Fixing Up the Old Jalopy–The Modern Limited Partnership Under the ULPA

Robert Kratovil
Raymond J. Werner

Follow this and additional works at: https://scholarship.law.stjohns.edu/lawreview
A vast body of literature has been generated extolling the virtues of the limited partnership as a vehicle for syndication of real estate ventures. These articles have dealt primarily with the tax implications, especially the tax shelter benefits, accompanying the holding of title to land in this manner. Additionally, writers often focus on the federal and state securities law implications of “public” syndications. This emphasis, however, ignores other aspects of this vehicle which are also of great importance.

The old-fashioned, small-scale limited partnership is “as dead as the dodo.” Today, it has been replaced by the limited partnership involving one large investor and by the “public limited partnership” wherein interests are offered to relatively large groups of investors in order to attract substantial amounts of investment capital. This evolution has greatly enhanced the need for complete reexploration of the organization and operation of the limited partnership. It is the purpose of this Article to draw attention to these neglected aspects of this investment vehicle.

Organizational Aspects

The Articles of Limited Partnership and the Certificate of Limited Partnership

Providing a counterpart to the charter and bylaws encountered in corporate practice, articles of partnership are, in the case of both

---


2 See, e.g., Greenwood, Syndication of Undeveloped Real Estate and Securities Law Implications, 9 HOUSTON L. REV. 53 (1971) [hereinafter cited as Greenwood]; Heyman & Parnall, supra
general and limited partnerships, frequently employed. Grants of agency powers and limitations on these powers, for example, are routinely set forth in this document. Since the articles of partnership in a syndication situation tend to be quite complex, various aspects will be touched on herein.

With respect to organization, the articles must provide for at least two persons, a general partner and a limited partner. Initially, some attorneys will create a limited partnership with one corporate general partner and one nominal limited partner, making provisions for the admission of additional limited partners and for the withdrawal of the original limited partner as investors come into the picture. This enables the partnership to embark upon its existence as well as provide assurance to future investors that they are buying into a going concern.

In contrast to the articles of limited partnership, the certificate of limited partnership is statutorily required. To form a limited partnership, two or more persons must sign and swear to a certificate setting forth the information required by the Uniform Limited Partnership Act (ULPA), the filing of which should take place within a reasonable time after execution of the articles. State requirements as to place of filing vary, however, and a few states even require publication of the certificate. A common practice in the area of real estate syndications is to name, in the subscription form or in the limited partnership agreement, one of the general partners as the "proper office" for filing to the individual states.

3 For a thorough discussion of the organization of real estate syndications, see Lehman, Equity Finance, in Practicing Law Institute, Real Estate Financing 45 (1973) (Real Estate Transcript Series) and Lowell, Selected Problems in the Creation, Operation, and Dissolution of the Limited Partnership, in Practicing Law Institute, Real Estate Syndications 33, 42 (1972) (Real Estate Transcript Series) [hereinafter cited as Lowell]. See also note 23 infra.

4 The ULPA lists 14 items of information which must be included in a certificate of limited partnership. Uniform Limited Partnership Act [hereinafter cited as ULPA] § 2(1)(a). The required information consists of items ranging from the name of the partnership and the character of its business to the sharing of profits and the right, if any, to accept additional limited partners. See also Heyman & Parnall, supra note 1, at 252.

5 Stowe v. Merrilees, 6 Cal. App. 2d 217, 44 P.2d 368 (1935) (certificate must be filed within a reasonable time and, if it does not work to the detriment of the party objecting to it, 49 days does not exceed that limit).

6 A. Bromberg, Crane & Bromberg on Partnership 145-46 (1968) [hereinafter cited as Crane & Bromberg]. ULPA § 2(1)(b) explicitly leaves designation of the "proper office" for filing to the individual states.

7 Crane & Bromberg, supra note 6, at 146. In New York, for example, "[a] copy of the certificate of limited partnership or a notice containing the substance thereof, [must] be published once in each week for six successive weeks, in two newspapers of the county in which such original certificate is filed. . . ." N.Y. Partnership Law § 91(b) (McKinney 1948).
partners as attorney-in-fact of the limited partners, giving him the power to execute and swear to the certificate on their behalf.8

The provision requiring that the certificate be sworn to clearly mandates that an affidavit, as opposed to an acknowledgment, accompany the filing.9 Legally, there is a difference. An acknowledgment merely states, prima facie, that a certain situation exists, while an affidavit guarantees the veracity of a representation.10 A problem arises because many practicing lawyers are unaware of this difference. In recognition thereof, some states have deviated from the ULPA by providing for an acknowledgment instead of requiring an affidavit,11 a requirement which was ill-advised from the start. Nevertheless, in those states adhering to the uniform provision, the use of an acknowledgment instead of an affidavit would probably not be fatal to the limited partnership aspect of the venture since only substantial, good faith compliance with the Act is required.12

Unlike the general partnership, where there is no requirement that any certificate be filed, the limited partnership poses a problem of dovetailing the statutorily required certificate with the nonstatutory articles of partnership. With respect to the contents of the certificate of partnership, the ULPA lists 14 necessary items.13 Of course, many more optional items may be included, though some may find a more comfortable setting in the articles of partnership, the provisions of which, limited only by the ingenuity of counsel,14 do not become a matter of public record. Indeed,

---

8 It may be argued, however, that an attorney-in-fact cannot be empowered to swear on behalf of another person. Heyman & Parnall, supra note 1, at 252.
9 ULPA § 2(1)(a) requires that “[t]wo or more persons desiring to form a limited partnership . . . [s]ign and swear to a certificate . . . .” (emphasis added). A signing-and-swearing requirement also applies to amendments to the certificate. Id. § 25(1)(b).
11 See, e.g., CAL. CORP. CODE § 15502 (West Supp. 1975); HAWAII REV. STAT. § 425-22 (1968); N.Y. PARTNERSHIP LAW § 91 (McKinney 1948); S.D. COMPILED LAWS ANN. § 48-6-2 (1967).
12 ULPA § 2(2) provides that “substantial compliance in good faith” will fulfill the statutory requirements of § 2(1).
13 Id. § 2(1)(a). See also note 4 supra.
14 See S. FRESHMAN, PRINCIPLES OF REAL ESTATE SYNDICATION 234-37 (2d ed. 1973) (list of 50 items which may be included in the partnership agreement); note 53 infra. See also Roulac, supra note 1, at 279.
many of the housekeeping arrangements convenient for the limited partnership may be kept confidential,\(^{15}\) although it should be noted that some provisions, such as limitations on the powers of general partners, should be matters of public record in order to protect the limited partners.\(^{16}\)

**Amending the Certificate**

The certificate of limited partnership must be amended in order to, among other things, change the partnership name, increase or alter the character of the contribution of a limited partner, or provide for the continuation of the business after the retirement or death of the general partner.\(^{17}\) These amendments, which must be filed in the same manner as the original certificate,\(^{18}\) are required to be executed by all the partners,\(^{19}\) and any amended certificate must be filed in the proper place.\(^{20}\)

Another event occasioning an amendment of the certificate is the substitution of a limited partner. If the articles and recorded certificate give the general partner specific authority to sign an amended certificate on behalf of the nonassigning limited partners, the delegation would probably be valid, at least as to third parties. A problem arises in that such a clause could be construed as a delegation of authority to an agent, and hence, death of a limited partner might revoke the power unless it is a power coupled with an interest. Arguably, it is such a power. In any event, boilerplate language protecting third parties is effective for that purpose.\(^{21}\) California's version of section 25 of the ULPA\(^ {22}\) specifically provides for signing by the general partner, and clearly a similar amendment to the ULPA is needed.\(^ {23}\)

\(^{15}\) Lowell, supra note 3, at 38-39.

\(^{16}\) There is no doubt that restrictions contained in the articles of partnership are binding as between the parties and will serve as the basis of a breach of trust action by the limited partners for any unauthorized actions taken by the general partner. Such a remedy, however, will often be illusory since the general partner is typically one with limited financial reserves. Furthermore, in the absence of restrictions in the certificate, the limited partners may find that they are unable to undo the wrong in an action against a third party on the ground that the action was unauthorized. This result follows because, unlike corporate law, where officers have little, if any, apparent authority, a general partner is clothed with sweeping apparent authority. See Uniform Partnership Act [hereinafter UPA] §§ 9, 14. See also notes 55-59 and accompanying text infra.

\(^{17}\) ULPA § 24(2).

\(^{18}\) See id. § 25.

\(^{19}\) Id. § 25(1)(b).

\(^{20}\) Id. § 25(5), which provides that the amendment becomes effective when filed in the office where the certificate is filed.

\(^{21}\) See notes 58-59 and accompanying text infra.


\(^{23}\) In one instance, the problem was avoided by having one limited partner who, in turn, sold participations in his interest to prospective investors. Since the units of participation are
Applicability of the Uniform Partnership Act

An indispensable starting point in the study of the ULPA is an understanding of its relationship to the Uniform Partnership Act (UPA). Since it is clear that the UPA is applicable to limited as well as general partnerships, the underlying philosophy of the UPA also pertains to limited partnerships. Dean James Barr Ames, the principal, initial draftsman of the ULPA, strongly favored the entity theory. After Dean Ames’ unfortunate death, however, Dean William Draper Lewis, an advocate of the aggregate theory, took over. The result was that the UPA was born with a schizoid personality, partly embracing the entity theory and partly the aggregate theory.

The Partnership Name and Execution of Documents

The ULPA and state law generally do not require the name of a limited partnership to include the word “limited” or “limited partnership.” Nevertheless, as a precaution against creating personal liability on the part of limited partners, it is advisable to advertise prominently the nature of the entity, having all documents refer thereto as a “limited partnership.” Furthermore, the partnership name may not contain the name of any limited partner.

Notwithstanding the above-mentioned confusion as to whether a partnership should be treated as an aggregate or an entity, it is quite clear that in any jurisdiction that has adopted the UPA and the ULPA, both a general partnership and a limited partnership can own and convey land in the firm name. When title is taken in

---


25 The entity theory regards the partnership as a legal personality separate and distinct from the individual legal personalities of its members. See Roege, Talbot & Zinman, Real Estate Equity Investments and the Institutional Lender: Nothing Ventured, Nothing Gained, 39 Fordham L. Rev. 579, 608 (1971) [hereinafter cited as Roege, Talbot & Zinman].

26 Id. at 609. The aggregate theory closely follows the common law notion that the individual partners deal directly with each other and third parties in transacting partnership business.

27 Id. at 608-10. While this same hybrid approach is reflected in the Internal Revenue Code, both the Bankruptcy Act and the Uniform Fraudulent Conveyance Act treat a partnership as an entity. Id. at 610.

28 ULPA § 5. Use of a limited partner’s name in contravention of § 5 can, under certain circumstances, expose the limited partner to the liability of a general partner. See id. § 5(2).

Notably, in many jurisdictions, statutes requiring registration of trade names are applicable to partnerships. See Crane & Bromberg, supra note 6, at 106. This requirement often dovetails with the recording requirements of ULPA § 2(1)(b).

29 Crane & Bromberg, supra note 6, at 221-24.
the firm name, the partnership must also convey or mortgage in that name.\textsuperscript{30} Thus, in any deed or mortgage conveying partnership land, the partnership name will appear as grantor or mortgagor. In addition, the partnership name will appear on the signature line, followed, as in the execution of corporate documents, by the signatures of those authorized to sign in a representative capacity. Normally, a general partner will sign on the “by” line, placing beneath it the statement that he is doing so “as duly authorized agent of said partnership pursuant to powers conferred by Articles of Partnership dated __________.” Such partner’s name will also appear in the certificate of acknowledgment which will state that the execution of the instrument was the free and voluntary act of that partner and of the partnership. In this way, the certificate will be conformed to the law of the state where the land lies. Most lawyers seem to prefer the long form of acknowledgment even where the state has adopted the Uniform Acknowledgments Act.

\section*{The Corporate Partner}

\textit{The Corporate General Partner}

Many public limited partnerships have one general partner, a corporation. When these vehicles were first launched, considerable controversy emerged concerning the power of a corporation to become a general partner. Commentators argued that a basic rule of corporation law mandates that the destiny of the corporation and all its major decisions be the end product of the informed judgment of a responsible board of directors.\textsuperscript{31} But when a corporation enters into a partnership, the partners make the decisions and the control of the board of directors over the corporation is to that extent watered down.\textsuperscript{32} The UPA does not solve the problem. Although it does provide that two or more “persons” can form a partnership\textsuperscript{33} and defines “persons” to include corporations,\textsuperscript{34} the UPA does not include express statutory authority rejecting the former majority position that a corporation is without power to

\textsuperscript{30} UPA \textsection 8(3).
\textsuperscript{33} UPA \textsection 6. Note that the UPA and the ULPA are complementary in that the provisions of the UPA are used to fill in the blanks of the ULPA. See text accompanying note 24 supra.
\textsuperscript{34} UPA \textsection 2.
enter into a partnership. Fortunately, many states have adopted provisions in line with the Model Business Corporation Act specifically authorizing corporations to deal in the interests of partnerships or "to be a partner." Further, the Model Business Corporation Act severely restricts the old doctrine of ultra vires. And, since limited partners must refrain from interfering with the operation of the business on pain of losing their limited liability, the problem seems to disappear where the corporation is the only general partner.

The Corporate Limited Partner

The problem of delegation of power again arises when a corporation acquires a limited partnership interest. Since management power is delegated only to the extent of the assets invested, however, case law sanctions this investment.

Powers of the Limited Partner

Occasionally, a question is raised concerning the effect of provisions of the ULPA giving limited partners a vote on matters of major importance, such as the dissolution of the partnership or the sale of all of its assets. Whether the limited partners become personally liable because of their right to assume control in such circumstances is unresolved. It has been suggested, however, that

---

35 This majority rule that a corporation lacked the power to become a partner applied unless a statute or the corporate charter expressly authorized the corporation to enter into a partnership. See, e.g., Fechteler v. Palm Bros., 133 F. 462 (6th Cir. 1904); People v. North River Sugar Ref. Co., 121 N.Y. 582, 24 N.E. 834 (1890); Boyd v. American Carbon-Black Co., 182 Pa. 206, 37 A. 937 (1897).

36 ABA-ALI MODEL BUS. CORP. ACT § 4g (1971).

37 Id. § 4p. For example, in New York, a corporation has among its general powers the power "to be a promoter, partner, member, associate or manager of other business enterprises or ventures . . . ." N.Y. BUS. CORP. LAW § 202(a)(15) (McKinney 1963) (emphasis added).

38 See ABA-ALI MODEL BUS. CORP. ACT § 7.

39 CRANE & BROMBERG, supra note 6, at 54; see ULPA § 7. In situations of extreme urgency, however, as in the case of a failing enterprise, the general partner corporation's board of directors loses its unfettered discretion since §§ 9, 10 of the ULPA, see note 62 infra, specifically give the limited partners a voice on certain matters.

40 See Port Arthur Trust Co. v. Muldrow, 155 Tex. 612, 291 S.W.2d 312 (1956). In Port Arthur, the Supreme Court of Texas held that a trust company, which was organized as a corporation, could qualify as a "person" in order to enter into a limited partnership. Having found this to be an exception to the rule that a corporation cannot become a partner, the court noted that only specified trust assets were to be invested. The assets of the corporation, therefore, would remain intact and within the control of its officers and directors. Id. at 616, 291 S.W.2d at 314. For a fuller discussion of the Port Arthur case, see 55 Mich. L. Rev. 588 (1957) and 35 TEXAS L. REV. 265 (1956).

41 See ULPA §§ 9, 10. See also Feld, The "Control" Test for Limited Partnerships, 82 HARV. L. REV. 1471, 1474-75 (1969).
the ULPA, in giving a voice to the limited partners on these basic issues, obviously contemplated that they would not, by doing the very things it authorizes, lose their status as such.\textsuperscript{42} Some states have seen fit to spell this out.\textsuperscript{43} Moreover, Professor William Draper Lewis has stated rather categorically that the ULPA contemplates "some degree of control" over the enterprise by the limited partners.\textsuperscript{44} Evidently, he had in mind situations where the limited partners would be exercising powers conferred by the ULPA.\textsuperscript{45}

Another method thought to provide some form of control to the limited partners is the appointment of a general agent having veto power over certain acts of the general partners.\textsuperscript{46} This approach is untested and involves danger. Of course, the limited partners are free to "advise" the general partner and still remain secure in their positions.\textsuperscript{47} Notably, however, the general partner has the last word and may entirely ignore the advice of the investors.\textsuperscript{48}

Granting the limited partners power to remove the general partner is fraught with great difficulty and danger.\textsuperscript{49} An additional problem is created by regulatory provisions which, while seeking to protect the limited partners, may jeopardize their status as such.\textsuperscript{50} Whether courts will find that the exercise of these powers granted to the limited partners constitutes taking part in the control of the business remains to be seen.\textsuperscript{51}

\textsuperscript{42} Feld, The "Control" Test for Limited Partnerships, 82 Harv. L. Rev. 1471, 1481 (1969).
\textsuperscript{43} See, e.g., CAL. CORP. CODE § 15507(b) (West Supp. 1975), which states that a limited partner shall not be deemed to take part in the control of the business by virtue of his possessing or exercising a power, specified in the certificate, to vote upon matters affecting the basic structure of the partnership. See also Comment, "Control" in the Limited Partnership, 7 John Marshall J. 416, 420-24 (1974).
\textsuperscript{45} See, e.g., ULPA §§ 9, 10.
\textsuperscript{46} INST. CONTINUING LEG. EDUC., CREATIVE REAL ESTATE FINANCING 142 (H. Eglit ed. 1968).
\textsuperscript{47} Taubman, Limited Partnerships, Corporate Practice Commentator, Feb. 1962, at 15, 23.
\textsuperscript{48} Id.
\textsuperscript{49} Roulac, supra note 1, at 295-97. See also Comment, "Control" in the Limited Partnership, 7 John Marshall J. 416, 427 (1974).
\textsuperscript{50} Where a change of general partners does take place, insulation of the new general partner from problems created by his predecessor is a matter of great concern. Roulac, supra note 1, at 295 et seq.
\textsuperscript{51} See generally Comment, Partnership: Can Rights Required to be Given Limited Partners Under New Tax Shelter Investment Regulations be Reconciled with Section 7 of the Uniform Limited Partnership Act?, 26 Okla. L. Rev. 289 (1973).
Powers of the General Partner

Power of the Corporate General Partner to Delegate Management Functions

Partnership is basically an agency situation, and agency law is applicable.\(^{52}\) Hence, the question will arise as to the power of the general partner—an agent of the limited partners—to delegate his management functions. Since the articles can clearly spell out the power of the general partner to hire a managing agent, good drafting and foresight can circumvent any problem that might arise.

Restricting the Power of General Partners

No doubt can exist as to the power of the limited partners to include in the articles of partnership restrictions on the power of the general partner.\(^{53}\) For example, the general partner may, for a reasonable period of time, be prohibited from establishing certain competing enterprises.\(^{54}\) When limited partnership real estate is in the construction stage and a danger of unauthorized activity by the developer general partner with respect to his other ventures exists, his powers in this area can be circumscribed.\(^{55}\) Or, the limited partners may want to restrict the right of a managing partner to raise his own salary.

Protecting Persons Dealing with General Partners

The manner in which restrictions on the power of the general partner are to be communicated to third parties merits serious consideration. Since the ULPA lists certain items the certificate of limited partnership must contain, but does not otherwise limit its contents,\(^{56}\) restrictive provisions may be included in this recorded

---

\(^{52}\) Of course, a general partner, like other agents, must possess the requisite degree of knowledge and exercise skill and care in the performance of his functions. See Roulac, supra note 1, at 287-91.

\(^{53}\) In Lanier v. Bowdoin, 282 N.Y. 32, 24 N.E.2d 732 (1939), for example, the court stated that as between themselves, members of a limited partnership may include in the articles of partnership any agreement not violative of statutory or common law.

\(^{54}\) Cf. Meisel v. Finley, 198 Va. 577, 95 S.E.2d 186 (1956) (restrictive covenant in limited partnership agreement providing that limited partners would not compete upon dissolution of the partnership upheld).

\(^{55}\) See B. Lehman, *Equity Finance*, in PRACTICING LAW INSTITUTE, REAL ESTATE FINANCING 45, 102 (1973) (Real Estate Transcript Series).

Of equal importance are the provisions conferring powers upon the general partners. These provisions should appear in the articles of partnership and, for the protection of third persons dealing with the partnership, in the recorded certificate.

In order to further protect third parties dealing with the general partner, both the articles of partnership and the recorded certificate of partnership should contain boilerplate language similar to that found in trust instruments\(^5\)\(^8\) excusing persons dealing with the trustee from examining the source of his powers. Although the boilerplate is probably not technically necessary,\(^5\)\(^9\) it should be included so that third parties are not compelled to inquire as to whether a particular transaction needs the approval of the limited partners.

In *Spilker v. Massachusetts Mutual Life Insurance Co.*,\(^6\)\(^0\) the general partner sold all of the real estate of the partnership without obtaining the consent of the limited partners. Rejecting the limited partners' argument that this was not authorized by the articles, the court upheld the sale, noting that "nothing in the agreement expressly prohibited sale of all the partnership property without the consent of the limited partners."\(^6\)\(^1\) Obviously a boilerplate provision in the articles of partnership and recorded certificate excusing the purchaser from examining these instruments could have further strengthened his claim to protection. Where such a provision is lacking, a purchaser may have to show compliance with the ULPA. Since the sale of all assets could put the partnership out of business, it may be argued that the ULPA requires the written consent of all of the limited partners.\(^6\)\(^2\) The ULPA speaks in terms

\(^{57}\) See ULPA § 9(1)(a), which states that a general partner has no authority to "[d]o any act in contravention of the certificate" without the written consent or ratification of all the limited partners.

\(^{58}\) See, e.g., Eisel v. Miller, 84 F.2d 174, 178 (8th Cir. 1936). An illustrative clause may be found in Mist Properties, Inc. v. Fitzsimmons Realty Co., 228 N.Y.S.2d 406 (Sup. Ct. Kings County 1962), which upheld the validity of a clause which read:

> Nothing herein contained shall require any assignee or grantee to investigate the General Partners' authority to sell and convey all or any portion of the Property or any other property of the Partnership, or to grant any option therefor, nor require any such assignee or grantee to inquire as to whether the approval of the Limited Partners for any such sale or conveyance has first been obtained. Any such conveyance, if executed by the General Partners, shall bind the Partnership.

*Id.* at 410 (emphasis omitted).


\(^{61}\) Id. at 8.

\(^{62}\) ULPA § 9(1) (emphasis added) reads:

> A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners,
of consent to a "specific act," however, and it is conceivable that such a general consent in the articles and in the recorded certificate might not constitute compliance with the Act anyway. Nevertheless, a provision protecting a bona fide third party will simply relieve him of making an inquiry. Reasoning from numerous cases decided on the basis of trust law, such a provision should protect the third party. After all, the sale, at worst, is a breach of trust, and this is precisely what the trust boilerplate protects against where an innocent third party is involved.

**THE TRUSTEE LIMITED PARTNER**

Since the purchase of a limited partnership interest results in a somewhat expansive delegation of his fiduciary duties, a trustee contemplating such an investment ought to examine his trust instrument carefully to see that it authorizes such action. The Partnership Acts themselves present no obstacles in this regard, since the definition of "person" is quite broad. Notwithstanding the absence of these possible barriers, the trustee must be mindful that such an investment might be neither advisable nor permissible under the "prudent man" rule governing his investments.

---

except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all the general partners have no authority to

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(d) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all the general partners have no authority to

except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all the general partners have no authority to

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(d) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

---

63 Id. This argument is strengthened by the negative implication of the language of ULPA § 9 itself. In other words, since the right to do two of the specific acts may be given in the certificate, it follows that blanket consent for the other specific acts may not be given in the certificate. Compare id. §§ 9(1)(f)-(g) with id. §§ 9(1)(a)-(e). But see Mist Properties, Inc. v. Fitzsimmons Realty Co., 228 N.Y.S.2d 406, 410 (Sup. Ct. Kings County 1962), quoting Lanier v. Bowdoin, 282 N.Y. 32, 38, 24 N.E.2d 732, 735 (1939).

64 See, e.g., Swanson v. Randall, 30 Ill. 2d 194, 195 N.E.2d 656 (1964). In Swanson, the trustee placed a mortgage on the res of the trust, real property, and converted the money to his own use. The trust agreement stated that no person dealing with the trustee had an obligation to see that the terms of the trust were complied with, and hence, the action to set aside the mortgage was unsuccessful. See also P. BASYE, CLEARING LAND TITLES § 43, at 168-69 (1970); COMM. ON CONTINUING EDUC. OF THE BAR, STATE BAR OF CALIFORNIA, CALIFORNIA LAND SECURITY AND DEVELOPMENT § 13.39, at 338 (1960).

65 See Note, Trust Participation in Partnership Ventures, 3 STAN. L. REV. 467, 468-69 (1951).

66 "'Person' includes individuals, partnerships, corporations, and other associations." UPA § 2.
The Life Company Limited Partner

Taking Collateral Security

Unlike the "public" limited partnership, a limited partnership may involve an arrangement pursuant to which a large financial institution, often a life insurance company or one of its wholly owned subsidiaries, is both mortgagee and the only limited partner. The one critical issue in such cases is whether the general creditors of the partnership will enjoy priority over the mortgagee if insolvency occurs. If this question is answered in the affirmative, large financial institutions could suffer disastrous loss. Fortunately, it is clear that the answer is in the negative.

The problem arises because of the awkward wording of section 13 of the ULPA, which provides:

(1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim
   (a) Receive or hold as collateral security any partnership property, or
   (b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

Obviously, it can be argued that subsection (a) categorically prohibits a limited partner from making secured loans to the partnership. Alternatively, it can be argued that a printer's error occurred, namely, the italicized language was meant to be applicable to both subsections (a) and (b) and should have been brought out to the margin.

The mischief sought to be avoided by the printer's error interpretation is the case of the limited partner who accepts security from an insolvent partnership. This reading is borne out by a Commissioner's comment stating that the limited partner may loan money to the partnership

---

69 ULPA § 13 (emphasis added).
70 See Roegge, Talbot & Zinman, supra note 25, at 604.
provided he does not, in respect to such transactions, accept from the partnership collateral security, or receive from any partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge its obligations to persons not general or limited partners.\textsuperscript{71}

The comment to section 23 of the ULPA provides further support for this theory:

Subsection (a) of this section, which apparently gives to a special partner the rights of a creditor with respect to claims other than for his contribution, is a departure from the policy of the earlier acts, which usually placed the special partner on the same footing as the general partner in this respect.\textsuperscript{72}

In the leading case of Hughes v. Dash,\textsuperscript{73} moreover, the court in effect adopted the printer's error theory, and subsection (a) was not read as a categorical prohibition. This construction is in keeping with the elementary rule that to give effect to the spirit and intent of the legislature, words and phrases may be transposed.\textsuperscript{74}

The legislative intent in this instance, being entirely free from doubt, the printer's error theory was accepted in A.T.E. Financial Services Inc. v. Corson,\textsuperscript{75} and a number of jurisdictions have modified the language of the ULPA accordingly.\textsuperscript{76}

It has been argued that at least in New York, however, a question persists:

In a letter on the stationery of the Commissioners on Uniform State Laws, New York State Board, dated March 21, 1922 and found in the Governor's Jacket on the ULPA, Carlos C. Alden, a New York Commissioner, wrote to the Honorable C. Tracey Stagg, counsel to the Governor, urging approval by the Governor of the ULPA. The letter commented "only on the most important changes which it [the ULPA] will make in our existing law."

\textsuperscript{71} ULPA § 1, Comment, in 6 Uniform Laws Ann. 565 (master ed. 1969).
\textsuperscript{72} ULPA § 23, Comment, in 8 Uniform Laws Ann. 32 (1922).
\textsuperscript{73} 309 F.2d 1 (5th Cir. 1962), noted in Crane & Bromberg, supra note 6, at 550.
\textsuperscript{74} See, e.g., In re Barry Equity Corp., 276 App. Div. 685, 689, 96 N.Y.S.2d 808, 812 (1st Dep't 1950) (literal meaning of statute rejected in favor of effectuating legislative intent). In Acheson v. Fujiko Furusho, 212 F.2d 284 (9th Cir. 1954), the court stated: "It is the duty of this Court to give effect to the intent of Congress. Primarily this intention is ascertained by giving the words their natural significance, but if this leads to an unreasonable result plainly at variance with the policy of the legislation as a whole, we must examine the matter further. We may then look to the reason of the enactment and inquire into its antecedent history and give it effect in accordance with its design and purpose, sacrificing, if necessary, the literal meaning in order that the purpose may not fail."

\textsuperscript{75} Id. at 295 (emphasis omitted), quoting Ozawa v. United States, 260 U.S. 178, 194 (1922).
\textsuperscript{76} See Roegege, Talbot & Zinman, supra note 25, at 606; e.g., Cal. Corp. Code § 15513 (West Supp. 1975).
Section 13 was one of the three sections discussed in the letter. Mr. Alden’s comment was as follows: “Under § 13, a limited partner may not secure a preference on partnership assets, upon a loan of money to it, through the taking of collateral security. This is not prevented under our present statute, and seems a proper safeguard to add to our law.” Most of the foregoing was also embodied in a memorandum from Mr. Stagg apparently to the Governor, also found in the Governor’s Jacket, in which he stated the bill “merits approval.” In addition, the Association of the Bar of the City of New York, in approving the bill, used the exact language quoted above from Mr. Alden’s letter. Thus there is some indication that the New York drafters of 1922 intended a result somewhat different from that intended by the drafters of the original uniform act, which had been approved by the General Conference of the Commissioners on Uniform State Laws in 1916.\(^7\)

The difficulty with this view is that it ignores the fact that the ULPA is a uniform act. Undoubtedly, in construing a uniform act, great deference should be accorded the intention of the drafters in order that the desired uniformity be achieved.\(^8\) The ULPA, moreover, plainly commands this rule of construction.\(^9\) The so-called New York view also ignores the rule that official comments are to be given great weight in interpreting uniform acts.\(^10\) Likewise, the rule of statutory construction that absurd and inconvenient consequences must be avoided\(^11\) is not honored. It is perfectly obvious that in times of stringency or panic the only funds a limited partnership can look to are in the hands of its friends.\(^12\)

\(^{7}\)Id. at 605-06 (footnotes omitted).

\(^{8}\)See People’s Sav. & Trust Co. v. Munsert, 212 Wis. 449, 249 N.W. 527 (1933), wherein the court stated:

In construing a uniform law, the meaning of which is not clear, the intention of those who drafted it, if that intention may be ascertained, should be given controlling consideration, else the desired uniformity will not result. Futility indeed is the passage of uniform laws by the several states if the courts are to construe them differently.

\(^{10}\)Id. at 457, 249 N.W. at 531.

\(^{8}\)ULPA § 28(2) states that “[t]his act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.”


\(^{10}\)See H. Kauffman & Sons Saddlery Co. v. Miller, 298 N.Y. 38, 44, 80 N.E.2d 322, 325 (1948) (“Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids injustice, hardship, constitutional doubts or other objectionable results.”).

\(^{12}\)See Clapp v. Lacey, 35 Conn. 468 (1868), wherein the court held that a limited partner who had made a loan to the partnership over his capital investment did not have to wait until all other partnership creditors were satisfied to recover his loan. In Lacey, the court found that the statutory section depriving partners of creditor status should be limited to capital advances and not extended to all other advances made in good faith and in the best interests of the partnership. Id. at 466, 469.
And those friends just won’t be there if the New York rule is imposed. Creating an obvious overlap between subsections (a) and (b), this approach also disregards the rule that every part of a statute must be given effect so that each subdivision is operative, no conflict exists, and the various sections are harmonious and sensible.\textsuperscript{83} And finally, it is self-evident that neither the material in a Governor’s Jacket nor the statement of one Commissioner constitutes legitimate legislative history.

It has been stated by an eminent authority that section 13 of the ULPA expresses a policy consistent with that of section 8 of the Uniform Fraudulent Conveyance Act,\textsuperscript{84} an approach completely consistent with the philosophy expressed in \textit{Hughes v. Dash}:

Every conveyance of partnership property and every partnership obligation incurred when the partnership is or will be thereby rendered insolvent, is fraudulent as to partnership creditors, if the conveyance is made or obligation is incurred,

(a) To a partner, whether with or without a promise by him to pay partnership debts, or

(b) To a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.\textsuperscript{85}

Section 1 of this same Act defines “conveyance” to include “every payment of money, assignment, release, transfer, lease, mortgage or pledge of tangible or intangible property, and also the creation of any lien or encumbrance.”\textsuperscript{86} Since the taking of security by a partner under this uniform act is declared to be fraudulent “when the partnership is or will be thereby rendered insolvent,” it follows that the taking of the same security interest during good times would be permissible.

Finally, the language of both the UPA and the ULPA clearly embraces the philosophy of \textit{Hughes v. Dash}. Since the UPA defines “conveyance” to include “every assignment, lease, mortgage, or encumbrance,”\textsuperscript{87} this definition being applicable to limited partnerships,\textsuperscript{88} the word “conveyance” in section 13(b) of the ULPA includes a mortgage. And if the phrase “collateral security” in section

\textsuperscript{83} See Markham v. Cabell, 326 U.S. 404, 409 (1945), wherein the Supreme Court stated that “[r]esort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes,” especially where “a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve.”


\textsuperscript{85} \textit{Uniform Fraudulent Conveyance Act} § 8.

\textsuperscript{86} Id. § 1.

\textsuperscript{87} UPA § 2.

\textsuperscript{88} Id. § 6(2).
13(a) also includes a mortgage, the two sections conflict. This is an inadmissible construction.

Operating a Noninsurance Business

Another problem is created for the institutional investor if it must come to the forefront and exercise control to protect its investment. If this situation develops, the life company limited partner ipso facto runs afoul of regulations that prohibit it from carrying on a noninsurance business. At least at the outset, there seems to be no way around this dilemma short of sale of its position.

The "Foreign" Limited Partnership

Until 1974 there was virtually no in-depth analysis of the multistate limited partnership. Yet, the problems raised by this type of operation are enormous and virtually beyond solution. In the more sophisticated corporate law, "doing business problems" are routinely encountered. But the antiquated simplistic ULPA evinces no recognition of the problem, undoubtedly because it dealt with an old-fashioned vehicle with a small number of limited partners and totally ignored the possibility that a partnership may operate in many states.

The title insurance companies were the first to become aware of the implications of multistate operation. Most of them required a limited partnership formed in state A but acquiring land in state B to file a partnership certificate in the county where the land being acquired was located. In addition, all requirements of local law as to limited partnerships had to be complied with. While these requirements adequately protect the title company, they ignore the problems involved in the entity theory, such as whether a partnership crossed the state line or whether a new partnership had been created. Some lawyers take comfort from a statement in the certificate of partnership filed in state B that "this partnership is the

80 For a discussion of the problems involved in multistate operation of the limited partnership, see Note, Foreign Limited Partnerships: A Proposed Amendment to the Uniform Limited Partnership Act, 47 S. Cal. L. Rev. 1174 (1974) [hereinafter cited as Foreign Limited Partnerships]. The author concludes that since treatment of foreign limited partnerships under the ULPA provides inadequate protection both for limited partners and individuals dealing with foreign limited partnerships, the ULPA should be amended to provide uniform rules of recordation for foreign limited partnerships.
81 For a discussion of filing requirements generally, see Crane & Bromberg, supra note 6, at 146, and 52 Cornell L.Q. 157 (1966).
same partnership as is evidenced by certificate recorded in ____ county, State of ______ in Book ______ Page ______.

The confusion and conflict in this area are beyond imagination. A few jurisdictions have enacted legislation dealing with the problem. Florida and Hawaii, for example, require a foreign limited partnership to file locally a copy of its limited partnership certificate. In Florida, the partnership name must include either the word “limited” or its abbreviation, “Ltd.” In Hawaii, the filing of an annual statement is required. In other jurisdictions, state officials have imposed their own nonstatutory requirements. If a “foreign” limited partnership tenders its certificate of partnership to a local recorder of deeds, it may be met by a polite refusal to accept the document, accompanied by the statement that local recording laws make no provision for the recording of foreign limited partnership certificates. The point is of overwhelming significance because failure to file a certificate in a county where the partnership does business may constitute a lack of “substantial compliance” with the ULPA. Reliance on conflicts of law rules is unwise. Finally, in a few states, formal procedures, like those relating to foreign corporations, have been enacted.

An additional problem is presented when one of the partners involved is a corporation. If the partnership's activities extend into a state where the corporate partner is not licensed to do business, the corporation may be subject to the doing business laws of that jurisdiction. While the total inquiry into this question is beyond

---

93 FLA. STAT. ANN. § 620.05 (1956).
95 See Foreign Limited Partnerships, supra note 90, at 1186.
96 See id. at 1188-89.
97 See id. at 1188.
98 See CRANE & BROMBERG, supra note 6, at 146.
99 See Scott Co. v. Enco Constr. Co., 264 So. 2d 409 (Miss. 1972) (where one of three foreign corporations involved in a joint venture had not qualified to do business in the state, each was deemed to have been transacting business within the meaning of the state statute); Harris v. Columbia Water & Light Co., 108 Tenn. 245, 67 S.W. 811 (1901) (a partnership composed of two individuals and a foreign, unlicensed corporation cannot enforce a contract made in and to be performed in the state); Ashland Lumber Co. v. Detroit Salt Co., 114 Wis. 66, 89 N.W. 904 (1902) (in an action against a partnership two of whose partners were foreign corporations, the court upheld a statute which provided that contracts made by an unlicensed corporation were void in its behalf, but were enforceable against the corporation). But cf. Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974) (commerce clause precludes a state court's refusal to enforce a contract made by a foreign corporation because the corporation was not licensed to do business in the state). See generally 17 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 8500 (1960); R. KRATOVIL, MODERN MORTGAGE LAW AND PRACTICE § 77 (1972).
the scope of this Article, it is clear that the mere leasing or ownership of land ordinarily does not constitute doing business. Of course, the governing state's laws may differ, and each transaction must be analyzed in light of its own set of facts.

Although it too is beyond the scope of this Article, choice of law problems loom large when the limited partnership operates in many states. Generally, the law of the state in which the partnership was organized and the partnership agreement concluded will govern the liability of the limited partner. But many and diverse conflicts rules have been applied to the whole of partnership problems, and whether an aggregate or entity approach is taken may complicate the problem by having a telling impact on the constitutional protections the partnership is afforded.

REAL ESTATE SYNDICATES: AREAS OF CONCERN

Closing the Deal

Normally the promoter who has acquired a contract for the purchase of land includes therein a provision authorizing its assignment. After the partnership has been duly organized and funds are available to pay the balance of the purchase price, the contract is assigned to the limited partnership and the deed executed in the partnership name is delivered thereto. If there is to be a purchase-money mortgage, it also should be executed in the partnership name. Obviously provisions must be included in the purchase money mortgage subordinating it to the construction

---

103 See, e.g., Wallen v. Rankin, 173 F.2d 488 (9th Cir. 1949) (tort liability of a surviving partner governed by the law of the place where the tort was committed); Price v. Independent Oil Co., 168 Miss. 292, 150 So. 521 (1933) (status of the parties as partners governed by the laws of the state where the parties reside); First Nat'l Bank v. Hall, 150 Pa. 466, 24 A. 665 (1892) (whether a contract created a partnership governed by the law of the place where the contract was to be performed).
104 By using an aggregate theory approach, it can be argued that the privileges and immunities clause prohibits a state from excluding individuals engaged in a lawful business. See Foreign Limited Partnerships, supra note 90, at 1185 n.42. For many purposes, however, courts have held that a partnership is an entity, see, e.g., United States v. A&P Trucking Co., 358 U.S. 121 (1958) (partnership as an entity could be held criminally responsible for violations of Interstate Commerce Commission regulations committed by its employees), and, as such, it is unlikely that it would be afforded such protection.
105 See UPA § 8(3); Greenwood, supra note 2, at 58-59.
106 Greenwood, supra note 2, at 58.
loan, end loan, and bridge loan. These provisions must be drafted with great care.\textsuperscript{107}

**Disclosure**

The prospective general partner often is a developer corporation which has a contract to purchase particular land. In addition to commitments for mortgage financing, soil tests, architectural drawings, and cost and income projections may have been made. While the general partner’s contribution to the partnership will consist of its contract to purchase the land and its developmental expertise, the limited partners will provide the bulk of the equity capital.\textsuperscript{108}

In order to fully disclose the investment potential of the operation and the various risks involved therein, the syndicator will prepare a brochure similar to a securities prospectus. If the transaction falls within the purview of federal or state securities laws, the disclosure provisions of these acts must be complied with. But even assuming that the syndication is exempt from these regulatory provisions, prudence, based on *Texas Gulf Sulphur*\textsuperscript{109} thinking, dictates the making of detailed disclosures to prospective investors. Areas warranting carefully drafted disclosure have been thought to include, *inter alia*, the risk factors of the partnership, its organizational structure and management, the tax implications of the venture, the terms of the offering, and the relevant competition.\textsuperscript{110}

**Partnership Opportunity**

There is no doubt, of course, that the general partner is a fiduciary of the limited partners.\textsuperscript{111} In addition to the well-known

---


\textsuperscript{109} SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1966) (en banc), cert. denied, 394 U.S. 976 (1969) (anyone who possesses material inside information must either disclose it to the investing public or abstain from trading in or recommending the securities concerned as long as such information remains undisclosed). See also SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971) (corporate insiders who purchased stock prior to public disclosure of the corporation's discovery of ore deposit required to make restitution of profits); Mitchell v. Texas Gulf Sulphur Co., 446 F.2d 90 (10th Cir.), cert. denied, 404 U.S. 1004 (1971) (investors who sold stock because of deceptive press release regarding corporation's mineral exploitation allowed to recover from corporation and officer responsible for the release even though there had been no trading in the market by the corporation's insiders). For a discussion of the *Texas Gulf Sulphur* cases, see Note, Texas Gulf Sulphur: Expanding Concepts of Corporate Disclosure Under SEC Rule 10b-5, 43 St. John's L. Rev. 425, 655 (1969), 82 Harv. L. Rev. 938 (1969), and 26 U. Miami L. Rev. 267 (1971).

\textsuperscript{110} Heyman & Parnall, supra note 1, at 276-85.

\textsuperscript{111} See Roulac, supra note 1, at 287-91. The fiduciary relationship among partners was
doctrine of corporate opportunity, there is surely a doctrine of partnership opportunity. The articles of partnership should spell out in some detail what opportunities are denied the general partner, including therein a prefatory statement clearly indicating that the list is intended to be illustrative rather than exclusive.

Conflicts of Interest

At times, limited partnerships having common general partners may deal with one another. As a result, questions arise as to whether an improper conflict of interest is involved. Transactions of this type ought to be avoided unless the articles and recorded certificate of limited partnership specifically authorize such dealings. Where such authority does exist, however, partnership law would seem to present no obstacle. Nonetheless, it would do no harm to expand the boilerplate to include language indicating that partnerships with common general partners are to be deemed distinct and separate legal entities and that the activities of the general partner in participating in the management of another partnership (or corporation) which has business dealings with the subject partnership will not constitute an improper conflict of interest.

A number of such conflict of interest problems typically appear in real estate syndications. For example, a problem may be encountered if the general partner is an affiliate or general partner of another limited partnership dealing in similar investments. Problems also exist where an affiliate of the general partner renders

discussed in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545 (1928), wherein Chief Judge Cardozo noted:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Id. at 464, 164 N.E. at 546.

112 The corporate opportunity doctrine is based on the theory that a corporate director owes a paramount duty to his corporation. Thus, if a business opportunity is within the scope of the corporation's own activities and of advantage to it, the corporate director may not seize the opportunity for himself. See Durfee v. Durfee & Canning, Inc., 323 Mass. 187, 80 N.E.2d 522 (1948) (corporate director violated his fiduciary obligations and could not retain the profits made by him at the expense of the corporation).

113 For a discussion of the accountability of a partner as a fiduciary, see Crane & Bromberg, supra note 6, at 389-97.

114 Ballantine, Adoption of Uniform Partnership Act in California, 17 Calif. L. Rev. 623, 626, 628 (1929). Under the common law aggregate theory of partnerships, Y, being a partner of both the XY and YZ partnerships, could conceivably be a party plaintiff and a party defendant to the same action. Id. at 628. Under the UPA and the entity theory, however, such partnerships are treated as distinct entities — as though they were composed of strangers — and the common party problem thereby ceases to exist. Id. at 626, 628.
services to the partnership as, for example, an underwriter, broker, or manager.\textsuperscript{115}

The articles of partnership could probably exculpate the general partner from all violations except a wilful breach of his trust.\textsuperscript{116} Such a provision being undoubtedly valid,\textsuperscript{117} it is incum-

\textsuperscript{115} The Securities and Exchange Commission found the following possible sources of conflict to be present in the majority of real estate limited partnerships or real estate investment trust (REIT) offerings:

1. The general partner is a general partner or an affiliate of the general partner in other limited partnerships (public and/or private) dealing in similar investments.
2. The general partner has the power (and does) invest the partnership's funds in other limited partnerships in which the general partner or an affiliate is the general partner.
3. Properties are bought from or sold to affiliates.
4. Affiliates who act as underwriters, real estate brokers, managers, etc., for the partnership act in such capacities for affiliated partnerships (or other affiliated entities).
5. The same counsel represents both the partnership and the general partner.
6. In a REIT, the advisor hired, or the trustees, are engaged in other real estate activities.
7. The general partner or an affiliate is hired by the partnership to manage the properties purchased, receiving sizable compensation.
8. An affiliate of the general partner acts as the underwriter for the offering, receiving underwriting compensation.
9. An affiliate of the general partner is a real estate broker, receiving finders fees for purchases of property for the partnership.
10. An affiliate of the general partner is a real estate broker, receiving commissions for sales of the partnership's property.
11. The law firm with which the general partner is affiliated renders opinions and drafts partnership documents and receives legal fees.
12. An affiliate of the general partner acts as an insurance agent for properties acquired by the partnership, receiving commissions.
13. An affiliate of the general partner acts as the accountant and administrator for the partnership, receiving payment from the partnership for such services.
14. An affiliate of the general partner places mortgages for the partnership or otherwise acts as a finance broker, receiving commissions for such services.
15. An affiliate of the general partner acts as a leasing agent receiving fees. (In the case of low and moderate government assisted housing some fees are far in excess of those permitted by the government if additional funds of limited partners had not been involved.)

\textbf{Real Estate Advisory Comm., Report to the Securities and Exchange Commission 42-44 (Oct. 12, 1972).} The Report noted that "[t]he conflicts of interest problem can be a substantial one, in part because of the limited partners' lack of power, and in part because of the many opportunities for overreaching." \textit{Id.} at 44.

\textsuperscript{116} \textit{Cf.} 2 A. Scott, \textit{Trusts} § 170.9 (3d ed. 1967). For an example of such a wilful breach of trust, see Executive Hotel Associates v. Elm Hotel Corp., 41 Misc. 2d 354, 245 N.Y.S.2d 929 (N.Y.C. Civ. Ct. 1964), wherein the court observed:

The conflict of interest between the [general partner's] duties to his partners and his self-interest in Elm resolved itself in a series of maneuvers, artful in design, brazen in their execution and utterly callous to the fiduciary obligations owed to his limited partners.

\textit{Id.} at 357, 245 N.Y.S.2d at 932.

\textsuperscript{117} \textit{See}, e.g., Riviera Congress Associates v. Yassky, 25 App. Div. 2d 291, 295, 268 N.Y.S.2d 854, 858 (1st Dep't), \textit{aff'd}, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966), wherein the court noted that where there is no legal prohibition to the contrary, agreement regarding partnership affairs may be made according to the wishes of the partners. \textit{See also} Comment, \textit{Public Limited Partnerships in Northwest Real Estate Syndication, 7 Williamette L.J.} 74, 79-82 (1971).
bent upon the prospective investor to protect himself by carefully analyzing the articles of partnership and evaluating both the existing exculpatory clauses and the character and standing of the principals involved.

Warranties of the General Partner

The articles of partnership normally include a multitude of warranties by the general partner to the limited partners. They relate to such items as title to land, the existence of title insurance, financing, initial operating losses, zoning, availability of utilities, mechanic’s lien protection, due organization of the partnership, construction contracts, and plans and specifications.

Assignability of Limited Partnership Interests

Just as a corporate stockholder needs the right to sell and assign his stock, the limited partner needs the right to assign his interest. The certificate, together with the articles of partnership, will deal extensively with restrictions on such assignments. Customary provisions call upon counsel for the partnership to examine the proposed assignment to see that it does not offend either the Internal Revenue Code or federal and state securities laws. And, transfer to a minor, who is unable to act in those situations where consent of the limited partners is necessary, is forbidden. A right of first refusal may be retained in the other limited partners. In addition, provision is made for terminating the limited partnership status of the assignor and for admitting the assignee as a substitute limited partner. Generally, the articles vest the exclusive right to admit an assignee in the general partner. After the general partner gives his written consent to the substitution, copies of the assignment and consent, as required by the articles, will be lodged with the partnership.

The Mortgage Documents

For income tax purposes it is necessary to structure the mortgages so that no partner is personally liable. Therefore, the mortgage documents, viz, the commitment, mortgage, and mortgage note, should contain provisions immunizing all partners from personal liability, a mortgage being perfectly valid without

118 See Crane & Bromberg, supra note 6, at 149.
119 See Heyman & Parnell, supra note 1, at 260.
such.\textsuperscript{120} Alternatively, the deed may run to a nominee who executes the mortgage and conveys the mortgaged land to the partnership. The use of a nominee is uniformly recognized as an approved practice limiting the liability of principals in a real estate transaction.\textsuperscript{121}

\textit{Admission of Investors into the Partnership}

To get the partnership started, it is not uncommon to find only two partners: the promoter general partner and a nominal limited partner who makes a nominal capital contribution of $100. As the investors are signed up, they are admitted as limited partners pursuant to detailed provisions of the articles of partnership. These terms provide for the return to the nominal limited partner of his capital contribution and for his retirement from the partnership. This procedure eliminates the strawman used to create the entity, and thereafter only serious investors remain.

\textit{Treatment of Defaulting Limited Partners}

At times the investors make a downpayment on the purchase of their interests, contracting to pay the balance of the purchase price at a stated time or times. Obviously defaults will sometimes occur. Coercive provisions are common. For example, there may be a provision giving any nondefaulting limited partner the right to purchase the defaulting limited partner's interest by payment of an amount equal to 10 percent of the defaulting limited partner's prior capital contribution. If valid, such a provision has an obvious in terrorem effect, but some courts are likely to view such provisions as invalid forfeitures.\textsuperscript{122} They may also run afoul of the price-unconscionability rule.\textsuperscript{123}

\textsuperscript{120} See R. KRATOVIL, MODERN MORTGAGE LAW AND PRACTICE § 104 (1972); G. OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES §§ 102-05 (2d ed. 1970).

\textsuperscript{121} See Barkhausen v. Continental Ill. Nat'l Bank & Trust Co., 3 Ill. 2d 254, 120 N.E.2d 649, cert. denied, 348 U.S. 897 (1954) (beneficiaries of a trust created in a mortgagor's interest in mortgaged property were not liable for the mortgage indebtedness). See also Cook, \textit{Straw Men in Real Estate Transactions}, 25 WASH. U.L.Q. 232 (1940); Schwartz, Using Corporate Nominees in Real Estate Transactions, 2 REAL ESTATE REV. 91 (Fall 1972). The tax aspects of such transactions are discussed in Kurtz & Kopp, Taxability of Straw Corporations in Real Estate Transactions, 22 TAX LAW. 647 (1969).

\textsuperscript{122} See, e.g., Freedman v. Rector, Wardens & Vestrymen of St. Mathias Parish, 37 Cal. 2d 16, 230 P.2d 629 (1951) (in an action based on a contract for the sale of property, breaching party held entitled to recover the amount of his downpayment in excess of defendant's damages).

\textsuperscript{123} RESTATEMENT (SECOND) OF CONTRACTS § 234, comment e at 109 (Tent. Draft No. 5 1970).
Conclusion

The ULPA, adopted in times when ventures were small and limited partners few, is poorly adapted to large transactions. Fortunately, the Uniform Commissioners have embarked upon a project to revise its provisions. It is hoped that such a revision will answer some of the problems raised in this Article.