Partnership Law Adviser

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5.2 Limited Partnerships

Subject to an express contrary provision of the Uniform Limited Partnership Act (ULPA) or Revised Uniform Limited Partnership Act (RULPA), the general partners in a limited partnership can organize among themselves as partners in general partnership do under the UPA. On the other hand, the reality is different for limited partners. As mentioned in chapter 2 and again in chapter 3, even assuming that the limited partnership has been properly formed and the limited

33. See UPA § 6. See also discussion at note 2 of chapter 2 and accompanying text. Compare Wroblewski v. Brucher, 550 F. Supp. 742 (D. Okla. 1982) (dictum to the effect that, under California law, a limited partnership with only one general partner is not a true partnership because there is no co-ownership (discussed above at note 48 of chapter 2 and accompanying text)) with Executive House Realty v. Hagen, 108 Misc. 2d 986, 438 N.Y. S. 2d 174 (Sup. Ct. 1981) (discussing proper garnishment proceedings under N.Y. Civ. Prac. L. & R.; except for limited rights and liabilities of limited partnership, limited partnership is means of business identical to general partnership). For an example of an explicit restriction on general partners expressly imposed by the uniform limited partnership laws, see ULPA (1916) § 9; RULPA (1976, 1985) art. 4 (discussed in this section 5.2).

34. See, generally, the introduction to section 2.2 above.

35. See brief discussion in section 3.2.1 above of ULPA (1916) §§ 7, 10; in sec-
partners properly identified, they will lose the benefits of limited liability if they exercise too much control.

The separate subsections of this section 5.2 review first what each of ULPA (1916) and the 1976 and 1985 variants of RULPA states to be the outer limits of permissible control by limited partners and what activities, if any, are in a statutory safe harbor. Next, each subsection will consider what provisions should be included in the limited partnership agreement in order to increase the likelihood that the limited partners will benefit from limited personal liability.

5.2.1 ULPA (1916)

ULPA (1916) section 7 states by negative implication that if a limited partner "takes control of the business," that partner will be liable as a general partner. That is, the nominal limited partner will be no more protected from limited personal liability than would be a general partner. Therefore, it is first critical to know what is meant by "control" in that context.

While the standard to be used in determining whether the purported limited partner is taking part in control is necessarily imprecise, limited partners are permitted to express opinions and give advice to the general partner. Generally, however, the limited partners will not be allowed to do ini-

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36. See generally, discussion of the three variants in the introduction to section 2.2 above.
37. See, generally, discussion in section 3.2.1 above. There are other ways, also discussed in that section 3.2.1, of losing the benefit of limited liability, but they are not directly related to issues of the partnership's management. The issue of whether a limited partner will benefit from limited partner status and therefore have no obligation to contribute to a co-partner is also relevant in the context of obligations described in chapter 4 above.
rectly what they cannot do directly. Therefore, if the limited partners do exercise control, but claim that they are doing so in a different capacity, i.e., through a wholly owned subsidiary, even if they are rigorous in isolating their role as limited partners, they may be held liable as general partners. If the corporate separateness is not respected, a limited partner who is both a shareholder and an officer of the corporation that is the sole general partner will undoubtedly be liable as a general partner.

The concept seems to be that if the limited partners exercise significant control over the operations of the limited partnership, the personal assets of the limited partners ought to be at risk. Rather than seeking to punish the limited partners, the object is to protect the reasonable expectations of the partnership's creditors. They should be able to assume that a partner who manages a partnership is a general partner.

39. See Delaney v. Fidelity Lease Ltd., 526 S.W.2d 543 (Tex. 1975) (when the sole general partner was a corporation whose officers, directors, and shareholders were limited partners, those limited partners were denied summary judgment because, if they proved to be controlling the general partner, they would be liable as general partners; there was no indication that corporate formalities had been neglected). But see Frigidaire Sales Corp. v. Union Properties, Inc., 88 Wash. 2d 400, 562 P.2d 244 (1977) (en banc), discussed at note 41 infra.

40. Mazaror Builders, Inc. v. Crown Mountain Apartment Assocs., 467 F. Supp. 1316, 1333–34 (D.V.I. 1978) (the limited partner did not even maintain the formality of acting as an officer of the general partner when managing the limited partnership, because corporate separateness of the general partner was not respected, the limited partner who served as the corporate general partner’s officer became personally liable as a general partner).

41. See, e.g., Frigidaire Sales Corp. v. Union Properties, Inc., 88 Wash. 2d 400, 562 P.2d 244 (1977) (en banc). In Frigidaire, the supreme court of Washington ultimately concluded that the third party dealing with the corporate general partner knew that it was dealing with a corporation, as opposed to the individual shareholders who were limited partners. Therefore, the court found that the third party’s reasonable expectations were respected when the court prevented the third party from recover-
ULPA section 7 remains unclear, however, about the precise activities that are permitted. There is the possibility that limited partners can exercise considerable control without losing their protected status. The problem from the point of view of the limited partner (and the limited partner’s advisers) is the lack of certainty. To guess wrong and therefore to exercise too much control can clearly be very costly. The limited partner’s personal assets are then placed on the line. But to be too conservative may deprive a limited partner of a legitimate right to protect his investment. ULPA (1916) section 10 provides a safe harbor of sorts.

What ULPA section 10 expressly permits a limited partner to do is to:

- Inspect and copy partnership books
- Demand information concerning the partnership
- Demand an accounting, if appropriate
- Obtain court-decreed dissolution and winding up.

Dissolution and winding-up are discussed in detail in chapters 7 and 10, respectively, but when they are under a court decree, the limited partner’s role is purely passive. The same is true in the event of an action for an accounting. Similarly, a demand for information and an inspection of the books, while important to an investor, do not constitute management of a business. 42 Consequently, although ULPA section 10 does provide a safe harbor for limited partners, its very narrowness implies

42 New York’s version of ULPA (1916) also expressly permits a limited partner to bring a derivative action. See N.Y. Partnership Law § 115-a (McKinney 1980). See note 4 of Chapter 1 above for an explanation of the continuing effectiveness of this statute.

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that any activity more than the purely ministerial or passive runs the risk of being impermissible control. That issue of control has an impact on not only the liability of the limited partners to their copartners, but also the liability of the limited partners to third parties and, therefore, the rights of third parties against the limited partners. It is clear that no provision in any partnership agreement or even in the certificate of limited partnership can alone reduce a limited partner's exposure to third parties.

Nevertheless, certain provisions in the limited partnership's documentation can be useful because it is the limited partner's behavior that will determine liability and the limited partner's behavior can be influenced by the terms of the limited partnership agreement. In the case of persons unfamiliar with the restrictions on a limited partner's permitted activities, provisions of the limited partnership agreement can serve an educational function. Much as typical corporate bylaws in part do no more than inform shareholders and directors how actions can be taken, the limited partnership agreement can specify acts that only the general partner is authorized to take and list those few acts that are within the authority of the limited partner. Those limited partner acts should be restricted to the receipt of a share of income and surplus and of the information described in ULPA (1916) section 10.

Second, the limited partnership agreement can describe how decisions will be taken in circumstances in which a limited partner would be tempted to step beyond the ULPA section 10 activities in order to protect his or her investment. The issue does not apply to the ULPA section 10 style of ministerial act because the limited partners do not in fact have to vote on such issues. ULPA section 10 merely describes rights that belong to each limited partner as an individual; for example, just as a general partner has the right of access to the part-
nership books without approval of the other partners, so does a limited partner.

On the other hand, voting can be important in the context of acts outside the narrow ULPA section 10 safe harbor. For instance, limited partnership agreements typically do—and should—specify what happens if there is no general partner, for that is a circumstance in which a limited partner can unwittingly be drawn into management. An obvious solution is to authorize the limited partners to appoint a replacement general partner, but to take no other action; the new general partner would then focus on management. For those common circumstances where there is more than one limited partner, the partnership agreement can also stipulate what percentage of the limited partners' aggregate votes will be necessary for those few actions of the limited partners that can be taken by vote, such as the appointment of the new general partner. Because the UPA applies to a limited partnership and therefore to a limited partner unless the ULPA expressly states otherwise, and because the ULPA nowhere describes how limited partners are to vote, UPA sections 18(c) and 18(h) will apply to them too. Consequently, limited partners will vote per capita unless otherwise stated. A limited partnership agreement will, however, typically provide that the limited partners will vote in accordance with the relative amount of

43. See, e.g., Dyco v. Belko Indus., Inc., 569 P.2d 553 (Okla. App. 1977) (limited partner acted as general partner after withdrawal of all general partners). As discussed in chapters 7 and 10, the withdrawal of the last general partner normally is an act of dissolution leading to winding up the limited partnership, but winding up is not necessary if the agreement provides otherwise.

44. See, e.g., Tescone v. Mast Property Management Inc., 251 Ga. 550, 307 S.E.2d 661 (1983) (it was permissible for agreement among partners to have limited partners decide by 50 percent in interest to remove or replace general partner and decide by 50 percent in interest to take other specified acts).

45. See UPA § 6. See also the introduction to chapter 2.

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their capital contribution, e.g., in proportion to their "units" in the partnership.

The statement that UPA section 18(b) also will apply to votes taken by limited partners could legitimately give rise to the following question: When can a limited partner safely take an extraordinary act, i.e., vote on an extraordinary matter, without losing the protected status? The answer may depend on the type of extraordinary act. Some are specifically mentioned in UPA or ULPA. For example, the appointment of a general partner is one such extraordinary matter because of the normal rule of deleictus personae articulated by UPA section 18(g). Also included would be those few topics that are not permitted to a general partner of a limited partnership absent "written consent or ratification of the specific act by all the limited partners." These are all acts that would be permitted to a partner in a general partnership, but are expressly excluded by ULPA sections 9(1)(a), 9(1)(f), and 9(1)(g). These three subsections prohibit a general partner in a limited partnership from doing any act forbidden by the certificate of limited partnership, or, unless the certificate so permits, from either possessing or assigning any partnership property, or continuing the business of the partnership, after the withdrawal of a general partner. For the limited partners to approve any of those acts taken by the general partners, clearly their vote must be unanimous. But, by a limited partnership agreement executed by all the partners, the limited partners

46. See note 17 supra.
47. ULPA (1916) § 9(1).
48. Note that ULPA (1916) § 9(1) lists the acts that would be prohibited a partner in a general partnership, too, under ULPA § 9(3). ULPA § 9(1)(a) acts that make it impossible to carry on the business of the partnership. ULPA § 9(1)(b): confessing a judgment against the partnership. ULPA § 9(1)(c): possessing or assigning partnership property other than for partnership purpose. ULPA § 9(1)(c) discusses admitting another general partner.

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can agree that, for example, the affirmative vote of a majority of the "units" (i.e., percentage of ownership interest) held by all limited partners is all that is required to approve any such action. In effect, the limited partners will have delegated certain of their voting rights to each other.

Those types of extraordinary acts, however approved, should not jeopardize a limited partner's status. In contrast, however, a vote by a limited partner on a matter that is ordinary for purposes of UPA section 18(b) would clearly put the limited partner at risk.

5.2.2 RULPA (1976)

The issue under the 1976 revision is also what is meant by "control." As mentioned in the introduction to section 3.2, the fundamental principle is that a limited partner who controls the limited partnership will not benefit from limited liability. Control implies activity of which third parties are aware and on which they can base an expectation that the partner will be personally liable.

Specifically, RULPA (1976) section 303(a), derived from ULP A (1916) section 7, states that a partner who "takes part in the control of the business" of the limited partnership may be "liable for the obligations of [the] limited partnership." However, RULPA (1976) section 303(a) differs materially from ULP A (1916) section 7. The differences are critical to an understanding of how a limited partnership agreement can, under the 1976 version of RULPA, be used to minimize the limited partners' risk of personal liability.

First, RULPA (1976) section 303(a) is clear that if a limited partner's "participation in the control of the business is... substantially the same as the exercise of the powers of a general partner," the limited partner will be liable as though the limited were a general partner. Second, the last sentence of RULPA (1976) section 303(a) provides that if the limited part-

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ner does exercise control, but it "is not substantially the same as the exercise of the powers of a general partner," the limited partner is personally liable only to persons who had "actual knowledge" of the limited partner's control.

This creates a far more general safe harbor than was available under ULPA (1916) section 10. Under the 1976 text, if the limited partner's exercise of power demonstrably is not comparable to that of a general partner, the limited partner will be personally liable only to a third party who knows of the limited partner's participation in control. But what constitutes an act not substantially the same as those of a general partner? And when is the limited partner's exercise of control so mild as not to give rise to personal liability even to a third party who knows of the limited partner's activities? Uncertainty remains.

RULPA (1976) section 305 reproduces the essence of ULPA (1916) section 10 by expressly allowing a limited partner to inspect partnership records and to obtain information (now expressly including the partnership's tax returns), but that is scant help for a limited partner seeking to identify those acts that are appropriate for a passive investor seeking to safeguard his investment.

Fortunately, RULPA section 303(b) provides a nonexclusive laundry list of activities expressly permitted the limited partner. It includes:

- Being an agent of the limited partnership or of its general partner;
- Advising the general partner;
- Voting on the transfer of all or substantially all the assets of the partnership; and
- Voting for a change in the nature of the partnership's business.
None of the explicitly protected activities alone constitutes involvement in the day-to-day operations of the business. Nevertheless, it is undeniable that each protected activity is far more significant than were the few passive and ministerial activities expressly permitted under ULLPA (1916) section 10. In addition, RULPA (1976) section 1001 also allows a limited partner to bring a derivative action on behalf of the partnership. What the activities authorized under RULPA (1976) sections 303(b) and 1001 have in common is that they allow an investor to shepherd the investment while placing off limits those day-to-day operating decisions that are in the jurisdiction of the general partner alone.

Given the nonexclusive list of RULPA (1976) sections 303(b) and 1001 and the flavor of the expressly permitted activities, how can the partnership agreement help to minimize the limited partner's risk of personal liability? In addition to serving an educational function by listing the expressly permitted activities and specifying which activities clearly are the general partner's alone, the partnership agreement can reduce the limited partner's temptation to act beyond the safe harbor.

The advisory role of the limited partner authorized by RULPA (1976) section 303(b)(2) can be very important. The partnership agreement should, therefore, establish a system by which the general partner obtains such advice. Not only should the general partner be able to request the advice, but the limited partner should, alone or together with any other limited partner, have a procedure by which advice is submitted to the general partner. Naturally, in order to be able to give advice, the limited partner must first have access to information. Consequently, the partnership agreement should also specify that the general partner must periodically and regularly give each of the limited partners the information set out in

49. See the discussion in note 55 below of the impact of the word "solely" in RULPA (1985) § 203(b); the word also appears in RULPA (1976) § 303(b).
RULPA (1976) section 305, even before receiving a specific request. Indeed, a limited partnership agreement typically sets out in detail what information is to be transmitted to the limited partners, and how and when.

On the other hand, the limited partnership agreement should not in any way require the general partners to follow the advice of the limited partners. That would place the limited partners in a position of control. There will, however, be significant incentive on the part of the general partners to respect and follow that advice: To the extent that the general partners ignore it, they run a greater risk of liability to the limited partners for failure to act with requisite care.

Similarly, the partnership agreement should specify that, as is permitted under RULPA (1976) section 303(b)(5), no transfer of all or substantially all the partnership's assets and no change in the nature of the partnership's business can be effected if the limited partners object. What RULPA (1976) section 303(b) clearly protects is a veto right given to the limited partners; it does not necessarily protect an affirmative right to demand such a transfer or change. Thus, to be conservative, the partnership agreement will have to state clearly that it is the general partner who generates the idea. To give each limited partner as much certainty as possible within the context of that restriction, however, the partnership agreement should try to define what is meant by substantially all the assets, and what the nature of the partnership's business then is. Further, it should specify a time by which the general partner must submit the proposed transfer or change to the vote of the limited partners. In other words, the opportunity to veto should occur before the general partners have signed a document that, under apparent authority, might bind the partnership (although leaving the limited partners with rights as against the general partner).
Note that there is no perfect analogue to ULP A (1916) section 9(1) in the 1976 revision. Specifically, there no longer exists a single section that is the equivalent to ULP A (1916) sections 9(1)(a), 9(1)(f), and 9(1)(g), discussed at the end of section 5.2.1 above, which set out acts that are beyond the authority of a general partner in a limited partnership. However, RULPA (1976) section 403 limits a general partner's authority to the extent restricted by the statute or a partnership agreement, which presumably includes the certificate of limited partnership. Further, RULPA (1976) section 301 stipulates how and when a new limited partner can be admitted. That topic is treated in more detail in chapter 9, but RULPA (1976) section 301(a)(1) does contain the general rule that a limited partner can be added as permitted by the partnership agreement, or by written consent of all the partners. Finally, RULPA (1976) section 201(a)(12) describes the certificate as being the only place where one general partner can be given the right to continue the business of the partnership after the withdrawal of another general partner. The amendment of the certificate can be effected by any one general partner together with any new partner,\textsuperscript{50} therefore, if there is no new partner, the surviving general partner appears to be able to amend the certificate to comply with RULPA section 201(a)(12) by acting alone. However, even if the act were enforceable by third parties against the partnership, it would not prevent the limited partners from seeking redress against the general partner in appropriate circumstances for breach of his fiduciary duty.

It may be useful for the partnership agreement to stipulate how the limited partners are to vote in those circumstances in which it is required or advisable that the limited partners be given the opportunity to vote. In that regard, the 1976 statute is the same as the 1916 draft described in the preceding sub-

\textsuperscript{50} RULPA (1976) § 204(a)(2).
section; therefore, the statutory norm is for all votes to be on a per capita basis.\footnote{RULPA (1976) section 302 does explicitly approve stipulation by a partnership agreement that the limited partners vote "on a per capita or other basis." Therefore, the agreement can, and typically does, provide inter alia for decisions by affirmative vote of a majority of the limited partners' "units."} Finally, note that the 1976 text of RULPA does not give any more comfort to limited partners than does ULPA (1916), if the structure of the partnership gives the limited partners indirect control. The common form of using a corporation as the sole general partner remains, as a result, not without risk. If the limited partners are principals of the general partner, they can be found to be controlling it and therefore to be exercising impermissible management control. The limited partners would then lose the protection of limited liability.

5.2.3 RULPA (1985)

The 1985 version of RULPA\footnote{The 1985 version of RULPA retains the concept that a limited partner who has "control" over the management of the limited partnership will lose the benefit of limited liability. That was mentioned in section 3.2.3 above in the context of a limited partner's potential liability to third parties. The risk resulting from the exercise of too much control by the limited partner does also include liability to his copartners, because, for a discussion of the impact of UPA § 18(c) & (h) on ULPA (1916), see the text at the end of section 5.2.1 above. Again, UPA § 6 confirms that the UPA applies to limited partnerships unless the applicable limited partnership laws expressly provide otherwise. And the 1976 version of RULPA does not change the UPA statutory norm of per capita voting, with unanimity required for extraordinary matters.} retains the concept that a limited partner who has "control" over the management of the limited partnership will lose the benefit of limited liability. The risk resulting from the exercise of too much control by the limited partner does also include liability to his copartners, because,

\footnote{See section 2.2.3 above: the National Conference of Commissioners on Uniform State Laws considers RULPA (1985) to be an amendment to and part of RULPA (1976). However, the changes are easier to review if analyzed separately.}
as described in chapter 4 above, the limited partner will be treated as a general partner for those purposes too. Therefore, it is important to understand what is meant by “control” for purposes of the 1985 version of RULPA, in order to know how best to minimize the risk that a purported limited partner will lose the protection of that statute.

The basic concept, then, remains that a limited partner will have the benefit of limited liability so long as control is avoided. However, the general safe harbor of RULPA (1976) section 303(a) has been rewritten to eliminate the unmanageable standard of “substantially the same as the exercise of the powers of a general partner.”

Instead, the 1985 text states that if the “partner participates in the control of the business” (without describing the extent of the participation or control), the limited partner still will be personally liable only to third parties who reasonably believe, “based upon the limited partner’s conduct, that the limited partner is a general partner.” The trigger, therefore, is the conduct of the limited partner, but only if it gives rise to a reasonable belief that the limited partner is a general partner; the third party’s mere knowledge of the limited partner’s participation in control is no longer sufficient. As the Official Comment to the 1985 revision emphasizes, that protects the limited partner except vis-à-vis a third party who, given the level of the limited partner’s activity, reasonably believes that the partner’s liability is unlimited. What uncertainty remains arises from the difficulty in ascertaining (1) what the third party’s belief actually was and (2) whether that belief was reason-

53 RULPA (1985) § 303 Official Comment. Despite the use of the word “person,” the section is implicitly for the protection of third parties, not co-partners. A copartner of the purported limited partner could not benefit from the provision because, as a copartner, he or she would in all likelihood not be able to prove a reasonable belief that the limited partner was in fact a general partner.
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able (presumably an objective criterion). It is not sufficient to prove merely what would have been a reasonable belief on the part of the third party.

In addition to the general safe harbor of RULPA (1985) section 103(a), RULPA (1985) section 305 still grants the limited partners the right of access to the partnership books. As the Official Comment to RULPA (1985) section 305 emphasizes, that section and RULPA (1985) section 105, which requires the partnership to keep records at its office and permits a partner's inspection and copying of those records, gain new importance. Now that much critical information is no longer contained in the public document, i.e., in the certificate of limited partnership, even the partners need assurance that they can see relevant information. Nevertheless, for all their utility, RULPA sections 105 and 305 do not address true issues of management. They do not increase the range of activities that a limited partner can take while still retaining limited liability. RULPA (1985) section 303(b), however, is different: It contains a nonexclusive list of specific safe harbors, a list substantially revised from the 1976 text.

The new RULPA section 303(b) list expressly authorizes a limited partner to attend meetings of partners and to vote on transactions involving a conflict of interest between the general partner and the partnership or the limited partners. A limited partner can be an officer, director, or shareholder of a corporate general partner. The section also specifically per-

54. See also the discussion in section 2.2 above, of the reduction of public information from the 1976 to the 1985 years of RULPA.

55. It is significant that while merely serving in any or all of these capacities is protected from automatic treatment as evidence of impermissible control, no act taken in such a capacity, e.g., as an officer, is necessarily protected. Consequently, I do not agree with Professor Eisenberg that RULPA (1985) § 303(b) necessarily endorses the Frigidaire result described in notes 39 and 41 supra. See Eisenberg, supra note 10, at 109. In quoting from section 303(b), he did not emphasize (or include the
mits a limited partner to prosecute a derivative action, thus buttressing the authorization still found in RULPA section 1001. The items in the 1976 list also are present, if slightly changed.56 But the most startling change is the addition of new subsection 303(b)(6)(ix). The 1976 text's subsection (b)(4) allowed a limited partner to approve or disapprove an amendment to the partnership agreement, and subsection (b)(6)(viii) of the 1985 text similarly permits a limited partner to vote on an amendment to the partnership agreement or to the certificate of limited partnership. However, new subsection (b)(6)(ix) also allows a limited partner to vote on any other topic, even if not listed in RULPA section 303(b), provided that the partnership agreement grants this authority.

What makes the new subsection so surprising is that there is no restriction on the nature of the topic. From the language of the provision, a permitted topic could include participation in the day-to-day management of the partnership. Further, from the change in the language of RULPA section 303(b)(6)'s introduction, it appears that the limited partners can initiate a RULPA (1985) section 303(b)(6)(ix) vote; they

word "solely," as in: "A limited partner does not participate in the control of the business . . . solely by . . . being an officer, director, or shareholder of a general partner that is a corporation." (Emphasis added.)

Delaware has amended its version of RULPA § 303(b) to provide expressly that an exercise of powers of, inter alia, an officer, director, or stockholder of a corporate general partner does not constitute control under Delaware’s RULPA § 303(b). Del. Code Ann. tit. 6, § 17-303(b) (1990). 56. For example, RULPA (1985) § 303(b)(6)(b) differs from RULPA (1976) § 303(b)(5)(b) because, while both permit a limited partner to vote on a transfer of substantially all of the partnership’s assets, only the 1976 text limits the authority to transfers "other than in the ordinary course of the partnership’s business." It is true that it is difficult to imagine that such a transfer could be in the ordinary course of the partnership’s business. Nevertheless, the deletion of the phrase emphasizes that the purpose of the 1985 changes is to create maximum certainty for the benefit of the limited partners, even at the risk of allowing the limited partners to engage in management to some degree.
are not restricted to merely approving or disapproving a matter put to them by the general partners.

A third party could review the certificate of limited partnership and thereby ascertain that a person is not listed as a general partner. If the person were actively participating in the control of the partnership business, the third party might assume that the person was a limited partner who will be treated as a general partner because of the significance of his involvement in management. But the third party could be wrong. The person in question might, indeed, prove to be a limited partner in the partnership's internal documentation, but the third party would have no way of knowing whether the private partnership agreement protects the limited-partner status despite the high degree of control exercised.

That result seems anomalous to those schooled in the principles of the earlier versions of the uniform limited partnership laws. It would mean a significant movement away from the concept that the uniform limited partnership laws are designed to protect the partnership's creditors rather than its limited partners. It is true that the evolution from the 1916 to the 1976 texts, and from the 1976 version to the 1985 amendments evidence such a movement. But the illustration just presented may be farther than the courts will be willing to go. They may, instead, read into RULPA (1985) section 303(b)(6)(ix) an overriding view that the permitted matters that can be enumerated in the partnership agreement as being subject to limited-partner vote must be of a nature other than in the ordinary course of the partnership's business. Therefore, they may look askance at aggressive mechanisms, such as an obligation imposed by the partnership agreement that the general partners submit routine matters to the limited partners, as being contrary to the spirit of the statute. Especially if the topic clearly affects the ordinary management of the partnership's business, the courts may feel that a limited partner who proposes a vote
on such a topic referred to in a partnership agreement is exercising so much control that, in fairness, the limited partner ought to be personally liable.

The conclusion is that, for the moment, the jury is still out as to how much activity new RULPA (1985) section 303(b)(6)(ix) can protect. Consequently, limited partners should not rely on it as a means of guaranteeing limited liability vis-à-vis third parties until the courts have clarified its meaning.

What should be included in the partnership agreement? It would be wise to include a list setting out as contractually permitted all those actions that a limited partner would be likely to take. Until there is case law interpreting RULPA (1985) section 303(b), the practitioner should warn clients that the extent of the protection offered by that list is particularly uncertain in the context of routine management decisions. Further, and despite subsection (b)(6)'s statement that a limited partner can actively propose as well as passively approve, the conservative approach would be to provide a structure in the partnership agreement whereby the limited partners in fact do not need to initiate matters. For example, the agreement could require the general partners to submit a wide range of topics to the limited partners on a regular and frequent basis.

In addition to addressing directly the issue of what constitutes permissible control, the partnership agreement should include provisions stipulating how the limited partners will vote. As was described in section 5.2.2 above, as soon as there are topics on which the limited partners are to vote, it is advisable at least to consider causing the partners to agree to delegate part of their rights. The limited partners could agree to vote based on the "units" they hold, i.e., in proportion to their ownership interest, as opposed to voting on a per capita basis, which remains the statutory norm. Similarly, they could
agree that a decision of the limited partners on even an extraordinary matter could be taken by the affirmative vote of a mere majority of those "units," instead of requiring unanimity. 57

Finally, the 1985 draft of RULPA provides no more comfort to limited partners than do the earlier versions, if the structure of the partnership gives them excessive indirect management control. To take the example discussed in section 5.2.2 above, assume that the limited partners are principals of the sole corporate general partner and are therefore found to be controlling it. Although the result can vary from jurisdiction to jurisdiction, 58 the limited partners still run the risk of being found to exercise impermissible management control to the extent that their activities as principals in the corporation are deemed to be control of the partnership. To that extent, the limited partners still can lose the protection of limited liability.

57. See discussion of the impact of UPA § 18(e), (h) on ULP A (1916) and RULPA (1976) in sections 5.2.1 and 5.2.2 above, respectively.

58. See notes 39 and 41 supra.