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Foreword

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FOREWORD

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The law of partnership is undergoing remarkable change. It is being reviewed, criticized, rewritten, and shaken to its very core by processes set in motion, in part,¹ by a report by an American Bar Association Committee (the "ABA Report")² recommending changes to the venerable Uniform Partnership Act (the "UPA"). The UPA was promulgated in 1914 by the National Conference of Commissioners on Uniform State Laws ("NCCUSL") and subsequently was adopted in every state, save one, until several years ago.³

NCCUSL reacted to the ABA Report with unusual speed. It promptly appointed a drafting committee to address the suggested changes and promulgated a new uniform act—the Uniform Partnership Act (1992)—just four years after the drafting committee first met.⁴ In response to criticism of the 1992 Act, NCCUSL reconsidered it and promulgated the 1993 Act.⁵ The 1994 Act followed, making more changes and establishing the dubious precedent of the promulgation by NCCUSL of three uniform acts covering the same area of law in three consecutive years. Although the 1994 Act is titled Uniform Partnership Act (1994), it is referred to as "RUPA" in almost all scholarship addressing the Act, including most of the papers in this symposium.⁶

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1. It is important to emphasize "in part." The age-old concept of personal liability of each partner for the obligations of the firm also is undergoing change, as will be noted later in this foreword.

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

3. The UPA is still effective in 47 states. See Uniform Partnership Act, 6 U.L.A. 1-2 (Supp. 1995) (table of adopting states). Louisiana has never adopted the Act.

4. For a brief history of the Act, see J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. L. REV. 727, 727-30 (1992).

5. The 1993 Act was adopted by three states: Montana, Wyoming, and Texas (with modifications). See 6 U.L.A. 225 (Supp. 1995) (Table of states adopting RUPA 1993).

6. The "R" stands for "Revised." Although the word "Revised" is not in the Act's official title, the Act consistently has been referred to as RUPA in the literature discussing it. See, e.g., Donald J.

A battle took place while drafting the UPA between proponents of the civil law entity theory of partnership and those advocating the common law aggregate theory.⁷ The drafting committee was well on its way to incorporating the entity theory when the death of Dean James Barr Ames, the first reporter, interrupted the process. The new reporter, Professor William Draper Lewis, was a strong advocate of the aggregate theory. His views prevailed, and a concise, tightly drafted uniform act was promulgated by NCCUSL and enacted countrywide.

The ABA Report invited a return to the debate over the underlying theory of the law of partnership. This invitation was accepted, and the aggregate theory of the UPA is overturned in RUPA, which expressly adopts the entity theory. Professor Hillman's article, which focuses on the soundness of RUPA's continuity provisions and the impact of latent liabilities on unwinding the partnership relationships after dissociation or dissolution, questions how much has been accomplished by RUPA's formal transition from aggregate to entity theory.⁸ Among other things, he notes that RUPA retains the default concept of automatic dissolution of a partnership at will whenever a partner leaves the firm, which undermines the presumed stability that the entity theory is intended to supply.⁹ One particular irony identified by Professor Hillman is that the *Fairway Development* case,¹⁰ which served as inspiration, at least in part, for the ABA Report, may be unchanged under RUPA because the partnership involved in that case apparently was at will.¹¹

Adoption of the entity theory is not the only major change made in RUPA. Among other things, RUPA also redefines the law of partnership fiduciary obligations in an innovative and controversial way. Curiously, RUPA both enhances and restricts freedom of contract among partners with regard to fiduciary duties. My article addresses the decision to define certain fiduciary duties as mandatory and argues for greater freedom of contract among partners

Weidner (the reporter for RUPA), *The Revised Uniform Partnership Act: Major Policy Decisions*, 21 U. TOL. L. REV. 825 (1990). Also, RUPA is easy to pronounce.

7. See Commissioners' Prefatory Note, 6 U.L.A. 5-8 (1969) (explaining the drafting history of the UPA). The distinction between the two theories, broadly stated, is that the civil law entity (or mercantile) theory viewed a partnership as "a body distinct from the members composing it, and having rights and obligations distinct from those of its members." ALAN R. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP 19 (1968) (quoting 1 NATHANIEL LINDLEY, PARTNERSHIP *110 (Ewell 2d Am. ed. 1888)). The common law aggregate theory "is otherwise; from an early date the judges insisted on regarding partners as individuals and imposing on them the law of joint or common tenancy in property and the law of joint obligations in contract." *Id.* at 18. In short, under the common law theory, a partnership is nothing more than an aggregate of its partners. If a partner leaves or dies or a new partner enters the business, the first partnership necessarily dissolves and a new partnership is formed (often by implication) because the business is now being carried on by a different aggregate of people.

8. Robert W. Hillman, *RUPA and Former Partners: Cutting the Gordian Knot with Continuing Partnership Entities*, 58 LAW & CONTEMP. PROBS. 7 (Spring 1995).

9. *Id.* at 10-14.

10. *Fairway Dev. Co. v. Title Ins. Co. of Minn.*, 621 F. Supp. 120 (N.D. Ohio 1985).

11. Hillman, *supra* note 8, at 13-14. In addition, there apparently was no agreement among the partners with respect to dissolution.

in order to enhance the values of stability and reliability of agreements.¹² This argument is based in part on the assumption that partners ordinarily have true freedom of choice and capacity to bargain on entering the partnership contract because each has something of roughly equal value to offer the other in the decision to become co-owners of a business for profit.¹³ Under such circumstances, the parties should be free to define their relationship as they wish, subject to the customary contract limitations of fraud, duress, and unconscionability.¹⁴

This view is vigorously challenged by two articles in this symposium. Dean Weidner, the reporter for RUPA, argues that people rarely bargain as equals for partnership agreements,¹⁵ that mandatory minima prevent types of relationships that would cost more than they would benefit,¹⁶ and that the mutual agency and joint and several liability features of the partnership relationship justify mandatory fiduciary duties.¹⁷

Professor Vestal also disputes the freedom of contract proposition, but from a different perspective.¹⁸ He disagrees with the approach taken by RUPA, arguing that its treatment of fiduciary duties goes too far in reducing the protection afforded fiduciary duties under the UPA. He proposes a compromise solution, taking into account the opposing views on the issue of fiduciary duties. His article works closely and in detail with the relevant language of RUPA and contains considerable information about the drafting history of its fiduciary provisions, including a description of the floor debate during the approval of RUPA in 1992.

Not all of the ongoing changes in partnership law can be traced to RUPA. For more than a thousand years, one of the essential characteristics of partnership law has been the personal liability of each partner for the obligations of the firm, including liabilities generated by the misconduct of fellow partners.¹⁹ Yet within the last several years, limited liability partnership ("LLP") legislation has appeared and has been adopted in at least twenty states.²⁰ Under the broad version of the LLP, the concept of a partner's personal liability for the obligations of the firm disappears. Perhaps the specter of huge damages in modern tort litigation has contributed to this movement in the law of partnership to limit personal liability to personal obligations.

12. J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29 (Spring 1995).

13. *Id.* at 41.

14. *Id.* at 46, 52-55.

15. Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58 LAW & CONTEMP. PROBS. 81, 101-03 (Spring 1995).

16. *Id.* at 101-03.

17. *Id.* at 84-85.

18. Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, 58 LAW & CONTEMP. PROBS. 55 (Spring 1995).

19. See 8 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 197 (1926).

20. Larry E. Ribstein, *Linking Statutory Forms*, 58 LAW & CONTEMP. PROBS. 187, 212 n.173 (Spring 1995).

Is the LLP a desirable change in the law of partnership? Professor DeMott addresses that question, among others, in her article, which focuses on the extent to which the law expects partners to monitor each other's actions.²¹ She refuses to accept uncritically the conventional wisdom that the LLP is an unalloyed good and an obvious improvement in the law of partnership. Instead, while identifying arguments in favor of the LLP, she notes that the LLP is likely to reduce the incentive of partners to monitor the conduct of fellow partners and nonpartner employees.²² She also cautions that the LLP may lead to increased costs for sophisticated clients of a partnership who, in the absence of derivative vicarious liability, may rigorously investigate the assets of the firm and the personal assets of the partner with whom they are dealing.²³

Professor Gazur focuses his article on yet another new form of doing business: the Limited Liability Company (the "LLC").²⁴ The LLC creates an entity for doing business that is not a corporation but does involve limited liability for its owners. The entity is not a partnership either, but it enjoys the benefits of partnership taxation, which, together with the fact that many provisions in LLC statutes are of partnership origin,²⁵ explains why this symposium on partnership law includes the LLC. Professor Gazur's article contains a comprehensive discussion of the LLC, including a careful comparison of the treatment of fiduciary duties by the different statutes.²⁶ The article also considers the likely impact of the LLC on traditional forms of doing business, including the general partnership and the limited partnership, noting that with the advent of the LLP, the impact of the LLC on traditional forms of doing business may not be as great as first anticipated.

Professor Ribstein addresses the issue of linkage, a matter of particular concern today in view of the legislative ferment described above.²⁷ Linkage, which applies when the rules from one statute are applied to a business form created under another statute, has long been of practical importance in partnership law because of the linkage between the UPA and the limited partnership acts. Professor Ribstein notes that, despite its benefits, linkage can cause confusion about the applicable law and can cause application of inappropriate rules in linked business forms. His article, which comprehensively treats the issues raised by linkage with regard to general and limited partnerships, and with regard to the new statutory forms of the LLP and LLC, advances the thesis that limited partnership statutes should be revised to stand

21. Deborah A. DeMott, *Our Partners' Keepers? Agency Dimensions of Partnership Relationships*, 58 LAW & CONTEMP. PROBS. 109 (Spring 1995).

22. *Id.* at 121-31. Professor DeMott is careful to note that other incentives to monitor exist, such as concern for the reputation of the business and preservation of the partnership assets.

23. *Id.* at 122-23.

24. Wayne M. Gazur, *The Limited Liability Company Experiment: Unlimited Flexibility, Uncertain Role*, 58 LAW & CONTEMP. PROBS. 135 (Spring 1995).

25. *Id.* at 135-36.

26. *Id.* at 146-65.

27. Ribstein, *supra* note 20.

alone.²⁸ Review of this complex issue recently has been undertaken by NCCUSL and the ABA.²⁹

Professor Levmore addresses the troubling issue of the availability of lawsuits among partners during the operation of a partnership that relate to partnership matters.³⁰ Partnership law historically has been reluctant to recognize such litigation when it is not coupled with an accounting, which, in the absence of agreement, usually accompanies dissolution of the partnership.³¹ Professor Levmore draws comparisons to the law of marriage and to corporate law. He connects that discussion to the choice between property rules and liability rules in the law and economics literature.

This symposium on partnership law is being published at an opportune time. It addresses some fundamental questions raised during the early stages of a revolution in American business law. The articles included cover a wide range and focus directly on many of the key issues at the core of the changes being made.

28. *Id.* at 206.

29. *Id.* at 187 n.8.

30. Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 *LAW & CONTEMP. PROBS.* 221 (Spring 1995).

31. RUPA contains language that attempts to expand the circumstances under which partners can bring claims against each other while the partnership is ongoing. *Id.* at 223-24.

