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# Special Problems in Limited Partnership Planning

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# SPECIAL PROBLEMS IN LIMITED PARTNERSHIP PLANNING

*by*

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LIMITED partnerships are relatively new to the common law countries in relation to other business entities, although some form of limited partnership has been known to the civil law for centuries. The English rejected attempts to form limited partnerships because of the prevailing common law theory that a person who shared the profits of an enterprise must also share in its losses.[1] The English view carried over to the United States and success-

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1. Waugh v. Carver, Carver & Giesler, 126 Eng. Rep. 525 (C.P. 1793).

fully hampered the development of limited partnerships for many years.[2] Because of the difficulty in obtaining a corporate charter in the period preceding general corporation acts, and because of increased needs for flexibility in business, pressure was exerted by businessmen to create an accessible form of limited liability business structure.

The first United States Limited Partnership Act was passed by New York in 1822. This statute, like many other early limited partnership acts, was based in large part on the Napoleonic Code. Yet, despite legislative approval, courts were hesitant to approve the "new" business structure.[3] Adverting to the English view that profit-sharing required loss-sharing, the courts construed the acts strictly as being in derogation of the common law. Thus, very strict attention to technicalities was required, with the result that limited liability, in practice, was quite ephemeral.

In 1916 the Commissioners on Uniform State Laws proposed the Uniform Limited Partnership Act (ULPA) for adoption by the states.[4] Underlying ULPA was the theory that a willing investor should be able to put his money in a limited partnership and depend on others for investment skills without incurring any liability in the process. In fact, one of the comments to ULPA notes:

> The act proceeds on the assumption that no public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business, provided creditors have no reason to believe at the time their credits were extended that such person was so bound.[5]

ULPA also reflects a desire to provide reasonable protection of commercial expectations through a uniform system of regulation of limited partnerships.[6] Today forty-nine states, the District of Columbia, and the Virgin Islands have enacted ULPA,[7] and Louisiana provides for partnerships *in commendam* which are similar to limited partnerships.[8] Texas adopted ULPA in 1955 with only a few minor changes.[9] In August 1976 the National Conference of Commissioners on Uniform State Laws at their annual meeting approved and recommended for enactment in all states a Revised Uniform Limited Partnership Act (RULPA).[10]

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2. England has since adopted a limited partnership law. Limited Partnership Act, 7 Edw. 7, c. 24 (1907).

3. A. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP § 26, at 143 n.22 (1968) [hereinafter cited as BROMBERG]; *see* cases cited in *id.* § 26, at 144 n.25.

4. C. TERRY, UNIFORM STATE LAWS ANN. 33 (1920).

5. Lewis, *The Uniform Limited Partnership Act*, 65 U. PA. L. REV. 715, 723 (1917); UNIFORM LIMITED PARTNERSHIP ACT § 1, Comment [hereinafter cited as ULPA].

6. ULPA § 28(b); Rathke v. Griffith, 35 Wash. 2d 394, 218 P.2d 757 (1950).

7. 6 UNIFORM LAWS ANN. 75 (Supp. 1976).

8. *See* Comment, *Partnership in Commendam—Louisiana's Limited Partnership*, 35 TUL. L. REV. 815 (1961).

9. Ch. 133, [1955] Tex. Laws 471, codified at TEX. REV. CIV. STAT. ANN. art. 6132a (1970) [hereinafter referred to and cited as TULPA]. As adopted in Texas, TULPA is essentially the same as the national act, although the legislature made a few minor drafting changes and numbered the Act differently.

10. Final copies of RULPA will be available from the office of the National Conference of Commissioners on Uniform State Laws, 645 North Michigan Avenue, Suite 510, Chicago, Illinois 60611. In Texas no attempt will be made to present RULPA to the legislature at its session beginning January 1977. However, it is expected that RULPA will be presented to the Texas Legislature in January 1979.

## I. CHOOSING THE LIMITED PARTNERSHIP FORM

There are a number of business structures that may be selected: sole proprietorships, general partnerships, corporations,[11] and, of course, limited partnerships. Each has its particular advantages and disadvantages from business, tax, and other points of view, depending as much on the nature of the business and its participants as upon the nature of the form chosen. Why should a limited partnership be selected? In many cases it obviously should not. When it is chosen, it is usually for one or more of three reasons: (1) tax advantages to the participants;[12] (2) limited liability for investors;[13] or (3) flexibility of organization and management.[14] There are many other factors of which the attorney and client should be aware when selecting a business structure, and reliance on the supposed benefits of only these three factors should not be given without a thorough understanding of others equally important. One author[15] lists ten factors that must be examined when considering a limited partnership:

(1) continuity of existence;[16]
(2) capital requirements and accessibility;[17]
(3) extent of ownership liability for business debts;[18]
(4) extent of owner participation in management;[19]
(5) transferability of proprietary interest;[20]
(6) government control of conduct of business;[21]

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11. Several states' business corporation acts provide maximum flexibility of structure in the corporate form. For example, TEX. BUS. CORP. ACT ANN. art. 2.30-1(B) (Supp. 1976-77) provides for shareholder management, which would allow the corporation to operate much like a partnership. *See* Lebowitz, *Recent Developments in Texas Corporation Law—Part I*, 28 SW. L.J. 641, 692, 716-19 (1974).

12. *See* discussion at note 24 *infra*.

13. ULPA § 7 (TULPA § 8).

14. Subject to control problems. *See* notes 80-138 *infra* and accompanying text.

15. 2 Z. CAVITCH, BUSINESS ORGANIZATIONS WITH TAX PLANNING § 39.02[2] (1967). *See also* 1 *id.* § 3.02.

16. The term of a limited partnership could be perpetual, considering the transferability aspects and the use of corporate general partners, but usually the term of a limited partnership is restricted because of the possible adverse tax consequences. *See* discussion at note 24 *infra*.

17. According to 2 Z. CAVITCH, *supra* note 15, § 39.02[2][b]: "A limited partnership is not the ideal choice of a business organization for those businessmen who seek large amounts of easily accessible capital." Nevertheless, the increase in the number of real estate and other syndications would indicate that the limited partnership form is an effective way for promoters to obtain investment money for their projects.

18. This factor is one of the advantages of the limited partnership over sole proprietorships and non-limited partnerships. ULPA § 1 (TULPA § 2) provides that there must be at least one partner who is generally liable, and the comments to that section indicate that there is no substantial policy that requires all investors to be generally liable. *See* notes 80-138 *infra* and accompanying text. Limited liability is not absolute, however, and is not without a corresponding "disadvantage." It may be lost under several sections of ULPA. *See* ULPA § 5(2) (TULPA § 6(b)); ULPA § 6 (TULPA § 7); ULPA § 7 (TULPA § 8).

19. The restrictions on limited partner participation in management is the trade-off for limited liability. ULPA § 7 (TULPA § 8) imposes general liability upon limited partners who take part in control of the business. "Control" problems are discussed at notes 80-138 *infra* and accompanying text.

20. Limited partners are free to assign their interests without causing a dissolution of the partnership. *See* ULPA § 19 (TULPA § 20) and notes 186-202 *infra* and accompanying text. There are, of course, limitations on the assignee's right to become a limited partner. ULPA §§ 19(4)-(7) (TULPA §§ 20(d)-(g)).

21. "The limited partnership, although entirely a creature of statute, is relatively free from governmental interference in the conduct of its business." 2 Z. CAVITCH, *supra* note 15, § 39.02[2][f]. Some notable examples of government control exist primarily in the area of securities regulation. *See generally* Erwin, *Partnership Interests as Securities: An Alice in Wonderland Tour*, 9 CREIGHTON L. REV. 310 (1975). It should be noted that some types of businesses may be prohibited from operating as limited partnerships. *See* note 23 *infra*.

(7) complexity and expense of organizing;[22]
(8) limitations on the business to be conducted;[23]
(9) tax factors;[24]
(10) liberality of courts in construing the organic law relating to the form chosen.[25]

Only after a complete analysis of the effects of each of these factors in the limited partnership context should the form be chosen. Several sections below will indicate the disadvantages of forming a limited partnership with a mistaken understanding of its advantages.

### A. *Preliminary Determinations—Prior to Formation*

1. *Organic considerations* are those problems which concern the structure of the limited partnership rather than internal, day-to-day management. Important determinations that should be made include:

22. The only formal requirement is the certificate discussed at notes 62-79 *infra* and accompanying text. There may be other formalities required to qualify the partnership to do business in multi-state transactions. *See* notes 237-66 *infra* and accompanying text. As to other formalities, including the written limited partnership agreement, see notes 56-61 *infra* and accompanying text. Generally, special franchise taxes are not applicable to limited partnerships. 2 Z. CAVITCH, *supra* note 15, § 39.02[2][g].

23. A limited partnership is usually not legally excluded from transacting any specific businesses, but Texas, in TULPA § 4, excludes banking and insurance, as do most states. In addition, states sometimes impose limitations on "where" certain businesses may be carried on. 2 Z. CAVITCH, *supra* note 15, § 39.05[5]. Thus, a limited partnership formed in state *A* may not be able to conduct business in state *B* because of restrictions or requirements in state *B*. As to qualification and multi-state problems, see generally notes 139-47, 237-66 *infra* and accompanying text.

24. This is quite a nebulous area, and the advice of an expert tax attorney should be obtained before choosing the limited partnership form. Generally, the limited partnership is taxed as a partnership, with single tax at the partner level, INT. REV. CODE of 1954, § 702(a), and pass-through of deductions to the extent of the partner's basis in his partnership interest, which basis includes partnership liabilities for which the limited partner may not be liable. *Id.* § 752; Treas. Reg. § 1.752-l(e) (1956). *See also* Rev. Rul. 75-31, 1975-2 CUM. BULL. 10, for reference to who can be liable for such debts. Special allocations can also be made. INT. REV. CODE of 1954, § 704. *But see* Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 201-14, 90 Stat. 1520. See especially § 204 which limits deductibility of losses to the aggregate amount of the investment "at risk."

The limited partnership may be taxed as an "association taxable as a corporation" if it resembles a corporation in too many ways and thus will lose most of its attractiveness. Treas. Reg. §§ 301.7701-2 (1956), -3(b) (1960). Treas. Reg. § 301.7701-2 sets forth four characteristics which, if a majority are met, will result in taxation as a corporation: (1) *No member is personally liable.* This characteristic is avoided by having a general partner; however, a dummy general partner can create problems. Treas. Reg. § 301.7701-2(d) (1965). (2) *Centralization of management.* This characteristic exists if substantially all interests are owned by the limited partners. Treas. Reg. § 301.7701-2(c) (1965). (3) *Continuity of life.* At one time California permitted partners to vote to continue the partnership on the death or retirement of a general partner. CAL. CORP. CODE § 15520(b) (West 1955). The IRS thought that the provision amounted to allowing perpetual existence, which forced California to amend its version of ULPA. CAL. CORP. CODE § 15520.5 (West Supp. 1976). Rev. Rul. 74-320, 1974-2 CUM. BULL. 404, noted that California's continuity of life problem had been corrected by bringing the California ULPA in line with the national act. *See generally* Roulac, *Resolution of Limited Partnership Disputes: Practical and Procedural Problems*, 10 REAL PROP., PROB. & TR. J. 276, 284 (1975). (4) *Free transferability interests.* There should be no problem if there is merely an assignment of a limited partner's share of profits and not an assignment of right to participate in management. Treas. Reg. §§ 301.7701-2(e)(1) (1965), -3(b)(2) (1960). When considering the limited partnership form, one should always consider the "safe harbor rules" issued by the IRS. Rev. Proc. 72-13, 1972-1 CUM. BULL. 735.

25. It has been asserted in 2 Z. CAVITCH, *supra* note 15, § 39.03[2][a] that courts tend to construe ULPA quite liberally to effect its purposes. While that may be true in many jurisdictions, special note should be taken of decisions by the Texas Supreme Court which tend to restrict the benefits of limited partnerships. *See* Park Cities Corp. v. Byrd, 534 S.W.2d 668 (Tex. 1976); Delaney v. Fidelity Lease, Ltd., 526 S.W.2d 543 (Tex. 1975).

(a) selection of the general partner and whether the general partner will be an individual or corporation;[26]

(b) the name and principal place of business of the proposed limited partnership;

(c) whether it is going to do business in another state;[27]

(d) the term of the proposed limited partnership;[28]

(e) the method of selecting limited partners and the number of limited partners;[29]

(f) the admissibility of limited partners after the formation of the limited partnership;[30]

(g) the transferability of interests of the limited partners; whether the acquiring party becomes a substituted limited partner;[31]

(h) the effect of the death, retirement, insanity, resignation, expulsion, or bankruptcy of the general partner on the dissolution of the limited partnership;[32]

(i) the extent of the controls the limited partners will have on the actions of the general partner;[33]

(j) the choice of laws that will govern the limited partnership;[34]

(k) the right of the surviving spouse of a limited partner to continue with the limited partnership.

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26. This consideration should include the "safe harbor" rules set forth in Rev. Proc. 72-13, 1972-1 CUM. BULL. 735, which states that the IRS will not issue a favorable advance tax ruling that a partnership with a sole corporate general partner is a "partnership" and not an "association taxable as a corporation" for federal income tax purposes unless the rules set out in that Rev. Proc. are followed. *See also* Rev. Proc. 74-17, 1974-1 CUM. BULL. 438, for the IRS position on ruling letters regarding partnerships. Rev. Proc. 74-17 applies whether the general partner is a corporation or an individual and Rev. Proc. 72-13 applies where there is a sole corporate general partner. A failure to comply with these safe harbor rules may create problems when the IRS conducts an audit of the limited partnership, or when there is litigation with the IRS. If a court finds that a limited partnership is an "association taxable as a corporation," the limited partnership becomes subject to double taxation, once at the "corporate" level and again on distribution to the partners, with no pass-through of losses. Treas. Reg. §§ 301.7701-2 (1965), -3(b) (1960).

27. *See* notes 237-66 *infra* and accompanying text.

28. For tax reasons, among others, the term of the partnership cannot be perpetual. *See* note 24 *supra*.

29. An interest in a limited partnership may be a security as defined in the Securities Act of 1933, 15 U.S.C. §§ 77a-aa (1970) and the Texas Securities Act, TEX. REV. CIV. STAT. ANN. arts. 581-1 to -39 (1964 & Supp. 1976-77). Securities Act rule 146, 17 C.F.R. § 230.146 (1976) provides the basic guidelines for selling securities under the so-called "private offering" exemption, which may provide some benefit to sellers of limited partnership interests. Article 581-5I of the Texas Securities Act, *supra*, allows a private offering exemption under Texas law. Failure to comply with both of these exemptions provides the purchaser with a right of recission or an action for damages against both the limited partnership and the promoters. Furthermore, criminal penalties are provided for violations of both state and federal securities laws. Securities Act of 1933, § 24, 15 U.S.C. § 77x (1970); TEX. REV. CIV. STAT. ANN. art. 581-29 (Supp. 1976-77).

30. *See* ULPA § 25 for requirements as to signatures on amended limited partnership certificates required when adding limited partners. For this reason the organizers should consider use of a power of attorney to facilitate execution. *See* text accompanying notes 221-36 *infra*.

31. ULPA § 19 (TULPA § 20).

32. ULPA § 20 (TULPA § 21). Consider IRS requirements and tax consequences whenever dissolution is dealt with unless the business is continued by the remaining general partners under a right to do so stated in the certificate or with the consent of all members. Determine what other events will cause the dissolution of the limited partnership—sale of all assets or bankruptcy of the limited partnership.

33. This factor must be considered carefully because of the strict requirements of ULPA § 7 (TULPA § 8). Under that provision, if "control" by the limited partners is found by a court, the result will be loss of limited liability. *See* notes 80-138 *infra* and accompanying text.

34. *See* notes 139-47 *infra* and accompanying text.

2. *Financial considerations* concern the initial contributions of partners, subsequent contributions and assessments, profits and losses, special allocations, and various financial reports. Financial determinations to be made include:

(a) the taxable year for the limited partnership;[35]
(b) the method of accounting to be used, whether accrual or cash;
(c) the amount and type of contribution to be made by limited and general partners;[36]
(d) whether additional limited partner contributions will be made;[37]
(e) the consequences of failure to make additional contributions;[38]
(f) whether contributions are to be returned prior to dissolution;[39]
(g) the frequency and amount of distributions and at whose discretion they will be made;[40]
(h) the allocation of profits and losses, of expenses, and depreciation or depletion;[41]
(i) definitions for relevant financial terms;[42]
(j) whether the limited partnership will make a basis adjustment on death of a partner or sale of his interest;[43]
(k) the distribution of assets on liquidation;[44]
(l) the treatment of additional contributions by the general partner, whether they will be considered loans or capital contributions;
(m) provision for capital accounts, and what will be charged or credited to such accounts;[45]
(n) the general partner's compensation, and whether he is to receive any guaranteed amounts or income;
(o) the locations of the partnership bank accounts.

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35. The taxable year of the partnership must be the same as of its principal partners, or, if principal partners have different taxable years, then the calendar year will be the taxable year. Treas. Reg. § 1.706-1(b)(1)(ii) (1973).

36. Limited partners may not contribute services. ULPA § 4 (TULPA § 5). If the general partner is contributing services, consider the best method of reducing the exposure to immediate ordinary income tax. *See* Treas. Reg. § 1.721-1(b)(1) (1956). *Compare* Sol Diamond, 56 T.C. 530 (1971), *aff'd*, 492 F.2d 286 (7th Cir. 1974), *with* Vestal v. United States, 498 F.2d 487 (8th Cir. 1974). ULPA allows interests to be classified according to the type of property received or other means. ULPA § 14 (TULPA § 15).

37. *See* notes 174-85 *infra* and accompanying text.

38. *Id.*

39. *See* ULPA § 16 (TULPA § 17).

40. Two questions involving frequency and amount of distributions are important. First, it should be determined whether any distributions are to be guaranteed to limited partners. Secondly, it is important to determine whether distributions will be sufficient to pay the taxes due because partners in a partnership are taxed on their pro rata share of partnership earnings without regard to distribution. INT. REV. CODE of 1954, § 704.

41. These items are primarily tax oriented and, thus, careful consideration should be given whether such allocations meet the "substantial economic effect" test. *Id.* § 704(b).

42. For example, the limited partnership agreement should define such terms as cash flow, capital account, profit, loss, income, deduction, affiliation persons, capital contribution, and sharing ratios.

43. INT. REV. CODE of 1954, §§ 743, 754.

44. The partnership agreement should indicate whether assets will be distributed on the basis of capital accounts, profit allocation percentage, or some other basis.

45. Determine if partners will be liable to return deficits in their capital accounts to the partnership when deficits are the result of depreciation and other accounting and tax concepts. *See* Park Cities Corp. v. Byrd, 534 S.W.2d 668 (Tex. 1976).

3. *Management considerations* include day-to-day management as well as extraordinary problems. Determinations include:

(a) the extent of the general partner's authority to buy assets for the limited partnership;[46]

(b) the extent of the general partner's authority to borrow on behalf of the limited partnership, such as his ability to refinance the project without the consent of the limited partners;[47]

(c) the power of the general partner to sell limited partnership assets, to incur liabilities on behalf of the limited partnership, to execute documents on behalf of the partnership, to make modifications or repairs to partnership property, to manage, and to hire employees for the limited partnership;[48]

(d) the authority of the general partner to deal with affiliated parties or with himself;[49]

(e) the amount of time which the general partner will be required to devote to the project, and the extent to which he may engage in competing activities;[50]

(f) the authority of the general partner to act without obtaining the specific consent of the limited partners despite their general consent in the limited partnership agreement;[51]

(g) the matters on which the limited partner may vote, if at all;[52]

(h) the power of limited partners to remove the general partner;[53]

(i) the formal duties of the general partner, which include obligations to get out reports, to file the certificate, to file amendments to limited partnership certificates;[54]

(j) the method of accounting and requirements for providing sufficient data for an audit, including choosing an accountant;

(k) the need for a power of attorney.[55]

### B. *Formal Requirements*

The formation of a limited partnership requires more formal documentation than may be required for a regular partnership. Documents which are either required or suggested include:

(1) the limited partnership agreement;[56]

46. ULPA § 9 (TULPA § 10); UNIFORM PARTNERSHIP ACT § 9 [hereinafter cited as UPA]; TEXAS UNIFORM PARTNERSHIP ACT § 9, TEX. REV. CIV. STAT. ANN. art. 6132b, § 9 (1970) [hereinafter cited as TUPA]. As to the general partners' powers as an agent see notes 203-20 *infra* and accompanying text.

47. *See* notes 196-214 *infra* and accompanying text.

48. *Id.*

49. For a discussion of the general partners' fiduciary duties see notes 203-20 *infra* and accompanying text.

50. ULPA § 9 (TULPA § 10) allows restrictions on the general partner to be placed in the certificate.

51. *See* notes 203-20 *infra* and accompanying text.

52. For a discussion of control problems see notes 80-138 *infra* and accompanying text.

53. *See* note 198 *infra* and accompanying text.

54. *See* discussion of control problems at notes 80-143 *infra* and accompanying text.

55. *See* discussion of power of attorney at notes 215-30 *infra* and accompanying text.

56. Several form books provide checklists and forms of agreements. *See* 3 H. KENDRICK & J. KENDRICK, TEXAS TRANSACTION GUIDE LEGAL FORMS §§ 28-34 (1976); 1 J. RABKIN & M. JOHNSON, CURRENT LEGAL FORMS WITH TAX ANALYSIS, PARTNERSHIPS—LIMITED PARTNERSHIPS (1976).

(2) the certificate of limited partnership;[57]
(3) a power of attorney for the general partner or a limited partner;[58]
(4) an assumed name certificate;[59]
(5) an offering circular;[60]
(6) consent of spouse.[61]

Limited partnerships are somewhat unique in the requirement that a certificate needs to be filed in order to create the entity with the attributes sought. Although the certificate is somewhat similar to corporate articles of incorporation, it contains significant differences.[62] The following discussion of the certificate will focus primarily on the content of the certificate. In light of recent controversies regarding the nature and effect of the certificate, however, it might be helpful to consider what the certificate does and what it means.

ULPA § 2 provides that the limited partnership is formed when there has been substantial compliance with the certification requirement; two or more persons must sign and swear to a certificate containing certain information specified in ULPA § 2(a) and file the certificate for record in the office of the secretary of state accompanied by the payment of a filing fee. The fundamental question at this point is: when is the limited partnership *formed*? For example, what if no certificate is filed with the secretary of state? Some authorities argue that a partnership is formed when the parties agree to become partners, but that the limited partners do not enjoy the limited liability shield until the certificate is filed.[63] Others argue that a de facto limited partnership is actually formed.[64] ULPA § 11 provides that a person who has contributed capital to a business,

> erroneously believing that he has become a limited partner . . . , is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits . . . .

The major questions arising from the confusion surrounding the legal effect of the certificate involve multi-state transactions and are more fully discussed below.[65]

To be legally effective the certificate must contain at least the following information:

57. The certificate is required by ULPA § 2 (TULPA § 3). For convenience, it may also contain the limited partnership agreement although many partnerships may wish to keep the documents separate because the certificate is typically open to public inspection. *See* BROMBERG § 26(b).
58. For a discussion of power of attorney see notes 221-36 *infra* and accompanying text.
59. TEX. REV. CIV. STAT. ANN. art. 5924.1 (Supp. 1976-77).
60. Federal or state securities laws may require an offering circular.
61. Certain community property states require this consent.
62. BROMBERG § 26(b).
63. *Id.* § 26, at 144 n.25.
64. *Id.* § 32, at 165 n.47. *See also* ULPA § 2(2) (TULPA § 3(b)): "A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1)."
65. *See* notes 237-44 *infra* and accompanying text.

(1) the partnership name;[66]

(2) the character of the business;[67]

(3) the location of the principal place of business;[68]

(4) the name and residence of each member, general and limited partners being designated;[69]

(5) the term of the limited partnership;[70]

(6) the contribution by each limited partner, specifying the amount of cash and the agreed value of property contributed by such limited partner;[71]

(7) the additional contributions (if any) to be made by each limited partner, and the times at which, or events on the happening of which, they shall be made;[72]

(8) the time, if agreed upon, when the contribution of each limited partner is to be returned;[73]

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66. ULPA § 2(1)(a)(I) (TULPA § 3(a)(1)(A)). The Texas secretary of state does not regulate the use of names and, therefore, will neither reserve a name nor permit names which are the same or deceptively similar to be used. ULPA § 5 (TULPA § 6) provides that a limited partner who permits his name to be used in the name of the limited partnership shall be liable as a general partner to creditors who extend credit without actual knowledge that he is not a general partner. *See* SECRETARY OF STATE OF TEXAS, FILING GUIDE FOR CORPORATION AND LIMITED PARTNERSHIP INSTRUMENTS 332 (1976) [hereinafter cited as S/S HANDBOOK]. The common law regulating trade names or rights to names will be applicable in some cases where businesses of a similar type are engaged in by two entities. *See* Assumed Name Statute, TEX. REV. CIV. STAT. ANN. art. 5924.1 (Supp. 1976-77).

67. ULPA § 2(1)(a)(II) (TULPA § 3(a)(1)(B)). TULPA § 4 provides that a limited partnership may carry on any business which can be conducted by a partnership except banking and insurance. Consider if a limited partnership having a sole corporate general partner can engage in activities of corporations prohibited by part four of the Texas Miscellaneous Corporation Laws Act. TEX. REV. CIV. STAT. ANN. art. 1302-4.01 to .07 (1962).

68. ULPA § 2(1)(a)(III) (TULPA § 3(a)(1)(C)). The Texas secretary of state generally requires that a place of business within Texas be shown.

69. ULPA § 2(1)(a)(IV) (TULPA § 3(a)(1)(D)). The Texas secretary of state requires that a street address be given for at least one general partner and will accept for filing a limited partnership certificate containing only the name, city, and state for each limited partner although the better practice would be to give street addresses for all partners. *See* S/S HANDBOOK 332. Persons serving as both general and limited partners should be designated as such.

A foreign corporation serving as a general partner in a Texas limited partnership is considered to be doing business in Texas, by its own admission, and must obtain a certificate of authority to do business in Texas pursuant to TEX. BUS. CORP. ACT ANN. art. 8.05 (Supp. 1976-77). A foreign corporation qualifying to do business in Texas subjects itself to taxation by Texas.

The Texas secretary of state's office issued a statement on November 26, 1974, to the effect that a foreign corporation limited partner is not deemed to have admitted that it is doing business in Texas. This policy, however, seems contrary to TEX. ATT'Y GEN. OP. NO. WW-191-A (1958) which takes the position that a foreign corporation serving as a limited partner is doing business in Texas and must, therefore, qualify.

70. ULPA § 2(1)(a)(V) (TULPA § 3(a)(1)(E)). The Texas secretary of state will not accept a certificate for filing with a perpetual term.

71. ULPA § 2(1)(a)(VI) (TULPA § 3(a)(1)(F)). ULPA § 4 (TULPA § 5) provides that contributions by limited partners must be in cash or other property but not services. If property is contributed, it must be described. Furthermore, showing the aggregate amount of limited partners' contributions is not sufficient; the individual contributions must be shown. *See* S/S HANDBOOK 332-33.

72. ULPA § 2(1)(a)(VII) (TULPA § 3 (a)(1)(G)). According to the Texas secretary of state's rules, if either the additional contribution is contingent on an event which may not occur or the amount of such contribution is indefinite and cannot be determined at the time of filing the certificate, the certificate will be filed only if it contains a statement to the effect that the amount of such contribution cannot be presently ascertained and that an amendment to the certificate setting forth the amount of such additional contributions will be filed when such contributions are made. Secretary of State of Texas Limited Partnership Rules 004.40.00.003(k), S/S HANDBOOK 343-44. *See also* S/S HANDBOOK 333. While the secretary of state's requirement that a certificate containing a statement to the effect that an amendment will be filed if uncertainties exist as to additional contributions may be more than TULPA requires, it is consistent with TULPA § 25 which requires the filing of an amendment to the certificate when a change occurs in the amount or character of the contribution of any limited partner. ULPA § 24(2)(a) (TULPA § 25(b)(1)).

73. ULPA § 2(1)(a)(VIII) (TULPA § 3(a)(1)(H)). The meaning of this provision has been

(9) the share of the profits or other compensation by way of income which each limited partner shall receive by reason of his contribution;[74]

(10) the right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of substitution;[75]

(11) the right, if given, of the partners to admit additional limited partners;[76]

(12) the right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority;[77]

(13) the right, if given, of the remaining limited partners to continue the business on the death, retirement, or insanity of a general partner;[78]

(14) the right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.[79]

## II. SPECIAL PROBLEMS

When drafting a limited partnership agreement or operating the partnership itself, it is important to take note of the various problem areas which have affected the law of limited partnership. There are, at this time, several difficult areas of which the attorney involved in limited partnership planning should be aware. These problems include control, conflicts of law and qualification of foreign limited partnerships, voting and dispute resolution

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scarcely explored. The question is, then: What constitutes "the return" of a limited partner's contribution? ULPA § 15 (TULPA § 16) implies that distributions of income provided for by the certificate are not a return of a limited partner's contribution, unless after such distribution all of the partnership assets are in excess of a partnership's liabilities. Similarly, ULPA § 16 (TULPA § 17) provides that no limited partner shall receive a return of any part of his contribution until all liabilities of the partnership (except to limited partners and general partners) have been paid, everyone consents, and the certificate is amended. This provision is, of course, subject to the limited partner's right to demand the return of his contribution under the circumstances set out in ULPA § 16(2) (TULPA § 17(b)).

Even when a limited partner does receive some returns, he may still have certain legal obligations. ULPA § 17(2) (TULPA § 18(b)) provides that a limited partner wrongfully receiving his contribution back from the limited partnership holds the proceeds in trust for the limited partnership. ULPA § 17(4) (TULPA § 18(d)) provides that even if a limited partner rightfully receives a return of his contribution, he is liable to the partnership for any sums necessary to discharge the partnership's liabilities to creditors who existed prior to the date of the return. Consequently, it would appear that any monies received by a limited partner from the partnership in excess of the limits imposed by ULPA § 15 (TULPA § 16) will be considered a return of contribution. That section appears to establish a test based on the balance sheet of the limited partnership.

74. ULPA § 2(1)(a)(IX) (TULPA § 3(a)(1)(I)). *See* TULPA § 16. Since profit-sharing sometimes involves very complicated calculations it appears that the better practice is to set forth the whole compensation and profit structure in the limited partnership certificate. The Texas secretary of state only reviews items 1 through 7 and item 9 above in a limited partnership certificate. S/S HANDBOOK 333.

75. ULPA § 2(1)(a)(X) (TULPA § 3(a)(1)(J)). TULPA § 20 defines and delineates the rights of a substituted limited partner as contrasted with the rights of an assignee.

76. ULPA § 2(1)(a)(XI) (TULPA § 3(a)(1)(K)). *See also* ULPA § 8 (TULPA § 9).

77. ULPA § 2(1)(a)(XII) (TULPA § 3(a)(1)(L)). If no priorities are set forth, all limited partners stand on equal footing. ULPA § 14 (TULPA § 15).

78. ULPA § 2(1)(a)(XIII) (TULPA § 3(a)(1)(M)). *See* ULPA § 20 (TULPA § 21) which provides generally that so long as the certificate provides, or all the members consent, the remaining partners (including at least one general partner) may continue the limited partnership without dissolution, notwithstanding the death of a general partner.

79. ULPA § 2(1)(a)(XIV) (TULPA § 3(a)(1)(N)). ULPA § 16(3) (TULPA § 17(c)) requires that unless otherwise provided limited partners are entitled to only cash when receiving a return of contribution.

mechanisms, assessments, and problems involved in transferring partnership interests.

### A. *Control*

Section 7 of ULPA provides: "A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, *he takes part in the control of the business.*"[80] Probably the most serious problem encountered in drafting and carrying out a limited partnership agreement is that of determining what constitutes taking part "in the control of the business" of a limited partnership. The problem is serious because the penalty for taking part in the control of the business of the limited partnership is general partner liability. Much of the current literature concerning limited partnership has attempted in some way to treat this difficult area.[81] In addition, some recent cases in attempting to solve the issue have only made it worse.[82]

Neither ULPA nor the official comments define what constitutes taking part in control of the business. The reason for this is apparent from the legal framework existing at the time of the drafting of ULPA. The drafters were confronted with a very difficult problem in that most state courts had strictly construed existing limited partnership acts as being in derogation of the common law. The drafters had to find a way to draft around the policy conflict that primarily gave rise to the reluctance of courts to uphold the limited liability vehicle. The conflict was between (1) the policy that requires that creditors and third parties be able to rely on their justifiable expectations of being repaid when lending money or of having their contracts performed, and (2) the policy that allows parties to agree to limit their liability to the amount of their investment.[83] The drafters attempted to resolve this conflict by requiring the existence of a partner who has unlimited liability for the obligations of the partnership and who controls the investments of those who want limited liability.[84] Thus, both the limited partner and the creditor get maximum policy satisfaction, and rely upon the general partner to assume all of the extraordinary business risks. Yet, even though the drafters were able to create a business organization acceptable to the courts by successfully reconciling the two conflicting policies, a third policy, that an investor should have some supervision over his own investment, was apparently disregarded by the drafters. Furthermore, in the sixty years since the drafting of ULPA the policy favoring investor supervision has received a great deal of attention. The stock market crash of 1929 can be blamed for most of this increased attention, and the passage of the Securities Act of 1933 and the Securities

80. Emphasis added.

81. *See, e.g.*, Augustine, Fass, Lester & Robinson, *The Liability of Limited Partners Having Certain Statutory Voting Rights Affecting the Basic Structure of the Partnership*, 31 BUS. LAW. 2087 (1976) [hereinafter cited as Augustine]; Feld, *The Control Test for Limited Partnerships*, 82 HARV. L. REV. 1471 (1969); Note, *Liability of Limited Partners Participating in the Management of the Sole Corporate General Partner—Delaney v. Fidelity Lease Ltd.*, 29 SW. L.J. 791 (1975).

82. *See* Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975), *noted in* 29 SW. L.J. 791 (1975); Frigidaire Sales Corp. v. Union Properties, Inc., 14 Wash. App. 634, 544 P.2d 781 (1975).

83. ULPA § 1, Comment.

84. ULPA § 1.

Exchange Act of 1934 indicates the importance of investor protection policies. Thus, as a result of the modern emphasis on investor supervision and the vagueness that surrounds the definition of "control" in ULPA, the limited partners' investor supervision policy has refused simply to roll over and play dead.

Cases continue to arise where limited partners interject themselves into the partnership business to an extent greater than they are allowed explicitly by ULPA.[85] Consequently, the following discussion of control is aimed at aiding the draftsman and participants in a limited partnership agreement to structure and operate the partnership with a proper balance of the three underlying policies of ULPA and to avoid the not so obvious pitfalls in allowing limited partners greater flexibility in supervising their investments.

1. *Attempts To Define Control.* Neither ULPA nor the commissioner's notes provide any definition of the phrase "takes part in the control of the business."[86] In the absence of a statute,[87] the definition of "taking part in the

85. *See, e.g.*, Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975).

86. Feld, *supra* note 81, at 1474.

87. A few states have attempted to define control statutorily, or, at least to define certain types of activity that limited partners can safely engage in without becoming generally liable. Those statutes are as follows:

(1) ALA. CODE tit. 43, § 27(12)(2) (Cum. Supp. 1973):

> A limited partner may from time to time examine into the state and progress of the partnership business, advise as to its management and act as attorney at law, but he must not act as agent for the partnership for any purpose; and if he acts contrary to this provision he is liable as a general partner to any partnership creditor who extends credit to the partnership in the good faith belief that he is dealing with a general partner.

Emphasis in this statute is clearly on reliance by third parties. The statute's failure to specifically enumerate permissible powers leaves unanswered the question of whether the limited partner can exercise unlimited control and retain his limited liability so long as there is no reliance by third parties. Also, based upon the California experience, Alabama may have adopted a provision which renders Alabama a state whose limited partnership law does not conform to ULPA, thus endangering the status of Alabama limited partnerships as partnerships for federal income tax purposes.

(2) CAL. CORP. CODE § 15507(b) (West Supp. 1976) provides:

> A limited partner shall not be deemed to take part in the control of the business by virtue of his possessing or exercising a power, specified in the certificate, to vote upon matters affecting the basic structure of the partnership, including the following matters or others of a similar nature:
>
> (I) Election or removal of general partners.
>
> (II) Termination of the partnership.
>
> (III) Amendment of the partnership agreement.
>
> (IV) Sale of all or substantially all of the assets of the partnership.

Complementing § 15507(b), 10 CAL. ADMIN. CODE rule 260.140.116.2, 1 CCH BLUE SKY L. REP. ¶ 8626 (1975), applicable only to real estate limited partnerships, provides in part that:

> *[t]o the extent the law of the state in question is not inconsistent*, the limited partnership agreement must provide that a majority of the then outstanding limited partnership interests may, *without the necessity of concurrence by the general partner*, vote to (1) amend the limited partnership agreement, (2) dissolve the program, (3) remove the general partner and elect a new general partner, and (4) approve or disapprove the sale of all or substantially all of the assets of the program. (Emphasis added.)

Two particular problems are raised by this last rule. First, does the introductory phrase mean that rule 260.140.116.2 is applicable if the law of any state which is applicable to the partnership does not expressly prohibit these powers being given to the limited partners? If rule 260.140.116.2 does require the above mentioned powers to be included in the partnership agreement unless expressly prohibited by the law of the state of formation, the exercise of these powers could very likely result in loss of limited liability in the master state. Rule 260.140.128.2, 1 CCH BLUE SKY L. REP. ¶ 8627 (1975), which is the comparable provision for oil and gas limited partnerships, somewhat modified this question by providing, "[t]o the extent the law of the state of organization is not inconsistent . . . ."

control of business" is left to state courts, although in many states this remains a question of first impression. The few cases decided have been analyzed by commentators who have attempted to bring them together on a consistent basis. From their studies the commentators have discerned two tests: the "power test"[88] and the "reliance by third parties test."[89]

The basis of the power test is quite formalistic and places too great an emphasis upon the organic structure of the limited partnership. Thus, if the limited partners have powers which include the right to initiate matters and to decide them entirely within the group of limited partners, such powers may constitute substantial control in the limited partners and the resulting loss of limited liability.[90] While mere potential to exert control is quite significant to a determination whether the limited partnership entity qualifies for partnership or association tax status, many authorities believe that potential control is not sufficient under ULPA § 7 which, at least literally, requires *actual* control. In fact, to date no case has ever held that ULPA § 7 was violated merely by possession of unexercised power to control.[91] For these reasons the trend of the law is toward a "reliance by third parties"[92] test which is defined as follows: "If the activities of the limited partner would induce reasonable reliance by third parties upon the apparent general liability of the limited partner, that partner will not have limited liability."[93]

The difficulty with the application of either of these tests is that neither can be applied across the broad range of control problems. Because the control problem is not wholly structural to the extent that an ULPA § 7 problem that is non-structural exists, the power test is inapplicable because the control problem is not wholly structural in nature. Similarly, the reliance test, while more practical overall, is unworkable when creditor reliance is not the key § 7 difficulty.[94] A better approach to the problem of defining control violations

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The second problem is that by not requiring the concurrence of the general partner(s), the rule would seem to bring the exercise of these powers within the "power test" discussed *supra*, because the ability of the limited partners, as a group, to initiate matters and decide them entirely within the group, may constitute control sufficient to cause loss of limited liability under ULPA § 7. In addition to those powers enumerated in rule 260.140.116.2, rule 260.140.128.2 requires that the limited partners be given the power to "cancel any contract for services with the sponsor or any affiliate without penalty upon thirty days notice." Again, application of the "power test" to this rule could result in loss of limited liability.

(3) DEL. CODE ANN. tit. 6, § 1707 (1974).

(4) NEV. REV. STAT. § 88.080 (1973).

(5) ORE. REV. STAT. §§ 69.280(2)(a)-(d) (1975).

(6) WASH. REV. CODE ANN. § 25.08.070(2) (Supp. 1975).

*See also* notes 149-63 *infra* and accompanying text regarding partnership democracy; Augustine, *supra* note 81. The authors indicate that exercise of statutory voting rights allowed by these states should not affect the limited liability of partners who vote, either within the state allowing the voting right or under the laws of states which do not. *Id.* at 2106-07.

88. *See* Comment, *Foreign Limited Partnerships: A Proposed Amendment to the Uniform Limited Partnership Act*, 47 SO. CAL. L. REV. 1174, 1193 (1974).

89. *See, e.g.*, Feld, *supra* note 81.

90. Roulac, *supra* note 24, at 283-85. *See* Plasteel Prods. Corp. v. Helman, 271 F.2d 354 (1st Cir. 1959); Rathke v. Griffith, 36 Wash. 2d 394, 218 P.2d 757 (1950); BROMBERG § 26; Augustine, *supra* note 81, at 2101.

91. Brodsky, *Corporate and Securities Litigation—Tax Shelter Litigation: Participating in Control of the Partnership*, 176 N.Y.L.J., Sept. 15, 1976, at 1, col. 1.

92. *See* Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975).

93. Note, *Partnership: Can Rights Required to be Given Limited Partners under New Tax Shelter Investment Regulations be Reconciled with Section 7 of the Uniform Limited Partnership Act?*, 26 OKLA. L. REV. 289, 293 (1973).

94. One problem with the reliance test which has never been pointed out is that it tends to protect only those creditors involved in the case under consideration, without expressing concern

may be found in a policy analysis of various "control" situations, using those policies enumerated above.[95]

2. *Policy Analysis of Control.* There are four distinct fact patterns which have given rise to control problems: (1) the third party reliance situation; (2) the inadequate general partner situation; (3) the powerful limited partner situation; and (4) the limited partner takeover situation. Each situation involves facts that affect the three policies underlying ULPA in very different ways. The failure of courts and commentators to deal adequately with this fact-policy relationship has been a major stumbling block to planning around control problems.

*The Third Party Reliance Situation.* As noted above, reliance cases have received the greatest attention by the courts.[96] This situation involves a limited partner whose acts might cause a third party or a creditor to rely upon the limited partner's credit as if he were a general partner. Cases are plentiful in which the limited partner's acts inducing reliance were an issue. For example, in *J.C. Wattenbarger & Sons v. Sanders*[97] the limited partner acted as personal guarantor of a loan to the limited partnership.[98] In *Gast v. Petsinger*[99] two limited partners were advertised to be "project managers" of the limited partnership property. The limited partner in *Silvola v. Rowlett*[100] acted as a foreman employed by the partnership and was allowed to purchase parts as necessary, but had no power to extend credit without approval from the general partner.[101] Finally, in *Fisk v. Moczik*[102] the limited partner sold trees to a third party from land owned by the partnership.[103] In reliance cases the policy most strongly affected is, of course, the policy of protecting third parties and creditors. Most courts which find "control" in third party reliance situations can find no reason to approve the limited liability of persons who actively induce others to rely.[104]

*The Inadequate General Partner Situation.* As noted above,[105] the policies underlying ULPA require the presence of a generally liable general partner to accommodate the conflict between creditor protection and freedom to agree to limit liability. Thus, when the general partner is "inadequate," either

for any effect on the policy of the law to protect creditors generally. A hint of this objection is present in *Delaney* where, although there was no creditor or third party reliance in the case itself, the structure of the partnership could possibly have impaired the overall policy of creditor protection. The court's swift and impolitic dismissal of third party reliance, however, has been read, not without justification, as a complete removal of all third party and creditor concerns from the "control" definition. *See* Note, *supra* note 81.

95. *See* discussion accompanying notes 88-94 *supra.*

96. *See* notes 92-93 *supra* and accompanying text.

97. 191 Cal. App. 2d 857, 13 Cal. Rptr. 92 (1961).

98. The court held that the question of fact as to whether the defendant held himself out as a general partner precluded summary judgment. 13 Cal. Rptr. at 96.

99. 228 Pa. Super. 394, 323 A.2d 371 (1974).

100. 129 Colo. 522, 272 P.2d 287 (1954).

101. The court held that the limited partner had not induced reliance by third parties, hence, had not taken control. 272 P.2d at 290.

102. 329 So. 2d 35 (Fla. App. 1976).

103. The limited partner was held liable for removing the trees and selling them without authority, but no mention was made of "control." *Id.* at 37.

104. Feld, *supra* note 81, at 1479.

105. *See* notes 84-85 *supra* and accompanying text.

financially or managerially, the policy accommodation is disturbed and control problems arise. This particular situation has received a great amount of attention in the past few years and an equal amount of misunderstanding. Fact situations can range from the blatant "straw man" general partner to the more subtle and serious problems involved with a corporate general partner.[106]

Four prominent cases, including one from Texas, have considered this problem. In *Weil v. Diversified Properties*[107] a situation arose in which the limited partners began to manage the business through a manager while the general partner removed himself from the scene.[108] Unfortunately, the court expressed no opinion as to the effect of allowing a non-partner manager to carry on in the place of the general partner and at the request of the limited partners.[109] The three other cases all involved limited partnerships having a corporate general partner. In *Evans v. El Dorado Improvement Co.*[110] the two limited partners had set up a corporation, of which they were the sole owners, to be the general partner of the partnership. The court refused to allow limited liability because the obvious "straw man" gimmick would have been inequitable to the third party judgment creditor.[111] In *Delaney v. Fidelity Lease Ltd.*[112] the general partner was a corporation. There were twenty-two limited partners, three of whom were also the shareholders, officers, and directors of the corporate general partner. The Texas Supreme Court, in a widely criticized decision,[113] held that the three shareholder, officer, and director limited partners could be generally liable if they had exercised control over the general partner. The Texas court improvidently stated that reliance was not required to give rise to control.[114] On what were for all practical purposes the exact same facts, a Washington court of appeals, in *Frigidaire Sales Corp. v. Union Properties, Inc.*,[115] held that shareholder, officer, and director limited partners were not liable without creditor reliance. A further comparison, however, shows the two cases to be more in accord than their divergent holdings would indicate.[116] Notwithstanding *Delaney*'s statements regarding reliance, the Texas Supreme Court indicated quite strongly that its primary concern was the danger that the situation would impair the policy of creditor protection. The court stated:

> In no event should they [the three limited partners] be permitted to escape the statutory liability which would have devolved upon them if there had been no attempted interposition of the corporate shield against

106. *See* Comment, *The Limited Partnership with a Corporate General Partner—Federal Taxation—Partnership or Association?*, 24 Sw. L.J. 285 (1970).
107. 319 F. Supp. 778 (D.D.C. 1970).
108. *Id.* at 780.
109. The case was decided on the rather narrow point whether a general partner could invoke § 7 against the limited partners.
110. 46 Cal. App. 3d 84, 119 Cal. Rptr. 889 (1975).
111. 119 Cal. Rptr. at 892. No reference to "control" was made in deciding the case, which can be read as a typical "piercing the corporate veil" case as well as a limited partnership liability case.
112. 526 S.W.2d 543 (Tex. 1975), *noted in* 29 Sw. L.J. 791 (1975).
113. *See, e.g.*, Augustine, *supra* note 81, at 2104 n.56; Note, *supra* note 81.
114. 526 S.W.2d at 545.
115. 14 Wash. App. 634, 544 P.2d 781 (1975).
116. *See* Brodsky, *supra* note 91, at 2.

> personal liability. Otherwise, the statutory requirement of at least one general partner with general liability in a limited partnership can be circumvented or vitiated by limited partners operating the partnership through a corporation with minimum capitalization and therefore minimum liability.[117]

Thus, from a policy viewpoint the Texas court might have decided correctly if it were not for the fact that the case contained no facts to indicate that the corporate general partner was minimally capitalized or that there was intent to disturb a creditor's rights. The *Delaney* decision results, therefore, in an impairment of the policies of allowing the parties to have limited liability and investor supervision, but does not significantly promote the policy of creditor protection.[118] The holding in *Frigidaire* is better reasoned. In that case the court indicated that the primary inquiry would be whether the corporation was formed for a valid business purpose, whether it was adequately capitalized, and whether it treated third parties as a corporate entity.[119] Thus, the *Frigidaire* case promotes creditor protection without impairing investor supervision or limited liability.

*The Powerful Limited Partner Situation.* This situation differs from the reliance situation noted above in that it is more of a structural or organizational problem than purely an activities related problem. Nevertheless, it upsets the ULPA policy balance between creditor protection and limited liability in much the same way as the inadequate general partner.[120] One situation in particular typifies this problem area: limited partner voting rights.

Partnership democracy is of concern in most limited partnerships.[121] In several states the principle is statutorily allowed, and in some it is required. In either situation, however, partnership democracy is often included in partnership agreements without consideration of whether it will create control problems. One author who has considered the problem analyzes the control effects by considering the third party reliance effects.[122] Another considers the problem in terms of structural effects.[123]

The problem is best analyzed by examining the nature of the subjects upon which limited partners may vote because the extent of these voting rights has an important bearing upon whether their exercise will constitute control. In most cases, voting rights are allowed only for the most extraordinary matters,[124] and they generally do not exist as to day-to-day matters. Even in extraordinary matters, however, limited partner voting rights may seriously impair the creditor protection policy. As one author states:

> An overall reading of the ULPA and a consideration of the policies behind it make it apparent that the forbidden participation in the control of the partnership business which is contemplated by section 7 of the ULPA is a taking part in the day-to-day business of the partnership, as

117. 526 S.W.2d at 546.
118. *See* note 83 *supra.*
119. 544 P.2d at 784-85.
120. *See* notes 105-19 *supra* and accompanying text.
121. *See* notes 149-54 *infra* and accompanying text.
122. Augustine, *supra* note 81, at 2101.
123. BROMBERG § 26, at 147-48 n.37.
124. *See* notes 154, 155 *infra* and accompanying text; Augustine, *supra* note 81, at 2101.

> opposed to the ability to influence the partnership's basic structure which the statutory voting rights provide. Arguably, this is why section 7, in effect, forbids a 'tak[ing] part in the control of the *business* of the partnership,' rather than an ability to influence management or the partnership's basic structure. A careful examination of the ULPA and the policies behind it lend additional support to this conclusion.
>
> The right to vote to remove the general partner, of all the statutory voting rights specifically permitted by statute . . . would appear to provide limited partners with the most direct means of influencing the course of the partnership's business and, for this reason, makes the strongest argument for the imposition of general liability. However, although the ULPA contains no direct reference to the possibility of limited partners voting to remove or to elect a general partner, the right is one which would seem to be entirely consistent with the policies behind the ULPA and, arguably, is implicit within it.[125]

*Gast v. Petsinger*[126] is one of the few cases which have dealt with the voting rights of limited partners. In *Gast* the limited partnership agreement granted the limited partners certain rights to attend meetings to vote on acts "outside the ordinary business of the partnership."[127] Although the limited partners attended meetings and received reports, the court held that they did not take part in the control of the business. Similarly, in *Plasteel Products Corp. v. Helman*[128] trustee limited partners who exercised the power to select a general sales manager had not taken part in control.

It is the consensus of most authors that exercising voting rights as to extraordinary matters should not constitute control. This conclusion is sound when analyzed from a policy viewpoint. The policy of investor supervision is most strongly promoted by allowing voting rights[129] because no investor desires to place his investment totally beyond his reach. Although the policy of creditor protection may be impaired to some degree if voting rights are extensive, when limited to certain conditions and certain matters, the optimum policy satisfaction would be achieved by yielding a small amount of creditor protection so as to allow a reasonable degree of investment supervision. Otherwise, the ability to achieve limited liability will be restricted by forcing businessmen to choose other business structures.

*The Limited Partner Takeover Situation.* This situation occurs invariably in the crises surrounding partnerships that are in financial difficulty.[130] The limited partner takeover presents the same policy clashes found in both the reliance situation and the powerful limited partner situation, although in a more intense fashion. Limited partners in this situation are typically in such a panic to salvage their investments that they act without considering either their own limited liability or the reliance of third parties at a time when their limited liability status is most threatened and creditors are most insecure.

Crisis takeover problems are apparent in several cases. In *Weil v. Diver-*

125. Augustine, *supra* note 81, at 2101.
126. 228 Pa. Super. 394, 323 A.2d 371 (1974).
127. 323 A.2d at 372.
128. 271 F.2d 354 (1st Cir. 1959).
129. *See, e.g.*, BROMBERG § 26, at 147-48 n.37; Augustine, *supra* note 81, at 2106-07; Roulac, *supra* note 24, at 283.
130. For a good discussion of the problems that may arise in limited partnerships with financial difficulties, and how to plan for unfavorable contingencies, see Roulac, *supra* note 24.

*sified Properties*[131] the limited partners met, selected managers, and continued the business without the general partner. No "control" was found because the case was decided on the issue of whether the ousted general partner could invoke ULPA § 7 against the limited partners.[132] The court did imply, however, that, if the action had been brought by a creditor, the limited partners would have been held liable.[133] In *Trans-Am Builders, Inc. v. Woods Mill, Ltd.*[134] the limited partners were more cautious. One limited partner visited the project site and berated the construction superintendent, but the court held that merely having meetings and taking part in discussions about the problem was not enough to cause the limited partners to lose limited liability. Deciding that the limited partners' acts did not constitute control, the court quoted *Weil*:

> Certainly common sense dictates that in times of severe financial crisis all partners in such an enterprise, limited or general, will become actively interested in any effort to keep the enterprise afloat and many abnormal problems will arise that are not under any stretch of the imagination mere day-to-day matters of managing the partnership business. This is all that occurred in this instance.[135]

Something else that "occurred in this instance" was that neither court considered the complex creditor reliance problems which exist when the partnership flounders. The court in *Weil* did not have to,[136] and *Trans-Am*'s facts indicate no abnormal creditor problem.[137] Nevertheless, limited partners in the crisis situation are more inclined to disturb the expectations of creditors than at any other time.

The problem of the financially distressed partnership cannot be eliminated. Through advance planning, however, limited partners can reduce the possibility of control problems should they find it necessary to salvage their interests from a sinking partnership. An adequate voting and general partner replacement provision in the agreement would outline the proper procedures limited partners should take in substituting new management,[138] and prevent the limited partner takeover that usually occurs.

3. *Control in Multi-State Transactions.* The problem of control is difficult enough when it is limited to a single jurisdiction. It becomes even more difficult when the limited partnership begins to cross state lines. Perhaps the most troubling aspect of the multi-state control problem is that neither the concept of control nor the jurisprudence of conflict of laws has become settled enough to allow any reasonable degree of predictability. Thus, a good

131. 319 F. Supp. 778 (D.D.C. 1970); *see* note 107 *supra.*
132. 319 F. Supp. at 781-84.
133. *Id.* at 783.
> Since the partnership agreement was not violated by the limited partners, Weil has no cause of action and his request for the appointment of a receiver and an accounting will be denied. *The provisions of the Limited Partnership Act are primarily designed to protect creditors.* So long as the provisions of the agreement were followed, no partner can complain. Weil's complaint is dismissed.

*Id.* (emphasis added).
134. 133 Ga. App. 411, 210 S.E.2d 866 (1974).
135. 210 S.E.2d at 868, quoting 319 F. Supp. at 782.
136. *See* note 133 *supra.*
137. The basis of the control argument in *Trans Am* was merely that the limited partners had met and discussed the matter with the general partner. 210 S.E.2d at 869.
138. *See* notes 149-69 *infra* and accompanying text.

deal of guesswork must be used in planning around control problems in multi-state transactions. The discussion contained in this section of the Article is intended to raise the problems involved in planning around such situations. Choice of law determinations are complicated processes, however, and this Article will not deal with them in any great depth. Nevertheless, three basic questions must be answered before making any choice of law planning determination.

First, the theory of conflict of laws in any particular state must be ascertained. There are a variety of methods which are usually described as being either traditional analysis methods[139] or functional analysis methods.[140] Second, in dealing with either method of conflict resolution a process of characterization must be accomplished. In the traditional method of analysis facts are characterized into traditional legal categories.[141] In functional analysis the characterization involved is a much more subtle articulation of the policies underlying the laws being applied. Thus, it must be recognized, contrary to the expectations of the advocates of functional analysis, that, similar to the traditional method, the functional analysis system is subject to manipulation by judges seeking to justify a particular result rather than honor a particular method. Finally, a choice of law should be made from use of the particular method invoked.

Very few reported cases have dealt with conflict of laws problems in the limited partnership context. The few decided cases are limited to the traditional method of analysis.[142] To date there have been no reported decisions using the interest analysis approach.[143] Since about half of the states now have adopted interest analysis,[144] and Texas also has expressed some tendency to adopt the method,[145] there appears to be little guidance from a planning viewpoint. Some generalizations are evident, however, and in matters involving disputes solely between partners the laws of the state of formation have been preferred.[146] Where creditors have been harmed the results have been

139. Traditional methods of analyzing conflicts questions were adopted in the RESTATEMENT (FIRST) OF CONFLICTS OF LAW (1934). The workings of the traditional system are described as a function of "categories of type situations" and designated "connecting factors." The categorization of type situations is called "characterization," and usually involves labeling a fact situation as one involving problems of contract, tort, real property, and others. The "connecting factor" refers to the link between a person or transaction and a given state. The connecting factor may be, for example, a place of contracting, domicile, or place of injury. Augustine, *supra* note 81, at 2090 n.7, *citing* A. SHAPIRA, THE INTEREST APPROACH TO CHOICE OF LAW 11 (1970). Characterization is the most difficult aspect of the traditional method.

140. Functional analysis is also known as "interest analysis." It was developed in a well-known article by Professor Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227 (1958). Functional analysis attempts to avoid the anomalies that often result in use of the traditional methods by focusing directly upon the policies underlying the laws of the jurisdictions in conflict. Often a policy analysis indicates there is no conflict of laws at all, in which case, the law of the only "interested" jurisdiction will be applied. Such situations are referred to as "false conflicts." "True conflicts" exist when both states involved are interested in the transaction. At this time, no satisfactory method has evolved for dealing with true conflicts. *See generally* D. CAVERS, THE CHOICE OF LAW PROCESS (1965); A. VON MEHREN & D. TRAUTMAN, THE LAW OF MULTISTATE PROBLEMS (1965).

141. *See* note 139 *supra*.

142. *See, e.g.*, Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A.2d 906 (1951); Annot., 29 A.L.R.2d 286 (1953); King v. Sarria, 69 N.Y. 24, 25 Am. R. 128 (1877).

143. Augustine, *supra* note 81, at 2096.

144. *See* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 234-38 (1971).

145. *See* Marmon v. Mustang Aviation Co., 430 S.W.2d 182 (Tex. 1968).

146. *See, e.g.*, Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A.2d 906 (1951); Annot., 29 A.L.R.2d 286 (1953).

less consistent.[147]

RULPA has attempted to deal with the multi-state problem by including the following choice of law provision:

> Subject to the Constitution and public policy of this state, the laws of the state under which a foreign limited partnership is organized govern its limited partners, and a foreign limited partnership may not be denied registration by reason of any difference between those laws and the laws of this state.[148]

### B. *Voting and Dispute Resolution*

Partnership democracy is the concept which allows limited partners a vote regarding certain actions taken by general partners.[149] The basis for partnership democracy is found in the policy reasons noted above favoring investment control[150] because in a partnership democracy situation the limited partner is better able to supervise his investment when given a vote regarding extraordinary matters. At the same time, the power of a general partner to act arbitrarily or capriciously with the investment money of limited partners is reduced.

Some states' limited partnership acts allow partnership democracy provisions in limited partnership agreements.[151] Most of these statutes, however, do not make voting provisions mandatory.[152] The blue sky laws of several states and policies of various securities associations also allow and often require limited partners' voting rights.[153]

If a partnership voting provision is to be included in the partnership agreement, the mechanics of the provision should be clearly spelled out. The provision for partnership democracy in the agreement should set forth in detail the procedures to be implemented in arranging for partnership democracy. The agreement should also provide for voting without meetings by use of written unanimous consents. The following matters should especially be considered and included in the agreement:

1. *Matters Subject to Vote of the Partners.* Before granting voting powers, a drafter should determine whether a proposed voting power is already the limited partner's "right" under ULPA, and whether the power will raise control problems.[154] Matters for which limited partners are commonly granted the right to vote include: (1) election or removal of the general partner; (2) termination of the partnership; (3) amendment of the partnership agreement; (4) sale of all or substantially all of the partnership's assets; and (5) other

147. *See* 2 Z. CAVITCH, *supra* note 15, § 28.03 (1963).
148. RULPA, *supra* note 10, § 901.
149. Roulac, *supra* note 24, at 297.
150. *See* policy discussion accompanying notes 80-85 *supra.*
151. *See* statutes cited and discussed in note 87 *supra.*
152. Augustine, *supra* note 81, at 2088.
153. *See, e.g.*, CAL. ADMIN. CODE rule 260.140.116.2, 1 CCH BLUE SKY L. REP. ¶ 8626 (1975); Midwest Sec. Comm'rs Ass'n Statement of Policy § VII(B), 1 CCH BLUE SKY L. REP. ¶ 4821 (1975); Texas Administrative Guidelines for the Registration of Real Estate Programs rule G(2) [065.09.00.007], 3 CCH BLUE SKY L. REP. ¶ 46,609, at 42,526 (1976).
154. *See* notes 80-138 *supra* and accompanying text; Augustine, *supra* note 81.

matters generally outside the normal course of management, such as, changing the nature of the business, or incurring excessive indebtedness.[155]

2. *Who May Call the Meetings?* The general partner should always have the right to call a meeting of the partnership, but the right should not be exclusively his, especially in a large partnership. For this reason, limited partner interests constituting a certain percentage such as ten percent or twenty percent, or a minimum amount of the total capital investment, should also be given the right.

3. *Notice.* The notice provision should specify the form and manner of notice. The notice itself should specify the subject matter of a proposed action by the partnership. In this context it may be important to consider whether the partners may discuss and vote on matters not described in the notice. Moreover, the general partner or the limited partner qualified to call the meeting should be required to send notice. The notice provision should provide adequate lead time for a meeting and should allow the use of regularly kept partnership records for the source of information as to whom and where notice should be sent. The location of the meeting should also be set out in the partnership agreement, subject to change. Any change in the location should be specified in the notice.

4. *Quorum.* The partnership agreement should provide a reasonable quorum requirement depending on the size of the partnership. The agreement should also state whether the quorum is based on a head count or a percentage of ownership interests.

5. *Voting Rights.* The agreement should specify the vote required for the adoption of any proposal although usually a majority of the ownership interests is required.[156] The agreement should also specify whether votes are to be based on percentage interest, amount invested, or on a per capita basis. In a complex organization it may even be necessary to classify the partners, much like corporate shareholders, and require a majority of each class, such as fifty percent of general partnership interests, fifty percent of each class of limited partnership interest. It may also be necessary to specify whether the vote required is to be a majority of all interests or of only those present and voting. It is important that the agreement be in accord with statutory provisions specifying voting requirements.[157]

Certain situations may alter the voting right temporarily. For example, partnership voting may involve actions in which the general partner or a limited partner is personally interested, and the voting requirements may be

155. *See, e.g.*, statutes cited at note 87 *supra.*

156. Midwest Sec. Comm'rs Ass'n Statement of Policy § VII(B), 1 CCH BLUE SKY L. REP. ¶ 4821 (1975) provides in part:

> B. *Voting Rights of Limited Partners.*
>
> To the extent the law of the state in question is not inconsistent, the limited partnership agreement must provide that a majority of the then outstanding limited partnership interests may, without the necessity for concurrence by the general partner, vote to (1) amend the limited partnership agreement, (2) dissolve the program, (3) remove the general partner and elect a new general partner, and (4) approve or disapprove the sale of all or substantially all of the assets of the program.

157. *See* statutes cited at note 87 *supra.*

varied to adjust to this situation.[158] The agreement should also specify the use of proxies, subject to the proxy rules of the state and federal securities laws.[159] Finally, limited partnerships which are comprised of other business entities may require special consideration in the partnership agreement.[160]

Some states have enacted statutes exempting limited partners who vote on certain matters from the drastic effects of ULPA § 7. These statutes have provided that control will not be affected by complying with the statutes.[161] In other states, including Texas, partnership democracy may create potential control problems even though state blue sky requirements, together with the extraordinary nature of the problems subject to partnership vote, suggest that giving the limited partners a vote does not constitute control within the meaning of ULPA § 7.[162] Still, the control problem is magnified when involved in a multi-state transaction in which one state allows partnership voting specifically and the other state is silent on the matter.[163]

In a move that may relieve much of the problem concerning control in the voting situation, the National Conference of Commissioners on Uniform State Laws has proposed the following revisions:

> Section 302 [*Voting.*] Subject to the provisions of Section 303, the partnership agreement may grant to all or a specified group of the limited partners the right to vote (on a per capita or any other basis) upon any matter.[164]
>
> Section 303(b). A limited partner does not participate in the control of the business within the meaning of subsection (a) solely by:
> (1) voting on one or more of the following matters:
> (a) the dissolution and winding up of the limited partnership;
> (b) the sale, exchange, lease, mortgage, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business;

158. *Cf.* discussion of general partner's fiduciary duties, at notes 207-20 *infra.*

159. *See* Securities Exchange Act of 1934, § 14, 15 U.S.C. § 78n (1970), and rules thereunder. At least one commentator has suggested that the proxy rules may have an increasing role in the limited partnership context.

> Proxy requirements and even guidelines governing tender offers are not alien to the limited partnership context. While efforts to replace the general partner are most frequently associated with partnerships in financial trouble, there have been several recent instances of a general partner's interests being taken over in partnerships whose performance, if not outstanding, at least was competitive—with the limited partners receiving a reasonable return on their investment. The mechanics for conducting a takeover bid in the corporate securities area are complex and subject to very specific regulation. Although the same general principles would seem to apply to the partnership area as well, there are no specific guidelines to suggest how such a contest might be handled in the partnership context.

Roulac, *supra* note 24, at 303.

160. *Id.*

161. *See* statutes cited at note 87 *supra.*

162. BROMBERG § 26, at 147-48 n.37.

163. *See* Augustine, *supra* note 81.

164. RULPA, *supra* note 10, § 302. The comment to this proposed section states:

> Section 302 is new, and must be read together with subdivision (b)(5) of Section 303. Although the prior uniform law did not speak specifically of the voting powers of limited partners, it is not uncommon for partnership agreements to grant such power to limited partners. Section 302 is designed only to make it clear that the partnership agreement may grant such power to limited partners. If such powers are granted to limited partners beyond the safe harbor of Section 303(b)(5), a court may hold that the limited partners have participated in 'control of the business' within the meaning of Section 303(a).

(c) the incurrence of indebtedness by the limited partnership other than in the ordinary course of its business;
(d) a change in the nature of the business; or
(e) the removal of a general partner.[165]

Voting is not the only method for resolving disputes in a limited partnership. For example, an arbitration clause may be desirable.[166] It is very important, however, to exercise caution in drafting such a clause. The draftsman should either name an arbitrator or set forth a means of choosing an arbitrator who will act fairly. Limited partners should not rely upon the general partner's discretion in this matter, especially since the provision will be employed only in the most serious disputes. Ground rules that will be fair to each side should also be agreed upon, although requiring compliance with the American Arbitration Association rules would probably be sufficient.[167] It should be noted that arbitration is subject to statutory control in various states. For example, the Texas General Arbitration Act[168] provides that arbitration agreements are valid and enforceable if entered into under certain strict conditions.[169]

Another appropriate dispute resolution mechanism might be provision of a lawyer to represent the limited partners' interests.[170] In many instances the general partner's attorney is the only attorney involved in drafting the limited partnership agreement. A clarification of the responsibilities of that lawyer and who he actually represents is often required. One author recommends that the limited partners retain counsel or have the general partner retain counsel for the limited partners to represent their interests both in drafting the agreement and in subsequent disputes with the general partner.[171] Other dispute resolution mechanisms include buy-out arrangements, with special provisions for funding them,[172] and a "conflict insurance fund" which would cover the cost of retaining independent economic and legal representatives in case of a dispute between general and limited partners.[173]

### C. *Assessments*

Except to the extent provided in the certificate of limited partnership or in the event of loss of limited liability, a limited partner's interest in the partnership is not assessable.[174] The limited partner will lose to creditors only

165. RULPA, *supra* note 10, § 303.
166. *See, e.g.*, Pacific Inv. Co. v. Townsend, 58 Cal. App. 3d 1, 129 Cal. Rptr. 489 (1976) (discussion of arbitration clause in a limited partnership). *See also* Roulac, *supra* note 24, at 308.
167. *See, e.g.*, 2 AM. JUR. LEGAL FORMS 2d *Arbitration and Award* § 23:41 (1971).
168. TEX. REV. CIV. STAT. ANN. arts. 224 to 238-6 (1973).
169. *Id.* art. 224 states in part:

> A written agreement concluded upon the advice of counsel to both parties as evidenced by counsels' signatures thereto to submit any existing controversy to arbitration or a provision in a written contract concluded upon the advice of counsel to both parties as evidenced by counsels' signatures thereto to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

170. Roulac, *supra* note 24, at 308.
171. *Id.*
172. Massman, *Buy-Sell Arrangements*, in CORPORATION, BANKING AND BUSINESS LAW SECTION, STATE BAR of TEXAS, TEXAS PARTNERSHIP LAW at E1 (1976).
173. Roulac, *supra* note 24, at 308.
174. ULPA § 17(1) (TULPA § 18(a)).

the amount of his capital contribution, even if rightfully returned to him,[175] and the partnership assets. For this reason, under ULPA § 2(1)(a)(VII) the certificate is required to state what additional contributions, if any, shall be made by each limited partner, at either a specified date or upon the occurrence of a predetermined event.[176] ULPA § 17(1) provides that a limited partner is liable to the partnership:

> (a) for the difference between his contribution as actually made and that stated in the certificate as having been made, and (b) for any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

Possible reasons for requiring additional contributions include foreseeable circumstances, such as funding periodic payments required under a mortgage or other purchase arrangement and funding a plan for new purchases of certain required items or additional investments each year for a specified number of years. Additional contributions might also be needed for such unforeseen circumstances as cash flow deficits, replacements required as a result of uninsured casualty losses, or unanticipated investment opportunities.

Special considerations involved in providing for additional contributions include the disclosure policies of the various securities regulatory agencies. Any additional mandatory assessments must be disclosed as a material item in any sale of limited partnership interests registered under the Securities Act of 1933.[177] Similarly, the Midwest Securities Commissioners Association Statement of Policy Regarding Real Estate Programs provides at section VII(H) that in any program other than a non-specified property program, a provision for assessability to meet deficiencies in cash flow caused by debt service, operating expenses, taxes, or special governmental assessments may be included in the program agreement, provided that the assessments are used only for that purpose.[178] Section VII(I) sets out the types of default provisions which may accompany the failure to pay the assessments.[179] The Texas Guidelines at rule G(8) set similar criteria for assessments.[180]

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175. ULPA § 17(4) (TULPA § 18(d)).
176. *See* notes 37-38 *supra.*
177. Securities Act Form S-1, 2 CCH FED. SEC. L. REP. ¶ 7122, at 6201 (1976).
178. 1 CCH BLUE SKY L. REP. ¶ 4821, at 647 (1976). For non-specified property programs, CAL. ADMIN. CODE rule 260.140.115.6, 1 CCH BLUE SKY L. REP. ¶ 8626, at 4553-13 (1975) states: "Programs calling for assessments shall not be allowed." Otherwise, CAL. ADMIN. CODE rule 260.140.116.8, 1 CCH BLUE SKY L. REP. ¶ 8626, at 4553-16 (1975), allows certain assessments to be provided for.
179. 1 CCH BLUE SKY L. REP. ¶ 4821, at 647 (1976).
180. 8. Assessments

> a. In the case of specified Income Property Programs, the Program agreement may provide for Assessments to meet all foreseen and unforeseen costs of the Program, including operating deficits and governmental and quasi-governmental assessments and the obligations of a defaulting Participant, provided the aggregate Assessments during the life of the Program do not exceed 25% of the Participants' initial Capital Contribution. Assessability must be limited to the foregoing obligations, and all amounts derived from Assessments must be applied only to satisfaction of the obligations set forth above.
>
> b. In the case of specified Unimproved Property Programs and certain specified Income Property Programs in which major capital improvements are planned and fully disclosed in the Prospectus, the Program agreement may provide for Assessments to meet all foreseen costs of the Program and unfore-

Securities laws pose particular problems in terms of registration of offerings. Some states consider that the decision to make each of the periodic contributions called for by the agreement is a new and separate investment decision which requires registration under the blue sky laws of that particular state. If a registered broker-dealer is selling the limited partnership interests and the partnership agreement provides for periodic capital contributions, the broker-dealer may be in violation of regulation T[181] promulgated by the Federal Reserve Board under section 7(c) of the Securities Exchange Act of 1934[182] because of a March 1972 interpretation issued by the Federal Reserve Board which held that "tax shelter programs" providing for payments to be made in installments would constitute arranging for the extension of credit in violation of regulation T.[183] In addition, the broker-dealer must be careful of § 11(d)(1) of the Securities Exchange Act[184] which prohibits a person who is both a broker and a dealer from arranging credit on a new issue of securities.[185] For this reason, when preparing an offering the parties should investigate the current status of the regulations relating to the extension of credit and other developments.

Another practical consideration is the problem of enforcing the partnership's right to force a limited partner to make the mandatory assessment. If the right to make assessments is disclosed to the investor before he becomes a limited partner and the method for enforcing them has been agreed upon by the limited partners, the partnership's right to the assessment is enforceable in court. A few other methods that might be used are: (1) allowing non-defaulting limited partners and the general partner to put in an amount equal to the uncollected assessment as a capital contribution and adjusting interests accordingly; (2) giving partners an option of treating all contributions made as being on behalf of the defaulting limited partner as a loan, with specified interest and terms; (3) allowing the general partner to loan money to the partnership on behalf of the defaulting limited partner with the defaulting limited partner or his agent signing a note to the general partner for the amount of the loan at a specified interest and term; payment of such note could possibly be secured by a security interest in the limited partnership; (4) providing that any partner who makes a loan beyond his pro rata share of the assessment will have an income preference until he has been repaid by the partnership.

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seen costs such as governmental or quasi-governmental special assessments and the obligations of a defaulting Participant. Such arrangements shall be subject to the following conditions:

(1) The period of Assessments shall coincide with the anticipated cash needs of the Program.

(2) Selling commissions upon Assessments ordinarily will not be permitted but in no event may be collected until payment is made.

(3) The actual amount of an Assessment may not exceed 125% of the amount projected for that period in the Prospectus.

3 CCH BLUE SKY L. REP. ¶ 46,609, at 42,528 (1976).

181. 12 C.F.R. §§ 220.1-.129 (1976), 2 CCH FED. SEC. L. REP. ¶¶ 22,201-87 (1976).

182. Securities Exchange Act of 1934, § 7(c), 15 U.S.C. § 78g(c) (1970).

183. 12 C.F.R. § 220.124 (1976), 2 CCH FED. SEC. L. REP. ¶ 22,282, at 16,174 (1976).

184. 15 U.S.C. § 78k(d)(1) (1970).

185. *Id.*

### D. *Transfer of Partnership Interests*

Several provisions in ULPA relate to the right to assign interests. Section 19[186] states that a limited partner's interest is assignable, and further provides for making an assignee a "substituted limited partner" and sets out the rights and duties of assignees and substituted limited partners. Section 8 allows admission of additional limited partners subject to certain formalities,[187] while section 9[188] restricts the power of the general partner to admit persons as either general or limited partners.

ULPA is not exclusive in regulating transfers of limited partnership interests. Many securities regulatory agencies have issued guidelines governing transfers and assignments. For example, the Midwest Securities Commissioners Association Statement of Policy Regarding Real Estate Programs section VII(E)[189] provides for admission of participants (original participants and substituted limited partners) and recognition of assignees. It provides, as to substituted limited partners, that the limited partnership certificate must be amended once each calendar quarter to effect a substitution of participants. Moreover, the amendments to proposed article III, § 3 of the NASD Rules of Fair Practice[190] provide that member firms shall not underwrite or participate in a distribution which imposes restrictions on assignment of a participant's program interest except for the approval by the sponsor of the transfer unless such restriction conflicts with any law of the state in which it was organized.[191]

1. *Limited Partners—Special Considerations.* Most publicly sold limited partnership agreements contain very specific language for substitution of limited partners as well as specific restrictions on the transferability of the interest of the limited partner. In addition, most public limited partnership agreements provide that any assignment will become effective at a certain specified time either upon the filing of the amendments or upon the delivery of the executed assignments to the general partner, an important consideration because both the limited partners and the limited partnership want to know when to change their accounting records.[192] Without a specific grant of authority, ULPA probably requires that any substitution take place only after approval by all of the limited partners, except, of course, the assignor.[193] For this reason, a number of limited partnership agreements only require the approval of the assignee by the general partner subject to section 9 before that person may become a substituted limited partner. A number of agreements, however, also provide that the failure to comply technically with the regulations for assigning an interest renders the assignment void. Therefore, in order to comply with ULPA §§ 9 and 19, most publicly offered limited

186. TULPA § 20.
187. TULPA § 9.
188. TULPA § 10.
189. 1 CCH BLUE SKY L. REP. ¶ 4821, at 646 (1975). Texas guidelines have essentially the same requirements as Midwest. *See* 3 CCH BLUE SKY L. REP. ¶ 46,609, at 42,527 (1976).
190. REAL ESTATE SECURITIES GUIDELINES '73, at 164 (1973).
191. *Id.*
192. *See* notes 35-45 *supra* and accompanying text.
193. ULPA §§ 9, 19 (TULPA §§ 10, 20).

partnership agreements specifically authorize the general partner to approve the proposed assignee limited partner and to execute an amendment to that effect in the limited partnership certificate.[194]

The failure of the limited partner to heed the restrictions in the limited partnership agreement may render him liable to the partnership for damages in the event a dispute arises between the assignee and the limited partnership. In addition, an assignment in such cases may be voidable, depending on how the restriction provisions were written, but, in any event, entitles the assignee only to the specific items referred to in ULPA § 19.[195] Although these restrictions on transfer may at first appear harsh, they actually serve an important role by modifying the free transferability element which is a part of the inquiry conducted by tax agencies to determine the tax status of the limited partnership.[196]

2. *General Partners—Special Considerations.* Absent provisions in the certificate of limited partnership, the assignment by the general partner of his interest in the limited partnership will cause a dissolution of the limited partnership.[197] Because the investors in the limited partnership are looking to the general partner for experience, and are depending on the general partner's credit to pull the partnership through financially, the custom in large limited partnerships is to permit the general partner only limited rights of assignment and, in some cases, only if the new general partner has a net worth almost equal that of the present general partner.

In the event of the assignment of interest by the general partner, the general partner remains at least secondarily liable, absent an agreement, for the obligations of the partnership incurred prior to the date of assignment. Accordingly, the general partner who assigns his interest is well advised to obtain releases of liability on all substantial debts and liabilities, or at least to obtain an indemnity agreement from the partnership and the remaining general partner.[198] A security arrangement for such an indemnity plan might also be appropriate.

3. *Removal and Substitution of the General Partner.* Several difficult questions arise when the interest transferred is that of the general partner who has been removed by the limited partners. Since limited liability is basic to the limited partner's decision to invest in a limited partnership, perhaps the greatest problem facing limited partners in removing a general partner is the

194. *See* notes 221-36 *infra* and accompanying text.

195. ULPA § 19(3) provides:

> An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

196. If a partner can assign only his right to share in profits, but cannot, without the consent of other members, assign his right to participate in management (*i.e.*, make the assignee a substitute limited partner), the characteristic of free transferability does not exist. Treas. Reg. §§ 301.7701-2(e)(1) (1965), -3(b)(2) example (1) (1960). The IRS, however, refuses to rule on whether an assignee who is not a substitute limited partner is entitled to an allocable share of losses. *But see* Evans v. Commissioner, 447 F.2d 547 (7th Cir. 1971).

197. ULPA § 20 (TULPA § 21).

198. *See, e.g.*, Korn v. Franchard Corp., 388 F. Supp. 1326 (S.D.N.Y. 1975).

control problem. As noted earlier, the better view is that the power to remove a malfeasant general partner is not the same as the right to conduct the business without a general partner; hence, it does not involve control.[199]

Another major problem involves the exchange of interests in the partnership. The limited partners may buy out the general partner's interest, but such a transfer may cause valuation problems, especially when the removed general partner contributed only services.[200] Consequently, the agreement should provide a method of evaluating the general partner's services.[201]

Another question concerns the nature of the interest which is transferred to a limited partner: is the financial exposure of a partner determined by his status or the interest purchased? This question arises when the general partner wants to retain an interest in the venture as a limited partner. If the removed general partner had made no cash contribution, there may be some difficulty in transforming his interest into that of a limited partner, especially considering ULPA § 4 which provides: "The contributions of a limited partner may be cash or other property, but not services."[202] Furthermore, since the departing general partner will remain liable on pre-removal transactions, he may seek an indemnity provision. Similarly, the new general partner will probably want to be indemnified against claims arising from his predecessor's activities, particularly where such claims arise from a violation of the securities acts, a state blue sky law, or a common law fraud charge.

### E. *The General Partner as Agent for the Partnership*

1. *The Agency Situation.* The general partner is the agent for the limited partners in managing the business of the partnership, based upon both the Uniform Partnership Act (UPA) and ULPA. ULPA § 9 provides: "A general partner shall have all the rights and powers and be subject to all the restrictions of a partner in a partnership without limited partners . . . ."[203] The ULPA reference to powers of a partner requires reference to UPA. UPA § 9 provides:

> [Partner Agent of Partnership as to Partnership Business.] (1) Every partner is an *agent of the partnership* for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.[204]

The authority of the general partner to act as agent for the partnership has been restricted statutorily, but it can also be restricted by agreement of the

199. BROMBERG § 26, at 147-48 n.37; Augustine, *supra* note 81; Brodsky, *supra* note 91; Comment, *"Control" in the Limited Partnership*, 7 J. MAR. J. PRAC. & PROC. 416 (1974).

200. Roulac, *supra* note 24, at 295-96.

201. *See* Midwest Sec. Comm'rs Ass'n Statement of Policy § VII(B), 1 CCH BLUE SKY L. REP. ¶ 4821, at 645-3 (1976), which states: "The agreement should provide for a method of valuation of the general partner's interest, upon removal of the general partner, that would not be unfair to the participants."

202. TULPA § 5.

203. TULPA § 10.

204. TUPA § 9 (emphasis added).

parties. Indeed, ULPA provides that the general partner has no authority without consent of the limited partners to do any of the following:[205]

(1) acts in contravention of the certificate (this provision recognizes the right of the partnership to restrict the general partner);

(2) acts which would make it impossible to carry on the ordinary business of the partnership;

(3) confess a judgment against the partnership;

(4) possess partnership property, or assign his rights in specific partnership property, for other than a partnership purpose;

(5) admit a person as a general partner;

(6) admit a person as a limited partner, unless the right so to do is given in the certificate;

(7) continue the business with partnership property on the death, retirement, or insanity of a general partner, unless the right so to do is given in the certificate.

ULPA makes restrictions of the general partner available through § 9(1)(a) which allows restrictions on general partner authority to be placed in the certificate.[206] Yet, placement of restrictions in the certificate may or may not have an effect upon third parties' reliance on the authority of a general partner because it is unclear whether a third party without actual knowledge can be bound by certificate restrictions he has never seen. Except in the most unusual case, a third party will not be able to examine the certificate to determine the general partner's authority to act for the partnership.

2. *Fiduciary Duties of the General Partner.* The courts have imposed fiduciary responsibility on the general partner for his management of the limited partners' investments. The policy reasons for this fiduciary duty are obvious;[207] the general partner has plenary power in relation to limited partners. In a similar circumstance a very high standard of care has been thought necessary to prevent the investor from being at the mercy of the managing agent's unfettered discretion. Thus, a fiduciary duty is imposed on corporate directors[208] and trustees of trust funds.[209] In non-limited partnerships with a greater ability to control held by each co-partner, the standard of care may not be as strict.[210]

The fiduciary duty also has a statutory basis. The ULPA § 9 reference to

205. ULPA §§ 9(1)(a)-(g) (TULPA §§ 10(a)(1)-(7)).

206. TULPA § 10(a)(1).

207. *See* Roulac, *supra* note 24, at 287.

208. H. HENN, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 236 (2d ed. 1970).

209. 2 A. SCOTT, TRUSTS § 170, at 1297 (3d ed. 1967).

210. BROMBERG § 68, at 395 states: "Although a partner owes a duty of faithful services to the best of his ability, he is not held to possess the degree of knowledge and skill of a paid agent." The footnote further states:

> A paid agent is under a duty to his principal to act with standard care and with the skill standard in the locality for the kind of work which he is employed to perform, and in addition to exercise any special skill which he has. He is liable for losses caused by failure to conform to this duty.

*Id.* at 395 n.94.

Yet, an exception exists where the management of the business is left to a managing partner. Johnson v. Buck, 540 S.W.2d 393 (Tex. Civ. App.—Corpus Christi 1976); Roulac, *supra* note 24, at 288.

duties of general partners as defined in UPA includes a reference to § 21(1) of UPA. That section provides:

> [Partner Accountable as a Fiduciary.] (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.[211]

The securities laws may also require full disclosure to investors.[212]

Since "fiduciary duty" is a relatively meaningless concept by itself, it must be defined by the context of the transaction involved. Consequently, the general partner's fiduciary duties should be examined, considering his duties as to partnership property, his duties as to the partnership, and his duties as to the individual partners.

As the concept of fiduciary duties is a familiar problem in corporation law, most fiduciary principles would apply equally in the limited partnership context.[213] The general partner should be generally aware of his duties of good faith, loyalty, and due care in the best interests of the partnership. He should also be aware that the following acts by a general partner may be held to be breaches of his fiduciary duty, creating liability to either the partnership or to individual partners:

(1) acting contrary to the partnership agreement;[214]

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211. TUPA § 21(1).

212. Item 6 under Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships, 17 C.F.R. § 231.5465, 1 CCH FED. SEC. L. REP. ¶ 3820, at 3337-38 (1976), states as follows:

> A. A discussion of the fiduciary obligation owed by the General Partner to the Limited Partners should be set forth. The following disclosure is suggested with appropriate modification for the laws of the state of organization:
>
> A General Partner is accountable to a limited partnership as a fiduciary and consequently must exercise good faith and integrity in handling partnership affairs. This is a rapidly developing and changing area of the law and Limited Partners who have questions concerning the duties of the General Partner should consult with their counsel.
>
> B. Where the limited partnership agreement contains an exculpatory provision and/or the right to indemnification, the following disclosure is suggested, as modified to reflect the substance of such provisions:
>
> *Exculpation*
>
> i) The General Partner may not be liable to the Partnership or Limited Partners for errors in judgment or other acts or omissions not amounting to willful misconduct or gross negligence, since provision has been made in the Agreement of Limited Partnership for exculpation of the General Partner. Therefore, purchasers of the interests have a more limited right of action than they would have absent the limitation in the Partnership Agreement.
>
> *Indemnification*
>
> ii) The Partnership Agreement provides for indemnification of the General Partner by the Partnership for liabilities he incurs in dealings with third parties on behalf of the partnership. To the extent that the indemnification provisions purport to include indemnification for liabilities arising under the Securities Act of 1933, in the opinion of the Securities and Exchange Commission, such indemnification is contrary to public policy and therefore unenforceable.
>
> Registrant's attention is also directed to Note A of Rule 460 under the Act relating to disclosure of indemnification agreements.

10 CAL. ADMIN. CODE rule 260.140.118.1, 1 CCH BLUE SKY L. REP. ¶ 8626, at 4553-32 (1974) provides a similar disclosure requirement. Texas Administrative Guidelines for Registration of Real Estate Programs, rule J [065.09.00.010], *Prospectus and Its Contents*, provides for a discussion of the fiduciary duties of the sponsor to the participants. 3 CCH BLUE SKY L. REP. ¶ 46,609, at 42,529 (1976).

213. H.HENN, *supra* note 208, § 235.

214. *See* ULPA § 9(1)(a) (TULPA § 10(a)(1)).

(2) taking extra compensation not provided in the agreement;[215]

(3) co-mingling partnership funds;[216]

(4) not disclosing personal benefits to himself when seeking limited partners in a promotion;[217]

(5) not disclosing material facts involving transfers to or from the partnership;[218]

(6) taking a partnership opportunity for his own benefit;[219]

(7) deriving personal profit from dealing with the partnership.[220]

3. *Power of Attorney.* The power of a general partner under ULPA § 9 and UPA § 9 includes the power to execute any instrument in the partnership's name.[221] Nevertheless, a limited partnership with more than a few limited partners may find it convenient to give the general partner or a limited partner a power of attorney for the purpose of carrying out certain ministerial acts, including the execution of and swearing to the limited partnership certificate or amendments thereto. The power of attorney has long been recognized as a means of creating an agency relationship between parties which confers upon the agent the authority to perform certain specified acts or kinds of acts on behalf of the principal.[222] The purpose of the power of attorney is to evidence the authority of the agent to third parties with whom the agent deals.[223] Generally, the law of the jurisdiction in which the contract creating the power of attorney is made controls the effects of a power of attorney.[224] No universal form has been created either judicially or by custom, however, as is evident from the number of different forms found in public offerings.

The power of attorney should be clear on its face because the principal who granted the power of attorney is not going to be present when questions concerning the power are raised. It should clearly indicate the powers to be exercised by the agent, should evidence its own authenticity, and should clearly designate the party who is going to act under the power of attorney. Furthermore, powers of attorney are generally construed strictly and will be held to grant only those powers which are specified; nevertheless, a strict construction will not be invoked to destroy the very purpose for which the power of attorney was granted.[225]

*Termination and Revocation.* If a power of attorney is given to and is retained by the agent and exhibited to third persons, the termination of the agent's authority by causes other than incapacity or impossibility does not prevent him from having apparent authority as to persons to whom he exhibits the document and who have no notice of termination.[226] The death or

215. Bassan v. Investment Exch. Corp., 83 Wash. 2d 922, 524 P.2d 233 (1974).
216. McGlynn v. Shultz, 90 N.J. Super. 505, 218 A.2d 408 (App. Div. 1966).
217. Newburger, Loeb & Co. v. Gross, 365 F. Supp. 1364 (S.D.N.Y. 1973).
218. Allen v. Steinberg, 244 Md. 119, 223 A.2d 240 (1966).
219. Bassan v. Investment Exch. Corp., 83 Wash. 2d 922, 524 P.2d 233 (1974).
220. *Id.*
221. UPA § 9 (TUPA § 9).
222. 2A C.J.S. *Agency* § 44 (1972).
223. 3 AM. JUR. 2d *Agency* § 23 (1962).
224. *Id.* § 25.
225. *Id.* § 29.
226. *Id.* § 130.

incapacity of the principal terminates the authority of the agent with three exceptions.[227] If the authority or power of attorney is coupled with an interest, it is not revocable by the act, condition, or death of the principal.[228] Powers given for consideration are generally revocable.[229]

*Capacity To Act as Agent.* Any legal entity has capacity to hold a power to act on behalf of another.[230] A corporation, for example, may act as an agent for an individual person or for another corporation.[231] Although a person whose interests are adverse to those of another can be authorized to act on behalf of the other, it is a breach of duty for him not to reveal the adverse interests to the principal.[232] Unless otherwise agreed, an agent is also subject to a duty not to deal with his principal as an adverse party in a transaction connected with his agency without the principal's knowledge.[233] An agent acting for multiple principals must deal fairly with all and reveal this conflict.[234] Since potential conflicts may arise between the general partner and the limited partners and may cause a situation where the general partner cannot act without breaching his duty to the limited partners, the principal may wish to give an agent in the power of attorney the right to substitute another in the agent's place or the power to name a third party to act as agent when the original agent is precluded from acting by a conflict of interest.

*Contents of Power of Attorney.* Generally these powers of attorney contain the following items:

(1) the name of the party acting (including his successors and assigns);

(2) the authority to make, execute, swear to, acknowledge, amend, file, record, deliver, or publish:

(a) any limited partnership certificate;

(b) any counterpart or amendment to the certificate of limited partnership for the purpose of substituting limited partners, for the purpose of recording, or for the purpose of qualifying or continuing the limited partnership;

(c) assumed name certificates;

(d) certificates of dissolution;

(e) other limited partnership agreements;

(3) an expression of the irrevocable nature of the relationship.[235]

A series of questions are raised, particularly in a large public limited partnership offering, when it becomes necessary to rely on the power of attorney for authority to execute the limited partnership certificate for purposes of filing the certificate in a number of states and to take other actions

227. *Id.* §§ 120, 122. Texas now recognizes the continuation of a power of attorney notwithstanding the later disability of the principal. TEX. PROB. CODE ANN. § 36A (Supp. 1976-77).

228. Womack v. Stegner, 293 S.W.2d 124 (Tex. Civ. App.—El Paso 1956, writ ref'd n.r.e.).

229. Sunshire v. Manos, 496 S.W.2d 195 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.).

230. RESTATEMENT (SECOND) OF AGENCY § 21 (1958).

231. 3 AM. JUR. 2d *Agency* § 13 (1962).

232. RESTATEMENT (SECOND) OF AGENCY § 23 (1958).

233. *Id.* § 389.

234. *Id.* § 392.

235. For example: The power of attorney hereby granted shall be deemed to be coupled with an interest and shall be irrevocable and survive the death or disability of the undersigned and shall extend to the undersigned's heirs, successors and assigns.

on behalf of the limited partnership. The primary questions, of course, concern the validity of the power. Does it make any difference if the general partner is given the power? How does a corporation swear to a certificate? Does the certificate sworn to by an attorney-in-fact comply with section 2 of ULPA?

A person subject to a duty can properly appoint an agent to perform the act or accomplish the result unless public policy or an agreement requires personal performance.[236] Duties or privileges created by statutes may be imposed or conferred upon a person to be performed or exercised only by himself. Whether a statute is interpreted in such a manner depends upon whether in view of the purpose of the statute the knowledge, consent, or judgment of a particular individual is required. Unless an overriding public policy requires that the actual limited partners sign and swear to the certificate for the limited partnership, however, it seems generally accepted that the signing and swearing to the certificate may be delegated to an agent.

### F. *Qualification of Foreign Limited Partnerships*

The basic question involving foreign limited partnerships is whether a limited partnership, having been properly formed in one state, the master state, is required to qualify in a foreign state in order to be recognized as a limited partnership and to have the limited liability status of its limited partners recognized. ULPA makes no provision for qualification or recognition of foreign limited partnerships, and only a few states have statutes which relate to foreign limited partnerships. The absence of statutory guidelines in most jurisdictions subjects interstate limited partnership transactions to potential risks because the limited partnership, unlike a general partnership, is exclusively a creature of statute, and because of the strictness with which limited partnership statutes have been construed by some states' courts.

The importance of qualifying the partnership in a foreign state can be better understood from a discussion of the theories underlying the certificate filing requirement as it relates to the existence of the limited partnership in the master state. As noted above, unlike the general partnership which existed at common law, the limited partnership is exclusively a creature of statute, and compliance with the statute is technically required in order to create the entity. Nevertheless, in many instances there are problems which result from failure to file. The failure may be either an absolute failure to file, a late filing which occurs after the business has commenced, or an erroneous filing. It appears that the primary reason for the certificate requirement is to give notice to third parties of the limited liability of certain partners, rather than to create the entity.[237] Thus, the ultimate problem involved in the failure-to-file situation is to protect the limited liability of limited partners while still protecting third parties. Section 2(2)[238] of ULPA affords some relief from failure to file problems by requiring only substantial good faith compliance with the formalities in order to create a valid limited partnership. It would be

236. One author expresses some reservations about use of a power of attorney because of the nature of the sworn certificate. Heyman & Parnall, *Use (or Abuse) of the Limited Partnership in Financing Real Estate Ventures in New Mexico*, 3 N.M.L. REV. 251, 252 n.7 (1973).

237. Note, *Regulation of Foreign Limited Partnerships*, 52 B.U.L. REV. 64 (1972).

238. TULPA § 3(b).

difficult to argue, however, that one has substantially complied with ULPA § 2(2) if no certificate is filed. Likewise, there may be difficult third party reliance problems if, for example, a construction contract is signed on behalf of the limited partnership, or drilling commences on a well, before the certificate is filed.

While some may argue that a failure to file means that a limited partnership has not been formed,[239] it is generally agreed that the failure does not automatically convert the limited partnership into a general partnership.[240] Under ULPA it is recognized that the limited partner is not essentially a general partner regardless of non-compliance with the filing requirements, and is not generally liable unless he acts like a general partner.[241] Indeed, ULPA § 11 provides that a person who believes himself to be a limited partner

> is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

Based on section 11, it appears that in the event of a failure to file, the only way a person who believes himself to be a limited partner and who does not exercise control can relieve himself of liability is to renounce the benefits of the association upon ascertaining the mistake.[242] From a policy viewpoint, this provision provides maximum protection for the limited partners while affording the creditors the protection of whatever profits may be left over. Conversely, the wording of section 11 also suggests that if a limited partner does not renounce his interests, he may be liable as a general partner of the partnership.

The question then raised, because the limited partnership is a de jure organization, is whether the limited liability should be recognized in a foreign state in which the ULPA § 2 formalities have not been met, even though there was a proper filing in the master state.[243] Under the traditional analysis the fundamental question is whether to classify the existence of the limited partnership as a matter *inter se* or a matter involving third party relations. The general rule, which is supported by several writers, is that so long as the limited partner did not take part in control or hold himself out as a general partner, the law of the place where the limited partnership was formed should govern the question of limited liability.[244] Thus, a partnership which had filed

239. *See* Taubman, *Limited Partnerships*, 3 CORP. PRAC. COMM., Feb. 1962, at 15, 23. *See also* Tiburon Nat'l Bank v. Wagner, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1968); Widder v. Leeds, 317 A.2d 32 (Del. Ch. 1974); Hoefer v. Hall, 75 N.M. 751, 411 P.2d 230 (1965); Holvey v. Stewart, 509 P.2d 17 (Ore. 1973).

240. BROMBERG § 26. *But see* Cheyenne Oil Corp. v. Oil & Gas Ventures, Inc., 42 Del. Ch. 100, 204 A.2d 743 (Sup. Ct. 1964) (loss of limited liability is the only sanction for failure to file a certificate).

241. ULPA § 7 (TULPA § 8). *See also* ULPA § 5(a) (TULPA § 6(b)); ULPA § 6 (TULPA § 7).

242. TULPA § 12. A split of authority has developed over the applicability of ULPA § 11 to protect limited partners in situations where the limited partnership committed some act which caused its certificate to become ineffective. *See* Graybar Elec. Co. v. Lowe, 11 Ariz. App. 116, 462 P.2d 413 (1969); Vulcan Furniture Mfg. Corp. v. Vaughn, 168 So. 2d 760 (Fla. App. 1964).

243. *See also* Kratovil & Werner, *Fixing up the Old Jalopy—The Modern Limited Partnership Under the ULPA*, 50 ST. JOHN'S L. REV. 51, 67 (1975).

244. *See, e.g.*, Note, *supra* note 237, at 68. *See also* Gilman Paint & Varnish Co. v. Legum, 197 Md. 665, 80 A.2d 906 (1951).

in the master state would have limited liability even as to out-of-state transactions. Although there is authority for the proposition that a limited partnership formed in one state is a legal entity that must be recognized,[245] several authors suggest that in order to place creditors on notice of the limited partnership status, which a court may well determine to be of such significance as to require filing of the certificate, the certificate should be filed in each state in which the limited partnership does significant business.[246]

The best solution yet proposed to deal with this interstate muddle is the process of qualification.[247] "Qualification" generally means the filing of the partnership certificate in the foreign state and paying the required registration fees. To date there are eight states that have some type of statute which relates to foreign limited partnerships: Florida,[248] Hawaii,[249] Idaho,[250] Kansas,[251] Kentucky,[252] Maine,[253] New Hampshire,[254] and Oregon.[255] The Texas secretary of state has promulgated the following rule to deal with the problem.

> [Limited Partnership Rule 004.40.00.005].
> [Foreign Limited Partnerships].
> A copy (having genuine signatures and seals) of a certificate of a limited partnership agreement which has been entered into and/or filed in another state may be filed for record in the Office of the Secretary of State of the State of Texas if the certificate is in substantial compliance with The Texas Uniform Limited Partnership Act as heretofore set out. A certificate is not in substantial compliance with the Texas Act if it contains a statement that it is filed pursuant to the laws of another state and does not also contain a statement that it is being filed pursuant to the laws of Texas.[256]

Because many other states' legislatures are taking action regarding qualification, it is suggested that before establishing contacts with a state in which a partnership may wish to do business the laws of that state be examined to determine its qualification procedures.

A comparison of qualification statutes of the states named above reveals several different ways of treating the problem.

*Filing Required.* The filing required is usually a copy of the original certificate filed in the master state. Kentucky presents unique problems since it has only recently adopted ULPA.[257] Previously, the Kentucky practice had been, rather than requiring a filing of the ULPA § 2 certificate of limited partner-

245. *See* Cheyenne Oil Corp. v. Oil & Gas Ventures, Inc., 42 Del. Ch. 100, 204 A.2d 743 (Sup. Ct. 1964), in which a New Jersey limited partnership which did business in Arkansas and Texas without filing was nevertheless able to sue as a limited partnership as to transactions in Arkansas and Texas.
246. BROMBERG § 26; 2 Z. CAVITCH, *supra* note 15, §§ 39.05[2][b]-[d]; Kratovil & Werner, *supra* note 243, at 67.
247. *See* Comment, *supra* note 88.
248. FLA. STAT. ANN. §§ 620.40-.49 (Supp. 1976-77).
249. HAWAII REV. STAT. §§ 425-71 to -77 (Supp. 1975).
250. IDAHO CODE § 53-306(2) (1957).
251. KAN. STAT. ANN. §§ 56-123b, c (Supp. 1975).
252. KY. REV. STAT. § 362.095 (Supp. 1976).
253. ME. REV. STAT. ANN. tit. 31, § 181 (Supp. 1973).
254. N.H. REV. STAT. ANN. §§ 305-A:1-:8 (1966).
255. ORE. REV. STAT. §§ 69.440, .450 (1975).
256. S/S HANDBOOK 344.
257. KY. REV. STAT. §§ 362.420-.700 (1972).

ship, to file a certified copy of the articles of partnership. In contrast, New Hampshire requires "registration" with the secretary of state and designation of a registered agent, but does not set forth any certificate filing requirements.[258]

*Effect of Filing.* The effect of filing in a foreign state may be either recognition of the limited partnership under the master state's laws[259] or subjection of the limited partnership to the foreign state's laws.[260] The effect of failure to file in a foreign state varies according to the state. General liability results in several of the qualification states, but if forfeiture of limited liability for failure to file a certificate is deemed necessary due to the de jure nature of limited partnerships, then possibly some type of indemnification by the general partners to the limited partners should be provided. Penalties,[261] as opposed to loss of limited liability for failure to file, may be a better solution for two reasons. First, modern limited partnerships may consist of hundreds of limited partners residing in numerous states. To place the burden of qualifying the limited partnership on these individuals seems impractical and inequitable. Second, activities by the limited partners in attempting to qualify the limited partnership might be held to constitute "taking part in the control of the business"[262] which would result in loss of limited liability.[263] In the jurisdictions in which statutes are silent as to penalties or general liability, the matter is left to the courts which may resolve the matter by interpreting ULPA § 11 to allow a limited partner the right to renounce his interest in profits to avoid general liability if the partnership has failed to qualify.[264]

*Miscellaneous Provisions.* Florida requires that the qualifying limited partnership have "Limited" or "Ltd" as part of its name.[265] Kansas requires the submission of annual reports upon penalty of loss of limited liability.[266] Maine applies the master state's laws to the qualifying partnership, except on the question of "control."[267]

## III. CONCLUSION

In this Article various aspects of planning and operation of a limited partnership have been explored. Due to its survey approach, many problems have not been discussed in the depth which many practitioners might prefer. It is hoped, however, that the discussion of the various problems will aid in the resolution of difficulties if only by pointing to other sources.

The law of limited partnerships is new, and consequently it is difficult to

258. N.H. REV. STAT. ANN. § 305-A:1 (Supp. 1973).
259. Idaho, Maine.
260. Florida, Hawaii, Kansas, New Hampshire, Oregon.
261. HAWAII REV. STAT. § 425-76 (Supp. 1975).
262. ULPA § 7 (TULPA § 8).
263. *See* notes 80-95 *supra* and accompanying text.
264. *See* note 242 *supra.*
265. FLA. STAT. ANN. § 620.05 (1956).
266. KAN. STAT. ANN. § 56-123a (Supp. 1975). *See also* HAWAII REV. STAT. § 425-50 (Supp. 1975).
267. ME. REV. STAT. ANN. tit. 31, § 181 (Supp. 1973).

answer many questions in the area, a number of which have arisen for the first time. Perhaps the Revised Uniform Limited Partnership Act will eliminate most of the difficulties in planning. Until that time attorneys must be aware that limited partnership planning will not be an easy task.

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