

## Saint Louis University Law Journal

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Volume 59  
Number 3 *Teaching Business Associations*  
(Spring 2015)

Article 4

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2015

### Teaching Interpretation and Structure of the Revised Uniform Partnership Act: *Moren ex rel. Moren v. Jax Restaurant* and the Duty of Indemnification

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#### Recommended Citation

George M. Cohen, *Teaching Interpretation and Structure of the Revised Uniform Partnership Act: Moren ex rel. Moren v. Jax Restaurant and the Duty of Indemnification*, 59 St. Louis U. L.J. (2015).  
Available at: <https://scholarship.law.slu.edu/lj/vol59/iss3/4>

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**TEACHING INTERPRETATION AND STRUCTURE OF THE  
REVISED UNIFORM PARTNERSHIP ACT: *MOREN EX REL. MOREN*  
V. *JAX RESTAURANT* AND THE DUTY OF INDEMNIFICATION**

GEORGE M. COHEN\*

INTRODUCTION

Legal academics often seem to treat the Revised Uniform Partnership Act (RUPA) as the neglected child of Business Associations law. Overtaken in sophisticated business practice and academic theorizing by an onslaught of limited liability entities, relegated to bit-player status in the law school curriculum, and under-represented in published opinions and scholarship, the statute may appear as outdated as the electronic gadgets from the 1990s that are its contemporaries. And yet, as the default business form involving two or more co-owners, RUPA retains practical significance for small and informal businesses. As the statutory foundation for limited liability partnerships (LLPs) in which many lawyers will practice, RUPA gives students a key introduction to the legal life of a law firm. And as RUPA enters its third decade of existence, the published cases interpreting the statute, though not especially voluminous, provide important guidance, even in cases involving limited liability entities, such as LLPs and limited liability companies (LLCs), for which the precedent case law is still in the relatively early stages of development. Moreover, included among the cases decided under RUPA are a number of notable decisions that can serve as great teaching vehicles.<sup>1</sup>

In this Article I discuss one such case that I teach in my Agency & Partnership course: *Moren ex rel. Moren v. Jax Restaurant*.<sup>2</sup> Case-based

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1. The casebook I use, J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES: CASES, MATERIALS, AND PROBLEMS (8th ed. 2011), includes a number of RUPA decisions as principal cases. Several that I particularly enjoy teaching appear in the chapter on dissolution and dissociation, an area in which RUPA significantly departed from the previous statutory regime. These cases include *Horizon/CMS Healthcare Corp. v. Southern Oaks Health Care, Inc.*, 732 So.2d 1156 (Fl. Dist. Ct. App. 1999); *Saint Alphonsus Diversified Care, Inc. v. MRI Assocs., LLP*, 224 P.3d 1068 (Idaho 2009); and *Brennan v. Brennan Assocs.*, 977 A.2d 107 (Conn. 2009).

2. 679 N.W.2d 165 (Minn. Ct. App. 2004). The case is included in the Hynes & Lowenstein casebook. HYNES & LOEWENSTEIN, *supra* note 1, at 645–57. See also SHAWN J.

teaching (not to mention my course title) probably seems as outmoded to many Business Associations professors as RUPA itself. Some argue that cases may be a good way to teach common law subjects but are not very effective for teaching statutory subjects such as business associations law. There is certainly much to be said for exposing students to alternative teaching methods, but I continue to believe there is great value in reading and analyzing cases even after the first year of law school. As James Boyd White has said, learning to read cases well is a skill that takes a lifetime to master.<sup>3</sup>

Although the continued publication of casebooks discussing RUPA suggests that I am not alone in my preference for teaching RUPA through cases, my teaching style differs from that of many of my colleagues. I am an unabashed slow-poke, though admittedly less so in Agency & Partnership than other classes. I prefer spending an entire class (and sometimes more) plumbing the analytical depths of a good, meaty case to whizzing through four or five cases in a class, using them more as jumping-off points for doctrinal comparisons, hypothetical variations, or theoretical musings. Despite the need to sacrifice some amount of “coverage,” I teach this way because I believe it effectively engages students in the practice of reading critically, analyzing and responding to arguments, evaluating the use of authority, and considering practical implications. All of these are of course essential lawyering skills, and in my view more important than the particular topics covered. Given my methodological approach, when it comes to cases interpreting a statute like RUPA, I prefer cases that raise interesting statutory interpretation questions, in particular questions about how various statutory provisions relate to each other and the statutory structure as a whole.

*Moren* fits this category perfectly. It is the leading, and practically the only, case on indemnity under RUPA.<sup>4</sup> The facts and identification of the legal issue are both simple, and the case could easily be used as a problem in a problem-based course. The apparent simplicity is deceptive, however.<sup>5</sup> The

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BAYERN, CLOSELY HELD ORGANIZATIONS 121–23 (2014); WILLIAM A. KLEIN ET AL., AGENCY, PARTNERSHIPS, AND LIMITED LIABILITY ENTITIES: UNINCORPORATED BUSINESS ASSOCIATIONS 251–53 (2d ed. 2007)

3. James Boyd White, *Law Teachers' Writing*, 91 MICH. L. REV. 1970, 1972 (1993) (“Learning to ‘read a judicial opinion’ is not a ‘skill’ to be ‘mastered’ in the first weeks of law school, before one gets to the really important matter of deciding what kind of society we should have; learning to read a judicial opinion well, and criticizing it intelligently as an ethical and political performance, as well as an intellectual one, is a task for a lifetime.”).

4. One other case reaches the opposite conclusion from *Moren*, but the statement is dicta, the court does not analyze any relevant provisions of RUPA, and the opinion is unpublished. *Franklin v. Bakersfield Mem’l Hosp.*, No. F065401, 2013 WL 6094564, at \*7 (Cal. Ct. App. Dec. 6, 2013) (“[T]he partnership is entitled to seek indemnity from the partner whose negligence caused the loss.” (citing a pre-RUPA California case)).

5. The fact that Professors Hynes and Loewenstein choose to include the case in their casebook suggests that they agree. The casebook asks a single question after the case: “Is the

law turns out not to be so simple, and discussion of the case could easily fill a class hour, though I acknowledge that few professors will feel they have the liberty to do that. In the remainder of this Article, I will identify ten topics that a class discussion of *Moren* could cover as well as some thoughts on those topics. In reality, this Article is perhaps more substantive than methodological, but that is, in part, the point. My goal is to persuade you that teaching RUPA through cases such as *Moren* is useful, insightful, and fun.

### I. THE *MOREN* OPINION

Jax Restaurant was a partnership operating in Minnesota.<sup>6</sup> Nicole Moren, one of the partners, left work late one afternoon to pick up her two-year-old son at day care but then returned with the boy to the restaurant after learning that her sister and fellow partner needed help because one of the cooks had not shown up for work.<sup>7</sup> Not wanting her son to create a disturbance in the restaurant, Moren brought him into the kitchen with her and set him on a counter top.<sup>8</sup> Moren then began rolling dough for pizzas using a pressing machine.<sup>9</sup> While Moren was making pizzas, her son put his hand into the press and sustained serious, permanent injuries.<sup>10</sup>

The son, through his father, sued the partnership, but not Nicole Moren or any other partner individually. The partnership in turn served a third-party complaint on Moren, a relatively rare action for a partnership to take.<sup>11</sup> The partnership argued that Moren, as a negligent partner, owed the partnership indemnity for any liability that the partnership owed to Moren's son, as a third party.<sup>12</sup> The district court granted summary judgment to Moren on this issue in the lower court, and the Minnesota Court of Appeals affirmed.<sup>13</sup>

The appellate court's analysis of Minnesota's version of RUPA is straightforward. The court begins with the observation that RUPA treats a

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court's rationale convincing?" HYNES & LOEWENSTEIN, *supra* note 1, at 647. I should note that the Teachers Manual to their casebook raises some, but not all, of the topics I discuss here, but does not, consistent with the nature of that type of work, include a full discussion of these issues.

6. *Moren*, 679 N.W.2d at 166.

7. *Id.*

8. *Id.* at 167.

9. *Id.*

10. *Id.*

11. *Moren*, 679 N.W.2d at 167. The opinion does not reveal how many partners were in the partnership or what the management structure of the partnership was. Most likely, the partnership contained at least three partners and the other partners outvoted Nicole to authorize the indemnity action against her.

12. *Id.*

13. *Id.* at 168–69.

partnership as an entity distinct from its partners,<sup>14</sup> and therefore it may sue and be sued.<sup>15</sup> The court then quotes section 305(a), RUPA's vicarious partnership liability rule, which states that "[a] partnership is liable for loss or injury caused to a person . . . as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership."<sup>16</sup> Immediately following that reference, the court continues that "[a]ccordingly," under RUPA section 401(c), "a 'partnership shall . . . indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership. . . .'"<sup>17</sup> The opinion then quotes one final provision that the court views as adopting the same principle "[s]tated conversely."<sup>18</sup> That provision is section 301(2), RUPA's apparent authority rule, under which "an 'act of a partner which is not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.'"<sup>19</sup> Having set forth those three statutory provisions, the court abruptly concludes: "Thus, under the plain language of the [RUPA], a partner has a right to indemnity from the partnership, but the partnership's claim of indemnity from a partner is not authorized or required."<sup>20</sup>

The rest of the opinion mostly discusses whether Moren's conduct was in the "ordinary course of business of the partnership."<sup>21</sup> The court concludes that because Moren was making pizzas for the partnership at the time of the accident, her conduct was in the "ordinary course," even though she was simultaneously acting out of personal motives in caring for her son.<sup>22</sup> The only other point the court makes is to distinguish an out-of-state case relied on by the partnership.<sup>23</sup> That case holds that a partner held liable for negligent

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14. Although not cited by the court, this principle is stated in REVISED UNIF. P'SHIP ACT § 201(a) (1997).

15. *Moren*, 679 N.W.2d at 166 (citing MINN. STAT. § 323A.3-07 (2002), recodified as MINN. STAT. § 323A.0307 (2014) and corresponding to REVISED UNIF. P'SHIP ACT § 307). REVISED UNIF. P'SHIP ACT § 307(a) states: "A partnership may sue and be sued in the name of the partnership."

16. *Moren*, 679 N.W.2d at 166 (quoting MINN. STAT. § 323A.3-05(a), recodified as MINN. STAT. § 323A.0305(a) and corresponding to REVISED UNIF. P'SHIP ACT § 305(a)) (internal quotation marks omitted).

17. *Id.* at 167 (quoting MINN. STAT. § 323A.4-01(c), recodified as MINN. STAT. § 323A.0401(c) and corresponding to REVISED UNIF. P'SHIP ACT § 401(c)).

18. *Id.*

19. *Id.* (quoting MINN. STAT. § 323A.3-01(2), recodified as MINN. STAT. § 323A.0301(2) and corresponding to REVISED UNIF. P'SHIP ACT § 301(2)).

20. *Id.*

21. *Moren*, 679 N.W.2d at 167-68.

22. *Id.* at 168.

23. *Id.* (citing *Flynn v. Reaves*, 218 S.E.2d 661 (Ga. Ct. App. 1975)).

behavior in the course of the partnership business cannot seek contribution from the other partners.<sup>24</sup> The court finds the case inapposite because it pre-dates RUPA and “applied common law partnership and agency principles.”<sup>25</sup>

Like many appellate cases, *Moren* is an odd duck. One might imagine that most partnerships in this situation would have covered the liability rather than try to shift it all to the wrongdoing partner. If *Moren* had negligently injured a customer rather than her son, maybe the partnership would have seen things differently. But family relationships create complicated dynamics in partnerships, as they do elsewhere. Perhaps *Moren*’s sister and the other partners (if any) resented *Moren*’s husband’s suit for something that seemed to them so obviously personal and *Moren*’s fault, while *Moren* was equally indignant about the partnership’s apparent indifference to her accidental tragedy that occurred while she was doing partnership work. Whatever the reason, the partners fought it out and, at least from a pedagogical point of view, we are fortunate they did. As I like to say to my students, let us see if we can figure out this case.

## II. PARTNER’S RIGHT OF INDEMNITY AND NEGATIVE IMPLICATION: SECTION 401(C)

One way to begin a discussion of *Moren* is to ask why the court structures its opinion the way it does. Because section 401(c) deals with indemnification, one might have expected the court to start there.<sup>26</sup> Instead, the court begins with the entity theory of partnership and the partnership vicarious liability rule.<sup>27</sup> Why? The answer is that section 401(c) does not directly answer the issue posed by the case, which is whether a partnership may seek *indemnity from a partner* for liability stemming from that partner’s negligence for which the partnership is held vicariously liable. Section 401(c) discusses required

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24. *Flynn* holds that “where a partner is sued individually by a plaintiff injured by the partner’s sole negligence, the partner cannot seek contribution from his co-partners even though the negligent act occurred in the course of the partnership business.” *Flynn*, 218 S.E.2d at 663. The court also notes that “had the co-partners been subjected to liability by the doctrine of respondeat superior, they would have a right of indemnity against [the allegedly negligent partner] for his actual negligence.” *Id.* at 663 n.2.

25. *Moren*, 679 N.W.2d at 166. Georgia did not adopt the Uniform Partnership Act until 1984, after the *Flynn* case. GA. CODE ANN. § 14-8-1 (2014). Georgia has not adopted the Revised Uniform Partnership Act. *Id.*

26. REV. UNIF. P’SHP ACT § 401(c) (1997) provides: “A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of business of the partnership or for the preservation of its business or property.”

27. *Moren*, 679 N.W.2d at 167.

*indemnification from a partnership to a partner.*<sup>28</sup> No other section of RUPA addresses whether a partnership may seek indemnity from a partner. Thus, *Moren* presents a classic case in which the court must fill in the statutory “gap.”

*Moren*’s understanding of section 401(c) is based on negative implication.<sup>29</sup> Section 401(c) provides for indemnity from the partnership to a partner.<sup>30</sup> RUPA does not include a provision for indemnity running from a partner to the partnership. Therefore, concludes the court, the “plain language” of RUPA precludes such a claim.<sup>31</sup> If that is the court’s argument, then why is that not the end of the matter? What are the other RUPA provisions and the discussion of “ordinary course” doing in the opinion?

### III. RELATIONSHIP OF PARTNERSHIP LAW TO OTHER LAW: SECTION 104(A)

One answer may be that the negative implication argument runs into an immediate difficulty as a result of another provision of RUPA, albeit one not cited by the court. Under section 104(a), “[u]nless displaced by particular provisions of [RUPA], the principles of law and equity supplement [RUPA].”<sup>32</sup> Included in those supplementary principles is the law of agency,<sup>33</sup> with which students will most likely already have studied. Thus, an alternative route into discussing the case would be to ask what the result would have been had *Moren* been simply an employee, even a store manager, rather than a partner. The answer is that the partnership, as employer, would have prevailed.<sup>34</sup>

Under agency law, a principal held vicariously liable for a negligent agent’s tort is entitled to (though rarely does) seek indemnity from the agent,<sup>35</sup>

28. REV. UNIF. P’SHP ACT § 401(c) (“A partnership shall reimburse a partner for payments made and indemnify a partner for liabilities incurred by the partner in the ordinary course of the business of the partnership or for the preservation of its business or property.”) (emphasis added).

29. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 107 (2012) (identifying the “Negative-Implication Canon,” under which the expression of one thing implies the exclusion of others or *expressio unius est exclusio alterius*).

30. See REV. UNIF. P’SHP ACT § 401(c).

31. *Moren*, 679 N.W.2d at 167.

32. REV. UNIF. P’SHP ACT § 104(a).

33. *Id.* § 104 cmt. Thus, RUPA § 104(a) simply continues the rule under the previous Uniform Partnership Act that the “law of agency shall apply under this act.” UNIF. P’SHP ACT § 4(3) (1914).

34. Whether it makes sense to treat partners differently from other agents for purposes of indemnity is a question that naturally follows. I return to this question below.

35. RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. b (2006) An agent’s liability to the principal includes “an obligation to indemnify the principal when a wrongful act by the agent subjects the principal to vicarious liability to a third person.” *Id.* See also RESTATEMENT (SECOND) OF AGENCY §§ 383 cmt. e, 401 & cmt. d (1958).

whereas a negligent agent cannot get indemnity from the principal.<sup>36</sup> A partnership is a principal and a partner is an agent under RUPA<sup>37</sup> and agency law. Thus, if neither section 401(c) nor any other RUPA provision answers the question of whether a partnership can get indemnity from an agent, the law of agency does, and section 104(a) trumps the interpretive device of negative implication. Under this interpretation, *Moren* reaches the wrong result.

#### IV. CONSISTENCY AND “ORDINARY COURSE OF BUSINESS”: SECTIONS 301 AND 305

Not so fast, a clever student might retort. Perhaps section 401(c) does, in fact, “displace” the agency rule on indemnification.<sup>38</sup> This argument makes use of a second interpretive approach, which is that words or phrases used in one statutory provision should be interpreted consistently with their use in other provisions of the same statute.<sup>39</sup> The key phrase is “ordinary course of business,” which defines not only the scope of a partnership’s indemnity obligation to a partner in section 401(c), but also the scope of a partnership’s apparent authority in section 301(1) and vicarious liability in section 305(a).<sup>40</sup>

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36. RESTATEMENT (THIRD) OF AGENCY § 8.14(2)(b) (stating that a principal must indemnify an agent “when the agent suffers a loss that fairly should be borne by the principal in light of their relationship”); *id.* cmt. b (“A principal’s duty to indemnify does not extend to losses that result from the agent’s own negligence”); *id.* cmt. d (“A principal does not have a duty to indemnify an agent against losses caused by unauthorized action taken by the agent that did not benefit the principal or losses caused solely by the wrongful acts committed by the agent”); *see also* RESTATEMENT (SECOND) OF AGENCY § 440 cmt. b. Interestingly, several years after *Moren*, the Minnesota Court of Appeals endorsed the Third Restatement’s position. *See* Graff v. Robert M. Swendra Agency, Inc., 776 N.W.2d 744, 751 (Minn. Ct. App. 2009). The Minnesota Supreme Court had, however, adopted the principle many years earlier. *See* Shair-A-Plane v. Harrison, 189 N.W.2d 25, 27–28 (Minn. 1971) (“[W]e know of no rule of law whereby, absent an express agreement to the contrary, a duty of indemnity is imposed upon a principal for losses incurred *due to the agent’s fault*. Rather the rule is that such a duty does not exist under those circumstances.”).

37. REV. UNIF. P’SHP ACT § 301(1) (“Each partner is an agent of the partnership for the purpose of its business.”).

38. RESTATEMENT (THIRD) OF AGENCY § 8.14 cmt. c recognizes that § 401(c) imposes a distinct statutory duty to indemnify, but does not take a position on whether that statutory duty “displaces” the Restatement rule on indemnity.

39. *See, e.g.,* SCALIA & GARNER, *supra* note 29, at 170 (identifying the canon of “Presumption of Consistent Usage,” under which a word or phrase is presumed to bear the same meaning throughout a text but a material variation in terms suggests a variation in meaning).

40. REV. UNIF. P’SHP ACT § 301(1) (“Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the execution of an instrument in the partnership name, for apparently carrying on in the *ordinary course the partnership business* or business of the kind carried on by the partnership binds the partnership, unless the partner had no authority to act for the partnership in the particular matter and the person with whom the partner was dealing knew or had received a notification that the partner lacked authority.”) (emphasis added); REV. UNIF. P’SHP ACT § 305(a) (“A partnership is liable for loss or injury caused to a



The court's view is that "ordinary course" must mean the same thing in section 401(c) as it does in sections 301 and 305.<sup>41</sup>

Therefore, the court reasons, because the partnership entity is liable for contracts made and torts committed by partners in the "ordinary course," partners who through their negligence incur personal liability while acting in the "ordinary course" must be entitled to indemnity from the partnership under section 401(c) for that personal liability.<sup>42</sup> RUPA's adoption of the entity theory, as well as its use of the same phrase in the three provisions, leads inexorably to the conclusion that the drafters intended the partnership entity, not individual partners, to bear the ultimate responsibility for the misconduct of partners "in the ordinary course of business."<sup>43</sup> That explains why the court devotes a good part of the opinion to discussing the meaning of "ordinary course" as if the issue in the appeal were whether the partnership is vicariously liable to Moren's son for Moren's negligence.

Another way to characterize the court's thinking is that indemnity for the same act cannot run in both directions. It cannot be that a partner can get indemnity from the partnership for liabilities incurred by the partner in the ordinary course, and also that the partnership can get indemnity from the partner for the same liabilities incurred by the partnership in the ordinary course, because that would just create an infinite loop. The partner could get indemnity from the partnership, which in turn could get indemnity from the partner, and so on *ad infinitum*. The drafters could not have intended this absurd result. Thus, section 401(c) must be read to expressly displace the agency law rule and exclude indemnity from a partner to the partnership.

One way to respond to the consistency argument is to point out that although "ordinary course" may mean the same thing in the three statutory sections, the language used is not precisely the same, and the context in which section 401(c) uses the phrase differs from the context in which the other two provisions use the phrase.<sup>44</sup> Section 401(c) applies the phrase to "*liabilities*

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person, or for a penalty incurred, as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the *ordinary course of business of the partnership* or with authority of the partnership.") (emphasis added).

41. Moren *ex rel.* Moren v. Jax Restaurant, 679 N.W.2d 165, 167 (Minn Ct. App. 2004).

42. *Id.* at 168.

43. REV. UNIF. P'SHIP ACT §§ 201, 301(1), 305.

44. The phrase "ordinary course of business" occurs in one other place in RUPA. Section 401(j) provides that "[a] difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners, [whereas,] [a]n act outside the ordinary course of business of a partnership . . . may be undertaken only with the consent of all the partners." REV. UNIF. P'SHIP ACT § 401(j). Does that provision, read in conjunction with section 401(c), mean that liabilities incurred by a partner are not subject to indemnity if they are incurred in connection with any act that requires unanimous consent of the other partners to be authorized, regardless of whether the partners unanimously approve of it?

incurred by a partner,” whereas sections 301(1) and 305(a) apply the phrase to an “act” or “conduct” of a partner.<sup>45</sup> This difference reflects a crucial distinction in RUPA. Sections 301 (apparent authority) and 305 (vicarious partnership liability) both address the rights of *third parties* against the partnership, whether in contract or in tort.<sup>46</sup> Both provisions reside in Article 3 of RUPA, entitled “Relations of Partners to Persons Dealing with Partnership.”<sup>47</sup> Both apparent authority and vicarious liability doctrines aim to protect innocent third parties.<sup>48</sup> By contrast, section 401(c) is located in Article 4, which deals with “Relations of Partners to Each Other and to Partnership.”<sup>49</sup> There is no reason why doctrines designed to protect third parties should necessarily determine partners’ rights vis-a-vis each other and the partnership. Thus, one could argue that sections 301 and 305 are simply irrelevant to the issue of whether the partnership or a negligent partner should ultimately bear the liability of that partner once the third party is compensated.

In fact, Article 3 of the RUPA has almost nothing to say about the personal liability of a partner to a third party for that partner’s own wrongdoing, except for section 307(d)(5), discussed below.<sup>50</sup> With respect to contractual liability, a partner who acts with actual or apparent authority is generally not liable on the resulting contract, as is the case for other agents.<sup>51</sup> There are some exceptions, such as when the partner treats the partnership as an undisclosed<sup>52</sup> or unidentified<sup>53</sup> principal, or when the partner personally guarantees the contract.<sup>54</sup> Similarly, a partner may be liable to a third party for breach of an agent’s warranty of authority if the partner acts without actual or apparent

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45. *See id.* §§ 301(1), 305(a), 401(c).

46. *See id.* §§ 301(1), 305(a).

47. *See id.* art. 3. Another canon of interpretation, the “Title-and-Headings Canon,” provides that the “title and headings are permissible indicators of meaning.” SCALIA & GARNER, *supra* note 29, at 221.

48. *See, e.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c (2006) (“Apparent authority holds a principal accountable for the results of third-party beliefs about an actor’s authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal. As to the third person, apparent authority when present trumps restrictions that the principal has privately imposed on the agent.”); PROSSER & KEETON ON TORTS 500 (5th ed. 1984) (“The modern justification for vicarious liability. . . . [is the idea that] losses caused by the torts of employees . . . are placed upon the employer because, having engaged in an enterprise, which will on the basis of all past experience involve harm to others through the torts of employees, and sought to profit by it, it is just that he, rather than the innocent injured plaintiff, should bear them.”).

49. *See* REV. UNIF. P’SHP ACT art. 4.

50. *See infra* note 117 and accompanying text.

51. *See* RESTATEMENT (THIRD) OF AGENCY § 6.01.

52. *See id.* § 6.03.

53. *See id.* § 6.02.

54. *See id.* § 6.01(2).

authority.<sup>55</sup> But RUPA does not expressly deal with these possibilities; instead, it leaves them to the law of agency and other law under section 104.<sup>56</sup> With respect to tort liability, partners are always liable for their own torts, as other agents are.<sup>57</sup> Section 306(a) does deal with a partner's personal liability to third parties, but only *vicarious* liability for "all obligations of the partnership,"<sup>58</sup> not *direct* liability for a partner's own wrongdoing, which again is governed under section 104 by general agency and tort law.<sup>59</sup>

The irrelevance of sections 301 and 305 to a partner's direct liability for personal torts suggests that the court's argument based on these statutory provisions and the phrase "in the ordinary course" gets it exactly backwards. An alternative interpretation of section 401(c) is that "liabilities incurred by the partner in the ordinary course of the business" does not refer to a partner's *personal* liabilities under tort or other law for the partner's own negligent or other wrongful acts.<sup>60</sup> Instead the phrase arguably refers only to *partnership* liabilities for which a partner is *vicariously* (though personally) liable under section 306(a). Under section 306(a), a partner is personally, but vicariously, liable for all liabilities "of the partnership," and these partnership liabilities arise under sections 301 or 305 as a result of another partner's conduct "in the ordinary course."<sup>61</sup> In this reading, "in the ordinary course" in section 401(c) is not meant to *include* a partner's personal liability for his own negligent acts, but to *exclude* those acts, because they are outside the scope of RUPA Article 3.

#### V. TEXTUALIST READING OF SECTION 401(C): UNLIMITED INDEMNITY

A student taking a textualist approach to statutory interpretation would object to the previous interpretation on the ground that section 401(c) includes no express limit on the types of liabilities for which a partner is entitled to indemnification, other than the limitation that those liabilities be "incurred by the partner in the ordinary course of the business of the partnership."<sup>62</sup> Specifically, section 401(c) does not say that a partnership shall indemnify a

55. *See id.* § 6.10.

56. REV. UNIF. P'SHIP ACT § 104(a) (1994) ("Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].").

57. *Id.* § 104(a); RESTATEMENT (THIRD) OF AGENCY § 7.01.

58. RUPA section 306(a) states: "Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law." REV. UNIF. P'SHIP ACT § 306(a).

59. *Id.* § 104(a); RESTATEMENT (THIRD) OF AGENCY § 7.01.

60. REV. UNIF. P'SHIP ACT § 401(c).

61. *Id.* §§ 301, 305–306(a) ("Except as otherwise provided in subsections (b) and (c), all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.").

62. *Id.* § 401(c).

partner “for *partnership* liabilities *vicariously* incurred by the partner.” The textualist student could also point to the one other indemnity provision in RUPA, section 701(d), which requires a partnership to “indemnify a dissociated partner whose interest is being purchased against all *partnership* liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702.”<sup>63</sup> The argument would be that since the drafters expressly limited the “liabilities” to be indemnified to partnership liabilities in section 701(d), but not in section 401(c), there is no such limit in section 401(c).

Although the textualist argument has force, it would have to confront a difficulty with a literal interpretation of section 401(c). Read literally, section 401(c) would permit a partner to get indemnification from the partnership even for liabilities that the partner owes *to the partnership*, for example, for breach of the partnership agreement or breach of fiduciary duties. Section 401(c) does not by its terms limit indemnification to liabilities incurred by the partner “to third parties.”<sup>64</sup> Interpreting section 401(c) to permit a partner to get indemnification for liabilities owed to the partnership makes no sense, however. Interpreting section 401(c) this way would essentially nullify section 405(a), another aspect of the entity theory, which allows the partnership to recover from a partner for breaches of the partnership agreement or breaches of fiduciary or other duties.<sup>65</sup> What would be the point of such recovery if the partnership would just have to indemnify the partner for the liability?<sup>66</sup> One solution to this dilemma would be to interpret the word “indemnify” implicitly to exclude payment for a partner’s liability to the partnership because the indemnifying party cannot be the same as the wronged party, but contracts often do contain provisions requiring one contracting party to indemnify the other, such as for attorneys’ fees. The point, however, is that if section 401(c) cannot be read literally on some issues, there is room for interpretation on other issues.

#### VI. RUPA COMMENTS ON LLPS AND SECTION 306(C)

Nevertheless, RUPA does contain some direct evidence favoring the court’s interpretation and casting doubt on the suggested alternative reading that “liabilities incurred by the partner in the ordinary course” in section 401(c)

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63. *Id.* § 701(d).

64. *Id.* § 401(c).

65. RUPA section 405(a) states: “A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.” REV. UNIF. P’SHIP ACT § 405(a).

66. This argument makes use of yet another interpretation principle, the “Harmonious Reading Canon,” under which the “provisions of a text should be interpreted in a way that renders them compatible, not contradictory.” SCALIA & GARNER, *supra* note 29, at 180.

means liabilities incurred vicariously, not directly, by the partner to third parties.<sup>67</sup> The evidence comes from several comments to RUPA, which provide an opportunity to explore yet another interpretive strategy. RUPA, in the modern tradition of many “uniform” statutes, includes numerous comments explaining the drafters’ intent concerning statutory provisions, in particular revisions from prior law. Comments, of course, are not binding and are often not even included in the version of the statute adopted by a particular state (as is true in Minnesota, which explains why the court makes no reference to the comments). Courts, however, sometimes look to comments to help interpret ambiguous statutory provisions.<sup>68</sup>

The comments supporting the *Moren* court’s interpretation, however, are somewhat odd and of questionable weight. They were added after RUPA was initially drafted, to take account of the increased recognition by states of limited liability partnerships (LLPs).<sup>69</sup> LLPs are partnerships that protect partners from personal vicarious liability for partnership obligations.<sup>70</sup> RUPA recognizes this effect of LLPs in section 306(c), which states that an LLP obligation, “whether arising in contract, tort, or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner.”<sup>71</sup>

The relevance of section 306(c) and LLPs to indemnity or section 401(c) is not immediately apparent. Like other provisions in RUPA Article 3, section 306(c) is directed at the protections (or lack thereof) afforded to third parties, not at the rules governing the relations between partners and the partnership.<sup>72</sup> Nevertheless, the comment added to explain section 306(c), after noting that partners in LLPs “remain personally liable for their personal misconduct,” adds the following paragraph:

In cases of partner misconduct, Section 401(c) sets forth a partnership’s obligation to indemnify the culpable partner where the partner’s liability was incurred in the ordinary course of the partnership’s business. When indemnification occurs, the assets of both the partnership and the culpable partner are available to a creditor. However . . . a partner who is not otherwise

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67. REV. UNIF. P’SHP ACT § 401(c).

68. Not all commentators agree that comments are legitimate interpretation tools. See Laurens Walker, *Writings on the Margin of American Law: Committee Notes, Comments, and Commentary*, 29 GA. L. REV. 993 (1995) (arguing against using such materials for judicial interpretation).

69. REV. UNIF. P’SHP ACT add. to prefatory note.

70. See, e.g., HYNES & LOEWENSTEIN, *supra* note 1, at 7.

71. REV. UNIF. P’SHP ACT § 306(c). RUPA section 306(a) was also changed to state that section 306(c) creates an exception to the general rule that “all partners are liable jointly and severally for all obligations of the partnership. . . .” *Id.* § 306(a).

72. See *id.* art. 3.

liable under Section 306(c) is not obligated to contribute assets to the partnership in excess of agreed contributions to share the loss with the culpable partner. . . . Accordingly, Section 306(c) makes clear that an innocent partner is not personally liable for specified partnership obligations, directly or indirectly, by way of contribution or otherwise.<sup>73</sup>

The comment supports the *Moren* court's reading of section 401(c).<sup>74</sup> Its statement that section 401(c) requires a partnership "to indemnify the culpable partner" whose "liability was incurred in the ordinary course of the partnership business" seems to refer to the personal liability of a tortfeasor partner, not the vicarious liability of an "innocent partner."<sup>75</sup> And if a partnership must indemnify the wrongdoing partner, it cannot be (as already discussed) that the wrongdoing partner must simultaneously indemnify the partnership.<sup>76</sup>

Yet the comment is peculiar. First, the comment's discussion of section 401(c) seems wholly unnecessary to the main point the comment makes, which is that in an LLP, the partners do not have to make contributions, beyond those previously agreed upon, to pay for partnership obligations created by a wrongdoing partner. If one removes the language in the comment starting with "Section 401(c)" until "a partner who is not otherwise liable," the main thrust of the comment would not change and the comment would make sense.<sup>77</sup> Put another way, if the partnership in *Moren* had been an LLP, whether the court required the partnership to indemnify the tortfeasor partner or not, the innocent partners would not have to make additional contributions to satisfy the partnership's obligations. Second, what is the meaning of the sentence, "When indemnification occurs, the assets of both the partnership and the culpable partner are available to a creditor"?<sup>78</sup> Are not the assets of both the partnership and the culpable partner in both a general partnership and in an LLP available to creditors, even in the absence of indemnification by the partnership of the culpable partner?

The drafters express a similar view in an "Addendum" to RUPA's "Prefatory Note" describing the LLP amendments to RUPA.<sup>79</sup> In a section entitled "Scope of a Partner's Liability Shield," discussing the reason for adding section 306(c), the drafters include the following:

The Act does not alter a partner's liability for personal misconduct and does not alter the normal partnership rules regarding a partner's right to indemnification from the partnership (Section 401(c)). Therefore, the primary

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73. *Id.* § 306 cmt. 3.

74. *Moren ex rel. Moren v. Jax Rest.*, 679 N.W.2d 165, 167–68 (Minn. Ct. App. 2004).

75. REV. UNIF. P'SHIP ACT § 306 cmt. 3.

76. *See supra* Part IV and accompanying text.

77. REV. UNIF. P'SHIP ACT § 306 cmt. 3.

78. *Id.*

79. *Id.* add. to prefatory note § 1.

effect of the new liability shield is to sever a partner's personal liability to make contributions to the partnership when partnership assets are insufficient to cover its indemnification obligation to a partner who incurs a partnership obligation in the ordinary course of the partnership's business.<sup>80</sup>

This addendum comment is more ambiguous than the comment to section 306(c), but equally confusing. It is more ambiguous because, although it does refer to an LLP partner's liability for personal misconduct and does then mention section 401(c), it does not clearly link the two.<sup>81</sup> In particular, the addendum comment does not state that the personal liability of a partner who commits a negligence tort is a partnership obligation in the ordinary course for which the partnership must indemnify the wrongdoing partner. In any case, as with the comment to section 306(c), the reference to indemnification seems unnecessary and misleading.<sup>82</sup> Surely the LLP shield protects partners from having to make contributions to cover partnership obligations regardless of whether those obligations result from a wrongdoing partner or a wrongdoing non-partner employee, or even just from ordinary business losses. Moreover, even if there is a partnership obligation created by a wrongdoing partner, if the partnership is sued and not the wrongdoing partner (as in *Moren*), there would be no "indemnification" obligation from the partnership to the wrongdoing partner. Why, then, does the statement say that the "primary effect" of the LLP shield is to eliminate the need for a partner to make contributions to "cover [the partnership's] indemnification obligation to a partner who incurs a partnership obligation in the ordinary course of the partnership's business"?<sup>83</sup>

Interestingly, the comment to section 401(c), the most directly relevant provision, says nothing one way or the other about indemnification for a partner's own negligence or other misconduct.<sup>84</sup> The closest it comes is the following statement: "Although the right to indemnification is usually enforced in the settlement of accounts among partners upon dissolution and winding up of the partnership business, the right accrues when the liability is incurred and thus may be enforced during the term of the partnership in an appropriate case."<sup>85</sup> Because the comment states that the indemnification right is "usually

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80. *Id.*

81. *Id.*

82. See REV. UNIF. P'SHIP ACT add. to prefatory note § 1 for the reference to indemnification.

83. The statement has been described as "puzzling" because "[i]t seems more accurate to describe the primary effect of the LLP provisions as severing a partner's personal liability established in section 306(a) for the obligations of the partnership, whether those obligations arise from the acts of partners or employees of the business." J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES: SELECTED STATUTES AND FORM AGREEMENTS 31 n.4 (2013)

84. REV. UNIF. P'SHIP ACT § 401 cmt. 4.

85. *Id.*

enforced” during the winding up of a partnership, one could argue that the drafters had in mind personal vicarious liability for partnership liabilities.<sup>86</sup> The “exhaustion requirement” of section 307(d) (to be discussed momentarily) means that suing an individual partner for partnership liabilities not resulting from his personal conduct is likely to be rare before winding up.<sup>87</sup> On the other hand, the comment does go on to say that “in an appropriate case,” a partner may pursue his indemnity right before winding up.<sup>88</sup> Perhaps personal liability for a partner’s own misconduct is such a relatively rare “appropriate case.” Nevertheless, it is somewhat odd that the comment to section 401(c) does not directly address this issue, while the comment to section 306(c) gives it such prominence.

#### VII. CHANGES FROM UPA SECTION 18(B)

The focus on RUPA comments naturally leads to another device for interpreting RUPA, namely comparing the changes in RUPA from the previous partnership statute, the Uniform Partnership Act (UPA).<sup>89</sup> One of the primary functions of the RUPA comments is to explain changes made from UPA, including whether the changes are intended to be substantive or merely stylistic.<sup>90</sup> In light of this significant purpose of RUPA comments, it is surprising that the comment to section 401(c) does not discuss the changes that section 401(c) makes to the UPA indemnity provision, section 18(b).<sup>91</sup> UPA section 18(b) states: “The partnership must indemnify every partner in respect of payments made and personal liabilities *reasonably* incurred by him in the ordinary *and proper* conduct of its business, or for the preservation of its business or property.”<sup>92</sup> section 401(c) drops the words “reasonably” and “proper.”<sup>93</sup> A natural interpretation of this drafting decision is that UPA section 18(b) did not provide indemnity for any “unreasonable” or “improper” act of a partner, including negligent acts, whereas the RUPA drafters wanted to

86. *Id.*

87. *See infra* note 114 and accompanying text.

88. REV. UNIF. P'SHIP ACT § 401 cmt. 4.

89. It is worth noting here that although I characterize the UPA as the “previous” statute, the UPA in fact remains the governing statute in sixteen states. *See HYNES & LOEWENSTEIN, supra* note 83, at 1 (Supp). Thus, one could make the connection by simply asking how *Moren* would come out in a UPA jurisdiction.

90. *Compare, e.g.,* REV. UNIF. P'SHIP ACT § 401 cmt. 9 (noting the change in RUPA § 401(h) from UPA § 18(f) to entitle any partner, not just a surviving partner to compensation for services rendered in winding up the partnership business) *with, e.g., id.* § 401 cmt. 10 (noting that RUPA § 401(i) “continues the substance of” UPA § 18(g)).

91. *Id.* § 401 cmt. 4.

92. UNIF. P'SHIP ACT § 18(b) (1914) (emphasis added). The comment to section 401(c) simply states that it is “derived from” UPA section 18(b). REV. UNIF. P'SHIP ACT § 401 cmt. 4.

93. REV. UNIF. P'SHIP ACT § 401(c).



expand the indemnity available to partners to include indemnity to partners who had engaged in wrongful conduct.<sup>94</sup>

If expanding the partnership's liability for indemnity was the intent of the RUPA drafters, however, why did they not expressly flag such an important revision in the comment to section 401(c)? Perhaps the omission was an oversight. Alternatively, the drafters may not have intended any substantive change. They may have thought that "reasonably" and "proper" were not necessary to include because those limits on indemnity were already implied either in section 401(c)'s "liabilities incurred by the partner in the ordinary course" language, or in other RUPA provisions.<sup>95</sup> It is hard to believe, for example, that the drafters thought that a partner could get reimbursed for *any* "payments made" regardless of their reasonableness.<sup>96</sup>

Even if the drafters did not intend any change from the UPA, there still might be a question of what "reasonably" and "proper" in UPA section 18(b) mean.<sup>97</sup> Although a plausible reading of section 18(b) is that it excludes a partner's indemnification for negligent acts, and therefore indirectly recognizes a partnership's right to indemnification against a partner for those acts, another possible interpretation is that "proper" conduct includes a partner's negligent acts, and "improper" conduct is limited to reckless or intentional acts.<sup>98</sup> Under

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94. See HYNES & LOEWENSTEIN, *supra* note 83 (suggesting that the language change from UPA § 18(b) to RUPA § 401(c) indicates an obligation to indemnify wrongdoing partners).

95. The interpretation that UPA section 18(b)'s limitations are implicit in a provision of RUPA apart from section 401(c) was endorsed by members of the Colorado Bar in a meeting discussing whether Colorado should adopt RUPA. See *Minutes of the Twelfth Meeting of the Ad Hoc Partnership Laws Committee*, COLO. BAR ASSOC. (Oct. 26, 1994), <http://www.cobar.org/index.cfm/ID/200/subID/937/CORP/Meeting-12/>. The minutes of the meeting state that in response to suggestions by some members that section 401(c) include a "conduct limitation on the right of indemnity," others offered the rebuttal that given the standard of partner conduct under section 404, it was "unnecessary to include the language of 'proper' or to otherwise change the language." *Id.* Nevertheless, the members did propose a revision to section 401(c), which the Colorado legislature adopted. *Id.* The revision added to the end of the provision the following caveat: "provided, however, that such payments were made or liabilities incurred without violation of the partner's duties to the partnership or the other partners." COLO. REV. STAT. § 7-64-401(3). Interestingly, the Colorado revision does not limit the relevant "partner's duties" to those listed in section 404, which I discuss in the next section. *Id.* See also *infra* Part VIII. Colorado is the only RUPA jurisdiction to have modified the language of section 401(c).

96. REV. UNIF. P'SHIP ACT § 401(c).

97. UNIF. P'SHIP ACT § 18(b).

98. See Russell C. Smith, *How the Uniform Partnership Act Determines Ultimate Liability for a Claim Against a General Partnership and Provides for the Settling of Accounts Between Partners*, 17 CAMPBELL L. REV. 333, 345-46, 348 (1995). Smith's conclusion rests on somewhat shaky grounds. He cites and discusses only three cases purporting to support his conclusion that under UPA section 18(b), a negligent partner can get indemnity from the partnership, and none of these cases discusses the "reasonably" and "proper" language of section 18(b). *Id.* at 343-44, 354. Moreover, the cases are distinguishable from the situation presented by *Moren*. One case involved

that interpretation, *Moren* would have come out the same way under section 18(b).

#### VIII. DUTY OF CARE: SECTION 404(C)

A provision of RUPA that might support a more limited scope for a partnership's right of indemnity against a partner is the partner's fiduciary duty of care in section 404(c), another provision not discussed in *Moren*.<sup>99</sup> Like section 401(c), section 404 appears in Article 4 of RUPA.<sup>100</sup> Section 404 is entitled "General Standards of Partner Conduct" and addresses duties owed by a partner to the partnership and other partners, whereas section 401, though entitled "Partner's Rights and Duties," deals mostly with duties of a partnership and rights of a partner.<sup>101</sup> Section 404(c) states: "A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."<sup>102</sup> Given that RUPA does not contemplate that a partner will be *liable* to the partnership for mere negligence, one could argue that RUPA consequently does not contemplate that a partner would be obligated to *indemnify* the partnership for that partner's mere negligence. On the other hand, if a partner violates the duty of care by engaging in grossly negligent, reckless, or unlawful conduct, the partnership would be able to seek indemnity from the wrongdoing partner if the partnership were held vicariously liable for that conduct.<sup>103</sup>

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a claim based on negligent management, which under RUPA § 404(c)'s duty of care and its version of the business judgment rule would not result in personal liability for the managing partner. *See* *Ferguson v. Williams*, 670 S.W.2d 327 (Tex. App. 1984). In the second case, the "innocent" partner seeking indemnity apparently knew of and acquiesced in the "wrongdoing" partner's conduct that the innocent partner later claimed was negligent. *Kraemer v. Gallagher*, 235 N.Y.S.2d 874 (N.Y. App. Div. 1962). In the third case, the liability of the "wrongdoing" partner was based not on ordinary negligence but on a statute imposing liability for scaffolding accidents on anyone "having charge of" the work, and the court said its indemnity rule did not apply if the wrongdoing partner's conduct evidenced "culpable negligence." *Marcus v. Green*, 300 N.E.2d 512 (Ill. App. Ct. 1973).

99. *See* REV. UNIF. P'SHIP ACT § 404(c).

100. *Id.* art. 4.

101. *Id.* §§ 401, 404.

102. *Id.* § 404(c).

103. Whether the partnership would ever be vicariously liable for a partner's "grossly negligent, reckless, or unlawful conduct" depends on whether a partner who engages in such conduct is "acting in the ordinary course of business of the partnership" under RUPA section 305(a), discussed above. Thus, under this interpretation, there may be a category of acts for which the partnership is vicariously liable and entitled to indemnity from a partner, but negligent acts would not be included among these.

The duty of care argument raises interesting questions about the source of a partner's duty of indemnity and its relationship to the partner's fiduciary duty. The duty of care under section 404(c) is directed at torts committed by a partner against the *partnership*, in particular mismanagement, not torts committed by a partner against *third parties*, which, as already discussed, are dealt with in Article 3.<sup>104</sup> In some partnerships such as law firms, partners develop agency relationships with clients, and so the partners owe the clients a fiduciary duty of care, but that duty is distinct from the duty of care partners owe to their other principal, the partnership. Moreover, neither section 401(c) nor its comment makes any reference to section 404(c).<sup>105</sup> Why, then, is a partner's duty of care to the partnership, which covers wrongs done by a partner to the partnership, relevant to the question of a partner's duty to indemnify the partnership for wrongs done by a partner to third parties? One answer might be that under agency law, the principal's duty to indemnify the agent, for losses incurred by an agent in the scope of his agency, is considered part of the agent's duty of care, though this is not entirely clear.<sup>106</sup>

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104. REV. UNIF. P'SHIP ACT § 305(a).

105. By contrast, the Uniformed Limited Liability Company Act does directly link indemnity to the duty of care standard. Compare REV. UNIF. LTD. LIAB. CO. ACT § 408(a) (2006) ("A limited liability company shall . . . indemnify for any . . . liability incurred by a member of a member-managed company . . . in the course of the member's . . . activities on behalf of the company, if, in . . . incurring the . . . liability, the member or manager complied with the duties stated in Section[] . . . 409."), with *id.* § 409(c) (defining the duty of care of a member of a member-managed LLC and directly linking indemnity to the duty of care standard).

106. The Restatements of Agency are somewhat fuzzy on this point, probably due to the fact that the characterization does not matter under agency law. The Restatement (Third) discusses an agent's duty to indemnify in the comment to section 8.08, labeled "Duties of Care, Competence, and Diligence." The comment states that the duty to indemnify is "derived from tort law," under which "an agent is subject to liability to the principal for all harm, whether past, present, or prospective, caused the principal by the agent's breach of the duties stated in this section." RESTATEMENT (THIRD) OF AGENCY § 8.08 cmt. b (2006) (citing RESTATEMENT (SECOND) OF TORTS § 910). This comment reflects the general philosophy of the Restatement (Third) of Agency, which condenses the large number of specific principles of the Restatement (Second) of Agency into a smaller number of more general principles and extensive comments. See RESTATEMENT (THIRD) OF AGENCY. The Restatement (Second) of Agency discusses the agent's duty to indemnify the principal in the comment to section 383, entitled "Duty to Act Only as Authorized," which is distinct from the "Duty of Care and Skill" in section 379. See RESTATEMENT (SECOND) OF AGENCY § 383 cmt. e (stating that an "agent may be subject to liability to his principal because he has . . . committed a tort or a crime upon a third person for which the principal is liable"); see also *id.* § 401 (stating that an "agent is subject to liability for loss caused to the principal by any breach of duty"); *id.* § 401 cmt. d (stating that an "agent who subjects his principal to liability because of a negligent or other wrongful act is subject to liability of the principal for the loss which results therefrom"); *cf. id.* § 440 cmt. b ("The principal has no duty to indemnify the agent for loss caused solely by the agent's negligence, whether or not the negligence constitutes a breach of duty to the principal.").

Another answer is that section 404 is an exclusive list of a partner's duties to the partnership. Section 404(a) states that the duties of care in section 404(c) and loyalty in section 404(b) are the "only fiduciary duties a partner owes to the partnership and the other partners."<sup>107</sup> Section 404 contains no express duty of a partner to indemnify the partnership.<sup>108</sup> If such a duty exists, one might argue that it must be derived from, and consistent with, the duty of care. In this view, under RUPA a partner can owe no duty to indemnify the partnership for the partner's negligent acts against third parties for which the partnership is held vicariously liable, because such negligent acts do not violate the partner's duty of care to the partnership.

Section 404(a), however, merely states that the only *fiduciary* duties a partner owes are the ones listed.<sup>109</sup> Would a partner's duty to indemnify the partnership be considered a "fiduciary" duty? RUPA includes two express, non-fiduciary duties owed by a partner: the duty of good faith in section 404(d) and the duty to provide information in section 403(c).<sup>110</sup> The fact that the duty to provide information lies outside section 404 means that section 404 is not the exclusive source of a partner's non-fiduciary duties. The existence of non-fiduciary duties owed by a partner apart from Section 404 is confirmed by section 405(a), which permits a partnership to "maintain an action against a partner for . . . the violation of *a duty* to the partnership."<sup>111</sup> Perhaps, the non-fiduciary duties are limited to section 403(c) and contractual duties created by the partnership agreement. On the other hand, the comment to section 405(a) reads that section to provide "that the partnership itself may maintain an action against a partner for any breach of the partnership agreement *or* for the violation of *any duty* owed to the partnership, *such as* a breach of fiduciary duty,"<sup>112</sup> which suggests that there are some duties that are both non-fiduciary and also non-contractual. These duties could include the duty of indemnification.

Moreover, section 405(b), which discusses suits that a partner can bring against the partnership or another partner, is very specific about which statutory provisions can give rise to such a suit, but section 405(a), which discusses suits a partnership can bring against a partner, is broadly drafted and contains no references to specific statutory provisions.<sup>113</sup> The distinction

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107. REV. UNIF. P'SHIP ACT § 404(a). The UPA does not have an express duty of care.

108. *See id.* § 404.

109. *Id.* § 404(a).

110. *Id.* §§ 403(c), 404(d).

111. *Id.* § 405(a) (emphasis added).

112. REV. UNIF. P'SHIP ACT § 405 cmt. 1 (emphasis added).

113. *Compare id.* § 405(a) ("A partnership may maintain an action against a partner for a breach of the partnership agreement, or for the violation of a duty to the partnership, causing harm to the partnership.") with *id.* § 405(b) ("A partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to

between a broadly stated rule for suits by the partnership and a more specific rule for suits by partners suggests that the drafters may have contemplated suits by the partnership to enforce duties not expressly stated in RUPA or the partnership agreement, but perhaps grounded in agency or tort law, such as the duty to indemnify.

#### IX. EXHAUSTION RULE: SECTION 307(D)

There remains yet another RUPA rule that might shed some light on the indemnification question. The rule, again not cited by the *Moren* court, concerns an important RUPA innovation derived from the entity theory, the exhaustion requirement.<sup>114</sup> Section 307(d) states that “[a] judgment creditor of a partner may not levy execution against the assets of the partner to satisfy a judgment based on a claim against the partnership unless the partner is personally liable for the claim under Section 306” and one of several listed conditions apply.<sup>115</sup> All of the listed conditions, except for one, have to do with whether the partnership assets are sufficient to pay the claim in full; if they are, the creditor cannot go after a partner’s personal assets.<sup>116</sup> The exception is section 307(d)(5), which states that even if the partnership has sufficient assets to pay the judgment, a creditor need not exhaust the partnership’s assets if “liability is imposed on the partner by law or contract independent of the existence of the partnership.”<sup>117</sup> According to the comment to section 307(d), an example of this exception is that “a judgment creditor may proceed directly against the assets of a partner who is liable independently as the primary tortfeasor. . . .”<sup>118</sup> That, of course, is exactly *Moren*.

Consider how section 307(d)(5) works in conjunction with indemnification. Under the *Moren* court’s interpretation of section 401(c), if *Moren*’s son had sued her individually rather than the partnership (perhaps a

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partnership business, to: (1) enforce the partner’s rights under the partnership agreement; (2) enforce the partner’s right under this [Act], including (i) the partner’s rights under Sections 401, 403, or 404; (ii) the partner’s right on dissociation to have the partner’s interest in the partnership purchased pursuant to Section 701 or enforce any other right under [Article] 6 or 7; or (iii) the partner’s right to compel a dissolution and winding up of the partnership business under Section 801 or enforce any other right under [Article] 8; or (3) enforce the rights and otherwise protect the interests of the partner, including the rights and interests arising independently of the partnership relationship.”).

114. *See id.* § 307(d) cmt. 4 (stating that the provision “respects the concepts of the partnership as an entity”).

115. *Id.* § 307(d) (failing to state that a creditor cannot sue an individual partner before exhausting partnership assets); *see id.* § 307(b) (expressly permits such suits (unless the partnership is an LLP)); *see id.* § 307(c) (showing that a judgment against an individual partner is a necessary prerequisite to recovering against the assets of that partner).

116. *See id.* § 307(d)(1)–(4).

117. REV. UNIF. P’SHIP ACT § 307(d)(5).

118. *Id.* § 307 cmt. 4.

farfetched hypothetical on the facts of the case, at least absent divorce or separation of the parents), then *Moren* would be entitled to seek indemnity from the partnership, leaving the partnership with the ultimate liability.<sup>119</sup> The question is why then would the drafters include section 307(d)(5) as an exception to the exhaustion requirement (allowing the injured third party to sue the partner without first having to sue the partnership and exhaust its assets) if the partnership was going to be ultimately liable anyway? Put another way, why would the RUPA effectively add an exhaustion requirement enforceable by wrongdoing partners, via the indemnity remedy in section 401(c), when section 307(d)(5) relieves third parties of the same exhaustion requirement? The assumption of section 307(d)(5) seems to be that creditors should be able to execute directly against the assets of a partner if that partner is directly rather than vicariously liable because the liability will end up being borne by the wrongdoing partner anyway. That is, section 307(d)(5) implicitly assumes that the partnership has the right of indemnity against a wrongdoing partner.

On the other hand, this argument faces a number of possible objections. First, section 307(d) is in Article 3 of RUPA, and so, as already discussed, is arguably relevant only to relations between partners or the partnership and third parties, and not relevant to relations between partners or between partners and the partnership.<sup>120</sup> Second, the assumption underlying section 307(d)(5) may not be that the wrongdoing partner will ultimately bear the liability, but simply that the injured third party may just find it more convenient in some circumstances to go after the wrongdoing partner rather than the partnership. Although the other exceptions to the exhaustion requirement in section 307(d) seem to cover most of the cases in which a third party would not want to go after the partnership's assets first,<sup>121</sup> perhaps the drafters thought that injured third parties should be relieved of having to prove the conditions necessary to satisfy those exceptions.

#### X. CONTRACTING FOR INDEMNITY AND LIABILITY INSURANCE: SECTION 103

One of RUPA's key features is its strong contractarian bent. Section 103(a) states that with the exceptions of a few enumerated mandatory provisions in section 103(b), "relations among the partners and between the partners and the partnership are governed by the partnership agreement."<sup>122</sup> The other RUPA provisions are merely defaults, and apply only if the partnership agreement "does not otherwise provide."<sup>123</sup> *Moren* makes no mention of a partnership agreement, so either there was no written agreement, or if there was it must not

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119. *See id.* § 401(c).

120. *Supra* note 47 and accompanying text.

121. REV. UNIF. P'SHIP ACT § 307(d)(1)-(4).

122. *Id.* § 103(a).

123. *Id.*

have said anything about indemnity. One point then to make about *Moren*—a standard one in transactional courses—is that partnerships should have written partnership agreements that deal with issues such as indemnity. Many do,<sup>124</sup> which helps explain why *Moren* is one of the few cases discussing indemnity under RUPA. One could certainly ask students what kind of indemnity provision they would write if they were forming a partnership.<sup>125</sup> Of course, another important lesson is that the existence of a partnership agreement does not necessarily mean that all interpretive questions will be resolved by that agreement.

In the absence of a partnership agreement, a standard approach to determining optimal default rules is for a court to attempt to discern the “majoritarian” rule to which most contracting parties would agree. As is often the case, there is no solid empirical evidence on this question. However, one could infer that *Moren* got it “right” under the majoritarian default criterion from the prevalence of partnership agreement indemnity clauses that protect partners against liability for negligent conduct. On the other hand, RUPA default provisions are supposed to be designed for small, informal partnerships that lack a written partnership agreement, and it is uncertain whether these partnerships would want the same kind of indemnity provisions as do larger, more sophisticated partnerships with extensive written agreements.

Adding to the complexity of the question is the issue of liability insurance. Most partnerships will have a liability insurance policy that covers both the personal liability of partners for negligent conduct in the ordinary course of business and the vicarious liability of the partnership for that conduct. *Moren* makes no mention of whether Jax Restaurant had such a policy, whether *Moren* had her own policy that would have covered her personal liability, or if there were two potentially applicable policies how they might have allocated the liability between them (assuming the two insurers were different). Arguably, the presence or absence of liability insurance is irrelevant to the statutory indemnification question. RUPA makes no mention of liability insurance in any of its provisions or comments. Even if a partnership has liability insurance, there may be deductibles or co-insurance payments, or the

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124. See *id.* §103(b)(4) (providing that a partnership agreement cannot “unreasonably reduce the duty of care.”) The comment to that section states the following:

[P]artnership agreements frequently contain provisions releasing a partner from liability for actions taken in good faith and in the honest belief that the actions are in the best interests of the partnership and indemnifying the partner against any liability incurred in connection with the business of the partnership if the partner acts in a good faith belief that he has authority to act.

*Id.* § 103 cmt. 6. The comment also concludes that such a provision is “intended to come within the modifications authorized by subsection (b)(4).” *Id.*

125. The statutory supplement for the casebook I use provides an example of a partnership indemnity provision. HYNES & LOEWENSTEIN, *supra* note 83, at 475.

insurance may not be sufficient to cover the liability, so the indemnification question could still exist. If the partnership lacks liability insurance, perhaps one could argue that the *Moren* result is a desirable “penalty default” because it would encourage partnerships, which are better situated than individual partners, to buy insurance covering business-related accidents. Liability insurance policies, because they are a form of contractual indemnity, might also be relevant to determining the scope of statutory indemnity. For example, most liability insurance policies exclude indemnity for intentional wrongs, which would support interpreting section 401(c) to exclude indemnity for such conduct, even though a literal reading of the provision might suggest (depending on the meaning of “ordinary course of business”) that such conduct is covered by mandatory indemnity.<sup>126</sup>

#### XI. THE PURPOSES OF PARTNERSHIP VICARIOUS LIABILITY AND THE FACTS OF *MOREN*

Last, but certainly not least (in fact, perhaps this question should not even be last), one could ask: What indemnification rule comports best with the purposes of partnership vicarious liability? For it is the partnership’s vicarious liability to third parties for a partner’s wrongful conduct that leads the partnership to seek indemnity from the partner in the first place. Perhaps the purposes underlying vicarious partnership liability support *Moren*’s implicit argument that if the partnership is vicariously liable, the liability should stay with the partnership.

There are at least two general types of arguments that one could make for partnership vicarious liability. One is that just as employers should not be able to escape liability by committing torts through judgment-proof employees, neither should partnerships as co-owned entities be able to escape liability by committing torts through judgment-proof partners or partners who put most of their assets in the partnership. That rationale does not help much with indemnity, however, because a partnership would have no interest in seeking indemnity against a judgment-proof partner and could use any partnership assets contributed by the wrongdoing partner to the partnership to pay off the judgment.

The other primary rationale for partnership vicarious liability is that the partnership is presumed to be co-managed as well as co-owned,<sup>127</sup> and so all the partners, even if not “negligent,” are deemed to control aspects of the business (including those referred to by economic scholars as “levels of

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126. 7A STEVEN PLITT ET AL., COUCH ON INSURANCE § 103:25 (3d ed. 2014).

127. REV. UNIF. P’SHIP ACT § 401(f) (“Each partner has equal rights in the management and conduct of the partnership business.”).



activity” not included in the negligence standard)<sup>128</sup> that can increase risks to third parties. In *Moren*, for example, the reason *Moren* was in the kitchen at all with her son was that one of the cooks scheduled to work did not show up and *Moren*’s partner asked her to help out.<sup>129</sup> Decisions about such things as scheduling of work hours, hiring of employees, the type of equipment present in the kitchen, and the handling of personnel emergencies are all arguably decisions of the partnership as a whole that, whether or not they amounted to negligent conduct by any other partner, arguably did contribute to the risk of an accident in non-trivial ways.<sup>130</sup> Thus, it makes sense to keep the ultimate liability on the partnership.

Like the other arguments, this one is not dispositive. In the first place, one could reasonably ask why the solution should not be one of risk sharing between the partnership and the wrongdoing partner rather than the partnership bearing the full loss. Perhaps the answer is that the statute does not contemplate this solution, but instead creates an incentive to the partners to do so in the partnership agreement (another penalty default argument). Another objection might be that a similar “activity level” rationale could be given for vicarious liability in the agency context. Yet, as we have seen, agency law allows an employer to seek indemnity from a negligent employee.<sup>131</sup> Of course, agency law might have it wrong, but the discrepancy between agency law and RUPA is unsettling. It could also be argued that partnership differs meaningfully from other types of agency because it involves multiple owners whom the statute presumes have equal management rights. Although that might explain why the partnership, rather than individual partners should share responsibility for mismanagement (of the kind covered by the duty of care), it is less clear why the fact of multiple ownership and divided control should dictate a different indemnity rule for partnership than for agency concerning personal acts of negligence.

#### CONCLUSION

As I hope I have shown, the resolution of the indemnity issue in *Moren* is not as easy as the court makes it out to be. *Moren* offers a great opportunity to explore a number of RUPA provisions, a variety of statutory interpretation

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128. See, e.g., STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 21 (1987) (discussing levels of activity).

129. *Moren ex rel. Moren v. Jax Rest.*, 679 N.W.2d 165, 166–67 (Minn. Ct. App. 2004).

130. The *Moren* opinion mentions that the district court had found that *Moren*’s sister and fellow partner had “authorized” *Moren*’s conduct, or that *Moren*’s bringing her son into the kitchen was at least not prohibited by the partnership agreement. The partnership challenged both conclusions on appeal, but the court declined to address the issue on the ground that it was merely an alternative basis for keeping the liability on the partnership and the court’s holding on indemnity was sufficient to resolve the case. *Id.* at 168–69.

131. *Supra* note 106 and accompanying text.

techniques, the differences between RUPA and UPA, the relationship between RUPA and agency law, and the merits and mechanics of vicarious liability and indemnity in partnerships. Students who are led to work through these difficulties will be better prepared to deal with the intellectual and practical challenges of transactional law practice. They will be in a better position to counsel clients about business entities and uncertainties that need to be planned for. For those of us among the Business Associations faculty who value teaching through the case method, it does not get much better than this.

