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# NEW LIMITED LIABILITY FOR FLORIDA LIMITED PARTNERS<sup>†</sup>

Donald J. Weidner\*

## I. INTRODUCTION

In 1822, decades before any state was willing to pass a general incorporation act, New York and Connecticut enacted our country's first limited partnership statutes.<sup>1</sup> Based on the French *Societe en Commandite*, the limited partnership acts authorized the creation of partnerships with two classes of "partners," general and limited. The basic approach was the same as today's. General partners were what we normally think of as partners, persons with full power to run the business who are unlimitedly personally liable to its contract and tort creditors. Limited partners, on the other hand, were passive investors who could lose their protected status as limited partners if they took part in the control of the business. In short, if the limited partners were truly passive investors, and if they followed a statutorily prescribed procedure for publicly recording their status as passive investors, they would be insulated from personal liability to the creditors of the partnership. Although limited partnership statutes spread, interest in limited partnerships began to fade as the corporate form became more freely available.

In 1916, in a period of relative dormancy of the limited partnership, the National Conference of Commissioners on Uniform State Laws adopted the Uniform Limited Partnership Act<sup>2</sup> ("Original Act"), which was subsequently adopted by virtually every state, including Florida.<sup>3</sup> For decades thereafter, the limited partnership remained a relatively insignificant form of business association. By the early 1960's, however, it had become clear that limited partnerships were being classified as partnerships for federal income tax purposes. Limited partners were offered limited liability similar to that available in the corporate form, minus the corporate income tax, plus the

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1. H. REUSCHLEIN AND W. GREGORY, AGENCY AND PARTNERSHIP 434 n.54 (1979).

2. Unif. Limited Partnership Act, 6 U.L.A. 561.

3. FLA. STAT. ANN. §§ 620.01 *et seq.*

"pass through" of tax losses available to those who are classified as partners for federal income tax purposes.<sup>4</sup> Because of this attractive combination of advantages, limited partnerships began to proliferate, particularly in depreciable real estate.

In 1976, the Uniform Commissioners replaced the bare-bones Original Act with a new act (the "1976 Act"). Although the 1976 Act was generally viewed as an improvement, it was a far from perfect updating of the statutory foundation for a form of business organization that had exploded in currency and come to be used in a wide range of sophisticated transactions involving many investors and large sums of money.<sup>5</sup> In 1985, prior to issuing their customary Official Comment, the Uniform Commissioners issued the latest version of the Uniform Limited Partnership Act (the "Uniform Act").<sup>6</sup>

In June of 1986, the Florida Legislature focused on the unprecedented significance of limited partnerships in Florida. The Staff of the House Commerce Committee reported that there are currently 12,110 limited partnerships, both domestic and foreign, registered to transact business in Florida and that an estimated 3,000 new limited partnerships will register this year.<sup>7</sup> It also noted that limited partnerships often involve many more limited partners than was anticipated at the time of the Original Act, and are used to finance a wide variety of ventures of unprecedented complexity. In addition, experience elsewhere had indicated the need for a wide range of new provisions, including those designed to clarify and fortify the basic limited liability of limited partners.<sup>8</sup> Accordingly, the Legislature completely

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4. For a discussion of the basic consequences of being classified as a partnership for federal income tax purposes, see Weidner, *The Existence of State and Tax Partnerships: A Primer*, 11 FLA. ST. U.L. REV. 1, 26-40 (1983). The Florida Legislature perceived itself as regulating a form of business organization characterized by its combination of limited liability and partnership tax classification. See Staff Analysis of CS/HB 347, Uniform Limited Partnership Act, Committee on Commerce, Florida House of Representatives 2 (April 21, 1986) [hereinafter cited as "Commerce Staff Report"]: "It is a plain fact that but for this tax flow-through characteristic of limited partnerships, many risky yet socially desirable projects, would not be undertaken."

5. The 1976 Act is published, together with Official Comment, at 6 U.L.A. 201 (1986 Supp.). See generally Comment, *Revising Ohio's Limited Partnership Law*, 54 U. CIN. L. REV. 271 (1985).

6. The Uniform Act appears in the 1986 Supplement to 6 U.L.A., accompanied by a note that states that "the prefatory note and comments have not yet been approved." 1986 Supp. at 284. The author is informed by a Commissioner that internal concerns over appropriate style have delayed the Commissioners from issuing the "prefatory note and comments" with the text of the Uniform Act.

7. Commerce Staff Report, *supra* note 4, at 10.

8. See authority cited *infra* note 116.

scrapped Florida's existing limited partnership act, which was based on the Original Act, and replaced it with a new statute (the "new Florida Act"), which is based on the Uniform Act. The new Florida Act provides that it is to be construed to make uniform the law of limited partnerships among the states adopting the Uniform Act.<sup>9</sup> The purpose of this article is to explain and evaluate the provisions of the new Florida Act that determine the limited liability of limited partners.

## II. FORMATION AND FAILURE TO FILE

### A. The Certificate Requirement and Point of Formation

The new Florida Act states that a limited partnership is "a partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners."<sup>10</sup> It further provides that a limited partnership is formed

at the time of the filing of the certificate of limited partnership with the Department of State or at any later time specified in the certificate of limited partnership if, in either case, there has been substantial compliance with the requirements of this section [8].<sup>11</sup>

The requirements of section eight are simply that a certificate must be executed and filed with the Department of State setting forth the name and mailing address of the limited partnership, the address of an office where required records are kept and the name and address of an agent for service of process, the name and business address of each general partner and the latest date upon which the limited partnership is to dissolve.<sup>12</sup> The certificate must be accompanied by an affidavit declaring the amount of the capital contributions of the limited partners and the amount anticipated to be contributed by the limited partners.<sup>13</sup>

There are two basic issues that are interrelated but must be dis-

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9. New Florida Act § 68(1), Commerce Staff Report, *supra* note 4, at 9. The New Florida Act to date only appears as 1986 Fla. Laws 86-263.

10. New Florida Act § 2(7). This is the same definition for "domestic limited partnership." New Florida Act § 2(4) defines "foreign limited partnership" as "a partnership formed by two or more persons under the laws of any state other than this state and having as partners one or more general partners and one or more limited partners."

11. New Florida Act § 8(2).

12. New Florida Act § 8(1). New Florida Act § 8(1)(f) indicates that the general partners may decide to include other matters in the certificate.

13. New Florida Act § 8(1).

tinguished. One, has a limited partnership been formed notwithstanding the failure to file a certificate? Two, if a limited partnership has not been formed, are the would-be limited partners automatically liable as general partners?<sup>14</sup>

With respect to the first issue, the new Florida Act makes it much more difficult to argue that a limited partnership has been formed notwithstanding the failure to file a certificate. Prior decisions had split on the issue. Some courts assumed that no limited partnership could exist until a certificate was filed.<sup>15</sup> Others emphasized that the Original Act does not state precisely when a certificate must be filed or when in relation to its filing the limited partnership begins.<sup>16</sup> The latter approach seems to be superceded by the provision in the new Florida Act that the limited partnership is formed "at the time of the filing of the certificate" or "at any later time specified in the certificate."<sup>17</sup> On the other hand, it still seems possible to argue that the purpose of the filing is simply to provide notice, and if creditors have actual notice that they are dealing with a limited partnership, they should not be permitted to rely on the fortuity of a failure to file to assert nonformation and thereby achieve a windfall.<sup>18</sup>

With respect to the second issue, there is no policy reason to assume that would-be limited partners automatically become liable as general partners if no limited partnership is formed.<sup>19</sup> Indeed, the

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14. Another question that could be raised is whether the "substantial compliance" test of the new Florida Act is to be applied at the partnership level or at the level of each individual partner. Cf. *Franklin v. Rigg*, 237 S.E.2d 526, 528 (Ga.App. 1977), which emphasized that "the general tenor of the [Original Act] is remedial and drawn with the purpose of protecting investors where there is a substantial compliance on their part."

15. See, e.g., *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel*, 587 P.2d 191 (Wash. App. 1978).

16. Section 2(2) of the Original Act provided that a limited partnership "is formed if there has been substantial compliance in good faith" with the requirement to sign, swear to and file a certificate. 6 U.L.A. at 568. In *Franklin v. Rigg*, 237 S.E.2d 526, 527 (Ga. App. 1977), the court said the Original Act "is admittedly vague as to the time when the existence of the partnership commences." Although FLA. STAT. ANN. § 620.02(2) (1985) differs from § 2(2) of the Original Act, it, too, fails to specify when a limited partnership comes into existence.

17. New Florida Act § 8(2).

18. See *Garrett v. Koepke*, 569 S.W.2d 568, 570-71 (Tex. Civ. App. 1978): "We hold, therefore, that where a party has knowledge that the entity with which he is dealing is a limited partnership, that status is not changed by failing to file." Cf. *Vulcan Furniture Mfg. Corp. v. Vaughn*, 168 So. 2d 760, 764 (Fla. 1st DCA 1964), in which the court found a "de facto" limited partnership notwithstanding the failure to make mandatory filings after initial formation.

19. But see *Dwinell's Central Neon v. Cosmopolitan Chinook Hotel*, 587 P.2d 191 (Wash. App. 1978), which seems to assume that if no limited partnership has been formed, the would-be limited partners automatically become general partners.

drafters of the Original Act stated to the contrary:

The limited partner not being in any sense a principal in the business, failure to comply with the requirements of the act in respect to the certificate, while it may result in the nonformation of the association, does not make him a partner or liable as such.<sup>20</sup>

Thus, even under the Original Act, the would-be limited partner whose certificate has not been filed must fall within the usual definition of "partner" before he can be burdened with personal liability.<sup>21</sup> There is nothing in the new Florida Act that indicates any increased exposure of would-be limited partners. Indeed, the new Florida Act provisions that give limited partners additional protection from liability for becoming active in the business suggest just the opposite.<sup>22</sup> Furthermore, now that limited partners need not even be named in the certificate, it makes even less sense to make them automatically personally liable simply because it has not been filed.<sup>23</sup>

The certificate required by the new Florida Act is dramatically different from the certificate required under prior law. Prior law required that the certificate disclose the names and places of residence of the limited partners, together with their agreed-upon contributions, the time when those contributions were to be returned, the share of profits or other compensation by way of income which each limited partner was to receive, and the right, if any, of the partners to admit additional limited partners.<sup>24</sup> In short, the certificate required disclosure of who the general and limited partners were and might be and what the limited partners invested and were promised in return. Under the new Florida Act, the certificate need not even name the limited partners. Most of the disclosure required under the new Florida Act is made outside the certificate itself.

A major component of the new disclosure provisions benefits the limited partners themselves. These provisions recognize that limited partners, like other purchasers of securities, may be best served by full disclosure that is often difficult to obtain if it is not required by law.<sup>25</sup> Consequently, the certificate must direct its reader to the office

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20. Original Act § 1, Official Comment, 6 U.L.A. at 564.

21. See Unif. Partnership Act § 6(1), 6 U.L.A. at 22; FLA. STAT. ANN. § 620.585(1) (1985).

22. See the discussion of new Florida Act § 25, text accompanying notes 84-111, *infra*.

23. See *infra* note 21 and accompanying text for a discussion of § 6 of the new Florida Act.

24. Original Act § 2(1)(a), 6 U.L.A. at 568; FLA. STAT. ANN. § 620.02(1)(a) (1985).

25. See also new Florida Act § 51, authorizing limited partners to bring derivative actions on behalf of limited partnerships.

where certain records must be kept.<sup>26</sup> Those records include the names and addresses of all partners, separately identifying general and limited, the certificate and any amendments,<sup>27</sup> copies of any federal, state and local partnership income tax returns and reports for the three most recent years, and copies of the current written partnership agreements and any partnership financial statements for the three most recent years.<sup>28</sup> In addition, if not contained in a written partnership agreement, the office must keep a written statement of:

1. The amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute;

2. The times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;

3. Any right of a partner to receive distributions, or of a general partner to make distributions to a partner, that include a return of all or any part of the partner's contribution; and

4. Any events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.<sup>29</sup>

These records are subject to inspection and copying "at the reasonable request, and at the expense, of any partner."<sup>30</sup>

Other disclosure requirements are more directly for the benefit of law enforcement officials. In addition to giving its records office address, the certificate must also state the name and address of the agent for service of process on the limited partnership.<sup>31</sup> Detailed information must be provided by the registered agent if he is served a subpoena by the Department of Legal Affairs.<sup>32</sup> This requirement was added at the request of the Attorney General's office to help "discover who the investors in the limited partnership are and to have subpoena power over them."<sup>33</sup>

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26. New Florida Act § 5(1).

27. Executed copies of any powers of attorney pursuant to which any certificate was executed must also be kept. New Florida Act § 6(1)(b).

28. New Florida Act § 6(1)(a)-(d).

29. New Florida Act § 6(1)(e).

30. New Florida Act § 6(2).

31. New Florida Act §§ 5(2) and 8(1)(b).

32. New Florida Act § 73(3).

33. Commerce Staff Report, *supra* note 4, at 3. Compare similar provisions in the Florida General Corporation Act at FLA. STAT. ANN. § 607.325 (1985).

## B. The Proper Limited Partner

A limited partner is "a person who has been admitted to a limited partnership as a limited partner in accordance with the partnership agreement."<sup>34</sup> Once the certificate is filed, the agreement of the parties controls the point at which a person becomes a limited partner. The new Florida Act provides that a person becomes a limited partner on the date the original certificate is filed or the date stated in the records of the limited partnership, whichever is later.<sup>35</sup> Once a person becomes a limited partner, he will not become liable as a general partner unless his name is improperly used or unless he takes part in the control of the business.<sup>36</sup> If the limited partnership is properly formed and operated, the limited partner's sole obligation is to make the contribution he promised to the partnership.

There are two striking features of the new Florida Act concerning the limited partner's liability to make the contribution he promised. First, a promise by a limited partner to contribute to his partnership "is not enforceable unless it is set out in a writing signed by the limited partner."<sup>37</sup> Second, the new Florida Act differs radically from the present law's firm policy that the contribution of a limited partner "may be cash or other property, but not services."<sup>38</sup> It expressly provides that the contribution of a partner "may be in cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services."<sup>39</sup> Unless the partnership agreement provides to the contrary, every partner must honor his promise to contribute cash, property, or services, "even if he is unable to perform because of his death or disability or any other reason."<sup>40</sup> If he does not perform, the partnership has the option to require him to contribute cash in an amount equal to the stated value of the contribution that remains to be made.<sup>41</sup> Unless provided otherwise in the partnership agreement, the obligation of a

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34. New Florida Act § 2(6).

35. New Florida Act § 24.

36. See the discussion of § 25 of the new Florida Act, *infra* note 84 and accompanying text.

37. New Florida Act § 30(1).

38. Original Act § 4, 6 U.L.A. at 579; FLA. STAT. ANN. § 620.04 (1985).

39. New Florida Act § 29. See also new Florida Act § 2(2), which defines "contribution" to include "any cash, property, or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services, which a partner contributes to a limited partnership in his capacity as a partner."

40. New Florida Act § 30(2).

41. *Id.*



partner to contribute may be compromised only by consent of all the partners.<sup>42</sup> However, a creditor "who extends credit or otherwise acts in reliance on that obligation after the partner has signed a writing that indicates the obligation and before the amendment or cancellation of the writing" may enforce it.<sup>43</sup> As the Commerce Staff Report explains:

Since this bill allows contributions in the form of promises to render services, provisions were added so that a partner who is unable to perform those services would be required to pay the cash value of the services unless the partnership agreement provides otherwise or the other business partners consent to a compromise. However, regardless of the compromise, if a creditor extends credit in reliance on that obligation and the partner has signed a writing that recognizes the obligation, that creditor may enforce the original obligation.<sup>44</sup>

### C. The Person Erroneously Believing Himself a Limited Partner

Section 26 of the new Florida Act contains a completely new and much expanded provision concerning the liability of a person erroneously believing himself to be a limited partner. Given that one becomes a limited partner on the later of the date the certificate is filed or the date stated in the records of the limited partnership,<sup>45</sup> this provision will only apply to a very limited class of situations. Prior case law had already established that its predecessor was confined to defective formation situations,<sup>46</sup> and there is nothing in the new Flor-

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42. New Florida Act § 30(3).

43. *Id.*

44. Commerce Staff Report, *supra* note 4, at 5. See also *id.* at 6:

Similarly, under section 30, the partnership agreement may provide that the interest of any partner who fails to make any contribution that he is obligated to make shall be subject to penalties as set forth in the partnership agreement. Such penalties may include reducing the defaulting partner's proportionate interest in the limited partnership, subordinating his interest to that of nondefaulting partners, forcing sale, redemption, or forfeiture of his partnership interest at a formulated price, etc.

45. New Florida Act § 24(1).

46. See *Vulcan Furniture Mfg. Corp. v. Vaughn*, 168 So. 2d 760, 764 (Fla. 1st DCA 1964):

The [erroneous belief followed by prompt renunciation] section of our statute is a part of the uniform limited partnership act, having application to those situations where, because of a failure to comply with the statute, the limited partnership never comes into existence . . . [T]his section . . . is not applicable to the situation . . . where the limited partnership was validly formed, but subsequently lost its status as such for its failure to comply with the requirements of the statute regarding payment of annual fee and securing a renewal certificate of authority to do business as a lim-

ida Act that indicates that the new section 26 is to have any broader applicability:

(1) Except as provided in subsection (2), a person who makes a contribution to a business enterprise and erroneously but in good faith believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if within a reasonable time after ascertaining the mistake, he:

(a) Causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed; or

(b) Withdraws from future equity participation in the enterprise by executing and filing with the Department of State a certificate declaring withdrawal under this section.

(2) A person who makes a contribution of the kind described in subsection (1) is liable as a general partner to any third party who transacts business with the enterprise before the person withdraws and an appropriate certificate is filed to show withdrawal or before an appropriate certificate is filed to show that the person is not a general partner, but in either case only if the third party actually believed in good faith that the person was a general partner at the time of the transaction.<sup>47</sup>

This new provision is essentially the same as the Uniform Act except that the latter does not expressly give the would-be limited partner "a reasonable time" after ascertaining the mistake.<sup>48</sup> It changes existing Florida law in several important respects. First, it adds the requirement that the erroneous belief in limited partner status must be "in good faith."<sup>49</sup> Second, it provides the limited partner with the alternative of curing the defect by causing an appropriate certificate of amendment to be filed or withdrawing "from future eq-

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ited partnership . . . . It would thus appear that even though the limited partnership involved in this case lost its right to operate as such because of its failure to make its annual report and secure the renewal certificate of authority . . . , such loss of status did not automatically convert appellee's status to one of a general partner as a matter of law. The legal character of the partnership ceased to continue as a de jure limited partnership, but became a de facto limited partnership . . . . The partnership's loss of legal status as a de jure limited partnership therefore did not automatically convert appellee's legal relationship to that of a general partner in the business.

*Id.* at 764.

47. New Florida Act § 26.

48. Uniform Act § 304, 6 U.L.A. at 290 (1986 Supp.).

49. Compare FLA. STAT. ANN. § 620.11 (1985), referring only to the person "erroneously believing that he had become a limited partner. . . ."

uity participation" by filing a certificate of withdrawal. This reference to "future equity participation" is intended to make clear that the person who chooses to withdraw in order to protect himself from personal liability is not required to renounce his then current interest in the partnership.<sup>50</sup> Finally, the new provision preserves general liability with respect to any third party who transacts business with the enterprise before the investor takes his curative action, provided the third party believed in good faith that the investor was a general partner.<sup>51</sup>

### III. LIABILITY FOR FALSE STATEMENT IN CERTIFICATE

One possible foundation for establishing the personal liability of a limited partner has been a false statement in the certificate. The Original Act provided that anyone suffering a loss by reliance on a false statement in a certificate could hold liable any party to the certificate who knew the statement to be false at the time he signed the certificate, or, subsequently, but within a sufficient time before the statement was relied upon to enable him to take curative action.<sup>52</sup>

The new Florida Act elevates the reliance requirement a plaintiff must prove to "reasonable reliance."<sup>53</sup> More basically, the fact that limited partners and their contributions are no longer required to be listed in the certificate suggests that they are no longer among those who "execute" the certificate. This would explain why the basic section on "liability of limited partner to third parties,"<sup>54</sup> which dis-

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50. FLA. STAT. ANN. § 620.11 (1985) vaguely required the withdrawing person to renounce "his interest in the profits of the business or other compensation by way of income." The Uniform Commissioners first added the language of "future equity participation" in § 304(a) of the 1976 Act, which Florida never adopted. Their Official Comment to the 1976 Act explains the provision, in part, as follows:

The provisions . . . are intended to clarify an ambiguity in the prior law by providing that a person who chooses to withdraw from the enterprise in order to protect himself from liability is not required to renounce any of his then current interest in the enterprise so long as he has no further participation as an equity participant.

6 U.L.A. at 244 (1986 Supp.).

51. Delaware's version of this provision protects only a third party who relies on the credit of the would-be limited partner. The third party who transacts business with the partnership before timely curative action is taken may recover only if he "actually believed in good faith that such person was a general partner at the time of the transaction, acted in reasonable reliance on such belief and extended credit to the partnership in reasonable reliance on the credit of such person." DEL. CODE ANN. tit. 6, § 17-304(b)(2) (1985 Interim Supp.).

52. Original Act § 6, 6 U.L.A. at 581; FLA. STAT. ANN. § 620.06 (1985).

53. New Florida Act § 15.

54. New Florida Act § 25.

cusses both the improper use of a limited partner's surname and the exercise of control by a limited partner, makes no mention of limited partner liability for a false statement in a certificate. Stated differently, the new Florida Act provision on liability for a false statement in the certificate seems aimed almost exclusively at general partners.

Section 15 of the new Florida Act provides that one who suffers loss by "reasonable reliance" on a false statement in the certificate may recover damages from:

(1) Any person who executed the certificate, or caused another to execute it on his behalf, and knew, and any general partner who knew or should have known, the statement to be false at the time the certificate was executed; and

(2) Any general partner who thereafter knows or should have known that any arrangement or other fact described in the certificate has changed, making the statement inaccurate in any material respect, within a sufficient time before the statement was relied upon reasonably to have enabled that general partner to cancel or amend the certificate or to file a petition for its cancellation or amendment under section 13.<sup>55</sup>

This provision of the new Florida Act is essentially the same as the Uniform Act, except that: (a) it specifies that the reliance must be "reasonable;" and (b) it provides that liability because of a changed fact must be based on a statement that is inaccurate in some "material" respect.<sup>56</sup>

The basic question is whether a limited partner is a "person who executed the certificate, or caused another to execute it on his behalf." Because limited partners no longer need be named in the certificate, it would seem that a limited partner is not generally a person who either executes a certificate or causes another to execute it on his behalf.<sup>57</sup> It would seem that the person executing the certificate should generally be viewed as executing it on behalf of the partnership as an entity, leaving only the general partners personally liable and not the limited partners who need not even be named. On the other hand, under the new Florida Act limited partners can receive

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55. New Florida Act § 15.

56. Compare Uniform Act § 207, 6 U.L.A. at 289 (1986 Supp.).

57. This basic question may be answered when the Official Comment to the Uniform Act is published. See *supra* note 6. See also the Official Comment to the antecedent of Uniform Act § 207, 1976 Act § 207, which refers to "providing explicitly for the liability of persons who sign a certificate as agent under a power of attorney and . . . confining the obligation to amend a certificate . . . in light of future events to a general partner." 6 U.L.A. at 237 (1986 Supp.).

their interests for services<sup>58</sup> and can assume many of the responsibilities of the partnership business.<sup>59</sup> To the extent their responsibilities include preparing and filing the certificate, they presumably can be people who execute the certificate for purposes of section 15.

#### IV. IMPROPER USE OF SURNAME

Even prior to the Original Act, a limited partner could lose his limited liability if his name was improperly used in the partnership name. The basic idea is that those who permit their names to be used in partnership names should be treated as if they realize that the use of a name inevitably suggests liability as a principal. The new Florida Act continues this basic policy by providing that the name of the limited partnership<sup>60</sup> may not contain the name of a limited partner unless:

(a) That name is also the name of a general partner or the corporate name of a corporate general partner; or

(b) The business of the limited partnership had been carried on under that name before the admission of that limited partner

. . . .<sup>61</sup>

If neither of these circumstances is present, a limited partner who "knowingly permits" his name to be used in the name of the limited partnership "is liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner."<sup>62</sup>

#### V. THE "CONTROL" LIMITATION

Perhaps the greatest disadvantage to the limited partnership form of doing business has been uncertainty about the "control" limitation.<sup>63</sup> The basic differences of opinion under the Original Act must

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58. New Florida Act §§ 2(2) and 29.

59. New Florida Act § 25(2).

60. Section 4 of the new Florida Act provides that the limited partnership's name may be reserved before the limited partnership is formed.

61. New Florida Act § 3(2).

62. New Florida Act § 25(4).

63. See J. CRANE AND A. BROMBERG, *LAW OF PARTNERSHIP* 147 (1968):

Limited partners are exempt from personal liability on condition that they do not participate in management. There is no express bar to their participation, but the threat of personal liability is a strong deterrent. Neither the Act nor the decisions under it are very helpful on the critical question of how much review, advisory, management selection, or veto power a limited partner may have without being regarded

be understood to appreciate the significance of the provisions under the new Florida Act.

### A. Decisions under the Original Act

Section 7 of the Original Act provided that a limited partner "shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."<sup>64</sup> There were two basic questions presented by this section. First, what constitutes "control" within the meaning of this section? It was anticipated by the drafters that limited partners would take "some degree of control over the conduct of the business."<sup>65</sup> Second, what are the consequences if a limited partner exercises a prohibited amount of control? Some assumed that limited partners were automatically liable as general partners if they took part in the control of the business. However, that is not what the statute says; that would have been an easy thing for the drafters to say and they chose not to. The Original Act provided that a limited partner "shall not become liable as a general partner unless . . . he takes part in the control of the business." That is, the exercise of control is a minimum requirement before a limited partner will be deemed a general partner; the statute does not expressly state that the mere exercise of control is sufficient. In some jurisdictions, courts inferred that a reliance requirement must be satisfied before third parties can establish the personal liability of limited partners on the ground that they exercised too much control.<sup>66</sup>

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as taking part in control. The resulting uncertainty is probably the greatest drawback of the limited partnership form.

See also M. GORDON, 3 FLORIDA CORPORATIONS MANUAL § 52.14:

The Florida law does not indicate what level of management participation will cause a limited partner to lose his limited liability status. No assistance is gained from ULPA. Numerous cases have addressed this issue, but there is no consistent pattern which helps in determining what level of participation is permitted by a limited partner before loss of that status. The issue has not been faced by the Florida courts.

64. Original Act § 7, 6 U.L.A. at 582. FLA. STAT. ANN. § 620.07 (1985) added "or violates s. 620.05" to the end of Original Act § 7. The section referred to is the one that provides that a limited partner's surname generally may not be used in the partnership name.

65. See text accompanying note 77 *infra*.

66. See Feld, *The "Control" Test for Limited Partnerships*, 82 HARV. L. REV. 1471 (1969). The imposition of general liability on a limited partner who exercises control may be prospective from exercise point and not retrospective. That is, he will not necessarily be held liable as a general partner *ab initio*. See *Garrett v. Koepke*, 569 S.W.2d 568 (Tex. Civ. App. 1978).

*Delaney v. Fidelity Lease, Ltd.*,<sup>67</sup> is a landmark case imposing personal liability on limited partners on the ground that they exercised control. The plaintiffs leased land to a limited partnership that had a corporation as its only general partner and twenty-two individuals as its limited partners. Three of the individual limited partners were directors, officers and shareholders of the corporate general partner. The lease was executed by "Fidelity Lease, Ltd., a limited partnership acting by and through Interlease Corporation, General Partner,"<sup>68</sup> thus leaving no suggestion that any of the limited partners was to be personally liable. Indeed, execution of the lease was a clear statement that the limited partners were not to be personally liable. The lease required the plaintiffs to build a restaurant, which they did, and required the limited partnership to take possession and pay rent, which it failed to do.

Liability was clear as to the limited partnership itself and, consequently, as to the corporate general partner. However, it was also clear that the liability of the partnership and its corporate general partner were worthless. Initially, the plaintiffs sued all the limited partners, apparently on the theory that no limited partnership had been formed because a corporation cannot be the only general partner in a limited partnership. The Original Act required "one or more general partners and one or more limited partners,"<sup>69</sup> and the plaintiffs' position was that a corporation cannot be a "legal general partner." The action was dropped against the limited partners who were not involved in the general partner and, amazingly, the court specifically declined to decide whether a corporation can ever become a "legal general partner."<sup>70</sup> The action proceeded, and was successful, against the three limited partners who were the directors, officers and shareholders of the corporate general partner. The court seemed to focus on them in their capacity as officers, and concluded both that they had exercised an impermissible level of control, and that that exercise resulted in their personal liability.

*Delaney* created an unfortunate windfall for the plaintiffs, who had not bargained for the personal liability of the limited partners.<sup>71</sup>

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67. 526 S.W.2d 543 (Tex. 1975).

68. *Id.* at 545.

69. Original Act § 1, 6 U.L.A. at 562.

70. 526 S.W.2d at 546.

71. Compare the better-reasoned opinion of the court below:

The logical reason to hold a limited partner to general liability under the control prohibition . . . is to prevent third parties from mistakenly assuming that the limited

Indeed, it appears that the freedom of the limited partners from personal liability was at the essence of the bargain struck. Nevertheless, the court repudiated the idea that reliance should be part of the plaintiffs' case or that lack of reliance should be an affirmative defense: "The statute makes no mention of any requirement of reliance on the part of the party attempting to hold the limited partner personally liable."<sup>72</sup>

Unhampered by any reliance requirement similar to what other courts had found, the court concluded that the three limited partners were liable because they had exercised control within the meaning of Original Act section 7. They had argued that it was their corporation, not they, who exercised the control, and that the corporate existence should not be ignored. The court, however, ignored the existence of the corporation, stating that "courts will disregard the corporate fiction . . . where it is used to circumvent a statute." In the case of limited partnerships, "[s]trict compliance with the statute is required if a limited partner is to avoid liability as a general partner."<sup>73</sup> The court focused on the statutory requirement that there be at least one general partner.<sup>74</sup> If the sole corporate general partner were not ignored, "the statutory requirement of at least one general partner with general liability in a limited partnership can be circumvented or vitiated by limited partners operating the partnership through a corporation with minimum capitalization and therefore minimum liability."<sup>75</sup>

A very different result was reached under quite similar facts in *Frigidaire Sales Corp. v. Union Properties, Inc.*<sup>76</sup> The defendants were two limited partners who were also directors, officers and shareholders of the corporation that was the only general partner of a limited partnership that had breached its contract. It was accepted as a

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partner is a general partner and to rely on his general liability. However, it is hard to believe that a creditor would be deceived where he knowingly deals with a general partner which is a corporation. That in itself is a creature specifically devised to limit liability. The fact that certain limited partners are shareholders, directors or officers of the corporation is beside the point where the creditor is not deceived.

*Delaney v. Fidelity Lease, Ltd.*, 517 S.W.2d 420, 425 (Tex. Civ. App. 1974).

72. 526 S.W.2d at 545.

73. 526 S.W.2d at 546. Compare Original Act § 28(1), 6 U.L.A. at 617; FLA. STAT. ANN. § 620.28(1) (1985): "The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act."

74. Original Act § 1, 6 U.L.A. at 562.

75. 526 S.W.2d at 546.

76. 562 P.2d 244 (Wash. 1977).



matter of fact that the two limited partners "controlled [the corporate general partner] and through their control of [the corporate general partner] they exercised the day-to-day control and management of [the limited partnership]."<sup>77</sup> Nevertheless, the Supreme Court of Washington held that the two limited partners were not personally liable.

The court first made clear that it is permissible in Washington to have a limited partnership with a corporation as the sole general partner. The Uniform Partnership Act, which applies to limited partnerships absent express provision to the contrary,<sup>78</sup> expressly provides that a corporation is a "person" who may become a partner.<sup>79</sup> Because there is no express provision to the contrary, said the court, corporations may also be partners in limited partnerships. This conclusion was reinforced by a Washington provision that anticipated a vote by the limited partners on the "transfer of a majority of the voting stock of a corporate general partner."<sup>80</sup> The court distinguished *Delaney* on the ground that the corporation and the limited partnership were set up contemporaneously, and the sole purpose of the corporation was to operate the limited partnership. The *Delaney* court was concerned that the limited partners who controlled the corporation were obligated to operate the corporation for the benefit of the partnership.

This is not the case here. The pattern of operation of [the sole corporate general partner] was to investigate and conceive of real estate investment opportunities and, when it found such opportunities, to cause the creation of limited partnerships with [itself] acting as the general partner. [The limited partnership in question] was only one of several limited partnerships so conceived and created. [The two limited partners] did not form [the corporate general partner] for the sole purpose of operating [the one limited partnership in question]. Hence, their acts on behalf of [the corporation] were not performed merely for the benefit of [the one limited partnership].<sup>81</sup>

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77. *Id.* at 245.

78. U.P.A. § 6(2), 6 U.L.A. at 22; FLA. STAT. ANN. § 620.585(2) (1985).

79. U.P.A. § 2, 6 U.L.A. at 12; FLA. STAT. ANN. § 620.565(3) (1985).

80. WASH. REV. CODE ANN. § 25.08.070(2)(a) (Supp. 1982).

81. 562 P.2d at 246. The dissent more directly rejected the reasoning of the Texas court that,

because the limited partners acted as officers of the corporate general partner, they "were obligated to their other partners to so operate the corporation as to benefit the partnership." 517 S.W.2d at 426. We find no inherent wrong in this. Persons in the position of the individual defendants in this case would be bound to act in the best

Despite this attempt to distinguish *Delaney* on its facts, it was clear that the Supreme Court of Washington differed in its basic approach to the issue. Whereas *Delaney* sought to give substance to the requirement of one general partner by insisting that there be meaningful personal liability, the *Frigidaire* court felt that the concern with minimum capitalization may arise any time a creditor deals with a corporation. Given that a corporation may be the sole general partner, "this concern about minimum capitalization, standing by itself, does not justify a finding that the limited partners incur general liability for their control of the corporate general partner."<sup>82</sup> The court said that if a corporate general partner is inadequately capitalized, creditors are protected under the "piercing-the-corporate-veil" doctrine of corporate law. However, when the limited partners control the corporation only in their capacities as agents for it, and no creditors are misled into thinking they are acting on their own behalf, the *Frigidaire* court indicated it would respect the separate corporate existence and refuse to impose personal liability on the limited partners.<sup>83</sup>

## B. The New Florida Act

The new Florida Act continues to suggest that a limited partner

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interests of both the corporate general partner and the limited partners under the guidelines of RCW 25.08.120. The dual capacities are not inimical as asserted.

*Frigidaire Sales Corp. v. Union Properties, Inc.*, 544 P.2d 781, 784 (Wash. App. 1976).

82. 562 P.2d at 246.

83. A somewhat different approach was taken in *Mursor Builders, Inc. v. Crown Mountain Apt. Assocs.*, 467 F. Supp. 1316 (V.I. 1978). The court noted the "literal" approach of *Delaney* that focused on "control" and seemed to indicate sympathy for the *Frigidaire* approach that considered "creditor reliance."

However, third party reliance is not the sole criterion. Some meaning must be given to the language embodied in [the control limitation]. I do not hold that merely by acting as officers of a corporate general partner, limited partners become subject to general liability. Rather, I hold that where, as herein, the corporate officers co-mingle partnership funds with personal funds, fail to maintain complete corporate and partnership financial records, utilize corporate and partnership funds for their personal enjoyment, and fail to maintain their corporate officer identity in conducting partnership affairs, said limited partners become generally liable for the debts of the partnership irrespective of third party creditor reliance.

*Id.* at 1333-34. For a discussion of early cases on the "control" limitation, including those that discuss it in terms of "interference" with a general partner, see Basile, *Limited Liability for Limited Partners: An Argument for the Abolition of the Control Rule*, 38 VAND. L. REV. 1199, 1202-04 (1985). For a discussion of cases under the Original Act, see Abrams, *Imposing Liability for "Control" under Section 7 of the Uniform Limited Partnership Act*, 28 CASE W. RES. L. REV. 785, 791-802 (1978).

can become liable by exercising too much control. Section 25(1) provides as follows:

(1) Except as provided in subsection (4) [dealing with the improper use of a limited partner's name in the partnership name], a limited partner is not liable for the obligations of a limited partnership unless he is also a general partner or, in addition to the exercise of his rights and powers as a limited partner, he participates in the control of the business.<sup>84</sup>

However, further provisions that elaborate this control limitation suggest that there may never be a case in which a limited partner will be held personally liable simply because he exercised too much control.

First, the new Florida Act expressly imposes a reliance requirement on plaintiffs who pursue the "control" route to the personal liability of limited partners:

[I]f the limited partner participates in the control of the business, he is liable only to persons who transact business with the limited partnership reasonably believing, based upon the limited partner's conduct, that the limited partner is a general partner.<sup>85</sup>

This particular reliance requirement is based on the Uniform Act.<sup>86</sup> It is very protective of limited partners because it both defines reliance in terms of belief that the limited partner is a general partner and states that the reliance must be reasonable. In essence, it is not control *per se* that causes a limited partner to become liable as a general partner; it is control that reasonably induces another to believe that the limited partner is a general partner.<sup>87</sup>

Second, the new Florida Act provides that participating in control does not include proposing, approving, or disapproving, by voting

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84. New Florida Act § 25(1). The new Florida Act also continues the old rule that a person may be both a general partner and a limited partner. See new Florida Act § 22:

A general partner also may make contributions to and share in profits, losses, and distributions as a limited partner. A person who is both a general partner and a limited partner has the rights and powers, and is subject to the restrictions and liabilities, of a general partner and, except as provided in the partnership agreement, also has the powers, and is subject to the restrictions, of a limited partner to the extent of his participation in the partnership as a limited partner.

85. New Florida Act § 25(1).

86. Uniform Act § 303(a), 6 U.L.A. at 290 (1986 Supp.).

87. Compare *Outlet Co. v. Wade*, 377 So. 2d 722 (Fla. 5th DCA 1979), emphasizing the importance of creditor reliance on the "individual credit" of the person whose liability is sought.

or otherwise, one or more of the following matters:

1. The dissolution and winding up of the limited partnership.
2. The sale, exchange, lease, mortgage, assignment, pledge, or other transfer of or granting of a security interest in, any or all or substantially all of the assets of the limited partnership.
3. The incurrence, renewal, refinancing, payment or other discharge of indebtedness by the limited partnership other than in the ordinary course of its business.
4. A change in the nature of the business.
5. The admission, removal or retention of a general partner.
6. The admission, removal or retention of a limited partner.
7. A transaction involving an actual or potential conflict of interest between a general partner and the limited partnership or the limited partners.
8. An amendment to the partnership agreement or certificate of limited partnership.
9. A matter related to the limited partnership not otherwise enumerated in this subsection which the partnership agreement states in writing is subject to the approval or disapproval of limited partners.<sup>88</sup>

This portion of the new Florida Act is based on the Uniform Act but includes some modifications made in Delaware that expand the safe harbor.<sup>89</sup> The references in subsection 2 to assignment and the granting of a security interest do not appear in the Uniform Act,<sup>90</sup> nor do the provisions in subsection 3 concerning the “renewal, refinancing, payment or other discharge” of indebtedness.<sup>91</sup> On the other hand, unlike Delaware, the new Florida Act limits the application of subsection 3 to events “other than in the ordinary course of [the] business.”<sup>92</sup> Both Florida and Delaware expanded subsections 5 and 6 to include reference to the “retention” of partners.<sup>93</sup>

Subsection 9 requires particular mention because it is an extremely broad “catch-all” safe harbor provision. Indeed it is one that

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88. New Florida Act § 25(2)(g).

89. Compare Uniform Act § 303(b)(6), 6 U.L.A. at 290 (1986 Supp.), with DEL. CODE ANN. tit. 6, § 17-303(b)(8)(b) (1985 Interim Supp.).

90. Compare Uniform Act § 303(b)(6)(ii), 6 U.L.A. at 290 (1986 Supp.) with DEL. CODE ANN. tit. 6, § 17-303(b)(8)(b) (1985 Interim Supp.).

91. Compare Uniform Act § 303(b)(6)(iii), 6 U.L.A. at 290 (1986 Supp.) with DEL. CODE ANN. tit. 6, § 17-303(b)(8)(c) (1985 Interim Supp.).

92. Del § 303(b)(8)(c) (1985 Interim Supp.).

93. Compare Uniform Act § 303(b)(6)(v)-(vi), 6 U.L.A. at 290 (1986 Supp.) with DEL. CODE ANN. tit. 6, § 17-303(b)(8)(e)-(f) (1985 Interim Supp.).

the partners can define with a written partnership agreement. In short, if a written partnership agreement subjects a matter to the approval of the limited partners, they do not take part in control by proposing, approving or disapproving it. This provision is even broader than that contained in the Uniform Act because it embraces any matter "related to the limited partnership" and not merely any matter related "to the business" of the limited partnership.<sup>94</sup>

This yeasaying, naysaying and voting safe harbor provision is intended to make sure that limited partners will not lose their limited liability if they exercise any of the broad "democracy rights" the new Florida Act anticipates they may be given. In many cases, these voting rights are inserted at the insistence of state "Blue Sky" commissioners.<sup>95</sup> More basically, under the new Florida Act the partnership agreement is the controlling document and it may give the limited partners or any class of limited partners the right to vote on "any matter."<sup>96</sup> Most narrowly, this democracy rights safe harbor protects limited partners who believe that they must take some action, perhaps including the removal of the general partner, to help prevent loss of their investment. However, it goes much further. In essence, it enables limited partners to have the same kind of "say" in management as holders of voting stock in a corporation.

Third, the new Florida Act provides that a wide range of active participation in partnership affairs will not be deemed, singly or in combination, to constitute participation in control. Section 25(2) provides that a limited partner does not participate in control solely by doing one or more of the following things:

(a) Being a contractor for or an agent or employee of the limited partnership or of a general partner or being an officer, director, or shareholder of a general partner that is a corporation.

(b) Consulting with or advising a general partner with respect to any matter, including the business of the limited partnership.

(c) Acting as surety, guarantor or endorser for the limited partnership or guaranteeing or assuming one or more specific obligations of the limited partnership or providing collateral for the limited partnership.

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94. Compare Uniform Act § 303(b)(6)(ix), 6 U.L.A. at 290 (1986 Supp.).

95. See generally Augustine, Fass, Lester and Robinson, *The Liability of Limited Partners Having Certain Statutory Voting Rights Affecting the Basic Structure of the Partnership*, 31 BUS. LAW. 2097 (1976).

96. New Florida Act § 27. This provision is more detailed than Uniform Act § 302, 6 U.L.A. at 289 (1986 Supp.).

(d) Taking any action required or permitted by law to bring or pursue a derivative action in the right of the limited partnership.

(e) Requesting, attending or participating in a meeting of partners.

(f) Serving on a committee of the limited partnership or the limited partners.<sup>97</sup>

Similarly, winding up the limited partnership pursuant to section 47, dealing with nonjudicial dissolution, will not constitute taking part in control,<sup>98</sup> nor will "[e]xercising any right or power permitted to limited partners under this act and not specifically enumerated in this subsection."<sup>99</sup> In addition, a limited partner is not to be automatically deemed to take part in control simply because he has or exercises a power not listed among the safe harbor provisions.<sup>100</sup>

Subsection (a), which is identical to the language in the Uniform Act,<sup>101</sup> clearly prevents a recurrence of *Delaney*.<sup>102</sup> It also goes much further because it indicates a limited partner may provide continuing services as an agent, employee or independent contractor of the partnership without taking part in control. This provision complements the new rule that a limited partner can receive his interest for services<sup>103</sup> and parallels the federal income tax rule that one can function in both partner and nonpartner capacities.<sup>104</sup> Subsection (b) is based on Delaware language that is broader than the Uniform Act because it refers to "any matter" and not merely to "the business of" the partnership.<sup>105</sup> Similarly, subsection (c) follows Delaware by adding reference to "providing collateral for the limited partnership."<sup>106</sup> Subsection (d) is identical to the Uniform Act language,<sup>107</sup> but subsection (e) once again follows the lead of Delaware by adding the ref-

97. New Florida Act § 25(2).

98. New Florida Act § 25(2)(h).

99. New Florida Act § 25(2)(i).

100. New Florida Act § 25(3):

The enumeration in subsection (2) does not mean that the possession or exercise by a limited partner of any power other than a power enumerated in that subsection constitutes participation by him in the business of the limited partnership.

101. Uniform Act § 303(b)(1), 6 U.L.A. at 290 (1986 Supp.).

102. See text accompanying notes 67-75, *supra*.

103. See text accompanying notes 38-41, *supra*.

104. INT. REV. CODE OF 1954, as amended, § 707(a).

105. Compare Uniform Act § 303(b)(2), 6 U.L.A. at 290 (1986 Supp.) with DEL. CODE ANN. tit. 6, § 17-303(b)(2) (1985 Interim Supp.).

106. Compare Uniform Act § 303(b)(3), 6 U.L.A. at 290 (1986 Supp.) with DEL. CODE ANN. tit. 6, § 17-303(b)(3) (1985 Interim Supp.).

107. Uniform Act § 303(b)(4), 6 U.L.A. at 290 (1986 Supp.).

erence to "participating" in meetings of partners.<sup>108</sup>

The provision that has no counterpart in the Uniform Act is subsection (f), which states that a limited partner will not participate in control simply by "[s]erving on a committee of the limited partnership or the limited partners."<sup>109</sup> This provision appears to authorize limited partners to serve on a committee analogous to a corporate board of directors, which classically makes the fundamental policy decisions of the organization. This provision is particularly significant in the light of the fact that limited partners have seemed most vulnerable when they exercise authority analogous to that of corporate board members.<sup>110</sup> Stated somewhat differently, the expanded "active conduct" safe harbor provisions in the new Florida Act appear to draft away the full range of cases in which limited partners might have been held liable simply because of taking part in control.

Overall, the scope of the safe harbor provisions is breathtaking, particularly given that they can be combined. To emphasize: the statute provides that a limited partner does not take part in control solely by doing "one or more" of the specified acts. Thus it appears, for example, that a limited partner can be an employee of the partnership, own the corporate general partner, be a consultant to the general partner, guarantee the partnership obligations, and serve on a partnership "committee," all without taking part in "control." The cumulative effect of the safe harbor provisions presumably explains why the Uniform Act abandoned the 1976 Act concept of a participation in control "substantially the same as the exercise of the powers of a general partner."<sup>111</sup> In short, under the new Florida Act safe har-

108. Compare Uniform Act § 303(b)(5), 6 U.L.A. at 290 (1986 Supp.) with DEL. CODE ANN. tit. 6, § 17-303(b)(4) (1985 Interim Supp.).

109. New Florida Act § 25(2)(f). For comparison, see DEL. CODE ANN. tit. 6, § 17-303(b)(7) (1985 Interim Supp.).

110. See Kempin, *The Problem of Control in Limited Partnership Law: An Analysis and Recommendation*, 22 AM. BUS. L.J. 443, 443-44 (1985):

The conclusion drawn is that limited partners have lost limited liability and were made personally liable only when they exercised the type of control that is theoretically exercised by the board of directors of corporations.

111. Section 303 of the 1976 Act provided, in part:

[I]f the limited partner's participation in the control of the business is not substantially the same as the exercise of the powers of a general partner, he is liable only to persons who transact business with . . . actual knowledge of his participation in control.

The Official Comment explained:

Because of the difficulty of determining when the "control" line has been overstepped, it was thought it unfair to impose general partner's liability on a limited

bor provisions, a limited partner can be much more active both in fundamental business decisions and in day-to-day operations than many general partners and still not run afoul of the control limitation.

## VI. CONCLUSION

Despite increased protection for limited partners under the new Florida Act, litigation can be expected concerning whether particular limited partners should be liable as general partners because they have taken part in the control of the business. Because the new generation of limited partnership statutes provides that limited partners can acquire their interests for services, and because many limited partners are relatively affluent investors, limited partners who become active in the business will continue to suggest themselves as attractive defendants. In determining whether they are liable for taking part in control, courts should consider not only the reliance requirement and the cumulative safe harbor provisions, but also the long and clear path of the law to greater protection of limited partners.

Roughly seventy years ago, the Uniform Commissioners stated the fundamental policy assumption behind the Original Act:

No public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business; provided creditors have no reason to believe at the times their credits were extended that such person was so bound.<sup>112</sup>

Florida courts long ago recognized that the basic purpose of the Original Act was "not to assist creditors, but to enable persons to invest their money in partnerships and share in the profits without being liable for more than the amount of money they contributed."<sup>113</sup> A basic purpose of both the 1976 Act and the Uniform Act has been to

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partner except to the extent that a third party had knowledge of his participation in the control of the business.

On the other hand, in order to avoid permitting a limited partner to exercise all of the powers of a general partner while avoiding any direct dealing with third parties, the "is not substantially the same as" test was introduced.

6 U.L.A. at 241 (1986 Supp.). The Uniform Commissioners have not yet published their explanation of the deletion of this test. See *supra* note 6.

112. 6 U.L.A. at 564.

113. *Vulcan Furniture Mfg. Corp. v. Vaughn*, 166 So.2d 760, 764 (Fla. 1st DCA 1964).



make more perfect the protection of limited partners by imposing reliance requirements on plaintiffs and by providing extensive "safe harbor" provisions listing conduct that is not to be deemed taking part in the control of the business. Florida has followed the lead of Delaware in giving limited partners even greater protection than that afforded by the Uniform Act. As the legislative history of the new Florida Act suggests, most limited partnerships probably would have been formed as corporations if the federal income tax classification of limited partnerships and corporations were the same. Given that shareholders can simply and without question insulate themselves from personal liability by registering under the general incorporation act, there is no reason why limited partners should be unable to achieve the same result by registering under the limited partnership act.<sup>114</sup> A limited partner who holds himself out as a partner could simply be held liable as a partner by estoppel.<sup>115</sup>

The problem is that even the very latest limited partnership statutes, including the new Florida Act, still have not reached the point of admitting that the emperor wears no clothes. Unable to separate themselves from their origins in a time when general incorporation statutes were unavailable, they fail to directly state that no limited partner will be subjected to personal liability unless he has held himself out as a general partner.<sup>116</sup> Rather, the statutes continue to provide vaguely and with elaborate qualification that a limited partner will not be personally liable "unless he participates in the control of the business." Probably no combination of reliance and safe har-

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114. See Kempin, *The Problem of Control in Limited Partnership Law: An Analysis and Recommendation*, 22 AM. BUS. L.J. 443, 466 (1985):

The rule that control means liability is a product of a jurisprudence of conceptions that is devoid of policy considerations other than the maintenance of the distinction between incorporated and unincorporated associations and their functional equivalents. Although the maintenance of that distinction may appeal to legal logic, it furthers no social or economic policy and denies to business persons an alternative form of organization that harms no one.

115. See Unif. Partnership Act § 16, 6 U.L.A. at 195; FLA. STAT. ANN. § 620.635 (1985). The U.P.A. applies to limited partnerships except to the extent that the limited partnership act is inconsistent. U.P.A. § 6(2), 6 U.L.A. at 22; FLA. STAT. ANN. § 620.585(2) (1985); new Florida Act § 70. See also *Outlet Co. v. Wade*, 377 So. 2d 722 (Fla. 5th DCA 1979) (emphasizing the importance of creditor reliance on "the individual credit" of the person to be held liable).

116. Several commentators have suggested that limited partners be insulated from personal liability even if they exercise management functions. See Basile, *supra* note 83; Donnell, *An Analysis of the Revised Uniform Limited Partnership Act*, 18 AM. BUS. L.J. 399 (1980); Kempin, *supra* note 114; Kessler, *The New Uniform Limited Partnership Act*, 48 FORD. L. REV. 159 (1979); and Pierce, *Limited Partner Control and Liability under the Revised Uniform Limited Partnership Act*, 32 SW. L.J. 1301 (1978).

bor provisions will ever completely eliminate the possibility of a holding that a limited partner is liable as a general partner by taking part in control. Nevertheless, with its cumulative "active conduct" safe harbor provisions based on Delaware modifications to the Uniform Act, the new Florida Act appears to come very close indeed.

