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H. 607: OHIO ADOPTS THE REVISED UNIFORM LIMITED PARTNERSHIP ACT

I. INTRODUCTION

In 1984, the Ohio General Assembly adopted Amended Substitute House Bill No. 607,¹ becoming one of a growing number of states² to have updated their respective versions of the Uniform Limited Partnership Act (ULPA)³ with a modified version of the Revised Uniform Limited Partnership Act (Revised ULPA).⁴ The original ULPA was adopted by the National Conference of Commissioners on Uniform State Laws in 1916,⁵ but it was not until 1957 that Ohio substantially incorporated the ULPA in its state law.⁶ In 1976 the Commissioners adopted the Revised ULPA.⁷ In 1984, Ohio adopted this revision, moving much more quickly than it did in adopting the original Act. The legislature's effort to keep pace with the development of limited partnership law acknowledges the limited partnership as an increasingly important form of business organization.⁸

Although Ohio's version of the Revised ULPA is substantially in

1. Act of Jan. 3, 1985, 1984 Ohio Legis. Serv. 5-895 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 1782.01-62 (Page 1985)) [hereinafter cited as Act].

2. Besides Ohio, the following states have adopted versions of the Revised Uniform Limited Partnership Act: Arizona, ARIZ. REV. STAT. ANN. §§ 29-301 to -366 (Supp. 1984); Arkansas, ARK. STAT. ANN. §§ 65-501 to -566 (1980); California, CAL. CORP. CODE §§ 15611-15723 (West Supp. 1985); Colorado, COLO. REV. STAT. §§ 7-62-101 to -1201 (Supp. 1984); Connecticut, CONN. GEN. STAT. ANN. §§ 34-9 to -380 (West 1981); Delaware, DEL. CODE ANN. tit. 6, §§ 17-101 to -1107 (Supp. 1984); Idaho, IDAHO CODE §§ 53-201 to -267 (Supp. 1984); Iowa, IOWA CODE ANN. §§ 545.101-1106 (West Supp. 1984); Maryland, MD. CORPS. & ASS'NS CODE ANN. §§ 10-101 to -1104 (1985); Massachusetts, MASS. GEN. LAWS ANN. ch. 109, §§ 1-62 (West Supp. 1984); Michigan, MICH. COMP. LAWS ANN. §§ 449.1101-2108 (West Supp. 1984); Minnesota, MINN. STAT. ANN. §§ 322A.01-.86 (West Supp. 1985); Montana, MONT. CODE ANN. §§ 35-12-501 to -1404 (1983); Nebraska, NEB. REV. STAT. §§ 67-233 to -297 (1981); Washington, WASH. REV. CODE ANN. §§ 25.10.010-.690 (Supp. 1985); West Virginia, W. VA. CODE §§ 47-9-1 to -63 (Supp. 1984); and Wyoming, WYO. STAT. §§ 17-14-201 to -1104 (Supp. 1984).

3. UNIF. LIMITED PARTNERSHIP ACT (1916), 6 U.L.A. 561 (1969) [hereinafter cited as ULPA].

4. 6 U.L.A. 216 (Supp. 1985). The revised Act updates the procedures for forming a limited partnership and clarifies the relationships between limited and general partners; the limited partnership is purely a creature of statute. *See id.*

5. Hecker, *Limited Partners' Derivative Suits Under the Revised Uniform Limited Partnership Act*, 33 VAND. L. REV. 343, 344 (1980). The original Act was promulgated to standardize relationships between the partners, and between the partners and creditors of the partnership. ULPA, *supra* note 3, at 562-65.

6. OHIO REV. CODE ANN. §§ 1781.01-.27 (Page 1978) (amended 1985).

7. 6 U.L.A. 216 (Supp. 1985).

8. *See* Donnell, *An Analysis of the Revised Uniform Limited Partnership Act*, 18 AM. BUS. L.J. 399, 399 (1980).

accord with the Act proposed by the Commissioners, there are some important differences.⁹ These differences, and the new provisions pertaining to foreign corporations, are especially important to the corporate or business attorney. The purpose of this legislation note will be (1) to discuss the practical implications of the basic provisions of the Act as adopted by Ohio, and to analyze the differences between Ohio's old ULPA and Ohio's Revised ULPA; (2) to discuss and analyze the practical differences between Ohio's Revised ULPA and the Revised ULPA proposed by the Conference; and (3) to briefly discuss and analyze the significant differences between Ohio's Revised ULPA and the versions of the Revised ULPA adopted by other states.

II. BACKGROUND—THE LIMITED PARTNERSHIP AND ITS PROBLEMS

A. *Development of the Limited Partnership*

The limited partnership, unlike the corporation, is not a peculiarly American product.¹⁰ Rather, this form of business organization was imported from Europe where limited partnerships were a common form of business organization.¹¹ Nonetheless, the limited partnership has come to be a very important form of business organization in America,¹² as a hybrid of the corporation and general partnership forms of business organization.

Most partnerships are general partnerships and are governed by versions of the Uniform Partnership Act (UPA).¹³ In general, the distinctive features of a partnership governed by the UPA relate to the liability of the partners and the form and method of management and control.¹⁴ The partners are jointly and severally liable for judgments against the partnership, and the partner has a right to participate in

9. See Act, *supra* note 1; REVISED UNIF. LIMITED PARTNERSHIP ACT (1976), 6 U.L.A. 216 (Supp. 1985) [hereinafter cited as REVISED ULPA]. See *infra* notes 195–232 and accompanying text for a discussion of the significant differences between the Ohio and Uniform Acts.

10. See H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 14–36 (3d ed. 1983). The corporation, as it developed in America, far outdistanced its English counterpart in form and concept; therefore, it is considered a distinct entity from its European counterparts. *Id.*

11. T. PARSONS, A TREATISE ON THE LAW OF PARTNERSHIP 572–73 (3d ed. 1878). The limited partnership form of business organization was in general derived from the French Code of Commerce. *Id.*

12. Donnell, *supra* note 8; Hecker, *supra* note 5, at 344.

13. The fact that most partnerships are general is inferred from the relative recency of the limited partnership, in comparison to the general partnership, as a form of business organization in the United States; moreover, limited partnerships are treated, conceptually, as an offshoot of the general partnership. See H. HENN & J. ALEXANDER, *supra* note 10, at 61–97. Statistical summaries prepared by the U.S. Government do not differentiate between the general partnership and limited partnership as a form of partnership.

14. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 14–36 (3d ed. 1983) [hereinafter cited as UPA].

the management of the partnership unless he or she waives this right.¹⁵ Withdrawal of a partner dissolves the partnership.¹⁶ And very importantly, the income of the partnership is taxed against the individual partner's income.¹⁷ The corporation, on the other hand, is characterized by limiting shareholder liability to amounts invested, limited shareholder participation in management of the corporation, and shareholder withdrawal without dissolution of the corporation.¹⁸ Profits of the corporation are taxed twice, once at the corporate level and then again as a component of the individual shareholder's income.¹⁹

The limited partnership combines distinctive features of both the general partnership and the corporation. A limited partnership is a partnership composed of both one or more general partners and one or more limited partners.²⁰ The general and limited partners have different liabilities and responsibilities,²¹ but both benefit from the symbiotic relationship. The general partner in a limited partnership has the same liabilities, responsibilities, and rights that he or she would have in a general partnership.²² By changing the partnership from general to limited and by bringing into the partnership a limited partner with investment capital, the general partner can raise capital as if the partnership were a corporation, yet avoid the formalities associated with incorporation and, of course, the double taxation of business profit.²³ The limited partner benefits through the availability of an opportunity for investment, an opportunity that does not have its profits taxed twice, and the limited liability exposure of an amount equal to his or her investment.²⁴ This former benefit has become especially meaningful as a tax shelter device as inflation has pushed incomes into higher tax brackets.²⁵

15. *Id.* pts. III-IV.

16. *Id.* § 31.

17. C. ROHRlich, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES § 3.03, at 3-5 (5th ed. 1975, rev. 1985).

18. *Id.* §§ 2.34-.35.

19. *Id.* § 3.02, at 3-4.

20. REVISED ULPA, *supra* note 9, § 101. Unlike the general partnership, but like the corporation, the limited partnership can only be formed through strict compliance with a state's enabling statute, which includes such formalities as the filing of a certificate defining the partnership. Mann, *Investors Need the Revised ULPA*, 1981 REAL ESTATE REV. 93, 94.

21. REVISED ULPA, *supra* note 9, arts. 3-4.

22. See generally *id.* art. 4; UPA, *supra* note 14, pts. III-IV.

23. See generally C. ROHRlich, *supra* note 17, §§ 2.17, 3.03.

24. *Id.*

25. Donnell, *supra* note 8, at 399. The losses of the partnership, as well as the profits, will flow through to the limited partner for tax purposes. See *id.* at 400-01. Consequently, the investor may seek out the limited partnership as a form of investment for the very purpose of acquiring losses to offset other income gains.

B. *Problems of the Limited Partnership*

The limited partnership form of business organization—a seemingly panaceaic answer to the investor's search for tax shelter—has not, however, been free of substantive operational problems.²⁶ The investor seeking entry into a limited partnership governed by the Uniform Limited Partnership Act (ULPA)—which has been adopted by all states except Louisiana—has been uncertain as to the extent of his or her legal rights, responsibilities, and liabilities.²⁷

The extent to which a limited partner could participate in the management of the partnership without losing the protection of limited liability has been a concern to many.²⁸ Section 7 of the ULPA provides that a limited partner will not be liable as a general partner “unless . . . he takes part in the control of the business.”²⁹ “Taking part in the control of the business” is a rather ambiguous standard to guide limited partners and courts in determining what actions are permissible.³⁰ The ULPA grants a limited partner some degree of control over the activities of the partnership in that the general partners are restricted from taking certain actions without the consent of the limited partners.³¹ The ULPA also grants the limited partner a right of access to information about the activities of the partnership.³² The limited partner's knowledge of the activities of the general partners can be said to be a form of control. The fact the limited partner has this knowledge may prompt the general partners to act aggressively in the pursuit of profit, or conversely, to act with self-restraint and avoid unnecessary risk.

The limited partner, as an investor much like the corporate shareholder, would like some control in the determination of business profits, but the limited partner is concerned that the exercise of any control would increase his or her potential liability. The corporate shareholder, through exercise of his or her voting rights, can influence the election of directors, and thus can arguably determine the direction of invest-

26. *Id.* at 400.

27. *Id.* at 399–400.

28. *Id.* at 400.

29. ULPA, *supra* note 3, § 7.

30. Feld, *The “Control” Test for Limited Partnerships*, 82 HARV. L. REV. 1471, 1475 (1969) (footnote omitted). “[T]here 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, and in none have they managed satisfactory descriptions of the standards by which to judge the partners' activities.” *Id.* See *Grainger v. Antoyan*, 48 Cal. 2d 805, 313 P.2d 848 (1957); *Silvova v. Rowlett*, 129 Colo. 522, 272 P.2d 287 (1954) (en banc); *Rathke v. Griffith*, 36 Wash. 2d 394, 218 P.2d 757 (1950).

31. ULPA, *supra* note 3, § 10.

ment and activity of the corporation. The limited partner, on the other hand, is exposed to potential general partner liability if he or she attempts to exert similar influence on the limited partnership.³³ This is of topical concern because limited partnerships today have become increasingly important as investment activities rather than as producers of goods.³⁴ The prudent limited partner will want to have some influence on how much of his or her risk capital is utilized.³⁵ If the investor cannot exert some influence or control, and know with certainty what legal liabilities stem from the exercise of that control, then the limited partnership becomes a less attractive form of investment.³⁶ Conversely, uncertainty may cause the limited partner to fail to exercise control when he or she is entitled to do so without incurring general partner liability.³⁷ "It was also thought unfair to impose unlimited liability on a limited partner for isolated acts of control" which really do not go to the heart of the management of the business and which are not known to outsiders dealing with the partnership.³⁸

Another problem relating to the limited partner's ability to control his or her investment arose in the arena of derivative actions. The limited partner, for the most part, is more like a corporate shareholder than a "partner."³⁹ It has been stated that the limited partner resembles a preferred shareholder; he or she expects a share in the profits of the business, is subordinate to general creditors, has some control over the direction of the partnership through a veto power over new entrants into the business, and can access partnership records for review.⁴⁰ But the limited partner is basically a passive investor,⁴¹ dependent upon the general partners dutifully carrying out their fiduciary responsibilities in order to insure the safety of the limited partner's investment.⁴² Unlike the corporate shareholder,⁴³ however, the limited partner has not had a

33. *Id.* § 9.

34. Schaeftler, *Foreign Limited Partnerships Act*, 5 J. CORP. L. 299, 299 (1980). "Six decades ago . . . limited partnerships were perceived as small organizations with few partners and little capital, purely concerned with local business. [Today there has been a great] increase in employment of the limited partnership device in investment syndications of real estate, oil and gas drillings, entertainment productions and other . . . [risky] ventures." *Id.*

35. Feld, *supra* note 30, at 1474.

36. Survey, *The Colorado Changes to the Revised Uniform Limited Partnership Act*, 53 U. COLO. L. REV. 823, 863 (1982).

37. *Id.* at 863.

38. *Id.* When the limited partner's actions are not known to those outside the partnership there can be no chance of misrepresentation by the limited partner, nor can there be any possibility of unfounded reliance.

39. Klebanow v. New York Produce Exch., 344 F.2d 294, 297 (2d Cir. 1965).

40. *Id.* at 297.

41. Hecker, *supra* note 5, at 344.

42. See Beane, *The Fiduciary Relationship of a Partner*, 5 J. CORP. L. 483, 484-85 (1980).

43. See, e.g., DEL. CODE ANN. tit. 8, § 327 (1983). Section 327 states that "[i]n any deriva-

statutory right to bring a derivative action.⁴⁴ Therefore, if the limited partner is aware that a general partner is not properly pursuing a cause of action (not an unlikely occurrence where the general partner is a potential defendant), the limited partner's standing to pursue the cause of action in the name of the partnership is uncertain, if recognized at all.⁴⁵ Case law supporting the limited partner's standing to bring a derivative action has been limited.⁴⁶

Others affected by the operation of limited partnership law have voiced concern about the effect the filing of a certificate of limited partnership in one county should have in another county.⁴⁷ If the certificate has no effect, the limited partner could be exposed to unlimited liability.⁴⁸ This has led some limited partnerships to mass file throughout the state, filing in every county in which the partnership does business.⁴⁹

A further problem with the ULPA is that there is no requirement for the partnership name to identify itself *per se* as a limited partnership.⁵⁰ The lack of such a requirement may be detrimental to both creditors and consumers. The creditor may be harmed because he or she is misled as to the true liability limits of the partners. Whether some of the partners in a partnership have limits on their respective liability is a factor any prudent creditor must know in making a deci-

derivative suit instituted by a stockholder of a corporation, it shall be averred in the complaint that the plaintiff was a stockholder of the corporation at the time of the transaction of which he complains." *Id.* See also OHIO R. CIV. P. 23.1, which establishes a shareholder's right to bring a derivative action in a class action context.

44. See, e.g., OHIO REV. CODE ANN. § 1781.26 (Page 1978) (amended 1985). Section 1781.26 states that "[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." *Id.* An excellent explanation of a shareholder derivative action is found in *Reeves v. Transport Data Communications, Inc.*, 318 A.2d 147 (Del. Ch. 1974). The court in *Reeves* states "[a] derivative action is in reality one brought by a stockholder on behalf of the corporation, not to redress a wrong done to him individually, but to obtain recovery or relief in favor of the corporation . . . for some wrong done to it as a whole." *Id.* at 149.

45. Hecker, *supra* note 5, at 345.

46. See *id.*

47. Donnell, *supra* note 8, at 400. Although the ULPA provided the option of designating the filing of the partnership certificate in any location or office, almost all adopting states utilized a local rather than central filing system. 6 U.L.A. 569-70 (1969). It may well be that when most states adopted the ULPA, the record-keeping capacity of the central state government was not capable of taking on an additional recording function. In addition, the transportation and communication systems in existence at that time would not have fairly supported a central filing requirement. It is also probable that there was no business requirement for such a system.

48. See ULPA, *supra* note 3, §§ 1-2. Because formation of a general partnership does not require the filing of a certificate defining the partnership, failure to substantially comply with the provisions of § 2 of the ULPA will cause the "limited partnership" arrangement to be considered a general partnership by default. *Id.*

49. Donnell, *supra* note 8, at 400.

50. See ULPA, *supra* note 3, § 9.

sion to extend credit.⁵¹ The consumer may be harmed because the ULPA allows a partnership name to potentially mislead the public from understanding the purpose for which the partnership exists.⁵²

The ULPA also contains ambiguities and interstices with respect to a partner's ability to withdraw from the partnership and the effect of withdrawal upon the partnership.⁵³ Whether the general partner has the "right" to withdraw is not certain.⁵⁴ This uncertainty arises because of the provision in the ULPA which states that a "limited partnership is formed if there has been substantial compliance" with section 2.⁵⁵ Although section 2 of the ULPA requires the limited partnership to be formed for a definite term, an agreement omitting this term might be held to be in "substantial compliance."⁵⁶ If such an agreement were held to be in substantial compliance, then withdrawal of a general partner from the partnership would not be held to be a breach of contract, and the remaining partners would not be entitled to damages.⁵⁷ If a general partner does withdraw from the partnership, and this construction of "substantial compliance" is followed, then a general partner's withdrawal from the partnership would cause dissolution of the partnership in accordance with section 20 of the ULPA.⁵⁸ Any limited partner could then demand return of his or her contribution and force dissolution of the partnership⁵⁹ if there were insufficient liquid assets to cover the limited partner's contribution to the partnership.⁶⁰ This result would occur even if the remaining general partners consented to carry

51. Of course, the more sophisticated investor-lender could make the search through the filed partnership certificates and determine precisely each partner's liability. See generally *id.* § 2.

52. See *id.* § 2; Hecker, *The Revised Uniform Limited Partnership Act: Provisions Affecting the Relationship of the Firm and Its Members to Third Parties*, 27 U. KAN. L. REV. 1, 4 (1978). Additionally, by allowing deceptively similar partnership names, the potential for misleading the public and creditors becomes greater. *Id.* Whether these are problems of significance is open to debate, but they are problems which can easily be avoided through the drafting of a more complete limited partnership act.

53. Hecker, *The Revised Uniform Limited Partnership Act: Provisions Governing Financial Affairs*, 46 MO. L. REV. 577, 608-24 (1981). Although the ULPA does not expressly address a general partner's power to withdraw from the partnership, this power could be inferred from a contemporaneous reading of the UPA and the ULPA. *Id.* at 609.

54. *Id.* at 609.

55. Section 9 of the ULPA states that "a general partner shall have all the rights and powers . . . of a partner in a partnership without limited partners." ULPA, *supra* note 3, § 9. Sections 29 and 31 of the UPA provide a general partner with the power to withdraw from the partnership. UPA, *supra* note 14, §§ 29, 31(1)(b)(2). Therefore, a general partner has the power to withdraw at will from the limited partnership.

56. Hecker, *supra* note 53, at 609.

57. *Id.* The partnership agreement is a contract; therefore, material breaches should result in damages being awarded to those harmed by the breach.

58. See ULPA, *supra* note 3, § 20.

59. *Id.* § 16(2)(a).

60. Hecker, *supra* note 53, at 610.

on the business or if the right of continuation was provided for in the certificate defining the partnership.⁶¹ This is a severe result and not conducive to investment. If the preceding scenario occurs, the injured limited partners may have no recourse against the withdrawing partner.⁶²

A final problem of special concern to lawyers giving advice on limited partnership law is how to treat the foreign limited partnership, procedurally.⁶³ Is a foreign limited partnership qualified to carry on business in this state?⁶⁴ If the foreign limited partnership could register as a limited partnership in this state, what are the registration requirements?⁶⁵ If the foreign limited partnership does register in this state, which state's law controls the filing, the formation of the partnership, and the partnership's activities in this state?⁶⁶ What is the status of the foreign limited partner's liability in this state?⁶⁷ What is the status of this state's limited partner's limited liability in the foreign jurisdiction?⁶⁸ These questions arise because the ULPA does not address the existence of foreign limited partnerships.⁶⁹ There are no provisions in the ULPA comparable to those in corporation statutes for admission of foreign corporations.⁷⁰ "The result is confusion and conflict, [causing] many limited partnerships with multistate operations [to form] new partnerships in each state of operation."⁷¹

The minimal amount of litigation over the provisions of the ULPA does not suggest that the Act is capable of meeting the requirements of today's investor or that the Act has worked smoothly.⁷² Conservative advice by lawyers has contributed to the lack of litigation.⁷³ Some may

61. *Id.*

62. *Id.* As one commentator has stated:

The only justification for this result is that the limited partner's original investments may have been made in reliance on the continued association of a particular general partner with the firm, especially since control of the business is vested exclusively in the general partners. It may be questioned, however, whether this possible reliance interest is sufficient to justify the potentially drastic relief afforded by the 1916 Act.

Hecker, *supra* note 53, at 610 (footnotes omitted). This undesirable result can also occur when a general partner dies or becomes insane. ULPA, *supra* note 3, § 20.

63. "'Foreign limited partnership' means a partnership formed under the laws of any State other than this State and having as partners one or more general partners and one or more limited partners." REVISED ULPA, *supra* note 9, § 101(4).

64. Schaefitler, *supra* note 34, at 299.

65. *See id.*

66. *Id.* at 300.

67. Mann, *supra* note 20, at 98.

68. *Id.*

69. Schaefitler, *supra* note 34, at 300 n.8.

70. Hayes, *Limited Partnership—Iowa Style*, 32 *DRAKE L. REV.* 1, 32 (1982-83).

71. Mann, *supra* note 20, at 98.

72. Feld, *supra* note 30, at 1484.

argue that “[i]f it ain’t broke, [don’t] fix it.”⁷⁴ This argument, however, precludes improving a workable, but less than perfect system.⁷⁵ Although the ULPA as adopted by Ohio was not “broke,” it has been made significantly better.⁷⁶

III. IMPACT OF OHIO’S VERSION OF THE REVISED ULPA

A. *Changes in the Ohio Law*

1. Formation of Limited Partnership

a. Name of Limited Partnership

Ohio’s revised limited partnership law contains provisions which put creditors on notice as to the type of business entity with which they are dealing. Prior Ohio law allowed limited partnerships to do business under any name.⁷⁷ As a result, the old law permitted a limited partnership to do business under a name which creditors might mistakenly attribute to a general partnership.⁷⁸ Under the new law, the name of a limited partnership organized in Ohio must contain the words “limited partnership” without abbreviation.⁷⁹ In most situations, the limited partnership name may not contain the name of a limited partner.⁸⁰ Additionally, the name may not contain any words or phrases which are misleading as to the purpose for which the limited partnership is organ-

74. *Limited Partnership—Recent Developments: Securities, Tax, and Substantive Partnership Law Issues*, 39 BUS. LAW. 677, 697 (1984).

75. *See id.*

76. The Ohio General Assembly’s action recognizes that:

The 1916 Act was drafted during a period in which limited partnerships were small, collegial concerns, more closely resembling general partnerships than corporations in all respects except the liability of their members. Many modern, publicly owned limited partnerships, however, in respects other than taxation, more closely resemble corporations than general partnerships.

Hecker, *supra* note 53, at 579. The Commissioners on Uniform State Laws state that the revised Act “clarifies many ambiguities and fills interstices in the prior uniform law by adding more detailed language and mechanics.” REVISED UNIF. LIMITED PARTNERSHIP ACT (1976) prefatory note, 6 U.L.A. 200, 201 (Supp. 1985).

77. OHIO REV. CODE ANN. § 1781.02 (Page Supp. 1983) (amended 1985).

78. The prior law in Ohio provided, however, that a limited partner who permitted his name to be used in the limited partnership name was liable as a general partner to creditors who extended credit without actual knowledge that he was not a general partner. OHIO REV. CODE ANN. § 1781.05 (Page 1978) (amended 1985). The state common law regulating trade names is also applicable in some cases where two entities engaged in similar businesses use similar names. *See Wertheimer, Substantive Law and Special Problems of General and Limited Partnerships*, in ALL-ABA RESOURCE MATERIALS ON PARTNERSHIPS 37 (5th ed. 1984).

79. OHIO REV. CODE ANN. § 1782.02 (Page 1985).

80. A limited partner’s name may only appear in the name of the limited partnership if it is also the name of a general partner, or the business of the limited partnership was carried on under the name of the limited partner was admitted. *Id.* § 1782.02(A).

ized.⁸¹ Therefore, the new law puts creditors on notice that they are dealing with a limited partnership and eliminates the potential for abuse inherent in the old law.

b. Filing of the Certificate

The new law makes it easier for creditors to obtain information concerning a limited partnership doing business in Ohio by making it easier to locate the certificate of limited partnership.⁸² Prior law required the certificate of limited partnership to be filed in the county recorder's office, in the county where the limited partnership's principal place of business was located, but provided no mechanism for locating the certificate when a limited partnership was active in more than one county.⁸³ As a result, when a limited partnership was active in many counties, locating the limited partnership's certificate could be a tremendous burden. The new law reduces this burden by requiring all limited partnerships doing business in Ohio to report to the secretary of state the name of the Ohio county in which the certificate of limited partnership is filed.⁸⁴ This permits creditors to call the secretary of state's office to determine the county in which the certificate is filed.

81. *Id.* § 1782.02(B). See also *supra* note 52.

82. Ohio's new limited partnership law requires the following information to be set forth in the certificate of limited partnership:

- a. name of the limited partnership;
- b. general character of the business;
- c. address of the principal place of business of the limited partnership;
- d. name and address of the agent appointed for service of process in Ohio;
- e. name and business or personal address of each partner, specifying separately the names of the general and limited partners;
- f. if agreed upon, the events or time at which a partner may terminate his membership in the limited partnership;
- g. the amount of cash, and a description and statement of the agreed value of other property and services contributed by each partner;
- h. the amount of cash and a description and statement of the agreed value of other property and services to be contributed by each partner in the future and the time or event at which the contribution shall be made;
- i. any right of a partner to receive, or of a general partner to make, distributions that include all or part of a partner's contribution;
- j. the time or event at which the limited partnership is dissolved and its affairs wound-up;
- k. any right of a limited partner to grant the right to become a limited partner to an assignee of any part of his limited partnership interest;
- l. any right of the remaining general partners to continue the business on the withdrawal of a general partner;
- m. any right of a partner to receive distributions of property from the limited partnership; - and,
- n. any other matters that the partners decide to include in the certificate.

OHIO REV. CODE ANN. § 1782.08(A)(1)-08(A)(13) (Page 1985).

83. OHIO REV. CODE ANN. § 1781.02(A)(2) (Page Supp. 1983) (amended 1985).

84. OHIO REV. CODE ANN. § 1329.01(B) (Page 1985).

The creditors may then contact the recorder's office in that county concerning the limited partnership in question. The new law, therefore, significantly reduces the legwork required to track down the certificate of a limited partnership which is active in several Ohio counties.⁸⁵

In the event the creditor finds it necessary to resort to legal action, the new law also makes it easier to bring an action against limited partnerships organized in Ohio. The prior law in Ohio did not require limited partnerships to appoint an agent for service of process.⁸⁶ Consequently, when a creditor decided to institute an action against a limited partnership, it was not always clear upon whom the process should be served. Limited partnerships organized in Ohio are now required to appoint an agent for service of process in Ohio.⁸⁷ The name and address of the agent appointed for service of process must be contained in the certificate of limited partnership.⁸⁸ This requirement permits creditors to determine the correct party upon whom to serve process by merely checking the limited partnership certificate. Therefore, the new legislation helps insure that limited partnerships organized in Ohio are held legally accountable for their actions.

c. Amendments to the Certificate

Ohio's new law requires a limited partnership to file an amendment to its certificate of limited partnership upon the occurrence of certain specified events and when changing circumstances cause the certificate to contain false statements.⁸⁹ This amendment must be signed by at least one general partner, all new partners, and all partners whose contributions have increased.⁹⁰ Although the prior Ohio law required a limited partnership to file an amendment under basically the

85. The new law also eliminates the need for limited partnerships to file in every county in which they do business so as to avoid liability to creditors. *See infra* text accompanying notes 221-25.

86. *See* OHIO LEGISLATIVE SERV. COMM'N, BILL ANALYSIS: AM. SUB. H.B. NO. 607 (AS REPORTED BY THE S. JUDICIARY COMM.) 3 (1984) [hereinafter cited as BILL ANALYSIS] (on file with the University of Dayton Law Review).

87. OHIO REV. CODE ANN. § 1782.04(B) (Page 1985).

88. *Id.* § 1782.08(A)(3).

89. Under the new law, an amendment to the certificate must be filed within 30 days of any of the following events:

- a. a change in the amount or character of any partner's contribution or obligation to make contribution;
- b. a new partner is admitted;
- c. a partner withdraws; or,
- d. the business is continued following the withdrawal of a general partner.

Id. § 1782.09(B)(1)-(4). An amendment need only be filed every 12 months, however, to show changes of address of limited partners. *Id.* § 1782.09(C).

same circumstances,⁹¹ the amendment was required to be signed by *all* general and limited partners.⁹² As a result, the administrative burden of contacting each partner could prevent even the most conscientious partner from filing prompt amendments.⁹³ The new law eliminates this requirement and, thereby, facilitates the timely correction of errors in the limited partnership certificate.

Moreover, under prior law, general partners could not be held liable for an injury suffered by a creditor in reliance upon a false statement unless the general partners had actual knowledge that the certificate contained a false statement.⁹⁴ As a result, the prior law failed to encourage partners to review the certificate periodically to insure its accuracy, and did little to discourage partners from deliberately avoiding knowledge of errors in the certificate. The new legislation permits a creditor to recover for injuries suffered in reliance upon false statements in the certificate from any general partner who knew *or should have known* that the certificate contained false statements.⁹⁵ Consequently, general partners are forced to keep abreast of changing circumstances which affect the limited partnership, and are required to file amendments to the certificate when changing circumstances cause a statement in the certificate to become false.

The new legislation also contains a "safe harbor" provision for partners. If the certificate is amended within thirty days of the event which causes the certificate to contain a false statement, the partners are not liable for injuries to creditors who rely upon the false statement before the amendment was filed.⁹⁶ But, if the amendment is not filed within thirty days of the event which causes the certificate to contain a false statement, the creditor may recover for any damages that result from his justifiable reliance on the false statement.⁹⁷ This safe harbor provision provides a realistic deadline for partners and should encourage partners to review and correct the limited partnership certificate periodically so as to avoid liability. The new law, therefore, should

91. OHIO REV. CODE ANN. § 1781.24(B) (Page 1978) (amended 1985). See BILL ANALYSIS, *supra* note 86, at 5-6.

92. OHIO REV. CODE ANN. § 1781.24(B) (Page 1978) (amended 1985).

93. *Limited Partnership—Recent Developments: Securities, Tax, and Substantive Partnership Law Issues*, 39 BUS. LAW. 677, 702 (1984) (comments by Mr. Berger on the administrative burden of getting in touch with the hundreds of limited partners in the larger nationally syndicated limited partnerships).

94. OHIO REV. CODE ANN. § 1781.06 (Page 1978) (amended 1985).

95. OHIO REV. CODE ANN. § 1782.14(B) (Page 1985). A creditor injured by reliance on false statements in the certificate may also recover from any person who executed the certificate or caused another to execute it on his behalf, knowing it contained false statements. *Id.* § 1782.14(A).

96. *Id.* § 1782.09(E).

improve the accuracy of statements in limited partnership certificates and reduce the incidence of injury to creditors relying on false statements without undue hardship upon the partners.

d. Foreign Limited Partnerships

Ohio's new limited partnership law contains provisions which act to protect creditors, while clarifying the liability of foreign limited partnerships. The prior law in Ohio contained no special provisions to regulate foreign limited partnerships doing business in Ohio.⁹⁸ As a result, where a foreign limited partnership doing business in Ohio could operate under a name which might mislead creditors, information concerning the foreign limited partnership might not be available, and serving process on the foreign limited partnership might be difficult or impossible. Under the new legislation, foreign limited partnerships are treated in many respects like domestic limited partnerships. First, the new provisions require foreign limited partnerships to include the words "limited partnership" in their name.⁹⁹ Second, the foreign limited partnership must register by submitting a signed and sworn application to do business in Ohio with the county recorder where the partnership's principal place of business is located.¹⁰⁰ Third, the foreign limited partnership must report to the secretary of state that it is doing business in Ohio under a fictional name¹⁰¹ and the Ohio county in which it has registered.¹⁰² Finally, the foreign limited partnership's application for registration must contain essentially the same information required to be filed by a limited partnership organized in Ohio.¹⁰³ In this way,

98. Royalty, *Introduction to Ohio's New Limited Partnership Law*, OHIO ST. B.A. REP. 536, 537 (1985) (discussing reasons for and summarizing effects of Ohio's new limited partnership law).

99. OHIO REV. CODE ANN. § 1782.51 (Page 1985).

100. *Id.* § 1782.49.

101. OHIO REV. CODE ANN. § 1329.01(B) (Page 1985).

102. *Id.* § 1329.01(C).

103. Ohio's new law does not require detailed information to be contained in the foreign limited partnership's registration application concerning partners' contributions, rights to distribution of property, or returns of contribution. However, the foreign limited partnership, whether organized under the ULPA or the Revised ULPA, will be required to report such information in the certificate filed in its home state. Since the new Ohio law requires the disclosure of the foreign limited partnership's state of organization, this information can be obtained—although finding the certificate in a state without centralized filing can still be burdensome.

Under the new law, the foreign limited partnership must file an application containing the following information:

- a. name of the limited partnership;
- b. state of organization and date of formation;
- c. general character of business in Ohio;
- d. name and address of the agent appointed for service of process in Ohio;
- e. address of the business office maintained in the state of organization; and,

creditors are put on notice that they are dealing with a limited partnership and are able to obtain information concerning the foreign limited partnership.

The foreign limited partnership must also indicate in the registration application that it appoints the secretary of state to accept service of process if it has not appointed a resident agent to do so.¹⁰⁴ Canceling the certificate of registration does not terminate the secretary of state's power to accept service of process.¹⁰⁵ In fact, the secretary may bring an action to restrain a foreign limited partnership which has not complied with the provisions of the new law from transacting business in Ohio.¹⁰⁶ In addition, if a foreign limited partnership fails to register in Ohio, it is not permitted to bring actions as a plaintiff in Ohio courts.¹⁰⁷ A foreign limited partnership can be brought into state court to defend,¹⁰⁸ however, and the secretary of state will act as agent to accept service of process for this purpose.¹⁰⁹ The new law, therefore, encourages foreign limited partnerships to register in Ohio and, in any event, insures that injured creditors can sue and recover from foreign limited partnerships.

A foreign limited partnership's failure to register does not impose unlimited liability on the limited partners.¹¹⁰ In this regard, the new law settles a controversy which had arisen under the previous Ohio law.¹¹¹ Under the prior law, it was unclear whether the foreign limited partnership was governed under the laws of Ohio or the laws of the state where it was organized.¹¹² As a result, it was unclear whether failure to register in Ohio caused limited partners to assume unlimited liability.¹¹³ The new legislation states that the law of the state in which the foreign limited partnership is organized governs the organization, internal affairs, and liability of its limited partners.¹¹⁴ Thus, the new law has clarified the choice-of-law question and settled the controversy over liability of limited partners in a foreign limited partnership.

ners, separately stated.

OHIO REV. CODE ANN. § 1782.49(A)–.49(G) (Page 1985).

104. *Id.* § 1782.49(E).

105. *Id.* § 1782.53.

106. *Id.* § 1782.55.

107. *Id.* § 1782.54(A).

108. *Id.* § 1782.54(B).

109. *Id.* § 1782.54(D).

110. *Id.* § 1782.54(C).

111. Royalty, *supra* note 98, at 2.

112. *Id.* This problem was also discussed in a letter from David Diroll to Ohio state representative Barbara Pringle (Feb. 8, 1985) (discussing Ohio's recent enactment of the Revised ULPA) [hereinafter cited as Diroll letter] (on file with the University of Dayton Law Review).

113. Royalty, *supra* note 98, at 2.

114. OHIO REV. CODE ANN. § 1782.48(A) (Page 1985).

e. Existing Limited Partnerships and Transition Rules

The effective date of Ohio's revised limited partnership law was April 1, 1985.¹¹⁵ With certain exceptions, limited partnerships existing before April 1, 1985, are subject to the same requirements under the new law as limited partnerships organized on or after this date.¹¹⁶ However, the new law is not to be applied retroactively and certain changes required by the new law need not be made by existing limited partnerships immediately.¹¹⁷

The provisions controlling transition from the old law to the new law do not require an existing limited partnership to file a new certificate in order to continue doing business in Ohio.¹¹⁸ However, certain events act as "triggers" which mandate compliance by the existing limited partnership with the new law. One such trigger is a name change by an existing limited partnership. Where an existing limited partnership changes its name after April 1, 1985, it is required to include the words "limited partnership" in its name.¹¹⁹ Another trigger is the occurrence of any event after April 1, 1985, which requires the limited partnership to file an amendment to its certificate. If an existing limited partnership is required to file an amendment after April 1, 1985, it is also required to appoint an agent for service of process in Ohio.¹²⁰ These transition rules eliminate the need to change the business name, appoint an agent for service of process, and file an amendment until required to do so for one of the reasons discussed above. Consequently, these rules make it less of a burden for existing limited partnerships doing business in Ohio to comply with the new law.¹²¹ These rules also work, however, to blunt the impact of the new legislation by delaying compliance with important creditor protection provisions.¹²²

Other provisions of the new law, dealing with contributions, distributions, assignments, and claims, affect existing limited partnerships immediately. These provisions are not, however, retroactive. For example, contributions and distributions made before April 1, 1985, are not

115. *Id.* § 1782.61(A).

116. *Royalty, supra* note 98, at 539.

117. *Id.*

118. OHIO REV. CODE ANN. § 1782.61(A)(1) (Page 1985).

119. *Id.* § 1782.61(A)(2).

120. *Id.* § 1782.61(A)(3).

121. *Royalty, supra* note 98, at 540.

122. It is unclear what happens to a limited partnership which does not comply with the new law. In *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111 (6th Cir. 1976), a case tried before enactment of the Revised ULPA, a partnership was treated as a general partnership when it failed to file the required certificate of limited partnership. *Id.* at 114. As a result, the limited partners

governed by the new law.¹²³ Ohio's new law also does not apply to assignments of limited partnership interests made before this date.¹²⁴ In addition, claims or actions arising before April 1, 1985, and still pending on or after this date, may be asserted or defended as if the new law had not been enacted.¹²⁵ The effect of these transition rules is to avoid the confusion and inefficiency which would result from applying the new law retroactively. These rules also avoid the injustice which could result from applying new law to transactions entered into by parties under the belief that the old law would control.

2. Contributions and Credit Requirements

a. Valuation of Promises to Perform Services

The interests of limited partnership creditors could be adversely affected by a new provision which permits partners to contribute the value of promises to perform services.¹²⁶ Under the prior law, partners could only contribute cash and property.¹²⁷ Additionally, if a partner failed to make a promised contribution, the creditor could bring an action to force the partner to contribute the promised cash or property.¹²⁸ While the new law retains the creditor's right to enforce the original obligation of a partner to contribute,¹²⁹ it also adds a provision which permits a partner to contribute the value of promises to render services.¹³⁰ This new provision presents a potential problem because courts will not generally order a partner to specifically perform the promised services.¹³¹ The limited partnership, at the insistence of creditors, can only force the partner or his estate to contribute in *cash* the difference

123. OHIO REV. CODE ANN. § 1782.61(A)(6) (Page 1985).

124. *Id.* § 1782.61(A)(7).

125. *Id.* § 1782.61(B).

126. The new provisions which permit partners to contribute the value of services performed also create potential problems with regard to the allocation of limited partnership profit and loss. Under the prior law, services were not permitted to be contributed and so no valuation problem existed. OHIO REV. CODE ANN. § 1781.04 (Page 1978) (amended 1985). The new law permits the value of services to be included in the partner's contributions. OHIO REV. CODE ANN. §§ 1782.01(B), 1782.27 (Page 1985). The new law also indicates that in the absence of a partnership agreement to the contrary, the profit and loss is to be allocated based on the relative contributions of the partners. *Id.* § 1782.29. Thus, the profit and loss allocation is affected by the valuation of services performed by the partners. Further, the valuation of services could, therefore, be used as a device to allocate larger profit and loss shares to the partners who control the valuation process. This in turn could lead to litigation between partners as to the appropriate value of a partner's service contribution. Therefore, the partnership agreement should specify a valuation procedure so as to avoid litigation related to the valuation of services.

127. OHIO REV. CODE ANN. § 1781.04 (Page 1978) (amended 1985).

128. *Id.* § 1781.17.

129. OHIO REV. CODE ANN. § 1782.28 (Page 1985).

130. *Id.* §§ 1782.01(B), .27.

between the value of any partial performance and the agreed value, as stated in the certificate, of the services promised.¹³² In situations where the partial performance has been overvalued, the partner's obligation to contribute cash is undervalued. Consequently, the limited partnership's ability to pay off creditors is reduced. Therefore, the interests of creditors who relied upon the promise of a partner to perform services as stated in the certificate of limited partnership can be prejudiced.

b. Priority of Partners in Partnership Dissolution

The most obvious disadvantage that the new law works on limited partners is that they no longer enjoy priority over general partners in distributions with respect to partnership interests or returns of contribution made following dissolution. Under the prior law in Ohio, general partners were not entitled to share in distributions following dissolution until the obligation to limited partners was satisfied.¹³³ This priority was required statutorily and could not be varied by agreement.¹³⁴ Under the new law, limited partners and general partners share in distributions following dissolution on a pro-rata basis unless the partnership agreement provides otherwise.¹³⁵ By permitting the priority to be determined by agreement of the parties, the new provision permits greater flexibility in structuring the limited partnership to the special needs of the particular business or investment opportunity in which the limited partnership is involved. Therefore, under the new law, the limited partnership form of business will be more attractive to Ohio investment organizers.

c. Partner's Liability for Contributions Returned

The new legislation encourages limited partnerships to make returns of contribution to partners in compliance with the terms of the partnership agreement and the provisions of Ohio's limited partnership law. Under the new law, if the return of contribution is not in violation of the partnership agreement or any provision of Ohio's limited partnership law, the partner is only liable to the limited partnership for contributions returned for a period of one year from the time the contribution was returned.¹³⁶ If the contribution is returned in violation of

132. OHIO REV. CODE ANN. § 1782.28(A) (Page 1985).

133. OHIO REV. CODE ANN. § 1781.23 (Page 1978) (amended 1985).

134. *Id.* See also BILL ANALYSIS, *supra* note 86, at 15-16.

135. OHIO REV. CODE ANN. § 1782.47 (Page 1985).

136. *Id.* § 1782.38(A). "A partner receives a return of his contribution to the extent that a distribution to him reduces his share of the fair [market] value of the net assets of the limited partnership below the value [of his unreturned contributions] as set forth in the certificate of limited partnership." *Id.* § 1782.38(C). A partner is only liable to creditors for a return of contribution if the return is necessary to discharge creditors' claims. *Id.* § 1782.38(A).

the partnership agreement or of any provision of Ohio's limited partnership law, however, the partner's liability continues for six years.¹³⁷ The effects of this new provision are two-fold. First, by cutting off liability after one year for returns of contribution not in violation of the partnership agreement or provisions of the new law, the new legislation encourages compliance with the terms of the partnership agreement and the provisions of Ohio's new law. Second, because the new legislation permits contributions to be returned to partners only to the extent and upon the occurrence of events specified in the certificate of limited partnership, creditors are able to discover under exactly what circumstances a partner may receive a return of contribution. Therefore, the new law gives creditors ample opportunity to bring suit when partners have received returns of contribution which affect their interests, permits creditors to discover when contribution can be validly returned to partners, and encourages returns of contribution to be made in compliance with the terms of the partnership agreement and Ohio's limited partnership law.

d. Priority of Creditors in Partnership Dissolution

While in many ways the new law acts to protect creditors, the new law also contains provisions which have the effect of making creditors more vulnerable. The most obvious change is that which eliminates the priority that third-party creditors had in dissolution of the limited partnership over partner-creditors.¹³⁸ By permitting partners, both limited and general, to transact business with the limited partnership and to be treated the same as any other creditor in the event of dissolution,¹³⁹ the new provision makes it less likely that third-party creditors will be paid in full.

These provisions also work a more subtle harm to third-party creditors by encouraging self-dealing between the limited partnership and its partners. Under the old law, loans by general partners would have

137. *Id.* § 1782.38(B).

138. OHIO REV. CODE ANN. § 1781.13 (Page 1978) (amended 1985).

139. OHIO REV. CODE ANN. §§ 1782.07, 1782.36 (Page 1985). Under the prior Ohio law, upon dissolution of the partnership, those having claims against the partnership received partnership assets in the following order:

- a. creditors, except claims owed to limited partners on account of their contribution and general partners;
- b. limited partners, with respect to their share of profit;
- c. limited partners, with respect to their capital contributions;
- d. general partners, other than with respect to profit or capital contributions;
- e. general partners, with respect to their share of profit; and,
- f. general partners, with respect to their capital contributions.

been repaid after loans by third-party creditors were satisfied.¹⁴⁰ Consequently, there was little reason for general partners to attempt to characterize contributions as loans. Under the new law, however, where a limited partnership is in financial difficulty, it would be to the benefit of the general partners to make loans rather than contributions. This is because in dissolution, the general partner who has made loans shares pro-rata with the third-party creditors,¹⁴¹ while the general partner who has made contributions receives nothing until the obligations owed to third-party creditors are satisfied in full.¹⁴² Therefore, the new law will probably result in litigation between third-party creditors and partner-creditors over whether a purported loan to the limited partnership by a partner was really a loan, or in fact, a disguised contribution.

3. Management and Control by Limited Partners

a. Access to Information

The new law permits limited partners to exercise more control over their investment in the limited partnership. Under prior law, a limited partner had the right to inspect and copy the limited partnership's books and to have, on demand, true and full information of all matters affecting the limited partnership.¹⁴³ The prior law did not, however, explicitly indicate which records other than the limited partnership's books the limited partner had a right to inspect.¹⁴⁴ The new Ohio legislation requires the limited partnership to permit all partners access to certain specified business records during ordinary business hours.¹⁴⁵ These records are to be maintained at the limited partnership's office,¹⁴⁶ and are to include a list of the names and addresses of all partners, a copy of the certificate and all amendments, copies of all federal, state, and local tax returns for the last three years, a copy of the partnership agreement, and any financial statements for the last three years.¹⁴⁷ Therefore, the new legislation makes available information which was not always available under the old law and enhances the ability of limited partners to better evaluate the performance of the limited partnership's operations.

140. OHIO REV. CODE ANN. §§ 1781.13, 1781.23 (Page 1978) (amended 1985).

141. OHIO REV. CODE ANN. §§ 1782.07, 1782.36 (Page 1985).

142. *Id.* § 1782.47.

143. OHIO REV. CODE ANN. § 1781.10(A) (Page 1978) (amended 1985). *See also* BILL ANALYSIS, *supra* note 86, at 8.

144. OHIO REV. CODE ANN. § 1781.10(A) (Page 1978) (amended 1985).

145. OHIO REV. CODE ANN. § 1782.05(A), (B) (Page 1985).

146. *Id.* § 1782.04(A).

b. Derivative Action brought by Limited Partners

The new law permits limited partners to protect their investment in a limited partnership by giving limited partners the right to bring derivative actions on behalf of the limited partnership.¹⁴⁸ Prior law prohibited limited partners from bringing an action on behalf of the limited partnership.¹⁴⁹ Consequently, under the old law, a limited partner who suffered a personal loss could only bring an action in his or her own name against a person in a contractual relationship with the limited partnership.¹⁵⁰ However, it was unclear if limited partners who did not suffer direct personal injury could bring suit on behalf of the partnership when the general partners refused to do so. In this way, the old law acted to insulate general partners from the consequences of decisions and may have discouraged limited partners from seeking judicial redress for an actionable wrong. The new law insures that general partners cannot act as a group to avoid legal liability to the limited partners by permitting limited partners to bring derivative actions on behalf of the limited partnership if the general partners refuse. Therefore, the new law will enable limited partners to better protect their investment in the limited partnership and make general partners more accountable for their performance to the limited partners.

c. Authority to Amend Certificate

The new legislation permits limited partners to protect their investment in the limited partnership from creditor damage claims by enabling them to amend the certificate if the partner responsible for doing so fails to take such action.¹⁵¹ Under the old law, a limited partner could avoid personal liability for a false statement in the certificate of limited partnership by renouncing his interest in limited partnership profits.¹⁵² However, it was not clear whether a limited partner could protect his or her interest in a limited partnership by amending the certificate if the general partners refused to correct errors in the certificate.¹⁵³ Under the new law, limited partners may amend the certificate when it contains an error or misleading statement.¹⁵⁴ As a result, the

148. *Id.* § 1782.56.

149. OHIO REV. CODE ANN. § 1781.26 (Page 1978) (amended 1985). *See also supra* notes 39-46 and accompanying text.

150. *Haddon View Investment Co. v. Coopers & Lybrand*, 70 Ohio St. 2d 154, 157, 436 N.E.2d 212, 215 (1982).

151. OHIO REV. CODE ANN. § 1782.12 (Page 1985).

152. OHIO REV. CODE ANN. § 1781.11 (Page 1978) (amended 1985).

153. Under the old law, limited partners were not permitted to bring actions on behalf of the limited partnership. *Id.* at § 1781.26. Therefore, it was not clear if limited partners had a right to have the writing executed by a person who refuses to do so. *Id.* § 1781.25(D).

154. OHIO REV. CODE ANN. § 1782.12 (Page 1985).

new law permits limited partners to protect themselves and their investment in the limited partnership from creditor damage claims without giving up their share of partnership profits. This in turn should work to benefit creditors by encouraging the correction of errors in the certificate and, thereby, reduce the incidence of creditor injury resulting from reliance on false statements contained in the certificate.

4. Limited Liability

Limited partners are now permitted to exercise a greater degree of control over their investment without fear of incurring unlimited liability.¹⁵⁵ The new law accomplishes this by clarifying the degree of control which a limited partner may exercise before unlimited liability is imposed.¹⁵⁶ Under the prior legislation, a limited partner was subject to unlimited liability if he or she participated in the control of the limited partnership's business.¹⁵⁷ However, the prior law did not define which acts constituted control of the limited partnership's business.¹⁵⁸ Consequently, fear of incurring unlimited liability discouraged limited partners from exercising any control over their investment in the limited partnership.

The new law provides that unlimited liability will be extended to a limited partner where the limited partner exercises control of the business which is "substantially the same as the exercise of the powers of a general partner."¹⁵⁹ The new law also indicates that certain specific acts performed by a limited partner will not, by themselves, be sufficient to trigger unlimited liability.¹⁶⁰ These actions include acting as agent, contractor, or employee of the limited partnership or a general partner, consulting or advising a general partner on limited partnership business, approving or disapproving amendments to the partnership agreement, or voting on removal of a general partner or other matters not related to the ordinary conduct of the limited partnership's business.¹⁶¹ The new legislation also indicates that the limited partner may exercise powers not enumerated in the statute without incurring unlimited liability.¹⁶²

The effect of this provision is to permit the limited partner to par-

155. See *supra* notes 28-38 and accompanying text.

156. See *Royalty, supra* note 98, at 537.

157. OHIO REV. CODE ANN. § 1781.07 (Page 1978) (amended 1985).

158. *Id.*

159. OHIO REV. CODE ANN. § 1782.19(A) (Page 1985). See also *BILL ANALYSIS, supra* note 86, at 7.

160. OHIO REV. CODE ANN. § 1782.19(B) (Page 1985).

161. *Id.*

162. *Id.* § 1782.19(C). The new law makes it clear that the list of activities contained in

ticipate in limited partnership activities to an extent not possible under the old law without risking the imposition of unlimited liability. This does not mean, however, that limited partners will necessarily exercise greater control over limited partnership operations. Increased participation by limited partners in limited partnership business is often not desirable from the general partner's perspective. Consequently, it is very likely that the partnership agreement will be used in many cases to restrict the participation of limited partners.¹⁶³ However, the mere possibility of exercising more control over limited partnership activities should work to the advantage of the limited partners. Limited partnerships are in competition for investment dollars with other limited partnerships and with other forms of investment. As a result, all things being equal, the limited partnership which offers the limited partners the greatest degree of control over their investment should be the more attractive investment. Further, if a limited partner does not choose to exercise the degree of control over his investment in the limited partnership which the new law now permits, the limited partner may negotiate for a greater share of the profit and loss. Therefore, the new law will allow limited partners to exercise more control over their investment in the limited partnership or negotiate for a greater percentage of the profit and loss.

5. Continuity of Life

Ohio's new limited partnership law makes the limited partnership form of business organization more like a corporation by providing for continuity of life following the withdrawal of a general partner. As under the old law, the withdrawal of a limited partner will not cause dissolution of the limited partnership.¹⁶⁴ However, under the old law, the withdrawal of a general partner caused the automatic dissolution of the limited partnership unless the business was continued by the remaining general partners.¹⁶⁵ If there were no remaining general partners, the limited partnership was automatically dissolved.¹⁶⁶ The new law gives the partners ninety days to elect to continue the business and

163. See Diroll letter, *supra* note 112, at 1. The new law makes the partnership agreement the key document by permitting the partnership agreement to be used to vary many aspects of the limited partnership's business organization including priority of partners in distributions, degree of participation of limited partners in business management, and assignment of limited partnership interests among others. *Id.*

164. The new provision is contained in § 1782.44 of the Ohio Revised Code. OHIO REV. CODE ANN. § 1782.44 (Page 1985). The old law can be found in § 1781.20 of the Ohio Revised Code. OHIO REV. CODE ANN. § 1781.20 (Page 1978) (amended 1985).

165. OHIO REV. CODE ANN. § 1781.20 (Page 1978) (amended 1985).

to appoint new general partners.¹⁶⁷ If the partners so elect, the limited partnership is not dissolved.¹⁶⁸ This change reflects the reality that many limited partnerships today are much more like corporations than partnerships. Limited partnerships today often involve large numbers of limited partners investing in businesses which can outlive the partners.¹⁶⁹ By eliminating the automatic dissolution provisions contained in the old law, the new law permits the limited partnership form of business to be used for long-lived projects without fear of unexpected dissolution. In so doing, the new law better serves the needs of today's modern limited partnerships and should encourage the increased use of the limited partnership form of business.

6. Federal Income Tax Implications

One of the predominate reasons a group of investors selects the limited partnership form of business over the corporate form is the favorable tax treatment limited partnerships receive.¹⁷⁰ However, regardless of the status afforded an organization under state law, the Internal Revenue Service will treat it as a corporation, subject to tax, if the organization more closely resembles a corporation than a partnership.¹⁷¹ In determining whether an organization more nearly resembles a corporation than a partnership, the Internal Revenue Service examines four basic corporate characteristics.¹⁷² If three of the four characteristics exist, the organization will be taxed as a corporation regardless of its status under state law.¹⁷³ These four characteristics are limited liability, free transferability of interest, continuity of life, and centralized management.¹⁷⁴

167. OHIO REV. CODE ANN. § 1782.44(C) (Page 1985).

168. *Id.*

169. Limited partnerships are being used for such diverse purposes as real estate, oil and gas, research and development, thoroughbred horse breeding, and other investment projects. See Royalty, *supra* note 98, at 2. See also Whetzel & Herrod, *Proposed Changes to Ohio's Limited Partnership Law*, 3 ENERGY REV. 18 (1984); *Publicly Traded Limited Partnership: An Emerging Financial Alternative to the Public Corporation*, 39 BUS. LAW. 709 (1984); *Research and Development Limited Partnerships: A Panel*, 38 BUS. LAW. 1917 (1983).

170. See *supra* notes 17-19 and accompanying text.

171. B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 2.04, at 2-11 (4th ed. 1971).

172. *Id.*

173. *Id.*

174. Treas. Reg. § 301.7701-2 (1983). Limited liability exists if under state law no member of the organization is personally liable for the debts of the organization. *Id.* § 301.7701-2(d)(1). Free transferability is deemed to exist if all members, or members owning substantially all interests, have the power to substitute another who is not a member, without the consent of other members of the organization. *Id.* § 301.7701-2(e)(1). Continuity of life does not exist if an organization is dissolved upon the death, insanity, bankruptcy, retirement, resignation, expulsion, or other bylaws of the organization. *Id.* § 301.7701-2(b)(1). An organization has centralized man-

The Internal Revenue Service issued regulations describing the four corporate characteristics and how they would be evaluated under the Uniform Limited Partnership Act (ULPA).¹⁷⁵ Under these regulations, a limited partnership organized under the ULPA could be virtually assured of being treated as a partnership for tax purposes.¹⁷⁶ Therefore, since Ohio's former limited partnership law was virtually identical to the ULPA, limited partnerships organized in Ohio could be reasonably assured of treatment for tax purposes as partnerships.¹⁷⁷

Such tax treatment under the Revised Uniform Limited Partnership Act (Revised ULPA) was not certain. As a result, states were slow to adopt the new act.¹⁷⁸ The Internal Revenue Service finally issued new regulations which indicated that limited partnerships formed under the Revised ULPA would be treated the same as limited partnerships formed under the ULPA for federal income tax purposes.¹⁷⁹ Although the Ohio limited partnership law varies to some extent from the Revised ULPA, the changes are not of sufficient magnitude to affect a limited partnership's federal tax status.¹⁸⁰ Therefore, attorneys working with limited partnerships formed under Ohio's version of the Revised ULPA can be assured that they will be treated the same as they were when organized under the old law in Ohio.

agement if any person or group (which does not include all members) has exclusive authority to make management decisions necessary to conduct the business for which the organization was formed. *Id.* § 301.7701-2(c)(1).

175. B. BITTKER & J. EUSTICE, *supra* note 171, ¶ 2.04, at 2-12.

176. *Id.* The factors of continuity of life, centralized management, and free transferability are not present if, under state law, one member has the power to dissolve the organization, notwithstanding provisions in the partnership agreement to the contrary. Under the regulations, non-continuity of life exists even though the partnership agreement permits the remaining partners to continue the business of the partnership, since continuation of the partnership business results from the subsequent agreement of the remaining partners. *Id.* See *Glensder Textile Co.*, 46 B.T.A. 176 (1942).

177. See *Royalty*, *supra* note 98, at 538-39.

178. *Id.*

179. Treas. Reg. § 301.7701-2(a)(5) (1983).

180. See *Royalty*, *supra* note 98, at 538-39. It should be noted, however, that the Department of the Treasury has recently issued a report proposing to treat large limited partnerships like corporations for tax purposes. *Treasury Report on Tax Simplification and Reform*, [Extra Edition] STAND. FED. TAX REP. (CCH) No. 53, at 144-48 (Dec 6, 1984). Under this proposal, limited partnerships with more than 35 partners will be treated as corporations. According to the proposal, this change is required to "restore the competitive balance between the corporate and partnership forms of business organization" and to avoid the enormous administrative and compliance burden on the Internal Revenue Service which pass-through tax treatment of large limited partnerships creates. *Id.* If this proposal is enacted, all but the smallest limited partnerships will be taxed as corporations and one of the primary reasons for organizing as a limited partnership

7. Status of Limited Partnership Interests as Securities

A limited partnership interest can be a "security" for federal securities purposes.¹⁸¹ If a limited partnership interest is a security, the interest is protected by federal security regulations.¹⁸² A limited partnership interest is considered a security for federal security law purposes if it satisfies the test created by the United States Supreme Court in *SEC v. Howey*.¹⁸³ The four elements of the *Howey* test are (1) an investment of money, (2) in a common enterprise, (3) with the expectation of profits (4) solely from the efforts of others.¹⁸⁴ Since limited partners invest money in a common enterprise for profit, the first three elements are clearly satisfied.¹⁸⁵ However, it was at first uncertain whether the provisions of the Revised ULPA, as enacted in Ohio, authorizing limited partners to exercise greater control over their investment would violate the fourth element of the *Howey* test.

The effect of not meeting the *Howey* test would be that the purchaser or seller of a limited partnership interest would not be protected by federal security regulations.¹⁸⁶ In the event of fraud, the purchaser or seller of a limited partnership interest would have to rely on the state common law causes of action. Proving fraud or deception under state common law may be more difficult than under the federal security regulations because, under state common law, the plaintiff must prove that the defendant had the actual intent to defraud.¹⁸⁷ Consequently, failure to meet the *Howey* test can impose a severe penalty on the pur-

181. R. JENNINGS & H. MARSH, *SECURITIES REGULATION* 253 (4th ed. 1977). See also *Garbo v. Hillery Franchise Systems, Inc.*, 479 S.W.2d 491, 499 (Mo. 1972) (citing several cases where limited partnership interests were held to be securities).

182. H. HENN & J. ALEXANDER, *supra* note 10, at 94.

183. 328 U.S. 293 (1945).

184. *Id.* at 298.

185. Wong, *Limited Partnerships and California Securities Law: Restricting the Public Sale of Limited Partnership Interests*, 13 U.C.D. L. REV. 618, 628-29 (1980).

186. Rule 10b-5, promulgated by the Securities and Exchange Commission under authority of § 10(b) of the Securities Exchange Act of 1934, prohibits fraud and deception in connection with the purchase or sale of securities. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). Although Rule 10b-5 does not expressly provide for a private right of action, the federal courts have implied such a right of action. *Id.* at 729-30. Under Rule 10b-5, the plaintiff must prove the defendant acted with "scienter." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976). The Supreme Court's decision in *Hochfelder*, however, left open the possibility that the scienter requirement could be met by proving recklessness on the part of the defendant. *Id.* at 193 n.12. Lower federal courts have found recklessness to be sufficient to satisfy the scienter requirement. See, e.g., *Sunstand Corp. v. Sun Chem. Co.* 553 F.2d 1033, 1045 (7th Cir. 1977), *cert. denied*, 434 U.S. 875 (1977).

187. Proving negligence or recklessness is not sufficient to make out a case of common law fraud. *Sun Fin. & Loan Co. v. Cononico*, 20 Ohio Op. 2d 289, 291, 177 N.E.2d 84, 86 (1959). Other elements of common law fraud include reliance by the plaintiff on the statement or act, injury to the plaintiff, and causal connection between the fraudulent act and the injury. See 51 O.

chaser or seller of a limited partnership interest.

Ohio's new partnership law permits limited partners to exercise more control over the limited partnership investment than they have dared exercise in the past for fear of incurring unlimited liability.¹⁸⁸ The furthest reach of limited partner control of limited partnership business, expressly authorized in the new act, is the power to vote for the removal of general partners.¹⁸⁹ Therefore, the question is whether the right to remove general partners violates the requirement that limited partners rely "solely on the efforts of others" to generate profits.

The Supreme Court indicated in *United Housing Foundation, Inc. v. Foreman*,¹⁹⁰ that the *Howey* test was to be applied flexibly and realistically, and that the definition of "security" for federal security law purposes included those arrangements that involved, in substance, if not in form, profits on the "efforts of others."¹⁹¹ Interpreting this statement, the lower federal courts have allowed limited partners to sue under federal security law even when they had the right to exercise limited control over their investment.¹⁹² Finally in *Stowell v. Ted S. Finkel Investment Services, Inc.*,¹⁹³ the Federal District Court for the Southern District of Florida expressly held that the ability of limited partners to replace a general partner was not sufficient control to violate the fourth element of the *Howey* test.¹⁹⁴ Therefore, interests in limited partnerships organized in Ohio, which otherwise meet the *Howey* test, will qualify as securities and be protected under federal security law so long as the limited partners are not authorized to participate in activities not specified in the new act.

B. Revised ULPA Provisions Not Adopted

The Ohio General Assembly has, for the most part, adopted the Revised ULPA in its entirety.¹⁹⁵ However, the legislature has made some changes. These changes can be placed into two categories: (1) changes which restate the law in a manner consistent with the "layout" and structure of the Ohio Revised Code, such as renumbering paragraphs, and (2) changes which alter the substance of the Revised

188. OHIO REV. CODE ANN. § 1782.19 (Page 1985). See also *supra* notes 155-63 and accompanying text.

189. OHIO REV. CODE ANN. § 1782.19(B)(5)(c).

190. 421 U.S. 837 (1975).

191. *Id.* at 851-52.

192. See, e.g., *Hirsch v. duPont*, 396 F. Supp. 1214, 1227-28 (S.D.N.Y. 1975), *aff'd*, 553 F.2d 750 (2d Cir. 1977).

193. 489 F. Supp. 1209 (S.D. Fla. 1980), *aff'd*, 641 F.2d 323 (5th Cir. 1981).

194. *Id.* at 1223.

195. See OHIO REV. CODE ANN. §§ 1782.01-.62 (Page 1985); REVISED ULPA, *supra* note <https://ecommons.udayton.edu/udlr/vol11/iss1/9>

ULPA. The former changes are not of consequence and will not be analyzed. The latter changes, however, wrought by failing to adopt selected substantive provisions of the Revised ULPA, defeat some of the creditor and consumer protections and procedural enhancements built into the Revised ULPA. These deficiencies should be corrected through remedial legislation.

1. Section 101—Definitions

Section 101 of the Revised ULPA is an important section as it sets down basic definitions for understanding and complying with the remainder of the Act.¹⁹⁶ Ohio, however, has chosen not to incorporate within chapter 1782 of the Revised Code a definition of major importance—"person"—and a definition of lesser importance—"state."¹⁹⁷ Failure to adopt the definition of "person" is of concern because section 1782.08 of the Ohio Revised Code states that in order to form a limited partnership, two or more "persons shall execute a certificate of limited partnership."¹⁹⁸ Section 1782.01(G) of the Ohio Revised Code also states that a limited partnership is a "partnership formed by two or more persons under the laws of this state."¹⁹⁹ In order to determine what is a "person" for purposes of forming a limited partnership, one must reach outside chapter 1782 and use a definition from chapter 1775 of the Ohio Revised Code—Uniform Partnership Law.²⁰⁰

Section 1775.05(B) of the Ohio Revised Code, which defines a "partnership," states that chapter 1775 applies to limited partnerships to the extent the provisions of chapter 1775 are not inconsistent with the limited partnership chapter.²⁰¹ Section 1775.01 states that a "[p]erson includes individuals, partnerships, corporations, and other associations."²⁰² Therefore, Ohio's definition of "person," for purposes of limited partnership law, is almost as broad as the definition expressed

196. See REVISED ULPA, *supra* note 9, § 101.

197. See OHIO REV. CODE ANN. § 1782.01 (Page 1985). Section 101 of the Revised ULPA states in part: "'Person' means a natural person, partnership, limited partnership (domestic or foreign), trust, estate, association, or corporation . . . [and] '[s]tate' means a state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico." REVISED ULPA, *supra* note 9, § 101.

198. OHIO REV. CODE ANN. § 1782.08 (Page 1985).

199. *Id.* § 1782.01(G).

200. OHIO REV. CODE ANN. §§ 1775.01, 1775.05(B) (Page 1985). The definition of "person," which includes within it "estate" and "trust," pertaining to statutory construction, also does not apply because of limiting language stating that these definitions apply "unless another definition is provided in such statute or a related statute." OHIO REV. CODE ANN. § 1.59 (Page 1984). Section 1775.01 clearly provides the appropriate definition, thereby excluding the use of § 1.59. See *infra* note 201 and accompanying text.

201. OHIO REV. CODE ANN. § 1775.05(B) (Page 1985).

in the Revised ULPA.²⁰³

However, failure to adopt the Revised ULPA definition of "person" in its entirety, does limit the "persons" who can participate in limited partnerships. Ohio does not allow a trust or estate to be a partner, as these two entities are not included within the definition of "person" contained in chapter 1775.²⁰⁴ It is open to conjecture whether excluding an estate from being a partner is a significant exclusion as estates should generally be distributed as quickly as possible, and the executor or administrator is to conserve the estate rather than speculate for investment.²⁰⁵ But certainly exclusion of a trust is significant as limited partnerships take on more of the character of corporations under the Revised ULPA.²⁰⁶ A limited partnership may be equally attractive as an investment for a trust as it is for a corporation.

Although the definition of "state" found in the Revised ULPA²⁰⁷ has not been included in Ohio's version of this Act, this exclusion has minor impact, if any. This is because the definition of "state" contained in section 1.59 of the Ohio Revised Code²⁰⁸ is equivalent to the definition of "state" contained in the Revised ULPA.²⁰⁹ And section 1.59 applies to the statutory construction of chapter 1782 of the Code.²¹⁰

In summary, the apparent impact of Ohio's failure to adopt all of the definitions stated in the Revised ULPA in their entirety will be to

203. See *supra* notes 197-202 and accompanying text.

204. *Id.* The issue is further confused by § 1782.43 of the Revised Code which addresses the powers of the estate of a deceased partner. OHIO REV. CODE ANN. § 1782.43 (Page 1985). Section 1782.43 states that "[i]f a partner is a corporation, trust, or other entity and is dissolved or terminated, the powers of the partner may be exercised by its legal representative or successor," inferring that a trust can be a person for purposes of forming a partnership. *Id.* At one time, § 1.02 of the Ohio Revised Code—general definitions applicable to all chapters—defined "person," but that definition is no longer contained in § 1.02. Hurd & Mayer, *Ohio Limited Partnerships—Business Use and Effect*, 22 OHIO ST. L.J. 373, 378 (1966); OHIO REV. CODE ANN. § 1.02 (Page 1984).

205. See *Hecker v. Schuler*, 12 Ohio St. 2d 58, 231 N.E.2d 870 (1967). It should be noted that § 1782.43 provides that the executor or administrator of a partner's estate can step into the shoes of the deceased partner and exercise all the rights of the decedent for purposes of winding up the estate. OHIO REV. CODE ANN. § 1782.43 (Page 1985).

206. A trustee may invest trust assets in a corporation. See generally OHIO REV. CODE ANN. § 1339.01 (Page 1979) (a trustee is a fiduciary, and a fiduciary may hold the securities issued by a corporation). As a limited partnership becomes an investment opportunity much like the corporation, it does not logically follow that a trust should be excluded from investing in a limited partnership.

207. REVISED ULPA, *supra* note 9, § 101(12). The Revised ULPA defines state as a "state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico." *Id.*

208. OHIO REV. CODE ANN. § 1.59 (Page 1984). Section 1.59 defines state as "any state, district, commonwealth, territory, insular possession . . . subject to the legislative authority of the United States." *Id.*

209. See *supra* note 199.

foreclose limited partnerships as an investment opportunity for trusts. It would have been legislatively more tidy to include these definitions in the Act and erase any doubt as to what the legislature intended, rather than construct a definition from other sections of the Code.

2. Section 102—Name

Section 102 of the Revised ULPA sets out the name requirements and restrictions for a limited partnership and “reflects the intention to integrate the registration of limited partnership names with that of corporate names.”²¹¹ However, Ohio has chosen not to adopt section 102(4) of the Revised ULPA which states that the partnership name “may not be the same as, or deceptively similar to, the name of any corporation or limited partnership organized under the laws of this State or licensed or registered as a foreign corporation or limited partnership in this State.”²¹² This omission is not provided for elsewhere in other code amendments also contained in Amended Substitute House Bill 607.²¹³

At first glance it may seem that the General Assembly’s amendment of section 1329.01 of the Ohio Revised Code—an amendment of chapter 1329 pertaining to use of trade names and contained in the legislation implementing the Revised Limited Partnership Act—read in conjunction with section 1329.02 of the Ohio Revised Code, incorporates the provision of section 102(4) of the Revised ULPA. This, however, is not the case. Section 1329.01 has been amended to define a “fictitious name” as a name which “includes the name of any domestic or foreign limited partnership that is formed under or subject to chapter 1782 of the Revised Code.”²¹⁴ Section 1329.02 of the Revised Code states that “[t]he secretary of state shall not file an application for registration of any trade name that might mislead the public, or is not readily distinguishable from trade names previously registered . . . or is not readily distinguishable from corporate names.”²¹⁵ These two code sections do not incorporate the provisions of section 102(4) of the Revised ULPA because there is no mandatory requirement to register a fictitious name—the name of the limited partnership—with the secretary of state.²¹⁶ Section 1329.01(C) merely requires a person who does business under a fictitious name—in this case the limited partner-

211. REVISED ULPA, *supra* note 9, § 102.

212. *Id.* § 104(2).

213. Act of Jan. 3, 1985, 1984 Ohio Legis. Serv. 5-895 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 1782.01-.62 (Page 1985)). See *infra* notes 214-18 and accompanying text.

214. OHIO REV. CODE ANN. § 1329.01 (Page 1985).

215. OHIO REV. CODE ANN. § 1329.02 (Page 1979) (amended 1985).

216. OHIO REV. CODE ANN. § 1329.01(C) (Page 1985).

ship—to report the name to the secretary of state.²¹⁷ The secretary of state is given no authority to deny use of the name to the person who reports it; the secretary merely keeps the report on file for inquiries with respect to the name.²¹⁸ The impact of failing to adopt a mandatory requirement to register the name of the limited partnership is that deceptively similar names can be used and can mislead creditors and consumers.

3. Section 201—Certificate of Limited Partnership

In this section of the Revised ULPA, the Commissioners set forth a major, modern update of limited partnership law²¹⁹—that is, a requirement for centralized filing of the partnership certificate.²²⁰ This requirement, however, was not adopted by the Ohio General Assembly, and filing of the certificate of partnership remains at the county recorder level.²²¹ Nevertheless, Ohio did resolve the problem of multiple filings required by old section 1781.02(A).²²² In the new Act, the limited partnership files only in the county in which the partnership has its principal place of business.²²³ This is a tremendous improvement, but it still does not permit easy, central access to filed certificates.

Ohio has made two additional modifications to section 201 of the Revised ULPA. New section 1782.08(3) adds “the address of the principal place of business” to the partnership certificate;²²⁴ new section 1782.08(4) allows the partners to list either their business or personal address on the partnership certificate.²²⁵ Both modifications are minor but should give partners and potential creditors more flexibility as well

217. *Id.*

218. *Id.*

219. See *supra* notes 50–52 and accompanying text.

220. REVISED ULPA, *supra* note 9, § 201(a).

221. OHIO REV. CODE ANN. § 1782.08 (Page 1985). Ohio did not adopt a centralized filing system in H.B. 607 because implementation would have required an appropriation to expand the secretary of state’s recording capability. Rather than hold the Revised ULPA hostage to an implementing appropriation, it was decided to proceed without a centralized filing system and make the transition to centralized filing at a later date. Telephone interview with Kenneth M. Royalty, private attorney assisting the Ohio State Bar Association Committee on Governmental Affairs (Feb. 15, 1985).

222. OHIO REV. CODE ANN. § 1781.02(A)(2) (Page Supp. 1983) (amended 1985). Section 1781.02(A)(2) stated that “[i]f the partnership has places of business in different counties, the certificates shall be filed for record in like manner in the office of the recorder in every such county.” *Id.*

223. OHIO REV. CODE ANN. § 1782.08(A) (Page 1985). Section 1782.08(A) states that “[t]he certificate shall be filed in the office of the recorder of the county in which the principal place of business of the limited partnership is located.” *Id.* Section 1782.13 allows the limited partnership to define in the certificate its principal place of business if there is a question about which of two or more places is the principal place of business. *Id.* § 1782.13.

224. *Id.* § 1782.08(3).

225. *Id.* § 1782.08(4).

as information.

4. Section 304—Person Erroneously Believing Himself or Herself to be a Limited Partner

A person who contributes to a partnership erroneously thinking that he or she is a limited rather than general partner can limit his or her liability if, on discovering the mistake, he or she either causes an appropriate certificate of limited partnership to be filed, or he or she withdraws from the partnership.²²⁶ Ohio has taken a very important step in defining how that withdrawal should be accomplished—by executing and filing a certificate of withdrawal.²²⁷ This provision should help to reduce any potential contest over whether withdrawal has been effected or not, and is a sensible modification to the Revised ULPA.

5. Section 902—Registration of Foreign Limited Partnerships

The section of the Revised ULPA defining how a foreign limited partnership is to register²²⁸ is an important, modern update to limited partnership law which Ohio has not adopted in its entirety.²²⁹ Specifically, Ohio has deleted a requirement for the foreign limited partnership to state the name under which it will be doing business in Ohio if this name is not the same as its foreign name.²³⁰ Although the secretary of state will have on file the name of the foreign limited partnership,²³¹ it is not clear from section 1329.01(C) of the Revised Code whether the name reported by the foreign corporation is its foreign name or the name under which it does business in Ohio.²³² This is confusing at best, and it can be misleading to outsiders dealing with the partnership at worst.

C. Significant Differences Between Ohio's Version of the Revised ULPA and Those Adopted by Other States

The states which have adopted the Revised ULPA, including Ohio, have adopted it virtually in toto.²³³ The substantial adoption of the version proposed by the Commissioners probably resulted more

226. *Id.* § 1782.20.

227. *Id.* Section 1782.20(A)(2) states that a limited partner can withdraw from the partnership by “[withdrawing] from future equity participation in the enterprise by executing, and filing in the office of the recorder of the county in which the certificate of limited partnership is filed, a certificate declaring withdrawal.” *Id.* § 1782.20(A)(2).

228. REVISED ULPA, *supra* note 9, § 902.

229. *See id.*; OHIO REV. CODE ANN. § 1782.49 (Page 1985).

230. OHIO REV. CODE ANN. § 1782.49 (Page 1985).

231. *See supra* notes 215–22 and accompanying text.

232. *Id.*

233. REVISED ULPA, *supra* note 9, §§ 101–1105 annot.

from the adverse tax implications of not doing so than the inherent completeness of the Revised ULPA.²³⁴ Legislators are reluctant to vary an organizational scheme which has passed Internal Revenue Service muster and has led to definitized regulations and known tax treatment.²³⁵ Each state, however, has "tweaked" the Revised ULPA to accommodate its unique needs,²³⁶ but the changes have been minor.²³⁷

Therefore, the variations between Ohio's version of the Revised ULPA and the versions adopted by other states are minimal. Ohio's only significant variation from the acts of other states is Ohio's requirement for local, rather than central, filing of the partnership certificate.²³⁸ However, the impact of this variation should be minimal on other states as a filing of a foreign limited partnership certificate is only required in one location—the county wherein the principal place of business is located.²³⁹

IV. CONCLUSION

The minimal amount of litigation over the provisions of the ULPA should not suggest that it is capable of meeting the requirements of today's investor or that it has worked smoothly. Conservative legal advice by lawyers has most probably been responsible for the lack of litigation. However, this does not mean that Ohio's limited partnership law could not be updated to meet the needs of today's investors. The Ohio General Assembly has done this through the adoption of Amended Substitute House Bill No. 607²⁴⁰—the Revised Uniform Limited Partnership Act (Revised ULPA).

Ohio's revised limited partnership law modernizes the prior law while retaining the special character of limited partnerships as compared to corporations. For example, withdrawal of a general partner does not automatically cause dissolution of a limited partnership, and amendment of a certificate of limited partnership no longer needs to be signed by all of the partners. The new law in Ohio also organizes the provisions in a more logical fashion, fills gaps in the prior law, and clarifies ambiguities by adding more detailed language—in this regard, the provisions governing liability of limited partners and foreign limited partnerships are the most striking examples. Finally, the new law adds

234. See Donnell, *supra* note 8, at 401.

235. See *Limited Partnership—Recent Developments: Securities, Tax, and Substantive Partnership Law Issues*, 39 BUS. LAW. 677, 699 (1984).

236. See REVISED ULPA, *supra* note 9, §§ 101–1105 annot.

237. *Id.*

238. OHIO REV. CODE ANN. § 1782.08 (Page 1985).

239. *Id.* § 1782.49.

240. Act of Jan. 3, 1985, 1984 Ohio Legis. Serv. 5-895 (Baldwin) (codified at OHIO REV. CODE ANN. §§ 1782.01–02 (Page 1985)).

many substantive and procedural changes designed to give business organizers increased flexibility. The partnership agreement is now an important instrument controlling the priority of creditors and partners in partnership distributions. This increased flexibility is of great value to today's modern business promoter involved in large multi-state real estate, oil and gas, research and development, and similar syndications.

However, Ohio's failure to adopt the Revised ULPA in its entirety deprives Ohio investors of some of the flexibility built into the Revised ULPA by its drafters. Ohio has chosen not to totally implement a centralized filing system, and Ohio has not adopted definitions and procedures which would allow a trust to invest in a limited partnership and which would protect investors and consumers from deceptively similar limited partnership names. These deficiencies should be corrected through remedial legislation.

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Code Sections Affected: To amend sections 1329.01, 1701.59, 1701.591, 1777.03, 1777.04, and chapter 1781.

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Sponsor: Verich (H)

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