

THE
REVISED UNIFORM
PARTNERSHIP ACT

2012-2013 EDITION

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The Revised Uniform Partnership Act

2012-2013 Edition

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ISBN: 978-0-314-61289-2

Preface

The Revised Uniform Partnership Act (“RUPA”) represents the first major recodification of partnership law in almost a century. It contains an extensive set of default rules and for the first time makes a clear distinction between default rules and mandatory rules. This book includes the text of RUPA, the Official Comments and our Authors’ Comments. It also includes sample forms. We have taken a “value added” approach to our Authors’ Comments. We do not repeat everything that has been said in RUPA or in the Official Comments. Rather, we add our own section-by-section analysis, including discussion of the emerging case law on RUPA. When appropriate, we include some citation to non-RUPA jurisdictions and to non-RUPA case law, particularly to significant case law in the emerging area of limited liability partnerships.

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September 2012

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THE REVISED UNIFORM PARTNERSHIP ACT

INTRODUCTION

A. INTRODUCTION TO THIS BOOK

This book offers a comprehensive analysis of the Revised Uniform Partnership Act, the first complete revision of partnership law since the Uniform Partnership Act was promulgated in 1914. RUPA was finalized by the National Conference of Commissioners on Uniform State Laws in 1994. In 1996, the Conference amended RUPA to include a full range of provisions for limited liability partnerships and for foreign limited liability partnerships. The first twelve chapters of this book correspond to the twelve articles of RUPA after the addition of articles on domestic and on foreign limited liability partnerships. Chapter 13 contains a variety of forms, including a sample partnership agreement.

The section analysis of RUPA in the first twelve chapters consists of three parts. First, the text of RUPA. Second, the “Official Comments” to RUPA prepared by the National Conference of Commissioners on Uniform State Laws. Third, our “Authors’ Comments.”

We have taken what we consider to be a “value added” approach to the Authors’ Comments. If something is sufficiently clear from the text of RUPA and/or from the Official Comments, we give it little or no treatment in the Authors’ Comments. The Authors’ Comments attempt to highlight the most important changes to partnership law made by RUPA. Our Comments also attempt to tie together the various provisions of RUPA, which are at times lengthy and complex. Our goal is to highlight both the opportunities and the pitfalls introduced by the new statute. We include sufficient discussion of case law under the UPA, which is included as an Appendix, to indicate continuity with the past. We also address the most significant cases interpreting RUPA.

RUPA introduces an unprecedented amount of form filing to the practice of partnership law. RUPA introduces a system for filing a wide range of statements that applies to all partnerships.

RUPA also imposes special requirements on limited liability partnerships and on foreign limited liability partnerships. Chapter 13 includes three types of forms that might prove helpful to practitioners. First are the standard forms adopted by the Florida Department of State. Second are generic forms developed by the authors. Third are two forms of partnership agreement that reflect some of RUPA's new rules, such as its new definition of the term "dissolution" and its new rules on partnership breakups.

RUPA is an ambitious and complicated statutory undertaking, the product of numerous compromises that resulted from a process in which widely divergent views were represented. The meaning of some key provisions will become settled only over time. We, ourselves, differ on some matters of interpretation and on some policy questions. We trust that our differences have made the book stronger and more useful. Individually and collectively, we invite your suggestions to improve future editions.

B. INTRODUCTION TO RUPA

RUPA represents a complete rewrite of the venerable UPA. Many of RUPA's rules continue UPA policy, but some of the old policy is restated in a new way. Some of RUPA's rules have no antecedent in the UPA. In addition, RUPA provides for limited liability partnerships and for foreign limited liability partnerships. At bottom, RUPA's most significant changes fall in seven major areas.

1. RUPA Introduces a Blanket Provision That, with Certain Limited Exceptions, Partners May Contract out of the Rules in RUPA That Govern Their Relations among Themselves.

Under RUPA, as under the UPA, the general rule is that the partnership agreement governs the relations among the partners and between the partners and the partnership. Generally, RUPA governs only to the extent the partnership agreement does not provide otherwise. This is reflected in Section 103(a), which provides that, unless a rule is listed in Section 103(b), the partners may vary it by agreement.

Section 103(b), therefore, is designed to list in one place the handful of rules that may not be abrogated by agreement. When it comes to the partners' rights among themselves, the Section 103(b) rules are the only ones they may not draft away. Most importantly, neither the partners' fiduciary duties of loyalty and care, nor their obligation of good faith and fair dealing, may be eliminated entirely, although the partners by agreement may identify activities that do not violate the duty of loyalty and may determine standards by which to measure good faith.

2. RUPA Contains a Number of Provisions That Adopt an Entity Theory to Achieve Simplicity.

RUPA contains a number of changes that adopt an entity theory of partnership. Section 201 states unequivocally: "A partnership is an entity."

The move to an entity model involves a completely different statement of the property rights of partners and partnerships. RUPA eliminates the UPA concept of a tenancy in partnership and its reference to a partner's rights in specific partnership property. Section 203 provides that property acquired by a partnership becomes property of the partnership and not of the partners individually. Under Section 204(a), property is partnership property when acquired in the partnership name or in the name of one or more partners with an indication of their capacity as partners or of the existence of a partnership. Section 402 provides that a partner has no right to receive a distribution in kind and may not be required to accept a distribution in kind. Because these rules are not listed in Section 103(b), they may be contracted away.

The partnership can be and to some extent must be treated as more of an entity by partnership creditors. Under Section 301, all partners are general agents with authority to bind the partnership. The partnership as an entity has its own rights and obligations, and Section 307(a) provides that the partnership may sue and be sued in the partnership name. In addition, the general rule of Section 306(a) is that all partners are jointly and severally liable for all partnership obligations. Section 307(c) provides that a judgment against a partnership is not by itself a judgment against a partner and that a judgment against a partnership may not be satisfied from a partner's assets unless there is a judgment against the partner. Section 307(d) generally requires a partnership creditor to levy unsuccessfully on the partnership's property before levying on a partner's individual property.

The new articulation of the partnership as an entity is part of an attempt to give more theoretical stability to partnerships, particularly partnerships that have contracted for stability. The entity articulation is related to the new dissociation and dissolution rules. The basic concept is that, in general, relationships between a partnership and its creditors are unaffected by the dissociation of a partner or by the addition of a new partner, unless otherwise agreed.

The entity theory is advanced even further by RUPA's provisions on limited liability partnerships. These provisions eliminate the joint and several liability of partners for partnership obligations incurred while the partnership is a limited liability partnership. Section 306(c) provides that an obligation of a

partnership incurred while the partnership is a limited liability partnership is solely the obligation of the partnership. Under Section 307, unless a partner is a wrongdoer, the partner may not be named in an action against the partnership.

3. RUPA Provides for a Completely New System of Partnership Filings.

The most dramatic change RUPA makes to the practice of partnership law is in the area of partnership filings. Section 105 introduces a new system of filed “statements” concerning the composition, operation and breakup of partnerships. Three key statements are the statement of partnership authority, the statement of dissociation and the statement of dissolution. A statement of partnership authority is filed by a partnership but other statements may be filed by individual partners.

Section 303 provides that a statement of partnership authority may be filed with the state. The statement must specify the partners authorized to execute an instrument transferring real property held in the name of the partnership. The statement also may contain any other matters the partnership chooses, including the authority, or limitations upon the authority, of some or all of the partners to enter into other transactions on behalf of the partnership. A grant of extraordinary authority binds the partnership to a person who gives value without knowledge that there is no authority. A grant of extraordinary authority to transfer real property must be recorded with the land titles to bind the partnership. A restriction on a partner’s authority, on the other hand, only binds nonpartners who know of it unless the restriction concerns real property. A restriction on a partner’s authority to transfer real property held in the name of the partnership is effective if, and only if, it is recorded with the land titles. Section 304 authorizes statements of denial that limit the effect of statements of partnership authority.

Section 704 provides for the filing of a statement of dissociation and Section 805 provides for the filing of a statement of dissolution. These statements are important to negate earlier statements of partnership authority and to more rapidly “wind down” liability and authority in partnership breakups.

4. RUPA Contains a New Articulation of the Fiduciary Duties of a Partner.

RUPA contains a completely new articulation of the fiduciary duties of partners. The basic purpose of the changes is to make clear that partners need not be disinterested trustees and that partners have great flexibility to contract among themselves concerning fiduciary duties. Section 404(a) states that the only fiduciary duties a partner owes to the partnership and to the other partners are the duties of loyalty and care as set forth in the Act.

Section 404(b) states that a partner’s duty of loyalty to the partnership and to the other partners is “limited” to three rules.

The first is based on UPA Section 21 and provides that a partner must account to the partnership and hold “as trustee” for it any property, profit, or benefit derived by the partner, without the consent of the other partners, in the conduct and winding up of the partnership business or from a use by the partner of partnership property. The second states that a partner must refrain from dealing with the partnership as or on behalf of a party having an interest adverse to the partnership without the consent of the other partners. The third states that a partner must refrain from competing with the partnership without the consent of the other partners. These rules may not be eliminated in the partnership agreement, although the agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable.

Section 404(c) provides that a partner’s duty of care to the partnership and to the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law. The duty of care may not be reduced unreasonably in the partnership agreement.

Section 404(d) states that a partner shall discharge the partner’s duties under the Act and under the partnership agreement, and exercise any rights, consistent with the obligation of good faith and fair dealing. This obligation may not be eliminated in the partnership agreement, but the partners by agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.

Section 404(e) provides that a partner does not violate any duty or obligation under the Act or under the partnership agreement merely because the partner’s conduct furthers the partner’s own interest.

5. RUPA Rewrites the Rules on Partnership Breakups but Retains Much of the Substance of Present Law.

Under the UPA, the rules on partnership breakups are activated by, and only by, a dissolution, which is defined as the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on of the business. The UPA definition and use of the term “dissolution” have led to considerable confusion. In addition, the UPA definition, based as it is on the departure of any partner, reflects an emphasis on the aggregate theory of partnerships that is inconsistent with RUPA’s move to an entity theory. While retaining much of the substance of the UPA rules on partnership breakups, RUPA redefines the term “dissolution” and limits its significance.

RUPA’s rules on partnership breakups are divided among three articles, each of which has a central provision. Article 6

concerns partner “dissociations,” which are withdrawals and other departures, such as expulsions. The central provision of Article 6 is Section 601, which lists all the ways in which a partner dissociates. Section 601(1) retains the present rule that a partner has the power to dissociate at will, even in a fixed term partnership. Section 602(a) underscores that a partner may exercise this power at any time. Moreover, Section 103(b) specifies that this is one of the rules that cannot be waived by agreement.

Article 7 concerns the situation in which there is a buyout of a partner who dissociates, rather than a dissolution of the partnership. Its central provision is Section 701, which describes the buyout in greater detail than present law and which provides for judicial determination of the buyout price if the partners are unable to agree.

Article 8 concerns the situation in which a dissociation or other event causes a winding up of the partnership business. Its central provision is Section 801, which provides that “a partnership is dissolved, and its business must be wound up, only upon” one of the events listed.

In many situations, the departing partner is simply bought out under Article 7, with no dissolution and winding up of the business. RUPA does, however, retain the present rule that gives a partner in an at will partnership the right to compel a winding up of the partnership business, unless otherwise agreed.

As mentioned earlier, the breakup rules interact with the Section 105 system of voluntary filings to give notice to third persons. Any partner or the partnership may file a statement of dissociation or a statement of dissolution. After 90 days, the filings are deemed notice to third persons for the purpose of winding down partners’ apparent authority and liability for partnership obligations. These provisions reflect a significant departure from the UPA and present new professional responsibilities for lawyers dealing with partnerships.

6. RUPA Creates a New “Safe Harbor” for Partnership Conversions and Mergers.

Article 9 is new and authorizes the conversion and merger of partnerships. Several states already authorize the merger of limited partnerships, and there is a need for certainty with respect to the legal validity of conversions and mergers. Under Section 902, a general partnership may convert to a limited partnership, and under Section 903, a limited partnership may convert to a general partnership. Generally, the unanimous consent of all partners is required. Section 904 explains the effect of a conversion on the entity and on the partners, especially their further liability for partnership obligations. Section 905 authorizes the merger of a partnership with one or more general or limited