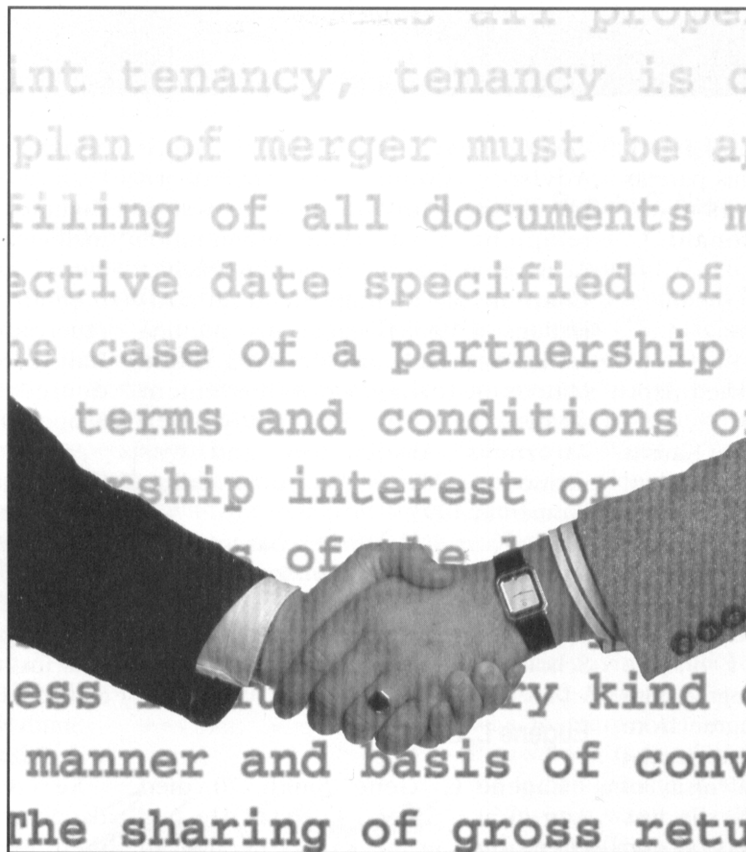

The Kansas Revised Uniform Partnership Act

By Edwin W. Hecker Jr.

The original Uniform Partnership Act (UPA) was promulgated in 1914 by the National Conference of Commissioners on Uniform State Laws (NCCUSL). At its pinnacle, it was the law in every state except Louisiana. Kansas adopted the UPA in 1972.[1]

In 1992, in response to a recommendation from an American Bar Association subcommittee,[2] the NCCUSL promulgated a revised version of the UPA. Although entitled Uniform Partnership Act, the revised act is almost universally referred to as the Revised Uniform Partnership Act (RUPA), and that terminology is used in this article. RUPA itself was revised in 1993 and again in 1994. In 1996 the NCCUSL amended RUPA to integrate provisions governing limited liability partnerships (LLPs).

The 1994 version of RUPA was introduced during the 1996 session of the Kansas Legislature, but it died in committee. The 1996 version was introduced in 1997, passed the Senate unanimously, but failed to be considered by the House. It was carried over to the 1998 session, when it passed the House and was signed into law by the governor.[3] The Kansas version of RUPA is codified as new Chapter 56a in Kansas Statutes Annotated.[4]

RUPA modernizes the UPA to reflect the changes in law and business that have occurred during the past eight decades. It carries over many of the concepts and rules that have withstood the test of time.[5] It also repairs or replaces concepts and rules that have not worked well.[6] Finally, it adds totally new concepts and provisions.[7] The purpose of this article is both to describe RUPA's innovations and to note the many respects in which it carries forward familiar principles from the UPA.

I. Nature and definition of partnership

A. Entity status

The most fundamental philosophical difference between the UPA and RUPA relates to their respective conceptions of the nature of a partnership. Under the UPA, as at common law, a partnership, unlike a corporation, is not considered to be a legal entity separate and distinct from its owners. Rather, under the so-called aggregate theory, a partnership is merely a group of persons.[8] Because it has no separate legal personality, the group, as such, cannot own property and cannot sue or be sued.[9] Moreover, the particular group necessarily ceases to exist every time there is a change in membership. If these precepts were taken to their logical extreme, partnership would be a completely unworkable form of business organization. The UPA did not do this, of course, but in order to create a regime in which partnerships could function in the real world, and yet pay lip service to the aggregate theory, it often was forced to adopt rules that were unnecessarily indirect and complex.[10]

The conception of a partnership under RUPA is exactly the opposite — it is affirmatively declared to be an entity, separate and distinct from the partners.[11] The result is a statute that is generally more directly functional than its predecessor. While RUPA may be more complex than the UPA, its complexity is due to its modernization and greater specificity, not its theoretical conception of the nature of a partnership.[12]

B. Definition

RUPA continues, almost verbatim, the UPA's definition of a partnership as an association of two or more persons to carry on as co-owners a business for profit.[13] Both include limited liability partnerships within the definition,[14] and both exclude business associations, such as corporations and limited liability companies, formed under the authority of other statutes.[15]

However, while the UPA provided that it "shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent," RUPA eliminates this express linkage and makes it clear that a limited partnership is not included within its definition of "partnership."[16] Nevertheless, RUPA will apply to limited partnerships in cases not covered by the Kansas Revised Uniform Limited Partnership Act (KRULPA) by reason of the express linkage contained in that statute.[17] Put differently, it is unnecessary

FOOTNOTES

1. 1972 Kan. Sess. Laws, ch. 210. The Kansas UPA was amended in 1975 to authorize trustees to participate in partnerships. 1975 Kan. Sess. Laws, ch. 289. It was amended again in 1988 to permit partnerships, as such, to sue and be sued. 1988 Kan. Sess. Laws, ch. 194. Finally, in 1994, the legislature added provisions recognizing limited liability partnerships. 1994 Kan. Sess. Laws, ch. 140. The UPA was codified at K.S.A. 56-301 to -347 (repealed 1999).

2. *See* UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations of the American Bar Association, *Should the Uniform Partnership Act Be Revised?* 43 Bus. Law. 121 (1987).

3. 1998 Kan. Sess. Laws, ch. 93.

4. K.S.A. 1998 Supp. 56a-101 to -1305. As of July 1, 1999, RUPA became effective as to all partnerships, regardless of when formed. *Id.* 56a-1304(b).

5. *E.g.*, provisions making each partner an agent of the partnership; default rules governing internal matters such as profit-sharing and management rights; provisions controlling transfers of a partner's economic interest in the partnership; and the charging order remedy available to the separate creditors of a partner. *See* K.S.A. 1998 Supp. 56a-301, -401, -502 to -504.

6. *E.g.*, ownership of partnership property; rules governing dissolution. *See id.* 56a-203, -501, - 601 to -701, -801.

7. *E.g.*, publicly-filed statements; statutory fiduciary duties; procedures for conversions and mergers; and extension of the protection afforded by limited liability partnerships. *See id.* 56a-101(m), -105, -306(c), -404, -901 to -1203.

8. Uniform Partnership Act (1914), Commissioners' Prefatory Note (hereinafter cited as UPA).

9. Most states have had to enact special legislation giving partnerships the legal capacity to sue and be sued. K.S.A. 56-344 (repealed 1999) is an example.

10. K.S.A. 56-325 (repealed 1999), governing partnership property, was perhaps the most extreme example. For further discussion, *see* text at notes 26-30, *infra.*

11. K.S.A. 1998 Supp. 56a-201(a).

12. Interestingly, unlike the situation with the UPA, RUPA's drafters began their work with no preconceived notions about whether a partnership should be viewed as an aggregate or an entity. They simply set out to craft pragmatic solutions to commonly recurring partnership problems. As work progressed, it became clear that they were consistently choosing entity-based solutions. It was not until near the end of the project that they adopted the affirmative statement noted in text — that partnerships are entities. Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 Bus. Law. 1, 3 (1993).

13. *Compare* K.S.A. 56-306(a) (repealed 1999) *with* K.S.A. 1998 Supp. 56a-101(f), -202(a). The UPA defined "person" to include "individuals, trustees, partnerships, corporations and other associations." K.S.A. 56-302(c) (repealed 1999). RUPA broadens this definition to cover, in addition, business trusts, estates, joint ventures, governments or governmental subdivisions, agencies or instrumentalities, or any other legal or commercial entities. K.S.A. 1998 Supp. 56a-101(j).

14. K.S.A. 56-306(a) (repealed 1999); K.S.A. 1998 Supp. 56a-101(e). *See also id.* 56a-201(b).

15. K.S.A. 56-306(b) (repealed 1999); K.S.A. 1998 Supp. 56a-101(f), -202(b).

16. K.S.A. 56-306(b) (repealed 1999); K.S.A. 1998 Supp. 56a-101(f), -202(b); Revised Uniform Partnership Act §§ 101 cmt., 202 cmt. 2 (1996) (hereinafter cited as RUPA).

17. K.S.A. 1998 Supp. 56-1a604.

that the linkage appear in both statutes, and it is more appropriate that it appear in the limited partnership statute.[18] The important point, however, is that RUPA is doubly important, because it will apply directly to general partnerships and indirectly to limited partnerships as to issues not covered by KRULPA.

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The RUPA definition of "partnership" also differs superficially from the UPA definition by providing that persons who associate to carry on a business as co-owners are partners "whether or not the persons intend to form a partnership."[19] This additional language, however, merely codifies the prevailing case law and makes it clear that the intent to form a partnership is determined objectively rather than subjectively.[20]

RUPA also carries forward, with little change in wording, the UPA's litigation-oriented rules for determining the existence of a partnership in a disputed case. Thus, mere co-ownership of property, even if the co-owners share profits from the property, is not of itself sufficient to establish a partnership.[21] Similarly, sharing of gross receipts is not of itself sufficient to establish partnership, even if the persons sharing the gross receipts are co-owners of property.[22] On the other hand, receipt of a share of the profits of a business will be sufficient to raise a rebuttable presumption that the recipient is a partner in the business.[23] This presumption is not raised, however, if the profits were received in a capacity other than that of co-owner of a business, such as creditor, employee or independent contractor, landlord, annuitant or vendor.[24]

Finally, the UPA's proposition that, with the exception of estoppel situations, persons who are not partners as to each other will not be liable as partners to third parties has been retained but moved to a more appropriate location in RUPA.[25]

II. Partnership property

As a practical matter, for any business enterprise to remain viable, it is necessary that property committed to the business be used only for business purposes. No business could long survive if its operations were subject to the disruption caused by use of its assets for the personal purposes of its owners, or attachment of its assets by creditors of its owners on the basis of personal, nonbusiness obligations. For similar reasons, it is vital to distinguish property the owners have committed to the business from property they have retained in their individual capacities. In both respects, RUPA makes significant advances over the situation prevailing under the UPA.

A. Ownership of partnership property

Having opted for the aggregate theory of partnership, the UPA's drafters were confronted by the problem of ownership of partnership property. If a partnership did not exist as a legal person, it could not own property. On the other hand, if the partners were deemed to own partnership property as tenants in common or as joint tenants with right of survivorship, chaos could result because of the incidents normally attaching to those forms of ownership.

Faced by this dilemma, the drafters adopted an uneasy compromise that reached an entity-like result while paying obeisance to the aggregate theory. This compromise was codified in K.S.A. 56-325, which provided that partners owned partnership property in a unique form of concurrent ownership known as tenancy in partnership.[26] The statute then stripped this co-tenancy of all individual incidents of ownership, leaving only group incidents intact.[27] Thus, without the consent of the other partners, a partner could possess partnership property for partnership purposes but not for individual purposes; a partner's interest in partnership property was not separately alienable, apart from the rights of the group; a partner's interest in partnership property was not subject to attachment or execution on the basis of a separate obligation, but it was subject to the claims of partnership creditors; when a partner died, the partner's interest in partnership property did not pass to his or her estate, heirs or devisees, but rather, vested in his or her co-partners by right of survivorship; and, correspondingly, a partner's interest in partnership property was not subject to dower, curtesy or similar interests.[28]

To make matters more confusing, the UPA then took the theoretically inconsistent position that record title to real estate could be acquired and held in the partnership name.[29] The purpose was to permit record title to corre-

18. RUPA §§ 101 cmt., 202 cmt. 2. In this regard, it is important to note that 1998 Kan. Sess. Laws, ch. 93 includes an amendment to KRULPA to update its cross-reference from the UPA to RUPA. *Id.*, § 73, *amending* K.S.A. 56-1a604. This eliminates a potential source of confusion, because without such a contemporaneous amendment, the KRULPA linkage provision could have been construed to refer to the now-obsolete provisions of the UPA.

19. K.S.A. 1998 Supp. 56a-202(a).

20. RUPA § 202 cmt. 1. Perhaps the most famous statement of this proposition appears in the early New York case of *Martin v. Peyton*, 246 N.Y. 213, 158 N.E. 77 (1927).

21. K.S.A. 56-307(b) (repealed 1999); K.S.A. 1998 Supp. 56a-202(c)(1).

22. K.S.A. 56-307(c) (repealed 1999); K.S.A. 1998 Supp. 56a-202(c)(2).

23. K.S.A. 56-307(d) (repealed 1999); K.S.A. 1998 Supp. 56a-202(c)(3).

24. K.S.A. 56-307(d) (repealed 1999); K.S.A. 1998 Supp. 56a-202(c)(3). RUPA broadens the UPA's protected categories to include profits paid as retirement or health benefits to a beneficiary, representative or designee of a deceased or retired partner and, in the creditor category, direct or indirect present or future ownership of collateral for the debt or rights to income, proceeds or increase in value derived from the collateral. *Id.* 56a-202(c)(3)(iv), (v). The latter provision was included "to protect shared-appreciation mortgages, contingent or other variable or performance-related mortgages, and other equity participation arrangements by clarifying that contingent payments do not presumptively convert lending arrangements into partnerships." RUPA § 202 cmt. 3.

25. K.S.A. 56-307(a) (repealed 1999); K.S.A. 1998 Supp. 56a-308(e).

26. K.S.A. 56-325(a) (repealed 1999).

27. *Id.* 56-325(b) (repealed 1999).

28. *Id.*

29. *Id.* 56-308(c) (repealed 1999). Personal property could be held in the partnership name even under the prestatutory common law. 1 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 3.02(d)(1) (hereinafter cited as BROMBERG AND RIBSTEIN ON PARTNERSHIP).

spond to practical reality by disclosing the partnership's interest in the property, thereby putting purchasers and creditors on notice that the property was not the individual property of one or more of the partners.[30]

Accordingly, the UPA reached a functional, entity result but did so only by complicated indirection. In keeping with its entity theory,[31] RUPA reaches the same result in a simple, direct and straightforward manner. It provides that "[p]roperty acquired by a partnership is property of the partnership and not of the partners individually."[32] Lest there be any lingering doubt, it reiterates, "[a] partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily."[33]

B. Distinguishing partnership property from individual property

Ideally, partners' contributions to the capital of the firm will be recorded on the partnership books. If property is contributed in kind and is evidenced by a document of title, title will be transferred to the partnership name.[34] Conversely, if property is merely loaned or leased to the partnership, with ownership being retained by an individual partner or partners, the nature of those transactions also will be well documented. Subsequent acquisitions of property by the partnership, by purchase or otherwise, also will be documented, and, if applicable, record title will be taken in the partnership name. Unfortunately, the world is not ideal, many partnerships are organized and operated with extreme informality, and vexing problems of distinguishing partnership property from individual property often arise.

The UPA offered little guidance in resolving these problems. K.S.A. 56-308(a) stated that property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership was partnership property.[35] This provision merely expressed a conclusion and therefore was of little assistance in determining specifically how to reach that conclusion.

Record title to such things as real estate, securities and motor vehicles is a useful place to begin. Title to such property could be held in the partnership name,[36] and if so held, was strong evidence that the property was partnership property.[37] On the other hand, record title may have been in the name of one or more partners. This, of course, was evidence that the property was not partnership property, but was far from conclusive.[38] It could be overcome by evidence showing such things as partnership payment of taxes on the property, its reflection on partnership financial statements, and its treatment for income tax purposes.[39]

If property is contributed in kind and is evidenced by a document of title, title will be transferred to the partnership name.

This same type of evidence, along with evidence of how the property was used in the business, had to be relied on in cases in which the disputed property was not evidenced by a document of title.[40] In many cases, however, the most probative evidence of ownership was the source of funds used to acquire the property. This was particularly true because the UPA created a rebuttable presumption that property acquired with partnership funds was partnership property.[41] This presumption was sufficiently strong, especially if corroborated by other evidence, that it could overcome the fact that record title was in the name of one or more partners.[42]

RUPA adds much needed precision to this area, at least as to real or personal property[43] evidenced by a document of title,[44] by codifying one absolute rule and two rebuttable presumptions. First, property *is* partnership property if it is acquired in the name of either: (1) the partnership; or (2) one or more partners with an indication in the instrument of transfer of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership.[45] "[I]n the name of the partnership" is a statutory term of art that encompasses a transfer either: (1) to the partnership in its name; or (2) to one or more partners in their capacity as partners if the name of the partnership is indicated in the instrument of

30. 1 Bromberg and Ribstein on Partnership § 3.02(d)(1). Conveyances of partnership property, and the competing interests of the partnership and third parties, are part of the broader subject of the agency power of partners, considered in Part III, *infra*.

31. K.S.A. 1998 Supp. 56a-201(a).

32. *Id.* 56a-203. As a corollary, partners may use or possess partnership property only on behalf of the partnership. *Id.* 56a-401(g).

33. *Id.* 56a-501.

34. *See* K.S.A. 56-308(c) (repealed 1999); notes 29-30 and accompanying text, *supra.*

35. K.S.A. 56-308(a) (repealed 1999).

36. K.S.A. 56-308(c) (repealed 1999); notes 29-30 and accompanying text, *supra.*

37. 1 Bromberg and Ribstein on Partnership § 3.02(d)(2).

38. *Id.* § 3.02(d)(3). Titling partnership realty in the partnership name under K.S.A. 56-308(c) (repealed 1999) was permissive, not mandatory.

39. 1 Bromberg and Ribstein on Partnership § 3.02(e).

40. *Id.* § 3.02(b), (e).

41. K.S.A. 56-308(b) (repealed 1999); 1 Bromberg and Ribstein on Partnership § 3.02(c).

42. 1 Bromberg and Ribstein on Partnership § 3.02(d)(4). *See Stauth v. Stauth*, 2 Kan. App. 2d 512, 582 P.2d 1160, *rev. denied*, 225 Kan. 846 (1978), in which the defendant partner took title to real estate in his own name, made the down payment with a personal check, and obtained a purchase money loan, secured by a mortgage on the property, in the name of himself and his wife. However, the partnership immediately reimbursed the defendant for the down payment, paid for the abstract, paid all property taxes, and made all payments on the loan. In addition, the property was carried on the partnership books as an asset (and the loan as a liability) and income from the property was reflected on the partnership's income tax returns. Interestingly, in affirming a district court finding that the property was partnership property, the court relied on the related concept of purchase money resulting trust under K.S.A. 58-2408 rather than on K.S.A. 56-308(b) (repealed 1999).

43. K.S.A. 1998 Supp. 56a-101(k) defines "property" as "all property, real, personal, or mixed, tangible or intangible, or any interest therein."

44. RUPA § 204 cmt. 2: "The concept of record title is emphasized, although the term itself is not used." As to property that is not formally titled, RUPA leaves the law where it found it.

45. K.S.A. 1998 Supp. 56a-204(a).

transfer.[46] Thus, to synthesize, property *conclusively* will be *deemed* to be partnership property in any of three circumstances: (1) the property is transferred to the partnership in its name; (2) the property is transferred to one or more partners in their capacity as partners with an indication of the name of the partnership; or (3) the property is transferred to one or more partners in their capacity as partners or with an indication of the existence of a partnership but without an indication of the partnership's name.

Under section 56a-301(a) each partner remains an agent of the partnership with power to bind it ...

As to property acquired by one or more partners in their individual capacities without any indication of the existence of a partnership, the property will be *rebuttably presumed* to be either partnership property or individual property, depending on whether partnership assets were used to purchase the property. If partnership assets were used in the purchase, the property is presumed to be partnership property, notwithstanding the state of title.[47] Conversely, if partnership assets were not used, the property is presumed to be separate property, even if it is used in the partnership business.[48] In such a case, the partners are presumed to be contributing use but not ownership of the property to the partnership.

III. Relations of the partnership and partners to third persons

A. Partners as agents

1. In general

Under the UPA, each partner was an agent of the partnership for purposes of its business. The act of a partner (including execution of an instrument) "for apparently carrying on in the usual way the business of the partnership" bound the partnership, unless the partner in fact lacked authority and the person with whom the partner was dealing had knowledge that the partner lacked authority.[49] Thus, a partner's "actual" authority to commit the partnership to transactions in the ordinary course of business could be restricted by his or her co-partners,[50] but such a restriction was ineffective to curb "apparent" authority unless the third person had knowledge of the restriction.[51] "Knowledge" was defined as either "actual knowledge" or "knowledge of such other facts as in the circumstances shows bad faith" ("bad faith implied knowledge").[52]

The phrase "for apparently carrying on in the usual way the business of the partnership of which he or she is a member" was intended to restrict factual inquiry to the manner in which the particular partnership carried on its business, and not to the way in which other partnerships engaged in the same kind of business conducted their affairs.[53] Nevertheless, in an effort to extend maximum protection to the reasonable commercial expectations of innocent third parties, at least one court has interpreted the language as applicable to both.[54]

No matter how the phrase was interpreted, an act that was not for apparently carrying on the business in the usual way did not bind the partnership unless actually authorized by the other partners.[55] The UPA went on to reinforce this ordinary/extraordinary dichotomy by specifying five types of transactions that were conclusively deemed to be extraordinary and therefore nonbinding in the absence of unanimous consent.[56]

RUPA continues this general framework of the agency power of a partner, with certain modifications. Under section 56a-301(a) each partner remains an agent of the partnership with power to bind it by acts "for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership," unless the partner in fact lacks authority and the third person with whom the partner is dealing knows or has received a notification that the partner lacks authority.[57] Conversely, section 56a-301(b) provides that an act not apparently in the ordinary course is not binding unless authorized by the other partners.[58]

There are several changes of note. First, the general rules stated in section 56a-301 are expressly made subject to the

46. *Id.* 56a-204(b). *See* Edward S. Merrill, *Partnership Property and Partnership Authority Under the Revised Uniform Partnership Act*, 49 Bus. Law. 83, 85-86 (1993), for further discussion. These various nuances of title are important not only for determining when, as between the partners, certain property is partnership property, but also for purposes of conveyancing. *See* K.S.A. 1998 Supp. 56a-302, -303, discussed in Part III, *infra*.

47. K.S.A. 1998 Supp. 56a-204(c). The Official Comments indicate that use of partnership credit to finance a purchase is to be treated as use of partnership assets. RUPA § 204 cmt. 3.

48. K.S.A. 1998 Supp. 56a-204(d).

49. K.S.A. 56-309(a) (repealed 1999); *Executive Financial Services Inc. v. Loyd*, 238 Kan. 663, 715 P.2d 376 (1986).

50. Such a restriction ordinarily would appear in the partnership agreement. If the agreement was silent, a restriction applicable to ordinary business could be imposed by a majority in number of the other partners, unless the agreement provided for a different vote. K.S.A. 56-318(h) (repealed 1999).

51. This same point was expressed in somewhat broader scope in K.S.A. 56-309(d) (repealed 1999).

52. K.S.A. 56-303(a) (repealed 1999).

53. Judson A. Crane, *The Uniform Partnership Act — A Criticism*, 28 Harv. L. Rev. 762, 779-80 (1915); William D. Lewis, *The Uniform Partnership Act — A Reply to Mr. Crane's Criticism* (pt. 2), 29 Harv. L. Rev. 291, 299-300 (1916).

54. *Burns v. Gonzalez*, 439 S.W.2d 128 (Tex. Civ. App. 1969).

55. K.S.A. 56-309(b) (repealed 1999). Because, by definition, the act was not in the ordinary course of business, the authorization would have to have been unanimous, unless the partnership agreement provided otherwise. *See id.* 56-318(h) (repealed 1999).

56. *Id.* 56-309(c) (repealed 1999). The five transactions were: (1) assignment of partnership property for the benefit of creditors; (2) disposal of the good will of the business; (3) any other act that would make it impossible to carry on ordinary business; (4) confession of a judgment; and (5) submission of a partnership claim or liability to arbitration or reference.

57. K.S.A. 1998 Supp. 56a-301(a). As under the UPA, restrictions on the authority to act in the ordinary course of business, if they do not appear in the partnership agreement, can be imposed by majority vote, unless the partnership agreement provides otherwise. *Id.* 56a-103, -401(j).

58. *Id.* 56a-301(b). Again, as under the UPA, conferral of authority to engage in extraordinary transactions would have to be unanimous, unless otherwise provided in the partnership agreement. *Id.* 56a-103, -401(j).

effect of a "statement of partnership authority" under section 56a-303. These are publicly filed and recorded statements that grant or limit the authority of partners to transfer real property held in the partnership's name and to enter into other transactions on behalf of the partnership.[59] If applicable, such statements may alter what would otherwise be the outcome under the general agency rules of section 56a-301 or the more specific rules on conveyancing in section 56a-302.[60]

Second, RUPA resolves the UPA's ambiguity in defining the ordinary course of business. Section 56a-301(a) clearly states that the partnership will be bound by an act that apparently constitutes carrying on in the ordinary course either the partnership business or business of the kind carried on by the partnership.[61] In practical effect, this means that an innocent third party can rely on how similar partnerships conduct their businesses and will not be prejudiced by the fact that the particular partnership may confine its activities to a narrower sphere. On the other hand, if the particular partnership in practice defines its business more broadly than do similar partnerships, an innocent third party will be equally protected in relying on this broader scope.

Third, as under the UPA, a partner's authority to engage in even ordinary business can be restricted by his or her co-partners.[62] Unlike the UPA, however, section 56a-301(a) provides that such a restriction will be effective to curb apparent authority if the person with whom the partner is dealing *either* knows or has received notification of the restriction.[63] As previously discussed, under the UPA only third party knowledge was sufficient to defeat a partner's apparent authority, but "knowledge" included both actual knowledge and bad faith implied knowledge.[64] Under RUPA, "knowledge" is confined to actual knowledge, meaning cognitive awareness.[65] A person receives "notification," however, not only when a fact actually comes to the person's attention, but also when the notification is duly delivered to the person's place of business or other place held out for receipt of communications, whether it actually comes to the person's attention.[66] Although the reference to "delivery" might be thought to imply that the notification be in writing, the statute contains no such express requirement, and the Official Comments specifically declare the contrary.[67]

The effect of this change apparently is in the eye of the beholder. The primary critics of RUPA view bad faith implied knowledge under the UPA as a very narrow exception to the requirement of actual knowledge. Inclusion of the concept of notification, especially verbal notification, therefore, expands the category of cases in which the partnership will not be bound and lessens third party protection.[68] The Reporters of RUPA, however, believe that bad faith implied knowledge under the UPA is much closer to "reason to know," a category of "notice" under RUPA[69] that is *not* sufficient to prevent a partner's apparent authority from binding the partnership to a transaction in the ordinary course of business. Thus, by eliminating the concept of bad faith implied knowledge, the reporters say RUPA actually increases third party protection.[70] RUPA's Official Comments equivocate.[71]

Finally, in the interest of flexibility, RUPA eliminates the statutory list of five things that were conclusively deemed extraordinary under the UPA.[72]

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2. Transfers of partnership property

Transfers of partnership property by one or more partners received, and continue to receive, special treatment under both the UPA and RUPA because they provoke an interplay among partners' agency power, record title, and the rights of good faith purchasers for value.

The relevant provisions of both statutes cover assignments, leases, mortgages and other encumbrances, as well as outright conveyances, but the UPA restricted itself to real property while RUPA treats both real and personal property evidenced by documents of title.[73] In addition, the outcome

59. *Id.* 56a-303.
60. Partnership conveyancing is discussed in text at notes 73-92, *infra.* The effect of statements of partnership authority is discussed in text at notes 111-32, *infra.*
61. K.S.A. 1998 Supp. 56a-301(a).
62. *See* note 57, *supra.*
63. K.S.A. 1998 Supp. 56a-301(a).
64. K.S.A. 56-303(a), -309(a) (repealed 1999) . *See* text at notes 49-52, *supra.*
65. K.S.A. 1998 Supp. 56a-102(a); RUPA § 102 cmt.
66. K.S.A. 1998 Supp. 56a-102(d). "Notification" under RUPA is similar to "notice" under the UPA. *See* K.S.A. 56-303(b) (repealed 1999). Under RUPA, "notice" is a broader concept that includes knowledge, receipt of a notification, and reason to know on the basis of other facts known. K.S.A. 1998 Supp. 56a-102(b).
67. RUPA § 102 cmt. This is the primary respect in which "notification" under RUPA differs from "notice" under the UPA. *See* K.S.A. 56-303(b)(2) (repealed 1999).
68. Alan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Limited Liability Partnerships and the Revised Uniform Partnership Act 280-81 (1998 ed.) (hereinafter cited as Bromberg and Ribstein on LLPs and RUPA).
69. K.S.A. 1998 Supp. 56a-102(b)(3). *See* note 66, *supra.*
70. Weidner & Larson, *supra* note 12, at 31-32.
71. *See* RUPA § 301 cmt. 2 (inclusion of notification increases third party risk, but elimination of bad faith implied knowledge decreases it).
72. RUPA § 301 cmt. 4. RUPA also deletes K.S.A. 56-309(d) (repealed 1999) as essentially redundant. This subsection separately provided that an act of a partner in contravention of a restriction on authority was not binding as to persons having knowledge of the restriction. *See* RUPA § 301 cmt. 5. For criticism of this change *see* Bromberg and Ribstein on LLPs and RUPA 281-82.
73. K.S.A. 56-310 (repealed 1999) governed the conveyance of a partnership's real property, and *id.* 56-302(e) (repealed 1999) defined "[c]onveyance" as including "every assignment, lease, mortgage or encumbrance." K.S.A. 1998 Supp. 56a-302 governs transfers of partnership property. *Id.* 56a-101(k) defines "[p]roperty" as "all property, real, personal, or mixed, tangible or intangible, or any interest therein," and *id.* 56a-101(n) defines "[t]ransfer" to include "an assignment, conveyance, lease, mortgage, deed, and encumbrance."

in a given situation under RUPA may be affected by whether the partnership has filed and recorded a "statement of partnership authority" under section 56a-303, discussed below.[74]

Partnership property may also be held in the name of one or more partners with no indication of their capacity ...

Under the UPA, any partner could convey real property held in the partnership name by a conveyance in the partnership name. However, the partnership could recover the property from the original transferee if the partner lacked power to bind the partnership in the ordinary course of business under K.S.A. 56-309(a). In such a situation, the partnership also could recover the property from a subsequent transferee who either had not given value or had known the partner lacked authority.[75]

The rules governing this situation under RUPA are similar but broader and more specific in several respects.[76] First, as already noted, RUPA covers titled personal as well as real property. Second, property held "in the name of the partnership" includes not only property actually titled in the partnership's name but also property titled in the names of one or more partners if their partnership capacity and the name of the partnership is indicated in the document of title.[77] Third, the scope of the transferring partner's agency power is not limited to the statutory power to bind the partnership to transactions in the ordinary course. It also includes extraordinary transactions that are binding because actually authorized by the other partners.[78] Fourth, in keeping with the distinction introduced in section 56a-301, the partnership will prevail over a subsequent transferee for value if the subsequent transferee either knew or had received a notification that the transferring partner lacked authority to bind the partnership.[79] Fifth, RUPA makes clear that the burden of proving lack of authority and knowledge or receipt of a notification is on the partnership.[80] Finally, in a provision that parallels Kansas's new Uniform Fraudulent Transfer Act,[81] RUPA clarifies that the partnership may not rescind an unauthorized transfer with respect to a remote transferee after the property has passed through the hands of an intervening good faith holder for value.[82]

Title to partnership property also may be held in the name of one or more partners with an indication of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership.[83] In this case, to be within the chain of title, an instrument of transfer would have to be executed by the partners in whose name the property is titled.[84] Nevertheless, the involvement of a partnership, if not the specific partnership, will be apparent to third parties. Therefore, the foregoing rules with respect to the partnership's ability to avoid unauthorized transfers should, and do, apply in the same manner as when the property is held and transferred in the partnership name.[85]

Partnership property may also be held in the name of one or more partners with no indication of their capacity as partners or even of the existence of a partnership.[86] Once again, the UPA's accommodation of the potentially competing interests of the partnership and the original and subsequent transferees is reflected in RUPA but in a broader and more specific way.

Under either statute, transfer must be made by the persons in whose name title stands.[87] If the transfer was unauthorized,[88] the partnership may be able to recover the property, but its case will be more difficult than in the two fact patterns previously discussed, because its interest in the property will not be evident from the relevant document of title. Therefore, it is possible that the original transferee, as well as any subsequent transferee, may be a good

74. K.S.A. 1998 Supp. 56a-303, discussed in text at notes 111-32, *infra*.

75. K.S.A. 56-310(a) (repealed 1999). Recall that "knowledge" under the UPA included both actual knowledge and bad faith implied knowledge. *Id.* 56-303(a) (repealed 1999); *see* text at note 52, *supra*. If title to realty was in the partnership name, a conveyance by a partner in the partner's own name could not pass legal title but would pass the partnership's equitable interest in the property if the transaction was otherwise binding. *Id.* 56-310(b) (repealed 1999). RUPA deletes this provision on the basis that "the conveyance is clearly outside the chain of title and so should not pass title or any interest in the property." RUPA § 302 cmt. 7. Such a conveyance would be treated as "a wild deed under normal state conveyancing law." Merrill, *supra* note 46, at 94.

76. *See* K.S.A. 1998 Supp. 56a-302(a)(1), (b)(1).

77. *Id.* 56a-204(b), discussed in text at note 46, *supra*.

78. K.S.A. 1998 Supp. 56a-301, -302(b). This corrects what may have been an inadvertently underinclusive cross-reference in the UPA. *See* RUPA § 302 cmt. 3.

79. K.S.A. 1998 Supp. 56a-302(b)(1). The same result is reached as to the original transferee by reason of section 56a-301, which is specifically incorporated by section 56a-302(b). Subsection 56a-302(b)(1) simply extends this rule to remote third parties who claim title through the original transferee but who did not directly deal with the transferring partner. The concepts of "knowledge" and receipt of a "notification" are defined in *id.* 56a-102(a), (d) and discussed in text at notes 65-67, *supra*.

80. K.S.A. 1998 Supp. 56a-302(b)(1); RUPA § 302 cmt. 3; Merrill, *supra* note 46, at 94; Weidner & Larson, *supra* note 12, at 33-34.

81. K.S.A. 1998 Supp. 33-208(a), (b)(2).

82. *Id.* 56a-302(c); Merrill, *supra* note 46, at 93-94.

83. K.S.A. 1998 Supp. 56a-204(a)(2).

84. *Id.* 56a-302(a)(2).

85. *See id.* 56a-302(b)(1), (c). The application of *id.* 56a-303, however, is different in this situation. *See* text at notes 119-32, *infra*.

86. Under RUPA, if partnership assets were used to acquire the property, it is rebuttably presumed to be partnership property. If partnership assets were not so used, the property is presumed to be separate property, but this presumption also is rebuttable. K.S.A. 1998 Supp. 56a-204(c), (d).

87. K.S.A. 56-310(c), (e) (repealed 1999) applied only to real property. K.S.A. 1998 Supp. 56a-302(a)(3) applies to both real and personal property. *Id.* 56a-101(k). K.S.A. 56-310(d) (repealed 1999) provided that if title to partnership real property was in the name of one or more or all partners, or in the name of a third person in trust for the partnership, an authorized conveyance by a partner in the partnership's name or in the partner's own name passed the partnership's equitable interest in the property. This provision, like K.S.A. 56-310(b) (repealed 1999), has no counterpart in RUPA. *See* note 75, *supra*.

88. Under K.S.A. 56-310(c) (repealed 1999), the question was whether the transfer was in the ordinary course of business, as defined in *id.* 56-309(a) (repealed 1999). Under K.S.A. 1998 Supp. 56a-302(b), the questions are whether the transfer was in the ordinary course of business, or if not, was otherwise authorized by the transferor's co-partners under *id.* 56a-301.

faith holder for value whose interest ought to be superior to that of the partnership. Accordingly, to recover the property, the partnership must prove[89] as to any transferee not only that the transferring partner or partners in fact lacked power to bind the partnership,[90] but also that a transferee who gave value knew or had received a notification[91] *both* that the property was partnership property and that the partner or partners lacked power to bind the partnership.[92]

B. Filed statements

1. 'Statements' under RUPA

In what promises to be one of its most significant innovations, RUPA creates a system by which partnerships and partners may make a public record of certain important information about the partnership. This information will be provided in documents called statements.[93] "Statement" is a defined term that means: (a) a statement of partnership authority; (b) a statement of denial; (c) a statement of dissociation; (d) a statement of dissolution; (e) a statement of merger; (f) a statement of LLP qualification; (g) a statement of foreign LLP qualification; and (h) an amendment or cancellation of any of the foregoing.[94] Because general partnerships are often formed informally, and sometimes even inadvertently,[95] filings under RUPA are voluntary rather than mandatory, as is the case with corporations, limited liability companies (LLCs), and limited partnerships.[96] Nevertheless, because these statements are intended to foster greater certainty in partnership affairs, from the point of view of both the partnership and those dealing with it, it is expected that over time they will gain favor with most formal commercial partnerships.[97]

The focus here will be on statements of partnership authority. These are statements that indicate the authority of partners to transfer real property held in the name of the partnership and that may grant or limit the authority of partners to enter into other transactions on behalf of the partnership.[98] Before considering statements of partnership authority in detail, however, the following section summarizes some formal requirements that are generally applicable to all statements.

... RUPA creates a system by which partnerships and partners may make a public record of certain important information about the partnership.

2. Generally applicable requirements

All statements must be filed centrally in the office of the secretary of state.[99] In addition, to be effective with respect to real estate, a certified copy of the filed statement must be recorded with the register of deeds of the county in which the real estate is situated.[100] The secretary of state has authority to set filing and recording fees.[101]

Statements filed by the partnership as an entity must be executed by at least two partners.[102] This is a compromise between the convenience of allowing a single partner to sign and the security of requiring execution by a majority or all of the partners.[103] It appears that the partnership agreement could require execution by more than two part-

89. RUPA places the burden of proof on the partnership as to all issues except whether a transferee has given value. *See* K.S.A. 1998 Supp. 56a-302(b)(2); RUPA § 302 cmt. 3.

90. K.S.A. 56-310(e) (repealed 1999) provided that if title to partnership real property was in the names of all partners, a conveyance executed by all partners passed all of their rights in the property. Authority was no longer an issue. RUPA deletes this provision as unnecessary. RUPA § 302 cmt. 7. On the other hand, under RUPA, if one person holds all of the partners' interests in the partnership, all of the partnership property vests in that person, and he or she may execute, file, and record a document in the partnership name to evidence such vesting. K.S.A. 1998 Supp. 56a-302(d). This section creates a mechanism for clearing record title when there is a definitional failure of a partnership, i.e., when it no longer consists of an association of two or more persons. *See* RUPA § 302 cmt. 6; Merrill, *supra* note 46, at 94.

91. K.S.A. 1998 Supp. 56a-302(b)(2). Under the UPA the question was one of knowledge. K.S.A. 56-310(c) (repealed 1999). *See* text at notes 52 & 64-71, *supra.*

92. Under K.S.A. 56-310(c) (repealed 1999) it was not clear whether the transferee must have lacked knowledge that the property was partnership property, that the transferring partner was without authority, or both. *See* 1 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 4.04(b)(3) at 4:83; Weidner & Larson, *supra* note 12, at 33-34 & n. 216.

As is true with respect to transfers of property held in the name of the partnership, or in the name of one or more partners with an indication of their capacity as partners or of the existence of a partnership, under RUPA the partnership may not recover property in the hands of a remote transferee after is has passed through the hands of an intervening good faith holder for value. K.S.A. 1998 Supp. 56a-302(c).

93. "Document" actually may have too narrow a connotation. Nothing in RUPA restricts the form of a filed statement to a written document. RUPA § 105 cmt. 1. K.S.A. 1998 Supp. 56a-105, *as amended by* 1999 Kan. Sess. Laws, ch. 41, § 15, authorizes filing by "telefacsimile communication," which is broadly defined to mean the use of electronic equipment to send or transfer a document.

94. K.S.A. 1998 Supp. 56a-101(m). The secretary of state has produced forms for all of the statements listed in text except the statement of merger. These forms are available on request from the office of the secretary of state, or they may be downloaded from its Web site at http://www.kssos.org.

95. RUPA § 105 cmt. 1; Weidner & Larson, *supra* note 12, at 34. *See* K.S.A. 1998 Supp. 56a- 202(a).

96. Although the Official Comments to RUPA state that all filings thereunder are voluntary rather than mandatory, RUPA § 105 cmt. 1, this is true with respect to statements of LLP qualification and foreign LLP qualification only in the most superficial of senses. If a partnership wishes to become a Kansas LLP, it *must* file a statement of qualification to achieve that status. K.S.A. 1998 Supp. 56a-1001. If a foreign LLP wishes to transact business in Kansas with full access to Kansas courts and free from the threat of an injunctive action by the attorney general, it *must* file a statement of foreign qualification. *Id.* 56a-1102, -1103, -1105. In effect, because these filings involve formal organizations with limited liability for the owners, they are mandatory, as they should be.

97. RUPA § 105 cmt. 1; Merrill, *supra* note 46, at 96.

98. *See* K.S.A. 1998 Supp. 56a-303.

99. *Id.* 56a-105(a), *as amended by* 1999 Kan. Sess. Laws, ch.41, § 15. Certified copies of statements that are on file in other jurisdictions also may be filed with the secretary of state. *See* note 93, *supra*, for a discussion of electronic and telefacsimile filing.

100. K.S.A. 1998 Supp. 56a-105(b); K.S.A. 58-2221.

101. K.S.A. 1998 Supp. 56a-105(f), (g).

102. *Id.* 56a-105(c). Statements filed by the partnership include statements of partnership authority, dissociation, merger, qualification, and foreign qualification. *See id.* 56a-303, -704, - 907, -1001, -1102.

103. Weidner & Larson, *supra* note 12, at 34.

ners but could not authorize signing by a single partner. That is, the statutory signing requirement arguably could be raised but not lowered.[104] In any event, statements other than those filed by the partnership must be executed by a partner or other person authorized by RUPA to file the particular statement.[105]

Unless it is canceled earlier by the partnership, a statement of authority terminates by operation of law five years after its filing date, or the filing date of its most recent amendment.

Persons executing a statement as or on behalf of a partner or person named as a partner must verify the statement's accuracy under penalty of perjury.[106] Furthermore, unless the partnership agreement provides otherwise,[107] a person who files a statement must promptly send a copy to every nonfiling partner and also to any other person named as a partner in the statement.[108] Failure to comply with this requirement, however, does not limit the effectiveness of the statement as to third parties.[109]

Finally, any person authorized to file a particular statement may amend or cancel a previously filed statement by filing an amendment or cancellation that names the partnership, identifies the statement, and states the substance of the amendment or cancellation.[110]

3. Statements of partnership authority

A partnership may file with the secretary of state a statement of partnership authority. This statement must include: (a) the name of the partnership; (b) the address of its principal office and of one office in Kansas, if applicable; (c) the names and addresses of all partners; and (d) the names of the partners authorized to execute instruments transferring real property held in the name of the partnership.[111] Alternatively, if the partnership does not wish to list publicly the names and addresses of all partners in the statement, it may state the name and address of an agent who maintains a list of the partners and who must make the list available to any person, on request, for good cause shown.[112] In addition to the mandated contents, the statement may also specify the authority, or limitations on authority, of some or all partners to enter into other transactions on behalf of the partnership and any other matter.[113]

As noted previously, a statement of partnership authority must be executed by at least two partners.[114] If it names the partnership and is properly executed, it will be effective as to third parties even though it omits one or more of the other required items of information.[115] Unless it is canceled earlier by the partnership, a statement of authority terminates by operation of law five years after its filing date, or the filing date of its most recent amendment.[116]

Before we analyze the substantive effect of statements of partnership authority, recall that a partnership generally is bound by transfers of partnership property and other transactions apparently in the ordinary course of business, unless the acting partner in fact lacked authority and the person with whom the partner was dealing knew or had received notification that the partner was without authority.[117] On the other hand, a transfer or other transaction that is not apparently in the ordinary course of business is binding on the partnership only if the acting partner was actually authorized by the other partners.[118]

In considering the effect on these general rules of statements of partnership authority, one must distinguish grants of authority from limitations on authority. One also must make distinctions among: (a) transfers of real property held in the name of the partnership; (b) transfers of real property held other than in the name of the partnership; and (c) transfers of partnership personal property and other partnership transactions.

A statement of partnership authority that grants authority to one or more partners to engage in certain transactions or types of transactions on behalf of the partnership will be useful both to confirm authority to engage in transactions in the ordinary course of business and to confer authority

104. K.S.A. 1998 Supp. 56a-103(a) states that, except as provided in section 56a-103(b), relations among partners and between partners and the partnership are governed by the partnership agreement. *Id.* 56a-103(b)(1) states that the partnership agreement may not vary the rights and duties with respect to statements under section 56a-105 except to eliminate the duty to provide copies of statements to all partners. However, *id.* 56a-105(c) provides that a statement filed by a partnership must be executed by *at least* two partners, appearing merely to state a minimum rather than an inflexible rule. *But see* Robert W. Hillman, Allan W. Vestal & Donald J. Weidner, The Revised Uniform Partnership Act 39-40 (1998) (hereinafter cited as Hillman, Vestal & Weidner, RUPA).

105. K.S.A. 1998 Supp. 56a-105(c). Statements filed by partners or other persons include statements of denial, dissociation, and dissolution. *See id.* 56a-304, -704, -805. Curiously, RUPA does not include statements of dissolution among the statements filed by the partnership. The Official Comments, however, indicate that a partner who files a statement of dissolution does so on behalf of the partnership. RUPA § 805 cmt. 1. Thus, the primary significance is that a statement of dissolution may be executed by any partner acting alone rather than by two or more partners, as is the case with statements filed by the partnership. *See* K.S.A. 1998 Supp. 56a-105(c). This is in keeping with RUPA's continuation, at least as to at will partnerships, of the UPA rule that any partner can cause dissolution at any time simply by withdrawing from the partnership. *Id.* 56a-601(a), -602(a), (b), -801(a), (b). *Compare* K.S.A. 56-331(a)(2), (b) (repealed 1999). For further discussion, *see* text at notes 329-88, *infra.*

106. K.S.A. 1998 Supp. 56a-105(c).

107. *Id.* 56a-103(a), (b)(1).

108. *Id.* 56a-105(e).

109. *Id.*

110. *Id.* 56a-105(d).

111. *Id.* 56a-303(a)(1).

112. *Id.* 56a-303(a)(1)(iii), (b). There is no indication in either the statute or the Official Comments of the parameters of "good cause." *See* Hillman, Vestal & Weidner, RUPA 121 & n. 15.

113. K.S.A. 1998 Supp. 56a-303(a)(2).

114. *Id.* 56a-105(c). *See* notes 102-04 and accompanying text, *supra.*

115. K.S.A. 1998 Supp. 56a-303(c).

116. *Id.* 56a-303(g).

117. *Id.* 56a-301(a). *See* text at notes 57-71, *supra.* The proposition that knowledge or receipt of a notification of lack of authority normally will prevent reliance on apparent authority is extended to remote purchasers of partnership property by K.S.A. 1998 Supp. 56a-302(b). *See* text at notes 79-92, *supra.*

118. K.S.A. 1998 Supp. 56a-301(b), -401(j).

to engage in transactions outside the ordinary course of business. As previously discussed,[119] such statements must be filed with the secretary of state, and, as to real property held in the name of the partnership,[120] recorded with the register of deeds of the county in which the property is situated.[121] A filed, and if necessary, recorded, *grant* of authority to: (a) transfer real property held in the name of the partnership; (b) transfer partnership personal property regardless of how titled; and (c) engage in any other transactions on behalf of the partnership, except transfers of partnership real property held other than in the name of the partnership, is *conclusive* in favor of any third party who gives value without actual knowledge to the contrary, unless the grant is conditioned or contradicted by a filed, and if necessary, recorded, statement limiting that authority.[122] Thus, absent such a limitation, third parties will be able to rely conclusively on the grant of authority unless they actually know the acting partner lacks authority. A mere notification of lack of authority is insufficient.[123]

A filed and recorded statement granting a partner authority to transfer partnership real property titled other than in the partnership name,[124] however, is not covered by RUPA, and consequently will have no conclusive statutory effect.[125] The proffered reason is that in such cases a title search would not disclose the partnership's interest in the property.[126]

A third person is *deemed to know* of a *limitation* on a partner's authority to transfer real property held in the name of the partnership if a certified copy of the filed statement containing the limitation has been recorded with the register of deeds of the county in which the real property is situated.[127] This constructive knowledge is equivalent to actual knowledge of lack of authority for purposes of sections 56a-301 and 56a-302.[128] Therefore, it will operate conclusively in favor of the partnership as against a claim founded on the appearance of authority.[129] Because this category of transaction routinely involves a title examination, no undue burden of inquiry is imposed on third parties.

With respect to all transactions other than transfers of real property held in the name of the partnership, a third party generally *is not deemed to know* of a *limitation* on authority merely because the limitation appears in a filed statement.[130] Thus, while such a filed limitation may serve as a source of actual knowledge if discovered by a third party in a routine record search, RUPA imposes no affirmative duty to engage in such searches.[131] The partnership theoretically can protect itself from a rogue partner as to specific third parties by delivering a copy of the limitation to their places of business. If this is done, the third party will have received "notification" of the partner's lack of authority for purposes of sections 56a-301 and 56a-302.[132]

A filed and recorded statement granting a partner authority to transfer partnership real property titled other than in the partnership name, however, is not covered by RUPA ...

C. Wrongful acts and omissions

The UPA imposed vicarious liability on a partnership for any wrongful act or omission of a partner that caused loss or injury to a third person, provided the partner was acting in the ordinary course of business or with the authority of the other partners.[133] In a separate section, it provided for partnership liability if a partner with apparent authority received the money or property of a third person and misapplied it, or if the partnership received a third person's money or property in the course of its business and

119. *See* text at notes 99-100, *supra.*

120. *See* K.S.A. 1998 Supp. 56a-204(b), discussed in text at note 46, *supra.*

121. K.S.A. 1998 Supp. 56a-105(a), (b); K.S.A. 58-2221. To be effective, the statement recorded with the register of deeds must be a certified copy of the statement filed with the secretary of state. K.S.A. 1998 Supp. 56a-105(b).

122. K.S.A. 1998 Supp. 56a-303(d)(1), (2). Limitations on a partner's authority may appear in statements of partnership authority, statements of denial, statements of dissociation, and statements of dissolution. *Id.* 56a-303(a)(2), -304, -704(b), -805(b). As a general proposition, a limitation on authority will counteract a grant of authority regardless of whether the limitation predates or postdates the grant. The purpose is to prevent the "battle of statements" that could occur if the document filed and recorded latest in point of time were to control. In case of conflicting statements, third parties must go outside the record to verify a partner's authority. RUPA § 303 cmts. 2 & 3; Merrill, *supra* note 46, at 97-98; Weidner & Larson, *supra* note 12, at 36. However, as an exception to this general proposition, RUPA provides that cancellation of a limitation on authority revives a previous grant of authority. K.S.A. 1998 Supp. 56a-303(d)(1), (2).

123. *Compare* K.S.A. 1998 Supp. 56a-301(a) *and* 56a-302(b) *with id.* 56a-303(d)(1), (2); Merrill, *supra* note 46, at 97.

124. It is possible for partnership property to be held: (a) in the name of the partnership; (b) in the name of one or more partners with an indication of their capacity as partners or of the existence of a partnership but without an indication of the name of the partnership; or (c) in the name of one or more partners without any indication of their capacity as partners or of the existence of a partnership. K.S.A. 1998 Supp. 56a-204, discussed in text at notes 43-48, *supra.*

125. *See* K.S.A. 1998 Supp. 56a-303(d)(1), (2). Subsection (d)(1) covers grants of authority "[e]xcept for transfers of real property ... ." Subsection (d)(2) covers only grants of authority "to transfer real property held in the name of the partnership ... ." Therefore, grants of authority to transfer real property held other than in the name of the partnership are not covered. RUPA § 303 cmt. 2; HILLMAN, VESTAL & WEIDNER, RUPA 123; Merrill, *supra* note 46, at 96; Weidner & Larson, *supra* note 12, at 36 & n. 228.

126. RUPA § 303 cmt. 2; Weidner & Larson, *supra* note 12, at 36.

127. K.S.A. 1998 Supp. 56a-303(e); K.S.A. 58-2221.

128. *See* K.S.A. 1998 Supp. 56a-301, -302(a)(1); RUPA § 303 cmt. 2.

129. Weidner & Larson, *supra* note 12, at 36.

130. K.S.A. 56a-303(f). Of course, a filed statement containing a limitation on authority may counteract what would otherwise be the conclusive affirmative effect of a filed grant of authority. *Id.* 56a-303(d)(1), (f). In addition, the general statement in text is subject to two further exceptions in the form of statements of dissociation and statements of dissolution. *Id.* 56a-303(f), -704(c), -805(c). The effect of these statements on the authority of a partner or former partner is discussed in text at notes 419-22 and 428-31, *infra.*

131. RUPA § 303 cmt. 3; Weidner & Larson, *supra* note 12, at 37.

132. K.S.A. 1998 Supp. 56a-102(d)(2), -301(a), -302(b); HILLMAN, VESTAL & WEIDNER, RUPA 124; Merrill, *supra* note 46, at 99.

133. K.S.A. 56-313 (repealed 1999); *Phillips v. Carson*, 240 Kan. 462, 731 P.2d 820 (1987). *See generally* 1 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 4.07.

such money or property subsequently was misapplied by any partner.[134]

RUPA combines these two sections into one and carries forward their substance, with certain modifications.[135] First, it broadens general vicarious tort liability to encompass no-fault torts as well as "wrongful" acts and omissions.[136] Second, it expands the class of potential tort plaintiffs to include, in addition to third parties, partners who have been injured by the conduct of a copartner.[137] Finally, with respect to misapplication of a third person's money or property, RUPA replaces the UPA's reference to a partner's "apparent authority" with a reference to "authority."[138] The drafters, however, state that "authority" is intended to include both actual and apparent authority.[139] Moreover, existing Kansas case law construes "ordinary course of business," a phrase used in both the UPA and RUPA, to cover conduct that is apparently authorized as well as that actually authorized.[140]

... although partners will remain individually liable for partnership obligations, in most cases this liability will be secondary rather than primary.

D. Liability of partners

As a general proposition, the Kansas UPA provided that all partners were jointly and severally liable for all partnership obligations.[141] RUPA continues this general rule of joint and several liability,[142] but subject to an important limitation. Traditionally, when partner liability is joint and several, a partnership creditor need not first exhaust partnership assets (or show that an attempt to do so would be futile) before proceeding against a partner's individual assets.[143] As discussed more fully below, however, RUPA adopts a contrary general rule that requires exhaustion.[144] Thus, although partners will remain individually liable for partnership obligations, in most cases this liability will be secondary rather than primary.

The general rule of joint and several liability also is subject to two exceptions under both the UPA and RUPA. The first is that a person admitted as a new partner in an existing partnership has limited liability as to partnership obligations arising or incurred before his or her admission.[145] The second relates to LLPs and is discussed below.[146]

E. Third party litigation

Consistent with the aggregate theory, at common law a partnership could not sue or be sued in the firm name because it did not exist as a legal person.[147] Although the official UPA was silent on this point, the Kansas version, like that of many other states, sensibly granted partnerships the capacity to sue and be sued.[148] This rule is continued by RUPA,[149] which further codifies Kansas case law by providing that litigation may be instituted against the partnership and any or all of the partners in the same or separate actions.[150] A judgment against the partnership, however, is not by itself a judgment against a partner and may not be satisfied from a partner's individual assets unless a judgment also has been rendered against that partner.[151] Therefore, if there is a chance that partnership assets will be insufficient to satisfy a judgment, it is incumbent on a claimant to sue both the partnership and the partners.

Moreover, as noted above,[152] even if a judgment has been rendered against a partner on a partnership obligation, the creditor must look first to the partnership assets for satisfaction. Thus, the judgment creditor may not levy execution on the partner's individual assets unless: (1) a judgment on the same claim has been obtained against the partnership and a writ of execution has been returned wholly or partially unsatisfied; (2) the partnership is a debtor in bankruptcy; (3) the partner has agreed that the creditor need not exhaust partnership assets; (4) a court grants an exception to the exhaustion requirement upon a finding that: (a) available partnership assets are clearly insufficient to satisfy the judgment, (b) exhaustion would be excessively burdensome, or (c) an exception is otherwise equitably warranted; or (5) liability is imposed on the partner by law or contract independent of the existence of the partnership.[153]

134. K.S.A. 56-314 (repealed 1999).

135. *See* K.S.A. 1998 Supp. 56a-305.

136. *See id.* 56a-305(a) ("wrongful act or omission, or other actionable conduct"); RUPA § 305 cmt.

137. *See* K.S.A. 1998 Supp. 56a-305(a); RUPA § 305 cmt. K.S.A. 1998 Supp. 56a-405(b)(3) authorizes suit in such a situation. Section 56a-305(a) also deletes the phrase that made the partnership liable "to the same extent" as the tortfeasing partner. The intent is to prevent the partnership from asserting the tortfeasor's possible personal immunity. RUPA § 305 cmt.

138. *Compare* K.S.A. 56-314(a) (repealed 1999) *with* K.S.A. 1998 Supp. 56a-305(b).

139. RUPA § 305 cmt.

140. *Phillips v. Carson*, 240 Kan. 462, 731 P.2d 820 (1987).

141. K.S.A. 56-315(a) (repealed 1999); *Belt v. Shepard*, 15 Kan. App. 2d 448, 808 P.2d 907 (1991). This was a departure from the official UPA, which made partners jointly and severally liable for torts and misapplications of funds but imposed only joint liability for contractual obligations. UNIFORM PARTNERSHIP ACT § 15 (1914).

142. K.S.A. 1998 Supp. 56a-306(a).

143. RUPA § 306 cmt. 1; 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 5.08(f); HILLMAN, VESTAL & WEIDNER, RUPA 136.

144. K.S.A. 1998 Supp. 56a-307(d), discussed in text at notes 152-53 *infra*.

145. K.S.A. 56-317, -341(g) (repealed 1999); K.S.A. 1998 Supp. 56a-306(b). Neither the UPA nor RUPA attempts to define precisely when an obligation arises or is incurred. This point is problematic with respect to long-term leases and contracts that predate a partner's admission but call for periodic payments thereafter. BROMBERG AND RIBSTEIN ON LLPS AND RUPA 289-90; HILLMAN, VESTAL & WEIDNER, RUPA 136-37.

146. K.S.A. 56-315(b), (c) (repealed 1999); K.S.A. 1998 Supp. 56a-306(c). *See* text at notes 486- 90 & 507-12, *infra*.

147. 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP §§ 5.06(b), 5.12(b).

148. K.S.A. 56-344 (repealed 1999).

149. K.S.A. 1998 Supp. 56a-307(a).

150. *Id.* 56a-307(b); *Hoelting Enterprises v. Nelson*, 23 Kan. App. 2d 228, 929 P.2d 183 (1996). There is, of course, an exception for partners who are not personally liable on the obligation, i.e., newly admitted partners and partners in LLPs. K.S.A. 1998 Supp. 56a-306(b), (c), -307(b). *See* text at notes 145-46, *supra*.

151. K.S.A. 1998 Supp. 56a-307(c). *Hoelting Enterprises v. Nelson*, 23 Kan. App. 2d 228, 929 P.2d 183 (1996).

152. *See* text at notes 143-44, *supra*.

153. K.S.A. 1998 Supp. 56a-307(d).

F. Purported partner (partner by estoppel)

1. In general

The concept of partner by estoppel (the UPA term) or purported partner (the RUPA term) is the sole exception to the proposition that persons who are not partners as to each other are not liable as partners to third parties.[154] The UPA and RUPA recognize this concept and do not differ materially with respect to its basic substance. Both provide that if a person (the "purported partner") represents himself or herself, or consents to another representing him or her, as a partner in an actual partnership or with one or more other persons who are not actually partners, the purported partner will be liable to any person to whom the representation is made and who relies on it in entering into a transaction with the actual or purported partnership.[155] Furthermore, the purported partner is deemed the agent of those who consent to the representation, with full power to bind them to a relying third party just as though the purported partner were an actual partner.[156]

With regard to the precise nature of the liability created in these two situations, however, the UPA and RUPA differ significantly. Both statutes provide that if an actual partnership liability results, the purported partner is liable as if he or she were an actual partner.[157] Under the UPA, this meant that the purported partner was liable jointly and severally with the actual partners.[158] RUPA also calls for joint and several liability among partners, but tempers the effect by imposing a general requirement that partnership assets be exhausted before the individual assets of partners become available for satisfaction of a partnership obligation.[159] This exhaustion requirement extends to the liability of a purported partner with respect to a partnership obligation.[160] If a partnership liability did not result, the UPA made the purported partner liable only jointly with the other persons consenting to the representation.[161] RUPA, on the other hand, imposes true joint and several liability in this situation, with no exhaustion requirement.[162]

2. Statement of partnership authority

As has been discussed previously, RUPA creates a mechanism for the voluntary filing with the secretary of state of various "statements" relating to partnership affairs.[163] Among these is a statement of partnership authority, which is intended to make a public record of partners who have authority to transfer real property held in the name of the partnership and also to enter into other transactions on behalf of the partnership.[164] Such a statement must list the names and addresses of all partners (or alternatively, the name and address of an agent who maintains such a list).[165] What is the status of a person who is not a partner but who is named by others as a partner in a filed statement of partnership authority?

absent evidence that the person consented to the representation and that the claimant entered into a transaction in reliance thereon, liability should not follow.

The filed statement certainly would qualify as a public representation that the person named is a partner. However, absent evidence that the person consented to the representation and that the claimant entered into a transaction in reliance thereon, liability should not follow.[166] This result is codified by section 56a-308(c), which provides that a person is not liable as a partner "merely because" he or she has been named as a partner in a statement of partnership authority filed by others.[167] The limited exculpatory effect of this provision must be emphasized. The language simply says that being named in a statement of partnership authority filed by someone else *is not sufficient, in and of itself,* to establish liability as a purported partner.

Unless otherwise agreed, however, the persons filing a statement must promptly send a copy to the nonfiling partners and also to every other person named in the statement as a partner.[168] If a person named as a partner receives a

154. K.S.A. 56-307(a) (repealed 1999); K.S.A. 1998 Supp. 56a-308(e).

155. K.S.A. 56-316(a) (repealed 1999); K.S.A. 1998 Supp. 56a-308(a). If the representation is made in a public manner, the purported partner will be liable to any relying third party, whether or not the purported partner knew he or she was being held out to the particular claimant.

156. K.S.A. 56-316(b) (repealed 1999); K.S.A. 1998 Supp. 56a-308(b).

157. K.S.A. 56-316(a), (b) (repealed 1999); K.S.A. 1998 Supp. 56a-308(a), (b). In order for a partnership liability to result, an actual partnership must exist. If an actual partner transacts business on behalf of the partnership, the only question is whether that partner had power to bind the partnership. *See* K.S.A. 56-309 (repealed 1999) and K.S.A. 1998 Supp. 56a-301, discussed in text at notes 49-72, *supra.* If the purported partner purports to transact business on behalf of the partnership, an additional requirement is that all actual partners consent to the holding out of the purported partner. K.S.A. 56-316(b) (repealed 1999); K.S.A. 1998 Supp. 56a-308(b). This is just a corollary to the rule that, absent agreement to the contrary, no person can become a partner without the unanimous consent of the existing partners. *See* K.S.A. 56-318(g) (repealed 1999); K.S.A. 1998 Supp. 56a-401(i).

158. K.S.A. 56-315(a) (repealed 1999).

159. K.S.A. 1998 Supp. 56a-306(a), -307(d), discussed in text at notes 142-44 & 152-53, *supra.*

160. K.S.A. 1998 Supp. 56a-307(e).

161. K.S.A. 56-316(a), (b) (repealed 1999). The imposition of joint rather than joint and several liability most probably was due to oversight. The official UPA imposes joint liability on partners with respect to contractual obligations, so it is natural and consistent to impose the same type of liability on purported partners. *See* UNIFORM PARTNERSHIP ACT §§ 15(b), 16 (1914). When Kansas adopted the UPA in 1972, it varied the official text by making actual partners jointly and severally liable for all partnership obligations, but apparently forgot to extend this liability to purported partners in situations in which a partnership obligation did not result. *Compare* K.S.A. 56-315(a) (repealed 1999) *with id.* 56-316 (repealed 1999).

162. K.S.A. 1998 Supp. 56a-308(a), (b). There can be no requirement that partnership assets be exhausted if no actual partnership exists, or if it exists, the liability is not a partnership liability. *Id.* 56a-307(e) codifies this result by implication.

163. K.S.A. 1998 Supp. 56a-101(m), -105. *See* text at notes 93-97, *supra.*

164. K.S.A. 1998 Supp. 56a-303. *See* text at notes 111-32, *supra.*

165. K.S.A. 1998 Supp. 56a-303(a)(1)(iii), (b).

166. *See id.* 56a-308(a).

167. *Id.* 56a-308(c).

168. *Id.* 56a-103(a), (b)(1), -105(e). Failure to send such copies, however, does not limit the effectiveness of the statement as to third parties. *Id.* 56a-105(e).

copy of the filed statement or otherwise acquires knowledge that the statement represents the person to be a partner, may consent be inferred from the person's failure to disavow the representation by filing a statement of denial?[169] Stated differently, is there an affirmative duty to file a statement of denial, the breach of which will give rise to liability as a purported partner with respect to relying third parties? The Official Comments to RUPA seem to indicate that there is no duty to file a statement of denial,[170] but this conclusion is not clearly supported by the actual language of section 56a-308(c).[171] Given the uncertainty, and the ease with which a statement of denial may be filed,[172] its use is highly recommended in this situation.[173]

... merely being named as a partner in a statement of partnership authority is not sufficient, in and of itself, to establish liability as a purported partner.

3. Dissociated partners

Purported partner/partner by estoppel issues also may arise with respect to a person who actually formerly was a partner but who has become dissociated from the partnership, the business of which is continued by others. In such situations, the ongoing partners will continue to have power for two years to subject the dissociated partner to liability to third parties who transact business with the partnership reasonably believing that the dissociated partner is still a partner and who lack notice of the dissociation.[174] Similarly, the dissociated partner will continue to have power for two years to bind the ongoing partnership to transactions with such third parties.[175] In either of these situations, the dissociated partner or the partnership may file a statement of dissociation, the effect of which is to reduce the period of exposure from two years to 90 days.[176] Neither of these situations, however, involves liability or power as a purported partner. Rather, they simply provide an interim winding down period[177] for the protection of innocent third parties during which the mutual agency power of both the dissociated and ongoing partners will continue to exist notwithstanding the dissociation.[178] Unlike the situation involving a purported partner, there is no requirement that the dissociated partner be held out as a partner with his or her consent.

If there were a holding out, however, it is possible that the dissociated partner could incur liability as a purported partner beyond the statutory winding down period. It is as to such potential liability that two other provisions of RUPA become relevant. Section 56a-308(d) provides that a dissociated partner does not continue to be liable as a partner "merely because" of a failure to file a statement of dissociation or to amend a statement of partnership authority to reflect the partner's dissociation from the partnership.[179] If the partnership has not previously filed a statement of partnership authority that names the dissociated partner as a partner, the reference to failure to file a statement of dissociation serves merely to reinforce the purpose of such a statement as a voluntary method by which the dissociated partner or the partnership may reduce the length of the statutory winding down period from two years to 90 days. If the partnership has filed a statement of partnership authority listing the dissociated partner as a partner, section 56a-308(d) seems to be just the counterpart of section 56a-308(c).[180] That is, it makes clear that merely being named as a partner in a statement of partnership authority *is not sufficient, in and of itself,* to establish liability as a purported partner. It does not state what the result would be if the additional elements of continued consent and third party reliance were established. The Official Comments to RUPA say only that "a partner's liability as a partner does not continue after dissociation *solely* because of a failure to file a statement of dissociation."[181]

A second common type of holding out might be continued use of the dissociated partner's name in the partnership name. As to this situation, section 56a-705 provides that continued use of a partnership name, or a dissociated partner's name as part of the partnership name, does not "of itself" make the dissociated partner liable for obligations of the continuing partnership.[182] Once again, read literally, the effect of this provision is very narrow: mere continued use of the dissociated partner's name *is not sufficient, in and of itself,* to establish liability. As such, this language would not necessarily preclude liability if, in addition to use of the dissociated partner's name, it could be shown that the dissociated partner consented to such use and a third party entered into a transaction with the partnership in reliance thereon. Such a construction would be at odds with the Official Comments to RUPA, which state the broader purpose of this section as preventing the partnership from having to sacrifice the good will associated with its name.[183] As is the case with sections 56a-308(c) and (d), however, it is questionable whether the statutory language is up to the task.

169. *See id.* 56a-304.

170. RUPA § 304 cmt.: "No adverse inference should be drawn from the failure of a person named as a partner to deny such status, however." *Id.* § 308 cmt.: "Subsection (c) makes it clear that an otherwise innocent person is not liable as a partner for failing to deny his partnership status as asserted by a third person in a statement of partnership authority." This view also is consistent with that of the drafters of the original UPA. *See* UNIFORM PARTNERSHIP ACT § 16 off. cmt. (1914). *But see* 1 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.12(c); William H. Painter, *Partnership by Estoppel*, 16 VAND. L. REV. 327, 329-32 (1963).

171. HILLMAN, VESTAL & WEIDNER, RUPA 152.

172. *See* K.S.A. 1998 Supp. 56a-105, -304.

173. HILLMAN, VESTAL & WEIDNER, RUPA 152; BROMBERG AND RIBSTEIN ON LLPS AND RUPA 287.

174. K.S.A. 1998 Supp. 56a-703(b). *See* text at notes 416-18, *infra.*

175. K.S.A. 1998 Supp. 56a-702(a). *See* text at notes 413-15, *infra.*

176. K.S.A. 1998 Supp. 56a-704. *See* text at notes 419-20, *infra.*.

177. The term "winding down" was coined by Weidner & Larson, *supra* note 12, at 13-16.

178. *Id.* at 14-15. The UPA also contained provisions dealing with lingering apparent authority after partnership dissolution, but no finite cut-off was provided. *See* K.S.A. 56-335(a) (repealed 1999).

179. K.S.A. 1998 Supp. 56a-308(d).

180. *See id.* 56a-308(c), discussed in text at notes 163-73, *supra.*

181. RUPA § 308 cmt. (emphasis added).

182. K.S.A. 1998 Supp. 56a-705. K.S.A. 56-341(j) (repealed 1999) was similar but narrower in that it only applied to continued use of the name of a deceased partner.

183. RUPA § 705 cmt.

IV. Relations of the partners to each other and to the partnership

A. Importance of the partnership agreement

In what has been heralded as "a bold attempt to correct a flaw in the UPA,"[184] RUPA affirmatively provides that, with certain exceptions, "relations among the partners and between the partners and the partnership are governed by the partnership agreement."[185] In other words, RUPA's provisions governing internal relations are largely default rules, subject to modification by agreement.[186] In this regard, RUPA's definition of "partnership agreement" as "the agreement, whether written, oral, or implied, among the partners concerning the partnership ..."[187] is especially significant.

Some of the exceptions to this plenary authority to "contract out" of RUPA are absolute and others are qualified. They are listed in section 56a-103(b) and are discussed in connection with the substantive provisions to which they relate.[188]

B. Choice of law

Normally, the internal relationships of participants in a business entity created by the formal filing of constitutive documents in a given state are governed by the law of that state. Thus, the internal affairs of corporations are governed by the law of the state of incorporation.[189] Because a general partnership may be created without any formal filing, the law governing its internal affairs historically has been the law of the state having the most significant relationship to the parties and the particular transaction at issue. Most often, this was the state in which the partnership's principal place of business was located.[190]

Unlike the official UPA, which had no choice of law provision,[191] RUPA states that internal affairs are governed by the law of the jurisdiction in which a general partnership has its principal office.[192] This term is not defined, but presumably it usually will coincide with the principal place of business. Like other RUPA default rules, however, this choice of law provision is subject to change by the partnership agreement.[193]

... RUPA states that internal affairs are governed by the law of the jurisdiction in which a general partnership has its principal office.

C. General rights and duties

1. Financial Rights

RUPA's provisions governing the internal financial affairs of a partnership, like those of the UPA on which they are based,[194] are all simple default rules, subject to change by the partnership agreement.[195] The first of these is actually a statutory innovation that provides for a basic system of partnership accounting. Section 56a-401(a) states that each partner is deemed to have an account that is credited with the partner's capital contributions and share of profits, and charged with distributions and the partner's share of partnership losses.[196] Although this provision has been criticized as an ill-advised subject for legislation, especially in the context of informal partnerships,[197] it comports with standard partnership accounting practice[198] and actually may be most useful for informal partnerships that have not been meticulous in keeping their books.[199]

Absent agreement to the contrary, partners will continue under RUPA to share profits equally, regardless of capital contribution, and will be charged with losses in the same manner that they share profits.[200] This rule of per capita profit and loss sharing perpetuates the distinction between general and limited partnerships.[201]

184. HILLMAN, VESTAL & WEIDNER, RUPA 37-38.

185. K.S.A. 1998 Supp. 56a-103(a). This also was the general thrust of the UPA, but it was executed on a less than uniform, section by section basis. *Compare* K.S.A. 56-318 (repealed 1999) *with id.* 56-319, -320 (repealed 1999).

186. Of course, the partners may not by agreement adversely affect the rights of nonconsenting third parties. K.S.A. 1998 Supp. 56a-103(a), (b)(10).

187. *Id.* 56a-101(g). This provision codifies the prevailing case law view under the UPA, which recognizes implied agreements. *E.g., Parks v. Riverside Ins. Co. of Am.*, 308 F.2d 175 (10th Cir. 1962) (Okla. law).

188. K.S.A. 1998 Supp. 56a-103(b) states the rights and duties that may not be waived or varied beyond what is specifically authorized. The Official Comments to RUPA state that the corresponding liabilities and remedies, found in *id.* 56a-405, implicitly are subject to the same restrictions. RUPA § 103 cmt. 1. Otherwise, a nonwaivable right could be eviscerated by elimination of the remedy. HILLMAN, VESTAL & WEIDNER, RUPA 49-50. *See* text at notes 295- 97, *infra.*

189. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 303-310 (1971).

190. *Id.* § 294 & cmt. d. *See also* E.H. Schopler, Annotation, *Conflict of Laws as to Partnership Matters*, 20 A.L.R. 2d 295, 301-03 (1953) (law of place where partnership formed and has its place of business governs internal matters).

191. The 1994 legislation by which Kansas first authorized LLPs contained little-noticed choice of law provisions, directed primarily at LLPs but phrased broadly enough to cover all partnerships. They provided that the law of the jurisdiction under which a partnership was "formed and existing" governed both its internal affairs and the liability of its partners. K.S.A. 56-347(c), (d) (repealed 1999). As applied to general partnerships, these provisions begged the question of how to determine the law under which an informal organization was formed and existing.

192. K.S.A. 1998 Supp. 56a-106(a). In this respect, Kansas differs slightly from the official version of RUPA, which refers to the location of the partnership's "chief executive office." RUPA § 106(a). It should be noted that a different rule applies to LLPs. Because an LLP requires formal organization, it is governed by the law of the jurisdiction under which it is formed. K.S.A. 1998 Supp. 56a-106(b), -1101(a).

193. K.S.A. 1998 Supp. 56a-103(a); RUPA § 106 cmt. The choice of law provision with respect to domestic LLPs, however, is not subject to variance. K.S.A. 1998 Supp. 56a-103(b)(9).

194. *See* K.S.A. 56-318 (repealed 1999).

195. K.S.A. 1998 Supp. 56a-103(a), (b); RUPA § 401 cmt. 1.

196. K.S.A. 1998 Supp. 56a-401(a).

197. BROMBERG AND RIBSTEIN ON LLPS AND RUPA 296.

198. WILLIAM A. KLEIN & JOHN C. COFFEE JR., BUSINESS ORGANIZATION AND FINANCE 77-81 (1996).

199. HILLMAN, VESTAL & WEIDNER, RUPA 158.

200. K.S.A. 1998 Supp. 56a-401(b). The partners may agree to share profits and losses other than equally, e.g., in proportion to capital contributions. They may also agree to share losses differently than profits. *See id.* 56a-103(a), (b).

201. *Compare* K.S.A. 56-1a303 (profits and losses of limited partnership allocated among partners on basis of value of contributions).

Profit and loss allocation is a bookkeeping concept. It bears no necessary relationship to actual distributions, which may be more or less than a partner's allocable share of the profits for a given accounting period.[202] Moreover, there is no automatic statutory right to receive interim distributions under either the UPA or RUPA. If not covered by the partnership agreement, the questions whether and how much partners may draw from the business is an "ordinary" matter to be decided by majority vote.[203] If a distribution is to be made, it must be made in cash rather than in kind, unless there is an agreement to the contrary.[204]

However, in the converse situation RUPA is explicit, as the UPA was not, that acts outside the ordinary course must be consented to by all partners.

If a partner makes a payment or incurs a liability in the ordinary course of business or for the preservation of the partnership's business or property, the partner is entitled to reimbursement or indemnification from the partnership.[205] Similarly, a partner is entitled to reimbursement if he or she makes an advance to the partnership beyond the amount of his or her agreed capital contribution.[206] The partnership's obligation in either of these situations is treated as a loan from the partner to the partnership, which draws interest at the statutory rate from the date of the payment or advance.[207]

As under the UPA, absent agreement, partners are not entitled to remuneration for services performed in the partnership business.[208] The theory is that normally all partners are expected to devote their time and efforts to the partnership business, and that they are compensated by way of their profit shares.[209] An exception is made for services rendered in winding up the business after dissolution.[210]

2. Management and related rights

RUPA continues the UPA rules that, unless otherwise agreed, each partner has an equal right to participate in management of the business, and that differences as to matters in the ordinary course of business are decided by majority vote.[211] However, in the converse situation RUPA is explicit, as the UPA was not, that acts outside the ordinary course must be consented to by all partners.[212] Unless otherwise agreed, amendments to the partnership agreement also require unanimous consent.[213] Finally, the long-standing principle of *delectus personae* — that a new partner can be admitted only with the consent of all existing partners — remains in force under RUPA as it was under the UPA.[214]

RUPA's specific provisions concerning a partner's rights and duties with respect to information are divided into two categories: those relating to partnership books and records, and those relating to other information. The following brief discussion considers each separately.[215]

Because general partnerships may be very informal enterprises, there is no affirmative requirement that any particular books and records be kept.[216] Those that are maintained, however, must be located at the partnership's principal office,[217] unless the partners agree otherwise.[218] The partnership must provide partners and former partners, and their agents and attorneys, access to such books and records during ordinary business hours.[219] This right of access includes both inspection and copying (for which the partnership may impose a reasonable charge)[220] and is not limited by a "proper purpose" requirement such as is found in corporate law.[221] Moreover, section 56a-103(b)(2) provides that the partnership agreement may not "unreasonably restrict" access to books and records.[222] Whether a "proper purpose" or other restriction designed to preserve confidentiality will be deemed a reasonable or unreasonable restriction remains to be seen.

In addition to the above, RUPA codifies two further

202. KLEIN & COFFEE, *supra* note 198, at 79-81.

203. K.S.A. 1998 Supp. 56a-401(j); RUPA § 401 cmt. 2; KLEIN & COFFEE, *supra* note 198, at 79-80.

204. K.S.A. 1998 Supp. 56a-402 provides that a partner has no right to receive, and cannot be forced to accept, a distribution in kind. This rule parallels but, with respect to involuntary in kind distributions, is more restrictive than limited partnership law. *See* K.S.A. 56-1a355 (prohibiting only disproportionate involuntary distributions in kind). Of course, the partners may agree to different rules for in kind distributions. K.S.A. 1998 Supp. 56a-103(a), (b).

205. K.S.A. 1998 Supp. 56a-401(c), based on K.S.A. 56-318(b) (repealed 1999).

206. K.S.A. 1998 Supp. 56a-401(d), based on K.S.A. 56-318(a) (repealed 1999).

207. K.S.A. 1998 Supp. 56a-104(b), -401(e), based on K.S.A. 56-318(c) (repealed 1999). *See also* K.S.A. 1998 Supp. 56a-404(f) (partner may lend money to and transact other business with partnership); *id.* 56a-807(a) (partner as creditor on partnership liquidation).

208. K.S.A. 1998 Supp. 56a-401(h), based on K.S.A. 56-318(f) (repealed 1999).

209. 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.02(g).

210. K.S.A. 1998 Supp. 56a-401(h). This exception is broader than the corresponding UPA provision, which applied only to a surviving partner winding up the business after dissolution caused by the death of another partner. *See* K.S.A. 56-318(f) (repealed 1999).

211. K.S.A. 1998 Supp. 56a-401(f), (j), based on K.S.A. 56-318(e), (h) (repealed 1999). Per capita voting, of course, is only a default rule that may be changed to some other method, *e.g.*, voting by interest in capital or profits. K.S.A. 1998 Supp. 56a-103(a), (b).

212. K.S.A. 1998 Supp. 56a-401(j). Case law in other jurisdictions has sensibly reached the same result under the UPA. *See*, e.g., *Paciaroni v. Crane*, 408 A.2d 946 (Del. Ch. 1979). What is at stake here is whether an act is rightful or wrongful as between the partners, not whether the partnership is bound to a third party. The latter question is governed by section 56a-301 and related provisions. K.S.A. 1998 Supp. 56a-401(k). *See* parts III A & B, *supra.*

213. K.S.A. 1998 Supp. 56a-401(j), based on K.S.A. 56-318(h) (repealed 1999).

214. K.S.A. 1998 Supp. 56a-401(i), based on K.S.A. 56-318(g) (repealed 1999). This provision too is merely a default rule subject to change by agreement. K.S.A. 1998 Supp. 56a-103(a), (b).

215. For greater detail, *see* HILLMAN, VESTAL & WEIDNER, RUPA 167-80.

216. RUPA § 403 cmt. 1.

217. K.S.A. 1998 Supp. 56a-403(a), based on K.S.A. 56-319 (repealed 1999).

218. K.S.A. 1998 Supp. 56a-103(a), (b).

219. *Id.* 56a-403(b), based on K.S.A. 56-319 (repealed 1999). In the case of former partners, access is restricted to those portions of the partnership's books and records that pertain to the period during which they were partners.

220. K.S.A. 1998 Supp. 56a-403(b).

221. *See* K.S.A. 17-6510(b). The theory is that a partner's unlimited personal liability justifies unlimited access to books and records. RUPA § 403 cmt. 2.

222. K.S.A. 1998 Supp. 56a-103(b)(2).

requirements. The first is an affirmative disclosure provision that requires every partner and the partnership to furnish a partner (or the legal representative of a deceased or disabled partner), without demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement and the law.[223] Furthermore, the partnership and each partner must furnish, on demand, any other information concerning the partnership's business and affairs, except to the extent the demand or information demanded is unreasonable or otherwise improper.[224] Unlike the partners' right of access to books and records, however, both of these information disclosure rules are subject to unlimited variation or elimination by the partnership agreement.[225] Finally, the Official Comments indicate that these disclosure requirements are not exclusive of others, such as those that may spring from the obligation of good faith and fair dealing.[226]

3. Fiduciary and related duties

Traditionally, partners in general partnerships have been held to occupy a fiduciary relationship with respect to their copartners and the firm.[227] This status and one facet of the fiduciary duty of loyalty were codified in the UPA.[228] This formulation, however, was not exclusive and did not preempt broader common law principles of partners' fiduciary duties.[229] In what has proven to be its most controversial feature,[230] RUPA breaks with this tradition, codifies partners' fiduciary duties of care and loyalty, and declares them to be exclusive.[231] It also codifies an obligation of good faith and fair dealing, borrowed from the Restatment (Second) of Contracts,[232] which it structurally characterizes as a nonfiduciary duty.[233] The following discussion considers these three duties and related provisions separately.

a. Duty of care

The UPA had no provision that spoke to the duty of care partners owed each other and the partnership in their conduct of the business. In the absence of a controlling statutory provision, three distinct approaches developed with respect to disinterested managerial decision-making. The most extreme view was represented by cases that seemed to say there was no duty of care whatsoever, although it is not clear they really meant it.[234] Others, representing a clear modern trend, applied the business judgment rule by analogy to corporate law. The effect was to adopt a standard of gross, rather than simple, negligence.[235] Still others, like Kansas, adopted an agent's duty of ordinary care, under which simple negligence produced liability.[236]

... RUPA breaks with this tradition, codifies partners' fiduciary duties of care and loyalty, and declares them to be exclusive.

RUPA follows the middle approach in providing that a partner's duty of care in conducting and winding up the business "is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."[237] The result in Kansas is to lower the pre-existing common law standard of care for partners and more nearly harmonize it with that applicable to corporate directors and officers.[238]

General partnerships, of course, differ from corporations

223. *Id.* 56a-403(c)(1). This provision is based primarily on case law and academic writing developed under the UPA, which did not contain an explicit non-demand-driven disclosure obligation. *See* William L. Cary & Melvin A. Eisenberg, Cases and Materials on Corporations 47 (7th ed. unabridged 1995); Hillman, Vestal & Weidner, RUPA 175-76.

224. K.S.A. 1998 Supp. 56a-403(c)(2), based on K.S.A. 56-320 (repealed 1999). The burden of showing that the demand is unreasonable or improper is on the party from whom the information is requested. RUPA § 403 cmt. 3.

225. K.S.A. 1998 Supp. 56a-103(a), (b).

226. RUPA § 403 cmt. 3. *See* K.S.A. 1998 Supp. 56a-404(d), discussed in text at notes 268-76, *infra*.

227. *See, e.g., Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (1928), quoted with approval in *Martin v. Hunter*, 179 Kan. 578, 297 P.2d 153 (1956) (joint venture). *But cf. In re Zanetti-Gierke*, 212 B.R. 375 (Bankr. D. Kan. 1997); *In re Weiner*, 95 B.R. 204 (Bankr. D. Kan. 1989); *In re Novak*, 97 B.R. 47 (Bankr. D. Kan. 1987), holding that partners are not fiduciaries in the technical trust sense of that term as used in the exception to discharge provisions of the Bankruptcy Code.

228. K.S.A. 56-321 (repealed 1999). This section provided that a partner must account to the partnership for any benefit, and hold as trustee any profit, derived without consent of the other partners from any transaction connected with formation, conduct, or liquidation of the partnership, or from use by the partner of partnership property.

229. RUPA § 404 cmt. 1; Hillman, Vestal & Weidner, RUPA 186.

230. *See, e.g.,* Symposium, *The Future of the Unincorporated Firm*, 54 Wash. & Lee L. Rev. 389 (1997); Symposium, *Partnerships*, 58 Law & Contemp. Probs. 1 (1995).

231. K.S.A. 1998 Supp. 56a-404(a)-(c).

232. Restatement (Second) of Contracts § 205 (1981).

233. *See* K.S.A. 1998 Supp. 56a-404(a), (d).

234. *E.g., Johnson v. Weber*, 803 P.2d 939 (Ariz. App. 1990); *Ferguson v. Williams*, 670 S.W. 2d 327 (Tex. Civ. App. 1984).

235. *E.g., Bane v. Ferguson*, 890 F.2d 11 (7th Cir. 1989) (Ill. law); *Shlomchik v. Richmond 103 Equities Co.*, 662 F. Supp. 365 (S.D.N.Y. 1986) (N.Y. law); *Master Garage Inc. v. Bugdanowitz*, 690 P.2d 879 (Colo. App. 1984); *Rosenthal v. Rosenthal*, 543 A.2d 348 (Me. 1988).

236. *Carlin v. Donegan*, 15 Kan. 375 (1875) (reversing the trial court for instructing the jury, in essence, that under the business judgment rule liability could be predicated only on a showing of gross negligence). *See* Restatement (Second) of Agency § 379 & cmt. c (1958). Although *Carlin*'s age might be thought to cast doubt on its continued viability, it has never been overruled and has been cited for this point as recently as 1987. *See In re Novak*, 97 B.R. 47 (Bankr. D. Kan. 1987). *See also Insley v. Shire*, 54 Kan. 793, 39 P. 713 (1895), in which lack of supervision allowed employees to embezzle partnership funds. Using a standard of "reasonable diligence," the court held that losses caused by culpable neglect were chargeable against the partners guilty thereof. To the extent that the negligence in *Insley* consisted of failure adequately to supervise subordinates, its holding is consistent with corporate law, which confines the gross negligence standard to situations in which a managerial decision actually is being made. *See* Principles of Corporate Governance: Analysis and Recommendations § 4.01(c) & cmt. c (1994).

237. K.S.A. 1998 Supp. 56a-404(c).

238. Although there is some confusion in the cases, it appears that a standard of gross negligence would apply to the decision-making function of directors and officers of ordinary Kansas corporations. *See Beard v. Achenbach Memorial Hospital Ass'n*, 170 F.2d 859, 862 (10th Cir. 1948); *Sampson v. Hunt*, 233 Kan. 572, 584-85, 665 P.2d, 743, 754-55 (1983). To the extent that RUPA adopts an across-the-board gross negligence standard, applicable to the supervisory function as well as the decision-making function, it actually is more liberal than analogous corporate law. *See* note 236, *supra*.

in significant respects, which may make a gross negligence standard even more appropriate for partnerships. For one thing, partners' residual unlimited personal liability for partnership obligations itself may be a powerful inducement for care that is absent in the corporate setting.[239] In addition, the profit and loss sharing that is the hallmark of partnership,[240] when combined with an internal duty of care that is breached only by gross negligence, means that a loss caused by a partner's ordinary negligence will be borne by all partners like any other loss, rather than being allocated solely to the acting partner. If all partners are active in the business and all are subject to the risk of acting negligently, they may well prefer this type of risk-sharing to a regime that would visit the consequences of simple negligence exclusively on the actor.[241]

... 'merely' because certain conduct furthers the partner's own interest is insufficient, in and of itself, to establish a violation of the duty of loyalty.

If this is not what the partners desire, they are perfectly free to raise the standard of care in their partnership agreement. RUPA provides that the partnership agreement may not "unreasonably reduce" the duty of care, but there is no objection to raising it.[242]

Precisely what would be an unreasonable, as opposed to a reasonable, reduction remains somewhat of an open question. The Official Comments indicate that provisions protecting a partner for actions taken in good faith and in the honest belief that they are in the best interest of the partnership are intended to be permitted.[243] They also state that elimination of liability for intentional misconduct is "probably" unreasonable![244] This leaves open the possibility that a provision insulating partners from the consequences of gross negligence is permissible. Such a provision clearly is authorized by analogous corporate law.[245]

b. Duty of loyalty

As noted above, a general partner's duty of loyalty had a statutory basis under the UPA.[246] This provision supported a national body of case law that developed along lines analogous to the corporate law duties of directors and officers. Thus, a partner's duty of loyalty inhibits him or her from engaging in self-dealing transactions with the partnership, using partnership property or information for personal benefit, usurping partnership business opportunities, or competing with the partnership.[247]

In section 56a-404(b) RUPA now codifies these facets as a comprehensive and exclusive statement of a partner's duty of loyalty, as follows:

> A partner's duty of loyalty to the partnership and the other partners is limited to the following:
>
> (1) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
>
> (2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
>
> (3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.[248]

Although stated as absolute prohibitions, these rules probably will be construed to permit validation of conduct that otherwise technically would violate the duty of loyalty if the partner carries the burden of proving good faith and the fairness of the challenged conduct.[249]

Two other provisions of RUPA bear directly on this point and support this interpretation. Section 56a-404(e) provides: "A partner does not violate a duty or obligation under this act or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."[250] This provision does not state that a partner may always further his or her self-interest with impunity. That would directly contradict, and in fact repeal, the duty of loyalty. Rather, it simply states that "merely" because certain conduct furthers the partner's own interest is insufficient, in and of itself, to establish a violation of the duty of loyalty. The Official Comments explain that a partner is not a technical trustee and is not held to the same strict standards of self-abnegation as a trustee.[251] Thus, this provision is an attempt to balance the partner's rights as owner and principal in the business with his or her duties and obligations as fiduciary and agent.[252] That balance may be struck by recognizing a partner's right to act in his or her own self-interest as long as the action follows full disclosure and is fair to the partnership and the other partners.[253]

RUPA further provides, in section 56a-404(f), that "[a]

239. Weidner & Larson, *supra* note 12, at 22.
240. *See* K.S.A. 1998 Supp. 56a-401(a), (b). *See also id.* 56a-401(c).
241. Weidner & Larson, *supra* note 12, at 21-23; Gerard C. Martin, Comment, *Duties of Care Under the Revised Uniform Partnership Act*, 65 U. Chi. L. Rev. 1307, 1322-24 (1998).
242. K.S.A. 1998 Supp. 56a-103(a), (b)(4); RUPA § 103 cmt. 6.
243. RUPA § 103 cmt. 6.
244. *Id.*
245. *See* K.S.A. 17-6002(b)(8).
246. K.S.A. 56-321 (repealed 1999). *See* note 228 & accompanying text, *supra*.
247. 2 Bromberg and Ribstein on Partnership § 6.07(b)-(e).
248. K.S.A. 1998 Supp. 56a-404(b).
249. *See, e.g., Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969 (2d Cir. 1989) (N.Y. law); *Newton v. Hornblower Inc.*, 224 Kan. 506, 582 P.2d 1136 (1978).
250. K.S.A. 1998 Supp. 56a-404(e).
251. RUPA § 404 cmt. 5. *Accord In re Zanetti-Gierke*, 212 B.R. 375 (Bankr. D. Kan. 1997) (Kan. law); *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969 (2d Cir. 1989) (N.Y. law).
252. RUPA § 404 cmt. 5.
253. *Cf. Tanzer v. International Gen. Indus. Inc.*, 379 A.2d 1121, 1124 (Del. 1977), *overruled in part, Weinberger v. UOP Inc.*, 457 A.2d 701 (Del. 1983): "[A] stockholder in a Delaware corporation has a right to vote his shares in his own interest, including the expectation of personal profit, limited, of course, by any duty he owes to other stockholders."

partner may lend money to and transact other business with the partnership, and as to each loan or transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law."[254] On its face, this provision is in direct conflict with a partner's duty of loyalty to refrain from dealing with the partnership as an adverse party.[255] The historical derivation of this subsection, however, indicates that its primary focus is not on the internal fiduciary relationship between the contracting partner and the partnership or other partners, but on the external relationship between the contracting partner and third party creditors of the partnership.[256] The Official Comments expressly recognize this lineage, as follows:

> Subsection (f) authorizes partners to lend money to and transact other business with the partnership and, in so doing, to enjoy the same rights and obligations as a nonpartner. That language is drawn from RULPA Section 107. The rights and obligations of a partner doing business with the partnership as an outsider are expressly made subject to the usual laws governing those transactions. They include, for example, rules limiting or qualifying the rights and remedies of inside creditors, such as fraudulent transfer law, equitable subordination, and the law of avoidable preferences, as well as general debtor-creditor law. The reference to "other applicable law" makes clear that subsection (f) is not intended to displace those laws ... .[257]

Therefore, the main thrust of subsection 56a-404(f) is simply to allow partners to deal with the partnership and, as a general proposition, to receive payment of any resulting claims on a parity with third party creditors.[258] Its placement in the section speaking to general standards of partners' conduct, however, suggests a broader purpose as well.[259] This interpretation is borne out by the Official Comments, which indicate that it is intended to permit a partner to purchase partnership property at a foreclosure, tax or liquidation sale.[260] Case law under the UPA also generally permitted such purchases, provided that the purchasing partner's conduct was not inconsistent with his or her duty of loyalty.[261] In order to harmonize section 56a-404(f) with section 56a-404(b), such a limitation ought to be carried forward under RUPA. The result would be that a partner could lend money to or transact other business with the partnership, as long as such loans and transactions withstand careful scrutiny with respect to their fairness from the standpoint of the partnership and other partners.

The partnership agreement ... 'may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable ... .'

The partnership agreement cannot completely eliminate the duty of loyalty, but it "may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable ... ."[262] This provision contemplates advance waivers with respect to types or categories of business transactions or activities, as long as the agreement is reasonably specific and the exculpation is not manifestly unreasonable.[263] The Official Comments give as an example a provision in a real estate partnership agreement authorizing a partner who is a real estate agent to buy or sell real property for his or her own account without first disclosing and offering the property to the partnership.[264]

In addition to *ex ante* contractual waivers, RUPA provides that "all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty ... ."[265] This provision authorizes the partners to validate a known past or anticipated future violation of the duty of loyalty that is not specifically authorized by the partnership agreement.[266] The authorization or ratification must be unanimous unless the partnership agreement permits action by a lesser number or percentage of the partners. Unless

254. K.S.A. 1998 Supp. 56a-404(f).

255. *See id.* 56a-404(b)(2).

256. This relationship was first addressed by the original Uniform Limited Partnership Act, which provided that a limited partner could loan money to and transact other business with the limited partnership and, with respect to resulting claims, share with general creditors a pro rata portion of the partnership's assets. The statute also contained a special fraudulent conveyance provision applicable to transactions between a limited partner and the limited partnership. 1967 Kan. Sess. Laws, ch. 302, § 13 (repealed 1983, effective 1986). The current version is found at K.S.A. 56-1a107.

257. RUPA § 404 cmt. 6.

258. The substance of subsection 56a-404(f) is mirrored in the section governing liquidation distributions, which provides that assets of the partnership must first be applied "to discharge its obligations to creditors, including, to the extent permitted by law, partners who are creditors." K.S.A. 1998 Supp. 56a-807(a). An early Kansas case reached the same result, unaided by statute. *See Farney v. Hauser*, 109 Kan. 75, 198 P. 178 (1921) (partner may contract with partnership as ordinary customer and, in latter capacity, is entitled to be treated same as third party unless partnership insolvent).

259. BROMBERG AND RIBSTEIN ON LLPS AND RUPA 307.

260. RUPA § 404 cmt. 6.

261. *See, e.g., Prentiss v. Sheffel*, 20 Ariz. App. 411, 513 P.2d 949 (1973); *McSweeney v. Buti*, 263 Ill. App. 3d 955, 637 N.E. 2d 420 (1994); *Mandell v. Centrum Frontier Corp.*, 86 Ill. App. 3d 437, 407 N.E.2d 821 (1980); *Natpar Corp. v. E.T. Kassinger Inc.*, 258 Ga. 102, 365 S.E.2d 442 (1988); *Westminster Properties Inc. v. Atlanta Assocs.*, 250 Ga. 841, 301 S.E.2d 636 (1983). *But see Cude v. Couch*, 588 S.W.2d 554 (Tenn. 1979). In *Old Colony Ventures I Inc. v. SMWNPF Holdings Inc.*, 918 F.Supp. 343 (D. Kan. 1996) (Kan. law), one of two partners financed the partnership by means of a secured loan. Although the partnership admittedly had not made scheduled loan payments, the court refused to grant summary judgment for the lender-partner because there was a question of material fact whether that partner had caused the nonpayments by breaching its fiduciary duty of loyalty.

262. K.S.A. 1998 Supp. 56a-103(b)(3)(i). This language is subject to more than one interpretation. *See* HILLMAN, VESTAL & WEIDNER, RUPA 40-44.

263. RUPA § 103 cmt. 4.

264. *Id.* A similar result was reached in *Crawford v. Crawford*, 163 Kan. 126, 181 P.2d 526 (1947), on the basis of an implied waiver.

265. K.S.A. 1998 Supp. 56a-103(b)(3)(ii).

266. RUPA § 103 cmt. 5.

disqualified by the partnership agreement, the interested partner apparently can vote to authorize or ratify his or her own conduct.[267]

The partnership agreement cannot completely eliminate the obligation of good faith and fair dealing.

c. Obligation of good faith and fair dealing

In addition to the fiduciary duties of care and loyalty, RUPA provides that a partner owes the partnership and the other partners an obligation of good faith and fair dealing in discharging any duties and exercising any rights under RUPA or the partnership agreement.[268] This obligation is not intended to be a separate, independent, status-based fiduciary duty.[269] Rather, it is a contract-based ancillary obligation that is superimposed on the manner in which a partner performs other duties or exercises rights.[270]

The precise meaning and application of the obligation have intentionally been left open for judicial development, although the Official Comments note that "good faith" suggests a subjective focus, while "fair dealing" implies an objective standard.[271] We know that the UCC definition of "honesty in fact" was rejected as too narrow and that section 205 of the Restatement (Second) of Contracts was the source of the obligation.[272] The comments to that section of the Restatement provide:

> Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.[273]

With specific reference to good faith performance, the comments conclude:

> Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.[274]

In addition, Kansas case law applying the obligation of good faith and fair dealing in other contexts may provide some guidance by analogy.[275]

The partnership agreement cannot completely eliminate the obligation of good faith and fair dealing. It may, however, prescribe standards by which performance is to be measured, if such standards are not manifestly unreasonable.[276]

D. Intrapartnership litigation

Under the pre-UPA common law, the exclusive remedy for a partner aggrieved by the conduct of co-partners was an action for a judicial accounting in connection with dissolution of the partnership.[277] The UPA broadened this rule to permit an action for an accounting prior to dissolution if: (1) a partner was wrongfully excluded from the business; (2) another partner had misappropriated partnership property; (3) the partnership agreement permitted an accounting; or (4) an accounting was otherwise just and reasonable under the circumstances.[278]

Nevertheless, the general rule remained that an accounting was the exclusive remedy. The primary reason for this rule was practical and related to the interdependence of partners' financial rights and liabilities as a result of profit and loss sharing. The courts thought that the rights of a single partner could not accurately be adjudicated without striking a balance of the rights and liabilities of all partners. Moreover, they believed it was more efficient to resolve all claims arising out of an interrelated set of facts in a single proceeding rather than to do so piecemeal in a series of separate actions.[279]

Notwithstanding these fairly substantial reasons supporting the exclusivity of the accounting remedy, a host of case law exceptions proliferated.[280] This evolution has culmi-

267. BROMBERG AND RIBSTEIN ON LLPS AND RUPA 266. *Compare Oberhelman v. Barnes Inv. Corp.*, 236 Kan. 335, 690 P.2d 1343 (1984) (interpreting K.S.A. 17-6304).

268. K.S.A. 1998 Supp. 56a-404(d).

269. RUPA § 404 cmt. 4.

270. *Id.* RUPA's articulation of an obligation of good faith and fair dealing is derived from RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981). Kansas case law implies such an obligation in every contract except those relating to employment-at-will. *See, e.g., Kansas Baptist Convention v. Mesa Operating Limited Partnership*, 253 Kan. 717, 864 P.2d 204 (1993).

271. RUPA § 404 cmt. 4. For further discussion, *see* Robert M. Phillips, Comment, *Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 1179 (1993).

272. RUPA § 404 cmt. 4.

273. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a.

274. *Id.* cmt. d.

275. *See, e.g., The Hartford v. Tanner*, 22 Kan. App. 2d 64, 910 P.2d 872, *rev. denied*, 259 Kan. 927 (1996) (implied covenant of good faith and fair dealing requires surety seeking indemnification to show that its conduct was reasonable). Care must be taken in this process, however. Contractual contexts may vary from truly adversarial to trusting and confidential, and so too must application of the obligation of good faith and fair dealing. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

276. K.S.A. 1998 Supp. 56a-103(b)(5). For further discussion, *see* HILLMAN, VESTAL & WEIDNER, RUPA 44-49.

277. *Farney v. Hauser*, 109 Kan. 75, 198 P. 178 (1921); RUPA § 405 cmt. 2; 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.08(b), (c).

278. K.S.A. 56-322 (repealed 1999).

279. 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.08(c).

280. *Id.* § 6.08(c) lists 10.

nated in section 56a-405 of RUPA, which radically alters the partnership litigation landscape by authorizing direct suits by the partnership against partners and permitting partners to sue the partnership and each other with or without an accounting.[281]

As a corollary to the entity theory of partnership,[282] section 56a-405(a) provides that a partnership may bring an action against a partner for breach of the partnership agreement or violation of a duty owed to the partnership that, in either case, causes harm to the partnership.[283] Unfortunately, the statute does not clearly answer the question how, in terms of internal procedure, such a suit is to be instituted and maintained. The Official Comments disavow any intent to authorize derivative suits,[284] but fail to state how many partners, in number or interest, must favor bringing a direct partnership action against a co-partner. Recall that, under the default rules, differences of opinion as to matters in the ordinary course of business are decided by majority vote, while unanimity is required for extraordinary matters.[285] Is instituting litigation against a co-partner ordinary or extraordinary?[286] Absent a clear answer in the statute, this is a matter that should be addressed specifically in the partnership agreement.[287]

RUPA also provides, in section 56a-405(b), that a partner individually may maintain an action against either the partnership or another partner, for legal or equitable relief, with or without an accounting, to enforce the partner's rights under the partnership agreement; to enforce the partner's rights under RUPA; or to enforce rights arising independently of the partnership relationship.[288] This provision abolishes the exclusivity of the accounting remedy and "reflects a new policy choice that partners should have access to the courts during the term of the partnership to resolve claims against the partnership and the other partners, leaving broad judicial discretion to fashion appropriate remedies."[289] Examples of suits authorized by this section include actions to enforce a partner's financial and management rights, the right to information, the fiduciary and related duties of other partners, the right to have the partner's interest purchased upon dissociation from the firm, and the right to compel dissolution of the partnership.[290]

A partner's fiduciary duties of care and loyalty, and the ancillary obligation of good faith and fair dealing, are owed to both the partnership and the other partners.[291] Consequently, a partner who breaches such duties faces the possibility of suit by the partnership under section 56a-405(a), suit by one or more of the other partners under section 56a-405(b), or both. Conceivably, the case law will develop distinctions, similar to those found in corporate law, between breaches of duty that give rise to a cause of action in the partnership as an entity and those that constitute actionable wrongs to the partners individually.[292] On the other hand, RUPA's codification of the duties of care and loyalty speaks solely to situations that, in the corporate realm, would give rise *only* to causes of action in the entity.[293] By providing that the duty in these situations is owed to *both* the partnership and the other partners, and further providing that either may sue to enforce these duties, RUPA blurs the distinction and creates the possibility of complete overlap. As stated by one authoritative source:

Examples of suits authorized by this section include actions to enforce a partner's financial and management rights ...

> Although partners clearly should be able to bring some kinds of litigation directly, as for recovery of distributions or indemnification, it is less clear that they should be able to sue individually on actions that belong to the firm. Such a right lets any partner burden the firm with costly litigation. ... Firms may want to avoid the potential for this kind of excessive litigation by requiring suit in the name of the firm.[294]

281. K.S.A. 1998 Supp. 56a-405.

282. *See id.* 56a-201(a).

283. *Id.* 56a-405(a).

284. RUPA § 405 cmt. 2. On the other hand, RUPA also does not affirmatively prohibit derivative suits, and they already appear to be in a nascent stage of development in the courts. *See* 2 BROMBERG AND RIBSTEIN ON PARTNERSHIP § 5.05.

285. K.S.A. 1998 Supp. 56a-401(j); *see* text at notes 211-12, *supra*.

286. *See* HILLMAN, VESTAL & WEIDNER, RUPA 204. Of course, if suit against a partner is deemed extraordinary, the default requirement of unanimity would make such a suit impossible. *Id.*

287. *See* K.S.A. 1998 Supp. 56a-103; HILLMAN, VESTAL & WEIDNER, RUPA 207-08.

288. K.S.A. 1998 Supp. 56a-405(b). The third type of action delineated essentially codifies the holding in *Farney v. Hauser*, 109 Kan. 75, 198 P. 178 (1921), but without the necessity of an accounting.

289. RUPA § 405 cmt. 2.

290. K.S.A. 1998 Supp. 56a-405(b)(2).

291. *Id.* 56a-404(a)-(d).

292. *See, e.g., Eisenberg v. Flying Tiger Line Inc.*, 451 F.2d 267 (2d Cir. 1971) (N.Y. law).

293. *See* K.S.A. 1998 Supp. 56a-404(b), (c).

294. BROMBERG AND RIBSTEIN ON LLPS AND RUPA 309. It is noteworthy that the UNIFORM LIMITED LIABILITY COMPANY ACT (1995) (hereinafter cited as ULLCA) contains parallel provisions that codify members' fiduciary duties of care and loyalty, as well as an ancillary obligation of good faith and fair dealing. ULLCA § 409(a)-(d). The precise factual situations covered are identical to those in RUPA, and as in RUPA, the duties and obligations run to both the company and the other members. The ULLCA further provides, in a fashion similar to RUPA, that a member may maintain an action against the company or another member, for legal or equitable relief, with or without an accounting, to enforce the member's rights under the operating agreement; to enforce the member's rights under the ULLCA; or to enforce rights arising independently of the member's relationship to the company. *Id.* § 410(a). Significantly, the Official Comments to section 410 state that "[a] member pursues only that member's claim against the company or another member under this section. Article 11 governs a member's derivative pursuit of a claim on behalf of the company." *Id.* § 410 cmt.; *see id.* §§ 1101-1104.

Recent developments in corporate law, however, suggest that allowing a partner individually to pursue an entity cause of action for breach of fiduciary duty may not be completely undesirable, at least in the context of the prototype small general partnership for which the default rules of RUPA were designed. *See, e.g., Richards v. Bryan*, 19 Kan. App. 2d 950, 879 P.2d 638 (1994) (if a corporation is closely held, a court may treat an action raising derivative claims as a direct action if doing so will not unfairly expose the corporation to a multiplicity of actions, materially prejudice the interests of creditors, or interfere with a fair distribution of the recovery among all interested persons).

This problem, among others, leads directly to the question of the extent to which the litigation rights conferred by section 56a-405 may be modified in the partnership agreement. Recall that section 56a-103(a) provides that the partnership agreement governs internal relations except to the extent otherwise provided in section 56a-103(b). As section 56a-405 is not one of the exceptions specified in section 56a-103(b), a literal reading of the statute yields the conclusion that the partnership agreement may modify in any way, or even completely eliminate, any of the remedies authorized by section 56a-405. The Official Comments, however, indicate a contrary intention. They state:

The rationale is that partners ought not to be able to do indirectly, by limiting litigation rights, that which they may not do directly, by limiting substantive rights.

> Only the rights and duties listed in Section 103(b), *and implicitly the corresponding liabilities and remedies under Section 405,* are mandatory and cannot be waived or varied by agreement beyond what is authorized.[295]

And again:

> Generally, partners may limit or contract away their Section 405 remedies. *They may not, however, eliminate entirely the remedies for breach of those duties that are mandatory under Section 103(b).*[296]

The rationale is that partners ought not to be able to do indirectly, by limiting litigation rights, that which they may not do directly, by limiting substantive rights.[297] Whether section 56a-103 will be read and applied literally or as modified by the Official Comments remains to be seen.

V. Transferees and creditors of a partner

A. Transferable interest in partnership

The UPA provided that a partner had the following property rights: (1) rights in specific partnership property; (2) an interest in the partnership; and (3) the right to participate in management of the business.[298] As discussed previously, a partner's individual rights in specific partnership property were purely nominal.[299] A partner's "interest in the partnership" was defined as his or her share of the firm's profits and surplus and was classified as intangible personalty.[300] It thus was a narrow concept consisting only of a partner's economic rights and not including management, informational or other rights as co-owner of the business.

RUPA creates a similar system but with a somewhat altered structure and, importantly, different usage of terms. As previously noted, under RUPA, the partnership as an entity owns partnership property, and the partners individually have no interest whatsoever in such property.[301] RUPA defines "partnership interest" or "interest in the partnership" more broadly than the UPA as covering the whole bundle of a partner's ownership rights, including the partner's transferable interest, management rights, and other rights.[302] A partner's "transferable interest in the partnership," in turn, is defined as the partner's share of partnership profits and losses and the right to receive distributions of cash or other assets from the partnership.[303] Thus, "interest in the partnership" meant something quite different under the UPA than it does under RUPA, and care must be taken in translating authorities from the UPA to the RUPA context. The equivalent term under RUPA is "transferable interest in the partnership."

B. Voluntary transfers

RUPA continues the UPA's general default rule[304] that a partner's transferable interest in the partnership is freely transferable.[305] However, as alluded to above, the transferee will acquire only economic rights–the right to receive interim and liquidating distributions to which the transferor otherwise would be entitled.[306] As a corollary to the concept of *delectus personae,*[307] the transferee has no right to participate in management of the business, to receive information concerning conduct of the business, or to inspect partnership books and records.[308] A transferee does, however, have the right to seek judicial dissolution and winding up of the partnership, at any time if it is a partnership at will, or upon expiration of the term

295. RUPA §103 cmt. 1 (emphasis added).

296. *Id.* § 405 cmt. 3 (emphasis added).

297. Hillman, Vestal & Weidner, RUPA 202-03. *But see* Bromberg and Ribstein on LLPS and RUPA 309: "It does not necessarily follow from the fact that a *duty* is mandatory that the *remedy* is also mandatory." (Emphasis in original.)

298. K.S.A. 56-324 (repealed 1999).

299. *Id.* 56-325 (repealed 1999). *See* text at notes 26-28, *supra.*

300. K.S.A. 56-326 (repealed 1999).

301. K.S.A. 1998 Supp. 56a-203, -501. *See* text at notes 31-33, *supra.*

302. K.S.A. 1998 Supp. 56a-101(i).

303. *Id.* 56a-101(c), -502. RUPA continues the rule that this interest is classified as personalty, regardless of the nature of the underlying assets of the partnership. *Id.* 56a-502; RUPA § 502 cmt.

304. *See* K.S.A. 56-327 (repealed 1999).

305. K.S.A. 1998 Supp. 56a-503(a)(1). Note that "transfer" is defined broadly to include assignments, conveyances, leases, mortgages, deeds, and encumbrances. *Id.* 56a-101(n). The UPA definition was similar. *See* K.S.A. 56-302(e) (repealed 1999). In *Wellsville Bank v. Nicolay,* 7 Kan. App. 2d 172, 638 P.2d 975 (1982), the court construed what was arguably an invalid attempted assignment of a partner's rights in specific partnership property as a valid assignment of the partner's transferable interest in the partnership. In *City of Arkansas City v. Anderson,* 242 Kan. 875, 752 P.2d 673 (1988), the court held that an assignment of a partner's transferable interest in the partnership that appeared to be absolute on its face, in fact created only a security interest when the transaction was viewed as a whole. In *Temple v. White Lakes Plaza Assocs., Ltd.,* 15 Kan. App. 2d 771, 816 P.2d 399 (1991), the court applied the rules governing assignment of a partner's transferable interest in the partnership to a transfer pursuant to a property settlement incorporated in a divorce decree. Accord RUPA § 503 cmt. 4.

306. K.S.A. 1998 Supp. 56a-503(b)(1)-(2). A transferee does not effectively have even these rights until the partnership has notice of the transfer. *Id.* 56a-503(e). "Notice" means knowledge, receipt of a notification, or reason to know based on known facts. *Id.* 56a-102(b).

307. *Id.* 56a-401(i); *Temple v. White Lakes Plaza Assocs., Ltd.,* 15 Kan. App. 2d 771, 816 P.2d 399 (1991).

308. K.S.A. 1998 Supp. 56a-503(a)(3). RUPA has been criticized for affording transferees absolutely no right to information. *See* Bromberg and Ribstein on LLPS and RUPA 313; Hillman, Vestal & Weidner, RUPA 222.

or completion of the undertaking if it is a partnership for a definite term or particular undertaking.[309] In case of a dissolution and winding up, whether by judicial decree or otherwise, a transferee has a right to an account of partnership transactions, but only for the period since the last account that was agreed to by all partners.[310]

The charging order constitutes a lien on the judgment debtor's transferable interest ...

The transfer of a partner's transferable interest, in whole or in part, does not cause the partnership to be dissolved, nor does it cause the transferor to be dissociated from the partnership.[311] On the contrary, the transferor remains a partner in all respects except in regard to distributions, to the extent of the transfer.[312] An absolute transfer of all or substantially all of a partner's transferable interest, however, gives the other partners the right to expel the transferring partner from the firm.[313]

The general rule that a partner's transferable interest in the partnership is freely alienable is subject to change in the partnership agreement.[314] There are no statutory limitations on the degree to which transferability may be restricted,[315] but UPA case law from another jurisdiction suggests that a restriction might be invalidated if it amounts to an unreasonable restraint on alienation.[316] A transfer in violation of a valid restriction is ineffective as to a person with notice of the restriction at the time of the transfer.[317]

C. Creditors' charging orders

The UPA created the charging order as a remedy by which a personal creditor of a partner could satisfy the debt from the partner's intangible transferable interest in the partnership without unduly disrupting partnership affairs by directly attaching partnership assets.[318] RUPA continues this remedy, which is stated to be exclusive,[319] with greater detail, in a way that is consistent with the UPA and case law thereunder.

The creditor of a partner (or of a partner's transferee) must reduce the claim to a judgment and then apply to the court for an order charging the transferable interest of the debtor to satisfy the judgment.[320] In effect, the order simply instructs the partnership to redirect distributions that otherwise would be made to the debtor to the judgment creditor.[321] The court also has power to issue such other orders as may be necessary to effectuate the charging order, including the appointment of a receiver for distributions due or to become due the judgment debtor.[322]

The charging order constitutes a lien on the judgment debtor's transferable interest in the partnership.[323] The court has discretion to order foreclosure and sale of the charged interest, and in such a case, the purchaser will have the rights of a transferee of the interest, described above,[324] including the right to seek judicial dissolution and winding up.[325]

As is true in the case of a voluntary transfer, a partner whose transferable interest in the partnership has been charged remains a partner with all of the attendant rights and duties of a partner.[326] Also as in the case of a voluntary transfer, if the lien is foreclosed, the other partners may expel the debtor partner from the firm.[327]

Because foreclosure thus may portend drastic consequences for both the debtor partner and the partnership, RUPA provides that the interest charged may be redeemed before foreclosure by: (1) the debtor partner; (2) one or more of the other partners, with property other than partnership property; or (3) one or more of the other partners, with the consent of all partners whose interests are not charged, with partnership property.[328]

VI. Dissociation and dissolution

A. Dissociation and dissolution: Causes and effects

1. UPA

Under the aggregate theory, a partnership is a particular

309. K.S.A. 1998 Supp. 56a-503(b)(3), -801(f). Unlike the situation under the UPA, this right is not absolute. It is dependent on a judicial determination that dissolution and winding up is equitable. *Compare id.* 56a-801(f) *with* K.S.A. 56-332(b) (repealed 1999). This right of a transferee cannot be varied by the partnership agreement. K.S.A. 1998 Supp. 56a-103(b)(8).

310. K.S.A. 1998 Supp. 56a-503(c).

311. *Id.* 56a-503(a)(2). The partnership agreement can provide to the contrary. *See id.* 56a- 601(b), 801(c).

312. *Id.* 56a-503(d).

313. *Id.* 56a-601(d)(2). Creation of a security interest will not trigger the right to expel unless the security interest is foreclosed. Absent a contrary provision in the partnership agreement, the vote to expel must be unanimous.

314. *See id.* 56a-103(a).

315. *See id.* 56a-103(b).

316. *See Battista v. Carlo*, 57 Misc. 2d 495, 293 N.Y.S. 2d 227 (Sup. Ct. 1968) (requirement of unanimous consent to assignment) (dictum). *But see Rafkind v. Simon*, 402 So. 2d 22 (Fla. Dist. Ct. App. 1981); *Pokrzywnicki v. Kozak*, 354 Pa. 346, 47 A.2d 144 (1946).

317. K.S.A. 1998 Supp. 56a-503(f). *See id.* 56a-102(b) for the definition of "notice." The converse question, whether a transfer in violation of a restriction is effective as to a person without notice of the restriction, is left open. RUPA § 503 cmt. 6.

318. J. Dennis Hynes, *The Charging Order: Conflicts Between Partners and Creditors*, 25 Pac. L.J. 1, 2-4 (1993). *See* K.S.A. 56-328 (repealed 1999).

319. K.S.A. 1998 Supp. 56a-504(e).

320. *Id.* 56a-504(a).

321. *Id.*; *City of Arkansas City v. Anderson*, 242 Kan. 875, 752 P.2d 673 (1988); *City of Arkansas City v. Anderson*, 12 Kan. App. 2d 490, 749 P.2d 505, *rev. denied*, 243 Kan. 777 (1988).

322 K.S.A. 1998 Supp. 56a-504(a); *City of Arkansas City v. Anderson*, 242 Kan. 875, 752 P.2d 673 (1988).

323. K.S.A. 1998 Supp. 56a-504(b). The lien created by a charging order dates from the time of service of the order on the partnership. It will have priority over a previous unperfected security interest created by assignment. *City of Arkansas City v. Anderson*, 242 Kan. 875, 752 P.2d 673 (1988).

324. K.S.A. 1998 Supp. 56a-504(b). *See* text at notes 304-10, *supra.* Under the UPA, the court typically exercised its discretion to order foreclosure only when it was unlikely that distributions from the partnership would satisfy the judgment within a reasonable time. J. Dennis Hynes, *supra* note 318, at 4-7. The interest charged may not be sold without prior foreclosure. *City of Arkansas City v. Anderson*, 12 Kan. App. 2d 490, 749 P.2d 505, *rev. denied*, 243 Kan. 777 (1988).

325. K.S.A. 1998 Supp. 56a-503(b)(3), -504(b), -801(f). *See* note 309 and accompanying text, *supra.*

326. Hillman, Vestal & Weidner, RUPA 228.

327. K.S.A. 1998 Supp. 56a-601(d)(2). The expulsion must be by the unanimous vote of the other partners, unless the partnership agreement provides for a lesser number or percentage.

328. *Id.* 56a-504(c).

association of specific persons. Logic dictates that the particular partnership will no longer exist (i.e., be dissolved) whenever one or more of the specific partners ceases to be a member of the association (i.e., is dissociated). This, in essence, was the general definition of partnership dissolution under the UPA.[329] The statute spelled out in somewhat greater detail various types of partner dissociation that caused the partnership to be dissolved, as follows: (1) expression of the partner's will (i.e., withdrawal); (2) expulsion of a partner pursuant to authority contained in the partnership agreement; (3) death of a partner, unless the partnership agreement provided otherwise; and (4) bankruptcy of a partner.[330] The UPA also dictated that a partnership was dissolved for several reasons other than dissociation of a partner, as follows: (1) in the case of a partnership formed for a definite term or for completion of a particular undertaking (a "term" partnership), expiration of the term or completion of the undertaking; (2) unanimous agreement of those partners who had not transferred their transferable interests or allowed them to be charged for separate debts; (3) occurrence of an event that made the business unlawful; (4) bankruptcy of the partnership; and (5) judicial decree.[331]

The mere fact of dissolution did not mean that the business invariably would be wound up and terminated. Certainly, winding up usually was the result when dissolution was caused other than by dissociation of a partner. But in cases involving the withdrawal, explusion, death, or bankruptcy of a partner, the partnership agreement might grant the remaining partners a right to continue the business, conditioned on buying out the interest of the dissociated partner.[332] Absent such an agreement, however, the dissociated partner and each other partner normally had the right unilaterally to insist that the business be wound up, its assets reduced to cash, its creditors paid off, and the excess, if any, distributed to the partners in accordance with their interests.[333] If some or all of the other partners wished to continue the business, the right to insist on liquidation placed an outgoing partner in a very strong position when negotiating a price for the buyout of his or her interest.[334]

The primary statutory exception[335] to the liquidation right involved premature dissolution of a term partnership by reason of a partner's wrongful withdrawal[336] or other wrongful conduct.[337] In such cases, the UPA gave the innocent partners a statutory right to continue the business for the remainder of the term, provided they purchased or posted security for purchase of the interest of the partner who wrongfully had caused dissolution, offset by any damages flowing from the dissolution.[338] This statutory right to continue the business, however, required the assent of all innocent partners. If any one of them did not wish to continue without the wrongfully dissociating partner, he or she could not be forced to do so, but could insist on liquidation.[339]

If some or all of the other partners wished to continue the business, the right to insist on liquidation placed an outgoing partner in a very strong position ...

2. RUPA

a. Dissociation: Three tracks

Inspired by the entity concept, RUPA's drafters have dramatically changed the law governing partnership breakups and dissolution.[340] The main thrust of this change is to increase radically the number of situations in which there will be a buyout of the interest of a dissociated partner, even if there is no continuation provision in the partnership agreement. Under RUPA, if a partner ceases to be associated in carrying on the business of the partnership, that dissociation may result in: (1) dissolution and winding up;[341] (2) buyout of the dissociated partner's interest unless at least half of the remaining partners prefer dissolution and winding up; or (3) buyout of the dissociated partner's interest.[342] Which of these three tracks will be followed in a

329. K.S.A. 56-329 (repealed 1999).

330. *Id.* 56-331(a)(2), (4), (b), (d), (e) (repealed 1999).

331. *Id.* 56-331(a)(1), (3), (c), (e), (f), -332 (repealed 1999).

332. *See id.* 56-338(a) (repealed 1999) ("unless otherwise agreed").

333. *Id.*

334. *See, e.g., Dreifuerst v. Dreifuerst*, 90 Wis. 2d 566, 280 N.W.2d 335 (1979).

335. A secondary exception withheld the right to insist on liquidation from a partner who had been expelled pursuant to the partnership agreement. Such a partner was entitled only to the net amount due him or her from the partnership. K.S.A. 56-338(a) (repealed 1999).

336. *See id.* 56-331(b) (repealed 1999).

337. *See id.* 56-332(a)(2)-(3) (repealed 1999); *Drashner v. Sorenson*, 75 S.D. 247, 63 N.W.2d 255 (1954).

338. K.S.A. 56-338(b)(2), (3)(ii) (repealed 1999).

339. *Id.* 56-338(b)(1)(i), (2) (repealed 1999).

340. RUPA § 601 cmt. 1.

341. Unlike the situation under the UPA, under RUPA dissolution will almost always be followed by winding up and termination of the partnership. K.S.A. 1998 Supp. 56a-801, -802(a); RUPA § 801 cmt. 2. The sole exception occurs if all of the partners, including dissociating partners other than wrongfully dissociating partners, waive the right to have the partnership wound up and terminated. K.S.A. 1998 Supp. 56a-802(b). A related situation involves expiration of the term or completion of the undertaking in a term partnership. Normally, this would result in dissolution and winding up. *Id.* 56a-801(b)(3). If, however, the partners continue the business, without an express agreement but also without any settlement or liquidation, they are presumed to have agreed to continue the partnership as a partnership at will. *Id.* 56a-406. This situation could be viewed as dissolution followed by an implied waiver of the right to have the business wound up. The Official Comments to RUPA go farther and state that no dissolution even occurs. RUPA § 406 cmt.

342. A note on terminology. As discussed in the text accompanying notes 301-03, *supra*, a partner's "interest in the partnership" is a broad concept consisting of the partner's transferable interest, management rights, and other rights. K.S.A. 1998 Supp. 56a-101(i). A partner's "transferable interest in the partnership" is the partner's share of profits and losses and right to receive distributions. *Id.* 56a-502. Although the buyout provisions are framed in terms of purchasing a partner's "interest in the partnership," *id.* 56a-701, upon dissociation a partner's management rights automatically cease, and his or her information rights are curtailed. *Id.* 56a- 603(b)(1); *see id.* 56a-403(b)-(c). Moreover, the statutory buyout price is defined as the liquidation distribution to which the dissociated partner would have been entitled had the partnership been dissolved and its affairs wound up. *Id.* 56a-701(b). Therefore, although RUPA speaks of the buyout of the interest of a dissociated partner, as a practical matter, it is the partner's transferable interest that is being purchased.

given case depends on the cause of the dissociation and on the type of partnership, whether at will or for a term.[343]

The statutory framework is somewhat complex. Section 56a-601 specifies in detail all of the events that will cause a partner's dissociation, and section 56a-602 lists those that are considered wrongful.[344] Section 56a-801 designates those that will result either in dissolution and winding up or in a buyout unless half or more of the remaining partners opt for dissolution and winding up.[345] If the event that causes the dissociation is not covered by section 56a-801, it will trigger a so-called mandatory buyout under section 56a-701.[346]

In a term partnership, by definition, the partners have agreed to remain together until the expiration of a definite term or the completion of a particular undertaking.

The three succeeding sections of this article simply attempt to list, without detailed discussion, which track a particular dissociation will follow.

b. Track one: Dissolution and winding up

If a partner in an *at will partnership* expresses a will to withdraw, the partnership will be dissolved and its business wound up, unless the partnership agreement provides otherwise.[347] This is the classic partnership scenario, and RUPA's drafters have chosen to continue it.[348] This result will follow regardless of whether the withdrawal is rightful or wrongful.[349]

No event causing a partner's dissociation from a *term partnership* will lead automatically to dissolution and winding up.[350]

c. Track two: Buyout or reactive dissolution and winding up

In a *term partnership,* by definition, the partners have agreed to remain together until the expiration of a definite term or the completion of a particular undertaking.[351] Therefore, this type of partnership ought to have a greater degree of permanency than a partnership at will. There ought always to be some statutory right of the remaining partners to continue the business, provided they purchase the interest of the dissociated partner.

On the other hand, the remaining partners should not be obligated to continue if an unforeseen event of dissociation causes the loss of a key partner. Therefore, as to many term partnership dissociations, the interest of the dissociated partner will be purchased and the business will be continued unless half or more of the remaining partners decide, within 90 days, that dissolution is preferable.[352] Dissolution under these circumstances is termed a "reactive dissolution" because it is based on the reaction of at least half of the remaining partners to loss of a partner perceived to be crucial to success of the enterprise.[353] If a majority of the remaining partners opt for continuation of the business, dissenters will not be obliged to continue with them. Those who wish may engage in a "reactive withdrawal,"[354] which will not be wrongful even though it occurs prior to expiration of the partnership's term or accomplishment of its undertaking.[355] The partnership interests of such dissenters will be subject to mandatory buyout.[356]

In the case of a *term partnership,* the following types of partner dissociation will result in either a buyout of the dissociated partner's interest or a reactive dissolution and winding up of the partnership: (1) withdrawal in breach of an express provision in the partnership agreement;[357] (2) withdrawal before expiration of the term or completion of the undertaking (unless it is a reactive withdrawal);[358] (3) expulsion by judicial decree based on the partner's misconduct;[359] (4) expulsion by unanimous vote of the other partners of (a) a corporation that is a partner because it willfully dissolved,[360] or (b) a partnership that is a partner because it willfully dissolved;[361] (5) bankruptcy or similar financial embarrassment of a partner;[362] (6) death or adjudication of incompetency or incapacity of an individual partner;[363] (7) distribution by a trust that is a partner of its

343. K.S.A. 1998 Supp. 56a-101(h) defines a "[p]artnership at will" as one "in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking."

344. The statutory events causing a partner's dissociation, and the designation of some as wrongful, are almost all default rules that may be varied by agreement. The only exceptions are that the partnership agreement may not vary the power of a partner to withdraw, nor may it vary the court's power judicially to expel a partner in enumerated circumstances. *Id.* 56a-103(a), (b)(6), (7), -601(a), (e), -602(a).

345. With only three exceptions, the provisions that call for dissolution and winding up are merely default rules, subject to change by the partnership agreement. The three exceptions are dissolution because the business has become unlawful; judicial dissolution on application of a partner; and judicial dissolution on application of a transferee of a partner's transferable interest. *Id.* 56a-103(a), (b)(8), -801(d)-(f). Note that none of these situations involve simple dissociation of a partner.

346. The buyout rules appear to be wholly default rules that may be altered or eliminated by the partnership agreement. *See id.* 56a-103(a), (b), -701. The Official Comments agree, but hedge the statement with the qualification that a provision completely forfeiting the interest of a partner probably would be unenforceable. RUPA § 701 cmt. 3.

347. K.S.A. 1998 Supp. 56a-601(a), -603(a), -801(a).

348. RUPA's continuation of this UPA rule is criticized as giving the withdrawing partner undue negotiating leverage in BROMBERG AND RIBSTEIN ON LLPS AND RUPA 336-38.

349. Withdrawal from a partnership at will is wrongful only if it is in breach of an express provision of the partnership agreement, such as one conditioning withdrawal on consent of some specified number or percentage of the other partners. K.S.A. 1998 Supp. 56a-601(a), -602(a), (b)(1). Although breach of such a provision will not prevent withdrawal or deprive the withdrawing partner of the right to force liquidation, it may expose him or her to liability for damages. *See id.* 56a-602(c).

350. *See id.* 56a-801(b)(1).

351. *See id.* 56a-101(h).

352. *See id.* 56a-801(b)(1); RUPA § 801 cmt. 5(i).

353. RUPA § 801 cmt. 5(i).

354. *Id.* § 601 cmt. 2.

355. *See* K.S.A. 1998 Supp. 56a-602(b)(2)(i).

356. *See* note 382 and accompanying text, *infra.*

357. K.S.A. 1998 Supp. 56a-601(a), -602(b)(1), -603(a), -701(a), -801(b)(1).

358. *Id.* 56a-601(a), -602(b)(2)(i), -603(a), -701(a), -801(b)(1).

359. *Id.* 56a-601(e), -602(b)(2)(ii), -603(a), -701(a), -801(b)(1).

360. *Id.* 56a-601(d)(3), -602(b)(2)(iv), -603(a), -701(a), -801(b)(1).

361. *Id.* 56a-601(d)(4), -602(b)(2)(iv), -603(a), -701(a), -801(b)(1).

362. *Id.* 56a-601(f), -603(a), -701(a), -801(b)(1).

363. *Id.* 56a-601(g), -603(a), -701(a), -801(b)(1).

entire transferable interest in the partnership;[364] (8) distribution by an estate that is a partner of its entire transferable interest in the partnership;[365] or (9) termination of a partner that is not an individual, partnership, corporation, trust, or estate (e.g., a limited liability company).[366]

No event causing a partner's dissociation from an *at will partnership* gives the remaining partners the option of a buyout or a reactive dissolution.[367]

d. Track three: Buyout

In a partnership at will, any type of partner dissociation other than withdrawal will result merely in a buyout of the dissociated partner's interest.[368] If one or more of the remaining partners do not wish to continue in the business without the dissociated partner, they can always withdraw, which will cause dissolution and winding up unless the partnership agreement provides otherwise.[369]

More specifically, the following types of dissociation from an *at will partnership* will trigger a buyout of the dissociated partner's interest: (1) the happening of an event specified in the partnership agreement as causing dissociation;[370] (2) expulsion pursuant to the partnership agreement;[371] (3) expulsion by unanimous vote of the other partners of (a) a partner with whom it is unlawful to carry on the business,[372] (b) a partner who has transferred all or substantially all of the partner's transferable interest or whose transferable interest was subjected to a charging order that was foreclosed,[373] (c) a corporation that is a partner because it has dissolved, its charter has been revoked, or its authority to do business has been suspended and such defect has not been cured within 90 days after notification by the partnership,[374] or (d) a partnership that is a partner because it has dissolved and its business is being wound up;[375] (4) expulsion by judicial decree based on the partner's misconduct;[376] (5) bankruptcy or similar financial embarrassment of a partner;[377] (6) death or adjudication of incompetency or incapacity of an individual partner;[378] (7) distribution by a trust that is a partner of its entire transferable interest in the partnership;[379] (8) distribution by an estate that is a partner of its entire transferable interest in the partnership;[380] or (9) termination of a partner that is not an individual, partnership, corporation, trust, or estate (e.g., a limited liability company).[381]

In a *term partnership* certain types of dissociation also will result in mandatory buyout, as follows: (1) reactive withdrawal;[382] (2) the happening of an event specified in the partnership agreement as causing dissociation;[383] (3) expulsion pursuant to the partnership agreement;[384] or (4) expulsion by unanimous vote of the other partners of (a) a partner with whom it is unlawful to carry on the business,[385] (b) a partner who has transferred all or substantially all of the partner's transferable interest or whose transferable interest was subjected to a charging order that was foreclosed,[386] (c) a corporation that is a partner because it has dissolved, its charter has been revoked, or its authority to do business has been suspended and such defect has not been cured within 90 days after notification by the partnership,[387] or (d) a partnership that is a partner because it has dissolved and its business is being wound up.[388]

If one or more of the remaining partners do not wish to continue in the business without the dissociated partner, they can always withdraw ...

e. Buyout procedure

In situations in which a partner's dissociation does not result in dissolution and winding up, the partnership must cause the dissociated partner's interest in the partnership to be purchased for a price equal to the liquidation distribution to which the partner would have been entitled if the partnership assets had been sold on the date of dissociation at a price equal to the greater of their liquidation value or their value based on sale of the business as a going concern (without the dissociated partner).[389] This gross buyout price is reduced by any amounts the dissociated partner owes the partnership, whether or not presently due.[390] It also is reduced by the damages, if any, caused by a wrongful dissociation.[391] Because the dissociated partner's share of partnership liabilities will already be reflected in the buy-

364. *Id.* 56a-601(h), -603(a), -701(a), -801(b)(1).
365. *Id.* 56a-601(i), -603(a), -701(a), -801(b)(1).
366. *Id.* 56a-601(j), -603(a), -701(a), -801(b)(1).
367. *See id.* 56a-801(a).
368. *Id.* 56a-601(b)-(j), -603(a), -701(a), -801(a).
369. *See* text at notes 347-49, *supra.*
370. K.S.A. 1998 Supp. 56a-601(b), -603(a), -701(a), -801(a).
371. *Id.* 56a-601(c), -603(a), -701(a), -801(a).
372. *Id.* 56a-601(d)(1), -603(a), -701(a), -801(a).
373. *Id.* 56a-601(d)(2), -603(a), -701(a), -801(a).
374. *Id.* 56a-601(d)(3), -603(a), -701(a), -801(a).
375. *Id.* 56a-601(d)(4), -603(a), -701(a), -801(a).
376. *Id.* 56a-601(e), -603(a), -701(a), -801(a).
377. *Id.* 56a-601(f), -603(a), -701(a), -801(a).
378. *Id.* 56a-601(g), -603(a), -701(a), -801(a).
379. *Id.* 56a-601(h), -603(a), -701(a), -801(a).
380. *Id.* 56a-601(i), -603(a), -701(a), -801(a).
381. *Id.* 56a-601(j), -603(a), -701(a), -801(a).
382. *Id.* 56a-601(a), -602(b)(2)(i), -603(a), -701(a), -801(b)(1).
383. *Id.* 56a-601(b), -603(a), -701(a), -801(b)(1).
384. *Id.* 56a-601(c), -603(a), -701(a), -801(b)(1).
385. *Id.* 56a-601(d)(1), -603(a), -701(a), -801(b)(1).
386. *Id.* 56a-601(d)(2), -603(a), -701(a), -801(b)(1).
387. *Id.* 56a-601(d)(3), -603(a), -701(a), -801(b)(1).
388. *Id.* 56a-601(d)(4), -603(a), -701(a), -801(b)(1).
389. *Id.* 56a-701(a), (b). The requirement that the partnership "cause" the purchase is intended to be broad enough to encompass purchase by the partnership, one or more partners, or a third party. RUPA § 701 cmt. 2. The buyer also is obligated to pay interest on the buyout price, at the statutory rate, from the date of dissociation to the date of payment. K.S.A. 1998 Supp. 56a-104(b), -701(b).

The UPA specifically excluded partnership good will from the statutory buyout price payable to a wrongfully dissociating partner. K.S.A. 56-338(b)(3)(ii) (repealed 1999). This exclusion could have the effect of imposition of a severe penalty for wrongful dissociation. *See, e.g., Drashner v. Sorenson,* 75 S.D. 247, 63 N.W.2d 255 (1954). By deleting the specific exclusion and referencing "going concern" value, RUPA implicitly reverses the UPA rule. *See* RUPA § 701 cmt. 3; BROMBERG AND RIBSTEIN ON LLPS AND RUPA 327.
390. K.S.A. 1998 Supp. 56a-701(c). Debts not presently due should be discounted to present value. RUPA § 701 cmt. 4. There is no statutory authority to increase the buyout price by any amounts the partnership may owe the dissociated partner. *Id.*
391. K.S.A. 1998 Supp. 56a-701(c); *see id.* 56a-602(b), (c).

out price, he or she is entitled to be indemnified against all partnership liabilities.[392]

The buyout process must be initiated by a written demand for payment by the dissociated partner.[393] Generally, within 120 days after the demand, the partnership must pay or cause to be paid in cash the amount it calculates as the net buyout price.[394] In cases in which the partner has wrongfully dissociated from a term partnership before expiration of the term or completion of the undertaking, however, the partnership may defer payment until expiration of the term or completion of the undertaking, provided it adequately secures its obligation and pays interest in the interim.[395] In the event of deferral, the partnership need only tender within the 120 day period a written offer to pay.[396] In either situation, the partnership must also provide the following information: (1) a statement of the partnership's assets and liabilities as of the date of dissociation; (2) the latest available partnership balance sheet and income statement, if any; (3) an explanation of how the partnership calculated the buyout price; and (4) written notice that the dissociated partner has 120 days to commence an action for judicial appraisal if dissatisfied with the buyout price or any of its attendant terms or obligations.[397]

In addition to determining the buyout price and ordering payment, the court has discretion to assess litigation expenses ...

As just mentioned, a dissatisfied dissociated partner may institute a judicial appraisal proceeding under section 56a-405. Such an action must be commenced within 120 days after the partnership's payment or offer or, if there has been no payment or offer, within one year after the dissociated partner's initial written demand.[398] In addition to determining the buyout price and ordering payment, the court has discretion to assess litigation expenses, including attorneys' and appraisers' fees, against a party it finds acted arbitrarily, vexatiously, or not in good faith.[399]

f. Other causes of dissolution and winding up

RUPA also specifies a number of events other than partner dissociation that will cause dissolution and winding up.[400] Two of these relate only to term partnerships: (1) the express will of all of the partners;[401] and (2) expiration of the term or completion of the undertaking.[402] In addition, any partnership is dissolved and its affairs must be wound up upon the occurrence of any of the following: (1) an event specified in the partnership agreement as causing dissolution and winding up;[403] (2) an event that makes unlawful all or substantially all of the partnership's business which is not cured within 90 days after notice to the partnership;[404] (3) on application by a partner, a judicial determination that (a) the economic purpose of the partnership is likely to be unreasonably frustrated,[405] (b) another partner has engaged in conduct that makes it not reasonably practicable to carry on the business in partnership with that partner,[406] or (c) it is otherwise not reasonably practicable to carry on the business in conformity with the partnership agreement;[407] or (4) on application by a transferee of a partner's transferable interest, a judicial determination that winding up is equitable (a) after expiration of the term or completion of the undertaking if the partnership is a term partnership,[408] or (b) at any time if the partnership is an at will partnership.[409]

B. Continuing agency power and liability

1. After dissociation

As was true under the UPA, the mere fact of partner dissociation does not discharge the dissociated partner from liability for previously incurred partnership obligations.[410] However, the dissociated partner may be released by an

392. *Id.* 56a-701(d). There is an exception for liabilities created by the dissociated partner after dissociation.

393. *Id.* 56a-701(e).

394. *Id.*

395. *Id.* 56a-701(h). Deferral will be unavailable if the dissociated partner establishes that earlier payment will not cause the partnership undue hardship.

Under the UPA, if the remaining partners continued the business, a dissociated partner was entitled to be paid the value of his or her interest in the partnership, together with interest for the interim between dissociation and payment. The dissociated partner had the option, however, of forgoing interest and instead receiving the profits attributable to continued use of his or her investment. K.S.A. 56-342 (repealed 1999). RUPA eliminates the profits alternative, a modification that is criticized in BROMBERG AND RIBSTEIN ON LLPS AND RUPA 327.

396. K.S.A. 1998 Supp. 56a-701(f).

397. *Id.* 56a-701(g).

398. *Id.* 56a-701(i).

399. *Id.*

400. Under *id.* 56a-802(b) the partners may unanimously waive winding up and resume business as though dissolution had never occurred.

401. *Id.* 56a-801(b)(2). In an at will partnership, dissolution may be caused by the express will of any one partner. *Id.* 56a-801(a). *See* text at notes 347-49, *supra.*

402. K.S.A. 1998 Supp. 56a-801(b)(3). If, after expiration of the term or completion of the undertaking, the partners continue the business without an express agreement, settlement, or liquidation, they will be presumed to be continuing as partners at will. *Id.* 56a-406.

403. *Id.* 56a-801(c).

404. *Id.* 56a-801(d). This provision may not be varied by the partnership agreement. *Id.* 56a-103(b)(8). A cure, however, within the 90 day period is retroactive. *Id.* 56a-801(d).

405. *Id.* 56a-801(e)(1). This provision may not be varied by the partnership agreement. *Id.* 56a-103(b)(8). The analogous UPA provision authorized judicial dissolution if the partnership business could only be carried on at a loss. K.S.A. 56-332(a)(4) (repealed 1999). The reformulation takes into account start-up losses and also tax shelter partnerships, in which "losses" do not necessarily equate with business failure. RUPA § 801 cmt. 8.

406. K.S.A. 1998 Supp. 56a-801(e)(2). This provision may not be varied by the partnership agreement. *Id.* 56a-103(b)(8). The same partner misconduct that will justify judicial dissolution under this section also will support the less drastic remedy of judicial expulsion of the offending partner. *See id.* 56a-601(e)(3). This will result in a buyout of the expelled partner in an at will partnership and the choice between buyout or reactive dissolution in a term partnership. *See* notes 359 & 376 and accompanying text, *supra.*

407. K.S.A. 1998 Supp. 56a-801(e)(3). This provision may not be varied by the partnership agreement. *Id.* 56a-103(b)(8).

408. *Id.* 56a-801(f)(1). This provision may not be varied by the partnership agreement. *Id.* 56a-103 (b)(8).

409. *Id.* 56a-801(f)(2). This provision may not be varied by the partnership agreement. *Id.* 56a-103(b)(8).

410. *Compare id.* 56a-703(a) *with* K.S.A. 56-336(a) (repealed 1999); *Belt v. Shepard*, 15 Kan. App. 2d 448, 808 P.2d 907 (1991); *Daniels Trucking Inc. v. Rogers*, 7 Kan. App. 2d 407, 643 P.2d 1108 (1982).

agreement to that effect with the creditor and the partners who are continuing the business.[411] The dissociated partner also is released if the creditor, with notice of the dissociation but without the dissociated partner's consent, agrees to a material alteration in the nature or time of payment of the obligation.[412]

When a partner dissociates without causing dissolution and winding up of the partnership, companion questions may arise concerning the dissociated partner's ongoing power to bind the partners continuing the business and their power similarly to bind the dissociated partner. These questions are treated in parallel fashion in sections 56a-702 and 56a-703.

As to the dissociated partner's agency power, it is clear that *actual* authority terminates upon dissociation.[413] Nevertheless, unless a statement of dissociation is filed and recorded, the dissociated partner will have *apparent* authority for two years following dissociation to bind the partnership to transactions that would have been binding under section 56a-301 if they had occurred prior to dissociation.[414] This power, however, is limited to situations in which, at the time of entering into the transaction, the other party both reasonably believed that the dissociated partner was a partner and lacked notice of the dissociation.[415] Similarly, a dissociated partner will be bound by partnership transactions entered into within two years after dissociation if, at the time of entering into the transaction, the other party reasonably believed the dissociated partner was still a partner and did not have notice of the dissociation.[416] Because "notice" is defined to include reason to know, as well as actual knowledge and receipt of a notification,[417] the law is somewhat less protective of third parties' expectations in situations in which there has been a dissociation than in those in which there has not.[418]

If either the dissociated partner or the partnership files and records a statement of dissociation,[419] third parties will receive even less protection, because the two-year period of exposure will be reduced to a maximum of 90 days. The reason is that once the fact of dissociation has been of record for 90 days, the public is conclusively deemed to be on notice of it for purposes of the foregoing rules.[420] In addition, a filed and recorded statement of dissociation will operate immediately as a limitation on authority to transfer real property held in the name of the partnership. As such, it will conclusively bar any third party claim with respect to such transactions.[421] Finally, such a statement will contradict any filed and recorded grant of authority, precluding the grant from operating conclusively in favor of a third party who gives value without actual knowledge to the contrary.[422]

Nevertheless, unless a statement of dissociation is filed and recorded, the dissociated partner will have apparent authority for two years following dissociation…

2. After dissolution

After dissolution, a partnership continues only for the limited purpose of winding up its business. Once winding up has been completed, the partnership terminates.[423] All partners who have not wrongfully dissociated are entitled to participate in winding up the business.[424] This process may include, but is not limited to: (a) preserving the business as a going concern for a reasonable time; (b) prosecuting and defending actions; (c) engaging in alternative methods of dispute resolution; (d) closing the business; (e) disposing of the partnership property; (f) discharging liabilities; and (g) making liquidation distributions.[425] Throughout this process, the partnership will be bound by any partner's act that is appropriate for winding up the business.[426]

As to transactions that are not appropriate for winding up, the partnership also will be bound by any act that would have been binding under section 56a-301 prior to dissolu-

411. *Compare* K.S.A. 1998 Supp. 56a-703(c) *with* K.S.A. 56-336(b) (repealed 1999); *Belt v. Shepard*, 15 Kan. App. 2d 448, 808 P.2d 907 (1991) (creditor's continued acceptance of payments from partners continuing business insufficient basis to infer agreement to release; agreement to release requires separate consideration).

412. *Compare* K.S.A. 1998 Supp. 56a-703(d) with K.S.A. 56-336(c) (repealed 1999).

413. K.S.A. 1998 Supp. 56a-603(b)(1); RUPA § 702 cmt. 1.

414. K.S.A. 1998 Supp. 56a-702(a). Because the dissociated partner lacks actual authority, he or she will be liable to the partnership for any damage caused by a transaction that is binding on the basis of the partner's lingering apparent authority. *Id.* 56a-702(b).

414ed)åã. *Id.* 56a-303(e), -702(a)(3), -703(b)(3), -704(b). *See* text at notes 127-29, *supra.* åãu. *Id.* 56a-703(b)(1), (2). åã. K.S.A. 1998 Supp. 56a-704(a). For a general discussion of publicly-filed and recorded partnership statements, *see* text at notes 93-110, *supra.*åã. RUPA § 306 cmt. 3.åãYå. This goal is accomplished by factoring references to section 56a-306 into the relevant substantive provisions throughout RUPA. *See* K.S.A. 1998 Supp. 56a-307, -703, -806, -807,

415. *Id.* 56a-702(a)(1), (2).

416. *Id.* 56a-703(b)(1), (2).

417. *Compare id.* 56a-102(b) *with id.* 56a-102(a), (d).

418. *See id.* 56a-301(a); text at notes 62-71, *supra.*

419. K.S.A. 1998 Supp. 56a-704(a). For a general discussion of publicly-filed and recorded partnership statements, *see* text at notes 93-110, *supra.*

420. K.S.A. 1998 Supp. 56a-702(a)(3), -703(b)(3), -704(c).

421. *Id.* 56a-303(e), -702(a)(3), -703(b)(3), -704(b). *See* text at notes 127-29, *supra.*

422. K.S.A. 1998 Supp. 56a-303(d), -704(b). *See* text at notes 119-26, *supra.*

423. K.S.A. 1998 Supp. 56a-802(a).

424. *Id.* 56a-803(a). The legal representative of the last surviving partner also may wind up the business. *Id.* 56a-803(b). For good cause shown, the district court may order judicial supervision of winding up. *Id.* 56a-803(a).

Normally, multiple partners will have the right to participate in the winding up process. RUPA does not address specifically how differences of opinion are to be resolved, and the "ordinary course of business" touchstone applicable to an ongoing partnership does not translate well to this context. *See id.* 56a-401(j); BROMBERG AND RIBSTEIN ON LLPS AND RUPA 341; HILLMAN, VESTAL & WEIDNER, RUPA 300-02. Consequently, this is a matter that should be addressed in the partnership agreement.

425. K.S.A. 1998 Supp. 56a-803(c).

426. *Id.* 56a-804(a). Among themselves, each partner must bear his or her share of any partnership liability incurred in winding up the business. *Id.* 56a-806(a).

tion, provided the other party to the transaction did not have notice of dissolution.[427] If a statement of dissolution has been filed and recorded, third parties conclusively will be deemed to have such notice 90 days after the filing, thus providing a definite cut-off of partners' apparent authority with respect to transactions that are inappropriate for winding up.[428]

A statement of dissolution also will cancel immediately any previous statements granting partnership authority.[429] Accordingly, after a statement of dissolution is filed and recorded, third parties will no longer be able to rely on the conclusive effect of such grants under section 56a-303(d), even if they give value and have no knowledge to the contrary.[430] Moreover, with respect to real property held in the name of the partnership, a filed and recorded statement of dissolution is a limitation on the authority of partners that will operate immediately and conclusively in favor of the partnership and against third parties.[431] The net effect will be to limit the power of all partners to real estate transfers that are appropriate for winding up.

Accordingly, after a statement of dissolution is filed and recorded, third parties will no longer be able to rely on the conclusive effect of such grants under section 56a-303(d) ...

The above effects of a statement of dissolution put third parties at risk as to whether a particular transaction is appropriate for winding up the partnership business. To alleviate this concern, the partnership subsequently may file and record a new statement of partnership authority that will protect third parties who give value without actual knowledge to the contrary, regardless of whether the transaction is appropriate for winding up.[432]

C. Settlement of accounts after dissolution

After the business is wound up, the partnership must first apply its assets, including any necessary additional contributions from partners, to discharge its liabilities to creditors, including, to the extent permitted by law, partners who are creditors.[433] After its obligations to creditors have been met, the partnership must make cash liquidation distributions to partners with positive balances in their partnership accounts. Partners with negative account balances must contribute an amount equal to the excess of charges over credits.[434] If any partner is insolvent or otherwise fails to make a required contribution, the other partners, in the proportions in which they share losses, must contribute the additional amount necessary to make up the difference.[435] The duty to contribute extends to subsequently-discovered obligations,[436] applies to the estates of deceased partners,[437] and may be enforced by an assignee for the benefit of creditors or other creditor representative.[438]

VII. Conversions and mergers

A. Conversions

RUPA provides simple, streamlined procedures by which a general partnership may convert into a limited partnership or a limited partnership may convert into a general partnership, all without dissolution or termination of the underlying partnership entity.[439]

427. *Id.* 56a-804(b). Under *id.* 56a-301(a), a third person is protected in relying on a partner's apparent authority to carry on the partnership business in the ordinary course unless the third person knows or has received notification that the partner lacks actual authority. *See* text at notes 62-71, *supra.* As to post-dissolution transactions that are not appropriate for winding up, however, a third person is protected only if he or she did not have "notice" of the dissolution, a concept that includes not only knowledge and receipt of a notification, but also reason to know on the basis of known facts. K.S.A. 1998 Supp. 56a-102(b).

If a transaction is inappropriate for winding up but nevertheless binding on the partnership, any partner who undertook the transaction with knowledge of the dissolution will be liable to the partnership for any consequent damage. *Id.* 56a-806(b).

428. K.S.A. 1998 Supp. 56a-805(c). A statement of dissolution may be filed on behalf of the partnership by any partner who has not wrongfully dissociated. *Id.* 56a-805(a). For a general discussion of publicly-filed and recorded partnership statements, *see* text at notes 93-110, *supra.*

429. K.S.A. 1998 Supp. 56a-805(b).

430. *See id.* 56a-303(d); RUPA § 805 cmt. 2; text at notes 119-26, *supra.*

431. K.S.A. 1998 Supp. 56a-303(e), -805(b). *See* text at notes 127-29, *supra.*

432. K.S.A. 1998 Supp. 56a-303(d), -805(d); RUPA § 805 cmt. 4; HILLMAN, VESTAL & WEIDNER, RUPA 306.

433. K.S.A. 1998 Supp. 56a-807(a). *See also id.* 56a-404(f). Payment of partner-creditors on a parity with outside creditors is a change from the UPA, which gave priority to outside creditors. *See* K.S.A. 56-340(b)(1), (2) (repealed 1999). It is, however, consistent with limited partnership law, which elevates both limited and general partners with creditor claims to the same status as third parties. K.S.A. 56-1a454(a). *See also id.* 56-1a107. Theoretically, at least, this change should not prejudice outside creditors. If there is a shortfall of partnership assets, the partners, including partner-creditors, remain personally liable to make up the difference. K.S.A. 1998 Supp. 56a-306(a), -807(b), (c). Moreover, RUPA eliminates the UPA's dual priority rule, under which partnership creditors had priority in partnership assets and separate creditors of a partner had priority in the partner's individual assets. *See* K.S.A. 56-340(h), (i) (repealed 1999); RUPA § 807 cmt. 2. Therefore, while payment of a partner's creditor-based claim with partnership assets will convert those assets into individual assets of the partner, it will not result in the partner's separate creditors' obtaining claims to those assets that have priority over the competing claims of partnership creditors. The practical problem involved in recovering partnership assets once they have left the firm, however, may call for equitable subordination of the partner-creditor's claim in this situation. The language of section 56a-807(a) clearly permits this.

434. K.S.A. 1998 Supp. 56a-807(b). *See id.* 56a-401(a), discussed in text at notes 196-99, *supra.* A combination of unequal capital contributions and equal profit and loss sharing may result in a situation in which a negative balance in a partner's account represents an obligation to make an additional contribution to compensate another partner for a capital loss. Unlike the obligation to contribute to ensure payment in full to creditors, the obligation to contribute to equalize capital losses is subject to change by the partnership agreement. *See* K.S.A. 1998 Supp. 56a-103(a), (b); RUPA § 807 cmt. 3; *cf. id.* § 401 cmt. 3.

435. K.S.A. 1998 Supp. 56a-807(c).

436. *Id.* 56a-807(d).

437. *Id.* 56a-807(e).

438. *Id.* 56a-807(f).

439. *Id.* 56a-904(a). Although a limited partnership is not a "partnership" as defined in RUPA, *id.* 56a-101(f), RUPA nevertheless will apply to limited partnerships in situations not covered by KRULPA. *Id.* 56-1a604.

The conversion of a general partnership into a limited partnership, and the terms and conditions of the conversion, must be approved by all of the partners, unless the partnership agreement specifies a lesser number or percentage.[440] Upon approval, the partnership must file a certificate of limited partnership with the secretary of state.[441] In addition to the information normally required,[442] this certificate of limited partnership must include: (1) a statement that the entity was converted from a general to a limited partnership; (2) its former name; and (3) the number of votes cast for and against conversion and, if less than unanimous, the number or percentage necessary under the partnership agreement.[443] The conversion is effective upon filing the certificate of limited partnership or at any later date specified in the certificate.[444]

A general partner who becomes a limited partner remains personally liable as a general partner for obligations incurred prior to conversion.[445] Such a limited partner also will be liable for obligations incurred within 90 days following conversion if the other party reasonably believed, at the time the transaction was entered into, that the limited partner was a general partner.[446]

The conversion of a limited partnership into a general partnership, and the terms and conditions of the conversion, must be approved by all partners of the limited partnership.[447] Because conversion will involve the prospective loss of limited liability by the limited partners, this unanimous vote requirement cannot be varied by the partnership agreement.[448] After approval, the limited partnership must cancel its certificate of limited partnership by filing a certificate of cancellation with the secretary of state,[449] at which time the conversion becomes effective.[450] A limited partner who becomes a general partner retains limited liability with respect to obligations incurred prior to conversion but is liable as a general partner for subsequently incurred obligations.[451]

Because conversion does not terminate the underlying entity, all of its property and obligations carry over and become those of the converted entity. Similarly, actions or proceedings pending at the time of conversion may be continued as though conversion had not taken place.[452]

B. Mergers

RUPA also provides a procedure by which a general partnership may merge with one or more other general or limited partnerships. These provisions are stated to be nonexclusive.[453] As there is no other statutory method by which one general partnership may merge with another, in practical effect, RUPA simply is a safe harbor by which to accomplish such mergers.[454]

The situation involving a merger that combines a general partnership with a limited partnership is somewhat different. Such mergers were already authorized by K.S.A. Chapter 17, Article 77, when RUPA was enacted. It thus appears that these mergers now may be accomplished with equal validity under either of two statutory procedures.[455] Interestingly, although much of the detail differs, many of the major substantive requirements of Article 77 are either replicated or incorporated in RUPA.[456] Consequently, because the substantive requirements of Article 77 are no more onerous than those of RUPA, and because Article 77 purports to be mandatory[457] while RUPA does not,[458] conservative counsel will continue to comply with the strict letter of Article 77 when merging general partnerships with limited partnerships. Nevertheless, for the sake of completeness, the following discussion will include reference to general partnership-limited partnership mergers as well as general partnership-general partnership mergers.

Because conversion will involve the prospective loss of limited liability by the limited partners, this unanimous vote requirement cannot be varied...

Under RUPA, any partnership merger is accomplished pursuant to a plan of merger that sets forth: (1) the name of each constituent general or limited partnership; (2) the name of the surviving entity; (3) an indication whether the surviving entity is a general or limited partnership and the status of each partner; (4) the terms and conditions of the merger; (5) the method of converting the interests in each constituent entity into interests in or obligations of the surviving entity, or into cash or other property; and (6) the address of the surviving entity's principal office.[459]

The plan of merger must be approved by all of the partners of a general partnership, or by such lesser number or percentage as is specified in the partnership agreement.[460] As to a limited partnership, the merger must be approved by the vote required for approval of a merger by the law of the jurisdiction in which the limited partnership is organized.[461] Absent such a specifically applicable law, the merger must be approved by all partners, both general and limited, notwithstanding any provision in the partnership agreement calling

440. *Id.* 56a-902(b).
441. K.S.A. 56-1a151, -1a156; K.S.A. 1998 Supp. 56a-902(c).
442. *See* K.S.A. 56-1a151(a).
443. K.S.A. 1998 Supp. 56a-902(c).
444. *Id.* 56a-902(d).
445. *Id.* 56a-902(e).
446. *Id.*
447. *Id.* 56a-903(b).
448. *Id.*; RUPA § 903 cmt.
449. K.S.A. 56-1a153, -1a156; K.S.A. 1998 Supp. 56a-903(c).
450. K.S.A. 1998 Supp. 56a-903(d).
451. *Id.* 56a-903(e).
452. *Id.* 56a-904.
453. *Id.* 56a-908.
454. RUPA §§ 901 cmt. 2, 905 cmt., 908 cmt.
455. This clearly is the intent expressed in the Official Comments. *See id.* § 901 cmt. 2: "[T]he requirements of Article 9 are not mandatory ... . If the requirements of the article are followed, the ... merger is legally valid."
456. *See* text at notes 461-66, *infra.*
457. *See* K.S.A. 17-7701(d).
458. RUPA § 908 cmt.: "Existing statutes in a few States already authorize the ... merger of general partnerships and limited partnerships. ... Those procedures may be followed in lieu of Article 9."
459. K.S.A. 1998 Supp. 56a-905(a), (b).
460. *Id.* 56a-905(c)(1). K.S.A. 17-7705(a)(1) is to the same effect.
461. K.S.A. 1998 Supp. 56a-905(c)(2).

for a different vote.[462] Because of the existence of Chapter 17, Article 77, the necessary approval for a Kansas limited partnership is a unanimous vote of both the general and the limited partners *unless otherwise provided* in the certificate of limited partnership or partnership agreement.[463]

If the merger involves only general partnerships, no documents are required to be filed with any public official ...

The merger will be effective on the later of: (1) approval of the plan of merger by all constituent entities; (2) the filing of all legally required documents; or (3) an effective date specified in the plan of merger.[464] If the merger involves only general partnerships, no documents are required to be filed with any public official, so the merger will be effective either upon approval of the plan of merger or any later effective date specified therein. If a limited partnership is involved, the reference above would appear to incorporate Article 77's requirement that either the plan of merger, or alternatively, a certificate of merger, be filed with the secretary of state.[465] If this conclusion is correct, the merger would not become effective before such filing was accomplished.[466]

When the merger becomes effective: (1) the separate existence of the constituent entities, other than the surviving entity, ceases; (2) the assets and liabilities of each constituent entity become those of the surviving entity; (3) pending actions or proceedings against any constituent entity may be continued as if the merger had not occurred, or the surviving entity may be substituted as a party.[467] A person who continues as a partner of the surviving entity: (1) remains liable for any obligations for which the partner was personally liable prior to the merger; (2) has limited liability with respect to all other pre-merger obligations of the surviving entity (i.e., those of constituent entities of which the person was not a partner); and (3) will have the liability of a general or limited partner, as the case may be, with respect to post-merger obligations incurred by the surviving entity.[468] A person who does not become a partner in the surviving entity is dissociated, as of the merger's effective date, from the constituent entity of which the person was a partner.[469] The surviving entity must cause the dissociated partner's interest to be purchased,[470] and if the dissociated partner was a general partner, he or she will have the post-dissociation agency power and liability described previously with respect to dissociated partners generally.[471]

Finally, although RUPA does not directly impose any mandatory filing requirements in connection with mergers,[472] it does provide for the optional filing of a "statement of merger."[473] Such a statement must name each party to the merger, including the surviving entity; identify the surviving entity as either a general or a limited partnership; and give the address of the surviving entity's principal office and of an office in Kansas, if any.[474] For purposes of partnership property transfers,[475] such a statement will convert record title to property that was held in the name of one of the other constituent entities before the merger into property held in the name of the surviving general or limited partnership. The statement will have this effect as to personal property when it is filed with the secretary of state.[476] It will have this effect as to real property when a certified copy is recorded with the register of deeds of the county in which the real property is situated.[477]

VIII. Limited liability partnerships

A. UPA

In 1994 Kansas amended its version of the UPA to author-

462. *Id.* 56a-901(d), -905(c)(2). The nonwaivability of the unanimous vote requirement is based on the prospective loss of limited liability by limited partners in cases in which the surviving entity is a general partnership. RUPA § 905 cmt.

463. K.S.A. 17-7705(a)(2). KRULPA, which governs mergers exclusively involving limited partnerships, has no specific vote requirement. *See* K.S.A. 56-1a609.

464. K.S.A. 1998 Supp. 56a-905(e).

465. *Id.* 17-7706(a). Because RUPA contains no mandatory filing requirements with respect to mergers, the reference in *id.* 56a-905(e)(2) necessarily is to a filing requirement imposed by some other statute. The Official Comments confirm this:

> The surviving entity must file all notices and documents relating to the merger required by other applicable statutes governing entities that are parties to the merger, such as articles of merger or a certificate of limited partnership.

RUPA § 905 cmt. The "plan of merger" under RUPA and the "agreement of merger" under Article 77 are identical in purpose and so similar in form that a document satisfying both statutes will not be difficult to construct. *Compare* K.S.A. 1998 Supp. 56a-905(b) *with* K.S.A. 17-7704. KRULPA, which seems less directly applicable because it governs only mergers exclusively involving limited partnerships, requires the filing of a certificate of cancellation for any limited partnership that is not the surviving entity. K.S.A. 56-1a609(b).

466. K.S.A. 1998 Supp. 17-7706(c).

467. *Id.* 56a-906(a). If the surviving entity is a foreign general or limited partnership, the secretary of state becomes its agent for service of process in any action to enforce an obligation of a constituent Kansas general or limited partnership that disappeared pursuant to the merger. *Id.* 56a-906(b).

468. *Id.* 56a-906(c). If the pre-merger obligations of a constituent entity are not satisfied by the surviving entity, the pre-merger general partners of the constituent must contribute the amount of the shortfall. *Id.* 56a-906(d).

469. *Id.* 56a-906(e).

470. *Id.* The purchase must be pursuant to *id.* 56a-701 "or another statute specifically applicable to that partner's interest with respect to a merger." KRULPA provides generally for purchase of the interest of a partner who withdraws from a limited partnership, K.S.A. 56-1a354, but neither it nor any Kansas statute other than RUPA applies specifically to the purchase of partners' interests in the merger context. Therefore, section 56a-701 will apply regardless of whether the constituent entity was a general partnership or a limited partnership. For a general discussion of buyouts under section 56a-701, *see* text at notes 389-99, *supra.*

471. K.S.A. 1998 Supp. 56a-906(e). *See id.* 56a-702, -703(b), -704, discussed in text at notes 413-22, *supra.*

472. *But see* note 465 and accompanying text, *supra.*

473. K.S.A. 1998 Supp. 56a-907(a). *See* text at notes 93-110, *supra,* for a general discussion of partnership statements.

474. K.S.A. 1998 Supp. 56a-907(b). *See* note 465 and accompanying text, *supra.* If a limited partnership is a party to the merger, and if it is determined to file a certificate of merger under K.S.A. 1998 Supp. 17-7706 rather than a plan or agreement of merger, the certificate might be constructed to do double duty as a statement of merger. *Compare id.* 17-7706(a) *with id.* 56a- 907(b).

475. *See* K.S.A. 1998 Supp. 56a-302; text at notes 73-92, *supra.*

476. K.S.A. 1998 Supp. 56a-907(c).

477. *Id.* 56a-907(d); K.S.A. 58-2221.

ize partnerships to become LLPs and thereby limit the personal liability of partners in some, but not all, respects.[478] To become a registered LLP, a partnership had to file a registration application with the Secretary of State, stating: (1) the partnership's name; (2) the address of its registered office and the name and address of its resident agent; (3) the number of partners; (4) a brief statement of the partnership's business; (5) a statement that it applied for status as an LLP; and (6) if a foreign LLP, the jurisdiction and date of its organization.[479] The application had to be signed by a majority in interest of the partners unless a different number was authorized.[480] There was a registration fee of $75 for each partner having a principal office in Kansas, but not less than $75 nor more than $2,500.[481] Registration had to be renewed annually.[482]

The partnership's name had to be such as to distinguish it on the secretary of state's records from the names of other corporations, partnerships, and limited liability companies, unless the other organization consented in writing.[483] The partnership's name also was required to conclude with the words "registered limited liability partnership" or the abbreviation "L.L.P." or "LLP."[484]

Prior law also provided that the internal affairs and liability of partners of a Kansas LLP were to be governed by Kansas law, while the internal affairs and liability of the partners of a foreign LLP were to be governed by the law of the foreign jurisdiction under which the partnership was formed.[485] Other than this, the law made no special provision for partnerships operating across state lines.

The 1994 legislation contained a number of provisions that integrated LLPs into the general framework of the UPA.[486] The primary substantive change, however, around which all else revolved, was the amendment to section 56-315, the provision that imposed joint and several liability on all partners for everything chargeable to the partnership.[487] This liability expressly was made subject to an exception that provided a partner in an LLP was not personally liable, directly or indirectly, by indemnification, contribution, or otherwise, for debts, obligations, and liabilities of or chargeable to the LLP, whether sounding in tort, contract, or otherwise, *to the extent such liabilities arose from*: (1) the performance of professional services as defined in the professional corporation law; or (2) negligence, malpractice, wrongful acts and omissions, or misconduct performed or committed in the course of the partnership business by another partner or an employee, agent, or representative of the partnership.[488] However, a partner remained personally liable for the partner's own negligence, malpractice, wrongful acts and omissions, or misconduct, or that of any person under the partner's direct supervision and control.[489]

To become an LLP under RUPA, a partnership must file with the secretary of state a 'statement of qualification' …

Thus, prior law shielded a partner only from vicarious liability arising from the performance of professional services or from other tortious conduct. It did not shield a partner from liability for malpractice or other tortious conduct committed personally by the partner or by a partnership employee working under the partner's direct supervision and control. Moreover, it did not shield a partner from personal liability flowing from the partnership's general commercial, contractual relationships, such as loans, leases, trade debts, wages, and taxes.[490] In this latter respect, prior Kansas law was what is known as a "partial shield" statute that did not provide the same kind of protection from individual liability that is at least technically available by incorporating or operating as a limited liability company.

B. RUPA

RUPA radically changes the law of LLPs.[491] To become an LLP under RUPA, a partnership must file with the secretary of state a "statement of qualification," which is superficially similar to the registration application of prior law.[492] The statement of qualification must contain the following information: (1) the partnership's name; (2) the address of the partnership's principal office and, if different, the address of an office in Kansas if there is one; (3) if there is no Kansas office, the name and address of the partnership's agent for service of process; (4) a statement that the partnership elects to be an LLP; and (5) if desired, a delayed effective date.[493]

478. 1994 Kan. Sess. Laws, ch. 140 added K.S.A. 56-345 to -347 and amended K.S.A. 56-302, -306, -315, -318, -334, -336, -340. K.S.A. 56-345, itself, was amended by 1995 Kan. Sess. Laws, ch. 60. *See generally* Thomas W. Van Dyke & Paul G. Porter, *Limited Liability Partnerships: The Next Generation*, 63 J. KAN. B.A. No. 9, 16 (1994).

479. K.S.A. 1998 Supp. 56-345(a) (repealed 1999).

480. *Id.* 56-345(b) (repealed 1999).

481. *Id.* 56-345(c) (repealed 1999).

482. *Id.* 56-345(e) (repealed 1999).

483. K.S.A. 56-346(a) (repealed 1999).

484. *Id.* 56-346(b) (repealed 1999).

485. *Id.* 56-347(c), (d) (repealed 1999).

486. *See* note 478, *supra.*

487. K.S.A. 56-315(a) (repealed 1999).

488. *Id.* 56-315(b) (repealed 1999).

489. *Id.* 56-315(c) (repealed 1999).

490. The reference to liability "arising in tort, contract or otherwise" as simply to prevent a plaintiff from circumventing the statute's limited protection by pleading a malpractice claim in contract.

491. The discussion here necessarily is abbreviated. For greater detail, *see* HILLMAN, VESTAL & WEIDNER, RUPA 341-46; Carter G. Bishop, *The Limited Liability Partnership Amendments to the Uniform Partnership Act* (1994), 53 BUS. LAW. 101 (1997). *See generally,* BROMBERG AND RIBSTEIN ON LLPS AND RUPA.

492. K.S.A. 1998 Supp. 56a-105(a), -1001(a), (c). *Compare id.* 56-345(a) (repealed 1999).

493. *Id.* 56a-1001(c). Note that a partnership can become a Kansas LLP even if it has no office in Kansas. This is because the statute defines "[l]imited liability partnership" simply as a partnership that has filed a statement of qualification under section 56a-1001 and that does not have a similar statement in effect in another jurisdiction. *Id.* 56a-101(e). "Foreign limited liability partnership," in turn, is defined as a partnership formed under the laws of another jurisdiction and that has the status of an LLP under those laws. *Id.* 56a-101(d). The point is important because Kansas law governs both internal relations and the liability of the partners of a Kansas LLP, while the law under which it is formed governs those matters with respect to a foreign LLP. *Id.* 56a-106(b), -1101(a). In addition, foreign LLPs must qualify to transact business in Kansas. *Id.* 56a-1102 to -1105. *See* text at notes 520-28, *infra.*

Although the statement may be signed by as few as two partners,[494] the decision to become an LLP must be approved by the vote necessary to amend the partnership agreement or, if the agreement provides different procedures for different types of amendment, the vote necessary to amend the agreement with respect to partners' contribution obligations.[495] If the partnership agreement is silent regarding amendment, the vote must be unanimous.[496]

... section 56a-306(c) provides that the limited liability shield will control over any inconsistent provisions in the partnership agreement that predate the vote to become an LLP.

The partnership's status as an LLP is effective upon the later of filing or any delayed effective date specified in the statement.[497] This status is not affected by errors or changes in the information required to be contained in the statement[498] and is intended to be conclusive with respect to third parties.[499] Unlike the registration application of prior law, the statement does not have to be renewed annually. Rather, the partnership's status as an LLP will continue until the statement is canceled by the partnership or revoked by the secretary of state.[500] Cancellation is accomplished by filing a statement of cancellation, which, like the statement of qualification, must be signed by at least two partners.[501] Unfortunately, the statute is silent regarding the vote necessary to approve either amendment or cancellation, but the drafters opine that it at least implicitly calls for the same vote necessary to approve the initial qualification.[502]

Although an LLP does not have to renew its statement of qualification annually, it does have to file an annual report and pay a franchise tax on the same basis as other business entities in Kansas.[503] The penalties for noncompliance also are the same and include forfeiture of the LLP's statement of qualification by the secretary of state.[504] Thus, LLPs now are sensibly integrated in a unified system of filing and franchise taxation, making this a neutral factor in choice of business form.

RUPA continues to require that the name of an LLP end with words such as "registered limited liability partnership" or "limited liability partnership," or their abbreviations, "R.L.L.P.," "RLLP," "L.L.P.," or "LLP."[505] The requirement of prior law that the name be distinctive,[506] however, has not been carried over.

Certainly, the biggest change effected by RUPA is the extent to which LLP status will shield partners from liability for partnership obligations. Section 56a-306(c) provides:

> An obligation of a partnership incurred while the partnership is a limited liability partnership, *whether arising in contract, tort, or otherwise,* is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for such a partnership obligation solely by reason of being or so acting as a partner.[507]

Thus, the partial shield of prior law has been extended to a full shield, equivalent to that of a corporate shareholder or a member of an LLC.[508] Mere status as a partner, without more, is insufficient for imposition of personal liability, regardless of the nature of the underlying cause of action. The protection applies to the indirect imposition of liability, such as by an obligation to contribute toward partnership losses, as well as to direct imposition.[509]

As is true with other limited liability forms of organization, however, partners of an LLP are not insulated from liability based on their own misconduct.[510] Similarly, they may waive their limited liability, partially or completely, by agreements with third parties (e.g., by personally guaranteeing a partnership debt) or, as among themselves, in the partnership agreement (e.g., by provisions relating to contribution obligations).[511] To guard against unintentional waiver, however, section 56a-306(c) provides that the limited liability shield will control over any inconsistent provisions in the partnership agreement that predate the vote to become an LLP.[512]

With respect to LLP distributions to partners, the Kansas

494. K.S.A. 1998 Supp. 56a-105(c).

495. *Id.* 56a-1001(b). The drafters chose the process for contribution/indemnification amendments because those obligations are directly affected by the decision to become an LLP. RUPA § 1001 cmt. Of course, if the partnership agreement speaks specifically to the vote necessary to become an LLP, that provision will control.

496. K.S.A. 1998 Supp. 56a-401(j).

497. *Id.* 56a-1001(d).

498. *Id.* 56a-1001(e).

499 *See id.* 56a-1001(f). The Official Comments use the term, "conclusive." RUPA § 1001 cmt. The language of the statute is somewhat less explicit.

500. K.S.A. 1998 Supp. 56a-1001(d); *see id.* 56a-1201(d).

501. *Id.* 56a-105(c), (d).

502. RUPA § 1001 cmt.:

> Since the statement of cancellation may be filed by a person authorized to file the original statement of qualification, the same vote necessary to approve the filing of the statement of qualification must be obtained to file the statement of cancellation.

503. *Compare* K.S.A. 1998 Supp. 56a-1201 *with id.* 17-7503, 17-7647, 56-1a606.

504. *See id.* 56a-1201(d). The LLP may be reinstated by filing a certificate of reinstatement and paying all taxes, fees, and penalties. *Id.* Although the statute is not explicit as to the retroactivity of reinstatement, it should be interpreted to be so because of its genesis in, and close connection with, corporate law. *See id.* 17-7002(d). A clarifying technical amendment on this point would be helpful.

505. *Id.* 56a-1002.

506. K.S.A. 56-346(a) (repealed 1999).

507. K.S.A. 1998 Supp. 56a-306(c) (emphasis added).

508. RUPA § 306 cmt. 3.

509. This goal is accomplished by factoring references to section 56a-306 into the relevant substantive provisions throughout RUPA. *See* K.S.A. 1998 Supp. 56a-307, -703, -806, -807, -902, -903, -906.

510. *Id.* 56a-306(c) insulates a partner from liability on a partnership obligation based "solely" on being or acting as a partner. RUPA § 306 cmt. 3. *Cf. Kerns v. G.A.C. Inc.*, 255 Kan. 264, 875 P.2d 949 (1994) (directors, officers, agents, and employees of corporation are individually liable for torts they commit or in which they participate).

511. *See* K.S.A. 1998 Supp. 56a-103.

512. *Id.* 56a-306(c); RUPA § 306 cmt. 3; HILLMAN, VESTAL & WEIDNER, RUPA 343-44.

version of RUPA affords protection to creditors beyond the general inhibitions of the Uniform Fraudulent Transfer Act.[513] It does so by borrowing two provisions from KRULPA and inserting them in the article governing LLPs.[514] The first of these imposes a simple balance sheet insolvency limitation on the ability of an LLP to make distributions to its partners. That is, an LLP may distribute cash or other assets to a partner in his or her capacity as a partner[515] only if, after taking the distribution into account, the fair value of the LLP's assets exceeds all of its liabilities, other than liabilities to partners on account of their partnership interests.[516]

The second provision imposes liability on partners who receive a distribution that constitutes a return of part or all of their capital contribution.[517] If the distribution violates either RUPA or the partnership agreement, the recipient will be liable to the LLP for six years for the amount of the distribution that is wrongful.[518] If the distribution does not violate RUPA or the partnership agreement, the recipient nevertheless will be liable to the LLP for one year for the amount of capital distributed, but only to the extent necessary to discharge the LLP's liabilities to creditors who extended credit during the period the partner's capital was in the firm.[519]

Finally, and not insignificantly, RUPA makes explicit and detailed provision for foreign LLPs transacting business in Kansas.[520] Thus, it again creates greater parity in the laws governing the various forms of business enterprise.[521]

Before transacting business in Kansas,[522] a foreign LLP must file with the secretary of state[523] a statement of foreign qualification that is substantially the same as the statement of qualification that must be filed by a domestic LLP.[524] The statement of foreign qualification is effective upon filing, unless a delayed effective date is specified, and will remain so until canceled by the foreign LLP or revoked by the secretary of state for failure to file annual reports or pay franchise taxes.[525]

A foreign LLP that is transacting business in Kansas without qualification is barred from access to the Kansas courts as a plaintiff until it has qualified.[526] In addition, the attorney general may institute an action to enjoin an unqualified foreign LLP from transacting business in Kansas.[527] Failure to qualify, however, will not impair the validity of any contract or act of the foreign LLP, prevent it from defending an action in Kansas, or constitute a waiver of the limited liability of its partners.[528]

IX. Conclusion

With the enactment of RUPA in 1998, fully effective as to all partnerships July 1, 1999,[529] Kansas joins 23 other states and the District of Columbia in bringing its partnership law to the verge of the 21st century. RUPA retains with little change time-honored rules concerning such matters as the agency power of partners, management and financial rights, and transfers of partners' economic interests in the business. At the same time, it breaks new ground with respect to partnerships as legal entities, ownership of partnership property, publicly-filed statements affecting partnership affairs, fiduciary duties, dissociation and dissolution, conversions and mergers, and limited liability partnerships. Although not perfect, RUPA represents a significant advance in partnership law that the bar will come to appreciate after becoming more familiar with some of its superficial complexity.

513. K.S.A. 1998 Supp. 33-201 to -212.

514. *Compare* K.S.A. 56-1a357, -1a358 *with* K.S.A. 1998 Supp. 56a-1003, -1004.

515. K.S.A. 1998 Supp. 56a-101(c).

516. *Id.* 56a-1003. This sort of limitation is less important if creditors of the business can follow its assets into the hands of its owners, as is the case with a general partnership. It becomes more significant if the owners of the enterprise are not personally liable for its obligations.

517. A partner receives a return of his or her capital contribution to the extent that a distribution reduces the partner's share of the fair value of the LLP's net assets below the value, as reflected in the LLP's records, of the partner's capital contribution that has not previously been distributed to the partner. *Id.* 56a-1004(c).

518. *Id.* 56a-1004(b).

519. *Id.* 56a-1004(a).

520. *See* note 493, *supra.*

521. *Compare* K.S.A. 1998 Supp. 56a-1101 to -1105 *with* K.S.A. and K.S.A. 1998 Supp. 17- 7301 to -7308, 17-7636 to -7644, 56-1a501 to -1a510.

522. K.S.A. 1998 Supp. 56a-1104(a) contains a nonexclusive list of 10 common activities that do not constitute "transacting business" for purposes of the qualification requirement. *Id.* 56a-1104(b) states that ownership of income-producing real or tangible personal property in Kansas, other than that on the list, constitutes "transacting business" in Kansas.

523. *Id.* 56a-105(a).

524. *Compare id.* 56a-1001(c), -1002 *with id.* 56a-1102(a).

525. *Id.* 56a-1102(b). As alluded to in the text, foreign LLPs, like domestic LLPs, must file annual reports and pay franchise taxes in a manner similar to that applicable to other types of foreign business entities qualified to do business in Kansas. *Compare id.* 56a-1202 *with id.* 17-7505, 17-7648, 56-1a607. *See id.* 56a-1202(d) and note 504, *supra*, regarding reinstatement after forfeiture.

526. K.S.A. 1998 Supp. 56a-1103(a).

527. *Id.* 56a-1105.

528. *Id.* 56a-1103(b), (c). The secretary of state is the statutory agent for service of process on an unqualified foreign LLP with respect to causes of action arising from its transaction of business in Kansas. *Id.* 56a-1103(d).

529. *Id.* 56a-1304(b).

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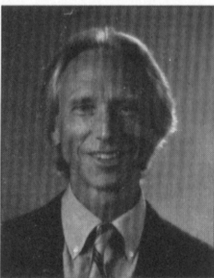

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