

# Loss Sharing, Settling Accounts in a General Partnership:

UPA (2013)'s Error and UPA (1997)'s Imperfection

Uniform Unincorporated Organization Acts Amendment  
Committee

Third Meeting of the Committee

February 16, 2021

# Loss Sharing, Settling Accounts in a General Partnership:

## UPA (2013)'s Error and UPA (1997)'s Imperfection

Law arm Unincorporated Organization on Acts Amendment Committee

Third Meeting of the Committee

February 16, 2023

Buy  
Feb 2 15:21

OMX18

OMX ICELAND 8

Sell

# Disclaimer #1

# Disclaimer #1

## Note 9

recognizes valuable  
“assistance from the chair  
and the reporter of RUPA”

but

“errors, omissions,  
obfuscations, etc. are the  
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Note 9

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See e.g. Note 9

“The Committee’s chair  
provided valuable  
comments, as did  
Professor Don ~~Widener~~  
Weidner, the reporter for  
RUPA.”

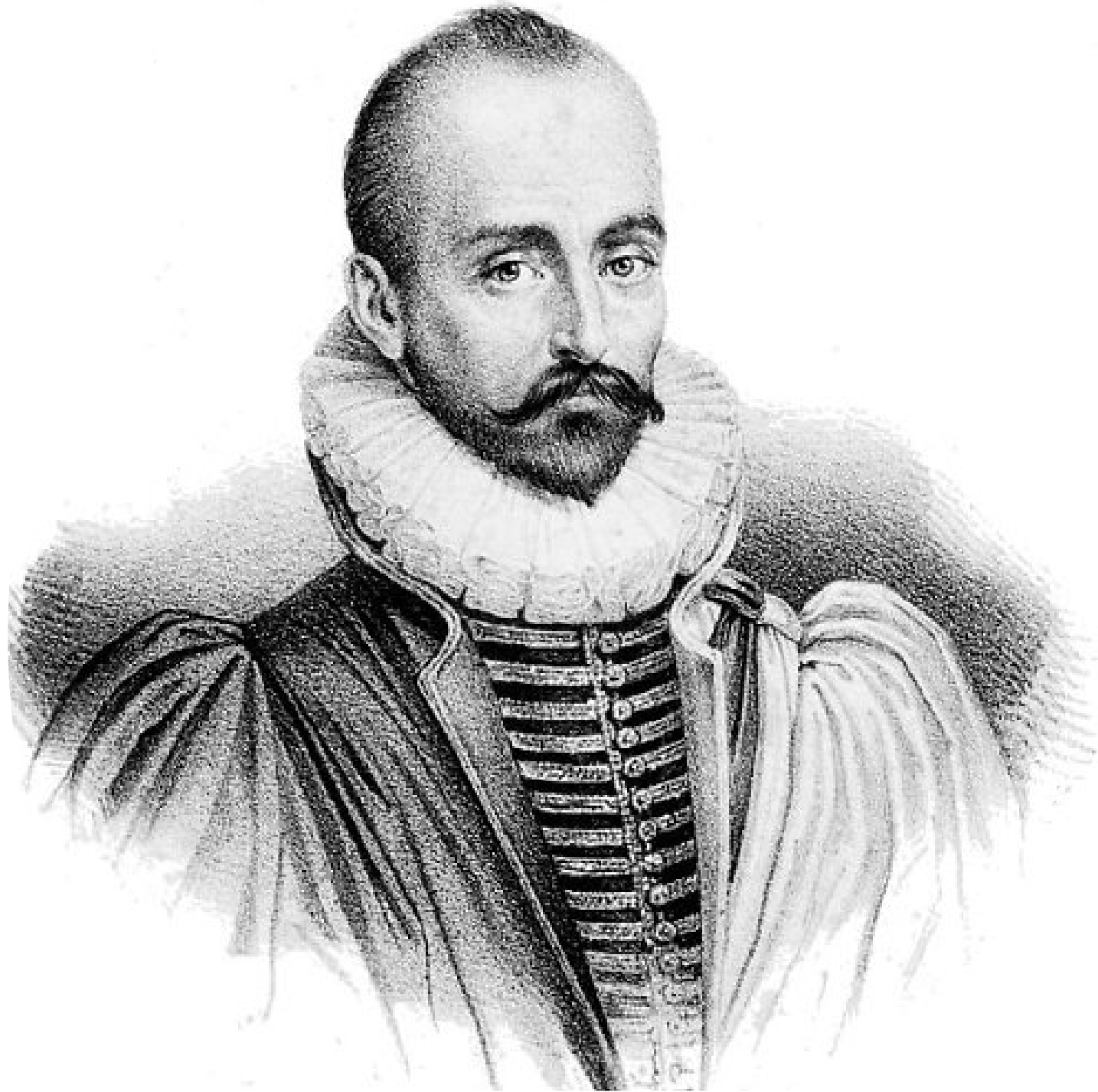
# Disclaimer #2

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“All I say is by way of discourse, and nothing by way of advice. I should not speak so boldly if it were my due to be believed.”

Michel de Montaigne

- The Essays of Michael Seigneur de Montaigne: Translated Into English (ed. 1759)



# Disclaimer #3

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This subject might be straightforward at 10,000 meters, but the mechanics are quite complicated.



If you are new to this material, it will/should give you a headache as you work through it.



If you are experienced with this material, getting back into it will also produce a headache.



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Like an engineer's approach  
to simplicity

**Normal people ... believe  
that if it ain't broke,  
don't fix it. Engineers  
believe that if it ain't  
broke, it doesn't have  
enough features yet.**

QUOTEHD.COM

Scott Adams  
American Cartoonist

# Agenda

1. the issue from 10,000 meters
2. introductory concepts
  - a. we live and draft for the “default” mode
  - b. loss sharing means – partners obligated to contribute funds as necessary to:
    - i. fund any unpaid company debts to creditors
    - ii. “true up” capital losses (contributions) to fit the loss allocation rules
  - c. loss sharing is a strange concept in the world of LLCs and corporations; a full liability shield means no loss sharing
  - d. profit allocation is not the same as the right to distributions (“distributive share”)
  - e. tax accounting is none of our business
3. profit and loss sharing under UPA (1914)
4. profit and loss sharing under UPA (1997) – RUPA’s innovation
5. locus of Harmonization’s error – not figuring out how to preserve the venerable concept of loss sharing in an LLP world

from 10,000 meters

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bird's eye view

from 10,000 meters

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bird's eye view

# from 10,000 meters

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Back in the day

before limited liability partnerships

partnership law and practice had a straightforward set of rules to determine:

- in the event the partnership lost money
  - whether insolvent or not
    - as among the partners (*inter se*)
    - how those losses affected each partner



bird's eye view

from 10,000 meters

from 10,000 meters

- The advent of the limited liability partnership

partners no longer liable *by status, automatically* for partnership obligations

- loss sharing goes
- **semi-out the window**
- In effect, the statute needed two different templates:
  - the old-fashioned rules for a non-LLP partnership
  - entirely different rules for an LLP



from 10,000 meters

- The advent of the limited liability partnership

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we live and draft for the “default” mode

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# we live and draft for the “default” mode

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- uniform entity acts
  - must be “self-actuating”
  - most work “off the shelf”
  - thus, a comprehensive set of “unless otherwise agreed” rules is necessary
- if the drafter of a partnership agreement varies a default rule but does not address all the ripples – the uniform act does not help
  - we do not provide additional rules to handle possibly inadequate variations from one default rule or another
- we strive for default rules that approximate would-have-made choices, but in all events:
  - we must choose a rule that is clear, not excessively complex and workable; and
  - we can only have one default rule for each situation

—  
for example – profit  
sharing per capita

---

“I never do per capita.  
It’s more likely some  
variation on per  
capital.”

**any  
competent  
and  
experienced  
transactional  
lawyer will  
tell us ...**

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ONE DOES NOT SIMPLY

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US

OK

for example – profit  
sharing per capita

---

“I never do per capita.  
It’s more likely some  
variation on per  
capital.”

**ONE DOES NOT SIMPLY**

**USE DEFAULT SPARK  
SETTINGS**

losing sharing: fbo of whom?

**creditors**

**fellow partners**

losing sharing: fbo of whom?

**creditors**

- partners obligated to contribute funds as necessary to:

fund any unpaid  
company debts to creditors

**fellow partners**

# losing sharing: fbo of whom?

## **creditors**

- partners obligated to contribute funds as necessary to:

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- partners obligated to contribute funds as necessary to:

“true up” capital losses  
(contributions) to fit the loss  
allocation rules (default or by  
agreement)



# losing sharing: fbo of whom?

## creditors

- partners obligated to contribute funds to:

fund any unpaid  
company debts to

## fellow partners

- partners obligated to contribute funds as

capital losses  
to fit the loss  
(default or by

agreement)

truing up occurs in theory  
(i.e., in the default mode)  
only upon dissolution and  
windingup.



the impact of the shield on loss sharing



the impact of the shield on loss sharing



the impact of the shield on loss sharing



absent piercing

impact (con't)

- no contribution to pay the company's debts

impact (con't)

**directly – the essence**

- no contribution to pay the company's debts

## impact (con't)

### directly – the essence

- no contribution to pay the company's debts
- no contributions to true up capital losses
- necessary to protect against a hole in the shield
  - creditor goes after partner's obligation to contribute to the partnership as an asset of the partnership
- LLC influence – following the corporation



## impact (con't)

### **directly – the essence**

- no contribution to pay the company's debts

### **indirectly necessary**

- no contributions to true up capital losses
- necessary to protect against a hole in the shield
  - creditor goes after partner's obligation to contribute to the partnership as an asset of the partnership
- LLC influence – following the corporation

# profit sharing

**profits**



Month	Sales	% Increase	Target	Var	Average (per day)
Jan	21.23	100%			
Feb	12.80	60%			
Mar	26.03	122%			
Apr	37.37	176%			
May	65.09	306%			
Jun	57.77	272%			
Jul	60.19	283%			
Aug	92.87	437%			
Sep	100.39	473%			
Oct	237.20	469%			

# distribution share

**distributive share**





AND NOW ....

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AND NOW ....

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profit and loss default  
rules

- **THROUGH THE AGES**

AND NOW ....

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profit and loss default  
rules

- THROUGH THE AGES



# UPA (1914) §18

## UPA (1914) §18

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining **after all liabilities, including those to partners**, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

query: to what does “after all liabilities ... are satisfied” refer?  
or rather: to when?

## UPA (1997) aka RUPA § 401

(a) Each partner is deemed to have an account that is:

(1) credited with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, the partner contributes to the partnership and the partner's share of the partnership profits; and

(2) charged with an amount equal to the money plus the value of any other property, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(b) Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.



## UPA (1997) aka RUPA § 401

(a) Each partner is deemed to have an account that is:

(1) credited with an amount equal to the money plus the value of any other property contributed by the partner, net of the amount of any liabilities, the partner contributes to the partnership; and the partner's share of the partnership profits; and

(2) charged with the money plus the value of any other property contributed by the partner, net of the amount of any liabilities, distributed by the partnership to the partner and the partner's share of the partnership losses.

(b) Each partner is entitled to an equal share of the partnership profits and is chargeable with a share of the partnership losses in proportion to the partner's share of the profits.

**the simplified  
accounts!**

## UPA (2013)'s error

- (a) Each partner is entitled to an equal share of the partnership **distributions** and, **except in the case of a limited liability partnership**, is **chargeable** with a share of the partnership losses in proportion to the partner's share of the distributions.

**LLC influence**

**temporal error**

**against what?**

# our conundrum

**pure, traditional non-LLP**

**pure LLP**

# our conundrum

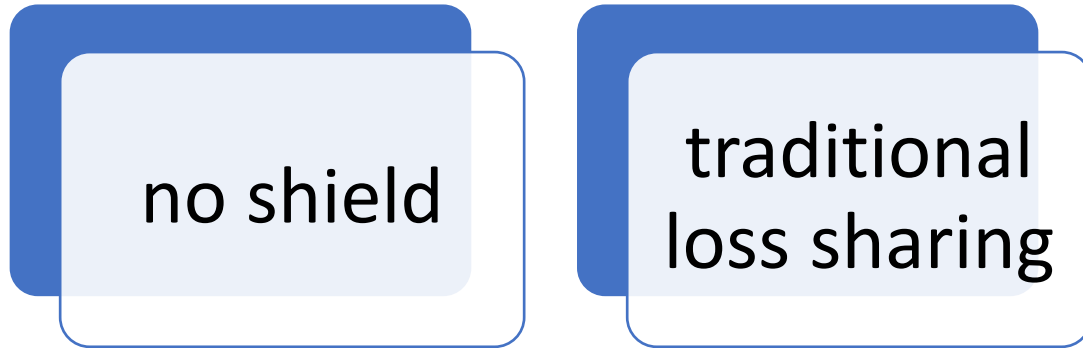
**pure, traditional non-LLP**

**pure LLP**

- total shield
- no loss sharing\*

# our conundrum

**pure, traditional non-LLP**



**pure LLP**

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# our conundrum

pure, traditional non-LLP

**NO LOSS SHARING?**  
**WHAT ABOUT THE IRS?**

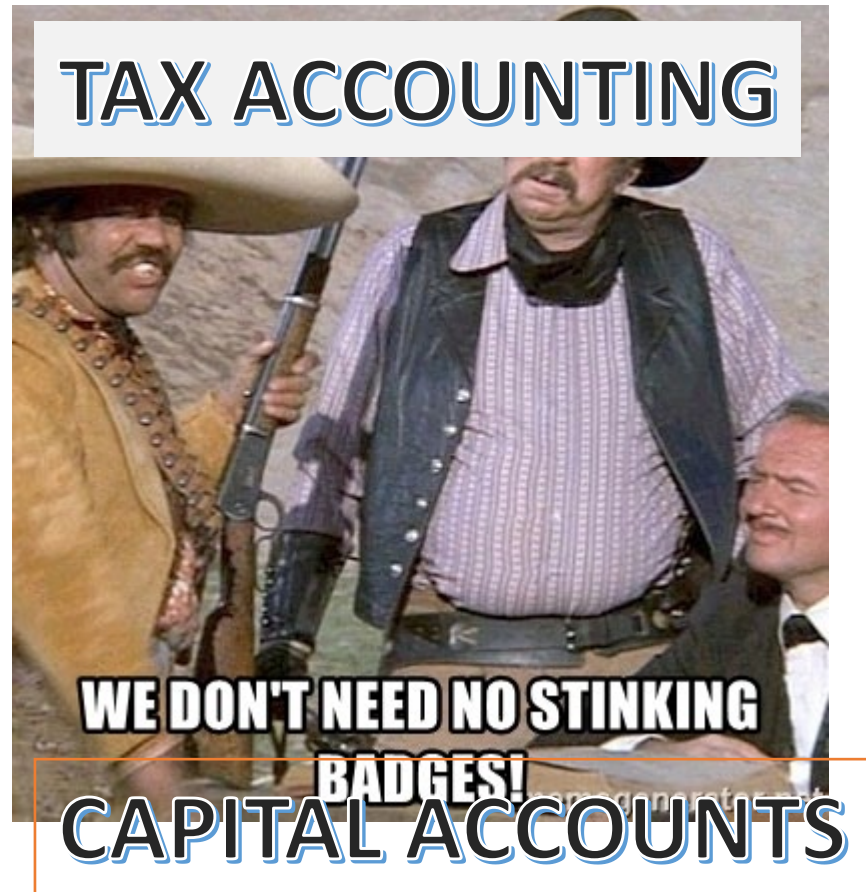
no shield

traditional  
loss sharing









the mutt problem



the mutt problem



the mutt problem

bringing us finally to:

bringing us finally to:

- the three questions
- on page 3 of the memo

# bringing us finally to:

- the three questions

Assuming

a general partnership (GP) has never been an LLP, should UPA (2013) produce the same loss-sharing results as RUPA (1996) and UPA (1914)?

- on page 3 of the memo

Assuming

a GP has been an LLP throughout its existence, should UPA (2013) produce the same results as ULLCA (2013)?

Assuming

a GP has been a non-LLP for some time and then an LLP until dissolution, what should the results be?