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COMMENT

THE "CONTROL" TEST FOR LIMITED PARTNERSHIPS

Alan L. Feld *

Under the Uniform Limited Partnership Act, a limited partner may become generally liable if "in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business." Although the Act is now over fifty years old, no satisfactory standard of "control" has been enunciated, and no definition of the "rights and powers" of a limited partner has been forthcoming. Mr. Feld examines the ambiguities in the statutory language and the dilemma in which they place counsel seeking to advise his clients, and concludes that the Act is due for an overhaul.

The limited partnership is often the most desirable form in which to conduct a business enterprise. Differences in income tax treatment of partnerships and corporations — for example, the pass-through to the partners of partnership gains or losses without change of character [1] as opposed to the double taxation of corporate income which is paid out as dividends — may make the corporate form unattractive. The availability of the Subchapter S election has obviated this distinction in many cases, but certainly not in all.[2] On the other hand, one or more investors in the enterprise may wish to protect assets not used in the enterprise from nontax liabilities arising in connection with it. A limited partnership permits such limitation of liability if certain conditions are met and thus can provide some investors with both the tax treatment of a partnership and the insulation from liability usually associated with a corporation.

Statutory rather than common law development has shaped limited partnerships in the United States.[3] Forty-three states

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[1] *See* INT. REV. CODE OF 1954, §§ 702(a), (b).

[2] *See* INT. REV. CODE OF 1954, §§ 1371–78. The election to be taxed under Subchapter S cannot be made under a variety of circumstances, for example, if there are more than ten shareholders. The election may be terminated upon the occurrence of certain disqualifying acts, such as a transfer of stock to a trust. The election is ineffective for any taxable year in which more than 20% of the corporation's gross receipts is passive investment income. Finally, the election may be ineffective for state tax purposes.

[3] For a discussion of the history of limited partnerships, see F. TROUBAT, THE

and the District of Columbia have statutes in effect which are based on the Uniform Limited Partnership Act (ULPA). Under the Act, a limited partnership is formed when a certificate is filed disclosing, among other things, the names of all partners, the nature and amount of the limited partners' contributions, and the share of profits or other compensation to be paid to the limited partners.[4] The ULPA vests control of the partnership in the general partners, stating that they "have all the rights and powers . . . of a partner in a partnership without limited partners," but it goes on to state that the general partners have "no authority," without the written consent or ratification of the limited partners, to do any of seven enumerated acts, including any act in contravention of the certificate or any act which would make it "impossible to carry on the ordinary business of the partnership."[5] The Act also requires that all partners, general and limited, execute any amendments to the certificate,[6] and it further provides that the certificate "shall be amended" upon ten contingencies, including a change in the character of the business or when the members desire to have the certificate "accurately represent" their agreement.[7]

Aside from the protection granted by these provisions, the ULPA gives only limited rights to the limited partners. Such partners are entitled to have the partnership books kept at the partnership's principal place of business, to inspect and copy the books, to demand information on "all things affecting the partnership," to demand a formal account of partnership affairs "whenever circumstances render it just and reasonable," to have dissolution by judicial decree, to receive a share in the profits of the partnership or other income, and to withdraw their contribu-

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LAW OF COMMANDATARY AND LIMITED PARTNERSHIP IN THE UNITED STATES 17–112 (1953); Gladdin & Tribble, *Status of a Limited Partner: A Comparative Treatment of Georgia and New York Law,* 11 GA. B.J. 176 (1948).

[4] ULPA § 2. Sometimes publication of this information is also required. *See, e.g.,* N.Y. PARTNERSHIP LAW § 91 (McKinney 1944).

[5] ULPA § 9. The other acts by general partners which require the consent or ratification of the limited partners are: to confess a judgment against the partnership; to possess or assign rights in specific partnership property for nonpartnership purposes; to admit a new general partner; to admit a new limited partner, unless permitted in the certificate; or to continue the business with partnership property on the death, retirement, or insanity of a general partner, unless permitted in the certificate.

[6] ULPA § 25(1)(b).

[7] ULPA § 24(2). The other contingencies are: a change in the partnership name or in the character or amount of a limited partner's contribution; substitution or addition of a limited partner; continuation of the business despite the death, retirement, or insanity of a general partner; a false or erroneous statement in the certificate; a change in the term of the partnership or of the date for return of a contribution; or fixing such date when none was specified.

tion to the partnership.[8] The statute also permits a limited partner to make loans to the partnership[9] and to assign his interest.[10]

A limited partner is not personally liable for partnership debts.[11] If his name appears in the name of the partnership in violation of the statute, however, he will be liable to partnership creditors who extend credit to the partnership without actual knowledge that the limited partner is not a general partner.[12] He may also become liable if the partnership has not substantially complied in good faith with the filing and publication requirements of the statute (in which case no limited partnership would have been formed)[13] or if the certificate of limited partnership contains a false statement which the limited partner knew to be false and on which the creditor relied to his detriment.[14] Finally, the limited partner may become personally liable if "in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."[15] All of these tests except the last are sufficiently specific that the limited partner can easily determine whether he has complied. The control test, on the other hand, presents substantial interpretative problems in cases falling between the extremes of the wholly passive investor and the partner who manages the business on a day-to-day basis.

A hypothetical case may help to focus the problem. Suppose a group of individuals wishes to invest venture capital. Two Investing Partners will contribute ninety percent of the capital and receive eighty percent of partnership profits and losses. The remaining twenty percent interest in profits and losses is for the

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[8] ULPA § 10. The limited partner's rights to share in profits and to a return of his contribution are elaborated in ULPA §§ 15, 16.

[9] ULPA § 13. The limited partner may not receive partnership property as collateral.

[10] ULPA § 19. An assignee does not automatically become substituted as a limited partner unless the certificate so provides or all the remaining partners consent.

[11] ULPA § 1. It should be pointed out that the extent to which a limited partner may be held liable, even if his liability is limited, is far from clear. Does liability extend to all property of the limited partner held by the partnership? If so, he may be liable not only in the amount of his initial contribution but in addition for realized profits not withdrawn from the partnership, or even possibly for open accounts of the limited partner with the partnership.

[12] ULPA § 5.

[13] ULPA § 2(2). However, under ULPA § 11, a person erroneously believing himself to be a limited partner will not be treated as a general partner by reason of his exercise of the rights of a limited partner if he renounces his interest in income from the partnership upon ascertaining the mistake.

[14] ULPA § 6.

[15] ULPA § 7.

account of Managing Partners, who will contribute their services and the other ten percent of the partnership capital. Managing Partners, who have substantial assets outside the partnership which are reachable by partnership creditors, will be personally liable for obligations of the partnership. They will supervise and direct the partnership's investments by majority decision.

One of the Investing Partners, Entrepreneur, is to make his contribution to the capital of the partnership in marketable stock of a corporation controlled by him (the Contributed Stock). It is intended that the partnership will borrow against the Contributed Stock, using the funds for partnership investments. The partners also agree that gain or loss on the Contributed Stock will affect only the account of Entrepreneur, since any appreciation or depreciation in the value of the Contributed Stock will be unrelated to the partnership's investment activities.

Investing Partners want to limit their liability in connection with the enterprise. They will not participate in managing the partnership's ordinary investment activities, leaving to Managing Partners the choice of ventures in which the partnership will invest, the supervision of these investments, and the determination of when to liquidate them. However, as a practical matter, it is unlikely that major commitments of capital would be made without informing and perhaps consulting with Investing Partners. In addition, Investing Partners would like to have certain powers included in the partnership articles to safeguard their interests in the partnership: the power to limit the amount of salaries paid to Managing Partners and to restrict other partnership distributions; the power to prevent Managing Partners from becoming partners or directors in other businesses; the power to prevent Managing Partners from acting as accommodation endorsers or guarantors of the commercial instruments of others; and in the case of Entrepreneur, the power to prevent the partnership from selling, disposing of, or unduly encumbering the Contributed Stock.

These powers must pass the control test if they are not to expose Investing Partners to liability as general partners. But no relevant source — the statute, the Commissioners' notes explaining the ULPA, or the cases — gives precise guidelines for determining the nature and quantity of activity which violates the control test. Counsel asked to advise Investing Partners which powers they may have and which they must forego is therefore left in something of a quandary.

It is clear that if the limited partner makes the day-to-day decisions of the partnership or performs the acts normally associated with the decisionmaking function, he will assuredly be

deemed to have taken part in the control of the business. For example, in *Holzman v. De Escamilla*,[16] where the partnership operated a farm, the two limited partners determined, over the general partner's opposition, what crops the farm would raise. The general partner did the actual farming at first, but the limited partners later substituted another as manager of the farm. Money was withdrawn from the partnership account primarily by checks signed by the limited partners. Checks by the general partner required the countersignature of one of the limited partners. The court had little difficulty in holding the limited partners liable as general partners. Cases such as *Holzman*[17] provide scant guidance to counsel for Investing Partners because the partners in question are so clearly responsible for the enterprise that the courts have not found it necessary to articulate the nature of the control which makes a partner generally liable.

Apart from clear cases of this type, there appear to be only three cases in which the courts have had to confront the issue of what and how much a limited partner may do with impunity,[18] and in none have they managed satisfactory descriptions of the standards by which to judge the partners' activities. In *Rathke v. Griffith*[19] the court found no violation of the control requirement despite some documentary indicia of involvement by the limited partner in the partnership's affairs. Under the bylaws of the partnership, the limited partner was to be one of three directors to run the enterprise. The evidence showed, however, that the limited partner never did serve as a director, and the

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[16] 86 Cal. App. 2d 858, 195 P.2d 833 (Dist. Ct. App. 1948).

[17] *E.g.*, Filesi v. United States, 352 F.2d 339 (4th Cir. 1965) (dictum) (purported limited partner's open and public part in management of partnership created tax liability); Plasteel Prods. Corp. v. Eisenberg, 170 F. Supp. 100 (D. Mass.) (alternative holding), *aff'd on other grounds sub nom.*, Plasteel Prods. Corp. v. Helman, 271 F.2d 354 (1st Cir. 1959) (trust device cannot be used to combine control and limited liability); Bergeson v. Life Ins. Corp. of America, 170 F. Supp. 150, 158–59 (D. Utah 1958) (alternative holding), *modified*, 265 F.2d 227 (10th Cir.), *cert. denied*, 360 U.S. 932 (1959) (participation in control to extent of becoming director of partnership-owned corporation created general liability).

[18] Numerous recent cases, culminating in three decisions of the New York Court of Appeals — Lichtyger v. Franchard Corp., 18 N.Y.2d 528, 277 N.Y.S.2d 377, 223 N.E.2d 869 (1966); Riviera Cong. Associates v. Yassky, 18 N.Y.2d 540, 277 N.Y.S.2d 386, 223 N.E.2d 876 (1966); Sloan v. Clark, 18 N.Y.2d 570, 277 N.Y.S.2d 411, 223 N.E.2d 893 (1966) — have been concerned with the right of a limited partner to bring suit in various capacities. Presumably where the limited partner is entitled to bring suit he may do so without violating the control test. The lower court opinion in Riviera Cong. Associates v. Yassky, 25 App. Div. 2d 291, 268 N.Y.S.2d 854 (1966), did state in dictum that the limited partner by bringing suit in the name of the partnership lost his limited status, but the courts have not been presented with the issue directly.

[19] 36 Wash. 2d 394, 218 P.2d 757 (1950).

court regarded the actual practice as controlling. In addition, two warranty deeds of property to the partnership were executed in the names of all the partners, including the limited partner, and the limited partner along with the general partner executed certain documents, including a power of attorney, an agreement with a bank, a contract, and leases. (The precise contents of these documents were not revealed in the court's opinion.) Noting that the creditor neither relied on these documents nor apparently even knew of them, the court held that the limited partner's activities were not such as to run afoul of the control test.

In *Silvola v. Rowlett*,[20] the limited partner was employed by the partnership as an auto repair shop foreman. He purchased parts as necessary without consulting the general partner. However, he could not extend credit without the prior approval of the general partner, unless the limited partner insured the credit of the customer. The general partner had full control over the partnership bank account. The partnership's accountant, who had actual knowledge of the limited partnership agreement, sued the limited partner for services rendered to the partnership. The Supreme Court of Colorado held for the defendant.

Finally, in *Grainger v. Antoyan*,[21] the limited partner was employed as sales manager for an automobile distributorship. He had obtained his interest in the business by making a fifty thousand dollar loan to the partnership in return for a chattel mortgage and a limited partnership interest to the extent of fifty thousand dollars. He supervised other sales people, but he did not have power to hire or fire them. He ordered new cars only on the general partner's instructions. The limited partner did not fix the selling price for cars or determine the trade-in values on used cars. Although the limited partner had the power to cosign checks, it was understood that such power was to be used only as a convenience to the general partner, and in fact it was only so exercised. The partnership later conveyed its assets to the limited partner. The Supreme Court of California held that on these facts the limited partner was not liable as a general partner.

These decisions do not attempt to state a general standard for determining when the control test is met nor to articulate the policy underlying the statute. Their holdings seem limited to the specific fact patterns considered and are of little use in future cases or to counsel at the planning stage. Even activities specifically passed on by the courts may not be permitted in all

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[20] 129 Colo. 522, 272 P.2d 287 (1954) (en banc).

[21] 48 Cal. 2d 805, 313 P.2d 848 (1957), *noted in* 56 MICH. L. REV. 285 (1957).

cases. Thus, some cases would permit the limited partner to "advise" the general partners.[22] But it is not at all clear that Investing Partners may do so without fear of liability in view of the weight their advice is likely to carry, both because of the size of their investment and because they are "carrying" Managing Partners' interests. The determination of control is a factual one and this relationship may, as a practical matter, give any "advice" the color of a command in the partnership. On the other hand, since formal decisionmaking power as to any particular investment decision is vested in Managing Partners, the control test may not be violated in such cases. Certainly in the absence of any standard for determining control, counsel could not confidently permit a regular practice of "advice."

There are at least three standards which might be used to determine when the limited partner "takes part in the control of the business." One possibility, opening the limited partner up to the greatest exposure, is that any action by the limited partner which affects the partnership and is not expressly permitted by statute will expose him to general liability unless the act is purely ministerial.[23] Under this reading, exercise of any of the powers Investing Partners desire would expose them to general liability. This construction has little to recommend it. It adopts a viewpoint which, according to the Commissioners' notes, the ULPA sought to reject: that there is a presumption against limited liability which cannot be overcome simply by a showing that no particular policy is advanced by holding the partner generally liable.[24] No public policy can be discerned in indiscriminately holding a limited partner generally liable for all activities not expressly authorized by the statute.

A second possible standard would involve reading the control

[22] *See, e.g.*, Plasteel Prods. Corp. v. Helman, 271 F.2d 354 (1st Cir. 1959). The result may be an echo of earlier statutes which specifically authorized the limited partner to give advice. *See* p. 1478 *infra*.

[23] In addition, an activity over which the limited partner has no effective control should not expose him to general liability if it is an isolated instance. For example, despite partnership representations as to the status of a limited partner, a third party may deed property to the partnership and name the limited partner as a grantee, or checks drawn to the partnership or insurance policies running in its favor may name the limited partner as a payee or beneficiary. *Cf.* Katz, *A Common Fallacy Respecting Limited Partnerships*, 20 J. ST. B. CALIF. 105 (1945). Receipt of the property by the partnership, endorsement of the checks by all the named payees, or receipt by the partnership of payment under the insurance policy should not of itself constitute taking part in control of the business by the limited partner. However, such activities, if not isolated, would be relevant in determining the existence of a pattern in which the limited partner was held out as a general partner.

[24] *See* Commissioners' Note to ULPA § 1.

test as a substantial reenactment of the analogous provisions in the prior limited partnership statutes.[25] A predecessor statute in New York,[26] for example, provided that "the general partners only may transact the business of the partnership . . . . [A] special partner may not sign for the partnership nor bind the same, nor transact any business on account of the partnership . . . ." The statute then spelled out certain rights of the limited partner — chiefly to keep an eye on the partnership "and advise as to its management" and to enter into transactions with the partnership — and concluded by stating that "[i]f a special partner interfere contrary to these provisions, he shall be deemed and be liable as a general partner." If this standard were adopted, the limited partner would not be generally liable so long as he does not do anything which would affect the partnership's relations to third parties; he may enter into whatever other arrangements with the general partners he may wish.[27] Stated in another way, so long as the limited partner's powers in no way affect the rights and powers of third parties, they should be respected as the conditions under which he agreed to risk his capital unless there is an overriding reason to the contrary. On this basis, Investing Partners could control the salaries of Managing Partners but probably could not restrict the directorial or other activities of Managing Partners or prevent the disposition of the Contributed Stock.

This standard has considerably more to recommend it than did the first standard. It gives the limited partner much more leeway in the scope of the powers which he can reserve, while at the same time it may extend some protection to creditors who lend money to the partnership in reliance on the managerial abilities of the general partners and are unaware of the power of the limited partner to interfere with their discretion. However, it is open to question whether even the pre-ULPA statutes were as restrictive as this test would indicate. The few decisions under early statutes which actually held a limited partner generally liable because of his interference in the conduct of the business did not involve relatively marginal powers, like those which Investing Partners are seeking, but dealt with limited partners who assumed detailed control over the partnership's day-to-day activities, as by appointing the controlling directors of the part-

[25] *Cf.* Comment, *The Limited Partnership*, 45 YALE L.J. 895, 902–03 (1936).

[26] N.Y. Partnership Law, art. 8, ch. 408, § 97, [1919] N.Y. Laws 1184–85.

[27] In Lanier v. Bowdoin, 282 N.Y. 32, 38, 24 N.E.2d 732, 735 (1939), the Court of Appeals said that the partners may, in the absence of a statutory bar, "include in the partnership articles any agreement they wish" among themselves. The case did not, however, deal with the rights of third parties and therefore does not clarify the effect of various agreements on the limitation of liability.

nership[28] or transferring all the assets of the partnership to themselves.[29] Moreover, the ULPA appears to be an attempt to move away from bright-line distinctions, such as that possibly embodied in the prior law. The Commissioners' notes suggest that some degree of control is compatible with limited liability.[30] Finally, this test seems incompatible with the Commissioners' emphasis on the presumption in favor of limited liability in the absence of a reason for holding the partner generally liable. It is difficult to see how Investing Partners' right to prohibit Managing Partners from acting as accommodation makers on others' notes, for example, could be sufficiently serious to a creditor to justify making an otherwise limited partner generally liable.

A third construction of the control test, and the most persuasive, is to measure it by the most logical rationale for holding the limited partner liable: to prevent third parties from mistakenly assuming that the limited partner is a general partner and relying on his general liability. This rationale is suggested by the Commissioners' notes and is repeated in an article by one of the draftsmen.[31] Under this view of the control test, only activities which conceivably could induce reasonable reliance, such as supervision of the partnership's day-to-day activities, should produce general liability.[32] Consequently, all of the powers which Investing Partners would wish to have should be permissible without incurring liability.

A possible objection to limiting the control requirement to the reliance standard is based on the fact that the ULPA refers explicitly to reliance in other sections. If the draftsmen of the control test had meant to make it a reliance test, the argument could go, they would have used the more explicit language employed elsewhere. Thus, section 5 of the ULPA holds a limited

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[28] Richardson v. Hogg, 38 Pa. 153, 156 (1861) (alternative holding); Strang v. Thomas, 114 Wis. 599, 91 N.W. 237 (1902).

[29] First Nat'l Bank v. Whitney, 4 Lans. 34 (Sup. Ct. 1871), *aff'd mem.*, 53 N.Y. 627 (1873).

[30] Commissioners' Note to ULPA § 1:

> No public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business; provided creditors have no reason to believe at the times their credits were extended that such person was so bound.

[31] *Id.*; Lewis, *The Uniform Limited Partnership Act*, 65 U. PA. L. REV. 715, 723 (1917).

[32] One comment discerns an increased emphasis on creditor reliance as one factor in determining control, stating that the decisions imply that reliance is an "added condition" of the control test. 56 MICH. L. REV. 285, 286-87 n.13 (1957). The comment bases this conclusion on the specific findings of no reliance made in opinions approving the limitation on liability when the challenge is based on the control test.

partner liable as a general partner if his name wrongfully appears in the partnership name, but only to creditors who extend credit to the partnership without actual knowledge that he is a limited partner; and section 6 establishes liability by any partner responsible for a false statement in the certificate to anyone "who suffers loss by reliance" on the statement. The most realistic answer to this argument is that the ULPA is the product of a less rigorous tradition of draftsmanship, which saw no need to spell out the precise meaning of the control test. Moreover, the difference in language might be given meaning in that lack of reliance under sections 5 and 6 is a defense to the limited partner: if he can show actual knowledge by the creditor under section 5 or no reliance by him under section 6, no liability will arise even though the limited partner's act was in violation of the statute. Under the control test, the omission of express reference to reliance might have been intended to rule out the defense of nonreliance by the particular plaintiff, as long as the partner engaged in conduct which could have induced reasonable reliance. In this view, the control test depends on notions of estoppel, much as the activities which may make a creditor generally liable to other creditors of the partnership are determined.[33] There is considerable justification for different scopes of liability under the control test and under sections 5 and 6. Liability under the latter two sections arises from a single act: holding out in name or in public statement. The determination of fact, whether the creditor knew of the misrepresentation and was misled by it, can be made without too great difficulty. On the other hand, the determination whether a particular plaintiff relied on the limited partner's role in the control of the business may require an inquiry into the entire course of the parties' conduct, perhaps over a considerable period of time. It might reasonably be regarded as unfair to subject the creditor to this burden. It may be, therefore, that reliance under sections 5 and 6 serves the function of limiting the class to which the limited partner will be liable, whereas in the control test it defines the liability-creating activities themselves.

Even if a court would construe the control test to forbid the rights sought by Investing Partners, they may be able to retain their limited liability if they can bring themselves within the exception to the control test for activities of the limited partner which are in the exercise of his "rights and powers as a limited partner." No cases have construed this exception. Like the control test itself, the exception may be construed with greater or less flexibility. The "rights and powers" of a limited partner

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[33] *Cf.* J. CRANE, HANDBOOK OF THE LAW OF PARTNERSHIP 125–28 (1938).

include at least those enumerated by the ULPA under the caption "rights of a limited partner," namely, to examine the books of the partnership, to call for an accounting, and to demand dissolution. They probably also include the rights to recover his capital, to receive a return on his capital, to lend money to the partnership, and to assign his partnership interest, all of which are guaranteed in other sections of the ULPA. Such a severely limited construction of the exception would support an argument for the narrowest possible reading of the control test itself, on the ground that if the ULPA draftsmen needed to make explicit the exclusion of these basic rights from the control test, virtually any other act not expressly mentioned must make the partner liable.[34]

A more sensible view of the exception is that it also includes rights and powers implicitly granted to the limited partner by the requirement that before the general partners may take certain actions, they must obtain his consent.[35] These requirements were probably made out of fairness to the limited partner, to prevent too radical a change in the character or management of his investment. The veto thus granted over these acts in all reason should be included within the exception to the control test; presumably the ULPA did not intend that the limited partner could withhold his consent in these cases only at the peril of loss of the limitation on his liability. If so, Entrepreneur should be able to prevent the disposition of the Contributed Stock as an act which would make it impossible to carry on the ordinary business of the partnership.[36] He might arguably be able to limit the outside activities of Managing Partners by the same reasoning. This construction of the exception is more compatible with the broad construction of the control test, since the exercise of the rights and powers of a limited partner could then be considered to be activities which as a matter of law could not induce reasonable reliance by a prospective creditor on the limited partner's liability.

A third possible construction of "rights and powers as a

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[34] However, it is hard to see how any rational interpretation of the control test could prohibit actions such as inspecting the partnership books and the other rights explicitly guaranteed.

[35] *See* p. 1472 *supra*.

[36] The "ordinary business" of the partnership is another phrase not defined in the statute. It is not clear whether this is the same as the "business" of the partnership, to which the ULPA also refers. Presumably, the "ordinary business" of the partnership — and therefore what constitutes a change in it — is a factual determination in which the partners' characterization in the certificate would be entitled to substantial weight. Thus, the certificate could describe the ordinary business of the partnership as the investment of contributed funds and funds borrowed against the Contributed Stock, but not to trade in the Contributed Stock.

limited partner" would build on the ULPA's denial of authority to general partners to do anything in contravention of the certificate and the ULPA's requirement that the limited partner's consent be obtained before the certificate is amended.[37] By implication, the rights and powers of the limited partner then should include any accorded him in the partnership certificate. The practical breadth of this construction depends on what powers the certificate may give to a limited partner without violating the control test. Certainly the certificate could not authorize him to act for the partnership in such a way as to lead third parties to rely on the limited partner's general credit; this limitation derives from the basic policy of the Act.

The statute does not expressly limit the contents of the certificate, but section 2(1)(a) does provide that the certificate "shall state" some fourteen different items. This might be understood as the minimum information required in the certificate or, instead, as the maximum which will be treated as legitimately within the partnership certificate.[38] The latter reading of the section is made less plausible by the statute's authorization of certificate amendments so as to make changes desired by the members in order to have the certificate accurately represent their agreement. This suggests that amendment is permissible to include anything regarded as germane to the limited partnership, whether or not included in the list in section 2(1)(a). If such matters are includable by amendment, it makes no sense to exclude them originally.

It seems unlikely, however, that the exception should be construed so broadly. If this construction is adopted in connection with the equation of the control test to a reliance test, as I have advocated, then the control test appears to be an exception to the "exercise of the rights and powers of a limited partner." The language of the statute, however, clearly contemplates the reverse situation. If the broad construction of the exception is adopted in connection with a narrow construction of the control test, then the effect is to impose general liability on the limited partner if the certificate is silent as to the power he exercises (by hypothesis one upon which it is unlikely that third parties

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[37] *See* p. 1472 *supra*.

[38] The N.Y. Stock Corporation Law § 5, ch. 908, § 1, [1934] N.Y. Laws Extra Sess. 1853–54, provided that the certificate of incorporation "shall state" some 12 items. The successor provision, N.Y. BUS. CORP. LAW § 402 (McKinney 1963), provides that the certificate "shall set forth" some nine items and adds that it may set forth additional matters not inconsistent with the statute. The new provision probably codifies rather than changes the practice under the old law. By analogy, the ULPA provision also should be read to allow additional matter germane to the certificate.

would rely to their detriment) and limited liability if the certificate authorizes the power's exercise. This puts a considerable premium on the foresight of counsel in drafting the certificate. While planning by counsel occasionally is well rewarded, such disparity in treatment here can be justified only if the certificate is regarded as effective notice to potential creditors. If in practice it is not, such disparity is unwarranted.

It is apparent that considerable uncertainty exists in construing both parts of the control test. From the point of view of counsel, such uncertainty requires that, if limited liability is more important to Investing Partners than the business reasons for exercising certain powers, the risk of a narrow reading of the statute is too great to permit Investing Partners to have those powers. If insulation against liability need not be absolute, the client may wish to run a risk in return for protection of his interest in the partnership by the desired power. This decision, in turn, may depend on the effectiveness of other available techniques for limiting liability. Thus, if the partnership's liabilities are likely to arise almost entirely by contract, limited liability can be achieved by writing it into the partnership's agreements. If the partnership will be open to possible tort liability, it may be able to insure against it. On the other hand, insurance may be expensive, or it may not be possible to limit the liability.

If limited liability is desirable but not essential, the inclusion of particular powers could be thought safer than others. Thus, the power to limit the salaries of Managing Partners is different in kind from the others, in that it is a reasonable measure to protect Investing Partners against undue withdrawals which would endanger their investment. Even a court construing the control test narrowly might be inclined to regard this power as not creating general liability. In addition, the form in which the powers are cast may have significance. The partnership agreement, for example, could prevent the partnership from selling or otherwise disposing of or unduly encumbering the Contributed Stock or any property initially contributed. Such a prohibition could have a practical effect similar to an explicit grant of power to Entrepreneur, since the restriction could be relaxed by simple amendment of the partnership agreement, an amendment which would require his approval (although, of course, it would also require the approval of all other partners). A court might look through the form of the prohibition as in substance creating a power in Entrepreneur, but there is little incentive for a court to do so where the exercise of the "power" did not induce reliance by third parties and no fundamental policy would be violated

From the foregoing it appears that, after more than fifty years, the ULPA is due for reexamination. The relative paucity of litigation should not be taken as demonstrating that it has worked smoothly; caution by counsel and relative unfamiliarity with the limited partnership form have accounted in part for the small number of cases. Although there are several problem areas,[39] the focus of any such review should be the control test.

[39] *See* notes 11, 18, 27, 36, & 38 *supra*.