution.

(d) Upon transfer, the transferor retains the rights and duties of a partner other than the interest in distributions transferred, including the transferor's liability to the limited partnership under Sections 208 and 502.

(e) A limited partnership need not give effect to a transferee's rights under this section until it has notice of the transfer.

(f) A transfer of a partner's transferable interest in the limited partnership in violation of a restriction on transfer contained in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer.

(g) A transferee who becomes a partner with respect to a transferable interest is liable for the transferor's obligations under Sections 502 and 510. However, the transferee is not obligated for liabilities unknown to the transferee at the time the transferee became a partner.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to retain the last phrase of subsection (d) ("including . . .); whether the notice element in subsection (e) should be changed to "received notification"; whether the knowledge element in the second sentence of subsection (g) should be changed to notice.

Source: RUPA § 503. Although for the most part RULPA's language "works," the formulation is oblique. In this instance, the benefits (especially for the uninitiated) of a more direct formulation outweigh the preference for retaining familiar language. Re-RULPA therefore takes RUPA language in place of RULPA language. (Draft #1 rearranged the provisions of RUPA § 503 so that the affirmative aspects were stated first and the limitations or negative aspects were stated second. Consistent with the Committee's instructions at the July, 1997 meeting, Draft #2 provided the RUPA provisions without significant change, while preserving Draft #1's language as an alternative version. At its March, 1998 meeting, the Committee rejected the alternative version, and that version has therefore been omitted from subsequent drafts.)

Subsection (b) – Prior drafts included subsection (b)(3), which authorized a transferee to "to seek under Section 802(b) a judicial determination that it is equitable to wind up the limited partnership business." Draft #5 has eliminated subsection 802(b).

Subsection (c) – RUPA § 503(c) reads: "the latest account agreed to by all of the partners." At its March, 1998 meeting, the Committee decided to deviate from RUPA.

Subsection (d) – The phrase beginning "including" does not appear in RUPA. See RUPA § 503(d). At its March, 1998 meeting, the Committee decided to append the language of RULPA § 704(c), which provides:

> (c) If an assignee of a partnership interest becomes a limited partner, the assignor is not released from his [or her] liability to the limited partnership under Sections 207 [now 208] and 502.

That language appears redundant, given the broad statement carried over from RUPA. Moreover, specifying this subset of continuing obligations might raise questions as to the status of other subsets; e.g., a transferor general partner's liability for breach of the duty of loyalty or care.

Subsection (g) – This subsection is derived from RULPA § 704(b). At its March, 1998 meeting, the Committee instructed the Reporter to preserve the substance of RULPA § 704(b)'s second and third sentences. Changes from RULPA § 704(b) are as follows:

> ~~An assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this [Act]. An assignee~~ A transferee who becomes a ~~limited~~ partner with respect to a transferable interest ~~also~~ is liable for the transferor's obligations ~~of his [or her] assignor to make and return contributions as provided in Articles 5 and 6~~ under Sections 502 and 510. However, the ~~assignee~~ transferee is not obligated for liabilities unknown to the ~~assignee~~ transferee at the time ~~he [or she]~~ the transferee became a ~~limited~~ partner.

In the first sentence of subsection (g), the phrase “with respect to a transferable interest” is new in Draft #5. The following example illustrates the operation of subsection (g).

> Ann and Tom are both partners in a limited partnership. Ann transfers all of her transferable interest to Howard, who does not become a partner. Howard is not liable for Ann’s obligations under Sections 502 and 510.
>
> Later, Tom transfers one-half of his transferable interest to Howard, who does become a partner with respect to that transfer. Howard is liable for *all* of Tom’s obligations under Sections 502 and 510. However, Howard’s status as a partner does not retroactively make him liable for Ann’s obligation’s under those Sections.

SECTION 703. RIGHTS OF CREDITOR OF PARTNER OR TRANSFEREE.

(a) On application to a court of competent jurisdiction by any judgment creditor of a partner or transferee, the court may charge the transferable interest of the judgment debtor with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of a transferee. The court may appoint a receiver of the share of the distributions due or to become due to the judgment debtor in respect of the partnership and make all other orders, directions, accounts, and inquiries the judgment debtor might have made or which the circumstances of the case may require to give effect to the charging order.

(b) A charging order constitutes a lien on the judgment debtor's transferable interest. The court may order a foreclosure of the interest subject to the charging order at any time. The purchaser at the foreclosure sale has the rights of a transferee.

(c) At any time before foreclosure, an interest charged may be redeemed:

(1) by the judgment debtor;

(2) with property other than limited partnership property, by one or more of the other partners; or

(3) with limited partnership property, by the limited partnership with the consent of all partners whose interests are not so charged.

(d) This [Act] does not deprive any partner or transferee of the benefit of any exemption laws applicable to the partner's or transferee's transferable interest.

(e) This section provides the exclusive remedy by which a judgment creditor of a partner or transferee may satisfy a judgment out of the judgment debtor's transferable interest.

Reporter’s Notes

Issues for Consideration at October, 1999 Meeting: whether a receiver with respect to a charging order should have greater rights of inquiry than the judgment debtor [subsection (a)]; whether the redemption by the limited partnership of "an interest charged" should require the consent of all the partners or merely a decision by disinterested general partners.

Caption – RUPA captions its comparable section "PARTNER'S INTEREST SUBJECT TO CHARGING ORDER." RUPA § 504. ULLCA captions its comparable section "Rights of creditor." ULLCA § 504.

Subsection (a) – RULPA § 703 does not refer to transferees; Re-RULPA's approach comports with both RUPA § 504(a) and ULLCA § 504(a). Subsection (a)'s last sentence originated in RUPA § 504(a). ULLCA § 504(a) incorporated the RUPA language but added the last phrase ("to give effect . . . ."), apparently in an effort to limit the extent to which the "or which" clause empowers a court to intervene in the entity's affairs. The Drafting Committee should consider why a receiver should have greater rights of inquiry than the judgment debtor.

Subsection (b) – Source: RUPA § 504(b).

Subsection (c) – Source: RUPA § 504(c) and ULLCA § 504(c).

Subsection (c)(3) – Source: RUPA § 504(c)(3). According to the RUPA provision, the redemption is by "one or more of the other partners." At its March, 1998 meeting, the Committee substituted the phrase "the limited partnership," making clear that the entity does the redemption. The Committee rejected language that would have allowed disinterested general partners to make the redemption decision.

Subsection (e) – Source: RUPA § 504(e).

SECTION 704. POWER OF ESTATE OF DECEASED PARTNER.

If a partner who is an individual dies, the deceased partner's executor, administrator, or other legal representative may exercise the rights of a transferee as provided in Section 702 and, for the purposes of settling the estate, may exercise the rights under Section 305 of a current limited partner.

Reporter's Notes

Prior Drafts gave no special powers to the estate of a deceased partner or the guardian of an incompetent partner. Although this section appeared in those Drafts, in essence it restated the

rules relating to dissociation: for a deceased partner and an incompetent general partner, transformation to a mere transferee; for an incompetent limited partner, no change.

At its March, 1999 meeting, the Drafting Committee directed the Reporter to reinstate RULPA language so as to provide sufficient informational rights to the estate of a deceased partner. Unfortunately, however, much of RULPA's language conflicts with major policy decisions made by the Committee. For example, under RULPA § 705 the estate of a deceased partner appears to have the power to manage the limited partnership until the estate is wound up. The guardian of an incompetent partner appears to have the power to manage the limited partnership indefinitely. ("If a partner who is an individual dies or a court of competent jurisdiction adjudges him [or her] to be incompetent to manage his [or her] person or his [or her] property, the partner's executor, administrator, guardian, conservator, or other legal representative may exercise all the partner's rights for the purpose of settling his [or her] estate or administering his [or her] property, including any power the partner had to give an assignee the right to become a limited partner.")

Therefore, Draft #5 eschews much of RULPA's language while seeking to provide additional informational rights to the estate of a deceased partner. Giving the estate the informational rights of a current limited partner will allow the estate information about the ongoing operations and value of the limited partnership.

[ARTICLE] 8

DISSOLUTION

SECTION 801. NONJUDICIAL DISSOLUTION. A limited partnership is dissolved, and its business must be wound up, only upon the occurrence of any of the following events:

(1) the happening of an event specified in writing in the partnership agreement;

(2) written consent of all general partners and of limited partners owning a majority of the profit interests owned by persons as limited partners;

(3) after the dissociation of a person as a general partner,

(i) if the limited partnership has at least one remaining general partner,

(A) the limited partnership's having notice within 90 days after the dissociation of the express will of any remaining general partner to dissolve the limited partnership, or

(B) written consent to dissolve the limited partnership given within 90 days after the dissociation by limited partners owning a majority of the profit interests owned by persons as limited partners immediately following the dissociation; or

(ii) if the limited partnership has no remaining general partner, the passage of 90 days after the dissociation unless within that 90 days partners owning a majority of the profit interests owned by limited partners immediately following the dissociation consent to continue the business and to admit at least one general partner and at least one person is admitted as a general partner in accordance with that consent;

(4) the passage of 90 days after the dissociation of the limited partnership's last limited partner, unless before the end of the 90 days the limited partnership admits at least one limited partner;

(5) the signing of a declaration of dissolution by the [Secretary of State] under Section 810(b);

or

(6) entry of a decree of judicial dissolution under Section 802.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether the partnership agreement should be able to vary the term of a limited partnership; assuming that the partnership can vary that term, how to resolve conflicts between the certificate and the partnership agreement regarding the term; whether to retain the reference to "writing" in Paragraph (1), in light of the UETA; whether, for the purposes of Paragraphs 3(i)(B) and 3(ii), the majority should be calculated against the profits interest owned by persons as limited partners immediately after

dissolution (as in this Draft) or against the profits interests owned at the time the consent is obtained; whether under paragraph 3(ii) the limited partners should have more than 90 days to actually admit a new general partner.

Paragraph (1) – This Paragraph raises three major issues.

Varying the term without affecting the public record – In Draft #3, Section 201 provided that only the certificate of limited partnership could vary a limited partnership's perpetual term. At its October, 1998 meeting, the Drafting Committee deleted that provision and directed that the corresponding deletion be made in this section. Under Drafts ## 4 and 5, a limited partnership can establish a term through the partnership agreement and the expiration of that term will cause dissolution as "the happening of an event specified in writing in the partnership agreement."

The Reporter believes that the Committee's decision may produce anomalous results. Assume, for example, that a partnership agreement states a limited duration but that the general partner -- for whatever reason -- continues operations past that date. Among other things, the general partner continues to file timely annual reports. In those circumstances:

- at least in some respects the limited partnership will have been dissolved [the contrary conclusion negates the idea of a term], but
- the public record will give no clue of that legal situation, and moreover
- the public record -- through the annual reports -- will actually suggest the contrary.

It is true that a similar problem exists under RULPA § 801(2) (providing for dissolution upon "the happening of events specified in writing in the partnership agreement") and Section 801(1) (same, as to "an event"). The problem seems more troubling, however, when the discrepancy involves a limited partnership's perpetual duration.

Conflicts between the certificate and the partnership agreement – The current approach may also be problematic in another way. Suppose a limited partnership states a term in its certificate (permissible under Section 201(b)) but neglects to include precisely the same term in the partnership agreement. That problem could be resolved by revising paragraph (1) to state: "the happening of an event specified in the certificate of limited partnership or in writing in the partnership agreement." However, that approach could produce awesome difficulties if the certificate and a written partnership agreement happened to disagree about dissolution.

Section (c) will not suffice to resolve those difficulties. Taken from ULLCA, Section 201(c) states that "the partnership agreement controls as to partners and transferees . . . and . . . the certificate of limited partnership . . . controls as to persons, other than partners and transferees, who reasonably rely on the [certificate] to their detriment." This formulation is drafted to address specific, particularized disagreements between the certificate and the partnership agreement, and it fails when the conflict relates to the fundamental notion of

dissolution. It would be bizarre to have a public record indicate on its face that an entity has dissolved and yet have the law deem the entity "un-dissolved" for many purposes. Moreover, a disagreement over dissolution could implicate every facet of a limited partnership's operations. It could be a gargantuan task for courts and practitioners to discern, much less resolve, all the ramifications.

The writing requirement – The reference to "writing" should be reconsidered when the Drafting Committee considers how to reconcile Re-RULPA with the UETA.

Paragraph (2) –Draft #2 followed RULPA. Draft #3 showed a revision tentatively adopted at the end of the Committee's March, 1998 meeting. That revision was discussed and not amended at the October, 1998 meeting. Draft #4 therefore preserved Draft #3's language and prompted no objections at the March, 1999 meeting. Draft #5 therefore preserves the approach of Drafts ## 3 and 4.

The reference to "profit interests owned by persons as limited partners" excludes profit interests that are owned by transferees who are not also partners. The phrase also excludes profit interests owned by general partners in their capacity as general partners.

At its March, 1998 meeting, the Committee deleted the following proposed new language, which had been derived from RUPA § 801(4) and ULLCA § 801(3):

> the passage of 90 days after the limited partnership has notice of an event that makes it unlawful for all or substantially all of the business of the limited partnership to be continued, unless the illegality is cured before the end of the 90 day period;

Paragraph (3) – This language was discussed and not amended at the October, 1998 meeting. The language prompted no objections at the March, 1999 meeting. Draft #5 makes only one small, stylistic change, substituting in paragraph (3)(i)(B) the phrase “with 90 days of the dissociation” for the phrase “within that 90 days.”

Paragraph (3)(i)(A) – A remaining general partner can exercise this power to cause dissolution without thereby dissociating as a general partner. The "express will" to dissolve is different from the "express will" to dissociate.

Paragraph (3)(i)(B) – Excluded from the calculation are profit interests owned by a transferee who is not a limited partner. Profit interests owned by a person who is both a general and a limited partner figure in *only to the extent those interests can be said to be held in the person's capacity as a limited partner*. Draft #5 has added language to Section 110 so that “for any person who is both a general partner and a limited partner, [the limited partnership’s records must include] a specification of what transferable interest the person owns in each capacity.” Section 110(8)(iii).

Query: should the majority be calculated against the profits interest owned by persons as limited partners immediately after dissolution (as in this Draft) or against the profits interests owned at the time the consent is obtained? The latter calculation would produce a different result if, prior to the consent, a second dissociation occurs and that dissociation causes a transfer to a person who is not a limited partner. Indeed, under the current approach *all* the remaining general partners might consent and yet be unable to invoke this provision.

The following scenario illustrates the problem:

> An individual is the sole general partner and also holds a majority of limited partner units. A court declares the individual incompetent, which automatically dissociates him or her as a general partner but not as a limited partner. Before the remaining limited partners (including the individual, acting through his or her guardian) can appoint a new general partner, the individual dies, dissociating as a limited partner. As of that moment it is impossible to muster the "majority of the profits interests owned by limited partners immediately following the [individual's] dissociation [as a general partner]," because a majority of those interests is now owned by a mere transferee.

Paragraph (3)(ii) – This language requires that all of the following occur within the 90 days: consent to avoid dissolution, consent to appoint a new general partner and admission of a new general partner in accordance with that consent. This language is arguably too narrow. For example, suppose that the requisite consent is obtained within the 90 days, in contemplation of a particular person becoming a general partner. Shortly before the end of the 90 days, the person refuses to be admitted as a general partner. To avoid dissolution the limited partners would have to find a substitute general partner and obtain new consents before the 90 day period expires. The rule is, however, merely a default rule. Before the 90 days expire the limited partners can amend the partnership agreement to extend the deadline.

The query posed in the Comment to paragraph (3)(i)(B) applies here as well. The Act should take the same approach to both these provisions.

SECTION 802. JUDICIAL DISSOLUTION. On application by or for a partner the [designate the appropriate court] court may decree dissolution of a limited partnership whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement.

Reporter's Notes

Both RUPA § 801 and ULLCA § 801 include nonjudicial and judicial dissolution in the

same section. This draft preserves RULPA's approach, dividing the two types of dissolution into two sections.

Subsection (a) – This subsection comes verbatim from RULPA § 802. At its March, 1999 meeting, the Drafting Committee deleted an additional provision, taken from RUPA § 801(5). That provision allowed a court to decree dissolution when "the economic purpose of the limited partnership is likely to be unreasonably frustrated." (RUPA § 801(5) is also the source of most of ULLCA § 801(4).)

Draft #3 had included another basis for judicial dissolution, also taken from RUPA § 801(5):

> another partner has engaged in conduct relating to the limited partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner

That provision also appears in ULLCA § 801(4)(i).

Re-RULPA deviates from ULLCA in another way. ULLCA § 801(4)(v) includes a concept developed in the law of closely held corporations. A court may decree dissolution of an LLC when "the managers or member in control of the company have acted in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to the petitioner." This draft does not include any analogous provision. At its October, 1998 meeting, the Drafting Committee discussed but did not adopt such a provision.

Former subsection (b) – At its March, 1999 meeting the Drafting Committee deleted a provision derived from RUPA § 801(6)(i), which was also the source for ULLCA § 801(5)(i). The deleted provision stated:

> (b) On application by or for a transferee the [designate the appropriate court] court may decree dissolution of a limited partnership if:
>
> (1) at the time of the transfer or entry of the charging order that gave rise to the transferee's interest the partnership agreement provided in writing for the limited partnership to have a term other than perpetual;
>
> (2) after having notice of that transfer or entry the limited partnership amended its partnership agreement in writing to extend the limited partnership's term;
>
> (3) the limited partnership's term would have expired but for that amendment; and
>
> (4) it is equitable to dissolve the limited partnership and wind up its business.

SECTION 803. WINDING UP.

(a) A limited partnership continues after dissolution only for the purpose of winding up its business. In winding up its business the limited partnership may amend its certificate of limited partnership to state that the limited partnership is dissolved, preserve the limited partnership business or property as a going concern for a reasonable time, prosecute and defend actions and proceedings, whether civil, criminal, or administrative, settle and close the limited partnership's business, dispose of and transfer the limited partnership's property, discharge the limited partnership's liabilities, distribute the assets of the limited partnership under Section 813, settle disputes by mediation or arbitration, file a statement of termination under Section 203, and perform other necessary acts.

(b) If a dissolved limited partnership has no general partners, limited partners owning a majority of the profit interests owned by partners may appoint a person to wind up the dissolved limited partnership's business. A person appointed under this subsection:

(1) has the powers of a general partner under Section 804; and

(2) shall promptly amend the certificate of limited partnership to:

(i) state that the limited partnership has no general partner and that the person has been appointed to wind up the limited partnership; and

(ii) give the business address of the person.

(c) On the application of any partner, a court may order judicial supervision of the winding up, including the appointment of a person to wind up the dissolved limited partnership's business, if:

(1) a limited partnership has no general partner and within a reasonable

time following the dissolution no person has been appointed pursuant to subsection (b), or

(2) the applicant establishes other good cause.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to adopt the alternative language proposed below for subsection (a); whether amending the certificate of limited partnership to state that the limited partnership is dissolved should be mandatory; whether filing a statement of termination should be mandatory; whether an appointment under subsection (b) should require the *written* consent of the partners.

This section differs from RULPA § 803 so as to: (i) provide, as a default matter, that so long as a dissolved limited partnership has at least one general partner, the limited partnership management structure remains in place during winding up; and (ii) incorporate many of the mechanical refinements of RUPA § 803. (RUPA § 803 is also the source for ULLCA § 803.)

Both RUPA § 802(b) and ULLCA § 802(b) allow the unanimous consent of partners/members to "un-do" a dissolution. For two reasons Re-RULPA does not include that provision. First, both RUPA and ULLCA provide for the buy-out of a dissociated owner in the event that dissociation does not cause dissolution. Re-RULPA, in contrast, freezes in a dissociated owner (as a transferee of its own transferable interest) until dissolution. It seems inequitable, therefore, to allow a waiver of dissolution without some consent of those transferees who are former partners. Second, providing for transferee consent would require at best an intricate statutory provision, and – given the limited partnership's durability in the default mode – the intricacy hardly seems warranted.

Subsection (a), first sentence – Both RUPA § 802(a) and ULLCA § 802(a) use this language. Based on years of explaining the dissolution and termination to the uninitiated, the Reporter prefers: "A dissolved limited partnership is not terminated but continues its existence only for the purpose of winding up its business."

Subsection (a), style issue – The language of this subsection comes essentially verbatim from RUPA 803(c). For two reasons the Reporter prefers the reformulation set out below. First, the RUPA language is exclusively permissive, and some of the listed items should be mandatory. Second, the reformulation gives more guidance to the uninitiated by creating two functionally distinct categories. The first category concerns the general processes of winding up. The second category concerns specific tasks necessary to close down the business. The reformulation would read as follows:

In winding up its business the limited partnership:

(1) may amend its certificate of limited partnership to state that the limited partnership is dissolved, preserve the limited partnership business or property as a going concern for a reasonable time, prosecute and defend actions and

proceedings, whether civil, criminal, or administrative, transfer the limited partnership's property, settle disputes by mediation or arbitration, file a statement of termination as provided in Section 203, and perform other necessary acts; and

(2) shall discharge the limited partnership's liabilities, settle and close the limited partnership's business, and martial and distribute the assets of the partnership.

Subsection (a); amending the certificate of limited partnership to state that the limited partnership is dissolved and filing statements of termination – Both the language currently in Draft #5 and the language just suggested incorporate a decision made by the Drafting Committee at its October, 1998 meeting. At that meeting, the Committee deleted in this subsection and in Section 202 the *requirement* that a dissolved limited partnership amend its certificate to indicate dissolution. Such an amendment is still permitted, Section 201(b), and will often be the prudent way to curtail a general partner's power to bind the limited partnership during winding up. (Under Section 101(d), the amendment provides constructive notice.)

Also at the October, 1998 meeting, the Committee made the filing of a statement of termination permissive rather than mandatory. Accordingly, the following sentence has been deleted from Draft #3's version of this subsection: "Promptly after winding up is completed, the limited partnership shall file a declaration of termination as provided in Section 805 [now 203]."

For the reasons stated in the Reporter's Notes to Section 202(b)(3), the Reporter believes that filing amendment to the certificate of limited partnership stating that the limited partnership is dissolved and filing a statement of termination should both be mandatory.

Subsection (b) – At its July, 1997 meeting, the Committee eliminated writing requirements pertaining to most consents. Consistent with that action, Draft #2 eliminated Draft #1's requirement that the partners consent in writing to this appointment. However, given the special circumstances involved here, the Committee might wish to reinsert the writing requirement here.

Subsection (b)(1) – The appointee has neither the liabilities of a general partner to third parties nor the duties of a general partner. Prior Drafts had provided that the appointee would have the duties of a general partner, but at its March, 1999 meeting the Drafting Committee rejected that position. The appointee may well have comparable duties under other law (e.g., agency).

Subsection (b)(2) – Draft #3 also required the amendment to indicate that the limited partnership had dissolved. Such an indication is no longer mandatory, but will often be prudent. See Reporter's Notes to subsection (a).

Subsection (c) – Derived from RUPA § 803(a), which is replicated in ULLCA § 803(a). Prior Drafts gave standing to a transferee. Draft #5 does not, in accordance with the Drafting Committee's March, 1999 decision to delete former Section 802(b).

Former subsection (d) – Prior Drafts stated that "Except as ordered by the court, a person appointed under subsection (c) has the same powers and duties of a person appointed under subsection (b)." At its March, 1999 meeting, the Drafting Committee decided that this matter should be left to the court.

SECTION 804. POWER OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER TO BIND PARTNERSHIP AFTER DISSOLUTION.

(a) A limited partnership is bound by a general partner's act after dissolution that:

(1) is appropriate for winding up the limited partnership business; or

(2) would have bound the partnership under Section 402 before dissolution, if the other party to the transaction did not 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:

(i) less than two years has passed since the person's dissociation as a general partner, and

(ii) the other party does not have notice of the dissociation and reasonably believes that the person is still a general partner; and

(2) the act:

(i) is appropriate for winding up the limited partnership business, or

(ii) would have bound the limited partnership under Section 402 before dissolution and at the time the other party enters into the transaction the other party does not have notice of the dissolution.

Reporter's Notes

Changes from Draft #4 – Draft #5 substantially revises this section.

Relationship between this section and Section 606 – Draft #5 clarifies the relationship between this section and Section 606 (power to bind the partnership before dissolution of person dissociated as a general partner). A new subsection (b) replaces former subsection (e).

Statements regarding real property – Draft #5 deletes former subsections (b), (c) and (d). Those subsections involved statements granting or limiting authority to transfer real property, and at its March, 1999 meeting the Drafting Committee eliminated those statements.

Subsection (a) – This subsection is taken from RUPA § 804. In prior Drafts, this material appeared at Section 803A(a).

Subsection (b) – Paragraph (1) replicates the provisions stated in Section 606 for disabling a person dissociated as a general partner. Paragraph (2) replicates the provisions of subsection (a) for limiting the post-dissolution power to bind. For a person dissociated as a general partner to bind a dissolved limited partnership, the person's act will have to satisfy both paragraphs.

SECTION 805. LIABILITY AFTER DISSOLUTION OF GENERAL PARTNER AND PERSON DISSOCIATED AS GENERAL PARTNER TO LIMITED PARTNERSHIP, OTHER GENERAL PARTNERS AND PERSONS DISSOCIATED AS GENERAL PARTNER .

(a) If a general partner with 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 business, the general partner is liable:

(1) to the limited partnership for any damage caused to the limited partnership arising from the obligation, and

(2) if another general partner or a person dissociated as a general partner is liable for the obligation, then to that other general partner or person for any damage caused to

that other general partner or person arising from that 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 limited partnership for any damage caused to the limited partnership arising from the obligation, and

(2) if a general partner or another person dissociated as a general partner is liable for that obligation, then to that general partner or other person for any damage caused to that general partner or other person arising from that liability.

Reporter's Notes

Derived from RUPA § 806.

Former subsection (a) – Draft #5 deletes as unnecessary former subsection (a). That provision, taken essentially verbatim from RUPA § 806(a), stated:

> Except as otherwise provided in subsection (b), after dissolution a general partner is liable to the other general partners for the general partner's share of any partnership liability incurred under [Section 804].

A limited partnership remains a limited partnership during winding up. The rules regarding loss sharing among general partners are not limited to a limited partnership's pre-dissolution phase. Moreover, strictly speaking, general partners in a limited partnership do not "share" losses.

Subsection (a) – Derived from RUPA § 806(b), with several modifications. The only substantive change is Paragraph (2), which is new and gives a damage action to general partners and persons dissociated as general partners who are personally liable on the limited partnership's obligations.

The other changes are stylistic. This subsection refers to limited partnership obligations rather than liabilities, because new Paragraph (2) uses the concept of liability for a different purpose. Also, this subsection refers to a general partner "caus[ing] a limited partnership to incur an obligation" rather than "incur[ring] a partnership liability." Strictly speaking, the partner or person dissociated as a general partner does not incur the obligation. Finally, the syntax is re-styled slightly so as to parallel the syntax of new subsection (b), which does not exist in RUPA.

Subsection (b) – This subsection does not exist in RUPA. In Article 8 of RUPA, the term

"partner" encompasses dissociated partners.

Possible amalgamation of subsections (a) and (b) – These subsections have language in common and could be merged into a single subsection. However, in the Reporter's opinion, the merger would decrease readability. The merged section would be as follows:

> If a general partner with 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 business, or a person dissociated as a general partner causes the limited partnership to incur an obligation under Section 804(b), the general partner or person is liable:
>
> (1) to the limited partnership for any damage caused to the limited partnership arising from the obligation, and
>
> (2) if another general partner or other person dissociated as a general partner is liable for the obligation, then to that other general partner or other person for any damage caused to that other general partner or other person arising from that liability.

SECTION 806. KNOWN CLAIMS AGAINST DISSOLVED LIMITED PARTNERSHIP.

(a) A dissolved limited partnership may dispose of the known claims against it by following the procedure described in this section.

(b) A dissolved limited partnership shall notify its known claimants in writing of the dissolution. The notice must:

(1) specify the information required to be included in a claim;

(2) provide a mailing address where the claim is to be sent;

(3) state the deadline for receipt of the claim, which may not be less than 120 days after the date the written notice is received by the claimant;

(4) state that the claim will be barred if not received by the deadline; and

(5) unless the limited partnership has been a limited liability limited

partnership throughout its existence, state that the barring of a claim against the limited partnership will also bar any corresponding claim against any present or dissociated 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) in the case of a claim that is timely received but rejected by the dissolved limited partnership, the claimant does not commence a proceeding to enforce the claim against the limited partnership within 90 days after the receipt of the notice of the rejection.

(d) For purposes of this section, "claim" does not include a contingent liability or a claim based on an event occurring after the effective date of dissolution.

Reporter's Notes

Section 806 is derived from ULLCA § 807 and RMBCA § 14.06. In prior Drafts, this material appeared at Section 803B.

If this draft did not allow for LLLPs, Sections 806 and 807 would probably be unnecessary. The sections seem warranted, however, because many limited partnerships will be fully-shielded.

ULLCA lifted its provisions on this topic virtually verbatim from the RMBCA. This draft takes the same approach, making a few stylistic changes plus a few substantive additions necessitated by the personal liability of general partners in an ordinary (i.e., non-LLLP) limited partnership.

It is arguable that Sections 806 and 807 should apply only to liabilities incurred while a limited partnership is an LLLP. However, that approach would complicate even further two provisions that are already very complicated. An intermediate approach would apply Sections 806 and 807 to all liabilities while eliminating Section 808 (barring claims against former general partners when the corresponding claim against the limited partnership has been barred).

Subsection (b)(5) – This provision is needed due to the personal liability of general partners in an ordinary limited partnership and does not appear in the RMBCA/ULLCA

formulation.

Subsection (c)(2) – The phrase "against the limited partnership" is added to make clear that bringing a claim against an allegedly liable present or dissociated general partner does not save a claim against the limited partnership.

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 limited partnership to present them in accordance with the notice.

(b) The notice must:

(1) be published at least once in a newspaper of general circulation in the [county] in which the dissolved limited partnership's principal office is located or, if none in this State, in which the limited partnership's designated office is or was last located;

(2) describe the information required to be contained in a claim and provide a mailing address where the claim is to be sent;

(3) state that a claim against the limited partnership is barred unless a proceeding to enforce the claim is commenced within five years after publication of the notice; and

(4) unless the limited partnership has been a limited liability limited partnership throughout its existence, state that the barring of a claim against the limited partnership will also bar any corresponding claim against any present or dissociated 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 a proceeding to enforce the claim against the dissolved limited partnership within five years after the publication date of the notice:

(1) a claimant who did not receive written notice under Section 806;

(2) a claimant whose claim was timely sent to the dissolved limited partnership but not acted on; and

(3) a claimant whose claim is contingent or based on an event occurring after the effective date of dissolution.

(d) A claim not barred under this section may be enforced:

(1) against the dissolved limited partnership, to the extent of its undistributed assets;

(2) if the assets have been distributed in liquidation, against a partner or transferee to the extent of that person's proportionate share of the claim or the limited partnership's assets distributed to the partner or transferee in liquidation, 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 as part of the winding up of the dissolved limited partnership.

(3) against any person liable on the claim under Section 404.

Reporter's Notes

Derived from ULLCA § 808 and RMBCA § 14.07. In prior Drafts, this material appeared at Section 803C.

This section generated intense discussion at the Drafting Committee's March, 1999 meeting and doubtlessly will do so again at the October, 1999 meeting.

Subsection (b)(4) – This provision is needed due to the personal liability of general partners in an ordinary limited partnership and does not appear in the RMBCA/ULLCA formulation.

Subsection (d)(2) – This paragraph is quite complex, and variations among ULLCA, RMBCA and Re-RULPA are best indicated through notes, as follow:

> (2) if the assets have been distributed in liquidation, against a partner [A] or transferee[B] to the extent of that person's proportionate[C] share of the claim or the limited partnership's assets distributed to the partner or transferee in liquidation, whichever is less, but a person's total liability for all claims under this paragraph[D] may not exceed the total amount of assets distributed to the person as part of the winding up of the dissolved limited partnership.[E]
>
> [A] Arguably the reference should be "dissociated" or "former" partner, since the termination of a limited partnership ends partner status, but ULLCA uses "members" and RMBCA uses "shareholders."
>
> [B] ULLCA § 808(d)(2) does not include transferees.
>
> [C] RMBCA § 14.07(d)(2) uses "pro rata." ULLCA § 808(d)(2) uses "proportionate."
>
> [D] RMBCA and ULLCA refer to "this section." In light of subsection (d)(3), that reference is overbroad for Re-RULPA.
>
> [E] This draft adds the concluding phrase ("as part of the winding up of the dissolved limited partnership") to emphasize that the "clawback" relates only to liquidating distributions.

Subsection (d)(3) – The referenced section provides for personal liability of general partners in an ordinary limited partnership.

SECTION 808. EFFECT OF CLAIMS BAR ON PERSONAL LIABILITY OF PARTNERS AND DISSOCIATED PARTNERS.

Version #1 – If Section 806 or 807 bars a claim against a dissolved limited partnership, any corresponding claim under Section 404 is also barred.

Version #2 – No person is liable under Section 404 on account of any obligation of a

limited partnership with regard to which Section 806 or 807 has barred a claim.

Reporter's Notes

In prior Drafts, this material appeared at Section 803D.

This section requires a person to preserve its claim against the limited partnership in order to preserve a vicarious liability claim against the general partners. This requirement is arguably inconsistent with Section 405 (requiring claimants generally to exhaust limited partnership resources before pursuing a general partner but allowing some exceptions, most notably when the limited partnership is bankrupt). It might seem more consistent to specify circumstances in which a claimant could preserve its claim against a current or former general partner by proceeding against that partner without having to proceed against the limited partnership.

For the following three reasons, however, Re-RULPA eschews that approach. First, that approach would add complexity to an already complex series of sections. Second, if one dissociated or present general partner remains at risk, the other dissociated or current partners should have some means of learning of that risk. (They could be at risk by way of a claim for contribution or indemnification.) A proceeding against the limited partnership is a good (albeit imperfect) way of bringing the ongoing risk to the attention of all current and former general partners. Third, futility is the essential rationale for the exceptions provided by Section 405 to the exhaustion requirement. That is, there is no reason to require exhaustion when even extensive efforts to collect from the limited partnership are destined to be futile. That rationale does not apply here, because a simple, discrete act (i.e., the commencement of the proceeding against the limited partnership) accomplishes the desired result – i.e., preventing the bar.

SECTION 809. GROUNDS FOR ADMINISTRATIVE DISSOLUTION. The [Secretary of State] may commence a proceeding to dissolve a limited partnership administratively if the limited partnership does not:

(1) pay any fees, taxes and penalties due to the [Secretary of State] under this [Act] or other law within 60 days after they are due; or

(2) deliver its annual report to the [Secretary of State] within 60 days after it is due.

Reporter's Notes

Source: ULLCA § 809. In prior Drafts, this material appeared at Section 803E.

At its March, 1999 meeting, the Drafting Committee decided to limit the scope of Paragraph (1). Following ULLCA, that paragraph formerly read: “pay any fees, taxes, or penalties imposed by this [Act] or other law within 60 days after they are due.”

RMBCA includes three other grounds, omitted from ULLCA. See RMBCA § 14.20(3)-(5) (being without a registered agent or in-state office for 60 days or more; failing for 60 days or more to notify Secretary of State of certain changes in registered agent or in-state office; expiration of period of duration specified in articles of incorporation). Bert Black, the representative of the International Association of Corporation Administrators, suggests that "there needs to be some 'stick' to get the limited partnership to appoint a new agent" when the old agent resigns. He suggests administrative dissolution as that stick.

SECTION 810. PROCEDURE FOR AND EFFECT OF ADMINISTRATIVE DISSOLUTION.

(a) If the [Secretary of State] determines that a ground exists for administratively dissolving a limited partnership, the [Secretary of State] shall enter a record of the determination and serve the limited partnership with a copy of the record.

(b) If within 60 days after service of the copy the limited partnership does not correct each ground for dissolution or demonstrate to the reasonable satisfaction of the [Secretary of State] that each ground determined by the [Secretary of State] does not exist, the [Secretary of State] shall administratively dissolve the limited partnership by signing a declaration of dissolution that recites the grounds for dissolution and its effective date. The [Secretary of State] shall file the original of the declaration and serve the limited partnership with a copy of the declaration.

(c) A limited partnership administratively dissolved continues its existence but may carry on only business necessary to wind up and liquidate its business and affairs under Sections 803 and 813and to notify claimants under Sections 806 and 807.

(d) The administrative dissolution of a limited partnership does not terminate the authority of its agent for service of process.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether a filed declaration of dissolution should have the same constructive notice effect as amending the certificate of limited partnership to state that the limited partnership is dissolved; whether administrative dissolution should take effect when the declaration is served (or filed) and not when the declaration has merely been signed; whether subsection (d) should be deleted as unnecessary.

Source: ULLCA § 810, which closely follows RMBCA § 14.21. In prior Drafts, this material appeared at Section 803F.

Subsection (b) – ULLCA § 810(b) locates the "within" phrase in the middle of the sentence. The change from ULLCA is for ease in reading. ULLCA § 801(b) refers to "service of the notice" rather than "service of the copy" – an apparent residue from the RMBCA formulation. ULLCA § 810(b) refers to a "certificate of dissolution." As much as possible, Re-RULPA reserves the term "certificate" for the certificate of limited partnership. This section uses the term "declaration of dissolution" to distinguish the [Secretary of State's] act from the statement a limited partnership may file pursuant to Section 803.

Subsection (d) – The same thing is true for non-administrative dissolution, but this draft does not say so. Query: should it?

SECTION 811. REINSTATEMENT FOLLOWING ADMINISTRATIVE DISSOLUTION.

(a) A limited partnership administratively dissolved may apply to the [Secretary of State] for reinstatement within two years after the effective date of dissolution. The application must:

(1) recite the name of the limited partnership and the effective date of its administrative dissolution;

(2) state that the ground or grounds for dissolution either did not exist or have been eliminated; and

(3) state that the limited partnership's name satisfies the requirements of Section 107.

(b) If the [Secretary of State] determines that the application contains the information required by subsection (a) and that the information is correct, the [Secretary of State] shall cancel the declaration of dissolution and prepare a declaration of reinstatement that recites this determination and the effective date of reinstatement, file the original of the declaration of reinstatement, and serve the limited partnership with a copy.

(c) When reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the limited partnership may resume its business as if the administrative dissolution had never occurred.

Reporter's Notes

Source: ULLCA § 811, which closely follows RMBCA § 14.22. In prior Drafts, this material appeared at Section 803G.

Subsection (a)(2) – ULLCA § 811(a)(3) refers only to "ground." RMBCA § 14.22(a)(2) refers to "ground or grounds." The ULLCA version may reflect an oversight, since that version uses "have" – i.e., "the ground for dissolution either did not exist or have [sic] been eliminated."

Former subsection (a)(4) – Following ULLCA, prior Drafts also required the application to "(4) contain a certified statement from the [taxing authority] reciting that all taxes owed by the limited partnership have been paid." Consistent with the Drafting Committee's decision as to Section 809(1), Draft #5 omits that language.

Subsection (b) – ULLCA § 811(b) refers to "certificate of reinstatement." Re-RULPA seeks to confine the term "certificate" to the certificate of limited partnership.

SECTION 812. APPEAL FROM 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 limited

partnership with a record that explains the reason or reasons for denial.

(b) The limited partnership may appeal the denial of reinstatement to the [name appropriate] court within 30 days after service of the notice of denial is perfected. The limited partnership appeals by petitioning the court to set aside the dissolution and attaching to the petition copies of the [Secretary of State's] declaration of dissolution, the company's application for reinstatement, and the [Secretary of State's] notice of denial.

(c) The court may summarily order the [Secretary of State] to reinstate the dissolved limited partnership or may take other action the court considers appropriate.

Reporter's Notes

Source: ULLCA § 812. In prior Drafts, this material appeared at Section 803H.

Drafts ## 1 and 2 omitted any parallel provision to ULLCA § 812 on the theory that, absent good reason to the contrary, a State's generally applicable provisions for appealing the actions of an administrative agency should apply to the Secretary of State's denial of reinstatement. Consistent with instructions to follow RUPA/ULLCA, Draft #3 included an analog to ULLCA § 812.

At its March, 1999 meeting, the Drafting Committee deleted former subsection (d) as unnecessary. Following ULLCA, that subsection provided: "The court's final decision may be appealed as in other civil proceedings."

SECTION 813. SETTLING OF ACCOUNTS AND DISTRIBUTION OF ASSETS.

(a) In winding up a limited partnership's business, the assets of the limited partnership, including the contributions required by this Section, must be applied to discharge its obligations to creditors, including, to the extent permitted by law, partners who are creditors.

(b) Any surplus remaining after the limited partnership complies with subsection (a) shall be paid in cash as a distribution.

(c) If the limited partnership's assets are insufficient to discharge all its obligations under section (a), then with respect to each undischarged obligation incurred when the limited partnership was not a limited liability limited partnership:

(1) each person who was a general partner when the obligation was incurred and who has not been released from that obligation under Section 607 shall contribute to the limited partnership for the purpose of enabling the limited partnership to discharge that obligation and the contribution due from each of those persons shall be in proportion to the allocation of limited partnership losses in effect for each of those persons when the obligation was incurred;

(2) if a person fails to contribute the full amount required under paragraph (1) with respect to an undischarged limited partnership obligation, the other persons required to contribute by paragraph (1) on account of that obligation shall contribute the additional amount necessary to discharge the obligation and the additional contribution due from each of those other persons shall be in proportion to the allocation of limited partnership losses in effect for each of those other persons when the obligation was incurred; and

(3) if a person fails to make the additional contribution required by paragraph (2), further additional contributions shall be due and determined in the same manner as provided in that paragraph.

(d) A person who makes an additional contribution under subsection (c)(2) or (c)(3) may recover from any person whose failure to contribute under subsection (c)(1) or (c)(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 shall not

exceed the amount the person failed to contribute.

(e) The estate of a deceased person is liable for the person's obligations under this Section.

(f) An assignee for the benefit of creditors of a limited partnership or a partner, or a person appointed by a court to represent creditors of a limited partnership or a partner, may enforce a person's obligation to contribute under subsection (c).

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether subsection (a)'s requirement that a limited partnership "discharge its obligations to creditors" should be modified to allow a limited partnership to "discharge or make provision for the discharge of its obligations to creditors"; whether to retain the requirement that liquidating distributions be paid "in cash."

Derived from RUPA § 807. RUPA § 807(b) is omitted, however, because that provision rests on RUPA's concept of a partner's account. RUPA § 401(a). Re-RULPA does not adopt the "partner's account" approach. Also, this section does not refer to return of contributions. See Notes to subsection (b), below.

In prior Drafts, this material appeared at Section 804.

Subsection (a) – Source: RUPA § 807(a). A partner previously entitled to receive a distribution is a creditor. See Section 508.

Subsection (b) – This subsection differs substantially in form from RUPA § 807(b), in part because Re-RULPA does not specify the structure of each partner's "account." RUPA § 807(b) depends on RUPA § 401(a)'s concept of a partner's account.

Also, Draft #5 does not refer to the "return of all contributions that have not previously been returned." In prior Drafts, subsection (b) provided:

> (b) Any surplus existing under subsection (a) shall be distributed first as a return of all contributions that have not previously been returned and second as a distribution of profits allocated under Section 504. If the surplus does not suffice to return all contributions, the surplus shall be allocated in proportion to the unreturned contributions.

As explained in the Reporter's Notes the Section 503, Draft #5 eschews the unneeded concept of "return of contribution." So long as a limited partnership conforms to the default rules on sharing

of distributions, Draft #5's simpler approach will produce the same results as RULPA's abstruse language. See RULPA § 608(c) (defining return of contribution).

Subsection (c) – This draft's approach is more complex than RUPA's, because (i) this draft does not rely on the "partner's account" concept, and (ii) does provide for contributions from dissociated general partners. RUPA does not need the latter provision, because in the default mode the buy-out price of a dissociated RUPA partner reflects any liabilities outstanding at the time of dissociation. See RUPA § 701(b).

Subsection (e) – Derived from RUPA § 807(e), but query: why is this provision necessary? Is there something in other law that would excuse or release the estate? In any event, RUPA's formulation has been changed to include all obligations under subsection (c); i.e., not only a person's obligation to contribute to the limited partnership but also the liability of under-contributors to over-contributors.

[ARTICLE] 9

FOREIGN LIMITED PARTNERSHIPS

SECTION 901. LAW GOVERNING FOREIGN LIMITED PARTNERSHIPS.

(a) The laws of the State or other jurisdiction under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its partners and their transferees.

(b) A foreign limited partnership may not be denied a certificate of authority by reason of any difference between the laws of the jurisdiction under which the foreign limited partnership is organized and the laws of this State.

(c) A certificate of authority does not authorize a foreign limited partnership to engage in any business or exercise any power that a limited partnership may not engage in or exercise in this State.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether subsection (b) should be made expressly subject to Section 905.

Source: ULLCA § 1001.

Although ULLCA's Article 10 is based on RULPA's Article 9, ULLCA does differ from RULPA in some substantial ways. For two reasons Re-RULPA follows ULLCA. First, ULLCA's foreign registration provisions are dovetailed with various other ULLCA provisions adopted by Re-RULPA (e.g. Section 114 [change of designated office or agent], Section 210 [annual report]). Second, many of ULLCA's changes constitute improvements over RULPA.

Subsection (b) – ULLCA 1001(b) refers to "another jurisdiction under which the foreign limited partnership is organized" rather than "the jurisdiction . . . ."

SECTION 902. APPLICATION FOR CERTIFICATE OF AUTHORITY.

(a) A foreign limited partnership may apply for a certificate of authority to transact business in this State by delivering an application to the [Secretary of State] for filing. The application must set forth:

(1) the name of the foreign limited partnership and, if that name does not comply with Section 107, an alternate name adopted pursuant to Section 905(a).

(2) the name of the State or country under whose law it is organized;

(3) the street address of its principal office, and if the laws of the jurisdiction under which the foreign limited partnership is organized require the foreign limited partnership to maintain an office in that jurisdiction, the street address of that required office;

(4) the name and street address of its initial agent for service of process in this State;

(5) the name and business address of each of its general partners;

(6) whether the foreign limited partnership is a foreign limited liability limited partnership.

(b) A foreign limited partnership shall deliver with the completed application a certificate of existence or a record of similar import authenticated by the secretary of state or other official having custody of limited partnership records in the State or country under whose law it is organized.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether to require each foreign limited partnership to have an in-state office; whether to require each foreign limited partnership to have an in-state agent for service of process

Source: ULLCA § 1002.

Subsection (a)(1) – This provision differs from ULLCA as follows:

the name of the foreign ~~company or~~ limited partnership and, if ~~its~~ that name ~~is unavailable for use in this State~~ does not comply with Section 107, an alternate name adopted pursuant to ~~that satisfies the requirements of~~ Section ~~1005~~ 905(a).

Subsection (a)(3) – ULLCA does not contain the latter requirement, but RULPA §902(5) does. The RULPA provision requires disclosure of the principal office only if the law of the foreign jurisdiction does not require an office in that jurisdiction.

Subsection (a)(4) – This paragraph reflects a change from current law. RULPA does not require a foreign limited partnership to name an in-state agent for service of process. RULPA § 902(3) and (4).

Subsection (a)(5) – RULPA § 902(6) states this requirement. ULLCA § 1002(7) states the parallel requirement as to *initial* managers.

Subsection (a)(6) – This provision is derived from ULLCA § 1002(8). Both provisions pertain to displacing the statutory default rule on owner liability. The ULLCA provision refers to situations in which the articles of organization make owners liable for the entity's debts. The Re-RULPA provision refers to situations in which the certificate of limited partnership produces the opposite result for general partners.

ULLCA provisions omitted from Re-RULPA – Re-RULPA omits the following provisions

from this section.

(4) the address of its initial designated office in this State;[A]

. . .

(6) whether the duration of the company is for a specified term and, if so, the period specified;[B]

(7) whether the company is manager-managed, and, if so, the name and address of each initial manager;[C] and

(8) whether the members of the company are to be liable for its debts and obligations under a provision similar to Section 303(c).[D]

[A] RULPA does not require a foreign limited partnership to maintain an in-state office and on this issue Re-RULPA follows RULPA.

[B] This provision is inapposite, because the Drafting Committee has decided that the partnership agreement can vary the term of a domestic limited partnership. As a result, domestic limited partnerships need not disclose in their certificates of limited partnership any variation from the perpetual term established by the [Act]. See the Reporter's Notes to Sections 201 and 801. It makes no sense, therefore, to require such a disclosure from foreign limited partnerships. If the Drafting Committee changes its decision on domestic limited partnerships, a corresponding change should be made in this section.

[C] Subsection(a)(5) makes the analogous provision for general partners.

[D] Subsection(a)(6) makes a roughly analogous provision for LLLPs.

SECTION 903. ACTIVITIES NOT CONSTITUTING TRANSACTING BUSINESS.

(a) Activities of a foreign limited partnership that do not constitute transacting business in this State within the meaning of this [article] include:

(1) maintaining, defending, or settling an action or proceeding;

(2) holding meetings of its partners or carrying on any other activity concerning its internal affairs;

(3) maintaining bank accounts;

(4) maintaining offices or agencies for the transfer, exchange, and

registration of the foreign limited partnership's own securities or maintaining trustees or depositories with respect to those securities;

(5) selling through independent contractors;

(6) soliciting or obtaining orders, whether by mail or the Internet or through employees or agents or otherwise, if the orders require acceptance outside this State before they become contracts;

(7) creating or acquiring indebtedness, mortgages, or security interests in real or personal property;

(8) securing or collecting debts or enforcing mortgages or other security interests in property securing the debts, and holding, protecting, and maintaining property so acquired;

(9) conducting an isolated transaction that is completed within 30 days and is not one in the course of similar transactions of a like manner; and

(10) transacting business in interstate commerce.

(b) For purposes of this [article], the ownership in this State of income-producing real property or tangible personal property, other than property excluded under subsection (a), constitutes transacting 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 any other law of this State.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether to include in the safe harbor list "having partners who reside, are organized under the laws of, are authorized to

transact business in, or in their separate capacities do transact business in this State."

Subsection (a)(6) – The phrase "or the Internet" does not appear in ULLCA.

Rationale for possible additional language – Suppose that (i) a foreign limited partnership has a general partner that is an entity; (ii) the entity is authorized to do business in this state; (iii) the entity does business in this State; and (iv) the business does not relate to the foreign limited partnership. The foreign limited partnership is *not* transacting business in this State, and the additional language says so expressly. Other parts of the additional language address similar situations.

SECTION 904. ISSUANCE OF CERTIFICATE OF AUTHORITY. Unless the [Secretary of State] determines that an application for a certificate of authority fails to comply as to form with the filing requirements of this [Act], the [Secretary of State], upon payment of all filing fees, shall file the application, issue a certificate of authority to transact business in this State and send the certificate, together with a receipt for the fees to the foreign limited partnership or its representative.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether to preserve RULPA § 903(3)'s provision for an actual certificate of authority.

Source: ULLCA § 1004.

This section differs from ULLCA in expressly requiring the issuance of an actual certificate. ULLCA seems to implicitly deem the receipt to be the certificate. The difference from ULLCA is as follows.

> . . . the [Secretary of State], upon payment of all filing fees, shall file the application, issue a certificate of authority to transact business in this State and send the certificate, together with a receipt for ~~it and~~ the fees, to the foreign limited partnership or its representative.

The additional language is derived from RULPA § 903(3), which requires the [Secretary of State] to "issue a certificate of registration to transact business in this State.**"**

SECTION 905. NONCOMPLYING NAME OF FOREIGN LIMITED PARTNERSHIP.

(a) A foreign limited partnership whose name does not comply with Section 107 may not obtain a certificate of authority until it adopts, for the purpose of transacting business in this State, an alternate name that complies with Section 107. A foreign limited partnership that adopts an alternate name under this subsection and then obtains a certificate of authority with that name need not [designate appropriate action] under [designate fictitious name statute]. After obtaining a certificate of authority with an alternate name, a foreign limited partnership must transact business in this State under that name.

(b) If a foreign limited partnership authorized to transact business in this State changes its name to one that does not comply with Section 107, it may not transact business in this State until it complies with subsection (a) and obtains an amended certificate of authority.

Reporter's Notes

Derived from ULLCA § 1005, but modified substantially to limit overlap with Section 107. ULLCA does not specify the process for amending a certificate of authority, and neither does this Draft.

SECTION 906. REGISTERED NAME.

(a) A foreign limited partnership may register its name, if the name complies with Section 107.

(b) If a foreign limited partnership's name fails to comply with Section 107 solely because the name does not comply with Section 107(a), the foreign limited partnership may, for the purpose of registering its name:

(1) adopt an alternate name that complies with Section 107 and differs from the foreign limited partnership's name only as necessary to comply with Section 107(a); and

(2) register that alternate name without needing to [designate appropriate action] under [designate fictitious name statute].

(c) A foreign limited partnership registers its name, or an alternate name adopted under subsection (b), by delivering to the [Secretary of State] for filing an application:

(1) setting forth its name, any alternate name adopted under subsection (b), the State or country and date of its organization, and a brief description of the nature of the business in which it is engaged; and

(2) accompanied by a certificate of existence, or a record of similar import, from the State or country of organization.

(d) A foreign limited partnership whose registration is effective may renew it for successive years by delivering for filing in the office of the [Secretary of State] a renewal application complying with subsection (c) between October 1 and December 31 of the preceding year. The renewal application renews the registration for the following calendar year.

(e) A foreign limited partnership whose registration is effective may obtain a certificate of authority under the registered name or consent in writing to the use of the registered name by a limited partnership later organized under this [Act] or by another foreign limited partnership later authorized to transact business in this State. The registration terminates when the foreign limited partnership obtains a certificate of authority under the registered name, the limited partnership is organized under the registered name or the other foreign limited partnership obtains a certificate of authority under the registered name.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether this section is needed, in light of the ability to reserve for successive 120-day periods under Section 108.

Derived from ULLCA § 107. In prior Drafts, this material appeared at Section 103A.

Subsection (b) – In ULLCA this provision is part of subsection (a). Draft #5 creates this subsection by separating and revising some of the language from ULLCA 107(a). A foreign limited partnership may register an alternate name only when the sole barrier to registering the true name is the true name's failure to include the proper designators (e.g., limited partnership, LP, LLLP, etc.).

Subsection (b)(2) – If the sole barrier to registering the true name is the true name's failure to include the proper designators, then the true name cannot be in conflict with some other name on the records of the [Secretary of State].

SECTION 907. REVOCATION OF CERTIFICATE OF AUTHORITY.

(a) A certificate of authority of a foreign limited partnership to transact business in this State may be revoked by the [Secretary of State] in the manner provided in subsection (b) if:

(1) the foreign limited partnership fails to:

(i) pay any fees, taxes, and penalties owed to this State;

(ii) deliver its annual report required under Section 210 to the [Secretary of State] within 60 days after it is due;

(iii) appoint and maintain an agent for service of process as required by Section 113(b); or

(iv) file a statement of a change under Section 114 within **[TBD]** days after a change has occurred in the name or address of the agent; or

(2) a misrepresentation has been made of any material matter in any application, report, affidavit, or other record submitted by the foreign limited partnership pursuant

to this [article].

(b) The [Secretary of State] may not revoke a certificate of authority of a foreign limited partnership unless the [Secretary of State] sends the foreign limited partnership notice of the revocation, at least 60 days before its effective date, by a record addressed to its agent for service of process in this State, or if the foreign limited partnership fails to appoint and maintain a proper agent in this State, addressed to the foreign limited partnership's principal office. The notice must specify the cause for the revocation of the certificate of authority. The authority of the foreign limited partnership to transact business in this State ceases on the effective date of the revocation unless the foreign limited partnership cures the failure before that date.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether the provision on non-payment should be broader than the comparable provision pertaining to administrative dissolution; what deadline to impose on filing a statement of change pertaining to the name or address of the agent for service of process.

Source: ULLCA §1006.

Subsection (a)(1)(i) – This provision is broader than the comparable provision for administrative dissolution. See Section 809(1). Policies reasons might exist for maintaining the difference. Whatever decision is made, Section 210 (annual report) will be revised accordingly.

Subsection (a)(1)(iv) – ULLCA § 1006(a)(1)(iv) provides: " file a statement of a change in the name or business address of the agent as required by this [article]." However, Article 10 of ULLCA does not require a statement of change.

SECTION 908. CANCELLATION OF AUTHORITY. A foreign limited partnership may cancel its certificate of authority to transact business in this State by filing in the office of the [Secretary of State] a certificate of cancellation. Cancellation does not terminate the authority of the [Secretary of State] to accept service of process on the foreign limited partnership for [claims

for relief] arising out of the transactions of business in this State.

Reporter's Notes

Issues for Consideration at October, 1999 Meeting: whether the [Secretary of State]'s authority to accept service of process should continue *ad infinitum* after a foreign limited partnership cancels its authority or whether that authority should continue only for claims arising before or within some limited time after the cancellation.

Source: ULLCA § 1007. ULLCA refers to canceling the authority itself. Re-RULPA refers instead to canceling the certificate. The latter approach conforms to the usage in the rest of this Article.

SECTION 909. EFFECT OF FAILURE TO OBTAIN CERTIFICATE OF AUTHORITY.

(a) A foreign limited partnership transacting business in this State may not maintain an action or proceeding in this State unless it has a certificate of authority to transact business in this State.

(b) The failure of a foreign limited partnership to have a certificate of authority to transact business in this State does not impair the validity of a contract or act of the foreign limited partnership or prevent the foreign limited partnership from defending an action or proceeding in this State.

(c) A partner of a foreign limited partnership is not liable for the obligations of the foreign limited partnership solely by reason of the foreign limited partnership having transacted business in this State without a certificate of authority.

(d) If a foreign limited partnership transacts business in this State without a certificate of authority, it appoints the [Secretary of State] as its agent for service of process for [claims for relief] arising out of the transaction of business in this State.

Reporter's Notes

Source: ULLCA § 1008.

Subsection (c) – This subsection is derived from RULPA rather than ULLCA. RULPA § 907(c) states:

> A limited partner of a foreign limited partnership is not liable as a general partner of the foreign limited partnership solely by reason of having transacted business in this State without registration.

In contrast, ULLCA § 1008(c) states:

> Limitations on personal liability of partners and their transferees are not waived solely by transacting business in this State without a certificate of authority.

SECTION 910. ACTION BY [ATTORNEY GENERAL]. The [Attorney General] may maintain an action to restrain a foreign limited partnership from transacting business in this State in violation of this [article].

Reporter's Notes

Source: ULLCA § 1009.

[ARTICLE] 10

ACTIONS BY PARTNERS

SECTION 1001. DIRECT ACTIONS BY PARTNERS.

(a) Subject to subsection (b), a partner may maintain a direct action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business, to:

(1) enforce the partner's rights under the partnership agreement;

(2) enforce the partner's rights under this [Act]; or

(3) enforce the rights and otherwise protect the interests of the partner, including rights and interests arising independently of the partnership relationship.

(b) A partner bringing a direct claim 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) The accrual of, and any time limitation on, a right of action for a remedy under this section is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law.

Reporter's Notes

This Section is derived from RUPA § 405 but omits RUPA § 405(a). That subsection provides: "A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership." In Draft #5, that language appears in Section 104(b)(1) (powers of a limited partnership).

In prior Drafts, this material appeared at Section 1005.

Subsection (a) – Derived from RUPA § 405(b). RUPA 405(b) does not include the word "direct" to modify "action."

Subsection (a)(2) – RUPA § 405(b)(2) includes a non-exhaustive list of those rights. The Comment does not explain why some rights warrant special mention.

Subsection (b) – In ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract. Within a limited partnership, however, different circumstances may exist. For instance, if the partnership agreement recites or establishes the general partners' duties as managers of the enterprise, breach of those duties will create a classic derivative claim. The fact that the partnership agreement incorporates those duties does not transmute the claim into a direct one. Thus, a partner does not have a direct claim against another partner merely because the other partner has breached the partnership agreement. Likewise a partner's violation of this Act does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

The reference to "threatened" harm is intended to encompass claims for injunctive relief and does not relax standards for proving injury.

This provision has no analog in either RUPA or ULLCA.

Subsection (c) – Source: RUPA § 405(c).

SECTION 1002. DERIVATIVE ACTION. A partner may bring 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 limited 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 will be futile.

Reporter's Notes

Derived from RULPA § 1001. In prior Drafts, this material appeared at Section 1001.

At its March, 1999 meeting the Drafting Committee made two major decisions concerning the provisions on derivative actions. First, the Committee decided to modernize the language throughout those provisions. Second, after spirited debate, the Committee decided to expressly authorize a *general* partner to bring a derivative lawsuit.

Modernizing the language is not intended to change substance. Committee members disagreed as to whether permitting a general partner to bring a derivative suit changes current law. (RULPA is ambiguous, and the cases are few and in conflict.)

In any event, only minority general partners will have need of a derivative action. A general partner with majority control has the power to cause the limited partnership to sue in its own name. See Reporter's Notes to Section 406.

At the March, 1999 meeting, the Committee also discussed but did not adopt two other propositions: imposing a universal demand requirement, and giving transferees standing to bring a derivative suit.

Differences from RULPA language – The language in this section differs from the RULPA language in three ways. First, the Re-RULPA uses the concept of demand futility, rather than the

older, more oblique formulation that "an effort to cause those general partners [to act] is not likely to succeed." Second, Re-RULPA refers to the general partners causing the limited partnership to bring suit, rather than the general partners themselves bringing suit. This change reflects Re-RULPA's pure entity approach.

The third difference concerns the addressees of the demand. The RULPA provision refers to those "general partners with authority" to bring suit on behalf of the partnership, and ULLCA has a comparable formulation. See ULLCA § 1101. As in other instances, the word "authority" is confusing. Does it mean the right, the power, either, or both? In any event, in the context of a limited partnership the phrase "with authority" seems superfluous. A limited partner makes demand on the general partners collectively. If the partnership agreement allocates the decision on the demand to fewer than all of the general partners, that allocation affects the way in which the general partners process a demand, not the way in which the limited partner addresses the demand.

SECTION 1003. PROPER PLAINTIFF. In a derivative action, the plaintiff must be a partner at the time of bringing the action and:

(1) the plaintiff must have been a partner when the conduct giving rise to action occurred; or

(2) the plaintiff's status as a partner must have devolved upon the plaintiff by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the conduct.

Reporter's Notes

Issue for Consideration at October, 1999 Meeting: whether this section should require the plaintiff to be a proper representative of the interests of the limited partners.

Derived from RULPA § 1002. In prior Drafts, this material appeared at Section 1002.

RULPA § 1002 refers to the plaintiff having been a partner "at the time of the transaction of which he [or she] complains." Re-RULPA refers to "when the conduct giving rise to action occurred." Besides eliminating the "his [or her]" formulation, this change excludes the narrowing connotation associated with "transaction."

Neither RULPA nor this draft (nor ULLCA) expressly require a derivative plaintiff

to be a proper representative of other owners. Compare, e.g., Fed.R.Civ.P. 23.1, which states:

> The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.

Given the possibility of a general partner bringing a derivative lawsuit, perhaps this requirement should be added.

SECTION 1004. PLEADING. In a derivative action, the complaint shall state with particularity:

(1) the date and content of plaintiff's demand and the general partners' response to the demand, or

(2) why demand is excused as futile.

Reporter's Notes

Derived from RULPA § 1003. In prior Drafts, this material appeared at Section 1003.

SECTION 1005. PROCEEDS AND EXPENSES.

(a) Subject to 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 derivative plaintiff;

(2) if the derivative plaintiff receives any of those proceeds, the derivative plaintiff shall immediately remit them to the limited 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, from the recovery of the limited

partnership.

Reporter's Notes

Derived from RULPA § 1004. In prior Drafts, this material appeared at Section 1004.

Subsection (b) – A court can also order the defendants (or their counsel) to pay attorneys fees, if some other law allows (e.g., Rule 11).

[ARTICLE] 11

CONVERSIONS AND MERGERS

SECTION 1101. DEFINITIONS. In this [article]

(1) "Business organization" includes a domestic or foreign general partnership, limited liability partnership, limited partnership, limited liability limited partnership, limited liability company, corporation, and any other entity considered by its governing statute to have owners and ownership interests.

(2) "Constituent business organization" means a business organization that is party to a merger.

(3) "Converted business organization" means the business organization into which a converting business organization converts pursuant to section 1102.

(4) "Converting business organization" means a business organization that converts into another business organization pursuant to section 1102.

(5) "General partner" means a general partner of a limited partnership.

(6) "Governing statute" of a business organization means the statute under which the organization is incorporated, organized, formed, or achieves its fundamental organizational

status and which governs the structure, governance, operations, and other internal affairs of the organization.

(7) “Mere transferee” means a person who is not a partner and who owns a transferable interest in a limited partnership.

(8) “Organizational documents” means:

(i) for a domestic or foreign general partnership, its partnership agreement;

(ii) for a limited partnership and a foreign limited partnership, its certificate of limited partnership and partnership agreement;

(iii) for a domestic or foreign limited liability company, its articles of organization and operating agreement;

(iv) for a domestic or foreign corporation, its articles of incorporation, bylaws and other agreements among its shareholders which are authorized by its governing statute; and

(v) for any other business organization, the basic records that create the business organization and determine its internal governance and the relations among its owners.

(9) "Owner" means with respect to:

(i) a general or limited partnership, a partner;

(ii) a limited liability company, a member;

(iii) a corporation, a shareholder; and

(iv) any other business organization, a person recognized by the business organization's governing statute as being an owner of the organization.

(10) "Ownership interest" means an owner's proprietary interest in a business

organization.

(11) "Owner vicarious liability" means vicarious personal liability for an organization's obligations which is imposed by the organization's governing statute on an owner through a provision of that statute which makes owner status an essential element for establishing personal liability.

(12) “Person dissociated as a general partner” means a person dissociated as a general partner of a limited partnership.

(13) "Surviving business organization" means a business organization into which one or more other business organizations are merged. A surviving business organization may preexist the merger or be created by the merger.

Reporter’s Notes

“Business organization” [(1)] – This definition will permit a limited partnership to engage in an organic change with entities organized under the law of foreign countries but not with non-profit entities. The new provisions proposed for the RMBCA (“RMBCA’s new provisions”) refer to “any association or legal entity . . . organized to conduct business.” RMBCA’s new provisions, § 11.01(d).

“Constituent business organization” [(2)] – The RMBCA’s new provisions refer instead to a “party to a merger.” § 11.01(e).

“Organizational documents” [(8)] – Derived from RMBCA’s new provisions, § 11.01(c). The specific examples do not appear in the RMBCA’s new provisions.

“Ownership interest” [(10)] – The adjective “proprietary” comes from the RMBCA’s new provisions, § 11.01. “Equity” is a possible alternative. Whatever the adjective, the definition excludes transferable interests in a limited partnership which are owned by a person who is not a partner. This [Act] does not recognize that person as an owner. The same is true for RUPA transferable interests owned by non-partners.

"Owner vicarious liability" [(11)] – This definition does not encompass an owner's personal liability for approving or receiving improper distributions from the organization because

that liability is not liability for an *organization's* debts and other obligations." (Emphasis added.)]

"Surviving business organization" [(13)] – This definition comes essentially verbatim from the RMBCA's new provisions, § 11.01(g).

SECTION 1102. CONVERSION.

(a) A business organization other than a limited partnership may convert to a limited partnership, and a limited partnership may convert to another business organization pursuant to Sections 1102 to 1105 and a plan of conversion, if:

(1) the governing statute of the other business organization permits a conversion to occur in a manner consistent with Sections 1102 to 1105; and

(2) the other business organization complies with its governing statute and its organizational documents in effecting the conversion.

(b) The plan of conversion shall include:

(1) the name and type of the business organization prior to conversion;

(2) the name and type of the business organization after conversion;

(3) the terms and conditions of the conversion;

(4) the manner and basis for converting the ownership interests of the converting business organization into any combination of money, ownership interests in the converted business organization, and other consideration; and

(5) if the converting business organization is a limited partnership that has outstanding transferable interests owned by mere transferees, the manner and basis for converting those transferable interests into any combination of money, ownership interests in the converted business organization, and other consideration;

(6) the organizational documents of the converted business organization;

(7) any information required by Section 1110 or 1111; and

(8) any additional information required by the governing statutes of the converting business organization and the converted business organization and by the organizational documents of the converting organization.

(c) The terms described in subsections (b)(4) and (b)(5) may be made dependent on facts ascertainable outside the plan of conversion, provided that those facts are objectively ascertainable. The term "facts" includes the occurrence of any event, including a determination or action by any person or body, including the converting business organization.

(d) The plan of conversion may state other provisions relating to the conversion.

Reporter's Notes

Conversion necessarily works cross-entity and may work cross-jurisdiction as well. The only limitations are that:

- both the converting and converted entities be business organizations (i.e., that they have "owners"), and
- either the converting or converted business organization be a limited partnership (i.e., a domestic limited partnership, formed under this [Act]).

Thus, for example, Sections 1102 to 1105 will permit:

~ a Re-RULPA limited partnership to convert to a Bermuda limited liability company, if Bermuda law allows; and

~ a Delaware corporation to convert to a Re-RULPA limited partnership, if Delaware law allows.

Subsection (a) – The RMBCA's new provisions, § 11.02(a), state comparable requirements for a merger.

Subsection (b)(5) – This provision does not require that mere transferees have ownership interests in the converted business organization.

Subsection (c) – This language comes essentially verbatim from RMBCA's new provisions, § 11.02(d).

SECTION 1103. ACTION ON PLAN OF CONVERSION.

(a) A plan of conversion must be approved, subject to Sections 1110 and 1111:

(1) in the case of a converting business organization that is a limited partnership, by all the partners; and

(2) in the case of any other business organization:

(i) in the manner provided by the business organization's governing statute, including any appraisal rights established by that statute; and

(2) in conformity with any applicable provisions of the business organization's organizational documents.

(b) After a conversion is approved, and at any time before a filing is made under Section 1104, the plan may be amended or the planned conversion may be abandoned, subject to any contractual rights:

(1) by a converting business organization that is a limited partnership, subject to Sections 1110 and 1111:

(i) as provided in the plan, and

(ii) except as prohibited by the plan, by the same consent as was required to approve the plan; and

(2) by a converting business organization that is not a limited partnership, as permitted by that business organization's governing statute, subject to Section 1110.

Reporter's Notes

Subsection (a) – Section 1110 provides nonwaivable rights for persons who will have owner vicarious liability in the converted business organization. This subsection makes those protections applicable even when the converting entity is *not* a creature of this [Act]. This [Act] does not countenance a person being voted into owner vicarious liability.

Section 1111 provides nonwaivable rights for persons who hold transferable interests in a converting limited partnership and who are not partners. This [Act] does not extend those protections to persons who are "mere transferees" under other governing statutes (e.g., RUPA, ULLCA).

Subsection (b) – The RMBCA's new provisions, § 11.02(e) appear to allow amendment of a plan of merger only if the plan so provides. An amendment to the plan cannot be used to circumvent the protections provided by Sections 1110 and 1111.

Subsection (b)(2) – This provision defers only to the other business organization's governing statute and does not mention the other business organization's organizational documents. How those documents affect the other business organization's ability to amend or abandon is a matter for the governing statute of the other business organization.

SECTION 1104. FILINGS REQUIRED; EFFECTIVE DATE.

(a) After owners have approved the conversion:

(1) if the converting business organization is a limited partnership, the limited partnership shall:

(i) file whatever records are required by the governing statute of the business organization into which the limited partnership is to be converted, and

(ii) file with the [Secretary of State] articles of conversion, which must include:

(A) a statement that the limited partnership has been converted into another business organization;

(B) the name and type of that business organization and the

jurisdiction of its governing statute;

(C) the date the conversion is effective according to the governing statute of converted business organization; and

(D) a statement that the conversion was duly approved as required by this [Act];

(2) if the converting business organization is a not a limited partnership, the converting business organization shall file whatever records are required by its governing statute and shall file with the [Secretary of State] a certificate of limited partnership which must include, in addition to the information required by Section 201:

(i) a statement that the limited partnership was converted from another business organization;

(ii) the name and type of that business organization and the jurisdiction of its governing statute;

(iii) a statement that the conversion was duly approved in a manner that complied with the business organization's governing statute and organizational documents. .

(b) The conversion takes effect:

(1) if the converted business organization is a limited partnership, when the certificate of limited partnership takes effect; and

(2) if the converted business organization is not a limited partnership, at the time specified by the governing statute of the converted business organization.

Reporter's Notes

This section does not require public disclosure of the plan of conversion.

Subsection (a)(1)(ii) – This provision states no special signing requirements because the converting business organization is a limited partnership and Section 204 applies.

Subsection (a)(1)(ii)(D) – This provision is derived from RMBCA's new provisions, § 11.05(a)(3).

Subsection (a)(2) – This provision states no special signing requirements for the converting business organization because Section 204 states the signing requirements for a certificate of limited partnership.

SECTION 1105. EFFECT OF CONVERSION.

(a) When conversion to or from a limited partnership becomes effective:

(1) the business organization continues its existence despite the conversion and is for all purposes the same business organization that existed before the conversion;

(2) all property owned, and every contract and other right possessed by, the converting business organization is vested in the converted business organization without reversion or impairment;

(3) all obligations and liabilities of the converting business organization, including liabilities under Sections 1110 and 1111, are obligations and liabilities of the converted business organization;

(4) the name of the converted business organization may, but need not be, substituted in any pending proceeding for the name of the converting business organization;

(5) the ownership interests of each owner are converted as provided in the plan of conversion and those persons are entitled only to the rights provided them in the plan or under Section 1110; and

(6) if the plan provides for the conversion of transferable interests owned

by mere transferees, those transferable interests are converted as provided in the plan of conversion and those transferees are entitled only to the rights provided them in the plan or under Section 1111;

(7) owner vicarious liability for the obligations of the converted business organization shall be determined according to that business organization's governing statute and as provided in Section 1112(a);

(8) owner vicarious liability for the obligations incurred by the converted business organization before the conversion shall be determined according to that business organization's governing statute and as provided in Section 1112(b);

(9) the power to bind of owners and former owners of the converted entity shall be determined according to the converted business organization's governing statute and as provided in Section 1113;

(10) if the converted business organization is a foreign entity, the surviving business organization consents to the jurisdiction of the courts of this State to enforce any obligation owed:

(i) by the converting organization, if before the conversion the converting business organization was subject to suit in this State on that obligation; and

(ii) by the converted business organization to any person who immediately before the conversion was a partner or a mere transferee in a limited partnership that was the converting business organization.

(b) If the converted business organization is a foreign entity and is not authorized to transact business in this State, the [Secretary of State] is the surviving business organization's

agent for service of process for the purposes of enforcing an obligation described in paragraph (a)(10). Service on the [Secretary of State] under this subsection is made in the same manner and with the same consequences as stated in Section 116(c) and (d).

Reporter's Notes

Subsection (a)(10)(i) – If the converted business organization is a foreign entity, the converting business organization must have been a limited partnership. However, that fact alone will not satisfy this provision's triggering element ("was subject to suit in this State"). For example, a contract may have contained a forum selection clause.

SECTION 1106. MERGER.

(a) A limited partnership may merge with one or more other constituent business organizations pursuant to Sections 1106 to 1109 and a plan of merger, if:

(1) the governing statute of each of the other constituent business organizations permits a merger to occur in a manner consistent with Sections 1106 to 1109; and

(2) each of the other constituent business organizations complies with its governing statute and its organizational documents in effecting the merger.

(b) The plan of merger shall include:

(1) the name and type of each constituent business organization;

(2) the name and type of the surviving business organization and, if the surviving business organization is to be created by the merger, a statement to that effect;

(3) the terms and conditions of the merger;

(4) the manner and basis for converting the ownership interests of each constituent business organization into any combination of money, ownership interests in the

surviving business organization, and other consideration; and

(5) for each constituent business organization that is a limited partnership with outstanding transferable interests owned mere transferees, the manner and basis for converting those transferable interests into any combination of money, ownership interests in the surviving business organization, and other consideration;

(6) if the surviving business organization is to be created by the merger, the surviving business organization's organizational documents;

(7) if the surviving business organization is not to be created by the merger, any amendments to be made by the merger to the surviving business organization's organizational documents;

(8) any information required by Section 1110 or 1111; and

(9) any additional information required by the governing statutes or organizational documents of a constituent organization.

(c) The terms described in subsections (b)(4) and (b)(5) may be made dependent on facts ascertainable outside the plan of merger, provided that those facts are objectively ascertainable. The term "facts" includes the occurrence of any event, including a determination or action by any person or body, including the constituent business organization.

(d) The plan of merger may state other provisions relating to the merger.

Reporter's Notes

Subsection (a) – The RMBCA's new provisions, § 11.02(a) state comparable requirements for a merger.

Subsection (c) – This language comes essentially verbatim from RMBCA's new provisions, § 11.02(d).

Subsection (b)(5) – This provision does not require that mere transferees have ownership interests in the surviving business organization.

SECTION 1107. ACTION ON PLAN OF MERGER.

(a) A plan of merger must be approved, subject to Sections 1110 and 1111:

(1) in the case of a constituent business organization that is a limited partnership, by all the partners; and

(2) in the case of any other business organization:

(i) in the manner provided by the business organization's governing statute, including any appraisal rights established by that statute; and

(2) in conformity with any applicable provisions of the business organization's organizational documents.

(b) After a merger is approved, and at any time before a filing is made under Section 1108, the plan may be amended or the planned merger may be abandoned, subject to any contractual rights:

(1) by a constituent business organization that is a limited partnership, subject to Sections 1110 and 1111:

(i) as provided in the plan, and

(ii) except as prohibited by the plan, by the same consent as was required to approve the plan; and

(2) by a constituent business organization that is not a limited partnership, as permitted by that business organization's governing statute, subject to Section 1110.

Reporter's Notes

Subsection (a) – Section 1110 provides nonwaivable rights for persons who will have owner vicarious liability in the surviving business organization. This subsection makes those protections applicable even when the constituent entity is *not* a creature of this [Act]. This [Act] does not countenance a person being voted into owner vicarious liability.

Section 1111 provides nonwaivable rights for persons who hold transferable interests in a constituent limited partnership and who are not partners. This [Act] does not extend those protections to persons who are "mere transferees" under other governing statutes (e.g., RUPA, ULLCA).

Subsection (b) – The RMBCA's new provisions, § 11.02(e) appear to allow amendment of a plan of merger only if the plan so provides. An amendment to the plan cannot be used to circumvent the protections provided by Sections 1110 and 1111.

Subsection (b)(2) – This provision defers only to the other business organization's governing statute and does not mention the other business organization's organizational documents. How those documents affect the other business organization's ability to amend or abandon is a matter for the governing statute of the other business organization.

SECTION 1108. FILINGS REQUIRED; EFFECTIVE DATE.

(a) After each constituent business organization has approved the merger as required by Section 1107, articles of merger shall be signed on behalf of :

(1) each preexisting constituent business organization that is a limited partnership, by each general partner listed in the certificate of limited partnership; and

(2) each preexisting constituent business organization that is not a limited partnership, by a duly authorized representative.

(b) The articles of merger shall include:

(1) the name and type of each constituent business organization and the jurisdiction of its governing statute;

(2) the name and type of the surviving business organization, the

jurisdiction of its governing statute and, if the surviving business organization is created by the merger, a statement to that effect;

(3) the date the merger is effective;

(4) if the surviving business organization is to be created by the merger and will be:

(i) a limited partnership, the limited partnership's certificate of limited partnership;

(ii) a business organization other than a limited partnership, the organizational document that creates the business organization;

(5) if the surviving business organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the business organization;

(6) a statement as to each constituent business organization that the merger was duly approved in a manner that complied with the business organization's governing statute and organizational documents;

(7) whatever additional information is required by the governing statute of any constituent business organization

(c) Each constituent business organization that is a limited partnership shall file the articles of merger in the office of the [Secretary of State]. Each other constituent business organization shall file the articles of merger as required by its governing statute.

(d) A merger is effective under this [Article] upon the later of:

(1) compliance with subsection (c) and the performance of any acts

required to effectuate the merger under the governing statute of each constituent business organization; or

(2) subject to Section 206, a later date specified in the articles of merger.

Reporter's Notes

This section does not require public disclosure of the plan of merger.

Subsection (a) – A surviving business organization that is to be created by the merger cannot have someone sign on its behalf, because it does not come into existence until the merger becomes effective.

Subsection (b)(4) – This provision is derived from RMBCA's new provisions, § 11.05(a)(3) and (4).

Subsection (c) – Derived from RUPA §§ 905(e) and 906 and ULLCA § 906. Under this provision the merger is not effective as to a Re-RULPA limited partnership until the merger is effective as to each constituent organization. The provision aims principally at filing requirements imposed by other governing statutes.

SECTION 1109. EFFECT OF MERGER.

(a) When a merger becomes effective:

(1) the surviving business organization continues or comes into existence;

(2) each constituent business organization that merges into the surviving business organization ceases to exist as a separate entity;

(3) all property owned, and every contract and other right possessed by, each constituent business organization that ceases to exist is vested in the surviving business organization without reversion or impairment;

(4) all obligations and liabilities of each constituent business organization that ceases to exist, including obligations under Sections 1110 and 1111, are obligations and

liabilities of the surviving business organization;

(5) the name of the surviving business organization may, but need not be, substituted in any pending proceeding for the name of any constituent business organization that ceases to exist;

(6) if the surviving business organization is created by the merger and is:

(i) a limited partnership, the certificate of limited partnership becomes effective;

(ii) a business organization other than a limited partnership, the organizational document that creates the business organization becomes effective;

(7) if the surviving business organization preexists the merger, any amendments provided for in the plan of merger for the organizational document that created the business organization become effective;

(8) the ownership interests of each owner of each constituent business organization are converted as provided in the plan of merger and those persons are entitled only to the rights provided them in the plan or under Section 1110; and

(9) if the plan provides for the conversion of transferable interests owned by mere transferees, those transferable interests are converted as provided in the plan of merger and those transferees are entitled only to the rights provided them in the plan or under Section 1111;

(10) owner vicarious liability for the obligations of the surviving business organization shall be determined according to that business organization's governing statute and as provided in Section 1112(a);

(11) owner vicarious liability for the obligations incurred by each constituent business organization that ceases to exist shall be determined according to that business organization's governing statute and as provided in Section 1112(b);

(12) the power to bind of former owners of each constituent business organization that ceases to exist shall be determined according to the surviving business organization's governing statute and as provided in Section 1113;

(13) The surviving business organization consents to the jurisdiction of the courts of this State to enforce any obligation owed:

(i) by any constituent business organization, if before the merger the constituent business organization was subject to suit in this State on that obligation; and

(ii) by the surviving business organization to any person who immediately before the merger was a partner or a mere transferee in a limited partnership that was a constituent business organization.

(b) If the surviving business organization is a foreign entity and is not authorized to transact business in this State, the [Secretary of State] is the surviving business organization's agent for service of process for the purposes of enforcing an obligation described in paragraph (a)(13). Service on the [Secretary of State] under this subsection is made in the same manner and with the same consequences as stated in Section 116(c) and (d).

SECTION 1110. VETO RIGHTS OF PERSONS WITH OWNER VICARIOUS LIABILITY; ORGANIZATION'S OPTION TO PURCHASE.

(a) Except as provided in subsections (b) to (f), a conversion or merger pursuant

to this Article requires the consent of each person who will have owner vicarious liability for the obligations of the converted or surviving business organization. This requirement applies despite anything to the contrary in the governing law and organizational documents of any converting, converted, constituent or surviving business organization.

(b) If a person entitled to consent under section (a) refuses or fails to do so, the converting or constituent business organization in which the person is an owner or transferee may send the person a notification of option to purchase the person's ownership or transferable interest. The notification must include:

(1) a copy of the plan of conversion or merger to which the person has refused or failed to consent;

(2) a statement that:

(i) unless the person consents to the plan of conversion or merger within **[TBD]** days after receiving the notification, the converting or constituent business organization will have the right to proceed with the conversion or merger without the person's consent; and

(ii) if the converting or constituent business organization proceeds with the conversion or merger without the person's consent, the person:

(A) will have no interest in the converted or surviving business organization,

(B) will be indemnified by the converted or surviving business organization for any owner vicarious liability the person may have for the obligations of the converted or constituent organization; and

(C) will receive, when the conversion or merger becomes effective, the fair value in cash of the person's ownership or transferable interest calculated as provided in subsection (f); and

(3) the amount of the fair value payment, with a brief explanation of how the converting or constituent business organization figured that amount.

(c) If a person receives a notification pursuant to subsection (b) and does not consent to the conversion or merger within the **[TBD]** -day deadline stated in subsection (b), for the **[TBD]** days following the deadline the converting or constituent business organization has the option to purchase the person's ownership or transferable interest at the fair value amount stated in the notification. To exercise that right, the converting or constituent business organization must:

(1) send a notification to the person, stating that the option is being activated and will be exercised if the conversion or merger becomes effective; and

(2) amend the plan of conversion or merger to:

(i) state that the person's ownership or transferable interest will be purchased pursuant to this section if the conversion or merger becomes effective and that the person will be indemnified by the converted or surviving business organization for any owner vicarious liability the person may have for the obligations of the converted or constituent organization,

(ii) describe the interest to be purchased, and

(iii) state the price to be paid.

(d) Activating the option under subsection (c) does not:

(1) obligate the converting or constituent entity to:

(A) exercise the option and make the purchase unless the conversion or merger become effective;

(B) do or refrain from doing anything to cause the conversion or merger to become effective;

(2) prevent the converting or constituent entity, even after the conversion or merger has been approved as provided in this Article, from:

(A) amending or consenting to the amendment of the plan of conversion or merger; or

(B) abandoning or consenting to the abandonment of the conversion or merger;

(3) give the person whose interest is subject to the option to purchase any rights against any other person, unless the conversion or merger becomes effective.

(e) If a converting or constituent organization activates its option under this section and the conversion or merger becomes effective, the converted or surviving business organization shall immediately pay the person whose interest is subject to the option the fair value amount stated in the notification made pursuant to subsection (b) and shall indemnify the person for any owner vicarious liability the person may have for the obligations of the converted or constituent organization. A person who receives payment under this subsection and disputes the tendered price may take the tendered price and bring suit in [designate appropriate court] seeking additional payment. The suit must be commenced within one year after the payment is tendered.

(f) The purchase price under this section is the amount that would have been

distributable to the person whose interest is being purchased if, on the date the conversion or merger becomes effective, the business of the converting or constituent business organization were wound up and its assets sold at a price equal to the greater of:

(1) the value based on a sale of the entire business as a going concern without the person, or

(2) the liquidation value.

Reporter's Notes

Subsection (d)(2)(A) – An amendment cannot be used to circumvent this section.

Subsection (f) – This provision comes essentially from RUPA § 701(e) (buy out price for dissociated partner's interest when partnership is not dissolved), although phrases have been relocated in an attempt to improve readability. As this provision is drafted, the converting or constituent business organization will have to forecast the payment price, since the calculation is to be made as of a future time. This problem can be fine-tuned out of existence if the Drafting Committee approves the section's overall approach.

SECTION 1111. CONSENT REQUIRED FROM CERTAIN TRANSFEREES.

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

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

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

(b) If a converting or constituent business organization fails to obtain the consent

required by subsection (a), the business organization may use the provisions of Section 1110 to proceed with the conversion or merger, but:

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

(2) if the transferable interests owned by mere transferees comprise more than one class and the business organization invokes Section 1110 as to a transferable interest owned by a mere transferee, the business organization must invoke Section 1110 to the same extent and to the same effect as to all transferable interests in that class owned by mere transferees.

Reporter's Notes

Mere transferees must have some protection under this [Article]. If not, their rights are illusory – subject to forfeiture through a squeeze-out conversion or merger.

Relying on "good faith and fair dealing" will not suffice. For one thing, it is not clear that a limited partnership and its partners owe that obligation to mere transferees. The obligation developed as an aspect of contract law, and neither the limited partnership nor its partners collectively have a contractual relationship with mere transferees. (To the extent a person became a mere transferee pursuant to a contract, the transferor remains a partner, and the contract is not fully performed or otherwise discharged, that particular partner may owe an obligation of good faith to that particular transferee.)

Moreover, even if the obligation exists (or the [Act] creates it), the obligation would overhang every conversion or merger contemplated by a limited partnership that has mere transferees. Every such conversion or merger would be subject to a "fairness" challenge.

"Mere transferees" are creatures of partnership and LLC law and pose perplexing problems that do not exist in the corporate realm. This section seeks to provide some protection for mere transferees without subjecting every conversion and merger to open-ended second guessing by the courts.

Subsection (b) – This subsection may require some fine-tuning, which will be accomplished if the Drafting Committee approves the overall approach taken by this section.

SECTION 1112. LINGERING LIABILITY OF GENERAL PARTNERS.

(a) In addition to any other liability provided by law,

(1) a person who immediately before a conversion or merger became effective was a general partner in a converting or constituent business organization and had owner vicarious liability for that business organization's obligations is personally liable for each obligation of the converted or surviving business organization arising from a transaction with a third party after the conversion or merger becomes effective, if at the time the third party enters into the transaction the third party:

(i) does not have notice of the conversion or merger; and

(ii) reasonably believes that the converted or surviving business is the converting or constituent business organization and that the person is still a general partner in the converting or constituent business organization;.

(2) a person who was dissociated as a general partner from a converting or constituent business organization before the conversion or merger became effective is personally liable for each obligation of the converted or surviving business organization arising from a transaction with a third party after the conversion or merger becomes effective, if:

(i) immediately before the conversion or merger became effective the converting or surviving business organization was a limited partnership other than a limited liability limited partnership; and

(ii) at the time the third party enters into the transaction less than two years have passed since the person dissociated as a general partner and the third party:

(A) does not have notice of the dissociation;

(B) does not have notice of the conversion or merger; and

(C) reasonably believes that the converted or surviving business organization is the converting or constituent business organization and that the person is still a general partner in the converting or constituent business organization.

(b) A conversion or merger under this [Article] does not discharge any liability under Sections 404 and 607 of a person who was a general partner or dissociated as a general partner in a converting or constituent business organization, but:

(1) the provisions of this [Act] pertaining to the collection or discharge of that liability continue to apply to that liability;

(2) for the purposes of applying those provisions, the converted or surviving business organization shall be considered to be the converting or constituent business organization; and

(3) if a person is required to pay any amount under this subsection:

(i) the person has a right of contribution from each other person who was a general partner when the obligation was incurred and who has not been released from that obligation under Section 607; and

(ii) the contribution due from each of those persons shall be in proportion to the allocation of limited partnership losses in effect for those persons.

Reporter's Notes

Subsection (a)(1) – The phrase "had owner vicarious liability" excludes general partners in LLPs and LLLPs. There is no need to state an outside limit for the lingering liability, as in, e.g., Sections 606 and 607 (two years). For the conversion or merger to become effective, a filing must occur. That filing produces constructive notice 90 days after the filing's effective date.

Subsection (a)(1)(ii) – These requirements are most likely to be met when the converted or surviving business organization does business using the same name as the converting or constituent business used.

SECTION 1113. LINGERING POWER TO BIND OF GENERAL PARTNERS AND PERSONS DISSOCIATED AS GENERAL PARTNERS.

(a) An act of a person who immediately before a conversion or merger became effective was a general partner in a converting or constituent business organization binds the converted or surviving business organization after the conversion or merger becomes effective, if:

(1) before the conversion or merger became effective the act would have bound the converting or constituent business organization under Section 404;and

(2) at the time the third party enters into the transaction the third party:

(i) does not have notice of the conversion or merger; and

(ii) reasonably believes that the converted or surviving business is the converting or constituent business organization and that the person is still a general partner in the converting or constituent business organization.

(b) An act of a person who before a conversion or merger became effective was dissociated as a general partner from a converting or constituent business organization binds the converted or surviving business organization after the conversion or merger becomes effective, if:

(1) before the conversion or merger became effective the act would have bound the converting or constituent entity under Section 404 if the person had still been a general partner; and

(2) at the time the third party enters into the transaction less than two years

have passed since the person dissociated as a general partner and the third party:

(i) does not have notice of the dissociation;

(ii) does not have notice of the conversion or merger; and

(iii) reasonably believes that the converted or surviving business is the converting or constituent business organization and that the person is still a general partner in the converting or constituent business organization.

(c) If a person with knowledge of the conversion or merger causes a converted or surviving business organization to incur an obligation under subsection (a) or (b), the person is liable:

(1) to the converted or surviving business organization for any damage caused to the business organization arising from the obligation, and

(2) if another person is liable for the obligation, then to that other person for any damage caused to that other person arising from that liability.

Reporter's Notes

Subsection (c)(2) – The other person's liability might be owner vicarious liability or might arise from a general guaranty.

SECTION 1114. DISSOLUTION NOT CAUSED; AUTHORITY NOT GRANTED.

(a) Unless otherwise agreed, a limited partnership's conversion or merger pursuant to this [Article] does not dissolve the limited partnership for the purposes of [Article] 8.

(b) A foreign converted or surviving business organization is not authorized to do business in this State unless it complies with the laws of this State granting that authority.

Reporter's Notes

Subsection (a) – Since the conversion or merger is not an event of dissolution, there is no obligation to martial assets, pay off creditors, settle accounts among partners, etc. The contrary agreement could occur in the partnership agreement or in the plan of merger.

Subsection (b) – A foreign converted or surviving business organization will be the successor in interest to a limited partnership (which of course is authorized to do business in the State) and perhaps also to other business organizations authorized to do business in the State. The foreign converted or surviving business organization does not succeed to that authorization but must instead comply with the applicable state statute granting authority to transact business.

[ARTICLE] 12

MISCELLANEOUS PROVISIONS

Reporter's Notes to [Article] 12

This Article is taken, mostly verbatim, from RUPA, Article 12, which is substantially similar to RULPA's Article 11. To facilitate review of the effective date and applicability provisions, the Reporter has used the phrase "drag-in date" to refer to the date on which all preexisting limited partnerships become subject to the [Act]. That phrase appears in braces – {} – and will not be included in the official text.

SECTION 1201. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among States enacting it.

SECTION 1202. SHORT TITLE. This [Act] may be cited as the Revised Uniform Limited Partnership Act (20___).

SECTION 1203. 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.

SECTION 1204. EFFECTIVE DATE. This [Act] takes effect January 1, 20___.

SECTION 1205. REPEALS. Except as stated in Section 1206, effective January 1, 20___ {drag-in date}, the following acts and parts of acts are repealed: [the State Limited Partnership Act as amended and in effect immediately before the effective date of this [Act]].

Reporter's Notes

The exception does not exist in RUPA and is derived from RULPA § 1104.

SECTION 1206. APPLICABILITY.

(a) Before January 1, 20___{drag-in date}, this [Act] governs only:

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

(2) a limited partnership formed before the effective date of this [Act], that elects, as provided by subsection (d), to be governed by this [Act].

(b) Except as stated in subsection (c), beginning January 1, 20___{drag-in date}, this [Act] governs all limited partnerships.

(c) Each of the following provisions of [the State Limited Partnership Act as amended and in effect immediately before the effective date of this [Act]] continue to apply after

January 1, 20___{drag-in date}, to a limited partnership formed before the effective date of this [Act], except as the partners otherwise elect in the manner provided in the partnership agreement or by law for amending the partnership agreement:

(1) **[TBD]**

(2)

(d) Before January 1, 20___{drag-in date}, a limited partnership formed before the effective date of this [Act] voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be governed by this [Act]. If a limited partnership formed before the effective date of this [Act] makes that election, the provisions of this [Act] relating to the liability of the limited partnership's partners to third parties apply:

(1) before January 1, 20___{drag-in date}, to:

(i) a third party who had not done business with the limited partnership within one year before the limited partnership's election to be governed by this [Act]; and

(ii) a third party who had done business with the limited partnership within one year before the limited partnership's election to be governed by this [Act], only if the third party knows or has received a notification of the partnership's election to be governed by this [Act]; and

(2) after January 1, 20___{drag-in date}, to all third parties.

Reporter's Notes

Subsection (a) – RUPA locates the phrase "a [limited] partnership formed" in the introductory clause, but strictly speaking a partnership cannot be formed both before and after the

effective date.

Subsection (a)(1) – RUPA refers only to "after," leaving out partnerships formed on the effective date.

Subsection (c) – The concept is derived from RULPA § 1104. The method of election comes, essentially verbatim, from RUPA § 1206(c).

Candidates for inclusion in the list: perpetual term; no right of limited partner to withdraw; a court's power to expel a general partner when the partnership agreement does not provide for expulsion; new rules on avoiding dissolution following the dissociation of a general partner.

Subsection (d) – Following RUPA, this subsection creates special exposure for partners of a limited partnership that elects in. The [Act] creates no special exposure for preexisting limited partnerships that are "dragged in," so the special exposure for electing limited partnerships should end at the "drag-in date." RUPA's already complex formulation has been expanded to clarify that point. The RUPA formulation reads:

> The provisions of this [Act] relating to the liability of the partnership's partners to third parties apply to limit those partners' liability to a third party who had done business with the partnership within one year before the partnership's election to be governed by this [Act] only if the third party knows or has received a notification of the partnership's election to be governed by this [Act].

SECTION 1207. SAVINGS CLAUSE. This [Act] does not affect an action or proceeding commenced or right accrued before this [Act] takes effect.