Approved: January 28 1997
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Mike Harris at 10:10 a.m. on January 22, 1997 in Room 514-S of the Capitol.

All members were present except:

Committee staff present: Mike Heim, Legislative Research Department
Jerry Donaldson Legislative Research Department
Gordon Self, Revisor of Statutes
Mary Blair, Committee Secretary

Conferees appearing before the committee: Debra Perelman, National Conference of Commissioners on Uniform State Laws (ULC)
Webb Hecker, Kansas University Law Professor

Melissa Wangemann, Secretary of State Legal Counsel

Others attending: See attached list

Minutes of the January 15, 16, and 21 meetings were approved on a motion by Senator Emert and seconded by Senator Oleen. Motion carried.

SB 8 - Uniform Fraudulent Transfer Act
SB 9 - Uniform Partnership Act

Conferee Debra Perelman introduced herself and acquainted committee members with the history and function of the organization she represents which drafted the Uniform Fraudulent Transfer Act (UFTA) - **SB 8**. After giving the historical progression of UFTA (formerly the Uniform Fraudulent Conveyance Act - circa 1918), Ms. Perelman defined the term fraudulent transfer and summarized the intent and purpose of the act. (Attachment 1) She stated that 37 states have adopted UFTA and she recommended Kansas do so as well. Conferee Perelman related the history of the Uniform Partnership Act (UPA) which was written into law in 1914 and has needed no revisions until the present time. She stated that the ULC felt it was necessary to modernize the act's concepts and bring partnerships in line with current trends in the business world so the act was revised in 1994 and became the Revised Uniform Partnership Act (RUPA) - **SB 9**. Conferee Perelman presented some highlights about RUPA summarizing such topics as: RUPA as a default statute, entity approach, partnership break-ups, rights and duties of partners, creditors' rights and partnership property, statement of authority and new terminology. (Attachment 2) She stated that in 1996 RUPA was amended to include the Limited Liability Partnership Act (LLP). (Attachment 3) There was discussion and clarification of terminology and in response to Senator Emert's inquiry about merging the LLP language into **SB 9**, Ms. Perelman stated there was a language diskette available that could easily insert the language into the bill.

Conferee Webb Hecker, testified as a proponent of **SB 9**. He established his credentials and summarized the history of RUPA stating that it has been adopted in 49 out of 50 states. He stated that much of the language and concepts in the revised version of UPA remains the same as the original. He summarized the revisions that were made stating that the new act: codifies resolutions, requires unlimited liability of the partners, distinguishes between partnership creditors and individual creditors, codifies fiduciary duties of partners, and codifies duty of loyalty and duty of care. He defined the concept of disassociation as specified in Sect. 30 of the bill and referred committee members to the end of the bill for definitions of new concepts and provisions. There was discussion about the distinguishing differences between Kansas' current limited liability provisions and uniform limited liability provisions.

Conferee Melissa Wangemann outlined technical and procedural differences between **SB 9** and current law and how changes would effect the Secretary of State's office. She requested from the committee, consideration of several proposals she offered. (Attachment 4)

Written testimony was distributed by Ron Smith, General Counsel to the Kansas Bar Association in support of both **SB 8** and **SB 9**. (Attachment 5)

The Chair adjourned the meeting at 11:05 a.m. The next meeting is scheduled for January 23, 1997

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE JUDICIARY COMMITTEE GUEST LIST

DATE: 1-22-97

NAME	REPRESENTING
Paul Shelby	OJA
Webb Hecker	KU Law School
Debra Peehan	NAT'L Conference of Commissioners on Uniform State Laws
Ron Smith	Ks Bar Assoc
PHIL WAGES	SECRETARY OF STATE
Melissa Wangemann	"
Barbara Combs	KSC
Julie Meyer	KSC
Leigh Anne Harben	Budget Div.
Jeff Bridges	DOB
JAMES CLARK	KCDAA
Whitney Damron	Kansas Bar Assn.
Kathy Taylor	KBA
Kristin Baker	ACLU
[illegible]	ACLU
Jolene [illegible]	KTLA

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A Few Facts About
THE UNIFORM FRAUDULENT TRANSFER ACT

PURPOSE: Providing a creditor with the capacity to procure assets a debtor has transferred to another person to keep them from being used to satisfy the debt.

ORIGIN: The Uniform Fraudulent Transfer Act, completed by the Uniform Law Commissioners in 1984, revises the Uniform Fraudulent Conveyance Act of 1918.

ENDORSED BY: American Bar Association

STATE ADOPTIONS:

Alabama
Arizona
Arkansas
California
Colorado
Connecticut
Delaware
District of Columbia
Florida
Hawaii
Idaho
Illinois
Indiana
Iowa
Maine
Massachusetts
Minnesota
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Jersey
New Mexico
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Dakota
Texas
Utah
Vermont
Washington
West Virginia
Wisconsin

1997 INTRODUCTIONS:

For any further information regarding the Uniform Fraudulent Transfer Act, please contact John McCabe or Katie Robinson at 312-915-0195.

(1/1/97)

Senate Judiciary
attachment 1
1-22-97

WHY STATES SHOULD ADOPT
THE UNIFORM FRAUDULENT TRANSFER ACT

Are we only as good as the extent to which we honor our obligations? Many would argue for this proposition. And when our obligations are financial, the argument is reinforced by law. It is to this proposition that the Uniform Fraudulent Transfer Act is addressed. If we have acquired debt we should not be able to manipulate our assets so that creditors will be deprived of their value when we default on our debt. We should not be able to plan an artificial insolvency by transferring assets to others against the interests of our creditors.

The Uniform Fraudulent Transfer Act works as a deterrent, preventing such transgressions against obligations incurred, and provides creditors with a remedy when debtors transfer or hide assets that would otherwise be available to satisfy legitimate debts.

While the issue of obligation is preeminent, the economic issue is no less important. Credit is essential to the economic life of this country. Consumer credit, commercial credit, secured and unsecured credit enter into our lives, everyday. Credit remains available so long as those who extend it are given certain assurances about their rights at default. The Uniform Fraudulent Transfer Act provides assurances to creditors that help make credit available to all of us.

This economic issue leads directly to the issue of uniformity. The availability and the health of the credit mechanism require national standards. The principles of the old Uniform Fraudulent Conveyance Act became applicable to every person in every state because it was incorporated into the Federal Bankruptcy Act. Much of what is in the newer Fraudulent Transfer Act duplicates the Bankruptcy Reform Act of 1978. Uniformity has become not only a question of law between states, but also between state and federal law. Without uniformity, credit becomes less available, and the credit mechanism is less reliable. To avoid confusion and expense, the same rules must apply throughout the country. Public expectations are the same in every state and jurisdiction.

Associated with the issue of uniformity is the issue of modernity. The original Fraudulent Conveyance Act, which the Fraudulent Transfer Act replaces, was promulgated in 1918. Changes in federal bankruptcy law, in creditor-debtor relations in general, even in the rules governing the conduct of lawyers, make it clear that a modernization is overdue. The Uniform Fraudulent Transfers Act answers that immediate need.

A SHORT COMPARISON OF THE UNIFORM FRAUDULENT TRANSFER ACT

WITH THE UNIFORM FRAUDULENT CONVEYANCE ACT

The Uniform Fraudulent Transfer Act (UFTA) is a modernization of the Uniform Fraudulent Conveyance Act (UFCA) that was originally promulgated by the Uniform Law Commissioners in 1918. Since the rights and remedies between the earlier and later Acts are much the same, what are the differences, and what advantages accrue from adopting the UFTA over the UFCA? A short summary of the substantive differences follows[1]:

1. There are a number of more precisely defined terms in UFTA in Section 1 than are found in Section 1 of the UFCA. These new definitions include the words "affiliate," "claims," "debtor," "insider," "lien," "person," "property," "relative," "transfer," and "valid lien." The newly defined terms result in greater clarity throughout the UFTA and facilitate new provisions that will be discussed a little further on. Of the definitions, the one giving the UFTA its new title is "transfer." "Transfer" replaces the word "conveyance" as found in Section 1 of the UFCA. Both are comprehensive terms, but "transfer" comes from Section 101(48) of the Bankruptcy Code and is the more accepted modern term.

2. Both UFTA and UFCA define "insolvency" in Section 2, but UFTA establishes a rebuttable presumption of insolvency in Section 2(b) when a debtor is not generally paying his or her debts as they become due. Section 2(d) of UFTA prevents any fraudulently transferred property from being included in the debtor's assets when determining whether the debtor is insolvent or not. Section 2(e) of the UFTA prevents any obligation secured by a valid lien on the debtor's property, that is not an asset under Section 4, from being included as a debt for the purposes of determining insolvency. UFCA has no provisions similar to UFTA Sections 2(b), (d) or (e).

3. UFTA Section 3 replaces the term "reasonably equivalent value" for the term "fair consideration" as found in UFCA Section 3. "Reasonably equivalent value" is somewhat different from "fair consideration." "Good faith," which is an element in "fair consideration," is not an element in "value." "Good faith" becomes an element of defenses raisable under UFTA

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[1] A complete overview of the UFTA is contained in the summary that accompanied this comparison.

Section 8. Also, "reasonably equivalent value" does not "include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person." "Fair consideration" under UFCA does not explicitly exclude such an unperformed promise, and there is a split in authorities as to whether such promises are or are not "fair consideration." Generally, under UFTA, "reasonably equivalent value" is to be considered from the point of view of the creditor. Would the value received in the transfer be available to satisfy the debt?

Section 3(b) of the UFTA deals specifically with the problem raised by <u>Durrett v. Washington National Insurance Company</u>, 621 F.2d 201 (5th Cir. 1980), in which a foreclosure sale of a debtor's property under a mortgage was held a fraudulent transfer when the sale resulted in a recovery of less than 70% of the property's value. Section 3(b) of UFTA provides that "reasonably equivalent value" results when a properly conducted foreclosure sale takes place, no matter the amount recovered. UFCA includes no comparable rule.

UFTA Section 3(c) defines "present value." No similar rule is included in the UFCA.

4. UFTA Section 4(a) combines Sections 5, 6 and 7 of UFCA with clarifications. Section 4(b) of UFTA is new. Section 4 of UFTA generally provides for those actions that are fraudulent to present and future creditors. A future creditor under this Section is, simply, one whose claim "arose . . . after the transfer was made or the obligation incurred."

Section 4(b) lists a series of factors that may be considered to determine the issue of intent under Section 4(a)(1). The list of factors includes most of the badges of fraud construed by courts over the history of the UFCA and predecessor legislation. The list is non-exclusive.

5. UFTA Section 5 provides for transfers fraudulent to creditors only. Section 5(a) is derived from Section 4 of the UFCA. Section 5(b) is new, and identifies a kind of transfer, the "insider" transfer, that is not specifically a fraudulent transfer in the UFCA. The "insider" transaction in Section 5(b) of the UFTA is derived from prior case law. An "insider" is defined in Section 1(7) of the UFTA and includes relatives or family members, partners, a corporate director, and the like.

In part, Section 8 of the UFCA is subsumed in

Section 5(b) of the UFTA. Section 8 of the UFCA deals with transactions between partners and with a person not a partner that results in the insolvency of the partnership. Although partners are "insiders" under the UFTA, liability occurs when an insider "had reasonable cause to believe that the debtor was insolvent." Under Section 8(a) of the UFCA, a partner was, per se, liable, a rule deemed unduly favorable to partnership creditors and unduly burdensome to a partner's creditors. UFTA has no specific sections dealing with partnership transfers such as Section 8 of the UFCA.

6. Section 6 of the UFTA is entirely new. It was created to eliminate questions about the time a transfer is made or an obligation is incurred.

7. Section 7 of the UFTA incorporates Sections 9 and 10 of the UFCA. The UFTA makes no distinction between claims of creditors that have matured as opposed to those that are unmatured, as the UFCA does. Remedies under Section 7 are available to all creditors. Section 7(a)(2) provides for attachment, subject to constitutional constraints. But attachment is offered as an alternative remedy in the UFTA because of the uncertainty over the constitutional problems. A jurisdiction may reject Section 7(a)(2) without impairing uniformity, therefore.

8. Section 8 of the UFTA is entirely new. The UFCA does not provide for transferee defenses and protection of transferee interests. Note that good faith is an element of the defense established in Section 8(a).

9. UFTA Section 9 is new. It establishes statutes of limitations, a subject not addressed at all in the UFCA.

THE UNIFORM FRAUDULENT TRANSFER ACT

by

FRED H. MILLER
Professor of Law at the University of Oklahoma

Section by Section Analysis of the Act

Section 1 contains definitions. Section 2 also contains the definition of "insolvent," and Section 3 the definition of "value." The definition of "asset" in Section 2(2), together with the latter definitions of "insolvent" and "value," in a general sense formulate the core concept of the act: the transfer of an asset (or incurring an obligation) for inadequate value by an insolvent debtor or one rendered insolvent by the transaction is a fraudulent transfer. Subsection 3(B) is worth particular note in this respect because it overrules for state law the controversial holding in Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980), that a regularly conducted mortgage foreclosure that produces a price "too low" may be avoided as a fraudulent conveyance. By clouding property titles the Durrett rule virtually is a self-fulfilling prophecy.

Section 4 Subsection a(1) states the basic rule of the act: a transfer made or an obligation incurred with actual intent to hinder, delay or defraud creditors is actionable by creditors. How does a creditor prove the debtor's actual intent? Subsection b sets out "badges of fraud" if several of these appear it is strong evidence. Subsection a(2), on the other hand, sets out two cases where the law decrees the intent exists if the facts are as stated.

Section 5 states two further cases where the law decrees the transaction is fraudulent, but only as to present creditors and not also as to creditors arising later as is the case for transfers covered by Section 5.

Section 6 defines when a transaction occurs. It occurs when it can prejudice the rights of third parties, and not when it actually occurs between the parties to it. For example, a creditor does not need this act to set aside a fraudulent security interest that is never filed; the creditor can defeat that interest under the Uniform Commercial Code. Subsection 5 of this Section also states the time when an obligation is incurred.

Section 7 describes the remedies a creditor has to attack and avoid a fraudulent transfer or obligation.

Section 8, however, protects a good faith purchaser for reasonably equivalent value who did not share in the debtor's fraudulent purpose and subsequent good faith transferees for value who are sufficiently remote. Subsection (d) also gives a good faith transferee or obligee against whom the transaction can be avoided protection for any value given.

Subsection (e) is important as protecting lease terminations and security interest enforcement against "Durrett type" attacks, and Subsection (f) allows "workouts" and the like to occur.

Section 9 prescribes statutes of limitation specifically for the act.

Section 10 states the act is supplemented by other law and Section 11 specifies that in interpreting the act, precedent from other states that have enacted it should be used to maintain uniformity.

Section 12 provides the title.

Section 13 repeals the current statutes on the subject, including any old predecessor versions of this act.

DURRETT, THE UNIFORM FRAUDULENT TRANSFER ACT, AND FEDERAL BANKRUPTCY LAW - SORTING OUT CONFUSION

There has been much confusion over the relationship of mortgage foreclosures, however done, and fraudulent conveyance statutes, including the 1984 Uniform Fraudulent Transfer Act (UFTA). The confusion results from a single, now notorious case, Durrett v. Washington Nat. Ins. Co., 621 F.2d 201 (5th Cir. 1980). The Court, in Durrett, held a noncollusive mortgage foreclosure conducted pursuant to Texas law a constructively fraudulent transfer under Section 67d of the Bankruptcy Act. The Bankruptcy Act has fraudulent transfer provisions directly analogous to the UFTA.

Durrett has not been followed in all circuits of the federal courts. It has been directly rejected in the Sixth and Ninth Circuits, for example. Its influence on state law in the interpretation of the 1918 Uniform Fraudulent Conveyance Act (UFCA) and those states still following the common law is not yet clear. Much speculation attends the possibilities in that regard, however.

Why is Durrett so important? Its holding calls the validity of the bulk of mortgage foreclosure sales into question. Almost never do such sales realize the current market price for real estate bought and sold in the ordinary course. A key element in fraudulent conveyance analysis is the concept of "fair consideration" or "reasonably equivalent value." In Durrett, the foreclosure sale realized less than 70% of the alleged market value, and was a fraudulent transfer for that fact.

As a result of Durrett, buyers in foreclosure sales lose assurance of title. Lenders cannot be sure of lending practices. The uncertainty that Durrett forecasts has large economic impact in real estate markets.

UFTA attempts to alleviate the difficulties that Durrett suggests. In Section 3(b), value is "reasonably equivalent value" if given in "a regularly conducted, noncollusive foreclosure sale or execution of a power of sale for the acquisition or disposition of the interest of the debtor upon default under a mortgage, deed of trust, or security agreement." Adoption of this provision would preclude a Durrett type of holding in any state adopting UFTA. Only private, non-public types of transfers, such as some kinds of deed in lieu of foreclosure, would be vulnerable. But these are exactly the kinds of transfers UFTA is designed to remedy anyway. UFTA Section 3(b) removes the uncertainty that Durrett has created, insofar as state law is concerned.

We must be clear, however, on the distinction between federal and state law, the Bankruptcy Act and state fraudulent conveyance law. Durrett still applies in federal bankruptcy law,

even when the UFTA applies in state actions. Indeed, in the 1984 amendments to the Bankruptcy Act, the holding in Durrett was reinforced. Durrett continues to be a problem in bankruptcy proceedings.

Why eliminate Durrett-type holdings? Durrett reflects dissatisfactions with the state of foreclosure procedures and perceived inequities that result from them. And that may be a legitimate concern. Using notions of fraudulent transfer to redress those inequities, however, is an oblique approach at best and a meat axe at the worst.

UFTA, its predecessor UFCA, and all fraudulent conveyance law preceding them primarily protect unsecured creditors (those for which no property acts as collateral) from certain actions of debtors that most everybody can agree are actually or constructively fraudulent. Durrett tends to turn that notion on its head. It would turn the remedy against secured creditors who are using accepted, legal procedures to recover loss after a default. This is not a role that fraudulent transfer law was ever designed to fill.

Not only does Durrett turn the remedy against an inappropriate defendant, it clouds every subsequent sale until the statute of limitations runs on any possible fraudulent transfer action. Every title examination after a foreclosure must inevitably result in exceptions for fraudulent transfer actions, leaving subsequent purchasers exposed. These are costs that are borne by sellers and buyers who are not involved in the foreclosure. If there are inequities in foreclosure actions, attacking them with fraudulent transfer theories merely spreads their burden to others. Nothing is really done to remedy them. UFTA Section 3(b) is an appropriate, timely response to the problem.

UNIFORM FRAUDULENT TRANSFER ACT

When we say a person "owns" something, we tend to think in all or nothing terms. Whatever a person owns is at that person's disposal - to sell, to give, to abandon, or to pledge as security for a debt. But relationships between people over property are never so simple or so unqualified. A creditor-debtor relationship, for example, may materially change an owner's power over the property owned. A mortgage, clearly, restricts what an owner may do with mortgaged real estate. The creditor has legally protected rights in the real estate securing the debt. Under Article 9 of the Uniform Commercial Code, secured creditors, also, obtain rights in collateral that are protected.

A less clear category, but important to the maintenance of credit, is that of the unsecured creditor-debtor relationship in which the debtor manipulates property to defeat the creditor's interest solely for that purpose and for no other. Perhaps the debtor foresees insolvency and tries to conceal property that a creditor might use to satisfy the debt. Perhaps the debtor never intends to satisfy the debt and manipulates property to make himself judgment-proof. Should the creditor be without recourse, and should the debtor's rights to deal with property be unrestricted in these kinds of cases?

The National Conference of Commissioners on Uniform State Laws (ULC) proposed the Uniform Fraudulent Conveyance Act (UFCA) in 1918 as an answer to that question. It was created to supersede the Statute of 13 Elizabeth which was enacted in some form by many states, and which introduced the concept of the fraudulent conveyance into the law of every American jurisdiction, with or without enactment. The UFCA was adopted in twenty-six states, and its provisions were incorporated into the Federal Bankruptcy Act.

In 1984, this 1918 Act was revised and renamed the Uniform Fraudulent Transfer Act (UFTA). The intent of the UFTA is the same as the UFCA - it classifies a category of transfers as fraudulent to creditors and provides creditors with a remedy for such transfers. The fundamental remedy is the recovery of the property for the creditor. Why a new Act at this time? The terminology of the UFCA had become considerably archaic, and needed to be modernized. The Bankruptcy Reform Act of 1978 changed the federal law on fraudulent transfers in significant ways, and made it imperative to reconsider state law. And creditor-debtor relationships have changed and become more complicated, so that the whole issue of fraudulent transfers needed rethinking. In 1984, the UFTA is ready to promote the modernization of this subject area of law.

UFTA creates a right of action for any creditor against any debtor and any other person who has received property from the debtor in a fraudulent transfer. A fraudulent transfer occurs when a debtor intends to hinder, delay, or defraud a creditor, or transfers property under certain conditions to another person without receiving reasonably equivalent value in return. But not all such transfers are fraudulent to every creditor.

UFTA distinguishes between present and future creditors, and specifies the kinds of transfers that are fraudulent to each of the two categories of creditors. Both present and future creditors may recover property when there is a transfer with intent to defraud. Both may recover when a transfer is made without receiving reasonably equivalent value when the result is to make the debtor's assets unreasonably small in relation to the business or transaction in which the debtor is engaged or about to be engaged. Also, present and future creditors can both recover when a debtor transfers property without receiving reasonably equivalent value when intending to incur debts beyond the ability to pay.

Present creditors, however, can recover property when it is transferred by a debtor to another person without receiving reasonably equivalent value if the debtor is insolvent or becomes insolvent as a result of the transfer. A transfer to an "insider" without receiving reasonably equivalent value when the debtor is insolvent, is also fraudulent to present creditors. The term "insider" is defined, and is someone with a special relationship to the debtor. Examples are relatives or business partners (when the debtor is a partner). To be liable, an "insider" must have reasonable cause to believe that the debtor is insolvent.

The fundamental relief for a creditor when there is a fraudulent transfer is recovery of the property from the person to whom it has been transferred. UFTA allows "avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim...." Whatever is necessary to obtain the property is provided for, including attachment, injunctive relief, appointment of a receiver, or "any other relief the circumstances may require." If the creditor has reduced the claim to a judgment, the court may levy execution against the recovered assets. This means that the property can be sold to satisfy the amount of the judgment.

Much of the UFTA resembles the UFCA, its predecessor. What, then, are some of the differences? (A more detailed comparison is available from the ULC.) To begin with, the term "transfer" taken from the Federal Bankruptcy Act replaces the term "conveyance." UFCA uses the term "fair consideration" instead of "reasonably equivalent value." "Reasonably equivalent value" does not include the element of good faith as "fair consideration" does, and is more sharply defined than "fair consideration" is in the UFCA. UFTA overcomes the problem raised in the case of

Durrett v. Washington National Insurance Co., 621 F.2d 201 (5th Cir. 1980), a case that jeopardized mortgage foreclosure sales. Under UFTA, a properly conducted foreclosure sale is not a fraudulent transfer, notwithstanding the fact that it does not recover an amount somewhat near the actual market value of the property. The concept of the "insider" is new in the UFTA. UFTA provides for defenses of transferees and for a statute of limitations. Both issues are not addressed in the UFCA.

The Uniform Fraudulent Transfer Act continues the concept of a civil action for transfers fraudulent to creditors first created in the Statute of 13 Elizabeth, and comprehensively continued in the Uniform Fraudulent Conveyance Act. The new Act takes into account the considerable development in both law and practice in creditor-debtor relationships since 1918. The ULC hopes that it will be adopted uniformly in all states.

UNIFORM PARTNERSHIP ACT (1994)

KIT CONTENTS

- *Factsheet* – Uniform Partnership Act

- *Summary* – Uniform Partnership Act

- Limited Liability Partnerships: The 1996 Amendments to the Uniform Partnership Act (1994)

- "Uniform Partnership Act Revised After 80 Years," by Francis J. Pavetti

- Section by Section Analysis of the Uniform Partnership Act, by Harry J. Haynsworth

- *Uniform Law Commissioners* – a brief history of the ULC

Senate Judiciary
attachment 2
1-22-97

A Few Facts About
THE UNIFORM PARTNERSHIP ACT (1994)(1996)

PURPOSE: This act revises the Uniform Partnership Act of 1914. The 1994 act establishes a partnership as a separate legal entity, and not merely as an aggregate of partners. It recognizes the primacy of the partnership agreement over statutory rules, except for specific rules protecting specific partner interests in the partnership. The 1994 act explicitly addresses the fiduciary responsibilities of partners to each other, providing for express obligations of loyalty, due care, and good faith. The act was amended in 1996 to provide limited liability for partners in a limited liability partnership.

ORIGIN: Completed by the Uniform Law Commissioners in 1994, and amended in 1996.

APPROVED BY: American Bar Association

STATE ADOPTIONS:

Alabama
Arizona
California
Connecticut
District of Columbia*
Florida
Montana
New Mexico
North Dakota
Virginia
West Virginia
Wyoming

STATE ADOPTIONS WITH LLP:

Arizona
District of Columbia *

1997 INTRODUCTIONS:

For any further information regarding the Uniform Partnership Act (1994)(1996), please contact John McCabe or Katie Robinson at 312-915-0195.

** 1997 Enactment*

(1/15/97)

UNIFORM PARTNERSHIP ACT (1994)

Introduction

Partnership law in the United States has been derived from one source, the Uniform Partnership Act, since it was originally promulgated by the Uniform Law Commissioners in 1914. The Uniform Act is the law of partnership in the United States.

But 78 years is a long time in the reckonings of the law, and in 1992 the Uniform Law Commissioners promulgated the first revision of the Uniform Partnership Act. Some clarifying amendments were added in 1993 and 1994. The new Act reflects both continuity and change. On the one hand, it refurbishes a venerable form. Partnership as a form of business organization precedes corporations, limited partnerships, business trusts, and just about everything else except the most basic business organization of all, the sole proprietorship. And, in UPA (1994), a partnership retains its basic, historic character.

But, at the same time, the partnership form has to be adapted to the changes in the way business is done and the way it is expected to be done far into the next century. The change reflected in UPA (1994) is of an evolutionary sort. The distilled experience of the past 80 years is the basis for the new text.

A partnership is a form of business organization. It exists whenever more than one person associates for the purpose of doing business for profit. The notion is that the partners join their capital and share accordingly in profits and losses. They also share control over the enterprise and subsequent liabilities. Historically, every partner is equally able to transact business on behalf of the partnership. Creditors of the partnership are entitled to rely upon the assets of the partnership and those of every partner in the satisfaction of the partnership's debts. The character of any partnership depends upon the agreement of the partners.

A partnership may be as simple as two people meeting on a street corner and deciding to conduct some business together, arising from no more than verbal agreement and a handshake. A partnership may also be as complex as a large law firm, with tiers of partners and varying rights and obligations, memorialized in extensive written agreements. Partnership law must accommodate them all.

UPA governs the creation of a partnership, establishes what the nature of this business organization is, and provides some rules respecting the rights and obligations of partners among themselves, and those between partners and other parties that do business with the partnership and the partners. It provides the rules that govern the dissolution of a partnership when the appropriate time comes to dissolve it. The original Act did this, and UPA (1994) is designed to do the essential task much better. UPA (1994) adds, as well, concepts not ever contemplated in the 1914 Act, the concepts of merger and conversion.

This summary is an effort to highlight the essential differences between the 1914 Act and UPA (1994). It cannot be a comprehensive review, but is designed to point out to the reader the progress of 1994 over 1914.

Nature of a Partnership

The first essential change in UPA (1994) over the 1914 Act that must be discussed as a prelude to the rest of the revision concerns the nature of a partnership. There is age-long conflict in partnership law over the nature of the organization. Should a partnership be considered merely an aggregation of individuals or should it be regarded as an entity by itself? The answer to these questions considerably affects such matters as a partner's capacity to do business for the partnership, how property is to be held and treated in the partnership, and what constitutes dissolution of the partnership. The 1914 Act made no effort to settle the controversy by express language, and has rightly been characterized as a hybrid, encompassing aspects of both theories.

It is not necessary to go into the dispute with much detail here, because UPA (1994) makes a very clear choice that settles the controversy. To quote Section 201: "A partnership is an entity." All outcomes in UPA (1994) must be evaluated in light of that clearly articulated language.

What are some of the outcomes of this decision to treat a partnership as an entity in UPA (1994) that are not part of the hybrid 1914 Act? The 1914 Act expressly permits a partnership to hold property as a partnership. The difference is the interest that each partner holds. In the 1914 Act, a partner is treated "as a co-owner with his partners of specific partnership property holding as a tenant in partnership." In UPA (1994), a partner has his or her partnership interest, but is not a co-owner of specific partnership property. The entity holds the specific property. The partners have their interest in the entity.

The 1914 Act approach, which reflects the retention of aggregate theory in that hybrid Act, constitutes a serious impediment to transferring property to and from the partnership. The 1914 Act has to provide rules that carefully limit and restrict the transfer powers of partners so that individual partners cannot convey their ownership rights in ways to injure and inevitably defeat the partnership. Even so, subsequent cases have revealed the co-ownership aspect of partnership to be a serious weakness in partnership structure. That serious weakness is not continued into UPA (1994).

Dissolution of the partnership is another area in which selection of entity versus aggregate theory makes a big difference. Dissolution will be discussed a little later, but dissolution occurs whenever a partner disassociates under the 1914 Act, but not necessarily every time he or she dissociates from the entity under UPA (1994). Partnerships based upon aggregate theory are simply more fragile than partnerships based upon entity theory.

Creation of a Partnership

Creation of a partnership requires association of two or more persons to do business for profit. The concept is not materially different between the 1914 Act and UPA (1994). What UPA (1994) does is to put expressly what has been regarded as implied in the 1914 Act. By and large the rules of the 1914 Act have been regarded as default rules, rules that apply in the event that there is no express provision in the partnership agreement. The reliance upon implication leaves certain gray areas that have caused problems. How far can a partnership agreement go in abrogating the fiduciary responsibilities of a partner to other partners, for example?

UPA (1994) clearly expresses the primacy of the partnership agreement. The agreement applies, and the rules of UPA (1994) are regarded as default rules, with the exception of certain rules that protect partners. For example, a partner's duties of loyalty and good faith cannot be abrogated by agreement. The agreement cannot take away a partner's right of access to the partnership books. In general, however, the partnership agreement expressly controls over the language of the statute in UPA (1994).

Statement of Authority

A partnership is created anytime individuals associate together to do business. Under UPA (1994) the partnership formed is an entity, not an aggregation of individuals. UPA (1994) makes it clear the partnership is controlled by the agreement of the partners. But the partnership must function to do business, and the 1914 Act treats partners as co-equal in the conduct of that business. Any partner is an agent of the partnership. Any partner has the capacity to transfer property on the partnership's behalf. Any person doing business with a partnership is entitled to rely upon these basic rules to bind the partnership. To a large extent, these rules continue to apply in UPA (1994).

But UPA (1994) adds a new partnership capacity to the rules of the 1914 Act. The adoption of entity theory, again, provides some different perspective. Entities such as corporations and limited partnerships are founded upon the filing of a certificate in the appropriate state office. UPA (1994) does not require filing a certificate to found a partnership, preserving the availability of the partnership form of organization to both large and the small entities. However, it permits the filing of a statement of partnership authority. The statement can be used to limit the capacity of a partner to act as an agent of the partnership, and limit a partner's capacity to transfer property on behalf of the partnership. The statement is voluntary. No partnership need file such a statement, nor is the existence of the partnership dependent upon the filing of any statement. But the statement, if filed, has an impact upon a third party dealing with the partnership.

The main effect is to assure any third party that the business of the partnership can be conducted and the partnership will be bound, if the third party deals with a partner with

authority provided in a statement. Any limitation upon a partner's authority, however, does not affect any third party who does not know about the statement, except as to real estate transactions. If there is a limitation in a filed statement, that is also filed in the real property records of the locale, then a third party dealing with that partner in a real estate transaction is held to know of the limitation.

Other Statements Available

UPA (1994) provides for other statements that may be filed, as well, pertaining to the partnership. A partner may file a statement of denial respecting facts, including limitation upon partnership authority, found in a statement of partnership authority. A partner or the partnership may file a statement of dissociation for the partner. And there is a statement of dissolution that may be filed when a partnership is dissolving. Each of these statements has a notice function. Third parties are held to have knowledge of these last two statements 90 days after they are filed.

If there is a merger, a statement also may be filed. A merger statement establishes the property relationships of the new entity with respect to property of the merged entities.

Although these statements are not essential to either the creation or dissolution of a partnership, they have impact upon third parties transacting business with a partnership. They give necessary flexibility to the partnership in the conduct of business, and are important advances over the 1914 Act for that reason. They are also artifacts of the overall shift to entity theory in partnership law, the essential underlying shift in UPA (1994) over the 1914 Act.

Fiduciary Responsibilities

When a partnership is viewed as an aggregate of interests and an organization in which every partner is absolutely able to conduct the business of the partnership with third parties, and is able to conclude the partnership by any act of withdrawal, express treatment of partners' responsibilities to each other in the conduct of business may not be so important. All partners are assumed to be participating in the conduct of the business with knowledge of what other partners are doing on a daily basis.

The 1914 Act has very little to say about a partner's responsibilities to the other partners. A partner is a fiduciary who "must account to the partnership for any benefit, and hold as a trustee for it any profit derived by him without the consent of the other partners..." There is a full duty of disclosure between partners, but the 1914 Act is otherwise silent on the fiduciary responsibilities of each partner to the other partners.

UPA (1994) is not so silent. It articulates duties of loyalty and care to which each partner is to be held. There are baseline standards of conduct, therefore, that a partner has

to meet. No agreement can abrogate these baselines. In addition, there is an express good faith obligation to which each partner is subject.

The duty of loyalty includes the duty expressed in the 1914 Act, but adds to it. There is a duty not to do business on behalf of someone with an adverse interest to the partnership's. A partner must refrain from business in competition with the partnership.

The standard of care with respect to other partners is gross negligence or reckless conduct. A partner would be liable to another partner for such conduct, but not for ordinary negligence. The good faith obligation simply requires honest and fair dealing.

A partner may be sued more broadly in UPA (1994) than is the case in the 1914 Act. The earlier Act limited legal action to an action for an accounting.

Dissolution

A partnership dissolves under the 1914 Act upon the happening of specific events, either the end of the prescribed term of the partnership, as agreed by the partners, or when a partner dissociates, rightfully or wrongfully, from the partnership. At dissolution, the business of the partnership has to be wound up and fruits of the enterprise distributed to the partners – after the creditors are paid, of course.

Automatic dissolution of the partnership after dissociation of a partner does not take place under UPA (1994). In a partnership at will only a partner who dissociates with notice of "express will" to dissolve causes the dissolution of the partnership. Thus, if a partner is simply bought out, there is not automatic dissolution.

In a partnership for a term or for a particular purpose, dissolution and winding up are required unless a majority in interest of the remaining partners agree to continue the partnership within 90 days after a partner's triggering dissociation before the expected expiration of the term of the partnership. Again, a dissociation that triggers a buy out of the dissociating partner's interest does not imperil the partnership with dissolution.

Of the changes that UPA (1994) makes over the 1914 Act, these rules may be the most significant. The ordinary dissociation of a partner does not mean the dissolution of the entity. It takes something more under UPA (1994).

Dissociation normally entitles the partner to have his or her interest purchased by the partnership, and terminates his or her authority to act for the partnership and to participate with the partners in running the business. Otherwise the entity continues to do business without the dissociating partner. No other characteristic of a partnership under UPA (1994) better illustrates the adoption of entity theory.

Conversion and Merger

UPA (1994) has absolutely new provisions on "conversion" and "merger." A partnership may convert to a limited partnership or a limited partnership may convert to a

partnership under these new statutory rules. A partnership may merge with another partnership or limited partnership, forming an entirely new entity, under the new rules of UPA (1994).

Since a partnership is really a matter of agreement of the partners, there is no absolute barrier to either conversion or merger for a partnership under the 1914 Act. It would require unanimous consent of the partners, and a winding down process for the prior partnership or partnerships. What the statutory provisions of UPA (1994) do is to provide a process, and to permit agreement to less than unanimous consent of all partners to accomplish either conversion or merger. Under UPA (1994), a partnership agreement can specify that either conversion or merger can be accomplished with less than unanimous consent. The agreement controls.

Conclusion

These are some of the principal advances of UPA (1994) over the 1914 Act. Partnership, as a fundamental form of business organization, needs to be updated for the next century. UPA (1994) provides the needed update.

Founded in 1892, the National Conference of Commissioners on Uniform State Laws is a confederation of state commissioners on uniform laws. Its membership is comprised of 300 practicing lawyers, judges, and law professors who are appointed by each of the 50 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands to draft uniform and model state laws and work toward their enactment.

Uniform Partnership Act Revised After 80 Years

By Francis J. Pavetti

The Uniform Partnership Act (UPA) is one of the most venerable of the assemblage of uniform acts. It originally was adopted 80 years ago in 1914 by the Uniform Law Commissioners as a uniform act. Since that time it has been adopted by 49 states including Connecticut. The National Conference of Commissioners on Uniform State Laws recently completed a major revision of the UPA. This constitutes the only revision to the UPA since the original 1914 promulgation by the Uniform Law Commissioners. The new Revised Uniform Partnership Act (RUPA) is the result of six years' work by the Uniform Law Commissioners' drafting committee and is now ready for adoption by the states.

RUPA is likely to be introduced to the Connecticut legislature during the 1995 session. If adopted, it would make substantial changes to the laws governing partnerships. This article covers some of the more significant changes.

If adopted, RUPA will bring the law of partnerships in line with modern practices and trends.

RUPA makes basic revisions to several subjects in the UPA. Partnership breakups under RUPA do not require a dissolution in every case and can be subject to a mandatory buy-out of the departing partner's interest. RUPA also establishes and defines the scope of the partners' duties of care and loyalty, and the obligation of good faith and fair dealing. The confusing concept of property ownership under a tenancy in partnership is also abolished, the rules on the nature and transfer of partnership property are clarified to better facilitate transactions, and the rights and remedies of creditors are clarified.

RUPA moves away from the aggregate approach to partnership law and instead adopts an entity approach. RUPA also provides a procedure for record notice of partnership information including the partners' agency authority. In addition, RUPA provides statutory authority for mergers and conversions to and with limited partnerships under the protection of "safe harbor" rules.

Effect of Partnership Agreement

A basic concept of RUPA is that it operates, for the most part, as a default statute for matters not covered by the partnership agreement. The partnership agreement is any agreement between the partners, whether written, oral or implied, concerning the partnership, including any amendments. The partnership agreement is controlling as to virtually all matters, even if they are covered by the provisions of RUPA, with certain exceptions. The most significant exceptions under RUPA are that the partnership agreement may not eliminate the partners' duty of loyalty or the obligation of good faith and fair dealing; may not unreasonably reduce the duty of care; may not restrict the rights of third parties dealing with the partnership; may not unreasonably restrict a partner's access to books and records; or may not vary the power of a partner to dissociate.

Entity Approach

An important feature of the RUPA revision is its adoption of the entity theory for a partnership. At the time of the original drafting of UPA in the early 1900's, the drafters, after considerable debate, decided to adopt the common law aggregate theory rather than the entity theory. Since the adoption of the UPA, it has been found that the aggregate approach often

(Please see next page)

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militates against partnership stability. Section 201 of RUPA adopts the entity theory by stating that a partnership is an entity distinct from its partners — thus achieving greater partnership stability under this more modern approach. For example, the partnership is not always dissolved when a partner withdraws, a continuation of the partnership after a withdrawal does not result in a "new" partnership, and the partnership holds title to real property under the partnership entity and not through the partners under a tenancy in partnership.

Partnership Break-ups

The concept of dissolution under UPA has long been a confusing area of the law. Under UPA, a partnership dissolves every time a partner leaves. If the remaining partners decide to continue the same business, it must be under a new partnership. RUPA provides for a continuation of the partnership under certain situations through a buy-out of the departing partner's interest or by agreement of the partners to continue in the absence of a buy-out. Certain situations still bring about a dissolution of the partnership when a partner leaves, but the process is improved and clarified. The approach of RUPA creates a greater degree of stability and predictability, and it is more consistent with an entity approach.

RUPA applies the new term "dissociation" when a partner leaves the partnership. The right of a partner to withdraw and terminate the agency relationship is preserved. The events that cause a dissociation are defined in Section 601 and include voluntary withdrawal and such events as expulsion under the agreement or by judicial action, death, incapacity, bankruptcy and events specified in the partnership agreement. RUPA also defines a wrongful dissociation, and the consequences of dissociation when it is wrongful, including liability for any damages caused to the partnership.

Under Section 801 of RUPA, the following events or circumstances cause dissolution: withdrawal of a partner in a partnership-at-will; a partner's dissociation in a partnership formed for a definite term or a particular undertaking, upon the express will of at least half of the remaining partners; the express will of all the partners; expiration of the term or undertaking; illegality of the partnership business or upon judicial decree that it is not reasonably practical to continue the business; application of a transferee of a partner's transferable interest if winding up is found to be equitable; or if dissolution is agreed to in the partnership agreement.

Under RUPA, a partnership would continue after dissolution for the sole purpose of winding up. However, Section 802 of RUPA specifies that dissolution may be avoided during the winding-up phase if all the partners agree, including the dissociating partner who has not dissociated wrongfully. The partnership then would resume carrying on its business as if dissolution never occurred.

Another significant innovation of RUPA is the provisions requiring a buy-out of a dissociated partner's interest, if the dissociation has not caused a dissolution under Section 801. The buy-out price is defined as "the greater of liquidation value or value based on sale of the entire business as a going concern without the dissociating partner." The price also would be reduced by the dissociating partner's share of partnership liabilities, and an offset would be applied for any damages caused by a wrongful dissociation. If the parties cannot agree on the buy-out price, the dissociating partner would be able to maintain a court action to determine price, if a required tender of a price from the partnership is rejected.

Rights and Duties of Partners

RUPA clearly identifies the duties between and among the partnership and the individual partners. The defined fiduciary duties owed by a partner to the partnership and the individual partners are the duties of loyalty and due care as defined in RUPA. The duty of loyalty is limited to the obligation to account for benefits derived by a partner from the partnership business or the use of partnership property, including appropriation of a partnership opportunity; to refrain from dealing with the partnership on behalf of a party having an adverse interest; and not to compete with the partnership. The partnership agreement cannot eliminate the duty of loyalty, but the agreement may identify activities that do not violate the duty, if they are not manifestly unreasonable; and the partners, after full disclosure of the facts, may authorize or ratify an act or transaction that would otherwise violate the duty.

The duty of care is limited to refraining from gross negligence, reckless conduct, intentional misconduct, or a knowing violation of law. The partnership agreement cannot eliminate the duty of care, but it can reduce the duty, provided it is reasonable. The partners must discharge their duties and exercise their rights consistent with the obligation of good faith and fair dealing. This obligation may not be eliminated, but the partnership agreement may prescribe standards to measure the obligation of good faith and fair dealing if not manifestly unreasonable.

Under RUPA, the partnership has the duty to provide the partners with access to books, records and information. Information concerning the partnership's business and affairs must be furnished to a partner without demand, if the information is reasonably required for the proper exercise of the partner's rights, and must be furnished on demand, unless the de-

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mand or the information demanded is unreasonable or improper.

Creditors' Rights and Partnership Property

RUPA makes some changes and clarifications with respect to creditors' rights. Partners are jointly and severally liable for obligations of the partnership. A partnership may be sued in the name of the partnership, and an action may be brought against the partnership with the joinder of any, or all, of the partners in the same action or in separate actions. A judgment creditor of the partnership and a partner may not levy against the assets of the partner unless the assets of the partnership have first been exhausted. Partnership property is owned by the partnership, not by the individual partners, and there is no tenancy in partnership.

Clear and precise rules also are established for the transfer of property to and from the partnership. A partner may not transfer the partner's rights as a partner, but may transfer what is known as the partner's "transferable interest," an interest limited to the partner's share of profits and losses, and the right to distributions. A transfer of the partner's transferable interest does not cause a dissolution of the partnership, and does not give the transferee the rights of a partner.

Statement of Authority

RUPA also introduces an optional record-notice procedure to facilitate transactions. It also protects third parties, as well as the partnership, from unauthorized acts of partners. A statement of authority may be filed with the Secretary of State. It may grant, or limit, the authority of designated partners to act for the partnership. For real estate transactions, the statement must also be filed in the land records, and may be conclusively relied upon by a bona fide purchaser. This will facilitate real estate transactions by not requiring the signatures of all partners for every transaction. Procedures are also established for the optional filing of a statement of dissociation of a partner, and of dissolution of the partnership.

Conclusion

If adopted, RUPA will bring the law of partnerships in line with modern practices and trends, while retaining many of the valuable provisions originally contained in UPA. This article addresses the major changes, but not all of the provisions and technical rules. In addition to the modernization of partnership law, RUPA provides for partnership stability and a greater level of predictability for practitioners and clients.

Francis Pavetti is a partner in the New London law firm of Pavetti & Freeman. He also is a Uniform Law Commissioner and co-drafted the Revised Uniform Partnership Act as a member of the Drafting Committee.

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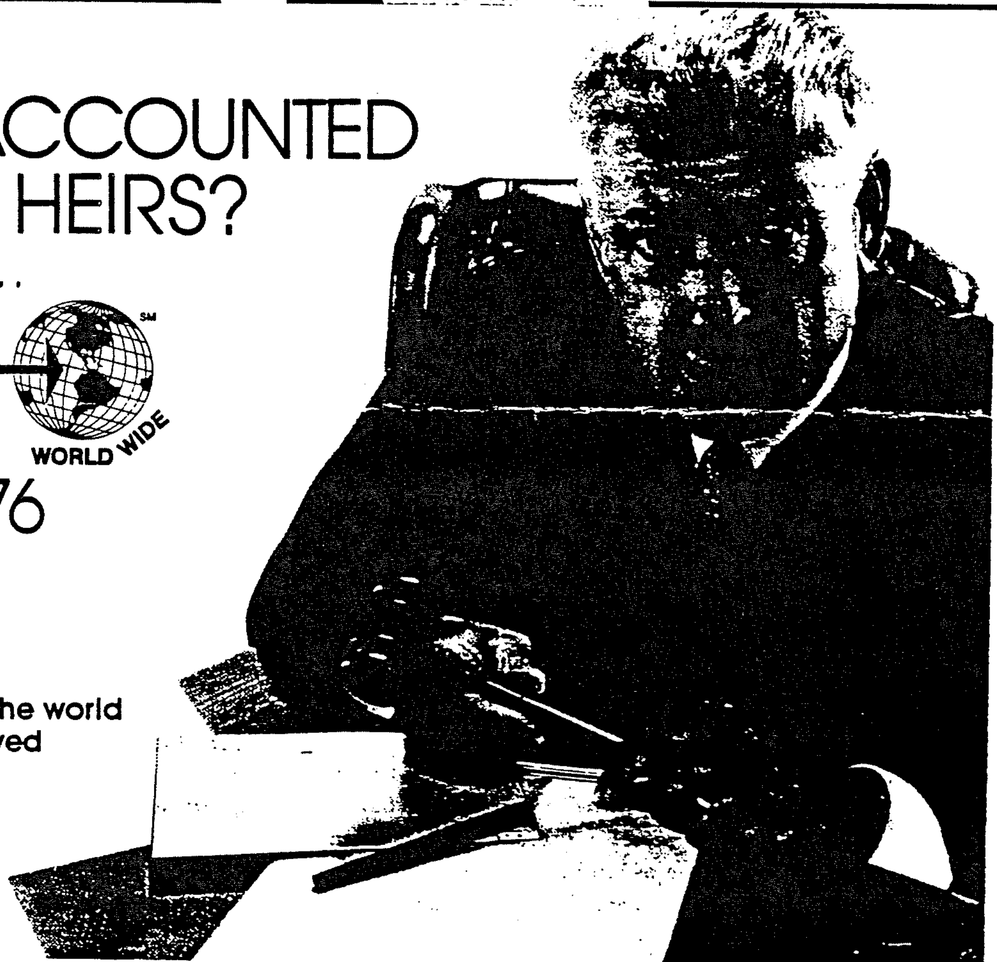

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SUMMARY OF THE REVISED UNIFORM PARTNERSHIP ACT*

RUPA SECTION	TITLE	PARALLEL §UPA	RUPA vs UPA
§101	Definitions	§2	RUPA deletes one definition in UPA (real property), expands on three UPA definitions (bankruptcy, conveyance (which is "transfer" in RUPA) and person) and contains seven new definitions (distribution, partnership, partnership, partnership agreement, partnership at will, property, state and statement (referring to various types of documents that may be filed by a partnership).
§102	Knowledge and Notice	§ 3	RUPA's formulation, which is based principally on UCC §1-201 (25) to (27), is more elaborate than UPA §3, but no major substantive change is intended.
§103	Effect of Partnership Agreement; Non-waivable Provisions	None	Subsection (a) sets forth the guiding principle that with respect to the rights of the partners between themselves and the partnership, RUPA contains default rules, which with limited exceptions, can be varied or restricted by the partnership agreement. This principle is contained in UPA, but the provisions where it is explicitly stated are spread throughout UPA. There are also several provisions in UPA dealing with the rights of partners qua partners and the partnership where the UPA is silent on the right to vary the statutory default rule, e.g., variation of fiduciary duties (§21) and the obligations to provide information about the partnership (§20). Subsection (b) lists nine exceptions to the default rule. The most significant is subsection (b)(9) which prohibits a partnership agreement from restricting the rights of third parties against the partnership or the partners. Several of the exceptions, which restrict but do not prohibit altogether variation by the partnership agreement of the default rule, are controversial. The formulation in RUPA represents a carefully worked out and extensively debated compromise between these persons who advocated no exception or a narrower exception than was approved by NCCUSL and those persons who thought the exceptions should be broader, thereby decreasing the number of situations where partnership agreement could override the default rule. The three most controversial exemptions are: 1. (b)(3) which does not allow the partnership agreement to "eliminate" a partner's duty of loyalty; 2. (b)(4) which does not allow the partnership agreement to "unreasonably reduce" a partner's duty of care; and

* Prepared by Dean Harry J. Haynsworth, Southern Illinois University School of Law, Carbondale, Illinois

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			3. (b)(5) which does not allow the partnership agreement to "eliminate" a partner's obligation of good faith and fair dealing.
§104	Supplemental Principles of Law	§5	Subsection (a) is the same as UPA §5. Subsection (b) which specifies the state statute that determines the interest rate on obligations created under the act, is new
§105	Execution, Filing and Recording of Statements	None	This section, which has no counterpart in UPA, sets forth the requirements for filing, amending and canceling partnership statements. Centralized filing in the Secretary of State's office is required; and in the case of real estate, local filing in the office for recording transfers of real property is authorized in order to facilitate transfers of real property from a partnership. All authorized filings are optional and can be made by any partnership regardless of where it is formed. There are five types of authorized statements: (1) a statement of partnership authority (§303) which, although it applies to all transfers of property from a partnership, will be used most frequently with respect to real estate transactions because the grant of authority to convey partnership real property contained in the statement is conclusive as to BFPs; (2) a statement of denial of partnership authority (§304), which is designed to protect a partner or any person named as a partner in a partnership statement from being bound by any grant of authority or liability as a result of being named as a partner in the filed statement; (3) a statement of dissociation (§704), which protects a former or a partner from personal liability for obligations of the partnership incurred more than 90 days after the statement is filed; (4) a statement of dissolution (§805), which is effective as constructive notice to third parties of the partnership's dissolution 90 days after the filing; and (5) a statement of merger (§907), which is required to be filed by the surviving partnership in a merger of a general partnership with another general partnership or with a limited partnership.
§106	Law Governing Internal Affairs	None	This section is similar to RULPA §901; but: (1) RUPA substitutes the laws of the state where the partnership has its chief executive office (cf. UCC 9-103(3)(d))for the state of the partnership's organization on the grounds that because of the informality with which a general partnership can be created, it is often impossible to determine where the partnership was organized but it will always have a chief executive office; and (2) unlike RULPA, RUPA allows the partnership agreement to specify the state whose partnership statute will govern its internal affairs.

§107	Partnership Subject to Amendment or Repeal	None	This section, which is adapted from §1.02 of the 1984 Revised Model Business Corporation Act, makes it clear that future amendments in RUPA may affect partnership agreements drafted on the basis of RUPA provisions at the time the partnership is formed; i.e., there can be no claim of vested rights in the statutory language of RUPA.
§201	Partnership as Entity	None	The section makes explicitly clear one of the most significant changes made by RUPA: a general partnership is a legal entity that can own and convey property and sue and be sued in its own name and continues in existence even though one or more partners may leave. RUPA eschews the dichotomy between the aggregate and entity theories of UPA and is much closer to the general partnership model of civil law countries than UPA.
§202	Formation of Partnership	§§6 and 7	RUPA makes two changes: (1) the list of profit sharing arrangements that do not per se create a partnership in UPA §7(4) has been modernized to specifically include shared appreciation and other types of equity participation loans (§202 (c) (3) (v)); and (2) the language in UPA §6(2) stating that the UPA applies to limited partnerships to the extent there is no inconsistent provision in the applicable limited partnership act has been deleted. The effect of the second change could be very significant. Although §1105 of RULPA currently states that the UPA governs "in any case not provided for" in RULPA, it is possible that a decision could be made to delink the two partnership acts entirely. This could be done simply by deleting §1105 of RULPA and adding to RULPA any provisions thought to be necessary to make RULPA a free standing statute. This issue is currently being studied by NCCUSL and the ABA Partnership Committee.
§203	Partnership Property	§§8(1) and 25	RUPA §203 states simply and affirmatively the principle that since a partnership is a separate entity, its property, however acquired, belongs to it and not to the partners. Because of the entity theory incorporated into RUPA, it is no longer necessary to use artificial concepts like tenancy in partnership (See UPA §25), which is an outgrowth of the compromise between the aggregate and entity concepts of partnership built into RUPA, to describe the legal status of a partnership.
§204	When Property is Partnership Property	§8(2), (3), (4)	This most significant substantive change made by this section is in subsection (b) which defines how property is acquired in the partnership name. This concept is undefined in UPA.

§301	Partner Agent of Partnership	§9	RUPA makes two significant changes: (1) language has been added to both subsections (1) and (2) ("or business of the kind carried on by the partnership") to make it clear that the apparent authority of a partner includes both the usual way the particular partnership conducts its business and the way other partnerships in the same business conduct their affairs; and (2) the laundry list of events in UPA §9(3) requiring unanimous consent for approval has been deleted on the grounds that it was incomplete, unnecessary and a potential trap for unwary third-parties doing business with the partnership.
§302	Transfer of Partnership Property	§10	There are two significant substantive changes made in this section by RUPA: (1) it covers transfers of all property vs § 10 of UPA, which only covers transfers of real property; and (2) new subsection (c) provides a mechanism for a sole surviving partner or a sole successor in interest of a partnership's assets to execute and file documents in the name of the partnership to transfer title to the surviving partner or successor in interest.
§303	Statement of Partnership Authority	None	The statement of partnership authority is designed to facilitate transfers of property from a partnership. The statement, which is not mandatory, must contain: the names of the partnership, the street address of its chief executive office and also of one office in this state, if there is one; the names and mailing addresses of all the partners, or alternatively the name and mailing address of an agent who has a list containing the names and addresses of all the partners; the names of persons who have authority to execute deeds and other instruments transferring interests in real property from the partnership and may contain a special grant or limitation on the authority of any partner or deal with any other matter relating to the partnership. If properly filed, the statement is conclusive as to BFP's with respect to the authority of partners to transfer property from the partnership. A limitation on authority in a filed statement, however, is only binding on non-partners who do not have actual notice of the limitation, and in the case of real estate transfers is binding on those partners only in circumstances where the limitation on authority is in a copy of the statement that is filed both in the Secretary of State's office and in the real estate records of the county where the real property is located. A statement of partnership is automatically canceled at the end of five years but can be renewed by amendment or a new filing that is effective on the date of filing and can be canceled by the partnership at anytime.

			A statement of partnership can be filed by a partnership formed in another state and will be effective to protect transferees of property from the partnership made within the state where it is filed. Whether a creditor or other third party can challenge the transfer in an action against a partnership formed in another state that has transferred property located in a state where a partnership statement is filed will depend on the conflict of laws rules of the state where the partnership is deemed to have been formed or is located.
§304	Statement of Denial	None	This section provides a mechanism whereby a person who is not a partner may file a statement of denial which operates as a limitation of authority. A statement of denial can also be filed by a partner or former partner who wants to correct an error or update a filed partnership statement. The person filing the statement of denial should, of course, notify all the partners and partnership creditors of the statement of denial and also in appropriate circumstances file a statement of dissociation (§704) and a statement of dissolution §806).
§305	Partnership Liable for Partner's Actionable Conduct	§§13 & 14	The three significant changes made by RUPA are: (1) to broaden the scope of the section to cover all actionable misconduct by a partner (the language in UPA §13 could be interpreted as not encompassing certain types of no-fault torts and other actions); (2) deleting language in UPA §13 ("not being a partner in the partnership") that has been interpreted as prohibiting a partner who has been harmed by a tort committed by the partnership or by another partner acting as an agent of the partnership from recovering in an action against the partnership; and (3) adding language making it clearer than under the UPA that the partnership is liable for property belong to a third party that is taken improperly by a partner even if the property is never actually received by the partnership.
§306	Partner's Liability	§15, §17 47(7)	Subsection (a) is the successor to RUPA §15. Under UPA partners are jointly and severally liable for torts committed while acting on behalf of the partnership, but are only severally liable for debts of the partnership. Under RUPA, partners are jointly and severally liable for all partnership obligations "unless otherwise agreed to by the claimant or provided by law." Several states have already amended their version of UPA to incorporate this change. Subsection (b), which provides that an incoming partner is not personally liable for partnership obligations incurred before that person's admission as a partner, is the same as UPA §17. See also UPA §41(7).

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§307	Action Against Partnership and Partners	None	This section of RUPA makes two major changes: (1) it specifically authorizes a partnership to sue and be sued in the partnership name (many states have implemented this concept in recent years either in their codes of civil procedure or as amendments to UPA); and (2) a creditor with a judgment against the partnership and the partners cannot collect the judgement against the partner's individual assets until the creditor has unsuccessfully attempted to satisfy the judgment against the partnership. There are several exceptions to this basic rule, which in effect makes partners guarantors of payment for partnership obligations: (1) the partnership is a party to a bankruptcy proceeding, and in the case of an involuntary case, the proceeding has not been dismissed within 90 days of filing; (2) a court gives permission to proceed against the partners after finding that the partnership's assets are clearly insufficient or otherwise unavailable to satisfy the judgment; (3) a partner has agreed that the creditor need not first exhaust partnership assets; or (4) individual partner liability is imposed by law (e.g. CERCLA environmental clean up liability). This may well be the most significant substantive change made by RUPA.
§308	Liability of Purported Partner	§16	This section, which deals with the liability of a person who is deemed to be a partner because of his or her conduct or consent, is essentially the same as UPA §16.
§401	Partner's Rights and Duties	§18	With minor modifications, RUPA carries forward the default rules in UPA §18, which sets forth the basic rights and duties of partners inter se. The modifications are: (1) an explicit provision describing debits and credits to a partner's capital account (subsection (a)); (2) expanding UPA §19(f) to allow all liquidating partners and not merely the "surviving partner" compensation for services rendered in winding up the partnership (see subsection (h); and (3) adding specific language to UPA §18(h) making it clear that all acts outside the ordinary course of the partnership's business and all amendments to the partnership agreement must be approved by unanimous consent of the partners.(See Subsection (j)).
§402	Distribution In Kind	38(1)	RUPA continues the rule in the UPA that in the absence of a contrary agreement, a partner cannot be required to accept an in kind distribution from a partnership. See also §808(a), which has the same rule with respect to liquidating distributions to partners.
§403	Partner's Information Rights and Duties	§§19 & 20	RUPA makes several significant change and clarifications: (1) subsection (a) makes it clear that a partnership has no mandatory duty to have any books and records; (2) the

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partnership books and records are to be kept at the partnership's "chief executive office" vs its "principal place of business"; (3) subsection (b) explicitly states that agents and attorneys of a partner have the same rights as the partner to inspect the partnership's books and records; (4) subsection (b) also contains an explicit provision allowing former partners access to the partnership books and records for the period in which they were partners (UPA §19 was silent on this point); (5) the right to access and copy books and records is limited to "ordinary business hours" whereas under UPA §19 a partner can have access and copy the partnership books and records "at all times"; (6) subsection (b) of RUPA also adds a specific provision allowing the partnership to impose a reasonable charge for copies of documents furnished to a partner or a former partner; (7) the obligation of partners to furnish information about the partnership is to furnish without demand "any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement" or RUPA and with demand "any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances", which gives partners and courts a basis for refusing burdensome and unreasonable demands for this nonessential information (UPA §20, which does not distinguish between the two types of information, requires "true and full" information about the partnership on demand and contains no unreasonable demand limitation); and (8) RUPA §103 allows the partnership agreement (a) to restrict the statutory rules on access to books and records, so long as the restrictions are not "unreasonable" (§103(b)(2)) and (b) to eliminate altogether the obligation to provide information about the partnership business UPA contains no specific authorization for restrictions on access and the duty to provide information).

§404	General Standard of Partner's Conduct	§21	This section, which is perhaps the most controversial section in RUPA, basically states two propositions: (1) a partner has two fiduciary duties to the other partners and the partnership: a duty of loyalty and a duty of care, which is "limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law"; and (2) a partner has an obligation of good faith and fair dealing to the other partners and the partnership in discharging the partner's duties and exercising any rights under RUPA and the partnership agreement. The fiduciary duties of loyalty and due care and the obligation of good faith and fair dealing can be modified but the parameters of the modifications are different: the partnership agreement may not eliminate the

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duty of loyalty but may "identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable"; the partnership agreement cannot"unreasonably reduce" the duty of due care; and the partnership agreement cannot eliminate the obligation of good faith and fair dealing but it may "determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable".

Under UPA, the fiduciary duties of a partner apply to the "formation, conduct, or liquidation" of a partnership. RUPA makes two significant changes in the scope of a partner's fiduciary duties: (1) under RUPA fiduciary duties of a partner only apply "in the conduct and winding up of the partnership business" and not to the "formation" of the partnership, a term that could be interpreted as making fiduciary duties applicable at the negotiation stage prior to the time an agreement to form a partnership has been reached; and (2) under RUPA, absent an agreement to the contrary, a disassociated partner can compete with the partnership after dissociation and the remaining duties of loyalty and the duty of care only apply to matters arising before the dissociation, exceptions that at best are only implicit in UPA.

There are several reasons why §404 is controversial. First, the section specifies that the duty of loyalty and due care are fiduciary duties; UPA, however, does not specifically state that the duty of loyalty is a fiduciary duty, a term that can be construed as requiring the same strict duty of loyalty as a trustee of a trust, (but the title to UPA §21 is "Partner Accountable as a Fiduciary" and virtually every partnership case since the seminal case of Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928) has characterized the duty of loyalty as a fiduciary duty). In addition UPA does not have any provision specifying a duty of care (but several cases have held that a duty of care does apply to partnerships). Third, there is no specific mention of an obligations of good faith and fair dealing in UPA (but cases have applied this contract principal to partnerships). Fourth, the section has been criticized because the formulations of the limitations on the partnership agreement being able to vary the statutory duties of loyalty and care and the obligation of good faith and fair dealing (See §103(b)) are said to be confusing and there is insufficient case law and examples in the comments to §404 on these limitations to provide a reasonable level of comfort to lawyers who draft partnership agreements.

§405	Actions by Partnership and Partners	§§13 and 22 and 43	Subsection (a), which is new, gives the partnership a right of action against a partner for breach of the partnership agreement or for violation of any other duty owed to the partnership. Subsection (b), which sets forth the remedies of partners against the partnership or another partner, makes two major substantive changes: (1) the language in UPA §13 which prohibits a partner from suing the partnership or another partner for torts and the like (the partnership is bound only for injuries to a "person not being a partner in the partnership") has been eliminated and new subsection (3) reinforces this change by specifically stating that a partner can sue the partnership and any partner for any cause of action" including rights and interests arising independently of the partnership relationship"; and (2) a partner may have relief against the partnership or another partner without the requirement of a formal accounting, as required by many courts interpreting UPA §21. Subsection (c), which states that the statute of limitations for an action brought by the partnership against a partner or by a partner against the partnership or another partner is the state's applicable statute of limitations for that particular cause of action, is new. This rule also applies to an accounting action brought at the time of liquidation. Any cause of action involved in the accounting that is barred by the applicable state statute of limitation can not be considered in the accounting action, however.
§406	Continuation of Partnership Beyond Definite Term	§23	This section continues the UPA rule that a term or single purpose partnership becomes a partnership at will if it continues after the term or completion of the undertaking, absent agreement to the contrary.
§501	Partner Not Co-Owner of Partnership Property	§§24 & 25	RUPA, as part of the implementation of the entity concept, eliminates the UPA concept in §§24 and 25 that partners own property belonging to a partnership as tenants-in-partnership, a unique form of co-ownership. One important legal consequence of eliminating the co-ownership theory is that a partner can now be held liable for embezzlement for misappropriating partnership property. Under UPA many courts held that partners could not be guilty for embezzlement since you cannot steal money or other property you own.
§502	Partner's Transferable Interest in the Partnership	§24, 26	This section makes it much clearer than under UPA that the only transferable interest of a partner is the right to transfer the partners profits and losses and right to distributions.

§503	Transfer of Partner's Transferable Interest	§§27, 32(2)	This section essentially carries forward the rules in UPA. The following changes are worth noting: (1) because of RUPA §103 it is now clear that a provision restricting or prohibiting a transfer would be enforceable as between the partners and the partnership (UPA §27(1) authorized variations in the rule that a transferee had no right to participate in the management of the partnership but was silent as to the right to restrict an assignment); (2) subsection (a)(3), which states that the transferring partner remains a partner for management and liability purposes, is new; subsection (e), which states that the partnership has no obligation to make distributions or otherwise recognize the rights of a transferee until after receiving notice of the transfer, is new; and subsection (f), which makes a transfer in violation of a restriction on transfer invalid as to transferees with notice of the transfer, is also new.
§504	Partner's Transferable Interest Subject to Charging Order	§28	This section carries forward the charging order rules in UPA §28, with the following modifications: (1) RUPA authorizes a judgment creditor of a partner's transferee, as well as a judgment creditor of a partner, to obtain a charging order against a partner's interest in distributions from the partnership; (2) subsection (b), which specifically states that a charging order is a lien on the debtor partner's right to distributions and can be foreclosed upon at any time, is new; and (3) subsection (e), which states that a charging order is the exclusive method of satisfying a judgment against a partner's right to distributions, is also new but is consistent with the majority of cases on this issue.
§601	Events Causing Partner's Dissociation	§§ 29,31 and 32	Under UPA the withdrawal of a partner cause a dissolution of the partnership, thereby automatically triggering the liquidation process; and if the partnership continues, it is legally a new partnership. Under RUPA, if the partnership continues in business after the dissociation of a partner, it is legally the same partnership as before the dissociation. Dissolution and liquidation occur only if the partnership is not continued. Thus, dissolution under RUPA has basically the same meaning as it has in corporate statutes. This separation of withdrawal ("dissociation") and dissolution reflects the adoption of the entity concept in RUPA and is one of the most fundamental changes made by RUPA. Section 601 rearranges and modifies, but does not fundamentally change the composite list of events of dissociation in UPA §§31 and 32. The major changes are: (1) a specific requirement that when a partner dissociates by express will, the dissociation is effective only upon

			receipt of the notice by the partnership, or at a later date specified in the notice; (2) a specific provision authorizing the partnership agreement to require that the notice of "express will" dissociation be in writing (§103(b)(6); (3) an express provision allowing the partnership agreement to define dissociation events other than those in §601; (4) a provision, modeled on RULPA 402(9), which authorizes expulsion of a corporate partner that has filed a certificate of dissolution, had its charter revoked or its right to conduct its business suspended, unless the problem is cured within 90 days after notice of expulsion from the partnership; (5) use of a new defined term ("debtor in bankruptcy") that makes it clear a partner against whom an order has been entered in an involuntary bankruptcy proceeding is, as of the time of the order, dissociated; (6) the addition of specific language making the execution of an assignment for the benefit of creditors, or the appointment of a trustee, receiver or liquidator of all or substantially all of a partner's property (and in the case of the appointment without consent of the partner, the failure to have the appointment vacated within 90 days of the appointment or within 90 days after the expiration of a stay to have the appointment vacated) are events that cause a dissociation; (7) the addition of detailed provisions based on equivalent provisions in RULPA defining what is meant by death of a partner in the case of a partner that is an entity, e.g., a corporation, partnership or trust; and (8) elimination of all the events in UPA §§31 and 32 that relate to termination of the partnership as opposed to withdrawal of a partner from the partnership.
§602	Partner's Power to Dissociate Wrongful Dissociation	§31(2), 38(2)	RUPA defines more precisely than UPA the circumstances in which a dissociation by a partner is wrongful. Subsection (b)(2)(iii), which makes bankruptcy a wrongful dissociation in a partnership for a term or definite undertaking is new. RUPA also eliminates the rule in UPA §38(2)(c) that prevents a wrongfully dissociating partner from receiving any good will value of the partnership if that partner's interest is purchased by the partnership or the other partners. The right of the partnership and the other partners to recover damages caused by the wrongful dissociation is, however, retained.
§603	Effect of Partner's Dissociation	New	This section accomplishes two purposes: (1) subsection (a) sets out the basic principle that upon dissociation Article 7 of RUPA applies if the dissociating partner's interest is to be purchased and Article 8 applies if the partnership is to be liquidated; and (2) subsection (b) provides that a dissociated partner "cannot participate in the management of the partnership unless and until the partnership is legally dissolved and begins liquidating (in which event only

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dissociated partners who have not wrongfully disso[illegible] can participate in the management of the partnership) but the dissociated partner can go into competition with the partnership with respect to new transactions but continues to have a duty of loyalty and due care to the partnership for matters arising before the dissociation.

§701	Purchase of Dissociated Partner's Interest	§38	This section, which can be varied by the partnership agreement, makes six major changes in the UPA buyout provisions: (1) perhaps the most significant and certainly the most controversial is the detailed formula for determining the buyout price of a dissociated partner's interest in subsection (a), which in essence sets out a willing buyer-willing seller model whereas UPA uses the term "value" with no elaboration of the criteria to determine value; (2) a partner who wrongfully dissociates from a term or single purpose partnership can be paid the discounted present value of his interest at the time of dissociation only if the court determines early payment "will not cause undue hardship to the business of the partnership" whereas under UPA the wrongfully dissociated partner has the right to immediate payment is secured by a bond approved by the court; (3) under RUPA the deferred payment to the wrongfully dissociating partner from a term or single purpose partnership must be secured by security authorized by the court as a bond; (4) as previously mentioned under RUPA but not UPA the good will value of the partnership can be taken into account when determining the value of a wrongfully dissociated partner's interest in the partnership; (5) RUPA adopts a procedure similar to the Revised Model Business Corporation Act for determining the value of a dissociated partner's interest when the dissociated partner and the partnership cannot agree (the partnership must pay the estimated value within 120 days of demand (or in the case of a term or single purpose partnership offer to pay) accompanied by a notice stating how the value was determined and the dissociated partner has 120 days after the tender to file suit (or one year after demand for payment if the partnership makes no tender) and if suit is filed the court will determine the value and can assess attorneys fees and expenses against any party found to have acted "arbitrarily, vexatiously, or not in good faith);" and (6) RUPA does not have the equivalent of UPA §42 which allows a dissociated partner who has not been paid the value of his or her interest the election to receive either interest on the value or a share of the profits of the partnership attributable to the use of that partner's capital by the partnership--under RUPA the dissociated partner is only entitled to interest on the unpaid value from the date of dissociation to the date of payment.

§702	Dissociated Partner's Power to Bind and Liability to Partnership	§§33 and 35	RUPA radically alters the UPA rules regarding the lingering apparent authority of a dissociated partner whose interest is purchased to bind the partnership following dissociation. Under UPA, the apparent authority extends without any time limit to any creditor who did not have actual notice or constructive notice by means of a newspaper notice published in all places where the partnership business "was regularly carried on." Under RUPA the apparent authority of the dissociated partner extends for a maximum of two years following dissociation and is terminated prior to that time by actual notice to a creditor or 90 days after the filing of a notice of dissociation under §704. Even if there is no actual or constructive notice, only a creditor who can prove reliance on the dissociated partner's status as a partner when extending credit to the partnership can recover the debt from the partnership.
§703	Dissociated Partner's Liability to Other Persons	§§35(2), 36	This section sets out two basic principles: (1) a dissociated partner whose interest is purchased remains liable for pre-dissociation liabilities of the partnership unless released from them voluntarily or by operation of law (but has a right of indemnification for all liabilities from the partnership and the continuing partners); and (2) a dissociated partner whose interest is purchased is not personally liable for post-dissolution liabilities of the partnership unless the dissociating partner's wrongful acts are responsible for the partnership being bound by the liability pursuant to §702. The first is basically a restatement of the same principal in UPA. The second represents a significant reduction in the possible exposure of the dissociated partner for post-dissociation partnership liabilities. See the comments to §702.
§704	Statement of Dissociation	None	The closest counterpart of this section in UPA is the provision in §35(b)(II) authorizing newspaper notice in all places where a partnership regularly carries on business as a means of cutting off the apparent agency power of a dissociated partner to bind the partnership to creditors who had not previously extended credit to the partnership prior to the dissociation. The statement of dissociation cuts off the apparent authority of the dissociated partner with respect to all creditors 90 days after the filing and not merely as to those creditors who have not previously granted credit to the partnership, and therefore is broader in scope and effect than UPA §35(b)(II). The statement of dissociation can be filed by either the dissociated partner or the partnership. It should be filed

			routinely in every case even though actual notice is made to all known creditors.
§705	Continued Use of Partnership Name	§41(10)	This section carries forward the rule in §41(10) that the continued use of the name of the partnership, even if it contains the name of a dissociated partner, will not by itself make the dissociated partner liable for the post dissociation liabilities of the partnership. This section and section 306(b), which carries forward the rule in UPA 41(7) that an incoming partner is not personally liable for partnership liabilities incurred before he or she became a partner, are all that are left of UPA §41.
§801	Events Causing Dissolution and Winding Up of Partnership Business	§§31 and 32	Section 801 lists the events, including certain types of dissociation, that can result in a dissolution and winding up of the partnership business. The "other than dissociation" events listed are basically the same as UPA, with the following modifications: (1) subsection (4) of RUPA gives a partnership a 90 day right to cure any event that makes it unlawful for all or substantially all the partnership's business to be conducted; (2) the language in UPA §32 (e) giving a court the right to dissolve a partnership when its business "can only be carried on at a loss" has been changed in RUPA subsection (5)(i) to "the economic purpose of the partnership is likely to be unreasonably frustrated" in order to make it clear that a partnership that has tax losses but is otherwise a viable business is not subject to judicial dissolution merely because of the losses; (3) the right of a transferee of a partner's interest in the partnership to have the partnership liquidated (See Subsection (6)) is made subject to a judicial determination that it is "equitable to wind up the partnership business"; and (4) RUPA does not carry forward the rule in UPA §32(f) that a court may decree a dissolution in any circumstances that it determines to be equitable--rather the list of dissolution events in §801 is intended to be exclusive. RUPA makes three major changes in the RUPA dissolution rules: (1) as previously noted in the comments to §601, if the partnership continues in business it is organically the same partnership rather than a new partnership as is the case under UPA; (2) in a partnership for a definite term or specific undertaking, where a partner has wrongfully dissociated, or a partner dies (including "death" of a partner that is an entity) or becomes bankrupt or incompetent or makes an assignment for the benefit of creditors or has a receiver or liquidator appointed over all or substantially all of that partner's property, the partnership is dissolved unless within 90 days of the dissociation, a "majority in interest" (See Rev. Proc. 94-46) of the remaining partners agree that the partnership business should be continued,

			whereas under UPA, any partner who had not wrongfully dissociated could force a liquidation; and (3) even if the partnership is dissolved and starts liquidating, the dissolution can be retroactively revoked by agreement of all the partners, other than a wrongfully withdrawing partner, at any time before the liquidation process is completed (under UPA it is possible to revoke the decision to liquidate but legally, the business is considered a new partnership).
§802	Partnership Continues After Dissolution	§30	RUPA incorporates the rule in UPA §30 that a partnership is not terminated by reason of its dissolution but rather continues until the liquidation is completed but adds an important new twist -- all the partners, including a dissociated partner who has not wrongfully dissociated, can agree to revoke the dissolution, and if they do so, the partnership business continues as if dissolution had never occurred. This revocation concept is an adaptation of §14.04 of the Model Business Corporation Act. If revocation occurs, the dissociated partner is entitled to be paid the fair value of his or her interest. Moreover, the rights of third parties who act in reliance on the dissolution and before receiving notification of the revocation, are not adversely affected. This will protect third parties who, for example, enter into a transaction with the partnership that is proper if the partnership is liquidating but that would not be enforceable against the partnership if it had not been dissolved. This section is merely a default rule and can be modified by the partnership agreement. Thus the partnership agreement can provide that in an at-will partnership the dissociated partner does not have the right to force a liquidation of the partnership, but instead the majority of the remaining partners shall decide whether the partnership will continue or be liquidated.
§803	Right to Wind Up Partnership Business	§37	This section, which is basically the same as UPA §37, provides that any partner other than a wrongfully dissociating partners may participate in the management of the partnership during the dissolution phase. The only major change made in UPA is the addition of specific language authorizing the liquidating partners to engage in activities not ordinarily incident to liquidating the partnership in order to preserve the partnership's business of property "as a going concern for a reasonable time."
§804	Partner's Power to Bind Partnership After Dissolution	§§33 and 35	This section provides a much less complex rule than the equivalent provisions in UPA: after dissolution, the partnership is bound by any acts by the partners that are appropriate for liquidation and also for any obligations not

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			appropriate for liquidation entered into with a non-partner who does not have actual or constructive notice of the dissolution.
§805	Statement of Dissolution	None	The Statement of Dissolution serves two purposes: (1) it provides constructive notice to the world that the partnership is dissolving, thereby cutting off after 90 days the apparent authority of a partner to bind the partnership for acts other than those reasonably necessary to liquidate the business; and (2) terminates authority to convey partnership real estate pursuant to section 303(d).
§806	Partner's Liability to Other Partners After Dissolution	§34	This section, which specifies how the partners share liabilities incurred during the liquidation process, is less complex than the equivalent UPA provisions. RUPA does not have different rules dependent on the cause of dissolution. In addition, pursuant to §103, it is possible for the partnership agreement to modify the rules in this section. There is no such authorization in UPA.
§807	Settlement of Accounts and Contributions Among Partners	§40	This section, which sets out the rules for liquidating distribution to the partners and the rules for contributions by partners necessary to wipe out a negative capital account and to pay partnership obligations in excess of its assets, makes the following changes in UPA §40: (1) partners who are creditors of the partnership are treated the same as other creditors "to the extent permitted by law", rather than being automatically subordinated to outside creditors; (2) the distinction between capital and profits in UPA §40(b)(II)-(IV) has been deleted as unnecessary because profits are part of capital under the definition of "distribution" in RUPA §101(3); (3) language in UPA §40 that could be interpreted to automatically make the amount of negative balance in a partner's capital account a debt to the partnership even if that is not the partners' intent, has been eliminated; and (4) the "jingle rule" in §§40 (h) and (i) giving creditors of a partner priority over partnership creditors in the assets of a bankrupt partner has been deleted as being inconsistent with §723(c) of the Bankruptcy code.
§901	Definitions	None	This section contains four definitions ("general partner," "limited partner," "limited partnership" and "partner" that apply to Article 9 of RUPA, which deals with conversions and mergers of partnerships.
§902	Conversion of Partnership to Limited Partnership	None	This section, which has no counterpart in the UPA, authorizes a non-exclusive safe harbor method of converting a general partnership into a limited partnership

			and specifies the responsibility of a general partner who becomes a limited partner for partnership liabilities before and after the conversion.
§903	Conversion of Limited Partnership to Partnership	None	This section, which has no counterpart in the UPA, authorizes as non-exclusive safe harbor method of converting a limited partnership into a general partnership and specifies the responsibility of a limited partner who becomes a general partner for partnership liabilities before and after the conversion.
§904	Effect of Conversion; Entity Unchanged	None	This section, which has no counterpart in the UPA, states that a partnership which has converted under §§902 or 903 is the exact same partnership before and after the conversion.
§905	Merger of Partnerships	None	This section, which has no counterpart in the UPA, authorizes a non-exclusive safe harbor method of merging a general partnership with one or more general or limited partnerships. The statutory format is similar to that for corporate mergers.
§906	Effect of Merger	None	This section, which basically follows the corporate merger statutes, sets out the legal effects of the merger, including the liability of a partner of the surviving partnership for the obligation of the merging and the surviving partnerships and the rights and liabilities of a non-continuing partner.
§907	Statement of Merger	None	This section, which has no UPA counterpart, sets out the requirements for a statement of merger as well as the legal consequences of filing the statement. The format is similar to the statement required to be filed by the surviving corporation under corporate merger statutes.
§908	Nonexclusive	None	This section makes it clear that partnerships can convert or merge in any other manner authorized by law.
§1001	Uniformity of Application and Construction	None	This section is a standard provision found in all recently drafted uniform acts.
§1002	Short Title	§1	This section sets out the official name of the act.

J3	Severability Clause	None	This section is a standard provision found in all recently drafted uniform acts.
§1004	Effective Date	§44	Because of the number of changes made by RUPA, state legislatures will probably want to have a delayed effective date in order to allow sufficient time for the various partnership statement forms to be prepared and filed and to educate lawyers and their clients about the changes.
§1005	Applicability	None	This section provides for a phased-in applicability of RUPA depending on whether a partnership is formed before or after the effective date of the Act. RUPA applies to partnerships formed before its effective date at a time certain specified by the state legislature (until that time they are governed by UPA); but such partnerships can elect to be governed by RUPA before this date. RUPA applies to all partnerships formed after its effective date. These rules should minimize transition problems.
§1007	Savings Clause	None	This Section, which parallels RULPA §1106, sets forth two standard rules: (1) the provisions of RUPA do not impair contract obligations existing on the effective date; (2) the changes in RUPA do not affect any action or proceeding commenced or any right accrued before the effective date.

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January 12, 1995

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Limited Liability Partnerships:
The 1996 Amendments to the Uniform Partnership Act (1994)

The Uniform Partnership Act (UPA) was approved by the Uniform Law Commissioners in 1994. It is a complete revision of the Uniform Partnership Act of 1914, which was adopted in every state except Louisiana. UPA updates partnership law to meet the needs of modern business, clearly establishing that a partnership is an entity rather than an aggregate of partners.

The 1996 Amendments to UPA add a significant option to partnership law: limited liability for all partners in a partnership when the entity chooses the registered limited liability partnership form. A partner in a limited liability partnership has nearly the same level of limited liability as a shareholder in a business corporation.

One of the historic principles of general partnership law is that each individual partner is personally liable for all partnership obligations. This means that partners may be required to discharge partnership obligations from their own personal assets once partnership assets are exhausted.

However, limited liability for participants in a business organization can have an important economic impact. Whether an individual or entity invests in or participates in a business may very well depend upon the quality of limited liability – for obvious reasons. Much of the current development in unincorporated organization law has been devoted to combining the flexibility of a partnership with limited liability for the participants in the business. The limited liability company and certain kinds of business trusts are examples.

But there has continued to be a search for an even simpler form. Texas pioneered the concept of a limited liability partnership in 1991. The notion of a partnership that obtains limited liability for partners by a simple registration on the public record provides an even simpler form than a limited liability company, for example. The Texas experiment lead directly to the Amendments to UPA.

The 1996 Amendments to UPA provide for a limited liability partnership with complete limitation of liability. Some of the pioneer legislation posed limitation of liability only for professional malpractice. The UPA Amendments provide for immunity from

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personal liability for any actionable wrong committed by the partnership. No partner is immune from liability for his or her own acts. A partner who commits an actionable wrong in the conduct of partnership business is fully liable for his or her own actions. Immunity is granted only for liability that is imputed simply because a partner is a partner, not for liability directly incurred.

Limited liability is an election that requires partners to register to become a limited liability partnership. Corporations, limited partnerships, and limited liability companies, which provide members or participants with some level of limitation of liability, all are registered entities. A limited liability partnership must also identify itself as an L.L.P. to those with whom it does business. The registration and identification requirements are to provide clear notice of its limited liability status to those who do business with a partnership. Creditors may and will adjust their assessments of credit-worthiness, accordingly.

The Amendments provide an option. The traditional partnership remains intact as the "residual" business organization for those who join to do business together. The continuity of partnership law that comes from the 1914 Uniform Partnership Act remains unsullied. A limited liability partnership is a partnership, and the rules that govern such matters as partners' obligations to each other, distributions, dissociation from the partnership, dissolution of the partnership, and the like, remain the same for limited liability partnerships as they do for traditional partnerships.

The objective of the 1996 Amendments to UPA is to increase choices for those who intend to do business together. This should have a positive impact on the formation of new businesses. Tax consequences have always been a major factor in decisions about which form of business organization to choose. This impact upon choice appears likely to become less important in the future with the promulgation of new regulations by the Internal Revenue Service. Therefore, the appearance of the Amendments to UPA could not come at a more propitious time.

Sen Jud 1-22-97 #4

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STATE OF KANSAS

TESTIMONY TO SENATE JUDICIARY COMMITTEE ON SENATE BILL 9 JANUARY 22, 1997

Mr. Chairman and Members of the Senate Judiciary Committee:

I appreciate the opportunity to appear before you today on SB 9. My presentation is not intended to persuade the committee to adopt or reject the Uniform Partnership Act but to state some general observations of the bill's provisions in comparison to other business entities that file with the Secretary of State. I hope my testimony is objective, neutral and helpful to the committee as they review this legislation.

1. SB 9 refers to the partnership's main office as its "chief executive office." The Kansas corporate code and partnership law usually uses the term "principal office" or "principal place of business." The term "principal office" is used in the code of civil procedure in referring to service of process on corporations and partnerships. Assuming the term "principal office" and "chief executive office" are intended to mean the same thing, the committee may wish to substitute the term "principal office" to maintain uniformity with Kansas law and to prevent confusion caused by using two different terms.

2. SB 9 does not require registering general partnerships to have a name that is "distinguishable upon the record." All business entities registered with the Secretary of State: corporations, limited liability companies, limited partnerships, limited liability partnerships, must use a name "such as to distinguish it upon the records in the office of the Secretary of State from the names

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of other(s). . . ." The requirement that each name be distinguishable prevents confusion when the public requests information on a particular business entity.

3. SB 9 does not require general partnerships to file annual reports with the Secretary of State. All other registered entities file annual reports, excluding LLP's who, instead, re-register every year. Annual reports provide the public with updated information about the business entity and allow the Secretary of State to calculate and charge a franchise fee based on shareholder equity or net capital accounts. The franchise fees do not generate revenue for the Secretary of State but are transferred to the general fund.

4. SB 9 allows general partnerships to convert to limited partnerships by filing a certificate of limited partnership. However, the requirements for this certificate, as outlined in Section 46 of SB 9, do not match the requirements for a certificate of limited partnership as outlined in the limited partnership statutes. A general partnership converting to a limited partnership is not required to provide the same information as a limited partnership forming under the LP statutes. Limited partnerships must list a registered office and resident agent, and names and addresses of the general partners in their certificates. A general partnership converting to a limited partnership need not provide this information. The committee may wish to make Section 46 consistent with the current law on LP's.

5. If the committee chooses to adopt the UPA provisions on limited liability partnerships, the Secretary of State requests that it be given rule and regulation authority to charge fees for filing and providing copies. Simply, we would ask that Section 5, subsection (f) and (g) of SB 9 apply to the additional provisions relating to LLP's. We would also ask that the committee consider all previous comments made in reference to the UPA as they may apply to the sections on LLP's.

6. The Secretary of State intended to introduce legislation this session allowing LLP's to amend their registrations. Current law does not allow LLP's to amend or correct information on their registration, it can only be corrected when the LLP re-registers at year's end. The UPA provisions on LLP's allow the LLP to file amendments. Adoption of these provisions would obviate the need for the Secretary of State's proposed legislation.

7. Section 50 of SB 9 requires the Secretary of State to act as the agent for service of process for foreign partnerships or limited partnerships. We request that the Secretary of State be given a service fee to cover the costs of processing and mailing the service. The code of civil procedure, specifically, K.S.A. 60-304(f) requires a service fee of $30 when the Secretary of State acts as the service agent for foreign companies. We would request that this fee be included in the provisions of the UPA.

I appreciate the opportunity to discuss SB 9, and I thank you for your consideration of these comments.

Melissa A. Wangemann
Legal Counsel

Sen Jud 1-22-97 #5

Legislative Testimony

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TO: Senate Judiciary Committee

FROM: Ron Smith, General Counsel

SUBJ: SB 8, SB 9
Uniform Fraudulent Transfers Act
Uniform Partnership Act, 1994 amendments

DATE: January 22, 1997

The Kansas Bar Association supports both these bills. The UFTA affects primarily debtor-creditor transfers. The Uniform Act creates two principle benefits: (1) lawyers can use the case law in other states to help construe the act; and (2) it changes our debtor-creditor laws to more closely mirror changes already existing in federal bankruptcy law. Fraudulent transfers in other situations not involving debtors and creditors would be handled under our existing case law. We support such change.

The Uniform Partnership Act is a new codification and update of general partnership law, reflecting a more modern approach to formation of such partnerships. The Secretary of State's office indicated that while general partnerships *currently* do not now make filings with their office, the new act would provide for five new filings but they are all discretionary with the partnership. The most important issue in the revised UPA is that a partnership does not dissolve if a partner dies or leaves as it does under present law. The act gives remaining partners a more level playing field in which to negotiate such changes in winding up a partnership.

The UFTA is new law and thus will have its own space in the statute book.

The UPA changes amend existing and often-used law with an entire new set of statutes. Some of those changes are minor. Other changes are more significant. We would hope one of two things would happen with the drafting of the bill. First that this committee would authorize the comments of the Uniform Laws Commission would be printed under the applicable statute. That has some expense, but is enormously helpful to practicing lawyers. This helps lawyers and judges understand any of the changes in the new law. Second if that cannot happen, then you should consider a substitute bill and let the revisors change the bill so that new changes are shown in the existing statute, like we do when we amend other bills. Then lawyers and judges looking at the session laws can tell the changes that were made and can more objectively determine the intent of the legislature.

Third, I would request that the effective date of both acts be changed to January 1, 1998, to allow for some continuing legal education of lawyers and judges on the use of both bills.

Thank you.

Senate Judiciary
attachment 5
1-22-97