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The Reporter's Rejoinder

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The Reporter's Rejoinder

Abstract

The word "rejoinder" connotes a reply to criticism, and that connotation sets the scope of this short essay. This Rejoinder will leave aside (albeit with thanks) the articles that explain the background to, the context for, or particular aspects of the Uniform Limited Partnership Act (2001). Instead, this Rejoinder will focus on the three articles that purport to find a blemish (Professor Bishop), a general theoretical deficiency (Mr. Callison and Dean Vestal), or a fundamental misconception (Professor Ribstein) in the new Act.

Keywords

Uniform Limited Partnership Act

Disciplines

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The Reporter's Rejoinder

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The word “rejoinder” connotes a reply to criticism,¹ and that connotation sets the scope of this short essay. This Rejoinder will leave aside (albeit with thanks) the articles that explain the background to, the context for, or particular aspects of the Uniform Limited Partnership Act (2001) (the new Act/ULPA (2001)). Instead, this Rejoinder will focus on the three articles that purport to find a blemish (Professor Bishop), a general theoretical deficiency (Mr. Callison and Dean Vestal), or a fundamental misconception (Professor Ribstein) in the new Act.

Professor Bishop and the “Control Rule” Blemish

In his article, *The New Limited Partner Liability Shield*,² Professor Carter Bishop begins with a very useful history of the control rule, which ULPA (2001) has eliminated.³ He then suggests two sets of circumstances in which, despite the elimination of the control rule, a limited partner might face general-partner-like liability for the debts of a limited partnership.⁴ With all respect to my co-author,⁵ co-reporter,⁶ and friend,⁷ this proposition is far more interesting as a concept than substantial as a practical danger.

According to Professor Bishop, the limited partner's danger has two aspects.

† The author served as the Reporter for the National Conference of Commissioners on Uniform State Laws (NCCUSL) Drafting Committee on the Limited Partnership Act.

1. See BLACK'S LAW DICTIONARY 1291 (7th ed. 1999) (defining the term as “[t]he defendant's answer to the plaintiff's reply”).

2. Carter G. Bishop, *The New Limited Partner Liability Shield: Has the Vanquished Control Rule Unwittingly Resurrected Lingering Limited Partner Estoppel Liability as Well as Full General Partner Liability?*, 37 SUFFOLK UNIV. L. REV. 667 (2004).

3. Daniel S. Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act*, 37 SUFFOLK UNIV. L. REV. 583, 625-31 (2004).

4. See generally Bishop, *supra* note 2.

5. See, e.g., CARTER G. BISHOP & DANIEL S. KLEINBERGER, LIMITED LIABILITY COMPANIES: TAX AND BUSINESS LAW (Warren Gorham & Lamont/RIA 1994 & Supp. 2003-2).

6. The author and Professor Bishop serve as Co-Reporters for the NCCUSL Drafting Committee on the proposed “second generation” Uniform Limited Liability Company Act. See National Conference on Commissioners on Uniform State Laws Drafting Committee, *Uniform Limited Liability Company Act*, <http://www.llcproject.org> (last visited Apr. 17, 2004).

7. This proposition is beyond citation, but some words from Emerson are on point: “A friend is a person with whom I may be sincere. Before him, I may think aloud.” RALPH WALDO EMERSON *Friendship*, in ESSAYS: FIRST SERIES (1841).

The first is that a limited partner's "participation in management and control" might cause the limited partner to be "deemed" a general partner and thereby subject to general partner liability for all the debts of the limited partnership.⁸ In Professor Bishop's view, this danger has two sources in the new Act. First, the new Act blurs the line between general and limited partners by permitting a person to become a general partner without being so designated in the limited partnership's certificate of limited partnership⁹ and without having the *written* consent of the partners. Second, by eliminating the control rule, the new Act encourages or at least enables limited partners to participate so fulsomely in the management of the limited partnership as to appear to be general partners *de facto* through the partners' implied consent.¹⁰

As Gene Wilder's character exclaims in the movie, YOUNG FRANKENSTEIN, "It could work!" However, there are several substantial practical barriers. First, although the new Act permits limited partners to substantially participate in management without risking their liability shield, few limited partnerships will have that type of power-sharing structure. For such arrangements, a limited liability company is a far more likely vehicle; the new Act is designed for "sophisticated, *manager-entrenched* commercial deals"¹¹ or family limited partnerships in which general partner control is a principal *raison d'être*.¹²

Second, where a limited partner does substantially participate in management, that participation will almost always be the product of negotiation between the general and limited partner, which will be documented in a partnership agreement that expressly characterizes the limited partner as a limited partner. That agreement will expressly and formally negate any creditor argument that the limited partner's participation reflects the limited partner's implicit and informal admission into the status of general partner.

Third, even in the most minimally-lawyered limited partnership deals, the partnership agreement will state that admission of a general partner requires some form of written consent or vote. This formal requirement should by itself suffice to negate a *de facto* general partner theory advanced by a limited partnership creditor.

Fourth, although under the new Act a person can become a general partner without the certificate of limited partnership so stating,¹³ the new Act requires the prompt amendment of the certificate to indicate the admission of a new general partner. Both the general partners and the limited partnership are at

8. See Bishop, *supra* note 2, at 708.

9. For a detailed analysis of this feature of the new Act, see Kleinberger, in note 3 above, at 653-57.

10. Bishop, *supra* note 2, at 707-10.

11. UNIF. LTD. P'SHIP ACT Prefatory Note (The Act's Overall Approach) (emphasis added) [hereinafter ULPA (2001)].

12. See Thomas Earl Geu, *Selected Estate Planning Aspects of the Uniform Limited Partnership Act (2001)*, 37 SUFFOLK UNIV. L. REV. 735, 736 (2004).

13. Kleinberger, *supra* note 3, at 653-57.

risk for failing to do so.¹⁴ Consequently, failure to amend is strong evidence against an implied admission theory.

Fifth, as Professor Bishop points out, a well-advised limited partnership will be a limited liability limited partnership (LLLP),¹⁵ and, with a LLLP, not even general partners have status-based liability for the limited partnership's debts.¹⁶

The second aspect of Professor Bishop's concern is estoppel liability.¹⁷ The nub of this theory is that: (i) a limited partner's participation in the management and control of a limited partnership might cause an innocent third party to reasonably believe that the limited partner is a general partner and thereby liable for the limited partnership's debts; (ii) those beliefs might cause the third party to deal with the limited partnership (reliance); and (iii) if so, the limited partner should be estopped from denying general-partner-like liability for the limited partnership's debt to the third party.

Estoppel is necessarily conduct-based, and the new Act certainly leaves open the possibility of an estoppel claim. The limited partner's liability shield pertains to obligations asserted "solely by reason of [the asserted obligor] being a limited partner"¹⁸ and "does not prevent a limited partner from being liable as a result of the limited partner's own conduct."¹⁹ The shield "is therefore inapplicable when a third party asserts that a limited partner's own wrongful conduct has injured the third party."²⁰

Nonetheless, substantial practical barriers face any third party that asserts an estoppel claim. First, the claim presupposes that the limited partner is so substantially involved in management as to cause a third party to believe that the limited partner is a general partner. As discussed above,²¹ such involvement will be rare.

Second, the third party's belief and reliance must be reasonable. Of course, if a limited partner affirmatively misrepresents itself as a general partner, the misrepresentation should be separately actionable. But Professor Bishop's focus is on estoppel that arises from a course of dealing. How reasonable is it for a potential obligee to *assume* a person is a general partner without that person ever saying so? Moreover, how reasonable can it be to rely on an appearance of general partner status when a simple telephone call to, or Internet stop with, the relevant filing office will reveal that the person is *not* a general partner according to the public record? A person can be a general partner

14. Kleinberger, *supra* note 3, at 654.

15. Bishop, *supra* note 2, at 710.

16. Kleinberger, *supra* note 3, at 619-25.

17. Bishop, *supra* note 2, at 711-15.

18. ULPA (2001) § 303.

19. ULPA (2001) § 303 cmt.

20. *Id.*; see also ULPA (2001) § 107(a) (providing that "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]"); Kleinberger, *supra* note 3, at 630 (explaining how the limited partner liability shield does not protect against conduct-based claims).

21. *Supra* notes 11-12 and accompanying text.

without being so designated in the public record,²² but can a third party—especially one about to decide to take a substantial risk—*reasonably* rely without even checking the record? If the record says one thing and appearances indicate another, shouldn't the reasonable person at least inquire further before relying on appearances?²³

Third, the estoppel argument depends not only on a claimant's reasonable belief as to a limited partner's status, but also on the claimant's reasonable belief that the apparent status carries a particular liability result. That is, it is not enough for the estoppel claimant to prove that it reasonably believed that a limited partner was a general partner. The claimant must also prove that it reasonably believed that the apparent general partner would be liable for the limited partnership's debts *by reason of general partner status*. Once upon a time, the latter point would have proved itself; for centuries the "hallmark consequence" of general partner status was personal liability for the obligations of the partnership.²⁴ Today, however, the status of general partner no longer carries an automatic implication of personal liability. As Professor Bishop points out, "the limited liability partnership (LLP) is already becoming standard fare" for the general partnership,²⁵ and the LLLP form is becoming increasingly available. In general, it is an anachronism to believe that an owner—even an owner-manager—is by that status automatically liable for the entity's debts.²⁶

In sum, as a practical matter, the new Act's "[v]anquished control rule" has not "[r]esurrected lingering limited partner estoppel liability [or] full general partner liability" for limited partners.²⁷

J. William Callison, Dean Allan W. Vestal and the New Act's "Lack of a Theory"

In contrast with Professor Bishop's more focused critique, J. William

22. See Kleinberger, *supra* note 3, at 653-57.

23. For a discussion of an analogous question, see ULPA (2001) comment to section 401 (following 2nd Example). The comment (i) acknowledges that "[t]he omission of a person's name from the certificate's list of general partners is not notice that the person is not a general partner," (ii) states that a "Third Party review of the certificate does not mean that Third Party knew, had received a notification or had notice that [the undesignated general partner] lacked authority" to bind the limited partnership, but (iii) notes that the limited partnership "could argue that, because Third Party knew that [the undesignated general partner] was not listed in the certificate, a transaction entered into by [the undesignated general partner] could not appear to Third Party to be for apparently carrying on the limited partnership's activities in the ordinary course." Compare ULPA (2001) § 201(d)(2) (addressing conflicts between the publicly-filed certificate of limited partnership and the private partnership agreement and providing that, if the third party has reasonably relied to its detriment on the certificate, as between the third party and the limited partnership "the certificate of limited partnership . . . prevail[s]").

24. DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIP AND LLCs § 7.3, at 200 (2000).

25. Bishop, *supra* note 2, at 710.

26. See ULPA (2001) § 108(a) cmt. (explaining that it is no longer "reasonable for third parties to believe that an individual whose own name appear[s] in the name of a business [will] 'stand behind' the business").

27. See Bishop, *supra* note 2, at 667.

Callison and Dean Allan Vestal take issue generally with the new Act for what they see as its lack of “a clearly articulated theory when structuring information access and disclosure provisions, and correlative fiduciary duties.”²⁸ Their critique is consistent with their previously stated criticisms of the Revised Uniform Partnership Act (RUPA) and the Uniform Limited Liability Company Act (ULLCA)²⁹ and contains five major points:

1. By incorporating RUPA’s fiduciary duty formulation, ULPA (2001) incorporated the manifest defects of that formulation.³⁰
2. By incorporating RUPA’s statement on the relationship among good faith, fiduciary duty, and self-interest, ULPA (2001) joined RUPA in “debas[ing] the partnership relationship.”³¹
3. Given the structural differences between the paradigmatic general partnership and the paradigmatic limited partnership, general partners in a limited partnership should have different fiduciary duties (or, at least, a different formulation of fiduciary duties) than general partners in a general partnership.³²
4. Given that ULPA (2001) permits and, arguably, even encourages the allocation of significant power to limited partners, the statutory allocation of fiduciary duty should, in effect, “float” to follow any such allocation.³³
5. Limited partners should have a fiduciary duty not to misuse confidential information obtained from the limited partnership.³⁴

This Rejoinder will address each of these points in turn and then consider the new Act’s supposed “want of a theory.”

Incorporating the “defects” of RUPA’s fiduciary duty formulation: The Symposium’s “User’s Guide” addresses this issue in depth.³⁵ Here it is worth adding that RUPA was approved by the American Bar Association and has already been adopted by a substantial majority of the states.³⁶ Some adopting

28. J. William Callison & Allan W. Vestal, *The Want of a Theory, Again*, 37 SUFFOLK UNIV. L. REV. 719, 719 (2004).

29. See, e.g., *id.* at 719 & n.2, 720 & nn.3-6, 722 & n.12, 727 & nn.33, 35-38 & 40, 728 & n.41, 729 & n.43, 730 & n.50.

30. *Id.* at 727.

31. *Id.* at 727.

32. Callison & Vestal, *supra* note 28, at 728-29.

33. Callison & Vestal, *supra* note 28, at 721. The word “float” is the author’s, not Mr. Callison’s and Dean Vestal’s.

34. Callison & Vestal, *supra* note 28, at 732.

35. Kleinberger, *supra* note 3, at 631-34.

36. Information provided on the NCCUSL website: *A Few Facts about the Uniform Partnership Act (1994)(1997)*, http://nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-upa9497.asp (last visited Apr. 17, 2004). The America Bar Association also approved ULPA (2001), see *A Few Facts about the Uniform Limited Partnership Act (2001)*, http://nccusl.org/nccusl/uniformact_factsheets/uniformacts-fs-ulpa.asp (last visited Apr. 10, 2004).

states have varied the fiduciary duty formulation, and those states can and probably will make corresponding changes when adopting ULPA (2001).³⁷

Fellow-traveling with RUPA's debasement of good faith and fiduciary duty—Like RUPA, ULPA (2001) provides that: “A . . . partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the . . . partner’s conduct furthers the . . . partner’s own interest.”³⁸ Mr. Callison and Dean Vestal believe that “this endorsement of self-interest debases the partnership relationship.”³⁹

This condemnation reflects a too-narrow understanding of the partnership relationship. When a partner deals with the partnership, fiduciary duty applies in full force. However, when a partner deals with a fellow partner, undivided loyalty is neither possible nor required:

According to Cardozo, partners may not use tactics appropriate to “arm’s length” transactions in their inter se dealings. But even if partners are never fully at arm’s length, they are nonetheless occasionally on opposite sides of the negotiating table. In such circumstances, self-interest is inherent and inevitable. It therefore cannot be *per se* evil.⁴⁰

For an example of this reality, consider the partners in a law firm who, pursuant to a partnership agreement, decide annually how to share out a certain “bonus” portion of the firm’s profits. In this “zero sum game,” some self-interest is inevitably in play.

Like RUPA, ULPA (2001) accepts this reality. “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.”⁴¹ Nonetheless, as explained in detail in the “User’s Guide,” the concept of good faith and fair dealing remains an effective (albeit narrow) means to police partner-to-partner conduct under the new Act.⁴²

37. For example, Illinois’s version of RUPA varies from the uniform act’s approach by making the formulation of fiduciary duties non-exclusive. 805 ILL. COMP. STAT. 206/404(a) (2004). The bill to enact ULPA (2001) in Illinois makes the same change. See S.B. 2982 (as engrossed), § 408 (page 40, lines 6-10), 93rd Gen. Assem. (Ill. 2004), available at <http://www.legis.state.il.us/legislation/93/sb/09300sb2982lv.htm> (last visited Apr. 16, 2004). As of April 8, 2004, the bill had passed the Senate by a vote of 55-0 and received a first reading in the House. See State of Illinois, 93rd General Assembly, Senate Vote, Senate Bill 2982 (Mar. 26, 2004), available at http://www.legis.state.il.us/legislation/votehistory/93/senate/09300SB2982_03262004_012000T.pdf; Illinois General Assembly, Bill Status of SB2982, 93rd General Assembly (House action), available at <http://www.legis.state.il.us/legislation/BillStatus.asp?DocNum=2982&GAID=3&DocTypeID=SB&LegID=10154&SessionID=3&GA=93#actions> (last visited Apr. 16, 2004).

38. ULPA (2001) § 305(c) (referring to limited partners); § 408(e) (referring to general partners). The RUPA provision is section 404(e), which is identical to the new Act’s formulation, except that the RUPA provision refers simply to a “partner.”

39. Callison & Vestal, *supra* note 28, at 727.

40. Kleinberger, *supra* note 24, § 9.8.5, at 265.

41. ULPA (2001) § 305(b) cmt.; see also ULPA (2001) § 408(d) cmt. (“This provision [on the obligation of good faith and fair dealing] is identical to Section 305(b) and the Comment to Section 305(b) is applicable here.”).

42. For further discussion of good faith under the new Act, see Kleinberger, note 4 above, at 635-38.

Different fiduciary duty formulations for two categorically different types of partnerships? Mr. Callison and Dean Vestal assert that, because general and limited partnerships involve fundamentally different types of power arrangements, the limited partnership statute should not have the same formulation for general partner fiduciary duty as the general partnership statute:

[G]eneral partner fiduciary duties should be more robust in limited partnerships than they are in general partnerships where, at least as a default rule, all general partners participate in firm management. Partnership law has long recognized that partners with controlling power should be subject to heightened fiduciary duties.⁴³

The Reporter for the new Act had some sympathy with this point of view and urged it during the drafting process. However, wiser heads prevailed,⁴⁴ in part because no one could identify a set of circumstances in which the RUPA formulation would produce a bad result in the limited partnership context.⁴⁵ The notion that the RUPA formulation “reduc[es] the general partners’ fiduciary responsibilities”⁴⁶ had no traction within the drafting committee—not among the NCCUSL Commissioners (who had voting rights) and not among the ABA Advisors (whose collective judgment was often at least as powerful as the Commissioners’ voting rights). And, as explained in the “User’s Guide,”⁴⁷

43. Callison & Vestal, *supra* note 28, at 729.

44. But see ULLCA (2001) comment to section 107(a), which asks “to what extent is the case law of general partnerships relevant to limited partnerships governed by this Act?” and notes that the new Act does not address the question. The Comment then suggests the following approach:

Predecessor law, RULPA Section 403, expressly equated the rights, powers, restrictions, and liabilities of a general partner in a limited partnership with the rights, powers, restrictions, and liabilities of a partner in a general partnership. This Act has no comparable provision. . . . Therefore, a court should not assume that a case concerning a general partnership is automatically relevant to a limited partnership governed by this Act. A general partnership case may be relevant by analogy, especially if (1) the issue in dispute involves a provision of this Act for which a comparable provision exists under the law of general partnerships; and (2) the fundamental differences between a general partnership and limited partnership are immaterial to the disputed issue.

45. Mr. Callison and Dean Vestal believe that they have found such circumstances: “the need to recognize that there can be preformation duties is probably heightened in traditional limited partnerships in which general partners are active, and limited partners passive, with respect to preformation negotiations and business arrangements.” Callison & Vestal, *supra* note 28, at 728. In the Reporter’s view, this point has some substance, but the drafting committee did not agree. Moreover, the anecdotal information provided by the ABA Advisers suggested that limited partnership deals are often heavily lawyered on *both* sides. This information suggests that the need for pre-formation duties may sometimes be *less* in the limited partnership context than with some general partnerships, where the absence of lawyers for any participants may lead to unrecognized instances of overreaching. See also Callison & Vestal, *supra* note 28, at 730 (describing circumstances in which the limited partner is more powerful and sophisticated than the general partner).

46. Callison & Vestal, *supra* note 28, at 729.

47. Kleinberger, *supra* note 3, at 635-38.

the statutory duty of good faith and fair dealing is available to control any expropriating behavior.⁴⁸

Should the allocation of fiduciary duty “float” between general partners and limited partners? In its allocation of fiduciary duty, ULP (2001) draws a clear line between general partners (who have it, in their capacity as general partners, and cannot delegate it away) and limited partners (who do not and will not have it, in their capacity as limited partners, even if the limited partnership agreement allocates to them management rights beyond those provided by the statute).⁴⁹ Mr. Callison and Dean Vestal criticize this approach and assert that “the actual relations of the partners, and not the formal designation, should control” the allocation of fiduciary duties and that the allocation should be responsive to “the amount of actual control in given situations.”⁵⁰

As detailed in “A User’s Guide,”⁵¹ early drafts of the new Act considered a “pro tanto” approach, but the Drafting Committee rejected the idea for at least five reasons:

1. Given the Act’s “strong manager” construct, a general partner’s fiduciary duties should be nondelegable. It would be improper to allow a *pro tanto* provision to “strip away” a general partner’s fiduciary duty.
2. Fiduciary duty properly attaches to managers, given their ongoing control of an enterprise’s operations, and should not automatically extend to mere owners who might be able to bargain for an increased role in governance (and thereby some increased control over the general partners).
3. Any *pro tanto* provision would inevitably create difficult line-drawing issues. Suppose, for example, a partnership agreement required the general partners to prepare and submit an annual operating budget to the limited partners. Consider how difficult it would be to divide the budgetary duty of care between the general and limited partners.
4. A *pro tanto* provision would necessarily be under-inclusive, unless the provision were to cover not only reallocation via the partnership agreement but also delegation by the general partner to one or more limited partners through a separate agreement.
5. If the partnership agreement allocates substantial managerial authority to limited partners who misuse that authority to unfairly prejudice other

48. See also BISHOP & KLEINBERGER, *supra* note 5, ¶ 14.05[4][a], at S14-17 (explaining that, even under Delaware’s fulsomely “contractarian” limited partnership statute, even the most far-reaching agreement “will not immunize managers or members from claims that they have acted in bad faith and with a ‘tortious state of mind’” and that “even the most aggressive exculpatory provisions will not prevent the Delaware courts from enjoining illegitimate conduct or ordering other equitable remedies”) (footnotes omitted).

49. Kleinberger, *supra* note 3, at 646-49.

50. Callison & Vestal, *supra* note 28, at 721-22.

51. Kleinberger, *supra* note 3, at 646-49.

partners, the statutory obligation of good faith and fair dealing will provide adequate recourse.⁵²

As to Mr. Callison and Dean Vestal's assertion that "in their experience" a partnership agreement might allocate management rights to limited partners "particularly in the event the partnership's business does not perform as projected,"⁵³ this is precisely the type of situation in which the limited partners should not be burdened with fiduciary duty. During the drafting process, several ABA Advisors emphasized this point. When a general partner is misbehaving and the limited partners seek to enforce their rights under the partnership agreement, the general partner should not be in a position to threaten the limited partners with claims that the limited partners are breaching some fiduciary duty to the general partner.⁵⁴

Or, in the words of the Delaware Chancery Court:

A fiduciary is typically one who is entrusted with the power to manage and control the property of another. In this case, that description would seem to fit [the General Partner], who has almost exclusive control over the management of the Partnership. Therefore, it is with some irony that [the General Partner] argues that the Limited Partners have breached their fiduciary duties in attempting to remove the General Partner who manages and controls their property, and with whom they are no longer satisfied. In this particular case, that action is more akin to shareholders voting to remove a board of directors—action to which fiduciary duties would not normally attach.⁵⁵

*Should limited partners have a fiduciary duty not to misuse the confidential information they obtain from the limited partnership?*⁵⁶ There is no question that a limited partnership should be able to protect itself from such misuse, and "A User's Guide" characterizes this area as one of the "rough edges" of the new Act's approach to fiduciary duty.⁵⁷ However, as that same article explains, the new Act provides some protection through the statutory obligation of good faith and fair dealing and authorizes further protection via the partnership

52. As for "[h]ope springing eternal," Callison & Vestal, *supra* note 28, at 721, there is the current draft of "ULLCA II," NCCUSL's project to draft a "second generation" uniform limited liability company act. The April 2004 meeting draft distinguishes "operational responsibilities" from "governance responsibility" and applies different fiduciary standards to the two categories. See ULLCA II § 102(7) (defining "governance responsibility"); § 102(12) (defining "operational responsibilities"); § 408 (stating standards of conduct). The April, 2004 meeting draft is available at <http://www.law.upenn.edu/bll/ulc/ullca/Apr2004MtgDraft.htm> (last visited Apr. 16, 2004), and at http://www.llcproject.org/ULLCA/ULLCA_Apr04_MtgDraft.pdf (last visited Apr. 16, 2004). As of this writing, the ULLCA II drafting committee has not discussed the April 2004 draft.

53. Callison & Vestal, *supra* note 28, at 724 n.15.

54. If the limited partners are overreaching the agreement, the general partner has ample protection under the agreement and the statutory obligation of good faith and fair dealing. Kleinberger, *supra* note 3, at 635-38.

55. *Wilmington Leasing, Inc v. Parrish Leasing Co., L.P.*, No. 15202, 1996 WL 752364, at *14 n.19 (Del. Ch. Dec. 23, 1996).

56. Callison & Vestal, *supra* note 28, at 732.

57. Kleinberger, *supra* note 3, at 642.

agreement.⁵⁸ The new Act even authorizes the general partners to act on their own to achieve still further protection.⁵⁹

Want of a theory? As to Mr. Callison and Dean Vestal's general complaint that the new Act is bereft of an animating theory, the answer is that the Act's provisions reflect a confluence of two theories:

- first, given "a world in which limited liability partnerships and limited liability companies can meet many of the needs formerly met by limited partnerships,"⁶⁰ the new Act should seek to serve "two types of enterprises that seem largely beyond the scope of LLPs and LLCs,"⁶¹ namely:
 - "sophisticated, manager-entrenched commercial deals whose participants commit for the long term, and . . . estate planning arrangements (family limited partnerships),"⁶² which means in turn that,
 - "the Act's rules, and particularly its default rules" should assume "strong centralized management, strongly entrenched," and "passive investors with little control over or right to exit the entity,"⁶³
- second, given the almost dizzying pace of change in business entity statutes⁶⁴ and despite the formal de-linking of the new Act from RUPA,⁶⁵ the new Act should be drafted so that it can be learned and understood in tandem with RUPA.

At first glance, the second "theory" may seem a mere matter of convenience and not a theory at all. But the "in tandem" approach can significantly reduce learning costs for the non-expert and perhaps make life a bit more bearable for the business law practitioner trying to keep pace with the rapidly evolving law of business entities.

Professor Ribstein and NCCUSL's "Heavy-Handed" Approach to Fiduciary Duty Waivers

In contrast to Mr. Callison and Dean Vestal, Professor Ribstein believes that the new Act's fiduciary duties are too "robust," at least in the sense that they are too resistant to waiver by contract. In his article, *Fiduciary Duties and*

58. Kleinberger, *supra* note 3, at 642.

59. Kleinberger, *supra* note 3, at 642.

60. ULPA (2001) Prefatory Note (The Act's Overall Approach).

61. *Id.*

62. *Id.*

63. *Id.*

64. Kleinberger, *supra* note 3, at 583-84.

65. ULPA (2001) Prefatory Note (The Decision to "De-Link" and Create a Stand Alone Act). For a detailed discussion of this decision, see Kleinberger, in note 3 above, at 584-87.

Limited Partnership Agreements, Professor Ribstein seeks to show “that the ULPA 2001’s restrictions on contracting regarding fiduciary duties are seriously misguided because they are based on a fundamental misunderstanding of the special nature and functions of the limited partnership form.”⁶⁶

ULPA (2001) does limit the extent to which a limited partnership agreement can affect both fiduciary duties and the obligation of good faith and fair dealing,⁶⁷ and Professor Ribstein’s critique fits well within his well-known and oft-rehearsed approach to fiduciary duty and business entities.⁶⁸ To him, and to other “contractarian” scholars, fiduciary duties within a business organization are merely a subset of the default rules that the law provides to govern the owners’ *inter se* relationship.⁶⁹ At least as to *inter se* matters, any “particular business form” is “a default contract,” and fiduciary duties are mere gap-fillers⁷⁰—to be restricted or even eliminated as the parties see fit.

In Professor Ribstein’s view, the driving force behind business entity structure should be the market for efficient sets of default rules.⁷¹ For any particular business form, Cardozo’s “punctilio of an honor the most sensitive”⁷² is appropriate (or not) depending on whether the punctilio serves the goal of efficiency.

Professor Ribstein’s critique of ULPA (2001) has three main components: (1) RUPA’s restrictions on fiduciary duty waivers are grievously mistaken, and ULPA (2001) has replicated that grievous mistake; (2) even if RUPA-like limitations on waiver make sense for general partnerships, such limitations make no sense for the very different world of limited partnerships; and (3) the Delaware law of limited partnerships has developed a near perfect approach to fiduciary duty waivers in limited partnerships, and ULPA (2001) has turned its back on Delaware’s wisdom. Each component will be addressed in turn.

Replicating RUPA’s “mistake” on fiduciary duty waiver?—Professor Ribstein devotes a substantial portion of his article to demonstrating the fallacy of RUPA’s approach to waiver of fiduciary duties,⁷³ while noting that “RUPA has now been adopted in approximately half the states.”⁷⁴ If RUPA is wrong

66. Larry E. Ribstein, *Fiduciary Duties and Limited Partnership Agreements*, 37 SUFFOLK UNIV. L. REV. 927, 927 (2004).

67. Kleinberger, *supra* note 3, at 632.

68. See e.g., Ribstein, *supra* note 66, at 931 n.9, 933 n.21, 937 n.41, 940 n.52, 941 n.59, 945 n.77, 951 n.94.

69. Ribstein, *supra* note 66, at 934 (stating that “[t]he appropriate design of limited partnership fiduciary duties” should be developed just “like that of other standard form rules”); *id.* at 937 (stating that “[f]iduciary duties are a specific type of contractual term”).

70. Ribstein, *supra* note 66, at 931.

71. Ribstein, *supra* note 66, at 934.

72. The phrase is from *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), and is “probably the most often quoted passage in all of partnership law.” KLEINBERGER, *supra* note 24, § 9.8.1, at 259.

73. Ribstein, *supra* note 66, at 945-51.

74. Ribstein, *supra* note 66, at 929.

on the waiver point, *a fortiori* ULPA (2001) is wrong, because (i) the paradigmatic limited partnership involves participants with greater sophistication than the participants in the paradigmatic general partnership,⁷⁵ and (ii) the availability of waiver should correlate positively with the sophistication of the parties agreeing to the waiver.⁷⁶

But according to the marketplace of ideas, RUPA is not wrong. As of this writing, RUPA has been adopted in thirty-two states, the District of Columbia and the U.S. Virgin Islands.⁷⁷ Additional enactments are likely, as NCCUSL resumes focus on RUPA following the Conference's lengthy preoccupation with revising the Uniform Commercial Code. Moreover, while the academics were divided on this issue,⁷⁸ the American Bar Association chose to endorse RUPA.⁷⁹ That endorsement should be significant to Professor Ribstein because lawyers constitute the key decision makers in "the market for business forms."⁸⁰

Are RUPA-like waiver limitations out of place in the world of limited partnerships?—Analysis of this point requires an understanding of the world of limited partnerships. Everyone agrees that the limited partnership world differs fundamentally from the world of general partnerships, but there is considerable disagreement as to the precise nature of the limited partnership world.⁸¹

The new Act presupposes a limited partnership world populated with passive investors and strong, entrenched managers.⁸² Professor Ribstein considers that presupposition overbroad. He asserts that the limited partnership form should be designed more specifically for passive investors relying on asset managers—as distinguished from managers operating a "going concern" business.⁸³ This hypothesis is connected to another, more salient one—namely, that the law's approach to fiduciary duty waivers should be different (and more deferential) in the limited partnership context than in the context of other business entities.⁸⁴

75. On this point at least, Professor Ribstein and the drafters of ULPA (2001) agree. See ULPA (2001) Prefatory Note (The Act's Overall Approach); Ribstein, *supra* note 66, at 927 (abstract).

76. Ribstein, *supra* note 66, at 927 (abstract).

77. Information provided on the NCCUSL website. See *supra* note 36.

78. See, e.g., Ribstein, *supra* note 66, at 941 n.53.

79. See *supra* note 36 (setting forth NCCUSL website).

80. Ribstein, *supra* note 66, at 931.

81. Compare, for example, Professor Ribstein's view, described above, that limited partners should be assumed to be unremittingly passive, with the view of J. William Callison and Dean Vestal. See Callison & Vestal, *supra* note 28, at 723 n.15 (asserting that, "in our experience limited partnerships also are used for transactions in which the limited partner retains substantial management participation rights").

82. ULPA (2001) Prefatory Note (The Act's Overall Approach).

83. Ribstein, *supra* note 66, at 934.

84. Ribstein, *supra* note 66, at 927 (abstract) (stating that "[e]ven if restrictions on fiduciary duty waivers are appropriate in some contexts, they clearly are inappropriate in limited partnerships"); see also *id.* at 943 (stating that "particularly in limited partnerships, restricting waiver of fiduciary duties involves uncertain benefits and potentially significant costs") (emphasis added).

These hypotheses rest on some interesting assumptions, such as the notion that the lack of a significant secondary market in limited partnership interests “focuses more investor attention on the specific language of the constitutive documents”⁸⁵ and the assertion that, because limited partnership interests “are likely to be securities, the disclosure requirements of federal and state securities law will “help ensure disclosure of important contract provisions, including fiduciary duty waivers.”⁸⁶

Some of Professor Ribstein’s assumptions are indubitably correct, but some of the inferences are questionable. For example, limited partnership interests are almost invariably securities,⁸⁷ but so too are interests in closely held corporations.⁸⁸ Thus, the application of securities law to limited partnership interests does not justify any special deference to fiduciary duty waivers contained in limited partnership agreements.⁸⁹

Some of Professor Ribstein’s other assumptions seem questionable in themselves. For example, the assertion that “the typical limited partnership . . . is unlikely to have significant debts to outside creditors”⁹⁰ ignores real estate limited partnerships as well as the significant tax advantages provided by non-recourse debt.⁹¹

In sum, his argument that the waiver regime for limited partnerships must differ from the regime for general partnerships remains just that—an interesting but unproven argument.⁹²

Shunning the wisdom of Delaware—Professor Ribstein also criticizes ULPA (2001) for eschewing the balanced and nuanced approach to fiduciary waiver contained in the Delaware limited partnership statute and Delaware case law:

85. Ribstein, *supra* note 66, at 935.

86. Ribstein, *supra* note 66, at 935.

87. BISHOP & KLEINBERGER, *supra* note 5, ¶ 11.03[1][c][ii], at 11-22, S11-19.

88. BISHOP & KLEINBERGER, *supra* note 5, ¶ 11.02[7], at 11-15.

89. Professor Ribstein attempts to create a distinction by arguing that “the limited partnership form itself serves as a caution flag that should induce users to get legal advice, and that reduces the justification for protecting those who do not do so” and by characterizing close corporations along with general partnerships and limited liability companies as “‘default’ business forms that are likely to be used by small businesses, often with minimal planning and possibly without sophisticated legal advice.” Ribstein, *supra* note 66, at 942. It is difficult to see how close corporations and limited liability companies are properly characterized as “default” forms, since both of these entities come into existence only upon the filing of a public document with a public official or office specified by statute. Moreover, although some close corporations and LLCs come into existence without legal advice, many are as heavily lawyered as a limited partnership deal.

90. Ribstein, *supra* note 66, at 935.

91. BISHOP & KLEINBERGER, *supra* note 5, ¶ 3.10[4], at 3-45.

92. In at least one respect, the argument is more than unproven; it is wrong. By way of denigrating the new Act’s restrictions on fiduciary waiver, Professor Ribstein asserts that “the restrictions would force general partners in family limited partnerships to assume fiduciary duties to junior family members.” Ribstein, *supra* note 66, at 964. Such fiduciary duties are not problematic. To the contrary, they are essential to achieving the tax avoidance goals of a family limited partnership. See Geu, *supra* note 12, at 807.

“ULPA 2001 provides a kind of ‘limited partnership law for dummies,’”⁹³ and “legal advice to form under ULPA usually would be highly questionable, if not malpractice, for the many firms that could afford to organize under the more flexible Delaware-type law.”⁹⁴

To assess this criticism requires some assessment of the Delaware law of limited partnerships. Without question, that law is a fertile ground for analysis. Of late, the statute changes yearly,⁹⁵ the drafting is old style (Byzantine at best),⁹⁶ and the rich fabric of case law is achieved through often lengthy, always expensive, and almost always complex litigation.

Moreover, even Homer nods and even the vaunted Court of Chancery sometimes gets out line.⁹⁷ For example, on the very issue of fiduciary duty waiver, the Delaware Supreme Court recently felt compelled to engage in *dicta* in order to repudiate *dicta* pronouncements from the Chancery Court. At least two Chancery Court opinions had suggested that a Delaware limited partnership agreement could completely eliminate a general partner’s fiduciary duty. The Delaware Supreme Court emphatically disagreed:

[I]n the interest of avoiding the perpetuation of a questionable statutory interpretation that could be relied upon adversely by courts, commentators and practitioners in the future, we are constrained to draw attention to the statutory language and the underlying general principle in our jurisprudence that scrupulous adherence to fiduciary duties is normally expected. . . . There is no mention in [the statute], that a limited partnership agreement may *eliminate* the fiduciary duties or liabilities of a general partner.⁹⁸

The court went on to further “note the historic cautionary approach of the courts of Delaware that efforts by a fiduciary to escape a fiduciary duty, whether by a corporate director or officer or other type of trustee, should be scrutinized searchingly.”⁹⁹ It thus seems a bit far-fetched to assert that the Delaware regime of “case-by-case judicial interpretation” of fiduciary waiver is

93. Ribstein, *supra* note 66, at 964.

94. Ribstein, *supra* note 66, at 964.

95. For example, during a span of seven years the definition section alone was amended by the following acts: 66 DEL. LAWS 316, §§ 1-3 (1987-88); 67 DEL. LAWS 348, §§ 1-2 (1989-90); 69 DEL. LAWS 258, § 1 (1993); 70 DEL. LAWS 186, § 1 (1995); 71 DEL. LAWS 78, § 1 (1997); 71 DEL. LAWS 340, §§ 1-2 (1998); 72 DEL. LAWS 228, § 1 (1999); 73 DEL. LAWS 73, §§ 1-2 (2001); 73 DEL. LAWS 297, § 1 (2001) (each amending DEL. CODE ANN., tit. 6, § 17-101).

96. What the Delaware Supreme Court wrote in *Elf Atochem North America, Inc. v. Jaffari*, 727 A.2d 286, 291 (Del. 1999), of the Delaware Limited Liability Company Act could also be said of the Delaware limited partnership statute: “provisions that are prolix, sometimes oddly organized, and do not always flow evenly.” See BISHOP & KLEINBERGER, *supra* note 5, ¶ 14.01[2], at 14-6 to 14-7 (“Much of the Delaware LLC Act is copied from the Delaware Revised Uniform Limited Partnership Act, and, therefore, incorporates many of that law’s vagaries.”) (citations omitted).

97. Horace: De Arte Poetica, 359 (*Quandoque bonus dormitat Homerus*) (Even the worthy Homer sometimes nods).

98. *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 167-68 (Del. 2002) (emphasis in original).

99. *Id.* at 168.

so "far superior"¹⁰⁰ to the RUPA-ULPA approach that to invoke ULPA (2001) is to commit malpractice.

Conclusion

This Symposium has provided an excellent opportunity to examine the new Uniform Limited Partnership Act, to air and respond to criticisms of some of the new Act's important provisions, and, in doing so, to honor the memory of Marty Lubaroff, the original ABA Advisor to the drafting project that produced ULPA (2001). He was one of the nation's preeminent partnership lawyers, and, more importantly, a fine and decent man.

100. Ribstein, *supra* note 66, at 964.

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