Unincorporated Organization Acts Committee
materials for Information Session
Thursday, June 10, 2021
2 – 4 PM Central Time

The Scope of the Committee's Work and the Resulting Nature of these Materials

Scope

This drafting committee (the "Committee") has been empaneled to develop amendments to the to the Uniform Partnership Act, the Uniform Limited Partnership Act, the Uniform Limited Liability Company Act, and the Uniform Protected Series Act. The Committee's work is not intended include wholesale revisions to adopted policy. This project was proposed by the Joint Editorial Board on Uniform Unincorporated Organizations Acts ("JEBUUOA").

The ULC Executive Committee established the Committee in response to Proposal 1 of the June 28, 2020 Report from the Joint Editorial Board on Uniform Unincorporated Organization Acts to the ULC Executive Committee.[1] The substance of that report forms the basis for many of the modifications the Committee is considering. The Committee has also taken under consideration additional, comparable issues.

Thus, unlike the typical drafting committee, this Committee's work addresses limited and specific issues, some of which arise in more than one uniform act. Some topics are related to some other topics; many topics are unrelated to any other topic; many issues apply to several statutes

Nature of these Materials

These materials address seven issues:

1. Nomenclature Issues: Conversions/Domestications/Similar Substantive Effect
2. Effective Date for "Protected Agreements"
3. Definition of Partnership, Dissolution Avoidance When Partnership Has Zero Partners, and Status of Partnership Property When Next-to-Last Partner Dissociates
4. Rescinding Dissolution of a General Partnership
5. Becoming an LLP to Create Retroactive Shield for Already Incurred, Non-LLP Obligations
6. UPSA Merger Provisions
7. Loss Sharing Issues in General Partnerships

For most of these issues, the materials begin with prefatory observations – factual background and an explication of the issue. Then, using strike and underline and red and blue coloring, the materials show proposed revisions to the relevant statutory text.

[1] A copy of this report is at the end of these materials.

The issues arise from a variety of circumstances, including:

- passage of time has brought into question a provision's continued utility – e.g., so-called "protected agreements," which were first adopted 14 years ago to address then novel innovations in what had been "merger" law;[2]
- non-uniformity in non-uniform business entity acts with which uniform acts must interact – e.g., nomenclature differences with regard to domestications and conversions
- non-uniform provisions in uniform acts as enacted
- proper resolution of one issue requires corresponding fixes to other provisions or reveals related but separate issues; e.g., revisions on the UPA (2013) definition of partnership led the Committee to provide for a partnership that no longer has any partners to admit at least two new partners and thereby avoid dissolution; and
- with regard to the changes the Harmonization Project[3] made to RUPA (1997), the Project:
    - made more apparent some longstanding minor deficiencies in UPA – e.g. the definition of partnership;
    - made a few technical errors as it sought to harmonize UPA nomenclature with nomenclature in other business entity acts; and
    - made two substantive errors in further integrating limited liability partnership provisions in the retroactive LLP shield

Each of the seven issues is addressed beginning on a new page. When an issue pertains to more than one statute, the materials use only one of the pertinent statutes to show the proposed revisions. Conforming changes will be made to the other affected statutes. When an issue comprises several sub-issues, the materials provide background and propose statutory revisions to each sub-issue separately.

[2] These examples are noted here only in shorthand form but are explained and addressed in detail below.
[3] "From 2009 to 2013, the Uniform Law Conference undertook an intensive effort to harmonize, to the extent possible, all uniform acts pertaining to unincorporated organizations." See ULLCA (2006) (Last Amended 2013), Prefatory Note to 2011 and 2013 Amendments. These materials refer to this effort as the "Harmonization Project."

Nomenclature Issues: Conversions/Domestications/Similar Substantive Effect

Prefatory Observations

Background to the Issue: Article 2 of the Uniform Business Organization Codes ("UBOC"), pertaining to Entity Transactions,[4] describes:

- "domestication" as a transaction involving solely a change in an entity's jurisdiction of formation; and
- a "conversion" as a transaction necessarily involving a change in an entity's type and possibly also involving a change in the entity's jurisdiction of formation.[5]

In contrast, some jurisdictions[6] use solely the term "conversion", describing or defining a conversion as a transaction involving change of jurisdiction, change of entity type, or change of both jurisdiction and entity type ("umbrella approach").

Summary of the Issue: When an entity formed under the law of an enacting state seeks solely to change its jurisdiction of formation to a jurisdiction that uses the umbrella approach, will the transaction satisfy UBOC § 2-501(a) and (b) (authorizing domestication out [to a different jurisdiction"] and domestication in [from a different jurisdiction] in each case "if the domestication is authorized by the law of the foreign jurisdiction." Put another way: does a statute that authorizes domestication without using the term satisfy Sections 2-501(a) and (b)?

Explanation of Issue: Certainly, reasonable minds may differ as to which approach is better. Indeed, in 2001 the ULC adopted the umbrella approach. *See* ULPA (2001), § 1102, cmt. ("In a statutory conversion an existing entity changes its form, the jurisdiction of its governing statute or both."). More generally, jurisdictions are divided. See LPUE ; 2016 Conversion-Domestication [sic] Survey Results 4820-0414-6261 v.1.xlsx, to be posted under Documents at the Committee's webpage at https://uniformlaws.org/committees/community-home/librarydocuments?communitykey=721aeb0d-b7bc-40e6-93af-02e21a5164e5&tab=librarydocuments&LibraryFolderKey=&DefaultView= .

Committee's Decision: Add clarifying language to one of the introductory sections for uniform act provisions on entity transactions.

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[4] "Entity transactions" refers to the following:
- mergers (originally the sole, generally-accepted form of entity transaction);
- domestications and conversations:
  - entity transactions formerly effected in two steps (one of which was a merger); and
  - now available in one step (which is similar to a merger); and
- interest exchanges

[5] Each of the UPA, ULPA, ULLCA (2013) contains comparable provisions for a jurisdiction that has enacted UBOC or the Model Entity Transactions Act (2007) (the source of UBOC, Article 2).

[6] Notably, Delaware is such a jurisdiction.

Statutory Provisions Being Revised

SECTION 1002. RELATIONSHIP OF [ARTICLE] TO OTHER LAWS[7]

* * *

(c) As used in this [article], with reference to the law of a foreign jurisdiction:

(1) merger, interest exchange, conversion, or domestication respectively include a transaction which under the foreign law {is substantially like}{achieves the same substantive effect as}[8] a merger, interest exchange, conversion, or domestication, as the case may be, under this [article], even though the foreign law:

(i) denominates the transaction differently than this [article]; or

(ii) includes within a denomination two or more transactions which this [article] authorizes separately; and

(2) plan has the meaning necessary to give effect to subsection (c)(1).

[7] This language in drafted in reference to ULLCA (2013). Comparable revisions will be made to UPA, ULPA, UBOC, and META (Model Entity Transactions Act).

[8] In the context of its discussion of another issue (UPSA § 602; strictly limiting a protected series' involvement in any entity transaction), the Committee is considered substituting "achieves the same substantive effect" for "is substantially like". Whatever decision the Committee makes pertaining to UPSA § 602, the same decision should apply here (and likely anywhere else the latter phrase appears in the acts within the Committee's scope).

Effective Date for "Protected Agreements"

Prefatory Observations

Background to the Issue: Domestications (as noted previously, commonly understood to mean that an entity formed under the laws of one jurisdiction state changes its governing agreements such that it now is governed by the laws of a different jurisdiction) and conversions (understood in many states to be a change in form or type of entity)[9] are relatively recent innovations,[10] but each can produce results that have long been possible through two steps, the second of which is a merger.[11] The innovation merely substitutes one step (domestication, conversion) for the two steps.

Because a business organization is a legal "person"[12] but not an individual, many issues arise with business organizations that could not arise with an individual. One such set of issues relates to the effect or result of a merger, and, as a matter of customary practice, merger-related provisions exist in many agreements:

- to which an entity is a party; or
- which govern relations *inter se* an entity's owners and managers.

Back in the day (circa 2007 or earlier), when domestications and conversions were novel,[13] the ULC was concerned that persons could use the novel approaches to circumvent merger-related provisions, such as a restriction in a loan agreement that prevents mergers, which drafters had included in agreements long before the effective date of the relevant uniform act. To prevent this occurrence, the ULC adopted the concept of a "protected agreement." Following is the current official comment:

> "Protected agreement" [(a)(19)] – The term "protected agreement" refers to evidences of indebtedness and agreements binding on the entity or any of its governors or interest

[9] Form, or types, of entity include corporation, general partnership, limited partnership, limited liability company.
[10] Interest exchanges are not novel but when, via the Model Entity Transactions Act (2007), the ULC began comprehensively contemplating entity transactions, few jurisdictions authorized interest exchanges and the authorization applied only to corporations. Outside those few jurisdictions, few practitioners were conversant with the construct. The ULC's decision to include interest exchanges in the uniform acts raised the construct's profile significantly.
[11] Here is a simplified illustration: XYZ LLC, a Minnesota LLC, wishes to become an Iowa LLC. Step 1 – XYZ forms NewCo, LLC, a new limited liability company under Iowa law. XYZ is the sole member of NewCo. Step 2 – XYZ merges into NewCo, which changes its name to XYZ, LLC. Effectuating an interest exchange would be more complicated and involve more steps.
[12] A "legal person" also known as an "artificial person" is "[a]entity, such as a corporation, created by law and given certain legal rights and duties of a human being; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.' PERSON, Black's Law Dictionary (11th ed. 2019), def. 3.
[13] And interest exchanges were little known – see note10.

holders that are unpaid or executory in whole or in part on the effective date of this article. Thus, a revolving line of credit from a bank to a corporation would constitute a protected agreement even if advances were not made until after the effective date of this article. If a protected agreement has provisions that apply if an entity merges, those provisions will apply if the entity enters into an interest exchange, conversion, or domestication even though the agreement does not mention those other types of transactions. See Sections 2-301(d) (interest exchanges), 2-401(c) (conversions), and 2-501(d) (domestications).

Summary of the Issue: Has the protected agreement concept outlived its usefulness? If not, should the ULC nonetheless amend the relevant acts to sunset at some point after a state's adoption of domestication/conversion/interest exchange legislation?

Committee's Decision: Replace the current approach with bracketed "date certain" provisions and provide a legislative note to explain both the policy issues and the mechanics for determining the date certain in light of the enacting state's prior experience with the various entity transactions.

Statutory Provisions Being Revised

[Uniform Business Organizations Code] SECTION 2-102. DEFINITIONS

(a) ….

[(19) "Protected agreement" means:

(A) a record evidencing indebtedness and any related agreement in effect on [~~the effective date of this [article]~~ date certain];

(B) an agreement that is binding on an entity on [~~the effective date of this [article]~~ date certain];

(C) the organic rules of an entity in effect on [~~the effective date of this [article]~~ date certain]; or

(D) an agreement that is binding on any of the governors or interest holders of an entity on [~~the effective date of this [article]~~ date certain]].[14]

[14] The entire definition is bracketed in case an enacting state decides against including the concept.

Outline of Legislative Note

- explain the protected agreement construct and its rationale;
- in light of the rationale and its waning relevance: suggest that:
    - each enacting jurisdiction should determine, for each once-novel type of entity transaction,[15] the date by which the transaction became generally known to legal practitioners within the jurisdiction who were then actively practicing in this area of law; and
    - that date:
        - may vary by transaction type;
        - will not necessarily be:
            - the date on which the jurisdiction included or otherwise recognized the construct in the predecessor statute to the uniform act under consideration; or
            - the date on which the jurisdiction included or otherwise recognized the construct in any statute or reported case.

[PART] 3

INTEREST EXCHANGE

SECTION 2-301. INTEREST EXCHANGE AUTHORIZED.

[(c) If a protected agreement contains a provision that applies to a merger of a domestic entity but does not refer to an interest exchange, the provision applies to an interest exchange in which the domestic entity is the acquired entity as if the interest exchange were a merger until the provision is amended after [same date certain as in 2-102(19)~~the effective date of this [article]~~].]

[15] For an explanation of "entity transaction," see note 4.

Definition of Partnership, Dissolution Avoidance When Partnership Has Zero Partners, and Status of Partnership Property When Next-to-Last Partner Dissociates[16]
UPA (2013) §§ 102(11); 302(d)

Prefatory Observations

Background to the issue: 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.

During its discussions of the definition of partnership, the Committee identified another related subtopic – namely, providing for a partnership that no longer has any partners to admit at least two new partners and thereby avoid dissolution. The three subtopics are discussed in this order: definition of partnership, dissolution avoidance, eliminating Section 302(d) [automatic vesting].

[first subtopic]

Definition of Partnership

Explanation of the issue: See above, at the beginning of this topic.

Committee's Decision: The Committee considered three alternatives proposed revisions, as set forth below, for the definition of partnership. Alternative B differed from Alternative A only in making narrower the reference to Section 202. The Committee adopted Alternative C at the Committee's May 24, 2021 meeting.

[16] Further below, is a proposed revision to Section 801 (dissolution events), to take into account the possibilities that either the last remaining partner dissociates before admitting a second partner or all partners dissociate at once.

Statutory Provision Being Revised

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.

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 "foreign partnership" or "foreign limited liability partnership"~~[Article] 11]~~,[17] 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

[17] The proposed insertion of "'foreign partnership' or 'foreign limited liability partnership'" and deletion of "[Article] 11]" reflects an issue that surfaced at the Committee's most recent meeting (May 24, 2021) and is to be reviewed at the Committee's next meeting. The issue is highly technical and will not be discussed at the June 10 presentation. (Proposed changes, if any, will apply to several acts.)

[Article] 11 or Section 110 and, except as provided in Section 801(6) or 801(7),[18] 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.

[second subtopic]

Dissolution Provisions Expanded to Contemplate Zero Partners

Prefatory Observations

Background to the issue: Section 801(6), which currently refers to a partnership "not hav[ing] at least two partners," does not provide for avoiding dissolution if a partnership has no partners. If one partner remains, that partner can admit a second partner under the generally applicable provision for admitting new partners. Section 402(b)(3) (stating that "[a]fter formation of a partnership, a person becomes a partner…. with the affirmative vote or consent of all the partners"). If no partner remains, there is no way currently to admit new partners and avoid dissolution.

Committee's decision: To avoid that result, a new Section 801(7) adopts the same mechanism as ULLCA § 701(3) for filling the void.[19]

Statutory Provision Being Revised

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, …. at the time of the transfer or entry of the charging order that gave rise to the transfer; ~~or~~

(6) the passage of 90 consecutive days during which the partnership ~~does not have at least~~

[18] Section 801(6) and (7) contemplate a partnership having fewer than two partners but remaining a partnership (and moreover not dissolved) for 90 days, during which time the partnership can avoid dissolution by meeting the two-partner requirement. The Committee may decide that the exception should apply to all of [Article] 8 (which refers throughout to a "dissolved partnership").

[19] 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."

~~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.[20]

[third subtopic]

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

Prefatory Observations

Background to the issue: The general partnership dates back hundreds of years, for most of that time the law conceptualized the partnership as merely an aggregate of the persons co-owing and carrying on the business. The first uniform partnership act (1914) conceptualized the general partnership sometimes as an aggregate and sometimes as an entity – i.e., a legal person separate from its owners. The revised uniform act (1997) moved almost entirely to the entity construct, and the Harmonization Project moved still further. Against this background, Section 302(d) is an anachronism and, moreover, conflicts with other sections pertaining to dissolution and its aftermath.

Committee's decision: Eliminate Section 302(d).

Statutory Provision Being Revised

SECTION 302. TRANSFER OF PARTNERSHIP PROPERTY.

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

[20] As drafted, Section 801(7) provides a fresh 90 days in the event a 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 consensus of the committee was that the additional time is 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) – i.e., transferees by consent selecting at least two partners versus the sole remaining partner having the unfettered right to admit a new partner.

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

Rescinding Dissolution of a General Partnership

Prefatory Observations

Background to the issue: Before the Harmonization Project, only UPA (1997) provided a consensual mechanism for "un-doing" dissolution. Under Section 802(b): "[A]ll of the partners, including any dissociating partner other than a wrongfully dissociating partner [and thus including a rightfully dissociated partner], may waive the right to have the partnership's business wound up and the partnership terminated."

The Harmonization Project applied the concept the limited partnership and limited liability company acts and renamed the concept to be "rescinding dissolution". The Project focused first on the LLC act and then applied the language to the two partnerships. In this process, the Project did not customize the UPA language to take into account an entirely separation harmonization decision – namely, to replace "dissociated partner" in the UPA with "person dissociated as a partner".

Thus, Harmonization did not take into account that on this point, UPA differs from both ULPA (2013) and ULLCA (2013); neither of the latter two acts provides for dissolution at the behest of a person that has dissociated. (ULPA (2013) does provide for dissolution following the dissociation of a person as general partner, but that person has no role in the decision to dissolve.)

Committee's decision: Revise UPA (2013) to take into account the former partner issue (which is uniquely pertinent to UPA

Statutory Provision Being Revised

SECTION 803. RESCINDING DISSOLUTION.

….

(b) Rescinding dissolution under this section requires:

(1) the affirmative vote or consent of each partner; ~~and~~

(2) if the dissolution results from a person's dissociation under Section 801(1),[21] the consent of the person; and

[21] Section 801(1) exhaustively lists the occasions on which a person's dissociation both (i) caused dissolution; and (ii) is rightful. (It is possible to have the power to dissolve a UPA (1997 or 2013) general partnership without having the right to do so.)

(3) if the partnership has delivered to the [Secretary of State] for filing a statement of dissolution and: ….

Becoming an LLP to Create Retroactive Shield for Already Incurred, Non-LLP Obligations
(and associated changes re: dissolution notices)

Prefatory Observations

Background to the issue: Beginning with ULPA (2001), uniform business organizations act have (i) allowed a organization that has dissolved and is winding up its business and activity to give notice to creditors; and (ii) provided that, if a properly notified creditor does not properly respond to the notice, the organization's obligation to the creditor is discharged ("notice/discharge provisions"). The ULC's notice/discharge provisions derive from provisions of the Model Business Corporation Act.

The Harmonization Project added notice/discharge provisions to the UPA, applicable to any dissolved limited liability partnership. Inadvertently, the UPA (2013) notice/discharge provisions encompass all the obligations of a dissolving limited liability partnership – regardless of whether any or all of the obligations were incurred while the partnership was not an LLP.
Moreover, because in a non-LLP partnership, a general partner's personal liability is automatic and status based – i.e., for an obligation of the partnership, it seemed to follow logically that the discharge of a partnership obligation necessarily discharges any automatic, status-based partner obligation. And UPA (2013) so provides.

Thus, as a practical matter, 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).[22]

Committee's decision: The Committee considered this result significantly overbroad, [23] and proposes to confine the notice/discharge provisions to partnership obligations incurred when the dissolved partnership has been a limited liability partnership.[24]

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[22] The same issue exists under ULPA (2013) for a limited liability limited partnership that has not been an LLLP throughout its existence. The Committee proposes to resolve that issue in parallel to the Committee's resolution of the issue under UPA (2013).
[23] Certainly, neither the MBCA nor ULLCA (2013) address discharge of "unshielded" obligations of an entity. (None such exist.)
[24] "Incurred" is a term of art under UPA and ULPA (2013), with a long pedigree detailed in the official comments.

Statutory Provisions Being Revised

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) state that the partnership is a limited liability partnership at the time of the notice;

(2) identify the times during which the dissolved partnership has been a limited liability partnership;

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

(~~2~~4) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;

(~~3~~5) 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 [time?] [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~~5) 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 on 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~~.[25]

….

~~**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.~~[26]

[25] Section 306 – partner personal liability – is now inapposite because the discharges pertain only to shield claims. 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.

[26] Revisions to earlier sections moot Section 810 because, as revised, the notice/discharge provisions no longer encompass any "corresponding claim".

UPSA Merger Provisions

Prefatory Observations

Background to the issue: The background to this issue is complex – in large part due to the policy choices made by the Uniform Protected Series Act drafting committee ("UPSA drafting committee") which opted not to delve into the far-reaching and perhaps unintended consequences of permitting a protected series (a new type of "organization") of a series limited liability company to participate in mergers and other entity transactions.

The UPSA drafting committee chose to restrict a protected series from any participation except within a "narrow channel." That is, in a merger between or among limited liability companies:

- in which at least one series limited liability company is involved; and
- the surviving limited liability company, if a series limited liability company, existed before the merger took effect (i.e., was not formed by the merger);

then (and only then) protected series may be established, dissolved, or transferred as part of the merger.[27]

The materials for the Committee's April 26, 2021 meeting stated as follows:

[27] Per the comment to UPSA § 604:

The following chart shows what may happen to a protected series of a series limited liability company that is party to a merger under this [act].

post-merger status of merging company	fate of existing protected series	possible to create protected series as part of the merger?
non-surviving	relocated protected series or dissolved, wound up, and terminated Section 605 (2)(A)	no
surviving	continuing protected series or dissolved, wound up, and terminated Section 605(2)(B)	yes Section 605(2)(D)

Recap of Discussion to Date

The Committee has discussed on several occasions issues relating to the prohibition on participation by protected series in fundamental transactions, and the focus of the discussion has evolved. The following list recaps our steps, topic by topic.

1. Starting point – a technical question regarding cross-references
    a. UPSA, Section 602 appears to ban all involvement of a protected series in any type of entity transaction.
    b. Other provisions of UPSA, however, contemplate some limited involvement. (See Sections 605(d)(2); 607(2)).
    c. Question: should Section 602 include an appropriate cross reference to the two other provisions.
2. The Committee decided to answer that question in the affirmative; however, the Committee's discussion of Section 602 did not end there; rather, the original issue occasioned discussion about other language in Section 602 – namely, "substantially similar to".
    a. Section 602 uses two prongs to effect its ban:
        i. the first prong: the four established types of entity transactions that appear in the Model Entity Transactions Act ("META"), UPA (2013), ULPA (2013), and ULLCA (2013) – identified [only] by name: merger, conversion, domestication, interest exchange; and
        ii. the second prong: any other transaction "substantially similar to" any of the named entity transactions.
    b. Discussion has centered on the second prong and initially focused on whether "substantially similar to" is too vague and whether "same substantive effect" might provide better guidance. Initially, the discussion presupposed that new comments will elucidate the meaning of whichever phrase the Committee chooses.
3. The discussion comparing the two phrases naturally involved exploring defects in each of the phrases, which led to a discussion as to whether the statute should take a "belt and suspender" approach to the second prong; i.e.,
    a. the belt – general phrase (e.g., "same substantial effect")
    b. the suspender:
        i. list in the statute of the essential attributes of the various transactions; and
        ii. ban any arrangement with any of the essential attributes (attribute approach).
4. On the word choice, consensus developed in favor of "same substantial effect".
5. On the belt and suspenders question, the reporter undertook to prepare attribute language pertaining to mergers, conversions, and domestications (leaving interest exchange aside pending the committee's decision as to whether to use the attribute approach).

6. When the Committee considered the draft "attribute" language, the sense of the Committee seemed to warrant the reporter preparing attribute language for interest exchanges. However, reservations were expressed about the "turgidness" of the proposed language coupled with the view that the "suspenders" should appear in the comments rather than the statute.
7. When the Committee next considered Section 602, the Committee decided that the "suspenders" belong in the comments, rather than in the black-letter text.
8. The Committee also discussed the danger of the belt being interpreted as banning an "arrangement":
    a. accomplished by purely consensual means; and
    b. not involving any derogation to rights of non-parties.
9. That discussion, together with the reporter's further reflection on the attributes, has led to additional language to accompany "same substantive effect."
10. The same discussion also raised concerns as to whether the Section 602 ban might be undesirably underinclusive. In particular, would Section 602 prevail if some other law of the enacting state appears to authorize an arrangement with the same substantive effect as contemplated by Section 602?
    a. The Committee has two choices for approaching this concern:
        i. Provide expressly for the desired result in the language of the statute.
            - In the revised draft (below), a new subsection (b) effects this approach.
        ii. State the desired result in the comment only.
    b. Each approach is problematic.
        i. The "expressly in the statute" approach risks implying the contrary result for the rest of the UPSA.
        ii. The "comment only" approach is unlikely to persuade a court, except when the standard rules of statutory interpretation fail to point the way.[28]

Committee's decision: Retain the narrow channel, as described above. Revise the language of Section 602 to be more user friendly. Change the phrase "substantially similar" to "same substantive effect". Amplify comments to give guidance regarding "same substantive effect". Address the issue of "under-inclusiveness and which statute prevails," as discussed in point 21 above, in the comments, not the statutory text. Conform Section 603 (addressing the narrow channel from the perspective of a series limited liability company) to the revisions to Section 602.

[28] Although jurisdictions differ somewhat on the issue, in general:
1. The court attempts (strenuously if necessary) to harmonize the provisions.
2. If step #1 fails:
    a. sometimes the court chooses the more specific over the more general statute; and
    b. sometimes the court chooses the later enacted provision.

Statutory Provisions Being Revised

SECTION 602. PROTECTED SERIES MAY NOT BE PARTY TO ENTITY TRANSACTION. Except as otherwise stated in Sections 605(d)(2) and 607(2), a ~~A~~ protected series may not~~:~~

~~(1) be an acquiring, acquired, converting, converted, merging, or surviving entity;~~

~~(2) participate in a domestication; or~~

~~(3)~~ be a party to, participate in, or be formed, organized, established, or created in a transaction ~~substantially like~~ that is:

(1) a merger, interest exchange, conversion, or domestication; or

(2) a transaction that achieves the same substantive effect as a transaction listed in Section 602(1).

Loss Sharing Issues in General Partnerships

Prefatory Observations

Background to the issue: In an ordinary general partnership, general partners "share losses" not only to the extent necessary to pay partnership obligations the partnership cannot pay but also to adjust capital (i.e., investment) losses among the partners ("*inter se* losses"). In a limited liability partnership (LLP), no loss sharing occurs.

Neither UPA (1997) nor UPA (2013) successfully address what happens to existing *inter se* losses when an ordinary general partnership becomes an LLP.

The Committee has only begun to grapple with both policy and mechanics issues in such a transformation.