

Meeting of the
Unincorporated Organization Acts Committee
May 24, 2021
(sixth meeting)
version – 5-12-21

Materials for the First Two Substantive Agenda Items

In the interests of making our discussions more efficient, please review these materials ASAP and promptly email the chair and reporter,¹ if:

- *with regard to the statutory revisions proposed in these materials – you have any questions or concerns about the language proposed, or have suggestions for changing the proposed language; or*
- *with regard to the UPA (2013) provisions addressed in these materials – you believe it necessary to consider revising additional UPA (2013) provisions (i.e., provisions not mentioned in these materials).*

Thank you.

Issue – Definition of Partnership and Status of Partnership Property
When Next-to-Last Partner Dissociates²
UPA (2013) §§ 102(11); 302(d)
JEB Report– June 2020, Issue # 1

The June 2020 JEB Report explains the issue:

Definition of Partnership and related issues: RUPA §§ 102(11); 302(d). The existing RUPA definition requires “an association of two or more persons”, rendering the definition inconsistent with RUPA § 801(6) (the passage of 90 consecutive days during which the partnership does not have at least two partners). One proposed corrected definition of “partnership,” is “an entity created under RUPA 201”, eliminating and no longer including the “two or more” requirement. There is a related issue under RUPA § 302(d) (If a person holds all the partners’ interests in the partnership, all the partnership property vests in that person). There are two reasons to eliminate § 302(d): (i) it is inconsistent with Section § 801(6), and (ii) it reflects the abandoned “aggregate” theory of partnerships.

¹ Lisa.Jacobs@us.dlapiper.com & daniel.kleinberger@mitchellhamline.edu.

² An additional, related problem has surfaced – namely, how to provide for dissolution avoidance if all partners dissociate at once or the last remaining partner dies or otherwise dissociates before admitting a second partner. See below for a discussion of this additional issue and a proposed solution.

Following are three alternate proposals for revising the definition of partnership in UPA (2013). Alternative B differs from Alternative A only in making narrower the reference to Section 202. Alternative C is new as of the May 24, 2021 meeting.³

Definition of Partnership

SECTION 102. DEFINITIONS. In this [act]:

....

Alternative A

(11) “Partnership”, except in [Article] 11, means an entity ~~association of two or more persons to carry on as co-owners a business for profit~~ formed under this [act] or that becomes subject to this [act] under [Article] 11 or Section 110. The term includes a limited liability partnership.

³ There is also a technical issue with Section 202(b), discussed below. For context, here are Sections 201 and 202 of UPA (2013):

SECTIONS 201 AND 202 currently read as follow.

SECTION 201. PARTNERSHIP AS ENTITY.

(a) A partnership is an entity distinct from its partners.

(b) A partnership is the same entity regardless of whether the partnership has a statement of qualification in effect under Section 901.

SECTION 202. FORMATION OF PARTNERSHIP.

(a) Except as otherwise provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.....

(b) An association formed under a statute other than this [act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [act]

Read strictly, Section 202(b) overstates the exclusion (“not a partnership under this [act]”). Article 11 and Section 110 both override the subsection (b) exclusion. For example, a foreign partnership may come under this act through an entity transaction under [Article] 11; a partnership formed under a predecessor statute (i.e., UPA (1914)) may be “dragged into” this act under Section 110. Therefore, subject to discussions with our Style Liaison, the following revision is proposed for Section 202(b):

(b) Except as provided in [Article] 11 or Section 110, an~~An~~ association formed under a statute other than this [act], a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this [act].

Alternative B

(11) “Partnership”, except in [Article] 11, means an entity ~~association of two or more persons to carry on as co-owners a business for profit~~ formed under ~~this [act]~~ Section 202 or that becomes subject to this [act] under [Article] 11 or Section 110. The term includes a limited liability partnership.

Alternative C

(11) “Partnership”, except in [Article] 11 means an entity ~~association of two or more persons to carry on as co-owners a business for profit~~ formed under this [act] or that becomes subject to this [act] under [Article] 11 or Section 110 and, except as provided in Section 801(6) or 801(7), is an association of two or more persons to carry on as co-owners a business for profit. The term includes a limited liability partnership.

Dissolution Provisions Expanded to Contemplate Partnership with No Remaining Partners

Explanation: Section 801(6), which currently refers to a partnership “not hav[ing] at least two partners,” makes dissolution inevitable if no partners remain. To avoid that result, a new Section 801(7) adopts the same mechanism as ULLCA § 701(3) for filling the void.⁴

SECTION 801. EVENTS CAUSING DISSOLUTION. A partnership is dissolved, and its business must be wound up, upon the occurrence of any of the following:

(5) on application by a transferee, the entry by [the appropriate court] of an order dissolving the partnership on the ground that it is equitable to wind up the partnership

⁴ Section 801(6) does not need a void-filling mechanism because the sole remaining partner may admit one or more additional partners under Section 402(b)(3): “After formation of a partnership, a person becomes a partner:... with the affirmative vote or consent of all the partners.”

business....; ~~or~~

(6) the passage of 90 consecutive days during which the partnership ~~does not have at least two partners~~ has only one partner; or

(7) the passage of 90 consecutive days during which the partnership has no partners, unless before the end of the period:

(A) consent to admit at least two specified persons each as a partner is given by transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and

(B) at least two specified persons each become a partner in accordance with the consent.⁵

Eliminating the Aggregate-Based Vesting of Partnership Property in the Last Remaining Partner

SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

(a) Partnership property may be transferred as follows:....

(b) A partnership may recover partnership property from a transferee only if

(c) A partnership may not recover partnership property from a subsequent transferee if

~~(d) If a person holds all the partners' interests in the partnership, all the partnership property vests in that person. The person may sign a record in the name of the partnership to~~

⁵ As drafted, Section 801(7) provides a fresh 90 days in the event an 801(6) situation (a sole remaining partner) becomes an 801(7) situation (sole remaining partner dissociates without having admitted at least one other partner). Theoretically, therefore, an 801(6) situation might on the 89th day become a 801(7) situation, with a fresh 90 days, for a total of 179 days. The additional time seems warranted because the circumstances in play when filling the void under Section 801(7) are likely to be quite different than those in play under Section 801(6) – that is:

- transferees selecting by consent at least two partners [801(7)]; versus
- the sole remaining partner having the unfettered right to admit a new partner [801(6)].

~~evidence vesting of the property in that person and may file or record the record.~~

Issue – Becoming an LLP to Create Retroactive Shield for
Already Incurred, Non-LLP Obligations
(and associated changes re: dissolution notices)
JEB Report– June 2020, Issue # 9

Background on this Issue is provided as follows:

- the explanation from the June 2020 JEB Report
- the relevant statutory provisions
- analysis, including possible resolutions
- reporter’s recommendation

Issues as Explained in the June 2020 JEB Report

The June 2020 JEB Report explains the issue as follows:

RUPA §§ 807-810. Re-evaluating whether partners should be able to elect into an LLP and affect obligations incurred before LLP status, whether to extend the "notice-to-creditors/liability-discharge" provisions, §§ 807-809 [similar to ULLCA §§ 704-706 and MBCA §§ 1407-1409], currently applicable only to limited liability partnerships, to non-LLP general partners[hips]; and other revisions discussed in February 2019:

- (i) proposal to extend to general partnerships notice-to-creditor/liability-discharge provisions (currently limited to limited liability partnerships);
- (ii) whether to cross reference 306(c) – temporal limitation (note - would need to address in limited partnerships as well);
- (iii) revise § 810 (providing that discharge of partnership also discharges partners) to more clearly encompass piercing liability;
- (iv) consideration of general policy determinations regarding the cutoff of liability of general partners following notice given in connection with dissolution. A critical concern is that a general partnership can cut off GP liability by filing a notice of conversion to an LLP and then immediately dissolving

Relevant Provisions from UPA (2013)

(current statutory language of greatest pertinence is double-spaced and highlighted)

SECTION 807. KNOWN CLAIMS AGAINST DISSOLVED LIMITED LIABILITY PARTNERSHIP.

(a) Except as otherwise provided in subsection (d), a dissolved limited liability partnership may give notice of a known claim under subsection (b), which has the effect

provided in subsection (c).

(b) A dissolved limited liability partnership may in a record notify its known claimants of the dissolution. The notice must:

- (1) specify the information required to be included in a claim;
- (2) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;
- (3) state the deadline for receipt of a claim, which may not be less than 120 days after the date the notice is received by the claimant;
- (4) state that the claim will be barred if not received by the deadline; and
- (5) unless the partnership has been throughout its existence a limited liability

partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on Section 306.

(c) A claim against a dissolved limited liability partnership is barred if the requirements of subsection (b) are met and:

- (1) the claim is not received by the specified deadline; or
 - (2) if the claim is timely received but rejected by the limited liability partnership:
 - (A) the partnership causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the partnership to enforce the claim not later than 90 days after the claimant receives the notice; and
 - (B) the claimant does not commence the required action not later than 90 days after the claimant receives the notice.
- (d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

SECTION 808. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY PARTNERSHIP.

(a) A dissolved limited liability partnership may publish notice of its dissolution and request persons having claims against the partnership to present them in accordance with the notice.

(b) A notice under subsection (a) must:

- (1) be published at least once in a newspaper of general circulation in the [county] in this state in which the dissolved limited liability partnership's principal office is located or, if the principal office is not located in this state, in the [county] in which the office of the partnership's registered agent is or was last located;

(2) describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent;

(3) state that a claim against the partnership is barred unless an action to enforce the claim is commenced not later than three years after publication of the notice; and

(4) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on

Section 306.

(c) If a dissolved limited liability partnership publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership not later than three years after the publication date of the notice:

(1) a claimant that did not receive notice in a record under Section 807;

(2) a claimant whose claim was timely sent to the partnership but not acted on;

and

(3) a claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) A claim not barred under this section or Section 807 may be enforced:

(1) against a dissolved limited liability partnership, to the extent of its undistributed assets;

(2) except as otherwise provided in Section 809, if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, 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 after dissolution; and

(3) against any person liable on the claim under Sections 306, 703, and 805.

SECTION 809. COURT PROCEEDINGS

(a) A dissolved limited liability partnership that has published a notice under Section 808 may file an application with [the appropriate court] in the [county] where the partnership's principal office is located or, if the principal office is not located in this state, where the office of its registered agent is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the partnership and:

SECTION 810. LIABILITY OF PARTNER AND PERSON DISSOCIATED AS PARTNER WHEN CLAIM AGAINST PARTNERSHIP BARRED. If a claim against a dissolved partnership is barred under Section 807, 808, or 809, any corresponding claim under Section 306,⁶ 703,⁷ or 805⁸ is also barred.

Analysis

Background to the Issue

- The Harmonization Project added provisions on notice to creditors and discharge of obligations (“notice/discharge provisions”), deriving the language almost verbatim from provisions of the Model Business Corporation Act.
- *Accordingly*, the UPA (2013) notice/discharge provisions encompass all the obligations of a dissolving general partnership – regardless of whether any or all of the obligations were incurred while the partnership was not an LLP.
- However, when a partnership obligation is incurred while the partnership is a non-LLP partnership, each person then a partner has a corresponding personal obligation for the partnership obligation. As an official comment explains, for non-LLP partnership obligations, “one hallmark of general partner status [is] strict, vicarious liability for the debts, obligations, and other liabilities of the partnership.” ULP (2013), § 306(a), cmt.
- Because this partner liability exists only in reference to a partnership liability, it seems to follow logically that the discharge of a non-LLP partnership obligation necessarily discharges any status-based partner obligation pertaining to the partnership obligation.

Practical Problem

Under the relevant provisions of UPA (2013), a general partnership that has never been an LLP can opt into LLP status just before dissolution and then use the notice/discharge provisions to retroactively create a shield protecting the partners from liability for all obligations incurred during the non-LLP phase (i.e., the entire pre-dissolution period).

This result seems significantly overbroad. Certainly, neither the MBCA nor ULLCA (2013) addresses discharge of “unshielded” obligations of an entity. (None such exist.)⁹

⁶ SECTION 306. PARTNER’S LIABILITY.

⁷ SECTION 703. DISSOCIATED PARTNER’S LIABILITY TO OTHER PERSONS.

⁸ SECTION 805. LIABILITY AFTER DISSOLUTION OF PARTNER AND PERSON DISSOCIATED AS PARTNER.

⁹ ULP (2013) has the same problem with any limited partnership that has not been a limited liability limited partnership throughout its existence. If the committee accepts the fix proposed for UPA, making parallel fixes to ULP will be a merely ministerial action.

The possible responses to this situation include:

- i. no change (let sleeping dogs lie);
- ii. retain the current approach but make the results more explicit; or
- iii. undo the overbreadth by eliminating the current rule that:
 - ~ allows the discharge of LLP debts to discharge the partnership's liability for all outstanding obligations incurred in the non-LLP phase; and
 - ~ accordingly, allows the discharge of all partner vicarious liability for non-LLP debts.

Reporter's Recommendation

Having been part of the process that created the overbreadth and being unable to recall any discussion that espoused the overbreadth as correct policy, the reporter recommends the third above-listed response. In a nutshell, the proposed (third) response:

- provides that the notice/discharge provisions do not affect any partnership obligation incurred while a partnership was not an LLP; and
- accordingly omits any language contemplating:
 - the discharge of a non-LLP partnership obligation; or
 - the discharge of any partner status-based liability corresponding to a non-LLP partnership obligation.

SECTION 807. KNOWN CLAIMS AGAINST DISSOLVED LIMITED

LIABILITY PARTNERSHIP.

(a) Except as otherwise provided in subsection (d), a dissolved limited liability partnership may give notice of a known **claim**¹⁰ under subsection (b), which has the effect provided in subsection (c).

(b) A dissolved limited liability partnership may in a record notify its known claimants of the dissolution. The notice must:

(1) state [that the partnership is a limited liability partnership at the time of the notice;](#)

(2) [identify the period during which the dissolved partnership has been a limited](#)

¹⁰ In these provisions, "claim" is being used to mean two different things. Here, an obligation (and potentially a cause of action). Below (as highlighted in (b)(3)) – the document reflecting the cause of action. No change is proposed.

liability partnership:

(3) specify the information required to be included in a **claim**;

(24) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;

(35) state the deadline for receipt of a claim, which may not be less than 120 days after the date the notice is received by the claimant; and

(6) state that ~~the~~ a claim for an obligation incurred by the partnership while it was a limited liability partnership will be barred if not received by the deadline.

~~(5) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on Section 306.~~

(c) A claim against a dissolved limited liability partnership for an obligation incurred by the partnership while it was a limited liability partnership is barred if the requirements of subsection (b) are met and:

(1) the claim is not received by the specified deadline; or

(2) if the claim is timely received but rejected by the limited liability partnership:

(A) the partnership causes the claimant to receive a notice in a record stating that the claim is rejected and will be barred unless the claimant commences an action against the partnership to enforce the claim not later than 90 days after the claimant receives the notice; and

(B) the claimant does not commence the required action not later than 90 days after the claimant receives the notice.

(d) This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

SECTION 808. OTHER CLAIMS AGAINST DISSOLVED LIMITED LIABILITY PARTNERSHIP.

(a) A dissolved limited liability partnership may publish notice of its dissolution and request persons having claims against the partnership to present them in accordance with the notice.

(b) A notice under subsection (a) must:

(1) be published at least once in a newspaper of general circulation in the [county] in this state in which the dissolved limited liability partnership's principal office is located or, if the principal office is not located in this state, in the [county] in which the office of the partnership's registered agent is or was last located;

(2) state that the partnership is a limited liability partnership at the time of the notice.

(3) identify the period during which the dissolved partnership has been a limited liability partnership; and

(4) describe the information required to be contained in a claim, state that the claim must be in writing, and provide a mailing address to which the claim is to be sent; and

~~(3)~~ state that a claim against the partnership for an obligation incurred by the partnership while it was a limited liability partnership is barred unless an action to enforce the claim is commenced not later than three years after publication of the notice; ~~and~~

~~(4) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any~~

~~corresponding claim against any partner or person dissociated as a partner which is based on Section 306.~~

(c) If a dissolved limited liability partnership publishes a notice in accordance with subsection (b), the claim for an obligation incurred by the partnership while it was a limited liability partnership of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership not later than three years after the publication date of the notice:

- (1) a claimant that did not receive notice in a record under Section 807;
- (2) a claimant whose claim was timely sent to the partnership but not acted on;

and

(3) a claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) A claim not barred under this section or Section 807 may be enforced:

(1) against a dissolved limited liability partnership, to the extent of its undistributed assets; and

(2) except as otherwise provided in Section 809, if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person's proportionate share of the claim or of the partnership's assets distributed to the partner or transferee after dissolution, 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 after dissolution; ~~and~~

~~(3) against any person liable on the claim under Sections 306, 703, and 805.~~¹¹

....

~~**SECTION 810. LIABILITY OF PARTNER AND PERSON DISSOCIATED AS PARTNER WHEN CLAIM AGAINST PARTNERSHIP BARRED.** If a claim against a dissolved partnership is barred under Section 807, 808, or 809, any corresponding claim under Section 306, 703, or 805 is also barred.~~¹²

¹¹ Section 306 – partner personal liability – is now inapposite because the discharges pertain only to shielded claims (i.e., claims against the partnership incurred while the partnership is a limited liability partnership). The same is true for Section 703; liability under Section 703 depends *inter alia* on a partner having Section 306 personal liability. Section 805 was always inapposite, because the section refers only to claims *against a partner or dissociated partner* by the partnership or a fellow partner – i.e., not claims *against the partnership*.

¹² Revisions to earlier sections moot Section 810 because, as revised, the notice/discharge provisions no longer encompass any “corresponding claim”.