The Revised Uniform Partnership Act: Not Ready for Prime Time

Larry E. Ribstein*

The National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Revised Uniform Partnership Act (RUPA)\(^1\) which makes several significant changes from the venerable Uniform Partnership Act (UPA).\(^2\) This Article describes and critiques some important aspects of RUPA.\(^3\) It concludes that RUPA is not yet ready to replace the UPA. In general, RUPA fails to serve what should be its primary mission of providing suitable default provisions for relatively informal firms that are unlikely to draft customized provisions. RUPA also changes partnership law without adequate regard to the serious costs of unsettling eighty years of case law under the UPA. As detailed \textit{infra}, RUPA's most questionable

\*Larry E. Ribstein is the George Mason University Foundation Professor of Law, George Mason University School of Law. Research support was provided by the Sarah Scaife Foundation. Valuable comments were contributed by Peter Letsou of George Mason and the following members of the ABA Ad Hoc Subcommittee on the Revised Uniform Partnership Act: Gerald V. Niesar (Chair), Michael L. Gravelle, James L. Jerue, Robert Keatinge, Martin I. Lubaroff, Thurston R. Moore, Paul McCarthy, William G. Pusch, Lauris G.L. Rall, and Anthony van Westrum. The final product is my own and does not represent the views of the American Bar Association or the Ad Hoc Subcommittee.


2. \textit{Unif. Partnership Act} (1914) [hereinafter UPA].

3. I previously commented on the 1990 draft of RUPA. See Larry E. Ribstein, \textit{A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act}, 46 Bus. Law. 111 (1990). Because of space limitations, this Article discusses only some of the more important issues in the final Act, focusing primarily on matters either changed from the 1990 draft or not discussed fully in my first Article. For a more comprehensive summary and critique of the 1992 final version of RUPA, see \textit{Alan J. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership} (1988 & 1993 Special Release).
provisions increase third parties' costs of dealing with partnerships, impose new formalities and other accounting requirements that may frustrate partners' expectations, perversely deny enforcement of waivers of disclosure requirements and fiduciary duties, and introduce new and potentially confusing rules in connection with partnership breakup, without solving the most important dissolution-related problems under current law.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

RUPA Article 3 deals with three aspects of the partnership's relationship with third parties: (i) a partner's power as agent or servant to bind the firm; (ii) partners' personal liability to third parties; and (iii) acts of purported partners. The most important changes from UPA are in the first two areas.

PARTNERS' POWER TO BIND THE PARTNERSHIP

RUPA makes basic changes in the rights of third parties relating to partners' power to rely on partnership acts. First, it changes when the partnership is bound for a partner's "apparently . . . usual" act. The UPA provides that an "apparently . . . usual" act does not bind the partnership if the third party "has knowledge of the fact that [the partner] has no . . . authority," and defines knowledge as "actual knowledge" and "knowledge of such other facts as in the circumstances shows bad faith." This sensibly motivates partners to clarify partners' authority, and motivates third parties to pay attention to information already acquired, to avoid imposing the costs of unwanted transactions on partners. Although "knowledge"

4. RUPA § 301.
5. Id. § 301(1).
6. UPA § 9(1) (emphasis added).
7. Id. § 3(1). The Comments to RUPA §§ 102 and 301 erroneously characterize this definition as including inquiry notice. See RUPA §§ 102 cmt., 301 cmt. 2.
8. The UPA definition of knowledge clarifies that proof of knowledge does not depend on establishing subjective awareness of lack of authority. UPA § 3(1). For example, a partnership escaped being bound by a title document a third party knew related to the partner's personal loan even without proving that the third party subjectively was aware that the issuance was unauthorized. See Investors Title Ins. Co. v. Herzig, 360 S.E.2d 786 (N.C. 1987). In this situation, the third party ought to be able to infer the lack of authority from information already acquired.
is sometimes unclear under the UPA, the ample UPA case law provides guidance and protection. RUPA, on the other hand, binds third parties not only when they have knowledge, or should have inferred the facts from other information already acquired, but even when they do not know the facts but have "received a notification" of it. Notification is too flexible a term to use in barring a third party from relying on a partner's authority. For example, a third party may or may not have notification that a partner lacks authority merely because the third party has a copy of a lengthy partnership agreement that includes provisions generally limiting the partner's authority. Also, it is not clear how notification will be defined in the context of verbal statements. This change is debatable enough that RUPA should not have unsettled an area of partnership law that necessarily depends for clarity on decades of case law.

RUPA virtually forces third parties dealing with partnerships in all substantial transactions, no matter how "apparently ... usual," to get written evidence of the partner's authority. RUPA facilitates this by authorizing central filings that clarify partners' authority. RUPA section 303 permits a partnership to file "a statement of partnership authority" which (i) supplements partners' authority by binding the partnership in favor of third parties who lack knowledge contrary to the statements in the document.

9. See Green River Assocs. v. Mark Twain Kansas City Bank, 808 S.W.2d 894 (Mo. Ct. App. 1991) (because bank knew partnership agreement required deposit of proceeds of loan in partnership account, it could not rely on any apparent authority of general partner to deposit elsewhere, so partnership not liable for repayment of misappropriated proceeds); First Nat'l Bank & Trust Co. v. Scherr, 467 N.W.2d 427 (N.D. 1991) (under UPA § 9(4) and agency law, bank that earlier relied on authority of one partner to borrow for partnership could not continue to do so after it had knowledge from partnership agreement and signature card that consent of both partners required); Evans v. Pioneer Bank, 809 P.2d 251 (Wyo. 1991) (promissory note executed by one of two managing partners not binding on partnership where partnership agreement required consent of both to such transaction outside the regular course of business, and bank had a copy of agreement).

10. RUPA § 102(a) provides that "a person knows a fact if the person has actual knowledge of it." The Comment to RUPA § 102 adds that "actual knowledge" means "cognitive awareness" and contrasts this language with what it erroneously characterizes as an "inquiry notice" standard under UPA § 3(1).

11. RUPA § 301(1). RUPA § 102(e) provides:

A person receives a notification when it:
   (1) comes to the person's attention; or
   (2) is duly delivered at the person's place of business or at any other place held out by the person as a place for receiving communications.

RUPA § 102(f) provides rules for when "a person other than an individual knows, has notice, or receives a notification of a fact."

Response to Comments, supra note 1, at 2, 7, erroneously assumes that the shift from a notice to a notification standard eliminates problems like those discussed in the text.

12. This might be done by filing a statement of partnership authority under RUPA § 303. See infra text accompanying notes 13-15.

13. See RUPA § 105 (providing for filing requirements for all statements).

14. Id. § 303(d).
and (ii) limits partners' authority to transfer real property. Unfortunately, these provisions protect only more formal partnerships and those dealing with them. The informal "default" partnerships for which RUPA should be designed, and third parties dealing with them, must contend with RUPA's new regime.

RUPA permits other filings that may hurt partnership creditors by allowing partnerships to limit a partner's authority after the partner dissociated or the partnership dissolved. Partnerships may file statements of dissociation or dissolution which provide notice of the dissociation or dissolution ninety days after filing and immediately limit the authority of all of the partners of the dissolved firm or a dissociating partner. Because repeat trade creditors may neglect to check the public record every ninety days as the Comments recommend, these filings may effectively relegate creditors to collecting from whomever happens to remain associated with the firm at the time of collection. This may translate into higher credit costs for all partnerships, because creditors cannot know at the time of contracting whether the debtor partnership will file a statement while the debt is uncollected.

**PARTNERS' LIABILITY**

RUPA significantly changes the nature of partners' liability for partnership debts as compared with the UPA by providing that partners' liability is joint and several for all debts, rather than only for partners' wrongful acts as under the UPA. This eliminates the creditors' burden of finding and suing all partners as may be required for joint liability. But RUPA also provides for an "exhaustion" requirement that, like most

15. *Id.* § 303(e)-(f).
16. See *infra* text accompanying notes 17-18.
17. *Id.* § 704.
18. *Id.* § 806.
19. RUPA §§ 704 and 805 refer to RUPA § 303(d) and (e) regarding the immediate limit on authority. The reference to RUPA § 303(d) means that the statement would withdraw a supplement to partner authority contained in a statement of partnership authority, while the reference to § 303(c) means that the statement would limit partner authority to convey real property.
20. See RUPA § 702 cmt. 1. The Response to Comments justifies the rule by asserting without support that "a third party typically is better able to protect itself than is the dissociated partner." Response to Comments, *supra* note 1, at 35.
21. RUPA § 306.
22. UPA § 15.
23. RUPA § 307(d).
states’ rules for joint liability,24 prevents creditors from levying against
partners of non-bankrupt partnerships without first levying unsuccessfully
against the partnership or convincing a court that levy would be unsuccess­ful.

Requiring exhaustion obviously helps protect partners by saving them
the expense of paying the creditor and then seeking indemnification from
the firm. At the same time, it does not frustrate most creditors’ expec­
tations. Contract creditors generally rely on the firm’s assets because it is
usually not worth the trouble to keep track of individual partners’ wealth.
Creditors who find it worthwhile to rely on individual partners can obtain
guarantees that permit direct actions against the partners. Thus, the ex­
haustion requirement may not significantly increase partnerships’ credit
costs.25

Yet there are good reasons for not switching to an exhaustion rule.26
Requiring exhaustion for both joint liability and joint and several liability
will increase litigation costs for tort creditors who formerly could levy
against partners without exhaustion, and who have no opportunity to con­
tact around the rule.27 Partners may be able to obtain indemnification
cost-effectively at the same time as settling rights to assets in accounting.
Finally, moving the partnership form toward limited liability is particular­ly
inappropriate in light of the increased opportunity to obtain true limited
liability through limited liability companies.

24. See Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis, 849 F.2d 264, 271 (7th
Cir. 1988) (Illinois law); Commonwealth Capital Inv. Corp. v. McElmurry, 302 N.W.2d 222,
15 (Nev. 1969). For joint and several liability, the traditional rule is that the liability is
individual and may be enforced without exhaustion. See Foster v. Daon Corp., 713 F.2d 148,
151 (5th Cir. 1983) (Texas law); Catalina Mortgage Co. v. Monier, 800 P.2d 574 (Ariz. 1990)
(en banc); Head v. Vulcan Painters, Inc., 541 So. 2d 11 (Ala. 1989); Head v. Henry Tyler
 Constr. Corp., 539 So. 2d 196, 199 (Ala. 1988); Phillips v. Cook, 210 A.2d 743, 746-47
(Md. 1965). For a general discussion of the exhaustion requirement, see 2 Bromberg &
Ribstein, supra note 3, § 5.08(d)-(g).

25. See Larry E. Ribstein, The Deregulation of Limited Liability and the Death of Partnership,
70 Wash. U. L.Q. 417, 430-31 (1992) (discussing this as a justification for limited liability
in closely held firms)

26. The arguments against the RUPA approach are summarized in J. Dennis Hynes, The

27. As discussed supra, the general rule requires exhaustion in the case of joint liability,
which UPA § 15 imposes for non-tort claims. RUPA § 307(d)(3) would enforce contracts for
direct liability. The extent to which exhaustion increases tort creditors’ costs depends, of
course, on how onerous the exhaustion requirement is. If courts require only a single return
of execution, exhaustion may not be a serious problem. On the other hand, exhaustion may
be difficult if tort creditors must pursue partnership assets in several states. The drafters
appear to take inconsistent positions on this question. Response to Comments, supra note
1, at 11-12, minimizes the burden on creditors, while it also characterizes, id. at 45, the
exhaustion rule as RUPA’s “only fundamental change that could prejudice partnership cred­
itors.”
RUPA also may not be the right exhaustion rule. RUPA vaguely permits courts to excuse exhaustion if that "is an appropriate exercise of the court's equitable powers" or if "liability is imposed on the partner by law or contract independent of the existence of the partnership." The latter exception might permit creditors to pursue partners directly if, for example, they have negligently supervised their colleagues, or even possibly where the law imposes joint and several liability on all partners for partnership torts—an exception that could swallow the rule. Finally, by excusing exhaustion against bankrupt partnerships, RUPA perversely may both encourage unnecessary involuntary bankruptcies by creditors seeking to avoid the exhaustion requirement, and delay appropriate voluntary filings by partners.

**RELATIONS OF PARTNERS TO EACH OTHER AND TO THE PARTNERSHIP**

RUPA Article 4 deals with financial relationships and control rights among the partners of an existing partnership. Most of these rules, quite properly, are subject to contrary agreement. Nevertheless, some of RUPA's new rules create potential problems.

**PARTNERS' FINANCIAL RIGHTS**

The major difference between the UPA and RUPA regarding financial rights is RUPA's assumption that each partner has an "account" that is "credited with" partner contributions and shares of profits and "charged with" distributions and partner shares of losses. This language may have unexpected and unpredictable consequences for the very informal or unintentional partnerships for which the statute is intended. Such firms generally have nothing resembling partner accounts. Will such firms be deemed to have contracted around RUPA, be penalized in some way for violating the statute, or have their accounts judicially reconstructed? The latter interpretation may be the most logical, but is inconsistent with the partners' being "deemed" already to have accounts and may add cumbersome and unnecessary paperwork. In short, capital accounts belong in agreements, not in a statute that is designed specifically for firms that do not have agreements.

29. Id. § 307(d)(5).
30. Id. § 307(d)(2).
31. Partner dissociation and dissolution are governed by RUPA arts. 6-8.
32. See RUPA § 103. The exceptions include access to books and records and the fiduciary duties. See id. §§ 103(b), 403(b), 404.
33. Id. § 401(a)-(b).
PARTNERS' INFORMATION RIGHTS

RUPA mostly follows the UPA concerning partnership books and partners' duty to render information.\textsuperscript{44} RUPA does make some needed changes, including qualifying partners' right of access to partnership books by limiting inspection to business hours,\textsuperscript{35} permitting inspection by former partners only of books and records pertaining to the period during which they were partners,\textsuperscript{36} and allowing the partnership to charge for copies.\textsuperscript{37}

Unfortunately, RUPA continues to require demand for information.\textsuperscript{38} The prior case law overlooked the UPA demand requirement\textsuperscript{39} and compelled disclosure in other appropriate circumstances.\textsuperscript{40} As a court recently stated in interpreting a demand requirement in a comparable limited partnership provision: "[t]o hold that partners may replace their broad duty of disclosure with a narrow duty to render information upon demand would . . . invite fraud. Unless partners knew what questions to ask, they would have no right to know material information about the business."\textsuperscript{41} RUPA not only fails to align the black letter law with the case law, but confuses matters further by stating that the section's information rights "are not exclusive."\textsuperscript{42}

RUPA also senselessly invalidates agreements that "unreasonably restrict the right of access to books and records."\textsuperscript{43} The partners may need to limit disclosure, for example, to protect confidential information or to

\textsuperscript{34} Compare RUPA § 403 with UPA §§ 19, 20.

\textsuperscript{35} RUPA § 403(b). RUPA § 403, like the equivalent UPA provision, awkwardly states a "duty" of the "partnership" to keep books and records at a particular place without stating any penalty for breach of the duty. The partners care only about the right to inspect at the chief executive office.

\textsuperscript{36} Id. § 403(b).

\textsuperscript{37} Id.

\textsuperscript{38} Id. § 403(c).

\textsuperscript{39} UPA § 19.

\textsuperscript{40} See Witter v. Torbett, 604 F. Supp. 298 (W.D. Va. 1984) (joint venture); Reed v. Robilio, 273 F. Supp. 954 (W.D. Tenn. 1967), aff'd, 400 F.2d 730 (6th Cir. 1968) (purchase of estate's interest by surviving partner; duty held not breached); Appletree Square I L. P. v. Investmark, Inc., 494 N.W.2d 889 (Minn. Ct. App. 1993); Sutton v. Fleming, 602 So. 2d 228 (La. Ct. App. 1992) (joint venturer breached fiduciary duty by failing to inform other joint venturer that $100,000 of purchase price was actually finder's fee, portion of which was paid to co-joint venturer); Starr v. International Realty, Ltd., 533 P.2d 165 (Or. 1975) (failure to disclose receipt of side compensation from vendor of property; active concealment not required); Johnson v. Peckham, 120 S.W.2d 786 (Tex. 1938).

\textsuperscript{41} Appletree Square I, 494 N.W.2d at 893.

\textsuperscript{42} RUPA § 403 cmt. 3 (affirmative disclosure duties may arise from other sections, including the partners' equal rights in management of the business and the partners' obligation of good faith). It is far from clear that disclosure duties necessarily should be implied from these provisions, and the demand requirement in the section that explicitly governs disclosure duties would seem to negate any duty that otherwise would arise by implication. This Comment makes it impossible to predict how courts will interpret § 403.

\textsuperscript{43} Id. § 103(b)(2). Strangely enough, RUPA does not prevent waiver of the far more basic general disclosure duty provided for under RUPA § 403.
ensure that obstreperous partners or disgruntled former partners cannot badger the firm. RUPA simply gives these partners more ammunition for litigation. The courts can protect partners sufficiently from bad-faith behavior\textsuperscript{44} that the statute need not deal specifically with "sport" cases.\textsuperscript{45}

**FIDUCIARY AND GOOD FAITH DUTIES**

The UPA provides simply and comprehensively that a partner must account to the partnership for benefits appropriated without co-partner consent.\textsuperscript{46} Case law has evolved under this section to deal with a wide variety of partner conduct and surrounding circumstances.\textsuperscript{47} RUPA nevertheless unsettles existing law by providing in detail for a revised duty of loyalty, a duty of care, and an "obligation of good faith and fair dealing."\textsuperscript{48} As discussed infra, these new rules are seriously misguided.

**The Specification of Duties**

RUPA's first error is in attempting to specify all of the partners' duties.\textsuperscript{49} Fiduciary duty is a type of contractual term courts supply because the parties themselves would have contracted for the duties if it were not so costly to contract in detail.\textsuperscript{50} Fiduciary duties do not differ fundamentally from other types of terms the courts supply in interpreting contracts.\textsuperscript{51} Because fiduciary duties are contractual "gap-fillers," the precise nature of the duties that exist in any particular contractual relationship depends on the express and implied terms of the relevant contract. Moreover, the "fiduciary duty" issue often blends imperceptibly with broader questions concerning what property is owned by the firm. This insight underlies Justice Frankfurter's famous phrase: "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry."\textsuperscript{52}

\textsuperscript{44} See id. § 404(d). Indeed, because the restriction on contracting is in addition to the mandatory obligation of "good faith and fair dealing," courts may conclude that the statute prohibits even good faith denials of access that nevertheless fall within the nebulous "unreasonable" range.

\textsuperscript{45} See Michael P. Dooley, Two Models of Corporate Governance, 47 Bus. Law. 461, 479-81 (1992) (criticizing The American Law Institute's corporate governance code on this ground).

\textsuperscript{46} UPA § 21.

\textsuperscript{47} See generally 2 Bromberg & Ribstein, supra note 3, § 6.07.

\textsuperscript{48} RUPA § 404(b), (c), (d).

\textsuperscript{49} The Reporter noted that the specification of duties in RUPA § 404 would facilitate contracting around the duties. See Weidner, Midstream, supra note 1, at 856. Even if this purpose could justify the costs of specifying duties, it unfortunately is negated by the statute's limitations on contracting. See infra text accompanying notes 89-115.


\textsuperscript{51} See id. For a contrasting analysis emphasizing differences between fiduciary law and contract doctrine, see Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 Duke L.J. 879.

\textsuperscript{52} SEC v. Chenery Corp., 318 U.S. 80, 85 (1943).
ing a lawyer to share a contingency fee with his or her former partners is as much a question of whether the sharing ratio under the partnership agreement extends to work-in-process as it is a question of the withdrawing partner's fiduciary duty. Indeed, even Meinhard v. Salmon, which is celebrated for imposing on partners and other fiduciaries "the punctilio of an honor the most sensitive," could be characterized as involving nothing more than an interpretation of the scope of a joint venture.

The UPA prohibition on unilateral benefit without co-partners' consent gives courts the flexibility to fill gaps in partnership contracts by determining who owns what and the partners' duties regarding partnership property. Because the extensive case law under the UPA's simple language recognizes a full range of fiduciary duties, there was no need for further detail. Yet RUPA perversely attempts to spell out a set of duties that exists in all partnerships under all circumstances. As should be clear from the discussion supra, this attempt was certain to fail.

**Fiduciary Duties Under RUPA**

RUPA's fiduciary duty provision not only includes the UPA's language, but also specifies duties to refrain from self-dealing and competition, and to act carefully. RUPA thereby imposes on all partners a new obligation to be unselfish, which is wrong for many partnerships and contrary to existing law. Courts recognize fiduciary duties only in certain types of agency-like or trust-like contracts where it is appropriate to require a party


54. See Gravel v. Roy (In re Chris J. Roy), 130 B.R. 214 (Bankr. W.D. La. 1991) (Louisiana law; partner breached fiduciary duty by failing to account to co-partner for fees or to work on partnership cases as required by dissolution agreement), aff'd, 983 F.2d 1062 (5th Cir.), cert. denied, 113 S. Ct. 2931 (1993); Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180 (Cal. Ct. App. 1983).

55. 164 N.E. 545 (N.Y. 1928).

56. Id. at 546.

57. See 2 BROMBERG & RIBSTEIN, supra note 3, at 6:82 n.53; Easterbrook & Fischel, supra note 50, at 20-21. To illustrate the point that Meinhard involves nothing more than a "scope" issue, consider the contrasting case of Rinke v. Rinke, 48 N.W.2d 201 (Mich. 1951) (extension of automobile franchise belonged only to continuing partners).

58. UPA § 21.

59. See generally 2 BROMBERG & RIBSTEIN, supra note 3, § 6.07.

60. RUPA § 404.

61. Id. § 404(b)(1).

62. Id. § 404(b)(2)-(3).

63. Id. § 404(b)(3).

64. Id. § 404(c).
who controls another's property to act in the other's interests. For example, courts have held that there is no fiduciary duty of loyalty between a lender and a borrower or between a franchisor and franchisee. While partners may have a duty to act unselfishly in partnership affairs, RUPA errs in making this duty part of every partnership contract. Partners often do not contract to be strict fiduciaries in the typical agency or trust sense of one who controls the property of another. In other words, partners are not necessarily comparable to directors or executives of publicly held corporations. Instead, partners may be self-seeking co-venturers who are constrained from the worst kinds of misconduct by their contingent compensation, personal liability for debts, and their co-partners' close monitoring and power to withdraw at any time. A partner who loans money to the partnership does not necessarily have a duty to refinance the loan and a partner may buy partnership property on his or her own behalf at a liquidation sale. As two prominent commentators point out, in a partnership the "[duty of loyalty is] commonly relaxed. . . . Partners are treated more as co-owners than as each others' keepers." RUPA undermines the continued authority of prior law by prohibiting all partners from dealing with the partnership as adverse parties without co-partner consent.

Having misstated the law, RUPA then confuses matters further by providing that a partner does not violate a duty merely by furthering the partner's own interest, and that a partner may lend money and transact

65. See United States v. Chestman, 947 F.2d 551 (2d Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1759 (1992) (Winter, J., concurring and dissenting). For a case articulating the distinction between general commercial good faith and the fiduciary duties that exist only in certain contracts, see Market Street Assocs. L. P. v. Frey, 941 F.2d 588 (7th Cir. 1991).

66. See Kham & Nate's Shoes No. 2, Inc. v. First Bank, 908 F.2d 1351 (7th Cir. 1990) (holding against fiduciary duty); but see K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985) (recognizing a fiduciary duty).


68. See RUPA §§ 103(b)(3) (making duty of loyalty unwaivable); 404(b) (setting forth duty of loyalty).


70. See Mandell v. Centrum Frontier Corp., 407 N.E.2d 821 (Ill. App. Ct. 1980); Cude v. Couch, 588 S.W.2d 554 (Tenn. 1979); Prentiss v. Sheffel, 513 P.2d 949 (Ariz. Ct. App. 1973). This point is acknowledged even by the RUPA drafters. See RUPA § 404 cmt. 6 (discussing RUPA § 404(f)).

71. Easterbrook & Fischel, supra note 50, at 11.

72. RUPA § 404(b)(2). The reference in this subsection to co-partner "consent" is unclear. If, as stated in the Response to Comments it requires consent to specific transactions as distinguished from the advance waiver in RUPA § 103(b)(3), this could override any provision in the partnership agreement that defines the partners' rights, including provisions for compensating the partners. Response to Comments, supra note 1, at 19.

73. RUPA § 404(c).
business with the partnership. Saying that a partner has the right to act selfishly is inconsistent with saying that the partner is a fiduciary. The meaning of the contradictory provisions can be settled only by years of wasteful litigation.

**Good Faith Under RUPA**

RUPA also errs in its articulation of the obligation of "good faith." Good faith is an implied term in all contracts. In contrast to fiduciary duties, the good faith obligation does not require that parties act unselfishly. Rather, the good faith principle means that the courts interpret contracts by assuming that the parties agreed to act as would a reasonable contracting party having consented to the explicit contract terms, rather than seizing opportunistically on the contract's literal language. Any other approach to interpretation would require all contracting parties to engage in costly contracting and self-protection. Because this principle ensures that the parties' conduct conforms to their underlying deal, the parties obviously

74. Id. § 404(f). The language of this subsection is derived from the Revised Uniform Limited Partnership Act § 107 (1985), which provides that partner creditors are treated like outside creditors subject to applicable debtor-creditor law. See RUPA § 404 cmt. 6. Putting this language in a section on general standards of conduct, however, erroneously implies that it limits partners' duties among themselves and not merely to creditors. The Reporters state that the transaction-of-business subsection is a subcategory of the general rule permitting the partner to pursue self-interest. See Weidner & Larson, supra note 1, p. 20. Yet this just confuses matters more by raising the question of why the drafters included both the general category and the more narrow subcategory.

75. Comment 5 to RUPA § 404 states that § 404(e) says a partner is not a "trustee," while reaffirming that the partner is a "fiduciary." This distinction is incorporated in the black letter law of the Texas Revised Partnership Act. See 1993 Tex. Gen. Laws 917, § 4.04(f). The courts will have to settle precisely how RUPA's drafters intended to distinguish these terms.


77. See DeMott, supra note 51, at 900; Claire Moore Dickerson, Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and The Revised Uniform Partnership Act, 64 U. Colo. L. Rev. 111 (1993).

78. For explicit applications of this principle in two important recent Delaware decisions, see Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp., 17 Del. J. Corp. L. 1099 (Del. Ch. Dec. 30, 1991); Katz v. Oak Indus., Inc., 508 A.2d 873, 880 (Del. Ch. 1986).
cannot contract out of it, although they can vary its application by varying their deal.

RUPA, however, characterizes good faith as an "obligation" that exists in all partnerships, and not simply as a mechanism for interpreting contracts. While RUPA makes clear that the only fiduciary duties are those of loyalty and care defined in section 404(a), by identifying good faith as a "standard of partner's conduct" RUPA implies that good faith is a particular type of obligation that exists in all partnerships. Moreover, the Comments undercut the black letter by stating that the good faith obligation includes an affirmative disclosure duty, thereby indicating that "good faith" is intended to be fiduciary-like in nature.

RUPA therefore may change current law by requiring partners to be "nice" rather than merely to refrain from twisting the contract in ways the parties never intended. Consider, for example, RUPA's effect on agreements providing for expulsion of partners. Current law enforces the power to expel even without proof that it was exercised for good cause or in accordance with particular procedures. This makes sense because the purpose of summary expulsion provisions in the partnership agreement is to facilitate smooth functioning of the partnership without costly liti-

79. U.C.C. § 1-102(3).
80. Id. ("the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable"); Corensinet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129, 138 (5th Cir.) ("[w]e do not agree . . . that the section 1-203 good faith obligation . . . can properly be used to override or strike express contract terms"), cert. denied, 444 U.S. 938 (1979).
81. Comment 4 to RUPA section 404 states that the good faith obligation is not a "separate and independent obligation" in the sense that it "is dependent on the existence of another duty arising under the partnership agreement or the Act." But so long as good faith is identified as an "obligation" it must be something more than a principle of contract interpretation whether or not it is "dependent," whatever that means. Moreover, it is not clear why any duty, including a fiduciary duty, is not equally dependent on other duties. For example, the scope of a partner's duties to act carefully and loyally depends on the scope of the partners' management functions.
82. RUPA § 404(a).
83. Id. § 404 cmt. 4.
84. For a discussion of the fiduciary character of affirmative disclosure obligations, see Market Street Assocs. L. P. v. Frey, 941 F.2d 588, 593-94 (7th Cir. 1991). See also Weidner & Larson, supra note 1, p. 24 (reflecting the potential for confusion by saying that the good faith obligation draws upon both the fiduciary law of cooperative relationship and the contract law of adversarial relationships).
The UPA’s sole substantive fiduciary duty section provides that a partner drafting a clear-cut expulsion provision. At the time of drafting the partnership agreement, before the partners know who will be affected by an expulsion clause, the partners sensibly may choose to minimize the total costs of the relationship by drafting a clear-cut expulsion provision.

**Nonwaivability of Fiduciary Duties**

The discussion supra shows that many partnerships will find RUPA’s fiduciary duty provisions to be unsuitable as default rules. Even worse, RUPA’s standards of partner conduct cannot even be waived in the partnership agreement. Rather, the agreement can only “identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable” or “determine the standards by which the performance of the [good faith] obligation is to be measured, if the standards are not manifestly unreasonable.”

Mandatory fiduciary duties change decades of prior law under the UPA. The UPA’s sole substantive fiduciary duty section provides that a partner must account only for those profits derived “without the consent of the other partners.” The courts accordingly have enforced partnership agreements permitting partners to compete with the partnership and to engage in self-dealing.

88. Comment 4 to RUPA § 601 asserts, without support in the black letter law that the good faith obligation “does not require prior notice or opportunity to be heard.” Even if this Comment were controlling, it does not deal with other “bad faith” claims that expelled partners might make, such as an argument that there was no business purpose for the expulsion.
89. RUPA § 103.
90. Id. § 103(b)(3).
91. Id. §103(b)(5).
92. UPA § 21. The partners also may authorize partner compensation under the lead-in to UPA § 18, which is no different in effect from allowing a partner to take partnership opportunities as part of his or her compensation. There is even an internal conflict in this respect within RUPA, because RUPA § 401 is similar to UPA § 18, and RUPA § 404(b)(1) incorporates UPA § 21, including the consent language.
94. See Wilson v. Button, 404 F.2d 309 (5th Cir. 1968); Hooper v. Yoder, 737 P.2d 852 (Colo. 1987); Covalt v. High, 675 P.2d 999 (N.M. Ct. App. 1983), cert. denied, 674 P.2d 521 (N.M. 1984). For a discussion of cases enforcing partnership provisions opting out of fiduciary duties, see 2 Bromberg & Ribstein, supra note 3, at 6:90-6:92. RUPA’s drafters unduly emphasize a couple of cases that do not support a general rule of nonwaivability. Comment 2 to RUPA § 103 cites Labovitz v. Dolan, 545 N.E.2d 304 (Ill. Ct. App. 1989), appeal denied, 550 N.E.2d 557 (Ill. 1990) as authority for nonwaivability. In that case the court held that a provision in the partnership agreement giving the general partner discretion over distributions did not authorize him to breach his fiduciary duty by withholding distributions in order to squeeze out the limited partners. Id. at 313. The agreement did not include a fiduciary duty waiver. Moreover, it is unlikely that even a waiver of the duty not to engage in self-interested transactions could be construed as authorizing a squeeze out. Weidner & Larson,
Mandatory fiduciary duties also are bad policy because they preclude worthwhile contracts.\textsuperscript{95} For example, RUPA prevents partners from (i) contracting out of a duty of care where the probability that a partner with a heavy investment in the firm and exposure to personal liability will be grossly negligent is so low as not to be worth the costs and risks of litigation,\textsuperscript{96} (ii) avoiding liability on such vague additional grounds provided for in RUPA as “intentional misconduct” or “knowing violation of law,”\textsuperscript{97} (iii) protecting a managing partner who simultaneously is managing other partnerships from exposure to intractable conflicts,\textsuperscript{98} (iv) letting a managing partner enter into contracts with the partnership on behalf of the partner’s management company,\textsuperscript{99} or (v) clarifying that a partner can be expelled without any cause or without any special procedure.\textsuperscript{100}

There is no good reason for flatly prohibiting all of these contracts. The Comments suggest that waivers may result from “unequal bargaining power, information, or sophistication.”\textsuperscript{101} But the parties to formal general and limited partnership\textsuperscript{102} agreements, who often negotiate in detail or


\textsuperscript{96} RUPA § 404(c).


\textsuperscript{98} RUPA § 404(b)(2).

\textsuperscript{99} Id. § 404(b)(1).

\textsuperscript{100} Id. § 404(d). See supra text accompanying notes 87-88.

\textsuperscript{101} RUPA § 103 cmt. 2.

\textsuperscript{102} Professor Melvin A. Eisenberg of the University of California School of Law in Berkeley, California, warned the Commissioners that permitting fiduciary duty waivers in limited partnerships was a mistake particularly because “it would be at best a bad joke to believe that limited partners in a publicly held limited partnership can bargain about such provisions in any meaningful sense.” See Letter from Melvin A. Eisenberg to NCCUSL Commissioners 7 (July 27, 1992). While limited partners may not bargain individually concerning fiduciary duty waivers, they usually are sophisticated or have sophisticated investment advisors. Indeed, there is no reason to think they are any less able as a group to understand fiduciary duty waivers than general partners. See Larry E. Ribstein, \textit{Unlimited Contracting in the Delaware
are participating in sophisticated, idiosyncratic tax-motivated deals, are unlikely to need the protection of an unconscionability rule that invalidates entire categories of clauses. The NCCUSL Commissioners were told on the eve of adopting RUPA to prohibit fiduciary duty waivers because of the difficulties of foreseeing future events. But the partners' inability to foresee the future does not explain why they should be forced to permit future legal challenges, no matter how unpredictably harmful to the firm these challenges may be. This reasoning also ignores the courts' capacity to deal with unforeseen events through contract interpretation rather than broad prohibition. The conduct may not be within the language of the waiver, as where, for example, a partner not only competes with the firm as permitted by the waiver, but does so by making unauthorized use of confidential information. Similarly, the agreement may authorize a general or managing partner to act but not to self-deal. The conduct also may violate the contract under the general "good faith" interpretation principle discussed supra.

Even if partners need protection from unconscionable contract clauses, it follows from the inherently contractual nature of fiduciary duties that prohibiting one specific type of contract clause will not provide that protection because the parties always can contract for alternative mechanisms that achieve equivalent results. A promoter who is blocked from entering into a fiduciary waiver simply can bargain for more compensation, for a type of clause that is not considered a fiduciary duty waiver, or for a

Limited Partnership and its Implications for Corporate Law, 17 J. CORP. L. 299 (1991) (discussing Delaware statutory provision permitting waivers of fiduciary duties in limited partnerships, and comparing limited partners' and corporate shareholders' ability to understand fiduciary duty waivers).

103. See Letter from Melvin A. Eisenberg to NCCUSL Commissioners 2-4 (July 17, 1992).
104. See 2 Bromberg & Ribstein, supra note 3, at 6:92; see also supra note 81.
106. See Palmisano v. Mascaro, 611 So. 2d 632, 635 (La. Ct. App. 1992) (agreement which authorized partner to "grant, bargain, sell, assign, set over, convey, deliver, . . . said property in any manner, . . . for such amounts and on such terms and conditions . . . as said General Partner shall in his sole and uncontrolled discretion, deem necessary, advisable or proper" but which also required the general partner to act as a fiduciary did not authorize self-dealing) (emphasis in original), writ denied, 614 So. 2d 80 (La. 1993); Knopke v. Knopke, 837 S.W.2d 907 (Mo. Ct. App. 1992) (agreement which gave general partner "unqualified authority" to make all decisions relating to the financial affairs of the partnership did not eliminate partner's fiduciary obligations); Labovitz v. Dolan, 545 N.E.2d 304 (Ill. App. Ct. 1989), appeal denied, 550 N.E.2d 557 (Ill. 1990).
107. See supra text accompanying notes 76-80.
108. For a discussion of the equivalence of fiduciary duties and other types of contractual provisions, see supra text accompanying notes 49-57.
non-RUPA partnership\textsuperscript{109} or a non-"fiduciary" relationship.\textsuperscript{110} Because the parties can contract around purported limitations on fiduciary duty waivers, the main functions of these limitations will be to force the parties into protracted litigation over the meaning of the statutory limitations, or to adopt "second best" business forms or contract terms they would not have chosen if the partnership statute had not restricted contracting.

Finally, RUPA is perverse even in its limited authorization of waivers. RUPA permits "specific types or categories of activities" covered by duty-of-loyalty waivers and agreed "standards" for measuring the performance of the good faith obligation that "are not manifestly unreasonable."\textsuperscript{111} In other words, RUPA forbids even "reasonable" but non-"specific" waivers, and waivers that are "specific" but "unreasonable," but not waivers that are merely "unreasonable" but not "manifestly" so. These qualifications are so vague that sophisticated planners would be foolish to rely on them, but are sure to enmesh in litigation unfortunate partners who attempt private ordering of fiduciary duties—perhaps including some UPA partnerships that suddenly become subject to RUPA.\textsuperscript{112} For example, the Comment to this provision states that a partner who is a real estate agent can be authorized to retain commissions on property transactions that the partner arranges for the partnership, or to determine the properties and their prices without co-partner approval.\textsuperscript{113} But what if the provision authorized the partner to engage as an agent in transactions involving partnership property, but did not mention retention of commissions, or authorized the partner to retain commissions without saying the partner could set the price without co-partner approval?

In general, RUPA's vague and conflicting rules on waiver appear to reflect the drafters' desire to fashion a political compromise between con-

\textsuperscript{109} RUPA § 106 provides that the partnership is governed by the law of the state in which the partnership's chief executive office is located. Because this provision is not one of the nonwaivable provisions under § 103, however, the parties can determine by agreement which law applies.

\textsuperscript{110} See supra text accompanying notes 66-67 (identifying types of agreements in which the courts have held the parties do not owe fiduciary duties). One advocate of mandatory duties, Professor DeMott, recognizes that parties can avoid, in effect, fiduciary duties by choosing the form of relationship. See DeMott, supra note 51, at 901. Yet it is not clear why the parties should be limited to waiver by choice of form. Dickerson, supra note 77, argues that the choice of the partnership form necessarily should imply the existence of fiduciary duties because of partners intimacy and personal liability. But this ignores the tremendous variation among firms that do business in the partnership form, from sophisticated investment partnerships to family grocery stores.

\textsuperscript{111} RUPA § 103(b)(3), (5). It is not clear what the effect is of the different standards for waiving the duty of loyalty and the obligation of good faith. Response to Comments, supra note 1, at 20, states, without further clarification, that the variations in language are intended to reflect differences in the underlying duties.

\textsuperscript{112} See infra text accompanying notes 230-237.

\textsuperscript{113} RUPA § 103 cmts. 1-3.
tractarians and paternalists. The drafters point to criticism of RUPA from both camps as a sign of a successful balance. In fact, the varied response to RUPA is a symptom of its internally conflicting language. This ambiguity is sure to give rise to different schools of judicial interpretation, just as it already spawned diametrically opposed critics.

**REMEDIES**

RUPA changes the UPA rules regarding remedies between a partner and the partnership and among the partners. The UPA provides only for a "right to an [a]ccount," which involves a potentially lengthy proceeding resolving all pending matters among the partners. Courts have long made the accounting proceeding the partners' exclusive remedy for some causes of action arising out of partnership affairs. Because this rule introduced unnecessary procedural complexity, it was overdue for abolition.

RUPA provides that "a partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business." This provision, while intended to abolish the exclusivity requirement, does not do so explicitly. The UPA itself never explicitly provided for exclusivity and partners always have been able to bring some actions other than for accounting. The exclusivity rule can be reversed safely only by a clear statutory statement that an accounting is never a prerequisite to the exercise of a partner's remedies against the firm.

At the same time, RUPA may go too far by unduly broadening individual partners' remedies. Partners should not be able to sue individually on

114. See Weidner & Larson, supra note 1, p. 18 (describing § 404 as "a compromise on an extraordinarily controversial topic").

115. See Response to Comments, supra note 1, at 16 (noting both opposition to RUPA's mandatory rules by the subcommittee on RUPA, of the Committee on Partnerships and Unincorporated Business Organizations, of the Section on Business Law of the American Bar Association, and opposition to RUPA's freedom of contract by the Committee on Corporation Law of the Association of the Bar of the City of New York). For other commentary critical of RUPA's supposed move toward freedom of contract, see Dickerson, supra note 77.

116. UPA § 22.

117. See 2 Bromberg & Ribstein, supra note 3, § 6.08(d).

118. See id. § 6.08(c) (reviewing the exclusivity rule and its exceptions).

119. See Ribstein, supra note 3, at 141-42.

120. RUPA § 405(b).

121. See id. § 405 cmt. 2.

122. For a recent example of this mistaken reliance on the UPA, see All Am. Laundry Serv., Inc. v. First State Bank (In re Ascher), 141 B.R. 652, 659 (Bankr. N.D. Ill. 1992) (Illinois law; trustee in bankruptcy cannot sue partner without accounting, relying in part on UPA § 22(a), because claim and counterclaim both assert wrongful exclusion from the partnership business for which § 22(a) provides an accounting remedy).
actions that belong to the firm because that lets any partner burden the firm with costly litigation. Firms also may want to avoid the potential excesses of derivative litigation and require suit only in the name of the firm, particularly in light of RUPA's expansion of the duties that such suits can enforce. Even the exclusivity rule is better than expanding partners' rights to sue, because requiring formal accountings deter needless litigation by exposing the plaintiff to counterclaims. RUPA should be revised to clarify that individual partners cannot sue on actions belonging to the firm. Moreover, in light of the potential costs of excessive litigation, the statute should make clear that partners can contract to limit remedies.

**PARTNER DISSOCIATION**

The UPA provides that any partner dissociation causes dissolution. This extreme aggregate view of partnership significantly interferes with continuity of the firm. RUPA Articles 6, 7, and 8 appear to change this by clearly separating partner dissociation and dissolution: Article 6 identifies events that cause partner dissociation; Article 7 deals with buyout of a dissociated partner by a continuing firm; and Article 8 deals with dissolution. These structural changes hide the fundamental similarity between RUPA and UPA: under both, a single partner can compel liquidation of the firm at any time. The only significant difference between the approaches of the two acts is that, under RUPA, a partnership does not necessarily “dissolve” as a result of a partner’s dissociation.

---

123. This is the default rule suggested for limited liability companies in the Prototype Limited Liability Company Act. See ABA Ad Hoc Limited Liability Committee, Prototype Limited Liability Company Act § 1102.
124. See RUPA § 404. RUPA does not authorize explicitly derivative suits. See id. § 405 cmt. 2; Response to Comments, supra note 1, at 21. Nevertheless, RUPA's language is sufficiently broad to give courts the leeway to authorize derivative suits.
125. Instead, the Comment 3 to RUPA § 405 states that partners may not contract away their section 405 remedies for breach of the mandatory duties in section 103(b). This is not supported by and seems inconsistent with the black letter law. RUPA § 405 is not one of the provisions listed in RUPA § 103 as not being subject to contrary agreement. Contrary to the implication of the Comment 3 to § 405, it does not follow from the fact that a duty is mandatory that all aspects of the remedy also are mandatory. Indeed, the ALI Corporate Governance Project explicitly provides to the contrary. See The American Law Institute, Principles of Corporate Governance: Analysis and Recommendations § 7.19 (Proposed Final Draft, Mar. 31, 1992).
126. UPA §§ 29, 31.
127. Compare RUPA § 801 with UPA § 31.
NOTICE OF DISSOCIATION

RUPA's identification of "[e]vents causing partner's dissociation"\textsuperscript{128} improves on the UPA by adding some detail and clarity,\textsuperscript{129} but poses several problems by not requiring written notice of dissociation.\textsuperscript{130} Dissociation is a significant event under RUPA because it triggers buyout rights\textsuperscript{131} or winding up of the firm\textsuperscript{132} and changes in the liability and authority of the dissociating member and the firm.\textsuperscript{133} The benefits of written notice in terms of reducing uncertainty and litigation would outweigh the costs of additional formality.\textsuperscript{134}

RUPA not only fails to reduce uncertainty regarding "notice," but further increases it by raising questions about what constitutes the requisite notice. RUPA defines \textit{notice} broadly to include knowledge, reason to know, and receipt of notification.\textsuperscript{135} Also, because RUPA explicitly provides for dissolution only if the partnership has notice of a partner's express will to withdraw,\textsuperscript{136} it is not clear whether the partnership dissolves if the partner's "notice" expresses a will to dissolve, as would have been the case under the UPA.\textsuperscript{137}

MANDATORY POWER TO DISSOCIATE

RUPA wrongly provides that the partners cannot contract around a partner's power to withdraw by express will.\textsuperscript{138} There are two potential, but ultimately unpersuasive, arguments against letting partners contract around the dissociation right.\textsuperscript{139} The first argument is that partners must

\textsuperscript{128} RUPA § 601.

\textsuperscript{129} For example, RUPA § 601(8)-(10) defines dissociation for partners who are trusts, partners, and corporations. Section 602 defines "wrongful" dissociation, and clarifies that a dissociation is wrongful where a partner is dissociated by judicial decree for misconduct. Section 603 provides that the effect of a partner's dissociation is either the purchase of the interest under Article 7 or dissolution under Article 8, and that a dissociated partner loses the right to participate in management and conduct of the partnership business other than in winding up under Article 8.

\textsuperscript{130} See Ribstein, \textit{supra} note 3, at 146 (discussing the need for a writing requirement).

\textsuperscript{131} RUPA § 701.

\textsuperscript{132} Id. § 801.

\textsuperscript{133} Id. §§ 603, 702-704, 804-806.

\textsuperscript{134} Comment 2 to RUPA § 601 states that requiring a writing would be "unnecessarily formalistic, and a trap for the unwary." This assumes without analysis that the uncertainty costs of requiring a writing would outweigh those of not doing so.

\textsuperscript{135} RUPA § 102(b).

\textsuperscript{136} Id. § 801(1).

\textsuperscript{137} See UPA § 31(1)(b).


\textsuperscript{139} The contract that should be enforced is one explicitly limiting a partner's power to dissociate. In other words, the author does not suggest that a partnership for a particular term or undertaking should be interpreted as one prohibiting a partner from dissociating. For a contrary suggestion, see Robert W. Hillman, \textit{Indissoluble Partnerships}, 37 U. FLA. L. REV. 691, 731 (1985).
be able to escape continuing liability for partnership debts. But RUPA reduces the sting of such liability by requiring creditors, subject to their contrary agreement with the partners, to exhaust partnership assets before executing against individual partners.\textsuperscript{140} Partners who cannot dissociate still can negotiate with co-partners and creditors regarding indemnification and releases.

A second argument for maintaining the dissociation right is that partners cannot predict the effects of the agreement over the indefinite future of the partnership. But legislators and uniform law drafters are no better able to predict the long-term effects of the statutory rule for all partnerships. Moreover, courts can fill contracting gaps by considering whether partners’ actions are in good faith accord with their underlying deal, and by expelling partners or dissolving partnerships in cases of partner misconduct.\textsuperscript{141} It is unnecessary to prohibit all agreements to protect partners from the occasional bad deal. And even if the inability to dissociate is a bad idea, it does not follow that partners should be unable to decide the issue for themselves.

Mandating dissociation at will is in all events confusing because partners can agree to penalize withdrawal through liquidated damages, a low buyout price, or a noncompetition agreement.\textsuperscript{142} Although RUPA provides that the partnership “shall cause” the purchase of the interest,\textsuperscript{143} and the Comment provides that the “buyout is mandatory,”\textsuperscript{144} RUPA does not identify this as a nonwaivable provision.\textsuperscript{145} Courts could hold that the buyout right is a fundamental aspect of the power to dissociate, or that only termination of liability and authority is fundamental, or that waivers of the right are enforceable subject to good faith interpretation principles.\textsuperscript{146}

\section*{CONTINUATION AND TERMINATION OF PARTNERSHIP DUTIES}

RUPA provides for termination of a dissociating partner’s right to participate in the business and for continuation of fiduciary duties only as to certain pre-dissolution matters or events unless the partner participates in winding up.\textsuperscript{147} This provision raises questions concerning whether a

\begin{itemize}
  \item \textsuperscript{140} RUPA § 307(d).
  \item \textsuperscript{141} \textit{See id.} §§ 601(5) (judicial expulsion), 801(5) (judicial dissolution).
  \item \textsuperscript{142} \textit{See Pav-Saver Corp. v. Vasso Corp.}, 493 N.E.2d 423 (Ill. App. Ct. 1986) (discussed in Ribstein, \textit{supra} note 3, at 147 n.143).
  \item \textsuperscript{143} RUPA § 701(a).
  \item \textsuperscript{144} \textit{Id.} § 701 cmt. 2. Comment 3 of that section states that “a provision providing for a complete forfeiture would probably not be enforceable.”
  \item \textsuperscript{145} \textit{See id.} § 103.
  \item \textsuperscript{147} RUPA § 603(b).
\end{itemize}
partner's fiduciary breach concerns pre-dissolution matters, whether the breach involves the duty not to compete, which does not continue after dissociation even as to pre-dissociation matters, and whether the partners' agreement waives post-dissociation duties. For example, under this provision a withdrawing law partner who appropriated a client and a fee from work-in-process may be liable if the appropriation of work-in-process is "with regard to" a pre-dissociation matter or event, or if the partner is considered to be participating in winding up by completing work-in-process. On the other hand, the lawyer is exonerated for conduct deemed to be competition with his or her former firm. These questions undermine the continued authority of cases under the UPA that hold, for example, that former law partners may not appropriate the benefit of cases they continue to handle after leaving the firm.

RUPA's termination of fiduciary duties is not only confusing, but also superfluous and wrong. Nothing in RUPA prevents courts from holding that a dissociated partner retains some partner attributes, including fiduciary duties. Indeed, RUPA recognizes fiduciary duties in connection with "winding up" and that a dissociated partner may participate in winding up. Abrupt termination of duties as to all post-dissociation matters also is wrong because the conditions that justify recognizing fiduciary duties continue so long as a former partner retains control over partnership property or management power.

PURCHASE OF DISSOCIATED PARTNER'S INTEREST WHEN BUSINESS IS NOT WOUND UP

RUPA Article 7 provides for the consequences of dissociation when there is no dissolution pursuant to Article 8. These consequences primarily include the buyout of the dissociated partner and the termination of the dissociated partner's liability and power to bind the firm. RUPA provides

148. Because RUPA § 603 is not one of the nonwaivable provisions under § 103, the partners apparently can waive the continuation of their fiduciary duties. Of course, under that section they cannot waive the duties themselves.

149. See Rosenfeld, Meyer & Susman v. Cohen, 194 Cal. Rptr. 180 (Cal. Ct. App. 1983); Little v. Caldwell, 36 P. 107 (Cal. 1894); 2 Bromberg & Ribstein, supra note 3, § 7.08(e); see also Leff v. Gunter, 658 P.2d 740 (Cal. 1983) (partner could not bid against former partner on partnership opportunity after dissolution). Comment 2 to § 603 states that the post-dissociation duty of loyalty extends to "completing on-going client transactions" and "fees received from the old clients." This could be regarded as competition, however, which § 603(b)(3) permits after dissociation.

150. In fact, Comment 1 to RUPA § 601 states that "[a] dissociated partner remains a partner for some purposes."

151. See RUPA § 404(b)(1)-(2).

152. See id. § 804.


154. RUPA § 701.

155. Id. § 702.
for the purchase of a dissociated partner's interest. This is the counterpart to UPA provisions for the buyout of a dissociated partner where the firm is continued after a technical dissolution.

**VALUATION OF PARTNER'S INTEREST**

The UPA provides that the dissociated partner is entitled to the "value of his interest in the dissolved partnership." RUPA provides, in considerably more detail, that the dissociated partner is entitled to a "buyout price" of "the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner." RUPA's attempt to distinguish between "going concern" and "liquidation" value is confusing and destroys the precedential value of the case law interpreting the UPA. "Liquidation" means, simply, sale. The price of productive assets ordinarily depends on how they are to be used in a productive business—that is, their "going concern" rather than "scrap" value. RUPA's attempted distinction between these terms undoubtedly will confuse the courts.

RUPA's additional stipulation that the value must be determined "without the dissociated partner" may cause additional confusion. While it makes sense to exclude value attributable to the dissociated partner, the provision lends itself to a negative pregnant construction that includes value attributable to the other partners' reputations. This would change, perhaps unwisely, the general rule excluding such value in professional partnerships. Moreover, by qualifying only going concern value, the stipulation deepens the confusion created by the distinction between going concern and liquidation value.

156. Id. § 701.
157. UPA §§ 38(2), 42.
158. Id. § 42.
159. RUPA § 701(b). Basing the price on a sale of the entire business clarifies that there is no "minority discount." See id. § 701 cmt. 3.
160. The Comments characterize buyout price as a "new term ... intended ... as an independent concept appropriate to the partnership buyout situation, while drawing on valuation principles developed elsewhere." Id. § 701 cmt. 3. The Reporter described the new language as "intended to cut through some of the confusion in the cases concerning the term 'going concern value.'" Weidner, Three Decisions, supra note 1, at 442.
161. This confusion is evident in the corporate appraisal rights cases that require the net asset value component of fair value to be determined on the basis of what a third party would pay for the assets on liquidation, see Bell v. Kirby Lumber Corp., 413 A.2d 137 (Del. 1980); Poole v. N. V. Delii Maatschappij, 243 A.2d 67 (Del. 1968), yet exclude consideration of the investment value of the assets even if this is an important determinant of what the third party would pay. See Francis I. Du Pont & Co. v. Universal City Studios, Inc., 312 A.2d 344 (Del. Ch. 1973), aff'd, 334 A.2d 216 (1975).
162. RUPA § 701(b).
RUPA also changes the UPA by eliminating the former partner's right to be paid a share of profits attributable to use of the partner's investment in the business from dissociation until pay-off. There is no apparent reason for eliminating this important right. Investors generally expect to be paid for use of their invested capital. Moreover, unless the continuing partners must pay for the capital they use, they may prolong inefficiently the business instead of winding it up. Accordingly, the parties probably would draft for this right in a fully specified agreement, and the statute should provide this rule for the many informal partners who are unlikely to think to draft for it. Indeed, courts may continue to effectuate the parties' likely expectation even without explicit statutory authority.

INDEMNIFICATION

RUPA provides that the dissociated partner shall be indemnified against all present and future liabilities except pre-dissociation liabilities "unknown" to the partnership, and post-dissociation liabilities incurred by the dissociated partner's act. This clarifies somewhat the muddled UPA indemnification provisions that provide for no indemnification for rightfully withdrawing partners, a "discharge" for expelled partners and, as to wrongfully withdrawing partners, for indemnification "against all present or future liabilities" and release from "existing liabilities." RUPA unfairly saddles the dissociating partner with liability risk, while at the same time precluding him or her from sharing in unexpected post-dissociation gains in asset value.

Second, RUPA illogically distinguishes among types of contingencies. The known nuisance suit that unexpectedly blossoms into a major liability after dissociation, the "unknown" pre-dissociation partner misconduct that becomes a major liability after the dissociation, and the product that is sold before the dissociation but explodes afterward, all involve analogous risk-allocation problems. While the risk attributable to unknown outcomes of known liabilities may be larger than that regarding unknown liabilities,

164. See 2 Bromberg & Ribstein, supra note 3, at 7:135 (explaining reasons for profits-or-interest election).
165. RUPA § 701(d).
166. UPA § 38. See 2 Bromberg & Ribstein, supra note 3, at 7:130-7:133.
167. The author previously argued for a default rule indemnifying dissociating partners against all liabilities for which the partner may be held liable. See Ribstein, supra note 138, at 421.
168. See RUPA § 701(d).
the continuing partners should bear this risk because, as a group, they are in the best position to evaluate the firm's liabilities. 169

Third, RUPA unduly increases litigation costs because it forces tricky determinations as to whether a liability was incurred before or after the dissociation and, if before, whether it was "known." For example, a partner may or may not "know" of a liability merely by knowing litigation might arise out of something the firm did in representing a client, and liability for a product that was sold prior to the dissociation but exploded afterward may or may not have been "incurred" after the dissociation.

Fourth, RUPA fails to allocate drafting burdens properly. Most of the informal partnerships for which RUPA should be designed probably would prefer an inclusive indemnification rule because partners dissociating from such firms are likely to be in a poor position to learn about or protect themselves from liabilities asserted after dissolution. In any event, it probably is easier to contract out of a clear and inclusive default rule by specifying types of liabilities that are not covered than to contract out of the vague RUPA rule by specifying "unknown" liabilities or liabilities "incurred after the dissociation" that are covered.

PROCEDURES FOR PAYMENT

RUPA provides for detailed procedures regarding tender and payment of, and suit for, the value of a dissociated partner's interest. 171 Such procedures may surprise informal partnerships in which membership could change without anyone realizing that they belonged to a "partnership" governed by these elaborate provisions. For example, a partner may be barred unexpectedly from suit by not commencing an action within one

169. Comment 4 to RUPA § 701 points out that the burden of proving knowledge is on the partnership because it "is in the best position to know of contingent or yet unasserted liabilities." This is a good enough reason not to put the risk of "unknown" liabilities on the dissociating partner. Weidner and Larson defend the limitation on indemnification on the ground that it ensures indemnification only against liabilities that were taken into account in determining the buyout price. Weidner & Larson, supra note 1, pp. 12-13. This misses the point that the buyout price reflects the risks imposed on the parties, and not merely known amounts.

170. Note in this regard the final sentence of RUPA § 701(d): "For purposes of this subsection, a liability not known to a partner other than the dissociated partner is not known to the partnership." This sentence presumably does not mean what it seems to say: if a single partner does not know of the liability, the partnership does not. Rather, it seems to mean that a liability that is known by a single partner is known by the partnership. It is not clear why RUPA attributes the knowledge of a partner to the partnership in this particular instance while deleting UPA § 12, which generally attributes knowledge and notice of every partner to the partnership. Perhaps the reason has something to do with the allocation of the risk of contingency between dissociating and non-dissociating partners. This risk, however, generally should be allocated to the partnership rather than the departing partner.

171. RUPA § 701(e), (g), (i). These provisions are based on MODEL BUSINESS CORP. ACT § 13.25 (1984) [hereinafter Model Act].
year after writing a letter that was not intended, but could be construed as, a “written demand for payment.” Or the partnership may be bound unexpectedly to pay attorney’s fees and other expenses because it unreasonably failed to tender payment in response to such a letter. It follows that the procedures should be proposed as “opt-in” provisions that can be adopted by partnerships.

**WINDING UP PARTNERSHIP BUSINESS**

RUPA Article 8 deals with the situations in which the partnership is dissolved and its business is wound up. Although the UPA’s extreme aggregate rule of dissolution at the will of any partner was outmoded, the RUPA drafters have left the UPA’s basic approach virtually intact. At the same time they make enough changes to invalidate many years of case law under the UPA.

**EVENTS CAUSING DISSOLUTION AND WINDING UP**

RUPA provides that “a partnership is dissolved, and its business must be wound up” if (i) the partnership is at will and a partner withdraws by express will (ii) the partnership is for a definite term or particular undertaking and the term expires, all the partners express will to dissolve or, after a partner wrongfully dissociates or dissociates by bankruptcy or death (or an equivalent event for a partner who is not an individual), another partner decides to withdraw, (iii) an event occurs that the partners agreed should cause winding up, (iv) it is unlawful to continue the business, or (v) a court so decrees.

This provision may be the most controversial in the Act. To evaluate it, consider a small, informal partnership operating without a written agreement—precisely the situation in which a partnership statute is most valuable and for which it should be designed. Should a leaving partner be able to compel winding up of the firm, or only the right to a buyout and indemnification against liabilities? Note that the question is not whether the partnership “should be” continued, but rather whether the partners who wish to continue the firm should have negotiating leverage. If the leaving partner may compel liquidation, the firm nevertheless will continue if the other partners, in effect, purchase this right. If not, the firm will be liq-

172. See RUPA § 701(i).
173. Id.
174. UPA § 31(1)(b), (2).
175. For a recommendation that this rule be changed, see Ribstein, supra note 3.
176. RUPA § 801(1).
177. Id. § 801(2).
178. Id. § 801(3).
179. Id. § 801(4).
180. Id. § 801(5)-(6).
udated only if the leaving partner buys out the other partners and sells the firm.

In answering the critical question of whether the leaving or continuing partners should have negotiating leverage, it is important to keep in mind that the parties have made open-ended investments of their human and financial capital and personal credit in an on-going business. It follows that the group probably would rather not give each member a continuing option to force the other partners to buy the right to continue. Such a right puts the whole group at the mercy of any individual partner who can time his or her dissociation to facilitate a takeover of the firm at an advantageous price. Although partners theoretically can draft around the statutory rule, the statute imposes unnecessary drafting costs if most partnerships would prefer an alternative rule. It also imposes an inefficient rule on partnerships that unintentionally fails to completely vary the statute and on the informal and unintentional partnerships for which the statute should be designed.

Notwithstanding these considerations, the UPA gives the leaving partner a right to compel liquidation. This applies the extreme aggregate view of partnership that prevailed when the UPA was drafted as an association among particular parties that necessarily ends when one of the parties wants it to. Eighty years of the UPA has demonstrated the inappropriateness of the liquidation right, as indicated by the standard practice of drafting around the right and the many judicial decisions that find some way to qualify it.

Yet RUPA defies both logic and experience by continuing to give a dissociating partner the power to liquidate when the partnership is at will. The Comments nowhere acknowledge the problems with dissolution at will and the arguments against continuing this outmoded approach. RUPA can be supported only by the concern that a dissociating partner

182. UPA § 38.
183. See 2 Bromberg & Ribstein, supra note 3, at 7:3-7:4.
184. Some of these cases are reviewed in Ribstein, supra note 138, at 374-75. The Texas Revised Partnership Act further confirms the unpopularity of dissolution at will by permitting continuation on a vote of only a majority of the remaining partners, and providing that de facto continuation of the business precludes dissolution. See 1993 Tex. Gen. Laws 917, § 8.01(g).
185. RUPA § 801(1).
186. The Response to Comments generally does acknowledge the criticism of dissolution-at-will, but responds only by asserting, without elaboration or support, that: "the rule has not created hardship under the UPA," the alternative of relegating to buyout is "not attractive," that this rule is "most consistent with the parties' expectations," and that the liquidation right is most likely to achieve "ultimate fairness." Response to Comments, supra note 1, at 35, 36.
may be disadvantaged by being relegated to a judicially determined buyout price and to indemnification rather than pay-off of partnership assets. But the leaving partner is protected from possible mistreatment by judicial dissolution or expulsion of misbehaving partners.\textsuperscript{187} In light of the potentially high costs of the liquidation right, the problem of partnership liabilities is addressed best by providing for a broad indemnification right. Instead, RUPA gets the balance wrong by providing for only a limited indemnification right,\textsuperscript{188} thereby giving partners who leave informal partnerships the dubious choice between destroying the firm to ensure payment of liabilities or allowing the firm to continue and receiving only limited indemnification against liabilities.

Even if a partner always should be able to cause liquidation of a partnership at will, it makes no sense to give that right to a partner in a partnership for a definite term or undertaking merely because some other partner dissociated.\textsuperscript{189} RUPA differs from the UPA only in not requiring a deceased partner's estate to consent to continuation in this situation,\textsuperscript{190} in not technically dissolving the firm if all the partners decide to continue it,\textsuperscript{191} and in requiring that any decision to dissolve be made within ninety days.\textsuperscript{192} The rule requiring premature liquidation of a partnership for a term questionably assumes that the dissociating partner was critical to the firm. But it is logical to infer from the parties' agreement to a definite term or undertaking that premature liquidation prior to expiration of the term or undertaking would be particularly costly. Moreover, even if the departing partner was crucial to the firm's success, this is precisely when there is the greatest risk that the partner would use his or her leverage to take over the firm, and accordingly when the other partners' right to avoid a liquidation would be most valuable.

\textsuperscript{187} See RUPA §§ 601(5), 801(4)-(6); see also id. § 103(b)(5)-(6) (designating these remedies as not subject to the parties' contrary agreement). Accordingly, RUPA provides for a sort of judicial "escape valve" that protects parties against the oppressive effects of continuation agreements that could not have been anticipated at the time of the agreement.

\textsuperscript{188} See id. § 701(d).

\textsuperscript{189} Id. § 801(2).

\textsuperscript{190} See id. § 801(2)(i) (partnership dissolves only if another partner withdraws within 90 days). The estate's power to compel liquidation is unclear under the UPA. UPA § 38(1) gives the estate's power to compel liquidation to "each partner," although § 41(3) implies that the legal representative's consent is required for continuation. Some states' versions of the UPA explicitly let the estate compel liquidation. See, e.g., GA. CODE ANN. § 14-8-38(a) (1989). On the other hand, some statutes explicitly give a buyout right to the surviving partners. See, e.g., OHIO REV. CODE ANN. § 1779.04 (Baldwin 1992). For a discussion of the estate's right to compel liquidation under the UPA, see 2 BROMBERG & RIBSTEIN, supra note 3, at 7:100-7:101. Even if the estate has a technical right to compel liquidation, the right can be lost by acquiescence. See Hulet v. Martenson, 564 S.W.2d 584 (Mo. Ct. App. 1978); 2 BROMBERG & RIBSTEIN, supra note 3, at 7:104.

\textsuperscript{191} RUPA § 801(2)(i) (partnership dissolves only if another partner withdraws after the wrongful dissociation).

\textsuperscript{192} Id.
CONTINUATION AFTER DISSOLUTION

RUPA provides that at any time after dissolution and before completion of winding up, the non-wrongful partners can waive their right to have the business wound up by consenting to the continuation of the partnership and its business.193 If they do so, the partnership continues and any liabilities incurred by the partnership after the dissolution shall be "determined as if dissolution had never occurred."194

This provision may confuse and surprise partners and third parties by permitting sudden changes in the partners' rights, powers, and duties without any requirement of notice to third parties. A decision to continue changes partners' actual authority from a winding up mode, in which partners may be able to dispose of partnership property that is necessary for the business without unanimous consent,195 to a continuation mode in which unanimity for such dispositions is necessary.196 The decision also may terminate a dissociated partner's continuing liability and apparent authority to bind the firm, which is subject to a two-year limitation when the partnership continues,197 but not when the partnership dissolves,198 makes inapplicable any "statement of dissolution" the partners have filed,199 reverses the process of distribution and payoff200 and subjects the former partner to the buyout and indemnification provision,201 and may impact provisions in the partnership's agreements with third parties or among the partners that are triggered by dissolution.202 These sudden changes may confuse post-continuation creditors and frustrate dissociated partners' expectations, formed at the time of the original decision to liq-

193. Id. § 802(b).
194. Id.
195. See Cunningham & Co. v. Consolidated Realty Management, 803 F.2d 840 (5th Cir. 1986) (Texas law; because partnership agreement permitted dissolution by majority vote, unanimity is unnecessary for sale of the partnership's assets in connection with dissolution). Of course the continuation also may expand the partners' power to enter into transactions that are appropriate for continuation but not for winding up, thereby making some transactions binding that were not binding prior to the continuation. This is probably intended by the partners once they decide to continue. See RUPA § 802 cmt. 2 (noting the validating effect of § 802).
196. RUPA § 802(b) provides that "rights of a third party accruing under Section 804 before the third party knew or received a notification of the waiver may not be adversely affected." Thus, the third parties' rights depend on the vagaries of "notification." See supra text accompanying note 11.
197. See RUPA §§ 702(2) (power to bind), 703(b) (liability of dissociated partner).
198. See id. § 804(2) (liability of all partners for post-dissolution acts).
199. This statement is provided for under RUPA § 805. Unless the partners think to file a statement of dissociation, see id. § 704, the dissociated partner may be able to bind the firm to, and be bound by, debts that would not have been binding had the statement of dissolution not become inactive.
200. See id. § 807.
201. See id. § 701.
uidate, that assets would be sold and debts paid. Indeed, even a partnership that was formerly in dissolution under the UPA may become subject suddenly and unexpectedly to continuation under RUPA when the applicable state adopts RUPA. 203

By giving partners an open-ended power to change their minds about whether to continue the firm, RUPA section 802 also invites strategic behavior by continuing against leaving partners. For example, if the value of partnership property increases following dissociation, the partners can decide to switch from dissolution, in which the leaving partner would share in the increase in value, to continuing the firm and paying the leaving partner the value of his or her interest on the date of dissociation. 204 Indeed, the partners now have an incentive to prolong winding up, particularly because the continuing partners no longer have to pay the dissociating partner for using his or her invested capital after dissociation. 205

These problems are compounded by the fact that the continuation decision can come years after the dissolution. 206 Moreover, it may not be clear whether the partners consented to the continuation, as where the partners acquiesced in a course of conduct that seems more consistent with continuation than with winding up, or whether winding up was completed, thereby terminating the partners' ability to consent to continuation under the statute.

The confusion resulting from the RUPA continuation provision is unnecessary as well as unfortunate. Even without this provision, partners always could decide to continue the business through another partnership or other form of business association. While such a continuation might affect the power and authority of the members of the new firm, 207 it would not effect the retroactive changes discussed supra regarding the dissociated partner, undo a prior dissolution, or change the partners' power to bind the partnership vis-à-vis third parties without notice of the continuation.

SETTLEMENT OF ACCOUNTS AMONG PARTNERS

The UPA provides that assets of a dissolved partnership are distributed first to outside creditors, then to satisfy obligations to partners on account of loans, capital, and profits. 208 This approach probably is consistent with

203. See RUPA § 1006 (application to existing relationships).
204. See id. § 701(b).
205. See supra text accompanying note 164.
206. This contrasts with the 120-day limitation in the analogous provisions for revocation of dissolution in Model Act § 14.04(a). See Response to Comments, supra note 1, at 38 (noting similarity between RUPA § 802 and Model Act § 14.04(a)).
207. The dissociated partner's actual or apparent authority to bind the continuing firm under general agency law might be affected by the continuation.
208. UPA § 40.
most partners' expectations, and in any event was clarified by many cases. RUPA nevertheless makes several changes. Among other things, RUPA eliminates the priority of outside creditors over partner creditors, eliminates the UPA's priority of liabilities to partners in respect of capital, provides that profits and losses are credited or charged to partners' "accounts," and gives partners a right to receive distributions, or to make contributions, in the amount of the difference between credits and charges in their accounts (replacing the UPA's reference to "assets" and "liabilities").

These changes pose questions that are sure to provoke years of litigation. First, it is not clear how RUPA's requirement of "accounts" relates to an informal partnership that has not kept books. RUPA apparently requires a court to reconstruct partnership accounts rather than simply determining assets and liabilities and dividing them. Second, while RUPA suggests that any deficit in the partners' capital accounts constitutes a contribution obligation, these deficits may reflect only the parties' intentions regarding the tax consequences of partnership, and not the duty actually to make contributions to the partnership.

Third, RUPA's treatment of the obligation to repay capital contributions may surprise and confuse many partners. Under the UPA, service contributors had to share the obligation to refund partner capital contributions as a priority payment. Such a rule probably is consistent with the

209. See 2 Bromberg & Ribstein, supra note 3, § 7.10. Weidner and Larson unaccountably assert that "[t]here is remarkably little case law" on how partners are to settle accounts, and cite two cases for the proposition that "recent cases are hopelessly confused." Weidner & Larson, supra note 1, p. 10.

210. RUPA § 807. See also UPA § 40(a), (b).

211. Weidner and Larson say that RUPA brings partnership law "into conformity with modern accounting concepts." Weidner & Larson, supra note 1, p. 10. But that only introduces confusions when the law has to deal with partnerships that have not engaged in "modern accounting."

212. RUPA § 807 (basing determination on "partner's account").

213. This issue caused some confusion in the cases. In Park Cities Corp. v. Byrd, 534 S.W.2d 668 (Tex. 1976), the court required a general partner in a limited partnership to repay on dissolution a deficit in her account resulting from depreciation charges. Id. at 674-75. On the other hand, in Lamborn v. Dittmer, 873 F.2d 522 (2d Cir. 1989), the court held that an agreement requiring losses to be reflected in the partners' capital account did not compel the partners to make capital contributions. Id. at 528. Comment 3 to RUPA § 807 points out that the partners may agree that negative capital account balances do not reflect debts to the partnership. But this is not much solace for an informal partnership, and unnecessarily forces partners to engage in additional contracting if most firms could be expected to agree to this result.

214. See UPA § 40(b), which lists partners' capital contributions as a debt that must be paid by partner contributions. For cases recognizing the partners' obligation to repay capital losses under the UPA, see Eardley v. Sammons, 330 P.2d 122 (Utah 1958); Hamilton Airport Advertising, Inc. v. Hamilton, 462 N.E.2d 228 (Ind. Ct. App. 1984); Schymanski v. Coventz, 674 P.2d 281 (Alaska 1983); Dicus v. Belco Indus., Inc., 569 P.2d 553 (Okla. Ct. App. 1977); Halsey v. Choate, 217 S.E.2d 740 (N.C. Ct. App.), cert. denied, 220 S.E.2d 350 (N.C. 1975);
partners' expectations that, to the extent of their capital contributions, they will be treated like preferred shareholders. Yet RUPA's treatment of this obligation is far from clear. In the basic financial rights section, RUPA provides for charging partners' accounts with "losses, whether capital or operating." Moreover, because these capital accounts are the basis for distributions on dissolution, this suggests that, as under the UPA, losses that make the firm unable to repay capital are borne by all of the partners and not only by the capital contributors. On the other hand, because RUPA does not clearly require partners to repay capital, it could also be interpreted as changing the UPA rule, an interpretation that is supported by the Comments.

In light of these questions, RUPA should not have changed the UPA without any clear demonstration of the benefits of the new provisions.

CONVERSIONS AND MERGERS

RUPA Article 9 adds provisions concerning mergers and conversions for which there are no direct counterparts in the UPA. It provides methods for converting general to limited partnerships and vice versa, and a method of merging partnerships, and clarifies the critical issue of a partner's liability for pre-merger debts of the constituent partnerships by providing that the partners must contribute toward pre-merger liabilities of their own partnership not satisfied out of partnership property.

Although Article 9 is an important addition to partnership law, particularly in clarifying the effect of a merger, it unnecessarily adds questions. First, it is unclear what transactions will be deemed to comply with RUPA, because RUPA specifies procedural requirements but not the effect of


215. For a discussion of the rationale of the capital-loss-sharing rule, see 2 Bromberg & Ribstein, supra note 3, at 6:16-6:17.

216. See RUPA §§ 401(b), 401 cmt. 3 (noting that RUPA is continuing the rule regarding sharing of capital losses).

217. See UPA § 40(b), discussed supra note 214.

218. Comment 3 to RUPA § 807 notes that RUPA eliminates the distinction between the liability owing for capital and that for profits, and that "[b]y agreement, the partners may continue the UPA distinction and share 'operating' losses differently from 'capital' losses." (emphasis added). This confuses the very different situations in which the partnership has profits and in which it incurs losses and strongly suggests that RUPA changes the UPA rule dealing with the latter situation. Nevertheless, the Response to Comments asserts that the obligation to "zero out all accounts" makes "clear" the obligation to repay capital. Response to Comments, supra note 1, at 39-40.

219. RUPA §§ 902, 903.

220. Id. § 905.

221. Id. § 906.
noncompliance. For example, it is not clear if a merger is valid even if the required "plan of merger" omits some information, or the information is contained in a written or oral agreement that is not designated as a "plan of merger." The effect of conversion-like or merger-like transactions that are not accomplished under RUPA also is unclear. Although RUPA provides for partnership conversions or mergers "in any other manner provided by law," it is not clear what other law can authorize conversions or mergers or whether non-RUPA conversions or mergers, whether or not accomplished under such law, have the same effect as transactions that conform to RUPA, particularly regarding partners' liability. Finally, it is not clear what RUPA means by saying that the converted firm continues to be "the same entity that existed before the conversion." The "entity" clearly is changed in some sense if an agreement provides for cash-out of members or acceleration of loans upon a conversion.

RUPA should answer the questions concerning general partnership mergers and conversions without posing additional questions, and should recognize that its provisions are designed for informal firms. Accordingly, RUPA should provide simply for the effects of any agreement designated as a "merger" between general partnerships and performed pursuant to the partnership agreement, and clarify that this does not mean that other transactions do not have this effect.

APPLICATION AND EFFECT OF RUPA

RUPA Articles 1 and 10 contain several important general provisions relating to RUPA's application and effect.

AMENDMENT OR REPEAL OF ACT

RUPA provides that a partnership governed by the Act is subject to amendment or repeal of the Act. This is a "reserved power" provision

222. Id. § 905.
223. Id. § 904.
224. Id. § 908.
225. Comment 2 to RUPA § 901 states that it is likely that, despite § 908, this procedure "will be used in virtually all cases" because most states have no other procedures. Moreover, Comment 3 to § 103 states that, although conversion and merger rules are not listed as mandatory, noncompliance, including varying the unanimity requirement for limited partnerships, "is to deny that 'safe harbor' validity to the transaction." Unless this Comment is superfluous, it implies that the merger and conversion provisions are, in effect, mandatory although not listed as such. These Comments invite a court to penalize a transaction that looks like a merger or conversion but does not comply with Article 9, by imposing unexpected personal liability on merged partners.
226. RUPA § 904.
227. Id. § 107.
that traditionally was applied only to corporations.\textsuperscript{228} Legislators should not be able retroactively to change existing partnership agreements. In any event, such changes may violate the Contract Clause of the U.S. Constitution.\textsuperscript{229} Although legislatures need to be able to adapt the statute to new circumstances and incorporate new ideas, amendments ordinarily need not apply to existing firms, as distinguished from allowing such firms to opt into statutory changes.

\section*{APPLICATION TO PRE-RUPA PARTNERSHIPS}

RUPA includes two confusing and contradictory provisions on the Act's application to pre-RUPA partnerships. One provides that the Act applies to partnerships formed under the prior act except regarding the enforcement of a judgment against the partnership or a partner in an action commenced before the effective date of the Act.\textsuperscript{230} The other provides that the Act's repeal of statutory provisions does not impair or affect the organization or continued existence of a UPA partnership, impair any contract, or affect any right accrued before the effective date.\textsuperscript{231} This language is contradictory because applying the Act to pre-existing partnerships \textit{must} affect contract obligations.\textsuperscript{232} RUPA changes the effect and interpretation of existing formal agreements,\textsuperscript{233} the default rules that apply to existing informal partnerships,\textsuperscript{234} and even rules on whether a partnership is created.\textsuperscript{235} Moreover, if the new exhaustion-of-remedies provisions apply to post-RUPA actions on debts entered into under the UPA, as the exception negatively implies, RUPA clearly does affect the obligation

\begin{thebibliography}{10}
\bibitem{229} See \textit{U.S. Const.} art. I, § 10, cl. 6; \textit{Henry N. Butler \& Larry E. Ribstein, The Constitution and the Corporation} ch. 2 (1993); Henry N. Butler \& Larry E. Ribstein, \textit{The Contract Clause and the Corporation}, 55 \textit{Brook. L. Rev.} 767 (1989). The Comment to RUPA § 1007 recognizes the application of the Contract Clause in discussing the non-impairment clause in § 1007. See \textit{infra} text accompanying notes 230-237. The Comment to § 1007 states that "contemporary authority has rather severely restricted the application of the Contract Clause where the state is not a party." This statement ignores the continued vitality of the Contract Clause in contemporary cases involving private contracts. See, e.g., \textit{Walker} \textit{v. Mather} (\textit{In re Walker}), 959 F.2d 894 (10th Cir. 1992) (striking down state statute on exemptions for IRA's); \textit{Northshore Cycles, Inc. v. Yamaha Motor Corp.}, 919 F.2d 1041 (5th Cir 1990) (striking down law requiring manufacturer to repurchase distributor's inventory).
\bibitem{230} RUPA § 1006.
\bibitem{231} \textit{Id.} § 1007.
\bibitem{232} There is no reservation-of-power provision in the UPA that even could provide a pretext for validating any such contract impairment.
\bibitem{233} See, e.g., RUPA § 103(b) (invalidating contract terms).
\bibitem{234} See, e.g., \textit{id.} §§ 401(a) (mandating partner accounts); 404 (defining partner duties).
\bibitem{235} \textit{Id.} § 202(c)(3)(ii), (iv)-(vi) (redefining relationships that are not presumptively partnerships).
\end{thebibliography}
of at least some pre-RUPA credit contracts. The Comments attempt to make sense out of this by saying that RUPA protects "existing partnership agreements" but not the terms of UPA default rules. But, default rules are contract terms that are as entitled to protection from shifts in the law as express agreements.

RUPA says, in effect, that those who previously were contented with informal partnerships now must run to lawyers if, as this Article suggests often will be the case, they do not like what RUPA did to their agreements. One who is cynical about lawyers may suspect that this is the whole point of RUPA. RUPA should be changed to clarify that it applies only to partnerships that were either formed after the effective date or that elect to have RUPA apply, and that third parties must agree to opt-ins that change their rights.

APPLICATION TO LIMITED PARTNERSHIPS

RUPA, unlike the UPA, provides that the Act does not apply to limited partnerships. The Revised Uniform Limited Partnership Act (RULPA), however, still provides that the UPA governs in cases not provided for by RULPA. Although the change in RUPA at least eliminates potential conflict between differently formulated partnership and limited partnership provisions on the application of general partnership law to limited partnerships, it leaves open the larger question of whether partnership law—particularly as changed by RUPA—should apply to limited partnerships. Unlike general partnerships, limited partnerships necessarily have centralized management, passive limited-liability members, and some formality. These differences in basic features should result in pervasive dif-

236. Creditors may be affected adversely by other RUPA provisions, including those terminating partners' authority following dissociation or dissolution. See supra text accompanying notes 16-20. Yet the Response to Comments concludes that the change concerning exhaustion is the only one that could prejudice partnership creditors. Response to Comments, supra note 1, at 45.

The Comment to RUPA § 1007 says that the section only protects existing partnership agreements rather than default rules. Yet default rules clearly are part of the parties' agreement. The Comment recognizes this in explaining that subsection (b) is necessary to protect the partners' expectations. Also, the Comments inaccurately state, without citation, that modern authorities have repealed the Contract Clause with respect to laws regulating private parties. For a review of the modern law in this area, see supra note 229.

237. RUPA § 1007 cmt.
238. See id.
239. UPA § 6(2).
240. RUPA § 202(b) (providing that an association created under any statute other than this one is not a partnership).

ferences in default rules, including fiduciary duty and remedy provisions that limited partnership law borrowed from general partnerships. In any event, if RUPA does apply to limited partnerships, the RUPA changes must be evaluated in light of their suitability for limited as well as for general partnerships. For all these reasons, the promulgation of RUPA should have been an opportunity for reexamining the linkage between general and limited partnership law.\textsuperscript{242}

**SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS**

As stated at the beginning of this Article, RUPA’s drafters failed in many respects to provide a suitable set of default provisions for relatively small, informal forms, and to pay adequate regard to the serious costs of unsettling partnership law.

With regard to informal partnerships, it is important to keep in mind that the primary function of a general partnership statute must be to provide a basic set of rules for firms in which detailed contracting is likely to be excessively costly, and not a detailed contract for all partnerships. Because no committee effectively can draft a contract that is suitable for any large set of partnerships, most partnerships that can incur the costs of customized contracting probably will draft around the Act. It follows that any attempt to provide a detailed contract for all partnerships will be useless and counterproductive.\textsuperscript{245} But the statute must serve informal partnerships which often may not be governed by customized rules.

Contrary to these general considerations, RUPA changes partnership law to make it less suitable for informal firms by, among other things, (i) increasing the uncertainty of third parties dealing with partnerships by binding them to notice rather than knowledge of limits on partners’ authority and eliminating the UPA categories of presumptively nonbinding transactions,\textsuperscript{244} (ii) assuming the existence of partnership “accounts,”\textsuperscript{245} (iii) imposing complex buyout procedures,\textsuperscript{246} (iv) specifying new fiduciary

\textsuperscript{242} The drafters defend their decision to proceed with RUPA without resolving the problem of “linkage” between general and limited partnerships by stating that resolution could take several years, that linkage has not caused “insurmountable problems,” and that RUPA’s fiduciary duty provisions actually reflect limited partnership cases. Response to Comments, supra note 1, at 17. The latter point suggests that the real “linkage” issue may be the mistaken imposition of more stringent limited partnership fiduciary duties on general partnerships.


\textsuperscript{244} See RUPA § 301.

\textsuperscript{245} See id. §§ 401(a), 807.

\textsuperscript{246} See id. § 701.
duties and complicating the process of drafting around these duties, and (v) inventing a confusing new procedure for continuing dissolved firms. These changes may encourage firms to organize as limited liability companies or corporations, and may increase litigation costs for firms that do adopt the partnership form.

RUPA's drafters have unsettled partnership law by changing the UPA whenever they concluded they could do a better job than the UPA's black letter law, without regard to the costs of destroying the value of eighty years of case law under the UPA. RUPA therefore threatens the logic, simplicity, and uniformity across jurisdictions that have made the general partnership an attractive and widely used business form. In other words, RUPA would make partnership law worse even if much of RUPA were better than the UPA.

To appreciate the problems RUPA may cause in this respect, consider the following very partial list of questions posed by RUPA, and discussed in this Article, that now must be resolved by years of litigation: What is the effect of RUPA's new language concerning notice to an knowledge of third parties? What are the consequences of eliminating the list of presumptively nonbinding categories? What is the effect of RUPA's new rules on joint and several liability and exhaustion of remedies by creditors? How does the new "just and reasonable" limitation on the partners' disclosure duty interact with the "demand" requirement? What do RUPA's new fiduciary duties mean, and to what extent can the partners draft around them? To what extent is accounting now an exclusive remedy for partners? When will a partner be deemed to have given "notice" of dissociation? What are former partners' duties and liabilities to the firm? What are partner "accounts"? How will RUPA's new scheme regarding distribution of assets be applied? When and how may partners decide to continue a previously dissolved firm and what is the effect of the continuation? How will a dissociated partner's interest and the partner's indemnification right be determined? What law applies to existing partnerships in jurisdictions that adopt RUPA?

Until RUPA's problems are fixed, states should decline to adopt RUPA as a whole, partnerships should not form under the law of any state that does adopt RUPA, and third parties should exercise extreme caution in dealing with RUPA partnerships. States might adopt some of RUPA's more successful and useful provisions, but only after considering carefully the problems with those provisions, including those discussed in this Article.

247. See id. § 404. RUPA also complicates the issue of what duties continue after a partner's dissociation. See id. § 603(b).
248. See id. § 103(b)(3)-(5).
249. See id. § 802.
250. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 539 (4th ed. 1992): "[A]n accumulation of precedents dealing with the same question may create a rule of law having the same force as an explicit statutory rule."
and the availability of alternatives. Because RUPA is unlikely to be adopted as a whole by many states, it is unnecessary to adopt its provisions verbatim merely in order to preserve uniformity.

RUPA may cast a long shadow over partnership law even if no state adopts it because it applies to pre-existing partnerships, it subjects all partnerships to the risk of retroactive amendment, courts may use RUPA provisions in interpreting existing partnership agreements, and RUPA's adoption by NCCUSL's may delay needed improvements in partnership law. Thus, perhaps firms may avoid the partnership form in the post-RUPA era and choose instead the limited liability company, which is rapidly becoming an accepted form of business. The uncertainties for members and creditors in RUPA partnerships and UPA partnerships that potentially are subject to RUPA, as well as the increased burdens for creditors dealing with RUPA partnerships, eliminate many reasons for choosing the more established partnership form over the newer limited liability company form.

The problems with RUPA are inherent, to some extent, in uniform laws. The drafters attempted to produce the final statement on partnership law. This necessarily has drawn them into a protracted process of political compromise, which produced complexity and confusion. It would be better simply to let the states experiment with their own partnership provisions, as Texas already did.

Nevertheless, perhaps RUPA should not be discarded wholly, but rather finally receive the sort of exposure and comment that is necessary to produce a credible law of this type. The draft that was adopted in 1992 was changed significantly from any prior draft, and the 1992 RUPA has undergone continual changes culminating in a recently adopted 1993 version. Because RUPA's success depends on its suitability for a broad range of situations, and even the best drafters can make mistakes, wide exposure

251. This is indicated by the fact that a major partnership-law jurisdiction, Texas, recently adopted a new partnership statute that is based to some extent on, but differs significantly from, RUPA. See Texas Revised Partnership Act, 1993 Tex. Gen Laws 917. Important differences between the Texas and uniform acts include different rules regarding the creation of partnerships, id. § 2.03, recognition of limited liability general partnerships, id. § 3.08, and the rule that, in the absence of contrary agreement, a single partner cannot compel liquidation of the firm, id. § 8.01.

252. See RUPA § 1006.

253. This problem may be minimized, however, for formal partnerships that can agree under RUPA to be governed by the law of a non-RUPA state.


256. For an example of the problems resulting from compromise, see supra text accompanying notes 114-115.

257. See supra notes 75, 251.
is essential. It is not surprising, therefore, that there is much to criticize in RUPA. Even one who agreed with only a fraction of this author’s conclusions should have enough pause about the project to favor, as this author does, an extended comment and revision period. Whatever RUPA’s ultimate merit and prospects, it clearly is not yet ready for prime time.

258. For another article advocating more time for review, see Hynes, supra note 26.