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The Status of Enforcing Fiduciary Duties in a Limited Partnership After *Dupuis v. Becnel Co.*

Louisiana courts have adhered to the traditional rule barring suits among partners prior to dissolution. Louisiana jurisprudence adopted this rule from the common law states, where the rule still exists in the area of general partnerships. Our courts have applied this rule to both general partnerships and to limited partnerships, without consideration of the clear differences between the two forms of business associations. In a recent decision, however, the Louisiana Supreme Court abrogated this rule and expressly overruled all prior cases which had held that a partner was barred from maintaining an action prior to the dissolution of the partnership.

The case, *Dupuis v. Becnel Co.*,¹ involved a Louisiana limited partnership formed as part of a commercial real estate transaction. Five years after formation, the limited partners brought an action against the general partners, alleging among other claims that the general partners had breached their fiduciary duties. The limited partners sought damages for the general partners' actions or, in the alternative, a dissolution and an accounting of the partnership. The general partners defended the claim for damages by asserting the traditional rule barring actions between partners prior to dissolution.²

The Louisiana Third Circuit Court of Appeal, applying the traditional rule, held that the action by the limited partners was barred prior to dissolution.³ The court recognized that other Louisiana circuits had developed exceptions to the traditional rule,⁴ but chose not to follow those decisions. The proper remedy for the limited partners, said the court, was a proceeding for dissolution and accounting, not an action for damages against the general partners.

On review, the Louisiana Supreme Court unanimously overruled the court of appeal's decision and, in doing so, abolished the traditional rule barring suits between partners. Writing for the court, Justice

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1. 535 So. 2d 375 (La. 1988).

2. The general partners also argued that the limited partners could not withdraw by forcing a dissolution because the partnership had been formed for a thirty-five year term.

3. *Dupuis v. Becnel Co.*, 527 So. 2d 18 (La. App. 3d Cir. 1988).

4. *Beninate v. Bruno*, 497 So. 2d 1022 (La. App. 5th Cir. 1986); *Dohm v. O'Keefe*, 458 So. 2d 964 (La. App. 4th Cir.), writ denied, 460 So. 2d 1046 (1984).

Watson stated that since no statutory authority supported the rule, it "must fall."⁵

While the result reached in *Dupuis* may seem correct and in keeping with a nationwide trend, the reasoning of the court is open to criticism. *Dupuis* presented an opportunity for the court to clear up the confusion regarding the enforcement of fiduciary duties. But instead of formulating a policy for lower courts to follow, the *Dupuis* decision poses more questions than answers.

The purpose of this note is to analyze the abrogation of the traditional rule and its effects on Louisiana partnership law. The analysis begins with the history of the rule in Louisiana and in other states. Next, the *Dupuis* decision is discussed. Finally, a better method of enforcing fiduciary duties with regard to limited partnerships will be suggested.

HISTORICAL OVERVIEW

Rights of a Limited Partner at Common Law

Because limited partnerships can be traced to early French law, it is not surprising that its origin in the United States did not begin in the common law states.⁶ Louisiana was the first state to adopt the limited partnership concept.⁷ The concept was soon embraced by other states, the first being New York in 1822.⁸ The courts, however, strictly interpreted and enforced the enabling legislation. The slightest deviation from the terms of the enabling statute⁹ exposed limited partners to unlimited liability. This state of affairs quite naturally diminished the attractiveness of the limited partnership.

The Uniform Limited Partnership Act (ULPA) was introduced in 1916 to remedy the courts' harsh treatment of limited partners.¹⁰ The ULPA made great strides in protecting the limited partner from un-

5. *Dupuis*, 535 So. 2d at 378.

6. Limited partnerships can be traced to the twelfth century. They developed as a means for capitalists to enjoy a passive investment with limited liability. From this early concept, the modern notion of limited partnership evolved. For a good discussion on the history of limited partnerships, see Comment, Standing of Limited Partners to Sue Derivatively, 65 Colum. L. Rev. 1463 (1965) [hereinafter Comment, Standing of Limited Partners], and Comment, An Examination of Louisiana Limited Partnership—The Partnership in Commendam, 55 Tul. L. Rev. 515 (1981).

7. See Comment, Partnership in Commendam—Louisiana's Limited Partnership, 35 Tul. L. Rev. 815, 817 (1961) [hereinafter Comment, Partnership in Commendam]; Comment, Standing of Limited Partners, supra note 6.

8. Comment, Standing of Limited Partners, supra note 6, at 1464.

9. *Id.*

10. *Id.* at 1465.

limited personal liability by expressly allowing limited partners to take part in certain partnership transactions without violating the provision restraining their management of the partnership.¹¹ However, beyond the permissive activities of the ULPA, section 7 forbade the limited partners from taking part in control of the partnership at the risk of unlimited liability.¹² The general partners could control the business without fear of interference from the limited partners. This division of power created ample opportunities for fraudulent self-dealing and mismanagement.¹³ To make matters worse, the limited partner was refused any effective judicial relief when the general partner took advantage of the opportunities for misconduct, for section 26 of the ULPA was interpreted as barring a limited partner from being a proper party in a suit for damages against the general partner.¹⁴ This left the limited partner unable to protect his investment because of his limited authority but lacking procedural capacity to sue the general partner for mismanagement. The limited partner had only two options: either he could sue for dissolution of the partnership or he could withdraw upon six months notice.¹⁵ Neither remedy offered the limited partner much protection in the interim.

11. Uniform Limited Partnership Act [hereinafter ULPA] § 10 gave limited partners the right to demand information through inspection of the partnership books, to demand a formal accounting under certain circumstances, to seek a dissolution of the partnership by court order, and to share in the profits by way of a salary or income. ULPA § 13 allowed the limited partner to loan money and transact other business with the partnership.

12. ULPA § 7 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.

13. See Comment, Procedures and Remedies in Limited Partners' Suits for Breach of the General Partner's Fiduciary Duty, 90 Harv. L. Rev. 763 (1977).

14. ULPA § 26 provides:

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

15. ULPA § 16 provides in pertinent part:

(1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

While this was the prevailing policy of the courts, it is unclear whether this was the result intended under the ULPA. More specifically, some doubt exists whether the purpose of section 26 was to bar all actions by limited partners on partnership matters. A few decisions state that the provision was intended to keep the general partners from interfering in the litigation process, which is normally handled by the general partners.¹⁶ This explanation is not particularly persuasive, for section 7 of the ULPA already restricted the limited partner's involvement in the operation of the business. The most plausible explanation for section 26 is that it satisfied a procedural concern by avoiding the necessity of joining the limited partners in suits by or against the partnership.¹⁷ Whatever its intended purpose, section 26 as interpreted relegated limited partners to ineffective remedies for enforcing fiduciary duties owed by the general partners to the partnership.

It was not until the mid-1960's that courts began to analogize the position of the limited partner to that of a corporate shareholder, who enjoyed the remedy of a shareholder derivative suit to enforce the fiduciary duties of corporate directors.¹⁸ The seminal decision came from the United States Court of Appeals for the Second Circuit in

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

[Subsections 3 and 4 are omitted]

After the 1976 revision, Revised Uniform Limited Partnership Act [hereinafter RULPA] § 603 (1976) states:

A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in the certificate of limited partnership and in accordance with the partnership agreement. If the certificate does not specify the time or the events upon the happening of which a limited partner may withdraw or a definite time for the dissolution and winding up of the limited partnership, a limited partner may withdraw upon not less than 6 months' prior written notice to each general partner at his address on the books of the limited partnership at its office in this State.

16. *Klebanow v. New York Produce Exchange*, 344 F.2d 294, 298 (2d Cir. 1965). See also Comment, *Standing of Limited Partners*, *supra* note 6, at 1475, which states this proposition while citing several authorities.

17. The common law and the ULPA embraced an aggregate view of partnerships. That is, the partnership was not considered a distinct legal entity, but rather an aggregate group of relationships between its members. Therefore, when the partnership was involved in litigation, all of its members must be named as the partnership lacks an individual identity. See Comment, *Standing of Limited Partners*, *supra* note 6, at 1475.

18. Hecker, *Limited Partners' Derivative Suits Under the Revised Uniform Limited Partnership Act*, 33 *Vand. L. Rev.* 343, 343-44 (1980), states that limited partnerships grew in number, size and economic importance in 1960's and 1970's with the advent of sophisticated tax shelter planning.

the case of *Klebanow v. New York Produce Exchange*.¹⁹ *Klebanow* involved a suit brought by limited partners on behalf of the partnership to enforce the fiduciary duties owed by the general partners to the partnership. The general partners had refused to maintain an action because they themselves would be included as defendants. The federal district court dismissed the action, citing the New York version of section 26 of the ULP. By strictly construing this law, as had most courts interpreting section 26, the court concluded that the limited partners could not sue the general partners for mismanagement so long as the partnership existed.²⁰

The Second Circuit refused to interpret the New York provision so narrowly and reversed the lower court's decision.²¹ Judge Friendly, writing for the court, read the New York version of section 26 to mean only that limited partners need not be joined in an action by or against the partnership.²² The judge also stated that another intended purpose of section 26 was to restrain limited partners from interfering in management of the business.²³ This reading allowed the possibility of a derivative action by the limited partners.

The judge concluded that a limited partner derivative action was the best alternative. First, Judge Friendly likened a limited partner to a corporate shareholder. Both expect to share in the profits of the business; both are subordinated to outside creditors; and both enjoy limited control of the business through their authority to vote on internal matters. The telling difference between the two types of investors was that while the shareholder could bring an action on behalf of the corporation against those who controlled, the directors, the limited partners had no similar right against those who controlled the limited partnership, the general partners. Judge Friendly next recognized that both investors take the risk of self-dealing and mismanagement by those in control of the entity; however, while the corporate shareholder could seek redress through a derivative action, the limited partners' only remedy was withdrawal or dissolution. Dissolution, however, is often an expensive way to enforce fiduciary duties.²⁴ Furthermore, withdrawing from the partnership when there were still existing claims meant that the withdrawing partner would receive too little for his interest. The only sensible solution to the difficulties limited partners faced, concluded Judge Friendly, was a partnership derivative action.

19. 344 F.2d 294 (2d Cir. 1965). See also Comment, *supra* note 13 for a discussion of the *Klebanow* decision.

20. N.Y. Partnership Law § 115 (McKinney 1988).

21. *Klebanow*, 344 F.2d at 298.

22. *Id.*

23. *Id.*

24. See *infra* note 58 and accompanying text.

The limited partners were allowed to pursue claims on behalf of the partnership, with any recovery being paid directly to the partnership.

Initially, the New York courts did not follow *Klebanow*.²⁵ But the issue was ultimately settled in *Riviera Congress Associates v. Yassky*.²⁶ Here, the highest court of New York held that a limited partner may sue derivatively when the general partners wrongfully failed to enforce partnership claims. The *Riviera* court interpreted section 26 as only restraining the limited partners from interfering with the rights of the general partners to manage the business.²⁷ Next, the court followed Judge Friendly's analogy of the limited partner to the corporate shareholder and found that the limited partner required protection from mismanagement just as the shareholder. To reconcile this new right with its interpretation of section 26, the court reasoned that when the general partners wrongfully refuse to pursue proper claims of the partnership, they are not carrying out their duties to manage the business. Therefore, concluded the court, a derivative action did not interfere with the management of the partnership. Although the court's reasoning was rather weak, the *Riviera* decision set the course for subsequent decisions recognizing the right of a limited partner to bring a derivative action.²⁸

After the *Klebanow* and *Riviera* decisions, both New York and Delaware amended their partnership laws to give limited partners the statutory right under certain circumstances to sue on behalf of the partnership.²⁹ The 1976 Revised Uniform Limited Partnership Act (RULPA) incorporated similar provisions.³⁰ In effect, these new provisions allow a limited partner to maintain a derivative action, a procedure that resembles Rule 23.1 of the Federal Rules of Civil Procedure and similar state laws.³¹ Presently, thirty-nine states have adopted a version of these provisions of the RULPA.³²

25. *Millard v. Newmark & Co.*, 24 A.D.2d 333, 266 N.Y.S.2d 254 (1966).

26. 18 N.Y.2d 540, 223 N.E.2d 876 (Ct. App. 1966).

27. *Id.* at 543, 223 N.E.2d at 879.

28. *Phillips v. Kula*, 2 Haw. App. 206, 629 P.2d 119 (1981); *McCully v. Radack*, 27 Md. App. 350, 340 A.2d 374 (1975); *Jaffe v. Harris*, 109 Mich. App. 786, 312 N.W.2d 381 (1981); *Strain v. Seven Hills Assocs.*, 75 A.D.2d 360, 429 N.Y.S.2d 424 (1980).

29. N.Y. Partnership Law § 115 (McKinney 1968); Del. Code Ann. tit. 6, § 1732 (1974).

30. RULPA §§ 1001-04 (1976).

31. Fed. R. Civ. P. 23.1. A listing of state provisions can be found in DeMott, *Demand in Derivative Actions: Problems of Interpretation and Function*, 19 U.C.D. L. Rev. 461, 463-64 n.3 (1986).

32. Thirty-eight jurisdictions have adopted the RULPA as of Jan. 1, 1989. New York has not incorporated the Act but allows for a derivative action by a similar statute, N.Y. Partnership Law § 115-a (McKinney 1968). Indiana, a state not adopting the Act, has prospectively repealed their § 26 statute, Ind. Code Ann. § 23-4-2-26 to be abrogated on July 7, 1993.

Harsh Treatment of the Limited Partner in Louisiana

Louisiana has never had a provision such as section 26 of the ULPA that denied limited partners procedural standing. Instead, the courts applied the same rule used in the general partnership context, where partners are not allowed to sue each other during the existence of the relationship. This jurisprudential rule can be traced back to 1821 in Louisiana when the common law rule barring an action between partners was adopted.³³

Our courts adopted the common law rule despite Louisiana's different view of partnerships. Louisiana has consistently considered a partnership a distinct legal entity, separate from its members. The partnership enjoys its own legal identity. On the other hand, the common law traditionally has conceptualized the partnership as a group of personal relationships, a view commonly known as the aggregate theory. The partnership at common law has no identity separate from its individual members. Regardless of these differences, the justifications for the rule were compelling enough to convince our courts that the rule should prevail in Louisiana.

This rule still exists in common law states, but only with regard to general partnerships. The reasons behind such a rule still apply in the context of a general partnership. All partners in a general partnership enjoy the authority to bind the partnership, and therefore trust between the usually small number of partners is essential.³⁴ In the event of a lawsuit among the partners, this trusting relationship no longer exists, and therefore it makes little sense for the partners to remain in business together. This makes the rule requiring dissolution before allowing a suit among partners a sensible prohibition.

It is also possible that courts took a pragmatic approach in deciding to bar suits among partners during the existence of the partnership. The courts would be unduly burdened if called upon to settle every partnership dispute. Therefore, as a matter of judicial economy, the rule could have been developed to force partners to dissolve the partnership if the partners could not settle their differences internally.

The most practical justification for the rule is to protect outside creditors. If a partner were allowed to recover prior to settlement of the partnership, the claims of creditors would in effect be subordinated to the recovering partners.³⁵

33. *Dromgoole v. Gardner's Widow & Heirs*, 10 Mart. (o.s.) 433 (La. 1821).

34. *Clay v. Grubbs*, 1 Litt. 222 (Ky. 1822).

35. Other reasons have sometimes been forwarded. Early decisions held that to allow an action between partners prior to dissolution would be a complicated procedure if one partner were allowed to recover a judgment against a co-partner. *Frink v. Ryan*, 4 Ill. 322, 325 (1841); *Ivy v. Walker*, 58 Miss. 253, 259 (1880); *Devore v. Woodruff*, 1 N.D.

These reasons, along with the fact that there was no procedure at common law for a partner to sue his co-partner with respect to partnership obligations, prompted courts to prevent suits between partners during the partnership.³⁶ Instead, the courts created an equitable remedy for the partners, the action for dissolution. This remedy provided relief without compromising the policy reasons for supporting the traditional rule. The dissolution remedy is much like an involuntary corporate liquidation, for encompassed in winding up the partnership's affairs is the recovery of all claims of the partnership. The action for dissolution and accounting normally involves the recovery of all claims of the partnership and the distribution of the assets to creditors and owners in accordance with the priority of their respective claims.³⁷ The recoverable claims may include those against partners who have appropriated partnership assets to their personal use, or those against any partner for a breach of fiduciary duty that detrimentally affects the partnership.³⁸ These are viewed as assets of the partnership and are recovered before the payment of creditors or the distribution to the partners.³⁹

Many Louisiana decisions seem to rest on the assumption that the rule requires a dissolution in which claims for breaches of fiduciary duties by a partner are ignored. Allegations of wrongdoing could only be considered in a subsequent proceeding. That interpretation made no sense because it precluded a dissolution in which all of the assets of the partnership were collected prior to distribution to the partnership's claimants.

By misconstruing and misapplying the dissolution concept, a true dissolution was not taking place. The partnership owned valid claims against the partners at the time of the dissolution, but these claims

143, 150, 45 N.W. 701, 703 (1890). This would only confuse the accounting process of the dissolution. *Austin v. Vaughan*, 14 La. Ann. 43 (1859); *Gilliam v. Loeb*, 131 Mo. App. 70, 78, 109 S.W. 835, 837 (1908). Another reason given for the rule is that until the partnership claims are settled, it is unclear whether the suing partner is a debtor or creditor of the partnership. *Stone v. Mattingly*, 14 Ky. L. Rep., 113, 116, 19 S.W. 402, 403 (1892); *Li Sai Cheuk v. Lee Lung*, 79 Or. 563, 571, 156 P. 254, 256 (1916). See also Story, J., *The Law of Partnership*, §§ 216-33 (1841).

36. See Story, *supra* note 35, §§ 221, 282-88 (1841).

37. This was accomplished even though the procedure was complicated as a result of the common law aggregate theory of partnership. Uniform Partnership Act § 40 (1914). See also Story, *supra* note 35, §§ 328, 347-49, 358-60; Rawly, *Modern Law of Partnership*, §§ 571, 585-87 (1916).

38. *State v. Ninth Judicial District Court*, 50 Nev. 282, 257 P. 831 (1927); *Gross v. Gross*, 128 A.D. 429, 112 N.Y.S. 790 (1908); *Lyon v. Prescott*, 103 Vt. 442, 156 A. 679 (1931).

39. With this approach, the common law action for dissolution and accounting embraced Louisiana's entity view of partnerships, in contrast with the traditional common law theory.

were not included in the accounting or recovered before the final distribution of assets.⁴⁰ Thus, when the partnership assets were liquidated and distributed, outstanding assets remained. The courts simply failed to see that a claim against the partner arising from the operation of the partnership was a partnership asset. The effect of this application was that the partner who had misappropriated partnership funds through his self-dealing and mismanagement took more from the partnership than he deserved, while the other partners received less. This also affected outside creditors who may have been prejudiced by the incomplete dissolution.

A 1951 Louisiana Supreme Court decision is cited frequently as authority for Louisiana following the traditional rule. In *Jeffries v. Moore*,⁴¹ one partner in a general partnership filed an action for the dissolution and liquidation of the partnership, and requested settlement of a claim against the other partner relating to the operation of the business. The partnership owed no outside creditors. The supreme court dismissed the claim against the partner, stating that "an action is not maintainable between partners with respect to partnership transactions, unless there has been an accounting or settlement of the partnership affairs."⁴² While the court's decision made little practical difference because the partnership owed no outside debt, the holding shows the importance the courts' view of the importance of the requirement of dissolution prior to any action against a partner based on partnership business.

The rule became applicable to limited partnerships by virtue of the blending of concepts between general and limited partnerships.⁴³ Rather than analyzing the theoretical and practical differences between limited and general partnerships, courts tended to apply the rule to both forms of partnership. This was unfortunate, because the position of the limited partner differs greatly from the position of the ordinary partner.

Partners of general partnerships have the authority to participate in management and bind the partnership as an agent of the entity.⁴⁴ This authority balances the power in a general partnership among its members. In a limited partnership, by contrast, only the general part-

40. *Marine Services, Inc. v. A-1 Indus., Inc.*, 355 So. 2d 625 (La. App. 4th Cir. 1978); *Salsul Co. v. Kohlmeyer*, 325 So. 2d 858 (La. App. 4th Cir.), writ denied, 330 So. 2d 281 (1976); *Lawrence v. Recoulley*, 235 So. 2d 437 (La. App. 2d Cir. 1970); *In re Nelson*, 190 So. 2d 131 (La. App. 4th Cir. 1966).

41. 219 La. 692, 53 So. 2d 898 (1951).

42. *Id.* at 698, 53 So. 2d at 900 (quoting from Annotation, *Partners—Action at Law*, 21 A.L.R. 34 (1922)).

43. See Comment, *Partnership in Commendam*, *supra* note 7, at 817.

44. La. Civ. Code art. 2814.

ners enjoy this management and agency authority. The limited partners are without such powers.⁴⁵ Indeed, the limited partner risks unlimited personal liability if he does act as an agent of the partnership.⁴⁶ By the nature of the relationship, the limited partner has very little protection against the general partner's mismanagement and self-dealing. This puts most limited partners in about the same position as a minority shareholder in a corporation who also exercise no agency powers and are effectively subject to managements actions.

While this application of the rule exemplified the typical state of affairs under Louisiana partnership law, some dissatisfaction with the rule can be detected. One year after the *Jeffries* decision, the supreme court allowed a suit by limited partners against general partners before dissolution. In that case, *Novick v. Miller*,⁴⁷ the limited partners sought recovery of partnership assets that the general partners had withdrawn through unauthorized salary increases. The court not only permitted the claims to go forward prior to dissolution of the partnership, but refused to grant dissolution at the limited partners' request. Instead, the court ordered the general partners' salaries reduced and the funds used for the raises to be returned and distributed equally among the remaining partners.

The *Novick* court seems to have been correct in not demanding a dissolution prior to the limited partners' action for breach of a fiduciary duty against the general partners. However, the remedy granted—allowing the limited partners to recover individually—undercuts one valid policy underpinning of the traditional rule. The claims of the limited partners are placed ahead of outside creditors. The traditional role preserves the normal priority scheme, but granting the limited partner an individual right of action prevents that scheme by subordinating outside creditors to owners. The *Novick* decision, however has not had much effect at all, good or bad, for it has not been followed in the jurisprudence.⁴⁸

More dissatisfaction with the rule can be seen in the circuit courts' attempt to carve out exceptions to the traditional rule when limited partnerships were involved. In *Dohm v. O'Keefe*,⁴⁹ the court held that the alleged fraud of the general partners was a sufficient reason to

45. As mandated in the Civil Code, "[a] partner in commendam does not have the authority of a general partner to bind the partnership, to participate in the management or administration of the partnership, or to conduct business with the third parties on behalf of the partnership." *Id.* art. 2843.

46. *Id.* art. 2844.

47. 222 La. 469, 62 So. 2d 645 (1952).

48. *Sasul v. Kohlmeyer*, 325 So. 2d 858 (La. App. 4th Cir.), writ denied, 330 So. 2d 281 (1976).

49. 458 So. 2d 964 (La. App. 4th Cir.), writ denied, 460 So. 2d 1046 (1984).

allow the limited partners to sue before a dissolution had occurred. The court also took a position similar to the *Novick* court's by viewing the claim against the general partners as a personal right belonging to the individual limited partner.⁵⁰

In a later decision, the fifth circuit, in *Beninate v. Bruno*,⁵¹ upheld the validity of an action brought by the limited partners against the general partners prior to dissolution. The court reasoned that exceptions to the traditional rule have been recognized in past decisions.⁵² Of particular impact was the court's reliance on the 1980 revisions to the Civil Code articles on partnerships. The court suggested that new article 2809, which establishes a fiduciary relationship between partners and between the partnership and its partners, gives a partner the right to maintain an action. But instead of actually considering the nature of the claim, the *Beninate* court seemed to assume that this new right was a personal right of the partner.⁵³

What is obvious from these decisions, beginning with *Jeffries*, is that the courts have misunderstood the policies behind the rule that bars actions between partners.⁵⁴ Of all the common law justifications, Louisiana courts chose to emphasize the need to protect outside creditors. But the rule adopted was a misinterpretation of the common law rule and actually damaged the interests of creditors by precluding the consideration of a fiduciary duty claim as an asset of the partnership in the dissolution proceeding itself. This rule also affected the interests of other partners by forcing them to seek a dissolution of a going concern in order to enforce the fiduciary duties owed by the general partners to the partnership. It was this latter feature of the rule that led the courts to struggle with the idea of allowing a pre-dissolution suit for breaches of fiduciary duties owed to the partnership. In the eyes of most courts, the traditional rule applied in all situations. Later decisions, *Dohm* and *Beninate* in particular, indicate the courts began to question this application of the rule, especially when limited partnerships were involved. But by allowing pre-dissolution suits, these courts created another problem by confusing another issue—who owns the right to bring the action? As discussed, *Dohm* and *Beninate* assumed that the individual partner owns the claim. Had the courts analyzed the situations correctly, they would have concluded that the partnership owns the claims for breaches of fiduciary duty owed to the partnership.

The positions taken by Louisiana courts suggest an ironic conceptual shift in the law of partnership. By granting the partner the right

50. Id. at 966.

51. 497 So. 2d 1022 (La. App. 5th Cir. 1986).

52. Id. at 1024 (citing *Dohm*, 458 So. 2d 964).

53. *Beninate*, 497 So. 2d at 1024.

54. See *supra* text accompanying notes 34-36.

to bring a personal action, the courts have, in effect, abandoned the Louisiana view that partnerships are a separate entity.⁵⁵ This may have caused problems at common law where the partnership had no separate identity from its members.⁵⁶ But Louisiana courts should have had no conceptual difficulty in finding that the right belongs to the partnership.⁵⁷ Instead the court confused the issues and simply applied a single rule—no action among partners prior to dissolution.

By taking these positions, Louisiana courts have needlessly forced themselves into a dilemma. If the court recognizes the partner's right to recover individually for the mismanagement of another partner, it allows the rights of other creditors with superior claims to be prejudiced and interferes with the exercise of the general partner's management powers. If the court denies the personal action to the partner, no effective relief for the mismanagement is available other than dissolution. Until recently, the courts chose the latter, relegating the partners to the dissolution remedy or a post-dissolution action for damages. But dissolution and post-dissolution remedies often pose serious practical problems for the other innocent partners and outside creditors. Forcing dissolution may result in the termination of a profitable going concern and will almost always result in harsh tax consequences for the partners.⁵⁸ Furthermore, a dissolution while partnership claims against the general partners are still outstanding prejudices the creditors' rights to a full settlement of their claims.

A good example of our courts' struggle over these issues came in the third circuit decision of *Dupuis v. Becnel Co.*⁵⁹ There, the appellate court affirmed the application of the traditional rule in a pre-dissolution action. But on review, the supreme court reversed.

55. *Dupuis v. Becnel Co.*, 535 So. 2d 375 (La. 1988); *Beninate v. Bruno*, 497 So. 2d 1022 (La. App. 5th Cir. 1986).

56. See *supra* text accompanying notes 33-34. Louisiana considers a partnership a distinct juridical person under Louisiana Civil Code article 2801. The common law, however, views a partnership as an aggregate of agency relationships between its members.

57. La. Civ. Code art. 2801.

58. One situation that presents a harsh tax consequence is when the partnership is forced to liquidate and sell appreciated assets. By way of review, a partnership pays no income tax; rather, its partners are taxed individually on partnership income distributed to them over the course of the partnership. Income from operations is usually distributed over time, allocating the partners' tax liability evenly throughout this period. But when a partnership holds an appreciating asset, such as real estate, the gain in value, also considered income, is not distributed to the partners; therefore, no tax liability arises. However, when this asset is liquidated upon dissolution, each partner must be distributed his share of the gain, creating immediate tax liability. The partner is unable to spread this distribution over time. For a good discussion of the tax consequences resulting from dissolution of the partnership, see Comment, *supra* note 13, at 780-84.

59. 527 So. 2d 18 (La. App. 3d Cir. 1988).

DUPUIS IN THE SUPREME COURT

The facts of *Dupuis* typify the situation that has presented Louisiana courts with the most difficulty. A Louisiana limited partnership was formed as part of a commercial real estate transaction. The partnership agreement provided that the plaintiffs would provide the land and capital for the venture and serve as limited partners, leaving the management of the business to the defendants, the general partners. The limited partners began to suspect the defendants were wrongfully withdrawing funds from the partnership. Hence, they filed an action for damages, alleging the breach of fiduciary duties along with other similar claims, and in the alternative sought a dissolution and accounting.

The court of appeal, relying on the traditional rule, affirmed the trial court's decision to strike all of the plaintiffs' allegations except the claim for dissolution.⁶⁰ The court's reasoning was based on Louisiana's misinterpretation of the common law rule against pre-dissolution suits. The supreme court unanimously overruled the lower court decision. In doing so, the court expressly overruled all prior cases that made dissolution a condition precedent to a suit among partners.⁶¹ The abrogation of the traditional rule in this situation is to be commended. Several questions, however, remain unanswered after the *Dupuis* decision. This section will examine the opinion and the rationale expressed by the court.

Theory of the Decision

The *Dupuis* decision is troubling in several respects. The major concern relates to the court's formulation of the issue. The issue, as seen by the court, is: "Prior to a partnership's dissolution, does a partner have a cause of action against another partner for damages caused by breach of fiduciary duties, fraud or negligence?"⁶² The real issue posed seemed to be whether, prior to completion of the dissolution, a limited partner may enforce the fiduciary duties owed to the limited partner and the partnership. In misdescribing the issue as it did, the supreme court put itself in the same dilemma the lower courts had. The court assumed that an action brought to enforce fiduciary duties owed to the partnership would be a "personal" right of action held by the individual partners. This forced the court to choose between the interest of the plaintiff partners in redressing alleged breaches of fiduciary duty and the interests of other participants in the partnership,

60. *Id.* at 19.

61. *Dupuis*, 535 So. 2d at 378.

62. *Id.* at 376.

including creditors and other partners, in having the partnership managed by the general partners and in having its assets distributed in accordance with the legislatively established order of priority.

The supreme court concentrated on two areas in abrogating the traditional rule. First, the court emphasized the work of the Louisiana Law Institute in revising the partnership articles. Special mention was made of the adoption of articles 2808 and 2809 concerning the fiduciary duties owed by the members of a partnership,⁶³ but beyond a general mention of these articles, the decision failed to establish how the revision impacted upon its conclusion.

The court's brief analysis of articles 2808 and 2809 contributed to the confusion. The court noted the 1980 revision to the partnership articles, specifically the inclusion of article 2809. Article 2809 expressly creates fiduciary duties between partners, and the *Beninate* decision had left open the possibility that article 2809 gives one partner a personal right of action against another partner. However, the court's belief that article 2809 gives one partner a personal right of action against another partner was a conclusory assumption.

Several factors suggest that the supreme court's assumption is erroneous. Certainly the legislative history does not compel the conclusion that article 2809 gives one partner a personal action against another partner over partnership matters. The introduction to the revised partnership articles, drafted by the Partnership Law Revision Committee, states only that: "The Courts have long recognized that fiduciary duties exist between partners towards each other and the partnership, and the revision codifies this jurisprudential rule."⁶⁴ Article 2809 does appear to recognize that fiduciary duties are owed by partners, not only to the partnership, but to the individual partners as well. But this type of language has generally been interpreted so that it protects the direct personal interests of a limited partner or shareholder, for example, from being fraudulently induced into contributing capital to the business, and not the indirect, collective interests of partners and shareholders in the faithful and efficient management of the partnership or corporation in which they have invested.⁶⁵ The

63. La. Civ. Code art. 2808 states:

Each partner owes the partnership all that he has agreed to contribute to it.

La. Civ. Code art. 2809 provides:

A partner owes a fiduciary duty to the partnership and to his partners. He may not conduct any activity, for himself or on behalf of a third person, that is contrary to his fiduciary duty and is prejudicial to the partnership. If he does so, he must account to the partnership and to his partners for the resulting profits.

64. *Dupuis*, 527 So. 18, 21 (La. App. 3d Cir. 1988).

65. *Grand Isle Campsites, Inc. v. Cheek*, 262 La. 5, 262 So. 2d 350 (1972).

analogous provision to article 2809 under the Louisiana corporate statute⁶⁶ has been held not to grant to a corporate shareholder a personal right of action on a corporate claim.⁶⁷

What *Dupuis* and cases like it actually involve is breach of a duty to the partnership, not the individual partner. This breach of duty affects all members of the entity proportionately. There is no justifiable basis for making the right to seek redress for all the partner's harm into a personal right of the partner. This right must belong to the entity itself. By ignoring that point, the supreme court left it unclear what is to happen to other partners similarly situated and outside creditors in the case of a predissolution action for the recovery of damages arising out of an alleged breach of fiduciary duty. Following the *Dupuis* approach, giving partners a personal right to assert partnership claims will make creditors effectively subordinate to the partners' personal claims. Surely this is not what the court intended in its decision, but its characterization may lead to this result in practice.

Granting the right to bring this type of action to the individual partner rather than the partnership creates other problems besides the inherent prejudice to outside creditors. If each partner holds a right of action, there is no mechanism for dismissal of frivolous or non-meritorious claims. Members of the partnership not associated with the alleged mismanagement, who may not want the action to be filed initially, or who would vote to dismiss the claim, are without the authority to do so after the *Dupuis* decision. By recognizing the right to prosecute the claim as a personal right, other members of the partnership, even if they all agree, have no authority to dismiss the suit.

The most significant result of recognizing the partner's personal right of action concerns the possibility of uncertain liability for the general partner who is sued. If any one partner has a private right of action for the mismanagement of a general partner, then all partners must be considered similarly situated. Under Louisiana's narrow version of *res judicata*, a judgment in favor of the first partner to bring an action would not preclude other partners from suing the same defendant partner in a separate suit.⁶⁸ Effectively, a general partner found guilty

66. Louisiana Revised Statute 12:91 (1968) states that "officers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders."

67. *Bordelon v. Cochrane*, 533 So. 2d 82 (La. App. 3d Cir. 1988); *Beyor v. F & R Oilfield Contractors*, 407 So. 2d 15 (La. App. 3d Cir. 1981).

68. La. R.S. 13:4231 (Supp. 1989) provides:

The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between

of mismanagement could be sued by every other partner in separate proceedings and his liability would be uncertain, because the determination of damages may vary in each separate action. This is objectionable on several grounds. First, it creates the possibility of the general partner being liable for an amount in excess of the actual damages suffered once all the judgments are totalled. Second, the suing partners may each receive different amounts of recovery for effectively the same harm because of the different courts' assessment. Finally, judicial economy is hardly served by this position, not to mention the expense on the defendant partner. This problem could possibly be solved by the court ordering the joinder of all the remaining partners as necessary or indispensable parties, which would bind them to a final judgment.⁶⁹ But this procedure would require potentially complicated factual determinations under the joinder rules about the potential effects of a judgment in the suit on other partners and creditors. Moreover, it would not address the earlier concern of dismissing frivolous actions.

Next, the court outlined numerous exceptions to the traditional rule that were formulated in the Louisiana courts. Many of the so called "exceptions," however, have nothing to do with breaches of fiduciary duties such as in *Dupuis*. In fact, most of the cases are outside the scope of the traditional rule because they involve situations where the demand is based on a personal relationship between the partners and does not affect partnership business.⁷⁰ For instance, one decision dealt with a tort action between partners, while another involved an action over a private agreement of the partners, outside the partnership agreement. These situations have nothing to do with the traditional rule or with fiduciary duty claims. Nevertheless, the court emphasized these decisions as recognized exceptions. Another exception which the court relies on was established in *Dohm v. O'Keefe*.⁷¹ That

the same parties, and formed by them against each other in the same quality. *Welch v. Crown Zellerbach Corp.*, 359 So. 2d 154 (La. 1978); *Bowman v. Weill Construction Co.*, 502 So. 2d 133 (La. App. 3d Cir.), writ denied, 503 So. 2d 495 (1987).

69. La. Code Civ. P. arts. 641-44. See, e.g., *Beninate v. Bruno*, 497 So. 2d 1022, 1024 (La. App. 5th Cir. 1986).

70. *Ingersoll Corp. v. Rogers*, 217 La. 79, 46 So. 2d 45 (1950), is cited as an exception to the general rule. However, *Ingersoll* involved a suit among partners arising from a private agreement between the partners and not a claim that stemmed from a partnership transaction. Thus, the claim was not within the protection of the general rule. To consider the decision as an exception is a misnomer. Other cases cited by the court likewise have no application to the general rule. *Douglas v. Thomas*, 489 So. 2d 449 (La. App. 4th Cir. 1986) (private agreement between the partners was involved); *Kaufman & Enzer Joint Venture v. Bethlan Production Corp.*, 459 So. 2d 60 (La. App. 2d Cir. 1984) (the plaintiff partner was a creditor of the partnership); *Broillette v. Phoenix Assurance Co.*, 340 So. 2d 667 (La. App. 4th Cir. 1976), writ denied, 342 So. 2d 1115 (1977) (suit was in tort).

71. 458 So. 2d 964 (La. App. 4th Cir. 1984).

case held that alleging fraud of the general partners will overcome the traditional rule.⁷² The problem with this analysis is that fraud is commonly pleaded. Moreover, the *Dohm* facts are not so extreme that the abrogation of the traditional rule was compelled. Hence, the *Dohm* exception provides little support for the *Dupuis* conclusion.

The true difficulty with the *Dupuis* decision is the lack of clarity by the court in expressing reasons why the traditional rule was abolished. The court does compile various quotes and statutory excerpts in an attempt to justify its decision, but at best the court seems to have merged unconnected concepts, some of which were totally irrelevant to the question before it.⁷³ The most plausible conclusion is that the court abrogated the rule based on an exception established in the lower courts. Neither the supreme court nor the lower courts have thought the problem out very carefully, and the *Dupuis* approach creates serious problems for outside creditors and defendant partners.

After *Dupuis*, the question becomes whether the court has escaped the dilemma it had forced itself into. *Dupuis* answers the question whether an action for mismanagement and self-dealing may be brought prior to dissolution in the affirmative, expressly overrules "prior cases holding to the contrary."⁷⁴ Abrogation of the traditional rule in this factual setting moves Louisiana law in an appropriate direction. The majority of states now provide for pre-dissolution suits to enforce breaches of fiduciary duties owed to the partnership.

When faced with the question of who owns the right to the action, however, the decision has a negative impact on the law. By assuming that the right belongs to the individual partner, the supreme court has created enormous difficulties. Perhaps an escape from this dilemma

72. *Id.* at 966.

73. *Dupuis*, 535 So. 2d at 378 (quoting Comment, *supra* note 6, at 534). The court stated:

By expressly stipulating that a fiduciary obligation exists, the Revision protects the partner in commendam both prior to creation of the partnership and during its existence. If the fiduciary duty is violated, the partner in commendam has a right to bring an action for damages and lost profits.

The Tulane comment relies on an article from the Real Property, Probate and Trust Journal as authority. See Roulac, Resolution of Limited Partnership Disputes: Practical and Procedural Problems, 10 Real Prop. & Tr. J. 276 (1975), which discusses the general partner's role as a fiduciary, but that does not support the contention that the general partner is personally liable to the partner in commendam for a breach of fiduciary duty. One situation where this would be the case is when a general partner breaches a duty owed to the individual partner by defrauding the limited partner in inducing him to invest in the business. The Roulac article clearly recognizes the general partner's duty to the partnership as belonging to the partnership. *Id.* at 288. Thus, there is little foundation for the statement "the partner in commendam has a right to bring an action for damages and lost profits" when a fiduciary duty owed to the partnership is breached.

74. *Dupuis*, 535 So. 2d at 378.

remains, for one might argue that the issue of whether an individual partner owns the right was not before the court, notwithstanding the court's view. All indication, though, is that the court sees this right as a personal one, owned by each partner individually.

The court could have reached a similar result but by a different theory. Under this alternative theory, the integrity of the traditional rule could have been preserved while at the same time providing a pre-dissolution method of enforcing fiduciary duties owed to the partnership.

AN ALTERNATIVE SOLUTION

The *Dupuis* court could have used an approach that has been widely accepted in most other states, the partnership derivative action. As discussed earlier, the RULPA expressly created a derivative action in favor of limited partners as a pre-dissolution mechanism for enforcing fiduciary duties owed by the general partners.⁷⁵ The RULPA's limited partnership derivative action is based in part on the marked similarity between the limited partner and the corporate shareholder.⁷⁶

While Louisiana jurisprudence has not yet recognized the availability of a limited partner's derivative action, there is a compelling need to do so in light of the present confusion of the courts over the enforcement of fiduciary duties. The alternative of dissolution is an onerous, unrealistic remedy for the limited partners. The *Dupuis* approach, creating a personal right of action in power of the limited partner, is badly flawed as well. The derivative action solves both problems.

Louisiana courts could recognize a limited partner's derivative action without much difficulty. First of all, allowing a derivative action would not create any theoretical difficulties. Unlike the common law, Louisiana has never struggled with the idea of recognizing a partnership as a distinct entity.⁷⁷ There should then be no question that a partnership may own a litigious right, such as a claim against the partners for breach of fiduciary duties owed to the partnership.

Second, no new legislation would be needed. The Louisiana Code of Civil Procedure articles governing *shareholder* derivative actions⁷⁸ are broad enough to allow a partnership a derivative action. The articles refer to shareholders of a corporation and "members" of an "unincorporated association" as proper parties in a derivative suit.⁷⁹ This

75. RULPA § 1001-04 (1976).

76. Hecker, *supra* note 18, at 356.

77. La. Civ. Code art. 2801.

78. La. Code Civ. P. arts. 591-611.

79. *Id.* arts. 593, 596, 611.

language could reasonably be interpreted to include limited partners.⁸⁰

Moreover, the derivative action solves all the problems created by the recognition of a partner's personal right to enforce fiduciary duties owed to the partnership. Outside creditors would be protected by the requirement under Louisiana Code of Civil Procedure article 596, which requires a prayer for judgment in favor of the unincorporated association.⁸¹ Because any recovery is paid to the partnership, creditors' claims are not impaired. If a derivative action were employed, the partnership would own the claim; therefore, only the partnership would be the proper party to receive the proceeds from a judgment.⁸² The priority of creditor's claims would be protected in this case because the judgment would be an asset of the partnership. Therefore, if dissolution is later required, creditors have maintained their positions and have a better chance of realizing full payment of their claims. Thus, the concern of prejudicing creditors by recognizing a partner's direct right of action on a partnership claim disappears with a derivative action.

Article 596 requires the derivative plaintiff to make efforts to have the managing members maintain the action preserving the ability to

80. See Comment, *supra* note 6, at 539, where this suggestion is made. The Louisiana Code of Procedure was derived from an earlier version of the Federal Rules Civil Procedure. Nevertheless, the Louisiana articles and the older federal rules are nearly identical with respect to the requirements for bringing a derivative action. Under the federal rules, an "unincorporated association" has been interpreted to include a limited partnership. *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 183 (2d Cir.), cert. denied, 385 U.S. 817, 87 S. Ct. 40 (1966); *In re King Resources Co.*, 420 F. Supp. 610 (D. Colo. 1976); *Engl v. Berg*, 511 F. Supp. 1146, 1153 (E.D. Pa. 1981). See Hecker, *supra* note 18, at 375. Moreover, several other federal decisions have held that an "unincorporated association" under Federal Rules 17 and 23.2 includes both partnerships and limited partnerships. Likewise, the Louisiana articles, containing the same language as Rule 23.1, could easily be interpreted to allow a limited partner the procedural capacity to maintain a derivative action. *Pyle v. Arthur Andersen & Co.*, 16 Fed. R. Serv. 2d 634 (D. Or. 1972); *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348 (D.P.R. 1971); *Lee v. Navarro Savings Assoc.*, 416 F. Supp. 1186 (N.D. Tex. 1976), rev'd on other grounds, 597 F.2d 421 (5th Cir. 1979). See Hecker, *supra* note 18, at 375.

81. La. Code Civ. P. art. 596 states in pertinent part:

The petition in a class action brought by a shareholder or member of a corporation or unincorporated association because it refuses to enforce a right which it may enforce shall:

... (4) Include a prayer for judgment in favor of the corporation or unincorporated association and against the obligor on the obligation sought to be enforced.

82. RULPA § 1004 (1976) states that if a derivative action is successful, the court may award the plaintiff reasonable expenses, including attorney's fees. This payment is taken from any proceeds realized in the suit, but the limited partner shall "remit to the limited partnership the remainder of the proceeds received by him."

dismiss frivolous claims.⁸³ Thus, by imposing a demand requirement on the plaintiff partner, the derivative action protects against non-meritorious claims.⁸⁴ A plaintiff in a derivative action must make a demand on management to either bring the action or provide reasons for not doing so. This gives the general partners not connected with the alleged mismanagement an opportunity to decide upon the validity of the claim. Limited partners would be still protected by being excused from making a demand on management if there are valid reasons for not doing so.⁸⁵

The most attractive feature of the derivative action is that it eliminates the *res judicata* concern. The issue of *res judicata* is resolved in articles 591 through 597 and 611.⁸⁶ All partners must join in the action, meaning that a final judgment would bind all of them. Limited partners would maintain the action on behalf of the partnership, not themselves. The derivative action achieves the same results as would a joinder of necessary or indispensable parties by giving effect to the substantive rule of article 2801 of the Civil Code that a partnership is an entity. It also protects the ability of management and other partners to have non-meritorious suits dismissed. Thus, even under Louisiana's narrow view of *res judicata*, a subsequent action by partners similarly situated would be dismissed as pertaining to the same cause, same demand, and the same parties.

The code also creates a multi-party derivative action in article 611. If all partners cannot or will not join in the suit, these partners can be made defendants in the action. Again, a final judgment would preclude any subsequent suit by these partners. This protects the general partner from multiple liability while providing the true plaintiff, the partnership, with a procedure to enforce its claims.

The derivative action is the one solution that will afford limited partners the needed protection from general partners' mismanagement and self-dealing while preventing disruption of the business organization or prejudice to creditors. It addresses all the problems created by recognizing a personal right of action in each partner on claims for

83. La. Code Civ. P. art. 596(2) states that the petition must:

[A]llege with particularity the efforts of the plaintiff to secure from the managing directors, governors, or trustees and, if necessary, from the shareholders or members, the enforcement of the rights; and the reasons for his failure to secure such enforcement; or the reason for not making such an effort to secure enforcement of the right.

84. RULPA § 1003 (1976) requires:

In a derivative action, the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort.

85. *Id.*

86. La. Code Civ. P. arts. 591-97, 611.

breach of duties owed to the partnership. At the same time, this remedy solves the dilemma created by the courts.

A counter argument that may be raised is that when the legislature revised the partnership articles in 1980, the RULPA's derivative action had already been adopted, yet the lawmakers chose not to include these provisions in the revised articles. But, the legislature's failure to act should not bar such an action, especially in light of the need for the proceeding. The language of the RULPA is nearly identical to Louisiana's civil procedure articles regulating derivative actions. Thus, it would have been redundant for the legislature to adopt special provisions for a limited partnership derivative action. The language of articles 591 through 611 is flexible enough to conclude that a limited partner already has the necessary procedural vehicle for enforcing the partnership's claim through a derivative action.

CONCLUSION

The *Dupuis* decision is the classic example of the confusion existing in Louisiana's courts over the enforcement of fiduciary duties in the partnership context. The supreme court set out to give limited partners more protection by abrogating the traditional rule barring actions among partners prior to the completion of dissolution. This was an appropriate aim, for while the rule still has practical significance with regard to general partnerships, it makes little sense to apply it to the limited partners. Instead of distinguishing the limited and general partnerships, however, the court in *Dupuis* simply abolished the rule entirely, indicating that a partner has a private right of action against his co-partners prior to dissolution. It is unclear whether this was the issue before the court. *Dupuis* could be read alternatively to hold that a claim for mismanagement may be brought prior to dissolution. In this sense, the decision appears to correct the prior confusion, which operated to prejudice the claims of creditors by not including valid claims of self-dealing and mismanagement as assets in the dissolution proceeding. But the court assumes that the partners are the owners of such a claim. This only circumvents the reasons for allowing a pre-dissolution action for mismanagement. Once again, creditors are prejudiced, but this time by being subordinated to the rights of the individual partners.

Recognizing the right as a claim of the entity would be a better solution. The derivative action would give the courts an opportunity to provide an equitable remedy to all, partners and creditors. If an act of a managing partner affects all members of the partnership proportionately, the claim belongs to the entity, and the entity is the proper party to bring the suit. Derivative actions give members of an entity, not normally involved in management, an opportunity to protect

the interest of the business when management is unable or unwilling to do so. Thirty-nine states have seen the need for such a device in the context of limited partnerships to facilitate the enforcement of fiduciary duties. Louisiana already has the needed legislation to join these other states. Hopefully, when the next *Dupuis*-type fact pattern arises, the courts will be persuaded to recognize a derivative action.

B. Troy Villa