

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

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

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Disclaimer #1

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Note 9

recognizes valuable
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but

“errors, omissions,
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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

“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.

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

bird's eye view

from 10,000 meters



bird's eye view

from 10,000 meters

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



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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
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US

OK

ONE DOES NOT SIMPLY

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capital.”

**USE DEFAULT SPARK
SETTINGS**

losing sharing: fbo of whom?

creditors

fellow partners

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creditors

- partners obligated to contribute funds as necessary to:

fund any unpaid
company debts to creditors

fellow partners

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- partners obligated to contribute funds as necessary to:

“true up” capital losses
(contributions) to fit the loss
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agreement)

losing sharing: fbo of whom?

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- 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)

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



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
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profit sharing

profits



Month	%	Month	%	Month	%	Month	%	Month	%
Jan	27.5%	Feb	12.5%	Mar	26.0%	Apr	32.3%	May	65.0%
Jun	82.2%	Jul	60.1%	Aug	88.8%	Sep	100.0%	Oct	237.2%
Nov		Dec							

distribution share

distributive share





AND NOW



AND NOW

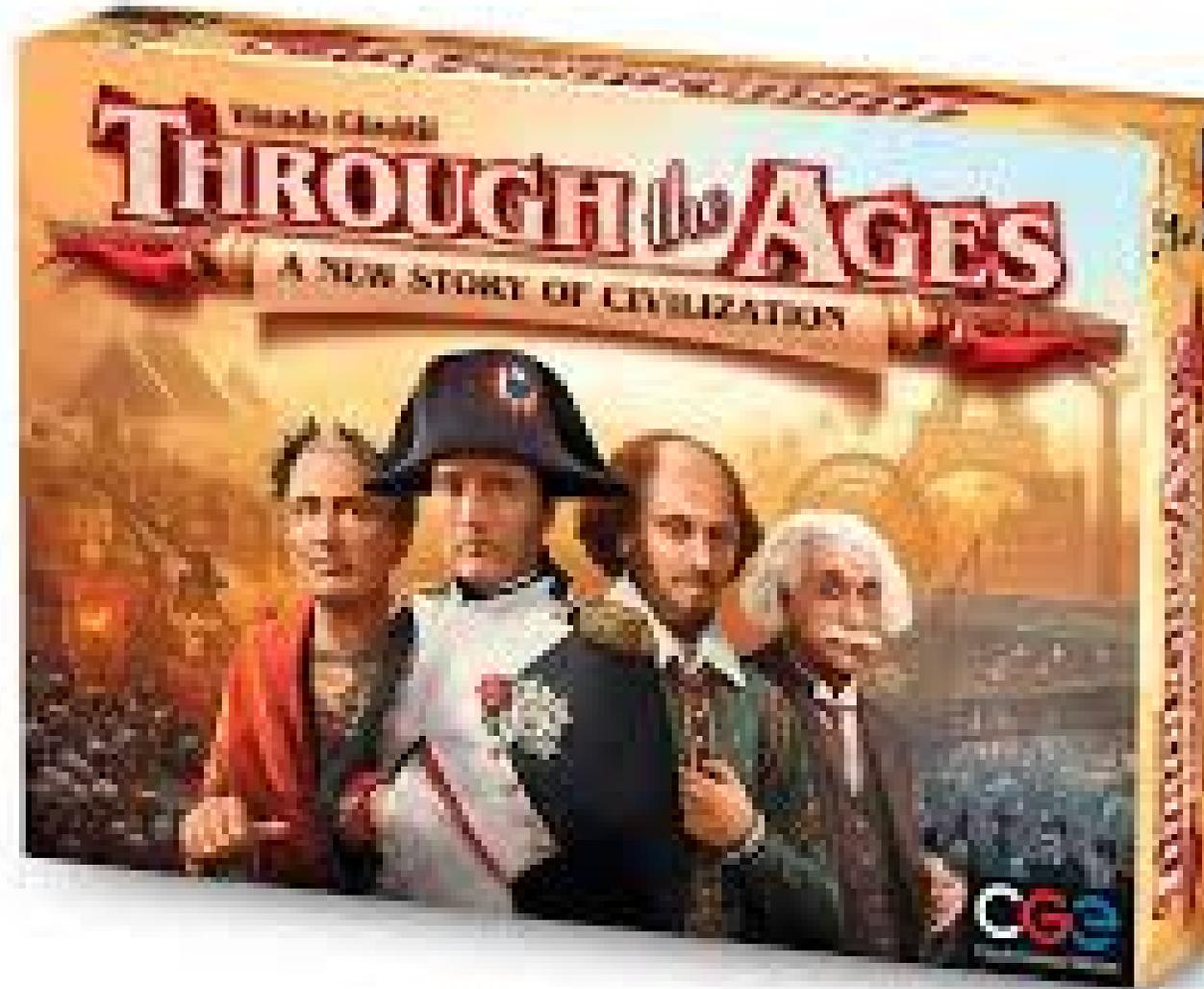
profit and loss default
rules

- **THROUGH THE AGES**

AND NOW

profit and loss default
rules

- **THROUGH THE AGES**



UPA (1914) §18

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(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, 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, net 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

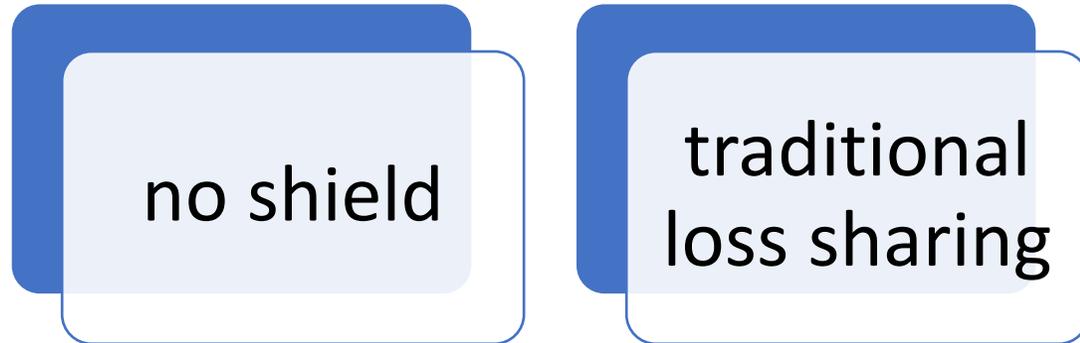
pure LLP

- total shield
- no loss sharing*

our conundrum

pure, traditional non-LLP

pure LLP



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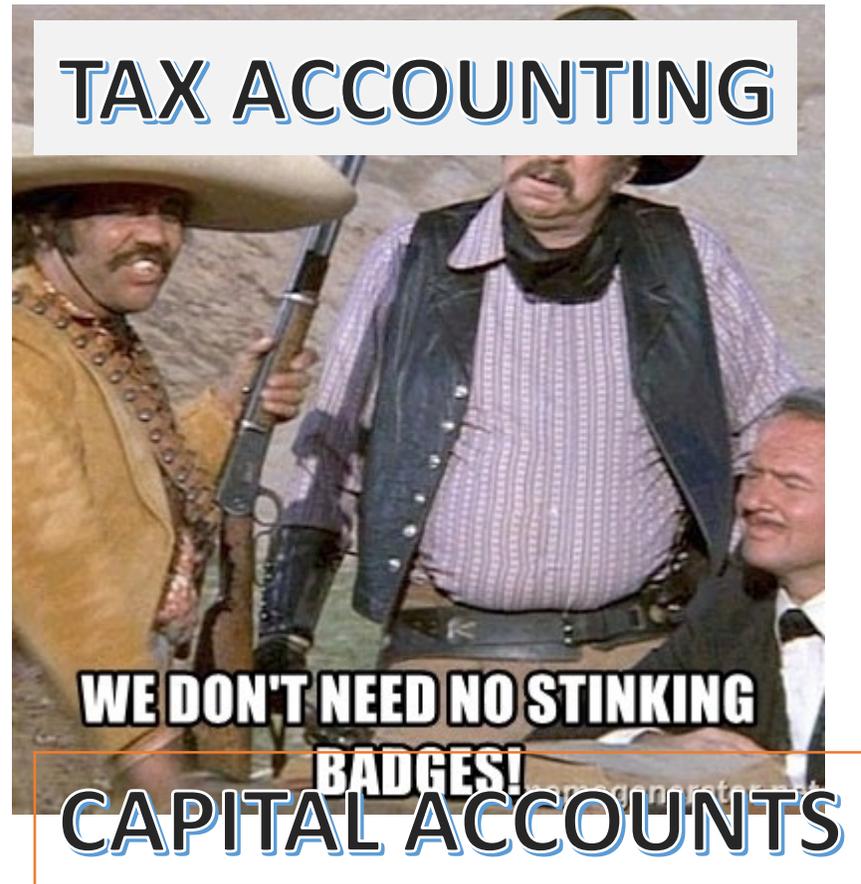
**NO LOSS SHARING?
WHAT ABOUT THE IRS?**

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?