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# New York Revised Limited Partnership Act

John A. Ronayne\*

## I. Introduction

On July 1, 1991, the Revised Limited Partnership Act (NYRLPA) became effective in New York.<sup>1</sup> NYRLPA finally modernized New York's version of the 1916 Uniform Limited Partnership Act (NYULPA),<sup>2</sup> which had remained substantially unchanged since New York adopted it in 1922.<sup>3</sup> NYRLPA applies to all domestic limited partnerships formed on or after July 1, 1991.<sup>4</sup> However, NYULPA, as contained in the New York Partnership Law, Article 8, remains unchanged. NYULPA continues to apply to domestic limited partnerships existing before July 1, 1991,<sup>5</sup> except in two circumstances. First, an existing partnership that elects to file a new certificate conforming to the requirements of NYRLPA will be governed by NYRLPA.<sup>6</sup> Second, a previously existing domestic partnership,

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1. Act of Dec. 31, 1990, ch. 950, 1990 N.Y. Laws 2110, *as amended by* Act of Apr. 1, 1991, ch. 33, 1991 N.Y. Laws 47; Act of Dec. 31, 1990, ch. 951, 1990 N.Y. Laws 2137; Act of Dec. 31, 1990, ch. 952, 1990 N.Y. Laws 2141. Chapters 950, 951, and 952 are codified at N.Y. PARTNERSHIP LAW §§ 121-101 to 121-1300 (McKinney Supp. 1993) (N.Y. Revised Limited Partnership Act [hereinafter NYRLPA]). NYRLPA is Article 8-A of the New York Partnership Law.

2. N.Y. PARTNERSHIP LAW §§ 90 to 119 (McKinney 1988) (N.Y. Uniform Limited Partnership Act [hereinafter NYULPA]). NYULPA is Article 8 of the New York Partnership Law. *See also* 1916 UNIF. LIMITED PARTNERSHIP ACT §§ 1 to 31, 6 U.L.A. 561 (West 1969 and Supp. 1993) [hereinafter ULPA].

3. *Compare* Act of Apr. 13, 1922, ch. 640, 1922 N.Y. Laws 1750 *with* NYULPA §§ 90 to 119.

4. NYRLPA § 121-1201(a) (McKinney Supp. 1993). The Act was enacted as an amendment to the New York Partnership Law. Act of Dec. 31, 1990, ch. 950, 1990 N.Y. Laws 2110 (the purpose statement of NYRLPA states that it is “[a]n Act to amend the partnership law and the general business law, in relation to limited partnerships . . .”).

5. NYRLPA § 121-1201(b).

6. *Id.* § 121-1202(a).

which files an amendment to its certificate of limited partnership, also comes under the provisions of NYRLPA.<sup>7</sup>

The purpose of this article is to discuss the most significant changes in New York limited partnership law effectuated by NYRLPA, and to compare NYRLPA to NYULPA<sup>8</sup> and to the Revised Uniform Limited Partnership Act of 1976 (RULPA), as amended in 1985.<sup>9</sup> Comparison will also be made to the Delaware Revised Uniform Limited Partnership Act of 1973 (Delaware Act), as amended in 1985.<sup>10</sup>

## II. Background

New York State was the first state to enact a limited partnership statute in 1822.<sup>11</sup> Delaware was the last state to enact a limited partnership statute when it adopted the Uniform Limited Partnership Act of 1916 (ULPA) in 1973.<sup>12</sup> However, when Delaware finally adopted ULPA, its version contained some non-uniform provisions which restricted the liability of limited partners to persons who transacted business with the partnership and provided a list of "safe harbor" activities that limited partners could engage in without incurring liability.<sup>13</sup> This produced a progressive act, considerably more progressive than NYULPA, which made Delaware an attractive jurisdiction in which to organize limited partnerships.<sup>14</sup>

In 1976, the National Conference of Commissioners on Uniform State Laws adopted the first revision to ULPA and

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7. *Id.* § 121-1202(b). When filing the amendment, the existing partnership must also file a certificate of adoption of the new law conforming to the requirements of § 121-201. *Id.*

8. *See supra* note 2.

9. REVISED UNIF. LIMITED PARTNERSHIP ACT §§ 101 to 1106, 6 U.L.A. 335-486 (West Supp. 1993) [hereinafter RULPA].

10. DEL. CODE ANN. tit. 6, §§ 17-201 to 1107 (1985).

11. Act of Apr. 17, 1822, ch. 244, 1822 N.Y. Laws 259; *see also* UNIF. LIMITED PARTNERSHIP ACT § 1, 6 U.L.A. 563 (Official Comment).

12. Act of June 25, 1973, ch. 105, 59 Del. Laws 192 (1973).

13. DEL. CODE ANN. tit 6, § 1707(a)-(b) (1973).

14. Comments of the Commissioners of the National Conference of Commissioners on Uniform State Laws, accompanying the 1985 revisions of RULPA. 6 U.L.A. 300, Prefatory Note (West Supp. 1993) [hereinafter Commissioners' Comments]; *see also* Joseph A. Basile, Jr., *The 1985 Delaware Revised Uniform Limited Partnership Act*, 41 BUS. LAW. 571, 574 (1986); Susan D. Lewis, *New Limited Partnership Law for New York*, N.Y. L.J., June 12, 1991, at 1, 6.

modeled some of the provisions after the Delaware law.<sup>15</sup> The Delaware legislature revised its law in 1982<sup>16</sup> and again in 1985.<sup>17</sup> In 1985, the Commissioners on Uniform State Laws adopted amendments to RULPA incorporating the best and most important improvements that have emerged in the limited partnership acts of Delaware and other states.<sup>18</sup> Most of these improvements are now contained in NYRLPA.<sup>19</sup>

New York probably failed to adopt RULPA until 1991 because of a critical report prepared for the New York State Law Revision Commission by Professor Robert A. Kessler of Fordham University School of Law.<sup>20</sup> The report, published in the *Fordham Law Review* in 1979, was adapted from a study prepared by Professor Kessler for the Law Revision Commission.<sup>21</sup> The report approved the assimilation of certain features of corporation law into RULPA but stated that the need for extensive amendments to conform to each state's corporate law statutes would destroy the uniform characteristics of the Act.<sup>22</sup> The report concluded that many provisions of the 1976 version of RULPA were improvements over ULPA, but criticized some new provisions as dubious policy decisions causing difficulty in interpretation.<sup>23</sup> The report did not recommend adoption by the state legislature.<sup>24</sup> New York's failure to adopt RULPA left New York with an outdated and difficult partnership law, which in turn resulted in an exodus of business to other states, most of which had previously adopted RULPA.<sup>25</sup>

New York Limited Partnership Law is now comprised of two distinct articles. Article 8 of the New York Partnership

15. See, e.g., RULPA § 303(a)-(b), 6 U.L.A. 391 (West Supp. 1993).

16. Act of July 21, 1982, ch. 886, 63 Del. Laws 420 (1982).

17. Act of July 19, 1985, ch. 188, 65 Del. Laws 330 (1985).

18. Commissioners' Comments, *supra* note 14.

19. See N.Y. PARTNERSHIP LAW Art. 8-A commentary at 24 (McKinney Supp. 1994) (noting that NYRLPA "generally follows the Revised Uniform Limited Partnership Act (1985) . . .").

20. Robert A. Kessler, *The New Uniform Limited Partnership Act; A Critique*, 48 FORDHAM L. REV. 159 (1979).

21. *Id.* at 159 n.\*.

22. *Id.* at 160-61.

23. *Id.* at 183-84.

24. *Id.* (stating that: "Legislators should . . . think twice about adopting [the 1976 version of RULPA] in its present form").

25. See Lewis, *supra* note 14, at 6.

Law, entitled "Limited Partnerships," contains NYULPA and still applies to domestic limited partnerships formed before July 1, 1991.<sup>26</sup> Article 8 is essentially ULPA,<sup>27</sup> except for amendments in 1968 which added statutory provisions for derivative actions,<sup>28</sup> and in 1979 which provided for registration of foreign limited partnerships.<sup>29</sup> The 1979 amendment pertaining to foreign limited partnerships, was repealed by NYRLPA.<sup>30</sup> The legislature enacted NYRLPA with its significant changes in order to modernize the process of organizing limited partnerships in New York State and end the flight of business to other states like Delaware.<sup>31</sup>

### III. Summary of Major Changes to the New York Limited Partnership Act

Although RULPA as enacted in 1976 was not intended as an alternative to the corporate form of organization,<sup>32</sup> limited partnerships have become an important alternative to the corporate form for large real estate and energy investments. This growing use of limited partnerships has transformed what had been small business organizations into popular forms of investment. With the growth in size of organizations and the use of limited liability for investors in limited partnerships, the desirability of certain features of corporation law became evident and were adopted into NYRLPA.

For instance, NYRLPA sets out several requirements including specific changes which make NYRLPA similar to the New York Business Corporation Law. These provisions include a name reservation provision,<sup>33</sup> statutory designation of the

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26. NYRLPA § 121-1201(b).

27. See *supra* notes 2-3 and accompanying text.

28. Act of June 5, 1968, ch. 496, 1968 N.Y. Laws 1852, 1852-56 (codified as amended at NYULPA §§ 96, 115-a to -c (McKinney 1988)).

29. Act of July 10, 1979, ch. 519, 1979 N.Y. Laws 1, 1-5 (codified as amended at NYULPA §§ 120, 120-a to -l (McKinney 1988)), *repealed by* Act of Dec. 31, 1990, ch. 950, 1990 N.Y. Laws 2110.

30. Act of Dec. 31, 1990, ch. 950, § 1, 1990 N.Y. Laws 2110, 2110.

31. Lewis, *supra* note 14, at 1, 6.

32. Commissioners' Comments, *supra* note 14.

33. Compare NYRLPA § 121-103 with N.Y. BUS. CORP. LAW § 303 (McKinney 1988 & Supp. 1993).

Secretary of State as agent for service of process,<sup>34</sup> a provision for naming a registered agent,<sup>35</sup> a record keeping provision comparable to corporations,<sup>36</sup> a provision for central filing with the Department of State,<sup>37</sup> and a section on foreign limited partnerships and their application for authority to do business in the state.<sup>38</sup>

NYULPA required the listing of the names, addresses and amount of contributions of each limited partner as well as each general partner.<sup>39</sup> NYULPA also required the amendment of the certificate on file with the county clerk whenever there was a change in the amount of a limited partner's contribution, whenever a person was substituted for a limited partner or an additional limited partner was admitted.<sup>40</sup> In large limited partnerships, with hundreds of limited partners, NYULPA imposes an unbearable burden upon limited partnerships to file amendments.<sup>41</sup>

NYRLPA changed the requirements for filing the certificate of limited partnership. NYRLPA eliminated the requirement to list the names, addresses and contributions of limited partners,<sup>42</sup> as well as the need to amend the certificate when limited partners, or their contributions change.<sup>43</sup>

NYRLPA allows a limited partnership to reserve its name in a manner similar to the provision for corporations.<sup>44</sup> It also requires the use of the words "Limited Partnership" or "L.P." in the name of the limited partnership.<sup>45</sup> Another change from NYULPA is the requirement that the partnership file the certifi-

34. Compare NYRLPA § 121-104 with N.Y. BUS. CORP. LAW § 304 (McKinney 1988 & Supp. 1993).

35. Compare NYRLPA § 121-105 with N.Y. BUS. CORP. LAW § 305 (McKinney 1988 & Supp. 1993).

36. Compare NYRLPA § 121-106 with N.Y. BUS. CORP. LAW § 624 (McKinney 1988 and Supp. 1993).

37. Compare NYRLPA § 121-206 with N.Y. BUS. CORP. LAW § 404 (McKinney 1988 & Supp. 1993).

38. Compare NYRLPA § 121-902 with N.Y. BUS. CORP. LAW § 1301 (McKinney 1988 & Supp. 1993).

39. NYULPA § 91(1)(a)IV, VI-VII.

40. *Id.* § 113(2)(a)-(c).

41. Basile, *supra* note 14, at 575-76.

42. NYRLPA § 121-201.

43. *Id.*

44. *Id.* § 121-103; see also N.Y. BUS. CORP. LAW § 303.

45. NYRLPA § 121-201.

icate with the Department of State<sup>46</sup> rather than with the County Clerk.<sup>47</sup>

NYRLPA also prohibits the use of names that are prohibited for corporations under the New York Business Corporation Law.<sup>48</sup> Further, it requires both foreign and domestic limited partnerships to designate the Secretary of State for service of process.<sup>49</sup> Under NYRLPA, limited partnerships may, however, designate a registered agent for the service of process.<sup>50</sup>

NYRLPA makes a major change by requiring that all foreign limited partnerships that have not received authority to do business in New York, prior to July 1, 1991, under the old Act, must file an application for authority with the Department of State.<sup>51</sup> In addition, NYRLPA imposes a publication requirement upon foreign limited partnerships similar to that required for domestic limited partnerships.<sup>52</sup>

NYRLPA also provides for mergers or consolidations of limited partnerships.<sup>53</sup> This provision was not included in RULPA, but was specifically authorized in the 1985 Delaware Act.<sup>54</sup> It also authorizes different classes of limited partners, allowing limitations on voting rights for some classes.<sup>55</sup> NYRLPA expands the permitted activities of a limited partner without the limited partner incurring liability as a general partner for participating in the control of the partnership.<sup>56</sup> New provisions make such a limited partner liable only to those persons who reasonably believed that the limited partner was a general partner.<sup>57</sup> In addition, NYRLPA also provides a "safe harbor" list of activities for which the limited partner will not be considered as exercising control of the partnership.<sup>58</sup>

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46. *Id.* § 121-201(a).

47. Compare NYRLPA § 121-201(a) with NYULPA § 91(1)(b).

48. NYRLPA § 121-102(a)(3); N.Y. BUS. CORP. LAW § 301 (McKinney 1988 & Supp. 1993)

49. NYRLPA § 121-104.

50. *Id.* § 121-105(a).

51. *Id.* § 121-902(a).

52. *Id.* § 121-902(d).

53. *Id.* § 121-1101.

54. DEL. CODE ANN. tit. 6, § 17-211 (1985).

55. NYRLPA § 121-302(a).

56. *Id.* § 121-303(b)(1)-(9).

57. *Id.* § 121-303(a).

58. *Id.* § 121-303(b)(1)-(9).

The general provisions of the new Act specifically allow partners, unless forbidden by the partnership agreement, to loan money to and transact business with the limited partnership.<sup>59</sup> Further, subject to other fraudulent conveyance and bankruptcy laws, the limited partners have the same rights as persons who are not partners and are creditors of the limited partnership.<sup>60</sup> A new provision requires that a limited partnership have a written partnership agreement signed by all general partners.<sup>61</sup> The former law in New York required a written and signed certificate to be filed with the County Clerk,<sup>62</sup> but did not require that the partnership agreement be in writing.

#### IV. Formation

##### A. *The Certificate of Limited Partnership*

To form a limited partnership under the new Act, the general partners must execute a written partnership agreement and file a certificate of limited partnership with the Department of State.<sup>63</sup> The major effect of NYRLPA's changes is to decrease the importance of the certificate and increase the importance of the partnership agreement.<sup>64</sup> Major provisions of NYRLPA will apply only if they are not covered in the partnership agreement;<sup>65</sup> therefore, great care should be taken in drafting the agreement.

Under the new law, the certificate requires only seven items, including the names and addresses of the general partners,<sup>66</sup> while eliminating the listing of limited partners and their contributions.<sup>67</sup> NYRLPA is logical because it is unneces-

59. *Id.* § 121-108.

60. *Id.*

61. *Id.* § 121-110.

62. NYULPA § 91(b).

63. NYRLPA § 121-201(a).

64. *See id.* §§ 121-110, -201.

65. *Id.* § 121-110(c) (The phrase "except as may be provided otherwise in the partnership agreement" which appears in § 121-110(c) indicates that amendments can be made to the partnership agreement by means provided on said partnership agreement despite provisions in the Act to the contrary; *see also* RULPA, 6 U.L.A. 301, Prefatory Note (West Supp. 1993) ("[T]he limited partnership agreement, not the certificate of limited partnership, is the primary constitutive, organizational and governing document of a limited partnership.").

66. NYRLPA § 121-201(a).

67. NYULPA § 91(1)(A)(4), (6).



sary to publicize information about partners with limited liability just as it is unnecessary to publicize the names of a corporation's shareholders.

The old law's requirement of naming all limited partners and their contributions, was not only a burden in the first filing, but continued to burden the partnership by requiring amendment of the certificate whenever limited partners were added or dropped, or the amount of their contributions changed.<sup>68</sup> This requirement imposed an impossible burden on large limited partnerships whose membership could change almost daily. The publication and filing provisions of the old New York law made it attractive and eventually routine for limited partnerships from New York to be organized under the more modern law of Delaware.<sup>69</sup>

### B. *The Publication Requirement*

The original draft of the new Act eliminated some of the former publication requirements.<sup>70</sup> It eliminated NYULPA's requirement that a copy of the certificate or a notice containing its substance be published once a week for six weeks in two newspapers in the county where the certificate had to be filed.<sup>71</sup> However, the newspaper lobby immediately went to work on the state legislators<sup>72</sup> and over the protests of the drafters of the

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68. See *id.* § 113(2)(a)-(c). A limited partnership's failure to amend the certificate under the old law and to list newly added limited partners could make the limited partners liable as general partners to creditors who secured a lien on the partnership. In a recent case, *Brookwood Fund v. Sloate*, 148 A.D.2d 661, 539 N.Y.S.2d 411 (2d Dep't 1989), the creditors of a limited partnership formed under the old law sought to hold newly added limited partners liable as general partners because the certificate had not been changed to list them as limited partners when the lien attached. *Id.* at 663, 539 N.Y.S.2d at 413. To avoid liability, the limited partners renounced their shares in the partnership as soon as they learned that the creditors were trying to hold them liable as general partners. *Id.* at 663-64, 539 N.Y.S.2d at 413. See NYULPA § 100.

69. Basile, *supra* note 14, at 571.

70. Act of Dec. 31, 1990, ch. 950, sec. 1, § 121-201, 1990 N.Y. Laws 2110, 2117, amended by Act of Apr. 1, 1991, ch. 33, secs. 1 and 2, 1991 N.Y. Laws 47. This initial draft did not include subsection (c) dealing with a limited partnership's publication requirement.

71. Compare Act of Dec. 31, 1990, ch. 950, sec. 1, § 121-201, 1990 N.Y. Laws 2110, 2117 (amended 1991) with NYULPA § 91(b).

72. See, e.g., Letter regarding Senate Bill No. 9154 from Nelson Seitel, Associate Publisher of the New York Law Journal, to Governor Mario M. Cuomo (July 23, 1990) (on file with the *Pace Law Review*); Letter concerning Senate Bill No. 9154

Act, a publication requirement was included in the new Act. After some negotiations, the State Senate and Assembly sponsors of the bill agreed to amendments which limited the publication requirements to the certification requirement.<sup>73</sup>

The amendments also made it clear that the general partners had one hundred and twenty days after the filing of the original certificate to arrange for publication of the notice and the filing of the affidavit of publication with the Department of State.<sup>74</sup> Failure to publish and file the notice does not impair the validity of the limited partnership or any contract entered into by it,<sup>75</sup> but denies the partnership the right to bring any action in a New York court until it completes these requirements.<sup>76</sup>

The newspaper lobby also managed to have a new section added to the portion of the new Act applicable to foreign limited partnerships, requiring publication of a notice in two newspapers for six weeks of ten listed items from the foreign partnership's application for authority to do business in New York.<sup>77</sup> This imposes an equal burden upon organizers of foreign limited partnerships and lessens the advantages of forming a limited partnership in another state and then applying for authority to do business in New York.

The hope expressed by some<sup>78</sup> that the publication requirement would "provide information that is of some utility to the public"<sup>79</sup> seems to be in vain. The newspaper lobby, however, continues to promote the fiction that notice in the papers serves a valuable purpose, outside of increasing their incomes.<sup>80</sup> It should be noted that the names and addresses of the general partners are no longer required to be published in the newspapers. The new Act only requires publication of a statement that

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from Dan Rattiner, Publisher of *Dan's Papers* (Bridgehampton, N.Y.) to Evan A. Davis, Counsel to Governor Mario M. Cuomo (undated) (on file with the *Pace Law Review*).

73. Act of Apr. 1, 1991, ch. 33, 1991 N.Y. Laws 47.

74. NYRLPA § 121-201(c).

75. *Id.*

76. *Id.*

77. *Id.* § 121-902(d).

78. Governor's Memorandum on Approval of chs. 950-952, N.Y. Laws (Dec. 31, 1990), reprinted in 1990 N.Y. Laws 2768-69.

79. *Id.*

80. See *supra* note 72 and accompanying text.

the names and addresses of the general partners are on file with the Secretary of State.<sup>81</sup>

### C. *Maintaining a Valid Certificate*

The former law required the partnership to amend the certificate upon the occurrence of any of ten events, including when an additional limited partner was admitted or a limited partner was substituted.<sup>82</sup> The new Act omits references to limited partners under events requiring amendment of the certificate.<sup>83</sup> This is the major and most advantageous change in the law for the benefit of limited partnerships filing in New York. The number of items now requiring the filing of an amendment has been reduced to four.

An amendment must be filed within ninety days of (1) the admission of a general partner;<sup>84</sup> (2) the withdrawal of a general partner;<sup>85</sup> (3) the continuation of the partnership after withdrawal of a general partner;<sup>86</sup> or (4) a change in the name of the limited partnership, or a change in the address to which the Secretary of State shall mail process, or a change in the name of the registered agent.<sup>87</sup> In addition, a general partner who becomes aware that any statement in the certificate is false, or that a matter described has changed, must amend the certificate within ninety days.<sup>88</sup> A certificate may be amended at any time for any proper purpose, which the general partners may determine.<sup>89</sup> Cancellation of the certificate requires the filing of a certificate of cancellation with the Secretary of State within ninety days of dissolution.<sup>90</sup>

The initial certificate of limited partnership must be signed by all general partners.<sup>91</sup> A certificate of amendment must be signed by at least one general partner, and by each new general

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81. NYRLPA § 121-201(c)(6).

82. NYULPA § 97.

83. NYRLPA § 121-202.

84. *Id.* § 121-202(b)(1).

85. *Id.* § 121-202(b)(2).

86. *Id.* § 121-202(b)(3).

87. *Id.* § 121-202(b)(4).

88. *Id.* § 121-202(c).

89. *Id.* § 121-202(d).

90. *Id.* § 121-203(a).

91. *Id.* § 121-204(a)(1).

partner.<sup>92</sup> A certificate of cancellation must be signed by all general partners, or if there is no general partner, by a majority of interest of the limited partners.<sup>93</sup> Any partner may sign a certificate by an attorney in fact.<sup>94</sup> Powers of attorney need not be filed with the Secretary of State, but must be kept in the records of the partnership.<sup>95</sup>

#### D. *Liability for False Statements*

NYRLPA makes three major changes to liability for false statements in the certificate. First, only a person who suffered a loss because of reasonable reliance upon the false statement can recover damages.<sup>96</sup> Second, because the limited partners are no longer listed in the certificate and no longer execute the certificate or amendments, they are no longer liable for false statements.<sup>97</sup> Third, any general partner who knows that the certificate has been filed, and who knows, or should with the exercise of reasonable diligence know that a statement in the certificate is false, is liable for the false statement if that general partner had ninety days to amend or cancel the certificate, or file a petition for its amendment or cancellation before there has been reliance on the false statement.<sup>98</sup> Since the material required to be filed in the certificate has been cut so drastically, the chance of error in the filing is decreased.

### V. The New Rule of Limited Partners

#### A. *Admission of Limited Partners*

After the effective date of the original certificate, a person may be admitted as a limited partner if he acquires a partnership interest directly from the limited partnership upon compliance with the partnership agreement, or if not provided for in the agreement, upon the written consent of all the partners.<sup>99</sup> A

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92. *Id.* § 121-204(a)(2).

93. *Id.* § 121-204(a)(3).

94. *Id.* § 121-204(b). Under this section, an "attorney in fact" actually means an agent appointed by a written power of attorney.

95. *Id.*

96. *Id.* § 121-207(a).

97. *Id.* § 121-207(a)(1).

98. *Id.* § 121-207(a)(2).

99. *Id.* § 121-301(b)(1).

person may also become a limited partner as an assignee of an original partner who had power under the partnership agreement to grant the assignee a partnership interest,<sup>100</sup> or if the power was not in the partnership agreement, with the written consent of all the partners.<sup>101</sup>

### B. *Classes and Voting by Limited Partners*

NYRLPA seems to have been influenced by corporate law because it allows the partnership agreement to provide for different classes of limited partners with differing rights to vote.<sup>102</sup> This is not covered in NYULPA.<sup>103</sup> The new Act also provides for the future creation of classes of limited partners having different rights, including rights and duties senior to existing classes of limited partners.<sup>104</sup> The partnership agreement may provide for the mechanics of voting, including notice, place of meeting, purpose of meeting and waiver of notice, quorum requirements, voting by proxy and other matters with respect to voting.<sup>105</sup>

### C. *Liability to Third Parties*

#### 1. *Limited Partners Liability-Generally*

NYRLPA retains the caveat of the old act by stating that a limited partner who takes part in the control of the partnership becomes liable as a general partner.<sup>106</sup> However, NYRLPA does make a radical change to liability to third persons by making the limited partner liable only to those persons who do business with the partnership reasonably believing that the limited partner is a general partner.<sup>107</sup>

100. *Id.* § 121-301(b)(2).

101. *Id.* §§ 121-301(b)(2), 121-704(a).

102. *Id.* § 121-302(a).

103. *See* NYULPA § 99. Section 99 defines the rights of limited partners and gives them the right to vote only when the limited partnership qualifies as an investment company under the Investment Company Act of 1940, 15 U.S.C. § 80a-1 to 80b-21, and then only on matters specified in § 99 or required by the Investment Company Act to be approved by holders of beneficial interests in the investment company. NYULPA § 99(3).

104. NYRLPA § 121-302(a).

105. *Id.* § 121-302(b).

106. NYULPA § 96; RULPA § 303(a), 6 U.L.A. 391 (West Supp. 1993); NYRLPA § 121-303(a).

107. NYRLPA § 121-303(a).

## 2. "Safe Harbor" Provisions

NYRLPA contains a list of specific "safe harbor" activities in which limited partners may participate without being deemed to have participated in the control of the partnership.<sup>108</sup> The safe harbor provisions are expanded by language permitting limited partners to vote on matters the partnership agreement states are subject to approval, disapproval or vote by the limited partners.<sup>109</sup> NYRLPA provides that these safe harbor activities are non-exclusive.<sup>110</sup>

The thrust of this section is to eliminate problems encountered under the old New York Limited Partnership Act concerning whether certain actions of limited partners made them liable as general partners. The cases under the old NYULPA explaining what constitutes control are apparently conflicting and although distinguishable, are not very helpful.<sup>111</sup> Thus, under NYULPA, this uncertainty discouraged investment in limited partnerships in New York and encouraged the formation of the limited partnership in Delaware or other states with modern provisions.<sup>112</sup> NYRLPA's "safe harbor" provisions seem to correct this problem.

### D. *Person Erroneously Believing Himself to Be Limited Partner*

NYRLPA retains some of the language of NYULPA. Under NYULPA, a person who made a contribution to the partnership believing he had become a limited partner could avoid liability as a general partner by promptly renouncing his interest.<sup>113</sup> This principle evolved from the 1950 case, *Rathke v. Griffith*,<sup>114</sup> where the Washington Supreme Court held that an immediate and complete renunciation of an interest would release such a person from liability under ULPA.<sup>115</sup> In *Rathke*, the defendant, Griffith, made a contribution to the limited partnership believ-

108. *Id.* § 121-303(b).

109. *Id.* § 121-303(b)(6)(A)-(L).

110. *Id.* § 121-303(c).

111. See discussion *infra* Section XII.B.

112. Lewis, *supra* note 14, at 1, 6.

113. NYULPA § 100.

114. 218 P.2d 757 (Wash. 1950).

115. *Id.* at 763-64.

ing himself to be a limited partner.<sup>116</sup> Learning that the creditors of the partnership were attempting to hold him liable as a general partner, he renounced his entire interest by immediately conveying such interest to the general partners.<sup>117</sup> This released him from liability as a general partner.<sup>118</sup>

Under the NYRLPA, a person who by virtue of making a contribution to the limited partnership, erroneously, but in good faith believes he has become a limited partner, will not be liable as a general partner if he takes certain actions.<sup>119</sup> An accurate certificate may be filed or an amendment to the original certificate may be executed to correct the mistake upon its discovery.<sup>120</sup> Alternatively, as under the old law, a person in this situation may withdraw from the partnership by delivering a written notice of withdrawal<sup>121</sup> However, avoiding liability is limited by the timeliness of the person's actions. Liability continues to exist as to any third party who transacts business with the limited partnership prior to the corrective withdrawal or certificate amendment.<sup>122</sup> Importantly, however, under NYRLPA, a person believing himself to be a limited partner will not be liable to a third person, unless the third person reasonably believed that the limited partner was a general partner and extended credit to the limited partnership in reasonable reliance on the personal credit of the limited partner.<sup>123</sup>

In any event, it is hard to see how a limited partner's contribution to the partnership could cause reasonable reliance in a creditor. Amendment of the certificate could only be effective if his name and address had been listed on the certificate as a general partner.<sup>124</sup> Merely making a contribution would not necessitate including his name in the certificate as a general partner.<sup>125</sup> The only other way he could be held liable as a general partner would be if he had expressly consented in writing to his

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116. *Id.* at 758.

117. *Id.*

118. *Id.* at 764.

119. NYRLPA § 121-304(a)(1).

120. *Id.* § 121-304(a)(1).

121. *Id.* § 121-304(a)(2).

122. *Id.* § 121-304(b).

123. *Id.*

124. *Id.* § 121-202(a).

125. *Id.* § 121-201.

name being used in the name of the limited partnership.<sup>126</sup> However, in this situation, the limited partner could only be liable to creditors who extended credit to the limited partnership without actual knowledge that the limited partner was not a general partner.<sup>127</sup>

## VI. General Partners

### A. Admission of General Partners

Additional general partners may be admitted to the limited partnership after the effective date of the original certificate as provided in the partnership agreement, or if the agreement does not provide for this, additional general partners may be admitted by written consent of all partners, including limited partners.<sup>128</sup> Obviously a properly prepared partnership agreement will take care to provide for the admission of new general partners.

### B. Events of Withdrawal of a General Partner

Under NYRLPA a person ceases to be a general partner if he withdraws from the limited partnership by giving written notice to the other partners.<sup>129</sup> Additionally, a general partner may be removed as provided for in the partnership agreement.<sup>130</sup> NYRLPA also provides that a general partner ceases to be a general partner under specific circumstances.<sup>131</sup> As an example, the general partner ceases to be a general partner if he is the subject of insolvency proceedings or of an order granting relief due to insolvency.<sup>132</sup> Further, a corporation or partnership which serves as general partner ceases to be a general partner if it is dissolved.<sup>133</sup> However, the certificate may provide that the general partner can remain under certain circumstances.<sup>134</sup>

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126. *Id.* § 121-303(d).

127. *Id.*

128. *Id.* § 121-401.

129. *Id.* § 121-602.

130. *Id.* § 121-402(c).

131. *Id.* § 121-402.

132. *Id.* § 121-402(d), (e).

133. *Id.* § 121-402(h), (i).

134. *Id.*



NYRLPA retains the provisions of the old law, where a general partner is a natural person, stating that he ceases to be a partner if he dies or is adjudicated incompetent by a court of competent jurisdiction.<sup>135</sup> NYRLPA provides for withdrawal of general partners which are not natural persons such as trustees of a trust, corporations, partnerships or estates, upon dissolution or its equivalent.<sup>136</sup>

### C. *General Powers and Liabilities*

Unless limited by the partnership agreement, a general partner has the same rights and powers and is subject to the same restrictions as a partner in a general partnership.<sup>137</sup> This makes a change from previous law, which enumerated certain specific acts that a general partner could not do without the consent of all the limited partners.<sup>138</sup>

### D. *Contributions and Voting by General Partners*

NYRLPA provides that a person who is both a general partner and a limited partner,<sup>139</sup> except as provided in the partnership agreement, has the rights and liabilities of a limited partner to the extent of his participation as a limited partner.<sup>140</sup> The provisions of NYRLPA for classes and voting by general

135. NYRLPA § 121-402(f); NYULPA § 109.

136. NYRLPA § 121-402(g)-(j).

137. *Id.* § 121-403(a).

138. NYULPA § 98. In the absence of written consent or ratification of the specific act by all limited partners, the Act denied one or all of the general partners the authority to:

- (a) Do any act in contravention of the certificate.
- (b) Do any act which would make it impossible to carry on the ordinary business of the partnership.
- (c) Confess a judgment against the partnership.
- (d) Possess partnership property, or assign its rights in specific partnership property, for other than a partnership purpose.
- (e) Admit a person as a general partner.
- (f) Admit a person as a limited partner, unless the right to do so is given in the certificate.
- (g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right to do so is given in the certificate.

*Id.*

139. NYRLPA § 121-404.

140. *Id.*

partners closely resemble the language of the new Act for limited partners.<sup>141</sup> Like the provisions for limited partners, NYRLPA authorizes the partnership agreement to provide for classes and different voting rights<sup>142</sup> and provisions for future creation of additional classes of general partners, with differing voting rights.<sup>143</sup>

## VII. Finance

### A. Contributions

NYRLPA reverses the restrictions in NYULPA on contributions by limited partners.<sup>144</sup> Under NYULPA, contributions of a limited partner could be in cash or property but not in services.<sup>145</sup> Under NYRLPA, contributions of both limited and general partners may be in cash, property, services rendered, a promissory note or other promise to contribute cash or render services.<sup>146</sup> However, the promise to contribute services may cause problems. The first problem occurs when a limited partner intends to contribute services. The services intended include those listed in the safe harbor provisions.<sup>147</sup> Another problem could arise in the event the services are not provided. In that case, the cash value of the promised service must be determined and contributed to the partnership, since even death or disability does not normally excuse the obligation to perform the promises made.<sup>148</sup> Moreover, the valuation

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141. *Id.* §§ 121-302(a), -405(a).

142. NYRLPA §§ 121-302(a), -405(a).

143. *Id.*

144. *Compare* NYRLPA § 121-501 with NYULPA § 93.

145. NYULPA § 93.

146. NYRLPA § 121-501.

147. *Id.* § 121-303(b).

148. *Id.* § 121-502(a). The decision to receive the contribution in the cash value of the promised property or services exists as an option of the limited partnership unless otherwise provided by the partnership agreement and except as provided in § 121-502(b). *Id.* However, the ability to compromise is limited by the right of a creditor to enforce the original obligation to the extent that he reasonably relied on the obligation in extending credit to the partnership. *Id.* § 121-502(b). Additionally, the partnership agreement may provide for specific consequences of failure to provide contribution, including, but not limited to, reduction or elimination of the defaulting partner's interest, subordinating his interest to that of the nondefaulting partners, and a forced sale of his interest. *Id.* § 121-502(c).

of such property or services may not be readily determinable.<sup>149</sup>

### B. *Profits, Losses and Distributions*

NYULPA provided for allocation of profits among limited partners as provided for in the certificate of limited partnership.<sup>150</sup> Allocation of profits, losses and distributions was not specified for general partners under NYULPA,<sup>151</sup> but in the absence of either express or implied provisions in the partnership agreement, general partners shared equally in the profits, by reference back to the Uniform Partnership Act.<sup>152</sup>

Under NYRLPA, profits, losses and distributions are allocated among the partners as provided in the partnership agreement.<sup>153</sup> If the partnership agreement does not provide for this, profits, losses and distributions shall be allocated upon the basis of the value of contributions, without regard to defaulted obligations.<sup>154</sup>

## VIII. Distributions and Withdrawals

### A. *Interim Distributions*

Subchapter 6 of NYRLPA states that both limited and general partners may receive interim distributions before withdrawal from the partnership as provided for in the partnership agreement.<sup>155</sup> A general partner may withdraw from the limited partnership at any time by giving written notice to the other partners.<sup>156</sup> If the withdrawal violates the partnership agreement, the partnership may recover damages for breach of the agreement.<sup>157</sup> The partnership agreement may, and should, provide some measure of liquidated damages against partners

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149. The valuation problem can be obviated by stating in the partnership records the cash value of the property or services to be contributed at the time the promise is made. *Id.* § 121-502(a).

150. NYULPA § 91(1)(a)IX.

151. *Id.* § 98.

152. *Id.* § 98; N.Y. PARTNERSHIP LAW § 40(1) (McKinney 1988); UNIF. PARTNERSHIP ACT, § 18(a), 6 U.L.A. 213 (1969).

153. NYRLPA §§ 121-503, -504

154. NYRLPA §§ 121-503, -504.

155. NYRLPA § 121-601.

156. *Id.* § 121-602.

157. *Id.*

who withdraw in violation of the agreement since it is difficult to prove actual damages in these situations.<sup>158</sup>

A limited partner must give no less than six months written notice upon withdrawing from a partnership, unless the partnership agreement specifies the circumstances when he may withdraw or he gets the consent of all the partners.<sup>159</sup> If the withdrawal violates the partnership agreement, the limited partnership may recover damages as determined in the partnership agreement.<sup>160</sup>

In the absence of a contrary provision in the partnership agreement, the new Act provides for the right of a withdrawing partner to receive a distribution within a reasonable time after withdrawal.<sup>161</sup> NYULPA provided that a limited partner had no right to demand and receive a distribution in any form other than cash in the absence of a statement in the certificate to the contrary.<sup>162</sup> NYRLPA maintains the provisions of the old law stating that a partner has no right to demand and receive a distribution in any form other than cash.<sup>163</sup> However, the partnership agreement may provide that withdrawing partners may be compelled to accept a distribution in kind upon withdrawal.<sup>164</sup> Distribution in kind may be more valuable upon dissolution than a forced sale would bring in cash.

A radical change is made in the new Act. Under NYRLPA, when a general or limited partner becomes entitled to a distribution, he obtains the status of a creditor of the limited partnership.<sup>165</sup> This right is limited by section 121-607 which prohibits distribution if it would render the limited partnership insolvent.<sup>166</sup> This right is also limited by section 121-804 of NYRLPA which provides for distribution to partners as creditors, but gives priority to outside creditors over partners' distributions upon a winding up of a limited partnership.<sup>167</sup>

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158. *Id.* §§ 121-602, -603.

159. NYRLPA § 121-603.

160. *Id.*

161. *Id.* § 121-604.

162. NYULPA § 105(3).

163. NYRLPA § 121-605.

164. *Id.*

165. *Id.* § 121-606.

166. *Id.* § 121-607.

167. *Id.* § 121-804.

## B. *Limitations on Distribution*

Other provisions in the new Act set up a three-year statute of limitations so that a partner who receives a wrongful distribution shall have no liability for return of the distribution (unless otherwise agreed in the partnership agreement) after three years from the date of the distribution.<sup>168</sup> A partner who receives a distribution, but does not know that it wrongful is not liable for the amount of the distribution.<sup>169</sup> This is a major change from the previous law which held a partner liable to the partnership for the wrongful distribution regardless of his knowledge of its wrongful character.<sup>170</sup>

The Revised Uniform Limited Partnership Act of 1976 provided a one-year statute of limitations for the return of a wrongful distribution to a limited partner if he had received the distribution without violation of the partnership agreement and for a six-year statute of limitations if the distribution was received in violation of the agreement.<sup>171</sup> It is permissible under NYRLPA, and probably wise, to have provisions in the partnership agreement making all partners liable to return wrongful distributions within the three years specified in the statute, regardless of the partners' knowledge of the wrongful character of the distribution.<sup>172</sup>

## IX. Assignment of Partnership Interests

The language of NYRLPA is similar to that of NYULPA in that an interest in a limited partnership is considered personal property.<sup>173</sup> Section 121-702 of NYRLPA clarifies the language of NYULPA which merely stated that "a limited partner's interest is assignable."<sup>174</sup> This left a question as to whether the certificate or partnership agreement could place any limitations on assignments. The new language specifies "[e]xcept as provided

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168. *Id.* § 121-607(e).

169. *Id.* § 121-607(b).

170. NYULPA § 106(2)(b).

171. REVISED UNIF. LIMITED PARTNERSHIP ACT (1976) § 608, 6 U.L.A. 438 (West Supp. 1993).

172. NYRLPA § 121-607(b), (c).

173. Compare NYRLPA § 121-701 with NYULPA § 107.

174. Compare NYRLPA § 121-702 with NYULPA § 108(1).

in the partnership agreement, a partnership interest is assignable in whole or part.<sup>175</sup>

An assignment does not dissolve the partnership or entitle the assignee to become a partner, but merely entitles the assignee to receive the distributions of profits and losses to which the assignor would be entitled.<sup>176</sup> However, a partner ceases to be a partner upon assignment of all of his partnership interest.<sup>177</sup> Unless otherwise provided in the partnership agreement, the pledge of, or the granting of a security interest in a partnership interest does not cause the partner to cease to be a partner.<sup>178</sup> It would be advisable, as is authorized by the new Act, to place prohibitions and set up procedures in the partnership agreement to limit (1) assignments of interests;<sup>179</sup> (2) rights of assignees to become limited partners;<sup>180</sup> and (3) the ability of assignees who are not partners, to retain excess distributions.<sup>181</sup>

A new provision in NYRLPA permits the partnership agreement to provide that a limited partner's interest may be evidenced by a certificate issued by the partnership.<sup>182</sup> The provision may also provide for the transfer of the interest represented by such a certificate.<sup>183</sup> A limited partner's interest may be a certificated security or an uncertificated security within the meaning of section 8-102 of the Uniform Commercial Code (UCC),<sup>184</sup> or if the requirements of that section of the UCC are not met, it shall be deemed to be a general intangible.<sup>185</sup> It is best to treat the limited partner's interest as a general intangible and perfect the interest by filing under the provisions of section 9-302 of the UCC.<sup>186</sup>

This new provision seems to further indicate the trend toward corporate law in large limited partnerships. Although

175. NYRLPA § 121-702(a)(1).

176. *Id.* § 121-702(a)(2)-(3).

177. *Id.* § 121-702(a)(4).

178. *Id.*

179. *Id.* § 121-702.

180. *Id.* § 121-704.

181. *Id.* § 121-702(a)(2), (3).

182. *Id.* § 121-702(b).

183. *Id.*

184. *Id.*; U.C.C. § 8-102 (1990).

185. NYRLPA § 121-702(b).

186. U.C.C. § 9-302 (1990).

nothing in RULPA authorized the issuance of such certificates, they were often issued by large limited partnerships with many limited partners.<sup>187</sup> The 1985 Delaware Act added a provision permitting such a practice in Delaware.<sup>188</sup>

A. *Rights of a Creditor of a Partner on an Outside Obligation*

NYRLPA carries over the provisions of NYULPA which allow a judgment creditor to charge the interest of a partner on a private obligation, except that NYULPA referred to a limited partner's interest, whereas NYRLPA refers to any partner's interest.<sup>189</sup> However, NYRLPA adheres to the language of RULPA leaving out specific remedies which were better left to other statutes on civil procedure.<sup>190</sup>

B. *Right of an Assignee to Become a Limited Partner*

Under NYRLPA, an assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if the partnership agreement permits the assignor to grant that right (to which all partners must consent in writing), or the partnership agreement provides for such procedure.<sup>191</sup> NYULPA permitted the admission of additional partners only if the right was specifically granted in the partnership certificate or if all the members except the assignor consent to the assignment.<sup>192</sup> NYULPA also required the partnership certificate to be amended when additional partners were admitted.<sup>193</sup> Amending the certificate required a written amendment, signed and acknowledged or sworn to by all general and limited partners and also signed by the person to be added.<sup>194</sup> In a larger limited partnership, with hundreds of limited partners, it would be practically impossible to comply with this procedure.

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187. Basile, *supra* note 14, at 590.

188. DEL. CODE ANN. tit. 6, § 17-702(b) (1985).

189. Compare NYRLPA § 121-703 with NYULPA § 111(1).

190. NYRLPA § 121-703; RULPA § 703, 6 U.L.A. 442.

191. NYRLPA § 121-704(a).

192. NYULPA § 108(4).

193. *Id.* §§ 97, 113(2)(c).

194. *Id.* § 114(1)(b).

Under NYRLPA, an assignee who becomes a limited partner assumes the rights and powers of the assignor and becomes subject to the obligations under the statute and the partnership agreement.<sup>195</sup> Unless otherwise provided in the partnership agreement, the assignee who becomes a limited partner is liable for the obligations of his assignor to make the required contributions to the partnership unless he was unaware of the obligation at the time he became a limited partner.<sup>196</sup>

However, the assignee who becomes a limited partner is not liable for the obligations of his assignor for damages for wrongful withdrawal under section 121-603 or for the return of a wrongful distribution under section 121-607.<sup>197</sup> The assignor is not released from any liability under NYRLPA or the partnership agreement except for liabilities which arose after the assignment and are pursuant to sections 121-207 and 121-607.<sup>198</sup> In addition, if the assignee becomes a limited partner, the assignor is released from liability under section 121-502.<sup>199</sup>

Under NYRLPA, if a partner who is an individual dies or is adjudged incompetent, the partner's legal representative may exercise all of the partner's rights to settle the estate or to administer his property.<sup>200</sup> These powers include the power to become a limited partner if this right is provided for in the partnership agreement.<sup>201</sup>

## X. Dissolution

NYRLPA has an entire subchapter on dissolution.<sup>202</sup> Strangely enough, there is no definition of dissolution in the rather extensive list of definitions in chapter I of the new Act.<sup>203</sup> "Event of withdrawal of a general partner" refers to any circum-

195. NYRLPA § 121-704(b).

196. *Id.* Liability extends only to contributions under § 121-502 and excludes contributions under §§ 121-603, -607. *Id.*

197. *Id.* § 121-704(b).

198. *Id.* § 121-705(a). Section 121-207 pertains to liability for making a false statement in the certificate of limited partnership. Section 121-607 concerns limitations on partnership distributions.

199. *Id.* § 121-705(a). Section 121-502 deals with partner liability for contributions to the partnership.

200. *Id.* § 121-706.

201. *Id.*

202. *Id.* §§ 121-801, to -804.

203. *See id.* § 121-101.



stance in a list of enumerated events that causes a person to cease to be a general partner as provided in section 121-402.<sup>204</sup> Subchapter VI also has a section on the withdrawal of a general partner,<sup>205</sup> however, this subchapter is concerned with notice to the other partners rather than with dissolution.

Sections one through eighty two of the New York Partnership Law is New York's adaptation of the Uniform Partnership Act.<sup>206</sup> The Uniform Partnership Act does contain a definition of the term "dissolution."<sup>207</sup> It states that: "[t]he dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."<sup>208</sup> In NYRLPA, the subchapter on dissolution states that a limited partnership is dissolved and its affairs shall be wound up upon the happening of the first of a list of specified occurrences.<sup>209</sup>

The occurrences requiring dissolution are: (a) at the time, if any, provided for in the certificate of limited partnership; (b) at the time or event provided for in the partnership agreement; (c) upon the written consent of all of the general partners or of two-thirds of each class of limited partners, unless the partnership agreement varies the percentage of partners whose consent is required; (d) at the withdrawal of a general partner, unless there is a remaining general partner who continues the business and the partnership agreement permits the limited partnership to be carried on by the remaining general partner, or if within ninety days, all partners agree in writing to continue the business and to the appointment of one or more additional general partners if necessary or desired; and (e) the entry of a decree of judicial dissolution under section 121-802.<sup>210</sup>

The problem which may arise under subdivision (d) of section 121-801 of NYRLPA when no general partner remains and

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204. *Id.* § 121-101(d).

205. *Id.* § 121-602.

206. N.Y. PARTNERSHIP LAW §§ 1 to 82 (McKinney 1988). The Uniform Partnership Act was approved by the National Conference of Commissioners on Uniform State Laws in 1914. UNIF. PARTNERSHIP ACT §§ 1 to 45, 6 U.L.A. and Supp. 1993.

207. N.Y. PARTNERSHIP LAW § 60; UNIF. PARTNERSHIP ACT § 29, 6 U.L.A. 364.

208. N.Y. PARTNERSHIP LAW § 60; UNIF. PARTNERSHIP ACT § 29, 6 U.L.A. 364.

209. NYRLPA § 121-801.

210. *Id.* § 121-801(a)-(e).

the remaining partners must agree in writing within ninety days to continue the business and appoint one or more general partners, was illustrated in the Washington State case of *Obert v. Environmental Research and Development Corp.*<sup>211</sup> The trial court found that the sole general partner had been properly removed by a majority vote of 77.4% of the limited partners, for breach of fiduciary duties as authorized in the partnership agreement.<sup>212</sup> The same 77.4% majority then elected a new general partner.<sup>213</sup>

Upon appeal by the former general partner, the court of appeals, upheld the lower court's finding that the general partner had been effectively removed by majority vote as authorized in the partnership agreement.<sup>214</sup> The court held, however, that the failure of the limited partners to unanimously elect a successor general partner, as required by the terms of the statute, resulted in the dissolution of the partnership.<sup>215</sup>

On appeal, the Supreme Court of Washington upheld the Washington Court of Appeals in part, holding that the former general partner had been properly removed by the majority vote, but reversed the part of the decision holding that the limited partnership had been dissolved by the removal.<sup>216</sup> The court held that the provision in the partnership agreement for the election of a new general partner by majority vote was valid under the former law which was in effect when the limited partnership was formed, and that the enabling act, when the new statute was passed contained provisions that the terms of partnership agreements, valid under the former law would continue to be valid under the new law.<sup>217</sup> There are no such provisions in the transition provisions of the New York law, as there were in the Washington law, so the vote for a new general partner must be unanimous.<sup>218</sup>

211. 771 P.2d 340 (Wash. 1989).

212. *Id.* at 342.

213. *Id.*

214. *Obert v. Environmental Research and Dev. Corp.*, 752 P.2d 924, 926 (Wash. App. 1988).

215. *Id.* at 927.

216. *Obert*, 771 P.2d at 350.

217. *Id.* at 345-46.

218. NYRLPA § 121-1201.

### A. *Winding Up*

NYULPA contained no detailed provisions on winding up. NYRLPA, however, provides that the general partners, or limited partners if there are no general partners, who have not wrongfully caused dissolution, may wind up the limited partnership's affairs.<sup>219</sup> Also, the supreme court in the district may wind up the affairs of the business upon application of any partner and may appoint a receiver or liquidating trustee.<sup>220</sup> Importantly, participation of limited partners in the winding up of the partnership does not affect the liability of the limited partners.<sup>221</sup>

### B. *Distribution of Assets*

Under the old law, when there was a distribution of the assets of a partnership upon dissolution, outside creditors were paid first, then limited partners and then general partners.<sup>222</sup> Under NYRLPA, general and limited partners are ranked together and are classified as creditors on an equal status with outside creditors.<sup>223</sup> This constitutes a major change in New York limited partnership law, but has existed since 1976 in RULPA.<sup>224</sup> Presumably, the policy behind this change was to encourage investors to become limited partners, but it seems to have diminished the investors' priority in recovering their investments. According to NYRLPA, the distribution to partners who are creditors is limited to the extent permitted by law.<sup>225</sup> This means that this right is limited by New York's fraudulent conveyance law,<sup>226</sup> which is intended to protect outside creditors.

After distribution to creditors, distribution is next made for the partnership's liability for interim distributions and distributions upon withdrawal to current and former partners.<sup>227</sup> Finally, distribution is made to partners for return of their

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219. *Id.* § 121-803(a).

220. *Id.*

221. *Id.* § 121-803(b).

222. NYULPA § 112.

223. NYRLPA § 121-804(a).

224. RULPA § 804(1), 6 U.L.A. 452 (West Supp. 1993).

225. NYRLPA § 121-804(a).

226. N. Y. DEBT. & CRED. LAW §§ 270-281 (McKinney 1990).

227. NYRLPA § 121-804(b); *see id.* §§ 121-601, -604.

contributions not previously returned, and then respecting their partnership interests per section 121-504.<sup>228</sup>

## XI. Foreign Limited Partnerships

NYRLPA clarifies a question left open by previous provisions regarding foreign-based limited partnerships doing business in New York. NYRLPA states that the laws of the jurisdiction under which the foreign limited partnership is organized govern its organization and internal affairs, and the liability of its limited partners, subject to the provisions of the New York State Constitution.<sup>229</sup> These new provisions of NYRLPA are similar to the provisions of RULPA<sup>230</sup> which seem to be based upon the provisions of corporate law dealing with the qualification of foreign corporations to do business in another state.<sup>231</sup>

### A. Application for Authority

Before doing business in New York, foreign limited partnerships must apply for authority to do business in the state by submitting a certificate of existence from their original state.<sup>232</sup> If the jurisdiction of origin does not issue such certificate, the limited partnership may submit a certified copy of a restated certificate and all amendments.<sup>233</sup> A sworn translation is required if the certificate is in a foreign language.<sup>234</sup> Secondly, a verified application for authority must be filed along with the certificate with the Department of State.<sup>235</sup> The application must be signed and verified or affirmed by a general partner.<sup>236</sup>

If the name of the foreign limited partnership is not acceptable for registration because of a conflict with a previously registered name or with the list of prohibited names in NYRLPA, the foreign limited partnership may adopt a fictitious name and

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228. *Id.* § 121-804(c); *see id.* § 121-504.

229. *Id.* § 121-901.

230. RULPA § 901(i), 6 U.L.A. 454 (West Supp. 1993).

231. *See, e.g.*, MODEL BUSINESS CORP. ACT § 15.01 (1985).

232. NYRLPA § 121-902(a)(i).

233. *Id.*

234. *Id.*

235. *Id.* § 121-902(a)(ii).

236. *Id.*

register that with the Department of State.<sup>237</sup> The provisions of the new Act specifically exempt the foreign limited partnership from registering the fictitious name under the provisions of section 130 of the General Business Law.<sup>238</sup>

The statute specifies the information required in the application. It lists nine items<sup>239</sup> substantially similar to the requirements in the certificate of a domestic partnership.<sup>240</sup> However, the application for a foreign limited partnership requires additional information, including: (1) the address of the office required to be maintained in its original jurisdiction;<sup>241</sup> (2) a statement that the foreign limited partnership is in existence in the jurisdiction of organization;<sup>242</sup> and (3) the name and address of the authorized officer in its jurisdiction of organization where a copy of its certificate or other papers of organization are on file.<sup>243</sup>

All foreign limited partnerships which received authority to do business in New York under the previous partnership law have automatic authority under the new Act to continue doing business.<sup>244</sup> They do not have to take any action such as applying anew or complying with the publication requirements of the new law for foreign limited partnerships.<sup>245</sup>

A foreign limited partnership is not considered to be doing business in this state for the purpose of the partnership law by: (1) maintaining, defending or settling any action or proceeding;<sup>246</sup> (2) holding meetings of its partners;<sup>247</sup> (3) maintaining bank accounts,<sup>248</sup> or (4) maintaining offices or depositaries with relation to its partnership interests.<sup>249</sup> However, the list of activities in section 121-902(b) does not specify which activities

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237. *Id.* § 121-902(a)(1); *see id.* § 121-102.

238. *Id.* § 121-902(a)(1); *see* N.Y. GEN. BUS. LAW § 130 (McKinney 1988 & Supp. 1993).

239. NYRLPA § 121-902(a)(1)-(9).

240. *Id.* § 121-201(a)(1)-(7).

241. *Id.* § 121-902(a)(6).

242. *Id.* § 121-902(a)(8).

243. *Id.* § 121-902(a)(9).

244. *Id.* § 121-1201(c).

245. *Id.*

246. *Id.* § 121-902(b)(1).

247. *Id.* § 121-902(b)(2).

248. *Id.* § 121-902(b)(3).

249. *Id.* § 121-902(b)(4).

may subject a foreign limited partnership to service of process or liability under any other state statute.<sup>250</sup>

For example, the New York State Department of Taxation and Finance uses a different definition of "doing business in New York"<sup>251</sup> for the purpose of applying the Business Corporation Franchise Tax upon foreign corporations which are limited partnerships. The Commissioner of Taxation and Finance has adopted a definition of doing business in New York by regulation,<sup>252</sup> which would include the actions stated in NYRLPA section 121-303(b). The definition of "doing business" would not constitute control of the limited partnership as sufficient under the tax laws to make the foreign corporate limited partner subject to the franchise tax in New York.<sup>253</sup> There should be no problem with recognizing the different application of tax laws and regulations compared with the partnership laws respecting "doing business in New York."<sup>254</sup>

#### B. *Publication Requirements for Foreign Limited Partnerships*

There were no requirements for publication imposed upon foreign limited partnerships under NYULPA. The newspaper lobby focused on this during the debate on eliminating all publication requirements.<sup>255</sup> The lobby was successful in restoring the requirements for publication not only for domestic limited partnerships but also for foreign limited partnerships which applied for authority to do business in New York. The newspaper lobby was successful in spite of protests from every bar association and law firm interested in the reform of the limited partnership law.<sup>256</sup>

250. *Id.* § 121-902(c).

251. Letter of comment upon Senate Bill No. 8542 from James W. Wetzler, Comm'r of Dep't of Taxation & Finance, to Governor Mario M. Cuomo (July 23, 1990) (on file with the *Pace Law Review*).

252. N.Y. COMP. CODES R. & REGS. tit. 20, § 1-3.2(a)(6) (1993).

253. *Id.*

254. *Id.*

255. See *supra* notes 72-73 and accompanying text.

256. See, e.g., Letters from Bruce A Rich, Chairman of the Partnership Law Committee of the New York State Bar Association, Partner, Spengler, Carlson, Gubar, Brodsky & Frischling (July 10, 1990 and December 7, 1990) (on file with the *Pace Law Review*); see *supra* note 73 and accompanying text.

The new Act requires foreign limited partnerships to have a notice published once a week for six weeks in two newspapers of the county within the state in which the office of the limited partnership is located.<sup>257</sup> Such notice must contain the substance of the terms of the application for authority to do business in New York.<sup>258</sup> The notice must contain ten items,<sup>259</sup> specified in the statute, which makes it longer than that required for domestic limited partnerships.<sup>260</sup> The failure to file proof of publication within 120 days with the Department of State shall not impair the validity of any contract or act of the partnership or the right to defend itself in any action.<sup>261</sup> Failure to file, however, does prohibit the foreign limited partnership from maintaining any action in this state until it does file.<sup>262</sup>

### C. *Effective Date, Amendments and Changes*

The authority to do business in this state is effective for the foreign limited partnership immediately upon filing with the Secretary of State.<sup>263</sup> The foreign limited partnership has such powers to do business in New York as it was permitted in the foreign state.<sup>264</sup> These powers may not, however, exceed those of a domestic limited partnership.<sup>265</sup>

A foreign limited partnership may amend its application from time to time, if such amendment comprises only those provisions which might be lawfully found in an application for authority when the amendment was made.<sup>266</sup> Such amendments must be filed with the Department of State within ninety days after any change of the information required to be set forth in its application for authority.<sup>267</sup> When a foreign limited partnership which has received authority to do business in New York is

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257. NYRLPA § 121-902(d).

258. *Id.*

259. *Id.* § 121-902(d)(1)-(10).

260. *See id.* § 121-201(c).

261. *Id.* § 121-902(d).

262. *Id.*

263. *Id.* § 121-904(a).

264. *Id.* § 121-904(b).

265. *Id.*

266. *Id.* § 121-903(a).

267. *Id.* § 121-903(b).

dissolved or its authority is canceled in the foreign state, a certificate of the official who is able to attest to the dissolution in the foreign state, or a certified copy from a court of record in the foreign state must be filed with the Secretary of State of New York to terminate its existence in this state.<sup>268</sup>

#### D. *Doing Business Without Authority*

A foreign limited partnership doing business without having received authority may not maintain any action, suit or special proceedings in New York.<sup>269</sup> The Attorney General shall bring an action to restrain any such foreign limited partnership from doing business in this state.<sup>270</sup> The Attorney General may also bring an action against any foreign limited partnership that is authorized to do business in New York, but is conducting any business in New York which is illegal under the laws of this state.<sup>271</sup>

### XII. Derivative Actions

NYRLPA substantially maintains the language of NY-ULPA concerning derivative actions.<sup>272</sup> The former law, like the language in the new law, stated that “[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 . . . .”<sup>273</sup> The statutory language setting up the procedure for derivative actions in New York was enacted after the decision in the landmark case of *Rivera Congress Associates v. Yassky*.<sup>274</sup> In *Yassky*, the New York Court of Appeals held that section 115 allowed limited partners to bring a derivative action on behalf of the limited partnership when the general partners will not

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268. *Id.* § 121-906.

269. *Id.* § 121-907(a).

270. *Id.* § 121-908.

271. *Id.*

272. Compare NYRLPA §§ 121-1001 and 121-1002 with NYULPA §§ 115 and 115-a.

273. NYULPA § 115. The new law is almost identical in its wording: “A limited partner, unless he is also 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 . . . .” NYRLPA § 121-1001.

274. 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966).



bring the suit.<sup>275</sup> The court reasoned that the sole purpose of section 115 was to prevent interference from the limited partners in the general partner's right to conduct the business of the partnership.<sup>276</sup>

The new language in NYRLPA specifically provides for the right of a limited partner to bring a derivative action.<sup>277</sup> The rest of the subchapter is substantially the same as the former law in New York.<sup>278</sup> The provisions requiring the plaintiff-limited partner to post security for expenses, including attorney's fees, and to indemnify the general partner for the defense of the derivative action are contained in the new Act.<sup>279</sup> NYRLPA adds provisions specifically stating that no indemnifications may be made to a general partner if a judgment adverse to the general partner establishes that he committed acts in bad faith or with dishonesty.<sup>280</sup> Further, a general partner may not be indemnified if he has personally gained a profit or other advantage to which he was not legally entitled.<sup>281</sup>

The Revised Uniform Limited Partnership Act adopted by the National Conference of Commissioners on Uniform State Laws in 1976 made a significant change to the old law by authorizing limited partners to bring derivative actions.<sup>282</sup> The 1985 amendments clarify the statute but do not make any substantive changes to Article 10.<sup>283</sup>

### XIII. Mergers and Consolidations

A further indication of the trend towards granting large publicly held limited partnerships the flexibility of a corporation, is the new subchapter on mergers and consolidations.<sup>284</sup> There are no similar provisions in RULPA, which has been

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275. *Id.* at 547, 223 N.E.2d at 879, 277 N.Y.S.2d at 391.

276. *Id.*

277. NYRLPA § 121-1002.

278. Compare NYRLPA §§ 121-1002 to -1004 with NYULPA §§ 115-a to -c.

279. NYRLPA §§ 121-1003, -1004.

280. *Id.*

281. *Id.* § 121-1004(b).

282. Compare RULPA § 1001, 6 U.L.A. 472 (West Supp. 1993) (authorizing derivative actions) with ULPA §§ 1-31, 6 U.L.A. 561-621 (1969) (omitting a provision for derivative actions).

283. See RULPA § 1002, 6 U.L.A. 473 (West Supp. 1993).

284. NYRLPA §§ 121-1101 to -1105.

adopted by most other states.<sup>285</sup> In this article, as in NYRLPA, “merger” means a procedure in which two or more limited partnerships combine into a single limited partnership which will thus remain one of the constituent limited partnerships.<sup>286</sup> “Consolidation” is a procedure by which two or more limited partnerships consolidate into a single limited partnership which shall then constitute a new limited partnership to be formed according to the consolidation.<sup>287</sup>

NYRLPA sets forth a detailed procedure for merger or consolidation. The plan must be submitted to the general and limited partners of each partnership.<sup>288</sup> A merger or consolidation must be approved by such vote of general partners as provided in the partnership agreement and by at least two-thirds of each class of limited partners.<sup>289</sup> Upon approval, dissenting limited partners are no longer partners, but are entitled to receive the fair value of their interest in cash as of the close of business the day prior to the effective date of the merger or consolidation.<sup>290</sup> Apparently the value will be determined by appraisal.<sup>291</sup>

#### XIV. Transition Provisions

Section 121-1201(a) of NYRLPA provides that “[a]ll limited partnerships formed on or after the effective date of this article shall be governed by this article.”<sup>292</sup> All domestic limited partnerships formed prior to the date of this article shall continue to be governed by the former law, unless they adopt the new

285. See RULPA §§ 101 to 1106, 6 U.L.A. 335-486 (West Supp. 1993); *infra* note 314 and accompanying text; see also DEL. CODE ANN. tit. 6, § 17-211 (Supp. 1992). Although the 1985 Delaware act contained provisions for mergers and consolidations, they are rather sketchy compared to the subchapter in NYRLPA.

286. NYRLPA § 121-1101.

287. *Id.*

288. *Id.* § 121-1102(a).

289. *Id.* § 121-1102(a)(i), (ii).

290. *Id.* § 121-1102(c).

291. *Id.* (providing for “fair value” for the dissenting partner). See N.Y. PARTNERSHIP LAW Art. 8-A commentary at 35 (McKinney Supp. 1993) (discussing appraisal rights); NYRLPA § 121-1105 (outlining procedure for appraisal proceedings).

292. NYRLPA § 121-1201(a).

law.<sup>293</sup> If the partnership adopts the new law, it will thereafter be governed by NYRLPA.<sup>294</sup>

The new Act provides that a limited partnership, created under the former law, may adopt the new law by filing a certificate of adoption with the Secretary of State.<sup>295</sup> Any limited partnership formed prior to the enactment of NYRLPA which wishes to amend its original certificate must file a certificate of adoption under the new Act, as well as the certificate of amendment of its original certificate.<sup>296</sup> The limited partnership must also file a notice with the county clerk, where its original certificate was filed stating it has filed an amendment to its certificate.<sup>297</sup> The limited partnership adopting the new law may continue to use the name under which it has done business before.<sup>298</sup>

The last subchapter specifies the fees to be collected by the Secretary of State.<sup>299</sup> Most noteworthy is the increase in fee from ten dollars to two hundred dollars for a foreign limited partnership applying for authority to do business in New York.<sup>300</sup>

#### A. *The Question of Control by Limited Partners*

The new Act has provided greater flexibility in internal organization and governance and has enlarged the permissible role of limited partners without making them subject to liability as general partners. NYRLPA section 121-303<sup>301</sup> closely tracks the progressive language of the model RULPA<sup>302</sup> and the even more advanced language of the Delaware statute<sup>303</sup> by setting forth the so-called "safe harbor" list of activities that do not con-

293. *Id.* §§ 121-1201(b), -1202(a).

294. *Id.* § 121-1202(a).

295. *Id.*

296. *Id.* § 121-1202(b).

297. *Id.* § 121-1202(a).

298. *Id.*

299. *Id.* § 121-1300.

300. Compare NYRLPA § 121-1300(k) with Act of July 10, 1979, ch. 519, sec. 1, § 120-b(1), 1979 N.Y. Laws 1073, 1074, repealed by Act of Dec. 31, 1990, ch. 950, sec. 1, 1990 N.Y. Laws 2110.

301. NYRLPA § 121-303(b)(1)-(9).

302. RULPA § 303, 6 U.L.A. 391 (West Supp. 1993) (1976 Act as modified by the 1985 Act).

303. DEL. CODE ANN. tit. 6, § 17-303 (1973 & Supp. 1992).

stitute participation in the control of the business.<sup>304</sup> In addition, the New York statute specifically requires the “reliance” concept from case law and RULPA.<sup>305</sup>

Unfortunately, none of the existing statutes articulate what constitutes control. The safe harbor provisions—added to the Delaware Act in 1982 and RULPA in 1985—merely enumerate a nonexclusive list of specific acts which do not constitute control by a limited partner.<sup>306</sup> Only three cases have been reported claiming control by a limited partner since the enactment of these provisions.<sup>307</sup> Examination of practices under the Delaware law should give an understanding of what is not control of the business.

Like the Delaware law and RULPA, NYRLPA allows voting by limited partners on whether the partnership should incur indebtedness.<sup>308</sup> Similar to a provision in Delaware law, NYRLPA also provides that a limited partner does not participate in the control of the business by voting on matters stated in the partnership agreement to be subject to approval, disapproval, or vote by the limited partners.<sup>309</sup> Limited partnerships formed under the Delaware law “frequently were structured with limited partner committees endowed with the power to approve or disapprove matters such as the types or valuation of investments, the distribution of assets in kind, the investment of more than a specified percentage of partnership assets in any one security, and deviations from stated investment guidelines.”<sup>310</sup> Since NYRLPA contains similar and even broader provisions,<sup>311</sup> the partnership agreement may be drafted to pro-

304. NYRLPA § 121-303(b)(1)-(9).

305. NYRLPA § 121-303(a). This section provides that if the limited partner participates in the control of the business, he is only liable to persons who transact business with the limited partnership who reasonably believe, based upon his conduct, that the limited partner is a general partner. *Id.*; see RULPA § 303(a), 6 U.L.A. 391; *infra* section XII.B.

306. DEL. CODE ANN. tit. 6, § 17-303(b); RULPA § 303(b)-(c), 6 U.L.A. 391 (West Supp. 1993).

307. See *infra* section XII.B.

308. NYRLPA § 121-303(b)(6)(E); RULPA § 303(b)(6)(iii), 6 U.L.A. 391; DEL. CODE ANN. tit. 6, § 17-303(b)(8)(c).

309. NYRLPA § 121-303(b)(6)(L); DEL. CODE ANN. tit. 6, § 17-303(b)(8)(L).

310. Craig B. Smith, *The Delaware Revised Uniform Limited Partnership Act*, 30(4) PRAC. LAW. 23, 30-31 (1984).

311. NYRLPA § 121-303(b)(6)(A)-(L).

vide for a committee of limited partners to have substantial control over critical aspects of the partnership business without incurring liability as general partners.

### B. *Case Law on Control by Limited Partners*

Unfortunately, none of the existing statutes—RULPA, the Delaware Act, or NYRLPA, state what actions by the limited partner would definitively constitute control. Although the “safe harbor” provisions have been effective under the Delaware Act since 1982 and RULPA was enacted in 1976<sup>312</sup> and revised in 1985,<sup>313</sup> and has been adopted by a majority of the states,<sup>314</sup> there are only three reported cases where control of the business by a limited partner was at issue.<sup>315</sup> Only one of these, *Pitman v. Flanagan Lumber Co.*,<sup>316</sup> is clearly on point. The trial court found that Pitman’s personal involvement in securing credit for the partnership constituted control of the business of the limited partnership and “that Flanagan had reasonably relied upon that participation in extending credit. . . .”<sup>317</sup> On that basis, the court held that Pitman was personally liable on the debt incurred under that line of credit.<sup>318</sup>

The second case under RULPA, *Federal Savings and Loan Insurance Corp. v. Stefanoff*,<sup>319</sup> was brought in United States Bankruptcy Court. The action was brought by the receiver of a defunct savings and loan association seeking a determination that a debt of the limited partnership was non-dischargeable because of fraud.<sup>320</sup> In *Stefanoff*, the court found that Stefanoff, the limited partner, through the general partner Walsh, made a materially false representation that the purchase price of real

312. RULPA §§ 101 to 1106, 6 U.L.A. 335-486 (West Supp. 1993); *see also supra* note 9.

313. RULPA §§ 101 to 1106, 6 U.L.A. 335-486 (West Supp. 1993); *see also supra* note 9.

314. *See* 6 U.L.A. 298-99 (West Supp. 1993) (table of jurisdictions where RULPA has been adopted).

315. *Pitman v. Flanagan Lumber Co.*, 567 So. 2d 1335 (Ala. 1990); *Federal Sav. and Loan Ins. Corp. v. Stefanoff*, 106 B.R. 251 (Bankr. N.D. Okla. 1989); *Gateway Potato Sales v. G.B. Inv. Co.*, 822 P.2d 490 (Ariz. Ct. App. 1991).

316. 567 So. 2d 1335 (Ala. 1990).

317. *Id.* at 1337.

318. *Id.*

319. 106 B.R. 251 (Bankr. N.D. Okla. 1989).

320. *Id.*

estate for which they had received a loan, was \$1.116 million.<sup>321</sup> The price had been inflated by the use of an intermediary buyer and seller, or straw man.<sup>322</sup> The court held that “a limited partner who actively participates in perpetrating a fraud, false pretenses, or the making of a false representation under [the bankruptcy law], becomes personally indebted for the money obtained by the partnership thereby.”<sup>323</sup> Stefanoff’s fraudulent conduct appears to be the primary reason that the court held him personally liable, although it also found that he took part in the control of the business to such an extent as to make him liable as a general partner.<sup>324</sup> It is not clear from the opinion whether the court meant that the limited partner was responsible for the false statement if the general partner was a fellow conspirator, or if there was other evidence of control of the business by the limited partner.

The issue of control by limited partners was raised in *Gateway Potato Sales v. G.B. Investment Co.*<sup>325</sup> Arizona adopted the 1976 version of RULPA.<sup>326</sup> The first sentence of section 121-303(a) of NYRLPA is the same as the language of the Arizona statute:

Except as provided in subsection (d) . . . a limited partner is not liable for the contractual obligations and other liabilities of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business.<sup>327</sup>

The next sentence of NYRLPA continues: “However, if the limited partner does participate in the control of the business, he is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner.”<sup>328</sup> This is the so called “reasonable belief” standard.

321. *Id.* at 255.

322. *Id.* n.1.

323. *Id.* at 256 (citing *Levy v. Runnells*, 66 B.R. 949, 960 (Bankr. E.D. Va. 1986)).

324. *Id.*

325. 822 P.2d 490 (Ariz. Ct. App. 1991)

326. RULPA §§ 101 to 1106, 6 U.L.A. 335-486 (West Supp. 1993).

327. NYRLPA § 121-303(a); ARIZ. REV. STAT. ANN. § 29-319(a) (1989).

328. NYRLPA § 121-303(a).

The language of the second sentence of the Arizona law, which the court was called upon to interpret, reads as follows: "However, if the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner he is liable only to persons who transact business with the limited partnership with actual knowledge of his participation in control."<sup>329</sup> The plaintiffs in the Arizona case sought to hold the limited partners liable for the debts of the limited partnership because they had exercised control that was "substantially the same" as a general partner.<sup>330</sup>

The defendants contended that it was necessary under section 29-319(a) for the plaintiffs to have had personal contact with the limited partners before they could be held liable to the creditors.<sup>331</sup> The Arizona court held that it was not necessary under the Arizona statute for the creditors to have had contact with the limited partners, to hold them liable for the limited partnership obligations, if they had exercised control that was substantially the same as the exercise of the powers of a general partner.<sup>332</sup>

The evidence in the case showed that the vice-president of the corporate limited partner and another employee of the corporation were at the offices of the limited partnership daily.<sup>333</sup> In addition, they made the general partner obtain their approval for all business decisions, including their approval of, and signature on, checks issued by the partnership.<sup>334</sup>

NYRLPA does not have the "substantially the same" language of the Arizona statute, but rather the requirement of reasonable reliance, before a limited partner may be held liable to creditors.<sup>335</sup> However, on the facts of *Gateway*, New York courts would probably find control by the limited partner based on the day to day operational control and control of finances if there was reliance upon the conduct of the limited partner sufficient to cause a reasonable belief that he was a general partner.

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329. ARIZ. REV. STAT. ANN. § 29-319(a).

330. *Gateway*, 822 P.2d at 491; see ARIZ. REV. STAT. ANN. § 29-319(a).

331. *Gateway*, 822 P.2d at 497.

332. *Id.*

333. *Id.* at 492 n.1.

334. *Id.*

335. NYRLPA § 121-303(a).

Although there are only three cases on point under RULPA and none under the Delaware Act, examination of a few cases under the old ULPA may help predict the future decisions under the new Act. In *Delaney v. Fidelity Lease Ltd.*,<sup>336</sup> the court held that limited partners who control the limited partnership as officers, directors and shareholders of the corporate general partners, are liable as general partners.<sup>337</sup> However, at the time the case was brought, it apparently was undecided in Texas whether a limited partnership could be formed with a corporation as a general partner.<sup>338</sup>

Conversely, *Frigidaire Sales Corp. v. Union Properties, Inc.*<sup>339</sup> held that limited partners did not incur liability as general partners solely because they are officers, directors or shareholders of the corporate general partner.<sup>340</sup> The Washington Supreme Court found no liability even though the limited partners controlled the corporate partner, Union Properties, and through their control of Union Properties exercised day to day control and management of the limited partnership.<sup>341</sup>

In 1990, the New York Court of Appeals held in *Gonzales v. Chalpin*,<sup>342</sup> under NYULPA, a limited partner who was the president and sole stockholder of the corporate general partner, was liable as a general partner on a debt of the partnership because he acted as an individual in the day by day management of the business and signed checks of the corporation as an individual without indicating that he signed as a representative of the corporation.<sup>343</sup> Under NYRLPA, a limited partner who is an officer, director or shareholder of a corporate general partner, should not by that fact alone be held liable as a general partner. Given the new requirement that a limited partner is liable only to persons who act in reliance, based upon the limited partner's conduct, that he is a general partner, it will be difficult to find him liable just because he is an officer of the corporate general partner.

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336. 526 S.W.2d 543 (Tex. 1975).

337. *Id.* at 545-46.

338. *See id.* at 546.

339. 562 P.2d 244 (Wash. 1977).

340. *Id.* at 247.

341. *Id.*

342. 77 N.Y.2d 74, 565 N.E.2d 1253, 564 N.Y.S.2d 702 (1990).

343. 77 N.Y.2d at 76-77, 565 N.E.2d at 1254-55, 564 N.Y.S.2d at 704.



One of the leading cases under the old ULPA, *Holzman v. DeEscamilla*,<sup>344</sup> held limited partners liable on the debt of the partnership because they exercised control over the business.<sup>345</sup> The limited partners overruled the general partner on the crops to be planted on the farm and effectively controlled the finances because the partnership agreement required the signature of one of the limited partners on the firm's checks.<sup>346</sup> These actions were enough to constitute control in the view of the court.<sup>347</sup>

The other leading case decided under ULPA, *Plasteel Products Corp. v. Helman*,<sup>348</sup> had a more complicated partnership agreement and resulted in a summary judgment for some of the limited partner defendants.<sup>349</sup> The plaintiff corporation contended that the limited partners were liable as general partners because they exercised control of the partnership by selecting Paul Sriberg as general sales manager and by providing in the partnership agreement for control of the business's finances by Sriberg and the general partner.<sup>350</sup> The agreement also provided that Sriberg could be discharged at any time by the general partner.<sup>351</sup> The court held that "the power . . . to discharge Sriberg and terminate any apparent control clearly distinguishes this case from *Holzman v. DeEscamilla*."<sup>352</sup> The defendant limited partners were held not liable as general partners.<sup>353</sup> Although it is unclear, the same result would probably be reached under NYRLPA.

Some commentators' views on what constitutes control by a limited partner may help in understanding the new Act. Craig B. Smith, in his article on The Delaware Revised Uniform Limited Partnership Act,<sup>354</sup> states that a limited partner may not deal directly with third parties on behalf of the partnership's

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344. 195 P.2d 833 (Cal. Dist. Ct. App. 1948).

345. *Id.* at 834.

346. *Id.*

347. *Id.*

348. 271 F.2d 354 (1st Cir. 1959).

349. *Id.* at 355-56.

350. *Id.* at 356.

351. *Id.*

352. *Id.*

353. *Id.*

354. See Smith, *supra* note 310, at 30-31.

business.<sup>355</sup> Robert M. Unger, in his memorandum on NYRLPA,<sup>356</sup> prepared for the New York State Bar Association's Seminar on The Revised Limited Partnership Act, stated that "day-to-day management functions, signing checks, tax returns, employment agreements, and exercising the essential functions of a manager," are likely areas of concern on the issue of control of the limited partnership.<sup>357</sup> NYRLPA does not clear up all questions that arose under NYULPA, but the lack of cases on control under the Delaware Act and RULPA, indicates that this might not be a major problem in New York under the revised statute.

## XV. Conclusion

The legislature has finally passed a progressive statute, which contains the best features of RULPA and additional modifications based on the statutes of other states, particularly Delaware. NYULPA was sufficient for small limited partnerships, but was inadequate for large publicly held limited partnerships.<sup>358</sup> Under NYRLPA, the names of limited partners and their contributions no longer must be listed in the certificate of limited partnership.<sup>359</sup> NYRLPA also omits references to limited partners under events requiring amendment of the certificate.<sup>360</sup> This is the most important and advantageous change in the law for limited partnerships filing in New York.

NYRLPA makes a radical change to New York partnership law regarding limited partners' liability to third parties. Limited partners are now liable only to those persons who do business with the partnership reasonably believing that the limited partner is a general partner.<sup>361</sup> While NYRLPA retains the provision from NYULPA that limited partners who participate in the control of the partnership are liable as general partners,<sup>362</sup> NYRLPA adds a list of "safe harbor" activities in which a lim-

355. *Id.* at 31.

356. Memorandum from Robert M. Unger to The New York State Bar Association (Nov. 1, 1991) (on file with the *Pace Law Review*).

357. *See* Smith, *supra* note 310, at 33.

358. *See supra* notes 68-69 and accompanying text.

359. *See supra* note 42 and accompanying text.

360. *See supra* note 83 and accompanying text.

361. *See supra* note 107 and accompanying text.

362. *See supra* note 106 and accompanying text.

ited partner may participate without being deemed to have participated in the control of the partnership.<sup>363</sup> Under NYULPA, it was unclear what activities by a limited partner constituted control, and could, therefore, result in a limited partner being held liable as a general partner.<sup>364</sup> Although NYRLPA does not define what *does* constitute control, it provides guidance as to what is *not* control. NYRLPA provisions for publication are burdensome, making New York a less attractive jurisdiction to create a partnership, compared to Delaware.<sup>365</sup> However, the new requirement for publication imposed on foreign limited partnerships seeking authority to do business in New York may equalize the burden, and limit organization of limited partnerships from New York in other states.<sup>366</sup>

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363. *See supra* notes 108-12 and accompanying text.

364. *See supra* note 111 and accompanying text.

365. *See supra* notes 69-76 and accompanying text.

366. *See supra* note 77 and accompanying text.