"Assume a Rather Large Boat . . ": The Mess We Have Made of Partnership Law

Allan W. Vestal

"Assume a Rather Large Boat . . .": The Mess We Have Made of Partnership Law

Allan W. Vestal*

> There was a fear, there is a fear, there always will be a fear, that highly productive partners . . . can leave, go to another place and get more money. And life is not made up of love, it is made up of fear and greed and money — how much you get paid in large measure. Unless we didn't get Cadwalader's profitability to where it was with our competitors' firms, my great fear was that people were going to leave and that we would then not be able to sustain ourselves.
>
> — John Fritts, Esq., Co-Chair, Management Committee
> Cadwalader, Wickersham & Taft[1]

> Co-partners, owe to one another, while the enterprise continues the duty of finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties.
>
> — Chief Justice Benjamin Cardozo
> *Meinhard v. Salmon*[2]

> [Wrongfully ousted former partner] James W. Beasley, shall recover from the Defendant, Cadwalader, Wickersham & Taft, damages in the amount of $2,487,502.00, for which let execution issue.
>
> — Judge Jack H. Cook
> *Beasley v. Cadwalader, Wickersham & Taft*[3]

---

* Associate Professor, Washington and Lee University School of Law. The assistance of the Frances Lewis Law Center, Washington and Lee University, is gratefully acknowledged. I would like to thank Randy Bezanson, Bill Callison, Keith Engel, Art Goldsmith, Bob Hillman, David Millon, Larry Mitchell, Barry Sullivan, Brenda Vestal, and Don Weidner for their helpful comments. I would also like to thank my research assistants Mara Leiding and Kathy Suh for their valuable contributions. This Article is based on an address presented at the Washington and Lee University School of Law on November 15, 1996, in connection with *The Future of the Unincorporated Firm* Symposium.

1. Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, at *7 (Fla. Cir. Ct. July 23, 1996) (quoting deposition of John Fritts at 95, ll. 10-25, docket no. 132).

2. *Id.* at *5 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.)).

3. *Id.* at *9. The award was subsequently increased to $3,647,011.17. *See infra* note 33. The case is on appeal. *See infra* note 34.

Introduction

In several ways, the ruling in *Beasley v. Cadwalader, Wickersham & Taft* measures our collective failure with respect to partnership law. One measure of our failure is that popular support of the traditional norms of partner behavior has eroded to such an extent that the managers of a partnership, a leading law firm no less, might have assumed the behavior chronicled by the court was acceptable.

It is another measure of failure that the outcome of *Cadwalader* under the Revised Uniform Partnership Act (RUPA) and its progeny would be far from certain, both because RUPA reflects the erosion of the traditional norms and because RUPA does not fully implement either the traditional structure or the competing philosophy, but represents an uneasy and unworkable compromise between the two.

It is a further measure of failure that although the group of knowledgeable commentators assembled for this Symposium would probably agree as to how a client could best arrange its affairs to avoid the situation in which the Cadwalader firm and James Beasley found themselves, there is no agreement as to whether the new structures are justified on the basis of any well-articulated policy.

It is also a measure of failure that we are seeing a breakdown in uniformity of the law of unincorporated firms. Such a breakdown is not directly involved in *Cadwalader*, to be sure, but the breakdown does promise to make situations such as that in *Cadwalader* more likely in the future because it gives a new means for partners acting in bad faith to attempt to avoid their fiduciary duties.

Cadwalader measures our failure the largest in the loss of any consensus as to what the law ought to be. Behind advocates' arguments over the application of the existing or emerging law, and behind disputes over new forms and uniformity within forms, we have abandoned the historical consensus on the theory of partnership law without having any consensus with which to replace it. We have discarded historical assumptions about the nature of partnership law, the importance of personal responsibility as reflected in the liability of general partners, and the desirability of uniform laws. And that abandonment of shared assumptions is the root cause of our failure and the resulting mess we have made of the law of the unincorporated firm.

I. The Case: Beasley v. Cadwalader, Wickersham & Taft

Cadwalader itself is interesting, and merits a short introduction.[4] From his lateral entry in 1989, James Beasley was a partner, "an extraordinary rainmaker and a skilled litigator,"[5] in the Palm Beach office of Cadwalader, Wickersham & Taft, which bills itself as the oldest law partnership in the United States.[6] In 1993, the share value of the Cadwalader firm declined, and concern among some partners resulted in a substantial change in the composition of the management committee.[7] Also in 1993, the Palm Beach office operated at a loss for the first time since Beasley's arrival.[8] The year 1994 saw an even larger decline in Cadwalader's share value.[9] A group of some fifteen "younger, more productive partners"[10] became upset at the compensation situation and pressed the management committee for action.[11] The management committee and the insurgents cooperated in an exercise, "Project Right Size," which "was aimed at identifying less productive partners for elimination from the partnership."[12] The status of the Palm Beach office became part of Project Right Size, "with the common purpose being to improve compensation to the remaining partners and to retain the disgruntled more productive partners."[13]

Confidential firm information was used to generate secret computer models of a downsized firm.[14] Events ran their course:

4. Except as noted, these facts are excerpted from "The Facts" section of Judge Cook's opinion. *See Cadwalader*, 1996 WL 438777, at *1-*3. Dean Donald Weidner presents a contrasting analysis of *Cadwalader* and RUPA. Donald J. Weidner, *Cadwalader, RUPA and Fiduciary Duty*, 54 WASH. & LEE L. REV. (forthcoming Fall 1997).

5. *Cadwalader*, 1996 WL 438777, at *1.

6. *Id.* There is some irony here, evident in the managing partner's acknowledgment that: "The partnership is technically dissolved every time a partner leaves . . . ." Amy Stevens, *Prestigious Law Firm Gets Sued by a Partner It Would Not Keep*, WALL ST. J., Nov. 11, 1994, at B1 (quoting John Fritts, management committee co-chair).

7. A detailed account of the internal politics appeared in the popular legal press. *See* Vera Titunik, *The Rising Sons*, AM. LAW., Mar. 1996, at 78, 78-83.

8. *Cadwalader*, 1996 WL 438777, at *1.

9. *Id.* at *2.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* At the instigation of a partner who was both a member of the management committee and the insurgent group, "numerous computer runs were generated . . . analyzing the financial impact of terminating from ten to thirty partners." *Id.* These computer runs

> The watershed of the project was a clandestine all day management committee meeting . . . . Prior to the meeting, Co-chair Donald Glascoff had asked all management committee members to submit lists of less productive partners for discussion as to possible termination. Only five of the twelve members chose to submit such a list. . . . All of the Florida partners appeared on at least three lists and one appeared on all five. The . . . meeting resulted in seventeen partners being identified for expulsion from the partnership, including all of the Florida partners.[15]

The management committee voted to go forward with Project Right Size.[16]

The day after the management committee decided to close the Palm Beach office, the firm notified the Florida partners.[17] Reportedly, the Florida partners were asked to voluntarily withdraw in exchange for a return of their capital contributions and three months' severance.[18] All refused, and thereafter the firm posted an armed guard at the Palm Beach office to protect its property.[19]

Negotiations with Beasley over the terms of his separation from the firm broke down, and litigation ensued.[20] Beasley advanced two substantive claims against the partnership: that he was expelled from the partnership in violation of the firm's partnership agreement, and that the firm's actions violated its fiduciary duty owed to him. He also advanced a claim for punitive damages.

---

were kept from the partnership generally, but were shared with at least one other member of the insurgents.

15. *Id.*

16. *Id.* at *2-*3. The clandestine meeting was held on August 7, 1994. *Id.* at *2. The final management committee vote to close the Florida office was taken on August 29, 1994. *Id.* The Florida partners were told of the closure of the Florida office on August 30, 1994; the remaining partners were informed of the decision on August 31, 1994. *Id.* at *3.

17. *Id.* at *3.

18. Stevens, *supra* note 6, at B1

19. *Id.*

20. *Cadwalader*, 1996 WL 438777, at *3. Early in September, a representative of the management committee went to Palm Beach to discuss the future of the Palm Beach partners. *Id.* He agreed with James Beasley that in Beasley's case a transfer to New York would be impracticable. *Id.* Through September, October, and early November, Beasley negotiated with the management committee on the terms of his departure. *Id.* Negotiations broke down, and on November 10, 1994, Beasley filed suit. *Id.* The next day, "the co-chairs of the firm ousted Beasley from the firm offices by letter, although his actual departure was delayed by a series of agreements until November 17, 1994." *Id.*

A. Expulsion as Violation of Firm Partnership Agreement

Remarkably, Cadwalader, Wickersham & Taft had no provision in its partnership agreement for the expulsion of a partner.[21] There being no statutory provision allowing the expulsion, the court determined that Beasley was expelled and the partnership agreement breached.[22]

B. Breaches of Fiduciary Duty

Beasley advanced three fiduciary duty claims: (i) that the firm expelled him in contravention of the partnership agreement, (ii) that the firm failed to disclose the plans to close the Palm Beach office and terminate its partners, and (iii) that the motivation for the expulsion was the financial gain of the remaining partners.[23] Judge Cook found a breach of fiduciary duty, apparently based on the third component of Beasley's claim.[24] After

---

21. *Id.* at *7. Judge Cook found that the partnership agreement contained no expulsion clause, that the management committee had a "legal memorandum which told them that they did not have the authority to expel partners," that the management committee members had not read the partnership agreement to see if it allowed them to expel a partner, and that the management committee did not consult its in-house experts on partnership law on the question of their power to expel a partner. *Id.* Professor Hillman reports that expulsion clauses are common in written law firm partnership agreements, but that comprehensive clauses are rare. ROBERT W. HILLMAN, HILLMAN ON LAWYER MOBILITY: THE LAW AND ETHICS OF PARTNER WITHDRAWALS AND LAW FIRM BREAKUPS § 5.3.2., at 5:7 (1996).

The partnership agreement for the White & Case firm did not contain an express termination provision either, leading to their collusive dissolution case involving a former partner. Dawson v. White & Case, 672 N.E.2d 589, 592 (N.Y. 1996). In contrast, the partnership agreement of the Pillsbury Madison & Sutro firm recently withstood a challenge to its expulsion provisions. Heller v. Pillsbury Madison & Sutro, 58 Cal. Rptr. 2d 336, 346-48 (Ct. App. 1996).

22. *Cadwalader*, 1996 WL 438777, at *5. Cadwalader argued that Beasley voluntarily withdrew. *Id.* at *3-*4. The firm claimed that the management committee didn't expel Beasley, it merely closed the Palm Beach office and offered to transfer Beasley to New York. *Id.* The court found that Cadwalader's offer to move Beasley to New York "was not a good faith offer of continued partnership," and that even had the offer been made in good faith, Beasley's rejection of the offer would not constitute a voluntary withdrawal from the partnership. *Id.* at *4. Judge Cook also found that the filing of Beasley's suit against the firm did not constitute a voluntary withdrawal. *Id.*

Having rejected Cadwalader's defenses, the court found that Beasley was wrongfully expelled from the partnership in two ways: "[T]he management committee's action in deciding to terminate the Florida partners and to close the Florida office constituted an anticipatory breach of the partnership agreement," and "Beasley was expelled by the letter of November 11, 1994 [ousting Beasley from the firm offices after he filed suit]." *Id.* at *5.

23. *Id.* at *5.

24. *Id.* at *5-*6. Judge Cook was not clear as to whether Beasley could have prevailed on the fiduciary duty claim without first prevailing on the partnership agreement

citing *Meinhard v. Salmon* as "[t]he point of beginning and perhaps ending for an analysis of partnership fiduciary duty within the State of New York,"[25] the court distinguished the case of *Day v. Sidley & Austin.*[26] Judge Cook then noted that the Cadwalader partnership agreement contained a provision allowing amendments to the partnership agreement by a less than unanimous vote of the partners. "However," the court stated, "the management committee chose not to follow this route, but rather, apparently for the sake of expediency, to bend to the will of the disgruntled partners by expelling others to whom they owed a fiduciary duty."[27] Looking to the lack of an expulsion mechanism in the partnership agreement and the failure to amend the partnership agreement to create an expulsion mechanism prior to the expulsion of Beasley, the court declared:

> These facts compel the conclusion that the management committee breached its fiduciary duty to Beasley. This was not a situation where the management committee was merely fulfilling its management function. Rather, it was participating in a clandestine plan to wrongfully expel some partners for the financial gain of other partners. Such activity cannot be said to be honorable, much less to comport with "the punctilio of an honor."[28]

---

claim. Certainly the opinion permits the inference that the partnership agreement breach was a central element of the fiduciary duty breach. Judge Cook stated that:

> These facts compel the conclusion that the management committee breached its' fiduciary duty to Beasley. This was not a situation where the management committee was merely fulfilling its' [sic] management function. Rather, it was participating in a clandestine plan to wrongfully expel some partners for the financial gain of other partners. Such activity cannot be said to be honorable, much less to comport with "the punctilio of an honor."

Id. at *6. But it is also true that there is nothing in the analysis that would preclude a finding for Beasley on the fiduciary duty claim even had the partnership agreement permitted the expulsion of a partner. Such a fact would simply have shifted the inquiry to whether it is a violation of the fiduciary duty of loyalty or the fiduciary obligation of good faith to use such a mechanism in the partnership agreement to target individual partners for the benefit of other individual partners. So presented, the question would become whether the existence of a partnership agreement expulsion provision would transform such an activity "to be honorable, much less to comport with 'the punctilio of an honor.'" *Id.*

25. *Id.* at *5 (citing Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)).

26. *Id.* (citing Day v. Sidley & Austin, 394 F. Supp. 986 (D.C. Cir. 1975)). The defendant had apparently cited *Sidley & Austin* "for the proposition that there is no breach of fiduciary duty when a partner is affected by a management committee decision." *Id.* at *5. Judge Cook distinguished *Sidley & Austin* on the facts. *Id.* at *5-*6.

27. *Id.* at *6.

28. *Id.* Thus, the court rejected the firm's affirmative defense. *Id.* The court found that Beasley was planning to leave the firm, that he had entered into discussions with some

C. Claim for Punitive Damages

Beasley based his punitive damages on Cadwalader's breach of fiduciary duty. Judge Cook's analysis went to two aspects of the Cadwalader management committee's conduct in expelling Beasley: the manner in which the management committee disregarded Beasley's rights and the underlying reason for the expulsion. As to the manner of the expulsion, the court looked to the absence of a partner expulsion provision in the partnership agreement, the clear meaning of the partnership agreement coupled with the memorandum on point that the management committee had received, the failure of members of the management committee even to read the relevant portions of the partnership agreement, and the failure of the management committee to consult its own experts on partnership law.[29] As to motive, the court found that "[t]he expulsion was for the express purpose of increasing the compensation available to the other partners."[30]

After contrasting managing partner Fritts's deposition endorsement of "fear and greed and money" with Justice Cardozo's declarations in *Meinhard v. Salmon*,[31] Judge Cook made the predicate finding for an award of punitive damages:

> Under the facts of this case, it was a gross breach of fiduciary duty for some partners to throw others overboard for the expediency of increased profits. I find that these facts establish at least conduct which was so reckless as to amount to a conscious disregard for the rights of Beasley and the other expelled partners.[32]

Judge Cook awarded James Beasley $2,038,763.25 in actual damages, $500,000.00 in punitive damages, $1,075,749.94 in attorney and expert witness fees, and $32,497.98 in costs for a total award of $3,647,011.17.[33]

---

associates, and that he had not disclosed these discussions to the other partners. *Id.* Judge Cook found that these actions did not constitute a breach of Beasley's fiduciary duty to the firm and that even if Beasley's conduct did constitute such a breach it would not be sufficient to defeat his claims: "It would not be equitable to allow Beasley's actions in this regard to stand as a defense to Cadwalader's much more egregious conduct. If Beasley had dirt under his fingernails, CW&T was up to its elbows in the dung heap." *Id.*

29. *Id.* at *7.

30. *Id.*

31. *Id.*

32. *Id.*

33. Beasley was awarded $2,487,502 in damages on July 23, 1996: $236,392 for his various accounts, $867,110 for his interest in the firm on the date of expulsion, $884,000 for the profits attributable to the use of his rights to the partnership property from the date

Both sides are appealing the ruling.[34]

II. Cadwalader Under the UPA: Correct and Predictable

Cadwalader would be unremarkable if it merely stood for the proposition that, under the Uniform Partnership Act (UPA) and the common law, a group of partners cannot expel one of their partners when the partnership agreement has no expulsion provision — that such partners must either amend the partnership agreement or dissolve the partnership.[35] The case is notable because of the juxtaposition of the attitudes and behavior of those in control of the partnership with Chief Justice Cardozo's rhetoric in *Meinhard v. Salmon*, and because of the apparent utter disregard of those partners in control for any sense of fiduciary duty.[36]

---

of his wrongful expulsion to the date of the court's order, and $500,000 in punitive damages. *Id.* at *8. Beasley did not receive an award for future lost income, because the court found that the greater weight of the evidence was that Beasley would not have continued as a partner at the firm past 1994. *Id.* The court reserved jurisdiction to make further awards of prejudgment interest and costs. *Id.* at *9. On October, 17, 1996, the court awarded Beasley an additional $931,600 in attorney fees and $144,149.94 in expert witness fees, and the court reserved plaintiff's claim for $66,698.56 in taxable costs and disbursements pending further hearings. *See* Order on Plaintiff's Motion to Tax Costs and Attorney's Fees, Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," at 10-11 (Fla. Cir. Ct. Oct. 17, 1996). On December 17, 1996, the court awarded Beasley $32,497.98 in costs, and on January 16, 1997, the court awarded Beasley an additional $51,261.25 in actual damages to account for Beasley's share of the firm income from May 30, 1996 to July 23, 1996. *See* Amendment to Final Judgment, Beasley v. Cadwalader, Wickersham & Taft, CL-94-8646 "AJ," at 1-2 (Fla. Cir. Ct. Jan. 17, 1997).

34. Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, *appeal filed*, No. 96-02805 (Fla. Dist. Ct. App. Aug. 19, 1996) (defendants' appeal notice); Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, *appeal filed*, No. 96-02805 (Fla. Dist. Ct. App. Aug. 28, 1996) (plaintiff's appeal notice).

35. The leading authority on law firm breakups makes the same point: "'It's more than a contract case,' says Robert Hillman . . . . 'People shouldn't take comfort in the fact that it is about an expulsion clause. There is a lot of language in that opinion about how partners are supposed to treat each other. I think it's going to be a very important case.'" Karen Dillon, *The Cadwalader Paradox*, AM. LAW., Sept. 1996, at 7, 8; *see also* Dawson v. White & Case, 672 N.E.2d 589, 591-92 (N.Y. 1996).

36. Indeed, the managing partners cast the decisions as being nothing special: "Donald Glascoff, co-chairm[a]n of the firm's managing committee, said, 'If you don't make business decisions, you don't have a law practice.'" Beth Reinhard, *P.B. Lawyer Sues Firm over Firing*, PALM BEACH POST, Nov. 16, 1994, at 6B. The inherent conceptual difficulty in expelling a partner from a partnership is not lost on thoughtful commentators: "On a fundamental level, a tension exists between removing a partner for reasons other than misconduct and the partner's status as a co-owner of the firm." HILLMAN, *supra* note 21,

One is struck by the almost adolescent bravado of the insurgents in their reported statements. The first crisis faced by the insurgents was how to deal with the well-entrenched chair of the firm, Rodney Dayan. At issue were compensation credits for client originations:

> "We controlled a lot of business," but didn't get credit for it, claims [Robert] Link . . . . "Rod's view was, 'Leave the client contact credit with me, and I'll take care of you.'"
>
> Link . . . and others, however, wanted to take care of themselves and began to agitate for a voice in the firm. Link . . . would bash around ideas with Chris White several times a week on the squash courts at the Downtown Athletic Club. They would go back to Cadwalader's offices on Maiden Lane and talk to others . . . and especially with . . . Holland West.
>
> West, White and Link are among the hardest workers in the firm. . . . So it's not surprising that they turned their sights on partners who didn't bill or hustle at the same pace.[37]

The insurgents approached Dayan about getting a voice on the management committee:

> "Rod was receptive to our desires," says [Karsten] Giesecke, but made no promises. . . . Although [the slate prepared by Dayan] included a few reform-minded partners, those seeking change still felt jilted. "That was Rod's downfall," asserts Link. "He didn't talk to me or anything. It was a miscalculation."[38]

Dayan's miscalculation cost him leadership of the firm; he was ousted from the management committee in the elections. Having ousted Dayan, the insurgents tried to manage the firm. Continued dissatisfaction on the issue of compensation forced the management committee members to turn their sights on the partners seen as less productive. It was "do-or-die time"[39] when those in control had to make "gut-wrenching"[40] decisions to make the firm into "a sleeker, more efficient, well-oiled machine."[41]

The insurgents deny they were motivated by greed:

> "It's not about younger people trying to put money in their pocket," Link says. "If it was about that, we would have left several years ago." . . .

---

§ 5.1, at 5:2.

37. Titunik, *supra* note 7, at 80.

38. *Id.* at 81.

39. *Id.* at 79 (quoting John Fritts).

40. *Id.* (quoting unidentified management committee member).

41. *Id.* (quoting M. Holland West).

> [P]artners with portable business maintain that if money had been the only thing on their minds, they could have abandoned ship. Instead, they pride themselves on their willingness to stick with each other and the firm, even when it meant making unpleasant decisions. "It's much harder to stay and slug it out and make it work," says West.[42]

They cast the change in terms of an exciting rite of passage:

> "Like a young kid just learning to walk," is how 44-year-old real estate partner W. Christopher White, a key management committee member, describes the new generation running the firm. "You're a little unsure of yourself, but then you find out not only can you walk, you can run."[43]

Let us then stipulate that in *Cadwalader* the actions of the insurgents and their fellow-travelers on the management committee confirm the observation that, "[m]ore often than not, as baby boomers get into law firm management, they tend to be thugs."[44] The surprise in *Cadwalader*, however, seems not that insurgents and managing partners were thugs (to adopt the parlance of the observation), it is that they were such witless thugs. They seem to have either missed the danger into which they were leading the firm,[45] or to have seen the danger and thought the risk appropriate.[46]

---

42. *Id.* at 81.

43. *Id.* at 80.

44. Barry Sullivan, *Professions of Law*, 9 GEO. J. LEGAL ETHICS 1235, 1244 n.32 (1996) (quoting Deborah Graham, *Coming of Age: Having Forever Changed the Profession by Their Numbers and Diversity, Baby Boomers Can Look Forward to Running Their Firms and Even (Gasp) Retirement*, 82 A.B.A. J., Jan. 1996, at 50, 54-55 (quoting Chicago-based legal consultant Joel Henning, who further observes: "They want it all and they want it now.")). For the record, John Fritts was reported in the spring of 1996 to be 61 years of age, not a baby boomer. Titunik, *supra* note 7, at 79. The other two members of the three-person executive committee were reported to be Robert Link, Jr., 41, and Karsten Giesecke, 45. *Id.* Also mentioned in the article are M. Holland West, 43 ("one of the upstarts") and W. Christopher White, 44 ("a key management committee member"). *Id.* at 79-80.

45. One executive committee member evidenced a remarkable disdain for the fiduciary claims: "John Fritts . . . was quoted as calling Beasley's lawsuit frivolous. . . . 'That's a bit of foolishness,' he said. 'The partnership is technically dissolved every time a partner leaves, and nothing happens. It's a paper, legalistic transaction and has none of the consequences he alludes to." *Watch on the Media*, LIABILITY WK., Nov. 21, 1994, *available in* LEXIS, Newsletter database.

46. After Judge Cook's decision, the same member of the executive committee cast the claim as simply a cost of doing business:

> The closing of the Palm Beach office was a sound strategic decision. Such decisions carry the possibility of lawsuits much like the one brought by Jim Beasley, and we accepted that fact in our decision-making process.

Dillon, *supra* note 35, at 8 (quoting prepared statement of John Fritts).

Of course, the behavior of the management committee is not surprising at all if one believes that the abandonment of the moral foundation of fiduciary law has serious social consequences.[47]

Although the matter is on appeal, and thus final evaluations are impossible, Judge Cook's core analysis in *Cadwalader* is solid; his reasoning seems debatable only on the margins or on issues not raised by the facts in that situation. As to the finding that Beasley was expelled from the partnership in violation of the partnership agreement, the analysis is sound.[48] Beyond any doubt, the UPA allows partnership agreements to provide a mechanism for the expulsion of a partner.[49] But the Cadwalader partnership agreement did not contain such an expulsion provision.[50] In dictum, Judge Cook indicated that the partners could have adopted such an expulsion provision and then expelled the targeted partners:

> There was a way for CW&T to address the problem of profitability and the presence of too many unproductive partners. . . . That was to present the problem to the partnership with a proposed amendment to the partnership agreement providing for the expulsion of partners. This could have been done pursuant to paragraph "O" of the partnership agreement. However, the management committee chose not to follow this route, but rather, apparently for the sake of expediency, to bend to the will of the disgruntled partners by expelling others to whom they owed a fiduciary duty.[51]

---

47. Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1729-31 (1990).

48. There is nothing in the record to suggest that Judge Cook was incorrect in his finding that "it is clear that the management committee had the power to close a branch office as part of its overall managerial authority." *Cadwalader*, 1996 WL 438777, at *4. A management committee certainly could be given such power. *See* UNIF. PARTNERSHIP ACT (1914) (UPA) § 18(e), (h), 6 U.L.A. 526 (1995). But such a conclusion does not end the inquiry. The Judge's analysis seems correct that James Beasley did not voluntarily withdraw by virtue of either his rejection of the bad faith relocation offer or his initiation of litigation.

49. UPA § 31(1)(d) ("Dissolution is caused . . . [w]ithout violation of the agreement between the partners . . . [b]y the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners . . . ."); UPA § 38(1) ("[I]f dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership."); UPA § 41(6) ("When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.").

50. *Cadwalader*, 1996 WL 438777, at *3.

51. *Id.* at *6.

Assuming that the partnership agreement contained a provision for the less-than-unanimous amendment of the partnership agreement,[52] there is still the question of whether the majority could so amend the partnership agreement as part of a single plan that included the expulsion of certain partners, without violating the fiduciary duty of good faith.[53] Professor Hillman finds that there is not much authority on point, but notes that "there is authority indicating a partnership may not by means of expulsion gain an undue advantage over one of its members."[54] But, of course, in *Cad-*

---

52. The agreement can include such a provision. UPA § 18(h) ("The rights and duties of the partners in relation to the partnership shall be determined, *subject to any agreement between them*, by the following rules: . . . [N]o act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.") (emphasis added); *see* HILLMAN, *supra* note 21, § 5.2, at 5:2-5:3 (noting that "expulsion pursuant to expulsion provisions in the partnership agreement" is one means of partner expulsion).

53. Professor Hillman does cite a case in which the partners used a less-than-unanimous amendment procedure to put in place an expulsion mechanism that was then used to expel a targeted partner. HILLMAN, *supra* note 21, § 5.3.2., at 5:6 n.10 (citing Aztec Petroleum Corp. v. MHM Co., 703 S.W.2d 290, 294 (Tex. App. 1985, no writ)). But the *Aztec* court was apparently not presented with a breach of good faith claim.

Beyond question, the partners had one way out, although the question of whether it would violate their duties of loyalty and good faith is unanswered. It appears that Cadwalader was a partnership at will, and as such, any of the partners, including any of the insurgents, could have dissolved the partnership at any time. UPA § 31(1)(b). Of course such a dissolution would simply trigger the winding up process. UPA § 30. The partners other than Beasley have no right to continue the business without him. UPA Section 38(2)(b) does not work because Beasley has not wrongfully dissolved; UPA Section 41(1) does not work because Beasley has not retired; UPA Section 41(2) does not work because Beasley has not retired; UPA Section 41(3) does not work because Beasley has neither retired nor died; UPA Section 41(5) does not work because Beasley has not wrongfully dissolved; and UPA Section 41(6) does not work because Beasley has not been expelled. And Beasley, as a partner who has not caused a wrongful dissolution of the partnership, has a right to participate in the winding up process. UPA § 37. If the dissolution was done in contemplation of a midnight bulk sale of the firm assets, even for a reasonable price, the participation of Beasley would likely prove to be a substantial complication:

> When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners.

UPA § 38(1).

54. HILLMAN, *supra* note 21, § 5.3.3.3, at 5:12 (citing Lawlis v. Kightlinger & Gray, 562 N.E.2d 435, 440, 442-443 (Ind. Ct. App. 1990); Levy v. Nassau Queens Med. Group, 476 N.Y.S.2d 613, 614 (App. Div. 1984); Gill v. Mallory, 80 N.Y.S.2d 155, 157-58 (App. Div. 1948)); *id.* § 5.3.3., at S-5:2 (citing Bohatch v. Butler & Binion, 905 S.W.2d 597 (Tex. App. 1995, writ granted) ("'Bad faith' in this context means only that partners cannot expel another partner for self-gain.")); *see* GEORGE H. CAIN, LAW PARTNERSHIP: ITS RIGHTS AND RESPONSIBILITIES 161-66 (1996). Cain refers to the classic cases of *Holman v. Coie* and

walader the question of whether a less-than-unanimous amendment mechanism can be used to insert and then exercise an expulsion clause did not arise, because the management committee simply elected to proceed with the expulsion without the benefit of any expulsion provision in the partnership agreement. Thus, Judge Cook's musings on amendment are not essential to the ruling.

As to the finding that Cadwalader breached its fiduciary duty to Beasley, Judge Cook's analysis raises questions, although the result is defensible. The fundamental question is whether the partnership can — in the absence of an agreement *ex ante* to allow such behavior — target some partners for ouster.[55] At one point, Judge Cook appears to believe that it is inappropriate per se for a partnership to so differentiate between partners:

> As Justice Cardozo observed in *Meinhard* . . . . "For each the venture had its phases of fair weather and foul. The two were in it jointly, for better or worse." When the partnership encounters foul weather, the partners must either all stay the course or all abandon it.[56]

Lawlis v. Kightlinger & Gray. Cain's conclusion does not raise the good faith question: "The lessons of *Holman* and *Lawlis* are that a partnership, with a properly drawn partnership agreement, can expel a partner without notice, without cause, and without providing any reason." CAIN, *supra*, at 166. But one of the cases cited by Cain indicates that a predatory purpose will violate the good faith obligation owed the expelled partner. Holman v. Coie, 522 P.2d 515, 523 (Wash. Ct. App. 1974). The Washington appellate court stated:

> Plaintiffs' claims do not relate to the business aspects or property rights of this partnership. There is no evidence the purpose of the severance was to gain any business or property advantage to the remaining partners. Consequently, in that context, there has been no showing of breach of the duty of good faith toward plaintiffs.

Id. The Indiana Court of Appeals in *Lawlis* is not as clear. It first distinguishes a partner from an at-will employee and notes the statutory good faith requirement and then addresses the question of a predatory expulsion: "[I]f the power to involuntarily expel partners granted by a partnership agreement is exercised in bad faith or for a 'predatory purpose,' . . . the partnership agreement is violated, giving rise to an action for damages the affected partner has suffered as a result of his expulsion." Lawlis v. Kightlinger & Gray, 562 N.E.2d 435, 440 (Ind. Ct. App. 1990). But later in the opinion, the court very narrowly draws the requirements:

> Where the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in "good faith" *regardless of motivation* if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled.

Id. at 442-43 (emphasis added).

55. This assumes that a specific and clear enough agreement could be drafted to allow such behavior without a violation of the partners' fiduciary obligations of loyalty and good faith.

56. Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL

But Judge Cook also stated that there was a way for the Cadwalader partners to eject the targeted partners without violating either the partnership agreement or the firm's fiduciary duty:

> There was a way for CW&T to address the problem of profitability and the presence of too many unproductive partners. . . . That was to present the problem to the partnership with a proposed amendment to the partnership agreement providing for the expulsion of partners. This could have been done pursuant to paragraph "O" of the partnership agreement.[57]

But doesn't amending the partnership agreement and expelling the nonproductive partners violate Judge Cook's "all stay the course or all abandon it" rule? There is an absolutist strain of partnership law that would force the partners to either all sink or all swim. Chief Justice Cardozo did, after all, put it that Meinhard and Salmon "were in it jointly, for better or for worse."[58] Under such a rule, for the Cadwalader partners to amend the partnership agreement to include an expulsion mechanism and then expel the targeted partners would be clearly inappropriate. Indeed, under such an absolutist approach it would arguably be inappropriate for the partners to use a pre-existing partnership agreement provision to expel the targeted partners. Under such an approach, Judge Cook would be wrong to suggest that the partners could have amended and expelled.

There is a second analysis, however, under which Judge Cook's pronouncements are not inconsistent and his judgment is defensible. The key is our conception of the partnership relation. The underlying principle of

---

438777, at *7 (Fla. Cir. Ct. July 23, 1996) (quoting Meinhard v. Salmon, 164 N.E. 545, 548 (N.Y. 1928)). The "all abandon it" option does not mean that the law firm has to completely break up, leaving no brick standing on another. It simply means that the partnership has to be dissolved and wound up in the sense of a fair bulk sale of assets to the partners who wish to continue. Examples of this type of dissolution abound, albeit with the dissolving party typically being the exiting partner. *See* Sharon Walsh, *Fight over Compensation Leads to a Legal Breakup*, WASH. POST, Oct. 1, 1996, at C1. In the case of the Washington D.C. firm of Nussbaum & Wald, Michael Nussbaum, the "founding partner and major rainmaker . . . announced he was dissolving the firm." *Id.* At issue was Nussbaum's compensation: "Nussbaum . . . believed he was entitled to 36 percent of the net profits" under an oral agreement he claimed had been in effect "for some time." *Id.* The other five equity partners believed Nussbaum was worth his pro rata one-sixth share, there being no oral or written agreement on the division of net profits. *Id.* "'I'm sure they think I'm greedy and I think they're greedy,' Nussbaum said . . . 'I thought my contribution as a rainmaker and a worker was worth more.'" *Id.* In a nice twist, the *Post* reported that name partners Michael Nussbaum and Robert Wald first met when Nussbaum represented Wald in the breakup of Wald's former firm. *Id.*

57. *Cadwalader*, 1996 WL 438777, at *6.

58. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, C.J.).

fiduciary-based partnership law seems clear: by joining the partnership, each partner agrees to advance the collective interest and not the short term individual interest of the partner.[59] This is not an abjuration of self-interest: Far from it. Individuals elect to join a partnership because they calculate that they will maximize their individual long-term interest through the collective enterprise, compared with alternative investments of capital and labor. This view of the partnership relation is clearly in accord with the traditional commentators[60] and case law,[61] and it is supported by some thoughtful contemporary analyses.[62]

Under the nonabsolutist analysis, the partners need not all either stay the course or abandon the venture, but the decision as to whether some partners are to be thrown overboard must be based on the best interests of the *collective*, not the best interests of individual partners who have the power to effectuate the expulsions.

Admittedly, it can be a fine distinction, and perhaps an illusory one when the group of nontargeted partners is coextensive with the group of partners making the decision to expel the targeted partners.[63] This analysis

---

59. Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 527 (1993).

60. *Id.* at 527 n.14; *see* JOHN COLLYER, A PRACTICAL TREATISE ON THE LAW OF PARTNERSHIP § 189, at 185 (4th Am. ed., Little, Brown & Co. 1853) ("The good faith of the partners is mutually pledged to each other, that the business shall be conducted . . . for their mutual advantage . . . ."); EUGENE A. GILMORE, HANDBOOK ON THE LAW OF PARTNERSHIPS, INCLUDING LIMITED PARTNERSHIPS 375 (1911) ("As the partnership relation is one of mutual confidence and trust, every member is obligated in all partnership affairs to consider the mutual welfare of all the partners, rather than his own private benefit."); NATHANIEL LINDLEY, A TREATISE ON THE LAW OF PARTNERSHIP *305 (5th ed., Callaghan & Co. 1888) ("Good faith requires that a partner shall not obtain a private advantage at the expense of the firm. He is bound in all transactions affecting the partnership to do his best for the common body . . . .").

61. Vestal, *supra* note 59, at 527 n.14; *see* Clement v. Clement, 260 A.2d 728, 729 (Pa. 1970) ("One should not have to deal with his partner as though he were the opposite party in an arms-length transaction. One should be allowed to trust his partner, to expect that he is pursuing a common goal and not working at cross-purposes.").

62. Claire M. Dickerson, *Is it Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111, 118 (1993) ("[A] partner is required to subordinate his or her separate self-interest, but is not required to eliminate or deny the existence of a conflict."). I also find helpful, "if somewhat wide of the mark," Professor Larry Mitchell's analysis of the fiduciary duties of participants in closely held corporations. Vestal, *supra* note 59, at 528 n.15 (discussing Mitchell, *supra* note 47, at 1676).

63. Such was not the case in *Cadwalader.* To the extent the full partnership approved (or did not reject) the management committee actions, the step was not taken until six weeks after the management committee voted to expel the partners, including Beasley. Beasley v.

is certainly more complicated than the absolutist prohibition. How does a judge, faced with the type of situation Judge Cook faced in *Cadwalader*, decide whether the partners who made the decision to expel another partner were motivated by the collective interest or their own, individual interests? One approach would be to shift the burden of proof, so that the partnership would have to prove that the challenged action advanced a legitimate business purpose of the collective.[64] Upon the partnership making the threshold proof, the burden would switch to the plaintiff-partner to prove that the partnership had other options which could have advanced the identified collective interest with less harm to the plaintiff.[65]

Other approaches are available.[66] One could avoid the motivation issue and instead focus on the procedural regularity of the transac-

---

Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, at *2-*3 (Fla. Cir. Ct. July 23, 1996) (noting that management committee vote to close the Florida office occurred in August 29, 1994; the sixty-seven to twelve partner nonrejection of management committee proposal occurred in mid-October).

That the size of the firm can be a factor in assessing good faith is confirmed in *Bohatch*, in which the expelled partner's claimed predatory purpose was rejected as a matter of law by the court:

> Bohatch . . . argues that she was expelled so that the other partners could acquire her partnership interest. Bohatch's partnership share was so small, however, that the jury could not have reasonably concluded that the partners' expulsion of Bohatch was *motivated* by their desire to acquire her partnership share.

Bohatch v. Butler & Binion, 905 S.W.2d 597, 604 (Tex. App. 1995, writ granted).

64. This would adopt an approach taken in the close corporation setting. *See* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976). Under *Wilkes*, if minority shareholders of a closely held corporation allege "a breach of the strict good faith duty owed them by the majority . . . . [i]t must be asked whether the controlling group can demonstrate a legitimate business purpose for its action." *Id.* The *Wilkes* approach represents a substantial retreat from pure fiduciary analysis. Mitchell, *supra* note 47, at 1699-1714.

This analysis parallels that suggested to evaluate the obligations owed to preferred shareholders. Lawrence E. Mitchell, *The Puzzling Paradox of Preferred Stock (And Why We Should Care About It)*, 51 BUS. LAW. 443, 475-76 (1996).

65. Under *Wilkes*, once the majority demonstrates a legitimate business purpose for its action, the burden shifts to the minority to demonstrate an alternative method of achieving the same result with less harm to the minority. *Wilkes*, 353 N.E.2d at 663. The *Wilkes* court stated: "When an asserted business purpose . . . is advanced by the majority . . . we think it is open to minority stockholders to demonstrate that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." *Id.* In his treatise, Professor Hillman suggests that "the availability of less drastic alternatives" to expulsion may be relevant to the good faith inquiry, although he acknowledges there is "little authority in case law" for such a measurement. HILLMAN, *supra* note 21, §§ 5.3.3.3.-.4., at 5:11-5:12.

66. Professor Mitchell's discussion is instructive on this point. Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 472-76 (1997).

tion,[67] or if procedural fairness could not be demonstrated, one could focus on the substantive fairness of the transaction.[68]

The record in *Cadwalader* appears to be so gross that it would not matter which approach was taken. The management committee's actions would clearly be inappropriate under the absolutist analysis.

Under the nonabsolutist analysis, using the first, burden-shifting and balancing approach, there are some indications that the controlling partners in *Cadwalader* could have made at least the threshold showing required.[69] Even co-chair John Fritts, in his unhelpful deposition statement, comes close to making the collective-interest argument: "Unless we didn't get Cadwalader's profitability to where it was with our competitors' firms, my great fear was that people were going to leave and that *we would then not be able to sustain ourselves*."[70] That statement certainly could be translated as a concern for the collective interest, not merely a naked attempt to expel partners for the direct benefit of certain other partners. But even if the management committee could recharacterize its motives, it is not at all clear that Beasley, who the court found to be "both an extraordinary rainmaker and a skilled litigator,"[71] couldn't have made a showing of a less injurious way of maintaining firm profitability.

As to the procedural and substantive fairness tests, the record is not helpful to the management committee. Judge Cook's findings in *Cadwalader*, which stress the lack of full disclosure and the self-interestedness of the decisionmakers, would seem to preclude a finding in favor of the

67. This is the fair dealing test discussed in the corporation context by Professor Mitchell. Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425, 452-54 (1993). Mitchell stated: "Fair dealing focuses on the process by which these terms are reached and is satisfied by proof that the negotiations surrounding the transaction were structured to replicate those that would take place between unrelated parties." *Id.* at 445-46.

68. This is the fair price test discussed in the corporation context by Professor Mitchell. Mitchell, *supra* note 67, at 445, 446-52. Mitchell stated: "Fair price is concerned with the substantive terms of the transaction and is satisfied by proof that the financial aspects of the transaction fall within a range that would be acceptable to unrelated parties." *Id.* at 445 (authorities omitted).

69. Firm profitability, as measured by the per share value, had declined in both 1993 and 1994. *Cadwalader*, 1996 WL 438777, at *1. The Palm Beach office operated at a loss in 1993. *Id.* The other senior partner in the Palm Beach office had "personality flaws" that made him "extraordinarily disruptive, exhibiting unpredictable temper tantrums." *Id.* And the Palm Beach office, although not Beasley, was involved in a sexual harassment complaint. *Id.*

70. *Id.* at *7 (emphasis added).

71. *Id.* at *1.

management committee under a procedural fairness test.[72] The award of $1,987,502 in compensatory damages,[73] taken together with the reports of the firm's initial offer to the targeted partners, would seem to preclude a finding in favor of the management committee under a substantive fairness test.[74]

In the end, the procedural irregularity and substantive inadequacy justify Judge Cook's decision and the award of punitive damages. A good faith attempt to treat a soon-to-be expelled partner fairly is simply inconsistent with the environment portrayed by Judge Cook, an environment in which a cabal of self-proclaimed "Good Guys,"[75] with the threat of mass resignations, sends the management committee into a series of clandestine meetings in which the cabal blackmails the management committee to use confidential firm information to generate hit lists of partners to be eliminated, and where the insiders disregard competent legal advice on their powers, make bad faith offers to the target partners, and conspire to disadvantage some partners to benefit the others. In the face of such behavior, Judge Cook's response is appropriate, and the failure of the management committee to anticipate the reaction is astounding[76] and perhaps civilly actionable on the part of the other partners not expelled.[77]

---

72. *Id.* at *6 (characterizing management committee action as "a clandestine plan to wrongfully expel some partners for the financial gain of other partners").

73. *Id.* at *8.

74. *Id.* at *6 (characterizing management committee action as "a clandestine plan to wrongfully expel some partners for the financial gain of other partners").

75. Ann Davis, *Memos Expose "Project Rightsize" — Cadwalader Papers Are Unsealed in Ex-Partner Suit*, NAT'L L.J., May 20, 1996, at A6.

76. As to the use of clandestine pressure to expel a partner for personal and not collective reasons, the management committee at Cadwalader would have profited by reading an example from 1853, quoted in Professor Hillman's essential text:

> [I]t was not fair nor right — it was clandestine . . . on the part of Mr. Vaughan, to secure the ear . . . of those parties having the controlling power . . . to get them . . . to sign this [expulsion] document, without the slightest communication to Mr. Blisset . . . . If Cave, Daniel, and Vaughan were equally of one mind [favoring the expulsion] . . . that would be sufficient; but, that Mr. Vaughan, who alone wished to get rid of Mr. Blisset — no other person having the slightest desire to do so — should not by these threats procure the concurrence of these two partners, and so effect that object.

HILLMAN, *supra* note 21, § 5.3.1., at 5:4-5:5 (citing Blisset v. Daniel, 10 Hare 493, 530-31 (1853)).

77. It is possible the actions of the management committee would support a claim by the remaining partners for breach of the fiduciary duty of care. The record does not indicate whether the Cadwalader partnership agreement attempts to insulate the management committee from liability for violations of the duty of care, but typically partners have a good faith

The controlling partners in *Cadwalader* sought to deprive James Beasley of two things to which he was entitled. The first was a fair price for the partnership interest expropriated. The second was the right to participate in the dissolution and winding up of the partnership. For if there was no expulsion right, then the only avenue open to the insurgents and their management committee allies was to dissolve the partnership.[78] They had the power to take this step.[79] But once the step was taken, the partnership

---

duty of care:

> Under a *good faith* standard of care, a partner is not liable to the partnership or his or her co-partners for acts which are not fraudulent or wanton and which are undertaken in good faith. . . . Partners have been held liable for mismanagement when they were grossly negligent or acted in reckless disregard for the affairs of the partnership.

J. WILLIAM CALLISON, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 12.02, at 12-6 (1995).

In *Beasley*, Judge Cook found that the management committee's actions were not taken in good faith, *Cadwalader*, 1996 WL 438777, at *3-*4; that the actions constituted "a gross breach of fiduciary duty," *id.* at *7; and that the "facts establish at least conduct which was so reckless as to amount to a conscious disregard for the rights of Beasley and the other expelled partners." *Id.* With a very large sum potentially at issue — in excess of $3,500,000 in damages and costs, plus the costs of appeals, plus any recovery in the pending New York litigation (as to which Judge Cook's findings may have issue preclusive effect if the New York plaintiff can meet the full faith and credit and fairness hurdles and if New York recognizes offensive issue preclusion) — one can imagine partners who were not members of the insurgent group or the management committee at the time of Project Rightsize exploring the possibility of a breach of care claim against the management committee.

78. HILLMAN, *supra* note 21, § 5.3.2., at 5:6-5:7. Hillman states:

> An expulsion by act of partners requires a preexisting agreement specifically authorizing the removal of partners. Absent such an agreement, an expulsion may not be accomplished without the unanimous consent of the partners; such consent would effectively be given for amending the partnership agreement to allow expulsions, a circumstance unlikely to occur since the target of the expulsion action would need to approve the amendment. The "firing" of a partner unsupported by an underlying expulsion agreement is not an expulsion but is a dissolution by express will of the partner's initiating the "removal" of one of their colleagues.

Id. (authorities omitted). Professor Hillman does indicate that a partner may also be removed, absent an expulsion provision in the partnership agreement, by judicial decree. *Id.* § 5.2, at 5:2-5:3.

79. *See* Page v. Page, 359 P.2d 41, 42-43 (Cal. 1961). If the firm was an at-will partnership, any partner could dissolve the partnership without violation of the partnership agreement. UPA § 31(1)(b). If the firm was a partnership for a specific term, any partner could dissolve the partnership, although the dissolving partner would be in violation of the partnership agreement. UPA § 31(2). This would prevent the wrongfully dissolving partner from participating in the winding up, UPA § 37, and would open that partner to a claim for damages. UPA § 38(2)(a)II.

would have to be wound up,[80] and James Beasley would have the right to participate in the winding up process.[81] He would have the ability to force a sale of the partnership assets, the application of the sale proceeds to partnership liabilities, and the cash distribution of any surplus to the partners.[82] This would include the right to receive information[83] and the right to petition for judicial supervision in the appropriate case.[84] By seeking to expel Beasley, the insurgents attempted unfairly to deprive him of this very substantial leverage.[85]

The cabal and the managing partners in *Cadwalader* apparently proceeded from the belief that the relations of partners are entirely economic; they assumed away the historical fiduciary obligations of partners. Judge Cook's findings of bad faith and his awards of significant compensatory and punitive damages are the direct results of those flawed assumptions.

III. Cadwalader Under RUPA: The Uncertain Results of Reform

How would *Cadwalader* be decided under the RUPA? It is a measure of our failure in this reform that the answer is not clear.

---

80. UPA § 30.

81. UPA § 37 ("Unless otherwise agreed the partners who have not wrongfully dissolved the partnership . . . [have] the right to wind up the partnership affairs . . . ."); HILLMAN, *supra* note 21, § 5.3.2., at 5:6-5:7 ("The distinction [between a partner properly expelled and one forced out through dissolution] is of some importance because a partner terminated but not expelled has the power to demand a liquidation and winding up.").

82. UPA § 38(1) ("When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, . . . unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners.").

83. Smith v. Brown & Jones, 633 N.Y.S.2d 436, 442 (Sup. Ct. 1995) (finding obligation to disclose financial information to targeted but unexpelled, departing partner).

84. UPA § 37. It should be noted that, unlike the right to participate in the winding up, the right to petition for a judicial winding up cannot be waived. *Compare* UPA § 37 (first cl.) ("*Unless otherwise agreed* the partners who have not wrongfully dissolved the partnership . . . [have] the right to wind up the partnership affairs . . ."), *with* UPA § 37 (second cl.) ("[P]rovided, however, that any partner . . . upon cause shown, may obtain winding up by the court.").

85. In contrast, an expulsion properly done would have limited Beasley to a cash-out remedy. UPA § 38(1) ("But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership.").

Under RUPA, as under the UPA, a partnership agreement may contain a provision for the expulsion of a partner.[86] The Cadwalader partnership agreement contained no such provision. But unlike the UPA, RUPA contains a detailed statutory mechanism for the involuntary separation of a partner from the partnership, after a judicial determination of cause.[87] Once a partner is dissociated under this provision, the remaining partners can proceed to a purchase of the dissociated partner's interest in lieu of a dissolution and winding up.[88] The problem with this approach is that the

---

86. REVISED UNIF. PARTNERSHIP ACT (1994) (RUPA) § 601(3), 6 U.L.A. § 601(3) (1995) ("A partner is dissociated from a partnership upon . . . the partner's expulsion pursuant to the partnership agreement."); UPA § 31(d).

87. RUPA § 601(5). Section 601(5) states:

> A partner is dissociated from a partnership upon the occurrence of any of the following events:
>
> . . . .
>
> (5) on application by the partnership or another partner, the partner's expulsion by judicial determination because:
>
> (i) the partner engaged in wrongful conduct that adversely and materially affected the partnership business;
>
> (ii) the partner willfully or persistently committed a material breach of the partnership agreement or of a duty owed to the partnership or the other partners under Section 404; or
>
> (iii) the partner engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with the partner.

Id. The UPA provides for judicial dissolution in the parallel cases. UPA § 32; *see* ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, GENERAL AND LIMITED LIABILITY PARTNERSHIPS UNDER THE REVISED UNIFORM PARTNERSHIP ACT 201-04 (1996).

RUPA also provides for a partner's expulsion on the unanimous vote of the other partners. RUPA § 601(4). Given the insurgents' designs on multiple partners in their purge, this course of action was not available to them. Additionally, such a vote requires that one of four factual predicates be present: illegality, a transfer of all or substantially all of the targeted partner's transferable interest, if the partner is a corporation and it has lost its charter, and if the partner is a dissolved partnership. None of the factual predicates was available in the *Cadwalader* situation. This is not surprising, because the grounds "are narrow and have little relevance to the law firm setting." HILLMAN, *supra* note 21, § 5.2, at 5:3.

88. The process is somewhat complicated. In this case the partnership would apply for a judicial determination of cause. RUPA § 601(5). Under the applicable switching provision, if the dissociation results in a dissolution and winding up, then the parties proceed under Article 8; if it does not, then Article 7 applies. RUPA § 603(a). But RUPA requires a dissolution and winding up only upon "notice from a partner, other than a partner who is dissociated under Section 601(2) through (10), of that partner's express will to withdraw as a partner." RUPA § 801(1). This reflects a desire on the part of the RUPA drafters to restrict the situations in which the departure of a partner would require a winding up of the partnership business. RUPA § 801 cmts. 1-5. Because in this case the dissociation of the

record is absolutely devoid of any indication that, as to James Beasley, the partnership could have made the showing of cause required.[89] If the firm could not make the factual showing necessary for a judicial determination leading to Beasley's involuntary dissociation, then only two avenues remained: a collusive dissolution and winding up or amendment of the partnership agreement to permit the expulsion of Beasley.

In the collusive dissolution and winding up, a partner other than Beasley would give notice of intent to dissociate.[90] That would trigger a dissolution and winding up,[91] in which the controlling partners would cause the partnership assets to be the subject of a bulk sale to a newly formed partnership comprised of all the predissolution partners (including the partner whose dissociation triggered the dissolution and winding up) except for Beasley and the other targets.[92]

There are two fundamental problems with the collusive dissolution and winding up option. The first is that Beasley could participate in the winding up and could request judicial supervision of the process.[93] The second is that Beasley would remain a partner during the winding up. Because of Beasley's continued status as a partner, two key nonfiduciary disclosure obligations,[94] two of the partners' and the partnership's fiduciary duties of

---

partner would be pursuant to RUPA Section 601(5), it would not require a dissolution and winding up under RUPA Section 801, and thus would be handled under Article 7. Article 7 provides for a negotiated settlement and, if the negotiations are not productive, for a judicial determination of a buyout price. RUPA § 701.

89. RUPA § 601(5). Judge Cook characterized James Beasley as "both an extraordinary rainmaker and a skilled litigator." Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, at *1 (Fla. Cir. Ct. July 23, 1996). He further opined that Beasley's plan and preparations to depart the firm were not a breach of Beasley's fiduciary duties toward the firm. *Id.* at *6.

90. RUPA § 601(1).

91. RUPA § 801(1).

92. *White & Case* is a classic collusive dissolution, in which the firm simply dissolved and reformed without one twenty-year partner. Dawson v. White & Case, 672 N.E.2d 589, 591 (N.Y. 1996).

93. Assuming Cadwalader, Wickersham & Taft is a partnership at will, any partner could dissociate at will. RUPA § 601(1). The cabal member giving notice of dissolution could force a collusive dissolution and winding up. RUPA §§ 801(1), 801 cmt. 3. Unfortunately for the cabal, any "partner who has not wrongfully dissociated may participate in winding up the partnership's business." RUPA § 803(a). Worse, "on application of any partner . . . [a court], for good cause shown, may order judicial supervision of the winding up." *Id.*

94. The nonfiduciary information access and disclosure provisions are not temporally limited as to partners. RUPA § 403(b), (c). In this case, the obligation to disclose "without demand, any information concerning the partnership's business and affairs reasonably

loyalty,[95] the fiduciary duty of care,[96] and the nonfiduciary obligation of good faith and fair dealing[97] apply during the "winding up" period. This would be potentially quite awkward for the other partners, because during

---

required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act]" is implicated when the partnership is considering selling all or substantially all of its assets to a partnership formed by all but one of the original partnership's partners. RUPA § 403(c)(1). In the case of a collusive dissolution and winding up, such relevant information would presumably include the plans to exclude the targeted partners and any information bearing on the adequacy of consideration. Also implicated is the obligation to disclose, "on demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances." RUPA § 403(c)(2). In the case of a collusive dissolution and winding up, one could expect a substantial number of demands for information to be made.

95. The duty of loyalty obligation to account would be implicated if the "new" partnership bought the assets from the "old" partnership for inadequate consideration. The duty to account applies "in the conduct and winding up of the partnership business." RUPA § 404(b)(1). The duty of loyalty obligation "to refrain from dealing with the partnership . . . as or on behalf of a party having an interest adverse to the partnership" would be implicated if the "new" partnership bought the assets from the "old" partnership, whether for adequate or inadequate consideration. RUPA § 404(b)(2). *But see* RUPA § 404(f) ("A partner may . . . transact . . . business with the partnership, and as to each . . . transaction the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law."); HILLMAN ET AL., *supra* note 87, at 152-54. The duty to refrain from adversarial dealings with the partnership applies "in the conduct or winding up of the partnership business." RUPA § 404(b)(2).

96. The duty of care runs to both the partnership and the other partners, and requires a partner to "[refrain] from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." RUPA § 404(c) ("A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."). It should be noted that Judge Cook found that the management committee's conduct constituted "a gross breach of fiduciary duty," and the conduct "was so reckless as to amount to a conscious disregard for the rights of Beasley and the other expelled partners." Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, at *7 (Fla. Cir. Ct. July 23, 1996).

97. RUPA § 404(d) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing."). Although itself not formally temporally limited, the nonfiduciary obligation of good faith and fair dealing depends for its application on the existence of a statutory or contractual obligation, extending it in this case into the winding up period by virtue of the two applicable disclosure obligations and the two applicable fiduciary duties. HILLMAN ET AL., *supra* note 87, at 155. Professor Mitchell has helped contrast fiduciary obligation and contractual good faith. Mitchell, *supra* note 64, at 457-60. It should be noted that he deals with good faith, not the RUPA standard of "good faith and fair dealing." RUPA § 404(d).

the winding up period they would want to accomplish a set-up bulk purchase of the partnership assets by the new partnership.

The problem with amendment of the partnership agreement to permit the expulsion of Beasley is that the amendment process is subject to some of the same information, fiduciary, and good faith duties as apply in the context of the collusive dissolution and winding up. Both the obligation to disclose without a predicate demand[98] and the obligation to further disclose on demand[99] are effective in this scenario as well.[100] Does the duty of loyalty come into play? The duty runs to both the partnership and the individual partners, including the partners on the hit list.[101] But to find a violation of the duty of loyalty, one must identify a violation of one of the three exclusive subparts of the duty of loyalty: the duty to account, the duty to refrain from adversarial conduct, and the duty to refrain from competition.[102] Like the collusive dissolution and sale option, the amendment and expulsion option presents a plausible claim for a duty of loyalty violation, through a violation of the duty to account, if the compensation offered the expelled partner is inadequate. This permits a finding that the expelling partners are using the expulsion to divert partnership assets for their personal use through the mechanism of the replacement partnership.[103]

98. RUPA § 403(c)(1); HILLMAN ET AL., *supra* note 87, at 136-38.

99. RUPA § 403(c)(2); HILLMAN ET AL., *supra* note 87, at 138.

100. The RUPA disclosure obligations are rather broad. Allan W. Vestal, *The Disclosure Obligations of Partners* Inter Se *Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559, 1577-82 (1995). Under the "any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties" standard, RUPA § 403(c)(1), one can imagine the management committee being forced to divulge all manner of information on partner compensation, partner productivity, partnership expenses, and management committee plans and projections previously held as confidential by the management committee.

101. RUPA § 404(b).

102. RUPA § 404(b).

103. It should also be noted that any act in the amendment-expulsion scenario that did violate the fiduciary duty of loyalty could be authorized by "all of the partners or a number or percentage specified in the partnership agreement." RUPA § 103(b)(3)(ii). This raises the interesting possibility that the cabal and their management committee followers could assemble enough votes to violate the duty of loyalty owed the targeted partners and simultaneously approve their violation. Of course, such an action would require full disclosure — presumably not a problem — and would require the inclusion of a provision allowing such ratification in the Cadwalader, Wickersham & Taft partnership agreement — potentially a problem if the absence of an expulsion provision is any indication.

Potentially the greatest barrier to the amendment-expulsion option is the nonfiduciary obligation of good faith and fair dealing.[104] It is not yet clear what meaning the courts will attach to the phrase; it is not defined in RUPA[105] or the commentary.[106] The drafters "decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases."[107]

The RUPA approval of self-interest also comes into play, again with unclear results: "A partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."[108] There are two very different interpretations of the approval of self-interest; the language can be seen as either meaning nothing or meaning everything.[109] Under the narrow interpretation, the language is merely an evidentiary rule that says very little.[110] Under the broader interpretation, the cited language is a broad-form insulation from liability based on the good faith and fair dealing standard.[111] The commentary and history from the section offer support to both interpretations, with perhaps a slight edge to the broader reading.[112] In his Symposium contribution, Professor Larry Mitchell suggests yet a

---

104. RUPA § 404(d) ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.").

105. Neither the definitions section of the Act, RUPA § 101, nor the fiduciary duty section, RUPA § 404(d), defines the term "good faith and fair dealing."

106. RUPA § 404 cmt. 4; *see* HILLMAN ET AL., *supra* note 87, at 149-51.

107. RUPA § 404 cmt. 4.

108. RUPA § 404(e).

109. *See* HILLMAN ET AL., *supra* note 87, at 151-52.

110. Under this interpretation, the language could be paraphrased as: "[T]he fact that a partner directly personally benefits from the partner's conduct in the partnership context does not, without more, establish a violation of the partner's duties or obligations under RUPA or the partnership agreement." *Id.* at 151 (emphasis omitted).

111. I have suggested that:

> Under the broad interpretation, § 404(e) means that partners are free to pursue their short-term, individual self-interest without notice to or the consent of the partnership, subject only to the specific restrictions contained in the § 404(b) duty of loyalty — in effect that the pursuit of self-interest cannot be a violation of the non-fiduciary obligation of good faith and fair dealing.

Id.

112. *See id.* at 151-52. The approval of self-interest language appears to have been an attempt to implement Professor Hillman's "rebargaining" analysis. Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 442-46 (1987).

third reading of the self-interest language: that it establishes a benefit-detriment test for partners' self-interested transactions.[113]

If the goal of RUPA was to provide predictability to the application of partnership law to real cases, *Cadwalader* is yet another indication that RUPA falls short of the mark.[114] If the goal of RUPA was to provide a subjectively fair outcome, to the extent *Cadwalader* would be decided differently under RUPA than it was at the trial level under the UPA, the reform is suspect.

There is a case to be made for the proposition that RUPA is the third-best possible outcome of the partnership law reform process. The best outcome was to retain a traditional fiduciary orientation for the default non-economic rights and obligations of partners. The second-best outcome was to adopt comprehensively a contractarian orientation for the default non-economic rights and obligations of partners.[115] The third-best, and worst possible, outcome was to compromise and adopt portions of each position, producing an internally contradictory and unworkable combination of provisions. Commentators from both the left[116] and the right[117] have criticized RUPA as consistent with the third-best, worst possible outcome.[118]

The drafters of RUPA proceeded from the belief that the relations of partners can best be characterized as matters of contract, not status; they assumed away the historical fiduciary obligations of partners. Then they trimmed and assumed that a coherent partnership statute could be fashioned

113. Mitchell, *supra* note 66, at 473-76.

114. It is not, of course, the only such indication. *See* Alexander v. Sims, 249 S.W.2d 832, 835-37 (Ark. 1952); Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994* Really *Be Retroactive?*, 50 BUS. LAW. 267, 267-68 n.3 (1994).

115. This is not, of course, to say that the second-best option is workable. Professor Mitchell argues persuasively in the corporate context that the complexity and indeterminacy of firm life makes it impossible to substitute contractual provisions for trust. Mitchell, *supra* note 67, at 477-80. There is no reason to think that his observations are any less forceful when applied to the unincorporated firm.

116. Vestal, *supra* note 100, at 1627-31.

117. J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29, 54 (Spring 1995); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 77-78 (1993).

118. I hasten to note for the record my sincere belief that RUPA embodies some significant advances in partnership law over the UPA, provisions unrelated to the fiduciary or contractarian orientation of the draft. The profession owes a debt of gratitude to the Reporter, the members of the drafting committee, and the National Conference of Commissioners on Uniform State Laws (NCCUSL) for their time and efforts on the partnership act revision process.

without an internally consistent view of the nature of partners' obligations *inter se*. The inability of RUPA to deal with *Cadwalader* is the direct result of those flawed assumptions.

IV. Future Cadwaladers: *The Atomization of Partnership Law*

Having the benefit of the *Cadwalader* decision, how would one advise a law firm, or any firm, to structure its affairs in advance to be able to expel a participant absent cause, without opening itself up to claims such as those of James Beasley?

The appropriate response divides into three parts: the firm members need to select a business form, they need to select a jurisdiction, and they need to negotiate the terms of their agreement. These are not sequential steps; the firm members need to do all three simultaneously. Additionally, they are not inconsequential steps; each can differentially advantage or disadvantage individual partners within the partnership, thus requiring their individual attention and participation.

Only ten years ago the world was not so complicated. However, over the last decade we have atomized the law of the unincorporated firm in three ways: we have introduced new forms, we have broken down statutory uniformity among the states as to each form, and we have permitted broader contractual modification of noneconomic statutory provisions.

A. The Multiplication of Forms: The Rise of LLPs and LLCs

A decade ago, there were two forms available for the unincorporated, multiperson firm: the general partnership and the limited partnership.[119] Such is not the case today.[120] In virtually every jurisdiction there are now four forms: general partnerships, limited partnerships, limited liability partnerships (LLPs),[121] and limited liability companies (LLCs).[122]

119. A handful of states also had limited partnership associations. *See* MICH. COMP. LAWS ANN. §§ 449.371-.373 (West 1989); N.J. STAT. ANN. §§ 42:3-1 to -29 (West 1993); OHIO REV. CODE ANN. §§ 1783.01-.12 (Banks-Baldwin 1994). Colorado has recently adopted a limited partnership association act. COLO. REV. STAT. §§ 7-63-101 to -117 (Supp. 1996).

120. Allan W. Vestal, *New and Revised American Laws for Unincorporated Firms Create Significant Traps for the Unwary*, *in* 2 PERSPECTIVES ON COMPANY LAW (Fiona Macmillan Patfield ed., forthcoming 1997) (manuscript at 3, on file with author) (providing general discussion of evolution of unincorporated business venture forms).

121. Vestal, *supra* note 120 (manuscript at 3-7). The early history of the LLP form is interesting. *See generally* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065 (1995). As of the fall of 1996,

It might be argued that the multiplication of forms is a matter of formality only, that the number of forms has not increased as a practical

---

LLP statutes had been adopted by at least forty jurisdictions. *See* Larry E. Ribstein, *Possible Futures for Unincorporated Firms*, 64 U. CIN. L. REV. 319, 320 n.4 (1996) (listing forty jurisdictions with LLP statutes). As this is written, nine of the twelve jurisdictions absent from Professor Ribstein's list have adopted LLP statutes, bringing the total number to forty-nine. ALA. CODE §§ 10-8A-1001 to -1109 (Supp. 1996); ALASKA STAT. §§ 32.05.405 - .760 (Michie 1996); HAW. REV. STAT. ANN. §§ 425-151 to -180 (Michie, WESTLAW through 1996 Reg. Sess.); ME. REV. STAT. ANN. tit. 31, §§ 801-876 (West Supp. 1996); Act of Apr. 12, 1996, 1996 Neb. Sess. Law Serv., L.B. 681 (WESTLAW through 1996 Reg Sess.); Act of June 10, 1996, ch. 212, 1996 N.H. Adv. Leg. Serv., No. 2, at 260; OKLA. STAT. ANN. tit. 54, §§ 401-417 (West Supp. 1997); 1996 R.I. Pub. Laws, ch. 96-270; W. VA. CODE §§ 47B-10-1 to -5 (1996). The remaining states, Arkansas, Vermont, and Wyoming, have not adopted LLP statutes.

Starting from RUPA, a working group under the auspices of the American Bar Association (ABA) drafted a series of amendments to provide for limited liability partnerships. *See* WORKING GROUP ON REGISTERED LIMITED LIABILITY PARTNERSHIPS, AMERICAN BAR ASS'N BUS. LAW SECTION, PROPOSED PROTOTYPE REGISTERED LIMITED LIABILITY PARTNERSHIP ACT — BASED ON UNIFORM PARTNERSHIP ACT (1994) (May 10, 1995 draft). In parallel with the ABA working group, a NCCUSL drafting committee developed the RUPA-based "Limited Liability Partnership Act: Amendment to Uniform Partnership Act (1994)." *See* DRAFTING COMMITTEE ON LIMITED LIABILITY PARTNERSHIP ACT, NCCUSL, LIMITED LIABILITY PARTNERSHIP ACT: AMENDMENT TO UNIFORM PARTNERSHIP ACT (1994) (July 1996 draft). To avoid confusion with RUPA, I shall refer to the limited liability partnership amendments as the Uniform Limited Liability Partnership Act Amendments (ULLPAA). The ULLPAA was promulgated by NCCUSL at its July 1996 annual meeting. With the promulgation of RUPA, and the work of the ABA and NCCUSL on RUPA-based limited liability partnership statutes, the way is open for a second generation of RUPA-based limited liability partnership statutes. As this is written, only three states have enacted such statutes. ALA. CODE §§ 10-8A-1001 to -1109 (Supp. 1996); VA. CODE. ANN. §§ 50-73.79 to -73.149 (Michie 1996); W. VA. CODE §§ 47B-1-1 to -11-5 (1996).

122. Vestal, *supra* note 120 (manuscript at 7-8); *see* Larry E. Ribstein, *Statutory Forms for Closely Held Firms: Theories and Evidence from LLCs*, 73 WASH. U. L.Q. 369, 404-06 (1995) (hereinafter Ribstein, *Theories*). By the summer of 1996, LLC statutes have been adopted in all of the states. By 1995, only Hawaii and Vermont had not adopted LLC statutes. Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1, 1 (1995) (hereinafter Ribstein, *Emergence*). Both Hawaii and Vermont have now adopted LLC statutes. HAW. REV. STAT. ANN. §§ 428-101 to -1302 (Michie, WESTLAW through 1996 Reg. Sess.); Act of May 22, 1996, H. 112, 1996 Vermont Laws P.A. 176 (WESTLAW through 1996 Reg. Sess.).

NCCUSL has approved for adoption by the states a Uniform Limited Liability Company Act (ULLCA). UNIF. LIMITED LIABILITY COMPANY ACT, 6A U.L.A. 425 (1995). NCCUSL approved the ULLCA in 1994, and amended it as of January 1995. As of this writing, the ULLCA has been adopted in four jurisdictions. KAN. STAT. ANN. §§ 17-7601 to -7651 (1995); MASS. GEN. LAWS ANN. ch. 156C, §§ 1-68 (West Supp. 1996); S.C. CODE ANN. §§ 33-43-101 to -1409 (Law Co-op. Supp. 1995); W. VA. CODE §§ 31B-1-101 to -1306 (1996).

matter because the new forms have rendered the traditional forms obsolescent. Apart from statutory restrictions on some businesses being carried on in the limited liability partnership form,[123] quirky tax provisions,[124] and outdated governmental regulations,[125] it is difficult to conceive of a reason why knowledgeable and well-represented participants would organize a firm as a general partnership or a limited partnership. The significant points of difference between RUPA and the Uniform Limited Liability Partnership Act Amendments (ULLPAA) relate to definitions,[126] choice of law,[127] partner liabilities,[128] and those sections under which LLPs are established[129] and maintained,[130] and those sections under which foreign LLPs are registered[131] and regulated.[132] As the limited liability partnership and limited liability company forms have emerged, the traditional general partnership and limited partnership should be going into eclipse. This is because the general and limited partnership forms have no advantages over the limited liability partnership and limited liability company forms — only disadvantages.

---

123. *See* N.Y. PARTNERSHIP LAW § 121-1500(a) (McKinney Supp. 1997) (restricting LLP status to individuals and firms engaged in professional services). Professor Hamilton indicates that the limitation to professional services is not as narrow as one might initially imagine. Hamilton, *supra* note 121, at 1089 n.67 (definition includes such "professions" as chiropractic, massage, midwives, acupuncture, and athletic trainers).

124. For example, franchise tax interpretations in some states evidently steer participants to limited partnership form in lieu of the limited liability partnership form.

125. Participation in some federal programs may cause ventures to be structured as limited partnerships instead of limited liability partnerships.

126. ULLPAA § 101; HILLMAN ET AL., *supra* note 87, at 302-04.

127. The ULLPAA supersedes the chief executive office default choice of law rule with respect to general partnerships, substituting for LLPs a place of filing rule that cannot be modified. ULLPAA §§ 103(b)(9), 106(b); HILLMAN ET AL., *supra* note 87, at 304-07.

128. The ULLPAA speaks to the reduced liability of partners in LLPs and to the associated procedural changes with respect to partners in LLPs. ULLPAA § 306(c) (liability of partners in LLPs); ULLPAA § 307(b), (d) (actions against LLP members individually); HILLMAN ET AL., *supra* note 87, at 312-15. The ULLPAA addresses the liability of a partner dissociated from an LLP. ULLPAA § 703(b) (dissociated partner liability conditioned by Section 306); HILLMAN ET AL., *supra* note 87, at 326-28. The ULLPAA addresses the postdissolution liability of a partner in an LLP. ULLPAA § 806(a) (liability to other partners); ULLPAA § 807 (settlement of accounts and contributions); HILLMAN ET AL., *supra* note 87, at 331-32. The ULLPAA addresses the postconversion and postmerger liability of a partner in an LLP. ULLPAA § 903(e) (liability of limited partner who becomes general partner following conversion); ULLPAA § 906(c) (liability of partner following merger).

129. ULLPAA § 1001 (discussing qualifications).

130. ULLPAA § 1003 (discussing annual reports).

131. ULLPAA § 1102.

132. ULLPAA §§ 1101-1105.

Advising a firm seeking to avoid a *Cadwalader*-type situation, one would presumably recommend either the LLP or LLC form.[133] For the participants, it just makes sense to opt for limited liability if there is no tradeoff.[134]

There are concerns, however, both within the firm and for society. Within the firm, the concerns arise because the shield from liability is not absolute. Partners in LLPs and members in LLCs continue to have liability for their own actions including various levels of liability for their actions in supervising others.[135] The allocation of such liability may change the way in which participants organize their involvement, in ways that do not work to the advantage of the firm. For example, when supervision brings exposure to potential liability, partners may avoid supervising others, to the overall detriment of the firm but to the benefit of the individual.[136] This is not a problem in the world of theory — participants can always agree to *increase* their exposure to liability to achieve an efficient result. One imagines that it is more of a problem in the real world.

There is a second, social concern. By extending limited liability we have reduced the assets available for third-party contract and tort claimants, shifting some burdens of contract breaches and torts from those traditionally responsible to either victims or society. And what have we gotten in return? Nothing, apparently.[137] The fact that LLPs and LLCs are so popu-

---

133. This assumes no statutory restrictions on the ability to carry on a law practice in the form selected.

134. It should be noted that case authority exists for treating the rights and obligations of law firm participants as if they were partners even when the firm is organized as a professional corporation, in effect ignoring the formal organization of the firm. *See* Fox v. Abrams, 210 Cal. Rptr. 260, 263-66 (Ct. App. 1985); Boyd, Payne, Gates & Farthing, P.C. v. Payne, Gates, Farthing & Radd, P.C., 422 S.E.2d 784, 784-88 (Va. 1992); HILLMAN, *supra* note 21, at 6:3-6:6. The cases are not unanimous, however, and the better reasoned analysis respects the form adopted. *See* Jones v. Teilborg, 727 P.2d 18, 25 (Ariz. Ct. App. 1986); *In re* Estate of Reichenbaum, 631 N.Y.S.2d 178, 179-81 (App. Div. 1995); HILLMAN, *supra* note 21, at 6:6 n.6.

135. Hamilton, *supra* note 121, at 1066-68 (discussing original Texas statute with narrow shield of limited liability); *id.* at 1087-90 (discussing Minnesota and New York statutes with broader shields of limited liability).

136. *See* Elisa Feldman, Comment, *Your Partner's Keeper: The Duty of Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 48 SMU L. REV. 1931, 1946 (1995). Insurance could mitigate, but not eliminate, this problem. Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences — The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 729-30 (1997).

137. Professor Hamilton has characterized the move from a narrow to a broad shield against liability as "gross overreaching by members of the legal profession." Hamilton,

lar suggests to some that the forms fail to strike an appropriate balance between private gain and social benefit. As Professors Bratton and McCahery's Symposium contribution makes clear, at the very least we have inadequate information upon which to base an extension of limited liability.[138]

In advising our hypothetical firm, we could undoubtedly agree on what they should do, and even why they should do it, but there would be no consensus as to why it is a good thing that these options are open to them. There is no convincing underlying theory to justify having either LLPs or LLCs, much less having them both. One commentator noted the conclusory nature of the underlying theory:

> The ongoing revolution in small business structure is driven by the belief that limited liability should be available to businesses without a tax penalty. Some reformers are motivated by a perception that tort liability is out of control; others are motivated by a perception that a corporate level income tax is irrational.[139]

These assumptions are flawed and hardly justify the multiplication of forms we have seen over the last decade.

B. *The Death of Uniformity: The Advent of RUPA*

We have atomized the law of the unincorporated firm in a second way: as to each form we have broken down statutory uniformity among the states. A decade ago, the organizational laws for the unincorporated, multiperson firm were remarkably uniform. Such is not the case today. Uniformity has broken down as to the partnership form, and has never been present with respect to the limited liability partnership and limited liability company forms.

---

supra note 121, at 1090-91. Seemingly, nothing was expected. The debates of the various state legislatures evidence a pattern of shockingly little debate on these substantial changes in the law: "The argument that this broadening of limited liability is necessary to make the shield of limited liability against malpractice claims 'more perfect' seems to me a pretext for quietly obtaining limited liability for all partners in general partnerships without telling the world about it." *Id.* at 1091.

138. Professors Bratton and McCahery's analysis calls into serious question the economic efficiency justifications for the expansion of limited liability. William W. Bratton & Joseph A. McCahery, *An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition*, 54 WASH. & LEE L. REV. 629 (1997).

139. Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Business*, 66 U. COLO. L. REV. 881, 881 (1995) (citation omitted).

As to partnerships, from the time of the First World War until quite recently, the law of general partnerships in the United States was both remarkably uniform[140] and essentially static.[141] In the late 1980s, the American Bar Association (ABA) and the National Conference of Commissioners on Uniform State Laws (NCCUSL) engaged in a project to revise the law of general partnerships. The result of the revision effort was RUPA, which was promulgated by NCCUSL and approved by the ABA in 1994.[142] At the time this is written, RUPA has been adopted in one form or another by twelve states, but with substantial variations among the states.[143] This is a significant breakdown in uniformity from the original UPA.[144]

The treatment of fiduciary duties is nonuniform and illustrates the complexity nonuniformity can introduce. Under the UPA-based regime, the

---

140. *See* 6 U.L.A. 128 (1995) (listing modifications of UPA by state).

141. There was a robust debate at the time the original Uniform Partnership Act was drafted. *See* William Draper Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 638-41 (1915); *see also* 6 U.L.A. 126 (1995) (providing commentary on adoption process). Following promulgation of the UPA by NCCUSL and adoption by almost all of the states, little revision was undertaken for some sixty years. In the mid-1980s, Georgia undertook a fairly substantial revision of the UPA as part of its adoption process. GA. CODE ANN. §§ 14-8-1 to -64 (1994 & Supp. 1996); Larry E. Ribstein, *An Analysis of Georgia's New Partnership Law,* 36 MERCER L. REV. 443, 447 (1985). Then, in 1987, an ABA committee issued a report recommending a general revision of partnership law. Uniform Partnership Act Revision Subcomm. of the Comm. on Partnerships and Unincorporated Business Orgs., ABA Section of Corp., Banking, and Bus. Law, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121, 124-27 (1987) [hereinafter *ABA Revision Report*]. With a 1988 article by the Reporter on the NCCUSL UPA revision project, the revision effort began in earnest. *See* Donald J. Weidner, *A Perspective to Reconsider Partnership Law*, 16 FLA. ST. U. L. REV. 1, 2 (1988).

142. The NCCUSL revision effort produced numerous drafts and three adopted texts. Allan W. Vestal, *A* Comprehensive *Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195, 1198 n.7 (1995) (listing RUPA drafts).

143. Two states, Montana and Wyoming, adopted the 1992 version of RUPA, not the 1994 version. MONT. CODE ANN. §§ 35-10-101 to -710 (1995); WYO. STAT. ANN. §§ 17-21-101 to -1003 (Michie, WESTLAW through 1996 Reg. Sess.). Before completion of the NCCUSL drafting process, Texas adopted a revision of its partnership law only loosely based on early RUPA drafts. TEX. REV. CIV. STAT. ANN. art. 6132b-1.01 to -10.04 (West Supp. 1997).

Even within the states that have adopted the 1994 version of RUPA, there are significant variations from the uniform act. *Compare* RUPA, *with* ALA. CODE §§ 10-8A-101 to -1109 (Supp. 1996), ARIZ. REV. STAT. ANN. §§ 29-1001 to -1111 (West Supp. 1996), CAL. CORP. CODE §§ 16100-16962 (West Supp. 1997), An Act Concerning the Uniform Partnership Act, 1996 Conn. Legis. Serv., P.A. 95-341 (West), FLA. STAT. ANN. §§ 620.8101 to .91 (West, WESTLAW through 1996 2d Reg. Sess.), N.M. STAT. ANN. §§ 54-1A-101 to -1005 (Michie 1996), N.D. CENT. CODE §§ 45-13-01 to -22-27 (Supp. 1995), VA. CODE ANN. §§ 50-73.79 to .149 (Michie 1996), W. VA. CODE §§ 47B-1-1 to -11-5 (1996).

144. 6 U.L.A. 128 (1995) (listing modifications by state).

fiduciary duties of partners *inter se* were largely a matter of common law, with the UPA supplementing the common-law treatment.[145] Under RUPA, the obligations are changed in four important respects. First, RUPA makes the obligations statutory and exclusive; the new regime attempts to displace the common law on point.[146] Second, within the statutory framework, RUPA defines the obligations restrictively; it fails to include within the fiduciary duty formulation one historically recognized obligation and narrowly states the others.[147] Third, under RUPA, the obligations are temporally limited; the statute eliminates the fiduciary protections during the formation period.[148] Finally, in the RUPA structure, the obligations are broadly amendable; the partners are granted broad latitude to change their obligations *inter se*.[149]

The problems of nonuniformity expand geometrically when one considers the variations that enacting states have written into their adoptions of RUPA on this point. In Texas, the statutory duties are apparently not exclusive.[150] In Florida, they are apparently intended to be statutory and exclusive, but not narrowly defined.[151] The California version weakens both the exclusivity language[152] and the narrow definition.[153] In Montana

145. *See* HILLMAN ET AL., *supra* note 87, at 147; Vestal, *supra* note 59, at 524-30.

146. *See* HILLMAN ET AL., *supra* note 87, at 147-48; Vestal, *supra* note 59, at 532, 537-45

147. *See* HILLMAN ET AL., *supra* note 87, at 148-54; Vestal, *supra* note 59, at 532-33, 545-55.

148. *See* HILLMAN ET AL., *supra* note 87, at 154-57; Vestal, *supra* note 59, at 534, 555-56.

149. *See* HILLMAN ET AL., *supra* note 87, at 21-36, 157-58; Vestal, *supra* note 59, at 534, 556-63.

150. *Compare* TEX. REV. CIV. STAT. ANN. art. 6132b-4.04(a) (West Supp. 1997) ("Duties. A partner owes to the partnership and the other partners: (1) a duty of loyalty; and (2) a duty of care."), *with* RUPA § 404(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c).").

151. Florida tracks RUPA in making the formulation of fiduciary duties statutory and exclusive. FLA. STAT. ANN. § 620.8404(1) (West Supp. 1996) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care, as set forth in subsections (2) and (3)."). But then Florida leaves the definition of the duty of loyalty open-ended. *Compare id.* § 620.8404(2) ("A partner's duty of loyalty to the partnership and the other partners includes, without limitation, the following . . . ."), *with* RUPA § 404(b) ("A partner's duty of loyalty to the partnership and the other partners is limited to the following . . . .").

152. The weakening in the definition of fiduciary duties from taking out the "only" in the RUPA formulation might be argued to not be enough to make the California formulation nonexclusive. *Compare* CAL. CORP. CODE § 16404(a) (West Supp. 1997) ("The fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty

and Wyoming, the restrictions on amendment differ from those in RUPA.[154] And in Virginia, the restrictions on amendment of the fiduciary duties of loyalty and care have been eliminated altogether.[155]

As to limited liability partnerships, NCCUSL did not promulgate the Uniform Limited Liability Partnership Act Amendments, which are a series of amendments to RUPA, until 1996. Virtually every state had adopted a limited liability partnership statute by that time, and thus the only hope for uniformity within the limited liability partnership form is if states adopt the NCCUSL Limited Liability Partnership Act Amendments as a second-generation LLP statute, or if the states spontaneously move towards uniformity.[156] Under the existing statutes, the problems of nonuniformity are significant because the statutes differ in some fundamental respects.[157]

As to limited liability companies, NCCUSL promulgated the Uniform Limited Liability Company Act (ULLCA) in 1995.[158] Again, most states had adopted limited liability company statutes by that time, and thus the hope for uniformity within the limited liability company form is that states will either adopt the NCCUSL Limited Liability Company Act as a second-generation LLC statute, or spontaneously move towards uniformity.[159]

---

of care set forth in subdivisions (b) and (c)."), *with* RUPA § 404(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)."). But the legislative history supports the nonexclusive reading. HILLMAN ET AL., *supra* note 87, at 30-31 (California Supp. 1997).

153. The weakening within the definition of the duty of loyalty is much more significant than the weakening in the definition of fiduciary duties and leads to the conclusion that the California enactment is not intended to define the duty of loyalty exclusively. *Compare* CAL. CORP. CODE § 16404(b) (West Supp. 1997) ("A partner's duty of loyalty to the partnership and the other partners includes all of the following . . . ."), *with* RUPA § 404(b) ("A partner's duty of loyalty to the partnership and the other partners is limited to the following . . . .").

154. *Compare* MONT. CODE ANN. § 35-10-106(2)(c) (WESTLAW through 1995 Reg. Sess.) (prohibition on elimination of duty of loyalty), *id.* § 35-10-405(3) (restrictions on amendment of duty of loyalty), WYO. STAT. ANN. § 17-21-103(b)(iii) (Michie, WESTLAW through 1996 Reg. Sess.) (prohibition on elimination of duty of loyalty), *and id.* § 17-21-404(c) (restrictions on amendment of duty of loyalty), *with* RUPA §§ 103, 404. The differences are due to these states having enacted the 1992 version of RUPA, not the final, 1994 version.

155. VA. CODE ANN. § 50-73.81.B (Michie 1996). Virginia did not change RUPA restrictions on partner-agreement amendments of the nonfiduciary obligation of good faith and fair dealing. *Id.* § 50-73.81.B.3.

156. *See generally* Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464 (1996).

157. Hamilton, *supra* note 121, at 1075-1102

158. ULLCA, 6A U.L.A. 425 (1995).

159. *See* Kobayashi & Ribstein, *supra* note 156, at 480-81.

Is the atomization of unincorporated firm law through the death of uniformity a problem? Uniformity has some obvious advantages. Uniform laws for business organizations reinforce the notion that this is a national society, not a balkanized collection of state economies. Uniformity reduces search costs and all but eliminates the maneuvering of firm participants seeking advantage through the choice of law.

Other than the argument that nonuniformity is desirable precisely because it undermines the notion of a national society, there are arguments that nonuniformity comes from beneficial experimentation and that non-uniformity may be desirable if participants are able to adopt the state law that gets them closest to their optimal bargain, thus reducing negotiation costs. This claimed advantage must be weighed against the higher search costs involved in identifying the best law and the possible uncertainty as to whether the parties have the power to make a plenary choice of law.[160]

An interesting alternative analysis has recently been presented by Professors Bruce Kobayashi and Larry Ribstein. Their analysis hails the breakdown of uniformity as a positive development, suggesting that this type of atomization of unincorporated firm law may be desirable over the long term because uniformity will spontaneously emerge *where uniformity is efficient*.[161] Reviewing the history of LLC statutes, Professors Kobayashi and Ribstein present evidence "consistent with the hypothesis that unguided evolution can achieve uniformity, and that such uniformity occurs when the benefits of uniformity outweigh the costs of reduced variation and experimentation."[162] Professors Kobayashi and Ribstein claim to "show that LLC

160. As to general partnerships under RUPA, if not LLPs under the ULLPAA or LLCs under the ULLCA, there remains a question as to whether the parties have the power to make a plenary choice of law election. *See* HILLMAN ET AL., *supra* note 87, at 45-46; Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 244-46 (1995).

161. Professors Larry Ribstein and Bruce Kobayashi have presented their case for spontaneous efficient uniformity and mounted their attack on NCCUSL in several venues. *See generally* Kobayashi & Ribstein, *supra* note 156; Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131 (1996) (hereinafter Ribstein & Kobayashi, *Economic Analysis*); Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947 (1995) (hereinafter Ribstein & Kobayashi, *Uniform Laws, Model Laws*); Ribstein, *Theories*, *supra* note 122. "Attack" is not too strong a characterization. Professors Ribstein and Kobayashi have suggested "that at least some of NCCUSL's efforts should be discouraged and denied public funding and other support." Ribstein & Kobayashi, *Uniform Laws, Model Laws*, *supra*, at 989. They conclude that: "Further study may reveal that NCCUSL is a dinosaur whose day, if there ever was one, is past." *Id.*

162. Kobayashi & Ribstein, *supra* note 156, at 466.

statutory provisions moved toward desirable uniformity even in the absence of a NCCUSL-sponsored proposal,"[163] and that "LLC statutes already have become uniform without NCCUSL's prodding on issues for which uniformity is important."[164]

Although the details of the Kobayashi and Ribstein argument, and the means by which they test their theory, will be taken up in a different venue, the underlying theory can be summarized as follows: The authors advance "a positive theory of desirable and undesirable uniformity . . . based on the tradeoff between, on the one hand, uniformity's benefits of reducing information costs, facilitating exchange and improving the allocation of resources, and, on the other, diversity's benefits of increasing flexibility and promoting experimentation and innovation."[165]

Rather than evaluate the advantages of uniformity on a statute-by-statute basis, the authors conclude that the information costs of diversity "vary among different types of provisions."[166] Kobayashi and Ribstein state that the difference in information costs between different statutory sections forms "the basic insight for our test for appropriate uniformity."[167] "Uniformity," the authors assert, "is relatively important for provisions affecting third-party creditors who engage in small, non-recurring transactions with many firms, where the creditors' marginal cost of learning an applicable provision likely exceeds their marginal benefit."[168] In contrast, they argue, "uniformity is less important regarding provisions that affect the members themselves."[169]

The authors parse the universe of statutory provisions found in the limited liability company statutes in effect by 1994[170] into three groups: (i) provisions affecting third parties,[171] "where uniformity is likely to be important;"[172] (ii) provisions affecting members,[173] where "uniformity is less

163. Ribstein & Kobayashi, *Economic Analysis*, *supra* note 161, at 186 (citing Kobayashi & Ribstein, *supra* note 156; Ribstein, *Theories*, *supra* note 122).

164. Ribstein & Kobayashi, *Uniform Laws, Model Laws*, *supra* note 161, at 947-48 (citing Kobayashi & Ribstein, *supra* note 156).

165. Kobayashi & Ribstein, *supra* note 156, at 468.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 468-69. Kobayashi and Ribstein also consider the benefits of diversity. *Id.* at 469.

170. *Id.* at 470, 474-75 (listing as tbl. II).

171. *Id.* at 474-75 (listing as tbl. II).

172. *Id.* at 468 n.18 (abbreviated listing); *id.* at 474-75 (comprehensive listing as tbl. II).

173. *Id.* at 474-75 (listing as tbl. II).

important" and as to which "firms have less of an incentive to adopt uniform provisions;"[174] and (iii) provisions[175] as to which owners[176] and lawyers may have incentives to adopt uniform provisions which are not efficient.[177]

Kobayashi and Ribstein evaluate the uniformity of the forty-eight limited liability company statutes and find "that large numbers of states have adopted similar forms of many types of provisions,"[178] evidence which "is consistent with the hypothesis that the states, without the help of a uniform lawmaking body, have recognized and attempted to reduce the costs of diversity by adopting uniform default rules that reduce the transaction and information costs of operating close corporations."[179] To determine whether such uniformity is efficiency-producing, Kobayashi and Ribstein use the three classifications within the provision universe. The data support the authors' hypothesis "that the average number of adoptions of the leading form will be smaller for provisions affecting members than for provisions affecting either third parties or the limited liability company's tax status."[180]

Beyond the critique of the details of the method by which the Kobayashi and Ribstein theory is translated into testable form, which is for another venue, Professors Kobayashi and Ribstein's analysis and conclusions are fairly debatable on several levels. To start, Kobayashi and Ribstein's positive theory of desirable and undesirable uniformity is so narrowly stated that it ignores a social value of interstate, intraform uniformity. The authors allow uniformity the possible benefits of "reducing information costs, facilitating exchange and improving the allocation of resources," but do not mention the potential social value of interstate, intraform uniformity on noneconomic dimensions such as fiduciary duties.[181] A common set of fiduciary duties may have value by reaffirming behaviors that benefit the society, such as the value of telling the truth.[182] Quite apart from the economic value of telling the truth when it reduces information costs, facilitates

174. *Id.* at 468-69.

175. *Id.* at 474-75 (listing as tbl. II).

176. *Id.* at 469.

177. *Id.* at 470.

178. *Id.* at 470-71.

179. *Id.* at 471.

180. *Id.* at 476.

181. *Id.* at 468.

182. Professor Marleen A. O'Connor has convincingly discussed the social importance of language in the parallel context of corporate directors' fiduciary duties, drawing upon the partnership experience. Marleen A. O'Connor, *How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's* Principles of Corporate Governance, 61 GEO. WASH. L. REV. 954, 962-82 (1993).

exchange, and improves the allocation of resources, the society may determine that it wants participants in unincorporated firms to tell the truth even when it is not demonstrably efficient for the participants in the short term to do so. And the theory needs to meet the possibility that network externalities may lead to results that are socially suboptimal, albeit uniform, and that contractual provisions cannot substitute for partnership law.[183]

Further, Kobayashi and Ribstein narrow the scope of their asserted benefits of uniformity and costs of diversity. Whereas they acknowledge that uniformity has benefits, and presumably that diversity has costs, in terms of "uniformity's benefits of reducing information costs, facilitating exchange and improving the allocation of resources,"[184] the assertion that the benefits and costs of diversity vary among different types of statutory provisions is cast entirely in terms of information costs, not in terms of otherwise facilitating exchange or improving the allocation of resources.[185]

Having asserted the existence of desirable and undesirable uniformity on the single dimension of information costs, the authors frame as the basic

183. This would parallel Professor Michael Klausner's work on the corporate side. *See generally* Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757 (1995). As to fiduciary duties, the model needs to address Professor Bill Bratton's insights on the duty of loyalty. *See* William W. Bratton, *Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty*, *in* PROGRESSIVE CORPORATE LAW 139, 142-52 (Lawrence E. Mitchell ed., 1995).

184. Kobayashi & Ribstein, *supra* note 156, at 468.

185. *Id.* at 468. The authors note, but then finesse, the other values of uniformity: "Economic analyses examining the benefits of uniformity have stressed the information and other costs created by diversity. In particular, information costs are generated when parties face a large number of statutory variations among jurisdictions." *Id.* Indeed, in another analysis, the authors have identified six "benefits or cost-reducing attributes of uniform laws." Ribstein & Kobayashi, *Economic Analysis*, *supra* note 161, at 137. These are: (1) a reduction in "inconsistency costs" by exposing parties involved in multiple jurisdictions to fewer sets of governance rules; (2) a reduction in "information costs" by making it easier for parties involved in multiple jurisdictions to determine what statute applies and to predict judicial interpretations of applicable statutes; (3) a reduction in "litigation costs" "by trivializing otherwise difficult choice-of-law issues and eliminating deadweight litigation costs involved in forum shopping"; (4) a reduction in "instability costs" as the uniform regime establishes a momentum to resist statutory changes that would differentially affect the parties to existing contracts; (5) a reduction in "externalities" when state legislators pass legislation to aid constituents at the expense of nonconstituents, by giving legislators a common solution to facilitate reciprocal fairness; and (6) a reduction in "drafting costs" by allowing drafting agencies to hire experts and otherwise dedicating resources to improve the quality of the legislative product. *Id.* at 137-40. Of the six potential benefits of uniform legislation identified by the authors, only the information cost benefit is the subject of analysis in the spontaneous efficient uniformity analysis. Kobayashi & Ribstein, *supra* note 156, at 468-69.

insight for their test the assertion that information costs generated when parties face a large number of statutory variations among jurisdictions "vary among different types of provisions."[186] The insight is not just that information costs (and thus the desirability of uniformity) vary among different types of provisions. Such an insight would not be very remarkable. The authors' insight is that such information costs and the associated desirability of uniformity vary among different types of provisions in a predictable pattern based on the party they see as being benefitted by the specific provision. Under their analysis, "[u]niformity is relatively important for provisions affecting third-party creditors who engage in small, non-recurring transactions with many firms, where the creditors' marginal cost of learning an applicable provision likely exceeds their marginal benefit,"[187] although "uniformity is less important regarding provisions that affect the members [of the firm] themselves,"[188] because "[t]he members of closely held firms typically make relatively large investments in few firms and therefore have relatively large marginal benefit and small marginal cost in being informed about each provision."[189] "As a result," Kobayashi and Ribstein conclude, "firms have less of an incentive to adopt uniform provisions of this type" than do third-party creditors.[190]

This step of the Kobayashi and Ribstein argument is particularly difficult to accept. As to third-party creditors, the language is imprecise: "Uniformity is relatively important for provisions affecting third-party creditors who engage in small, non-recurring transactions with many firms . . . ."[191] There are two possible interpretations of the language. If the authors mean that all third-party creditors engage in small, nonrecurring transactions with many firms, then they make an obviously unreasonable

186. Kobayashi & Ribstein, *supra* note 156, at 468.

187. *Id.* at 468.

188. *Id.* at 468-69.

189. *Id.* at 469.

190. *Id.* The authors limit their analysis to the provisions of the LLC statutes. Presumably, third-party creditors are more concerned about the uniformity of other statutory provisions that more directly govern their transactions with the firm, such as the provisions of UCC Articles 2 and 9, than they are with some of the provisions of the LLC statute identified by the authors as third-party provisions, such as the provision for reservation of a name or the definition of a foreign limited liability company. *Id.* at 474-75. Such third-party creditors are also presumably more concerned about bodies of applicable law as to which they can have an impact either by including a contractual choice of law provision or by structuring the transaction to come to a favorable result under applicable choice of law policy.

191. *Id.* at 468.

assumption.[192] If, on the other hand, the authors mean only that those third-party creditors who engage in small, nonrecurring transactions with many firms find uniformity relatively important as to provisions affecting them,[193] then the statement may or may not be true, but it certainly leaves several presumably large classes of third-party creditors completely outside of the analysis. These would at a minimum include third-party creditors who engage in large transactions and third-party creditors who engage in recurring transactions.

This assumption, flawed under either possible interpretation, is important because it goes to the heart of the implementation of the authors' basic insight: the division of the universe of limited liability statutory provisions into those in which uniformity is efficient and those in which uniformity is not efficient. That is because different types of third-party creditors presumably have different information costs; as to the entire universe of third-party creditors it is not true that "[u]niformity is relatively important for provisions affecting third-party creditors . . . where the creditors' marginal cost of learning an applicable provision likely exceeds their marginal benefit."[194]

Significant numbers of third-party creditors engage in small but recurring transactions, in which the creditor's marginal benefit of learning an applicable provision might well exceed the marginal cost over time. Examples of this type of third-party creditor would be a food wholesaler that services small, independent grocery store accounts and a plumbing firm that subcontracts with a limited number of developers on residential construction projects. Other third-party creditors engage in large transactions in which the creditor's marginal benefit of learning an applicable provision might well exceed the marginal cost on even a single-transaction basis. Examples of this type of third-party creditor would be a vendor of complex computer systems who offers financing and a financial institution that engages in shopping center development lending. It is a reasonable assumption that, however one defines "small" and "recurring," the number of third-party creditors that fit into one of these two classifications — those who engage in small but recurring transactions and those who engage in

192. *Id.* In this case, the intention of the authors would be something like: "Uniformity is relatively important for provisions affecting third-party creditors[,] who engage in small non-recurring transactions with many firms . . . ."

193. *Id.* In which case, the intention of the authors would be something like: "Uniformity is relatively important for provisions affecting [those] third-party creditors who engage in small, non-recurring transactions with many firms . . . ."

194. *Id.*

large transactions — far exceeds the number of third-party creditors that engage in small, nonrecurring transactions. And even third-party creditors that engage in only small, nonrecurring transactions may find their information cost is justified by the marginal benefit if the transactions are relatively uniform and the "many firms" are located in a small number of jurisdictions.

This step also seems troublesome as to the firm.[195] Kobayashi and Ribstein assert that because participants in closely held firms make relatively large investments in few firms, their relatively large marginal benefit and relatively small marginal cost of information make uniformity less important in their calculation.[196] It is not a quibble to observe that there is no way of knowing what the participants' marginal information cost will be. Given the opportunities for selection of any jurisdiction, the number of searches will be high.[197] And because the selection of applicable law in this case governs the internal relations of the parties, we may assume that the gathering of information will be an individual and not a firm effort, as the participants jockey for advantage against each other in the choice of law.[198] This, in turn, means that the information costs will be duplicated between — not shared among — the firm participants.

An example demonstrates the fragility of the authors' assumptions. Assume a $5,000,000 real estate development project, with the owner organized as a member-managed limited liability company, in which the ten members each contribute $50,000, and the $4,500,000 balance is financed on a nonrecourse basis with a financial institution. In such a situation, it

195. Of course, the entire exercise seems somewhat out of touch with a world in which a leading law firm does not have an expulsion clause in its partnership agreement. Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, at *3 (Fla. Cir. Ct. July 23, 1996).

196. Kobayashi & Ribstein, *supra* note 156, at 469. The authors state: "The members of closely held firms typically make relatively large investments in few firms and therefore have relatively large marginal benefit and small marginal cost in being informed about each provision. As a result, firms have less of an incentive to adopt uniform provisions of this type." *Id.*

197. There is an open question as to whether partners in a RUPA-based general partnership have plenary power to make a choice of law election. HILLMAN ET AL., *supra* note 87, at 41-46; Vestal, *supra* note 160, at 243-46. As to LLPs, the question of whether registration can override the otherwise applicable choice of law considerations is yet open, although most statutes give up the issue by deferring to the registration. As to LLCs, the participants are presumably free to choose.

198. Thus, the authors seem somewhat wide of the mark when they speak of the incentive structure of the firm. Kobayashi & Ribstein, *supra* note 156, at 469 ("As a result, *firms* have less of an incentive to adopt uniform provisions of this type.") (emphasis added).

seems quite odd to assume that the financial institution, with $4,500,000 plus interest, fees, and costs at risk, will find that its "marginal cost of learning an applicable provision . . . exceeds . . . [its] marginal benefit,"[199] while the ten members, each with $50,000 at risk, "have relatively large marginal benefit and small marginal cost in being informed about each provision" such that they would not favor uniform provisions.[200]

An initial review of the Kobayashi and Ribstein spontaneous efficient uniformity model suggests that the assumptions upon which their model is based are debatable and that their claims may be premature. We should not on the basis of the Ribstein and Kobayashi analysis quickly abandon the historical assumption that uniformity of the type brought about by the participation of groups such as NCCUSL, the American Law Institute, and the ABA is both economically efficient and socially beneficial.

C. The Shift to Contractarianism: The Move to Statutory Defaults

The third way in which we have atomized the law of the unincorporated firm is by permitting broader contractual modification of noneconomic statutory provisions. A decade ago, the range of noneconomic outcomes to which participants in the unincorporated firm could negotiate was fairly narrow.[201] Such is not necessarily the case today.

---

199. *Id.* at 468.

200. *Id.* at 469. Of course, this is not the most extreme example. *See* Commissioner v. Tufts, 461 U.S. 300, 302-03 (1983) (general partnership for real estate development in which partners' initial equity contribution was $0 and partners' ultimate equity contribution was $44,212 against nonrecourse financial institution financing of $1,851,500).

201. I acknowledge the significantly differing interpretations advanced on this score. *Compare* Hynes, *supra* note 117, *with* Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, 58 LAW & CONTEMP. PROBS. 55 (Spring 1995).

I also note Professor Ribstein's latest comment on point, in his symposium paper. Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537, 562 n.118 (1997). Professor Ribstein characterizes Dean Donald Weidner and me as "anticontractarians" who "have made conclusory arguments that the law does not permit such waivers [contracting out of fiduciary duties] while citing few, if any, supporting cases." *Id.* at 570. Dean Weidner is chided for citing no cases. *Id.* I am charged with citing only "three cases, none of which involves a fiduciary duty waiver." *Id.*

Dean Weidner can capably defend his own work, but I would note that the referenced portion of his article cites two cases that stand for the proposition that, under the UPA, fiduciary duties are not waiveable generally. Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58 LAW & CONTEMP. PROBS. 81, 91 (Spring 1995) (citing Wartski v. Bedford, 926 F.2d 11, 20 (1st Cir. 1991); Labovitz v. Dolan, 545 N.E.2d 304, 313 (Ill. App. Ct. 1989)).

As to Professor Ribstein's claim that none of the cases I cite involve fiduciary duty waivers, in my article cited by Professor Ribstein, I cite three cases for the proposition that "case authority rejects the notion that partners exist in a contractarian state of grace as to fiduciary duties under the UPA." Vestal, *supra*, at 58-60 n.17 (citing Saballus v. Timke, 460 N.E.2d 755 (Ill. App. Ct. 1983); Labovitz v. Dolan, 545 N.E.2d 304, 310 (Ill. App. Ct. 1989); Appletree Square I Ltd. Partnership v. Investmark, Inc., 494 N.W.2d 889, 893 (Minn. Ct. App. 1993)). Professor Ribstein's analysis of *Appletree Square* is not supported by a close reading of the case. *See Appletree Square*, 494 N.W.2d at 893. Having established that the common-law and statutory duties of disclosure co-exist in UPA-adopting jurisdictions, the *Appletree Square* court turned to the question of whether "the parties limited their duties of disclosure in their contract." *Id.* In response to that question the court stated:

> Partners may change their common law and statutory duties by incorporating such changes in their partnership agreement. . . . However, where the major purpose of a contract clause is to shield wrongdoers from liability, the clause will be set aside as against public policy . . . . Additionally, while "partners are free to vary many aspects of their relationship . . . they are not free to destroy its fiduciary character."
>
> . . . .
>
> To hold that partners may replace their broad duty of disclosure with a narrow duty to render information upon demand would destroy the fiduciary character of their relationship . . . .

Id. Professor Ribstein summarizes the court's holding as: "The court reasoned that a contract provision which relieved the defendant of the duty to disclose was against public policy in this setting where its major purpose was to shield wrongdoers from liability." Ribstein, *supra*, at 576. This is at best incomplete, because it ignores the "additionally" clause in the holding which specifically relates to a broad-form waiver of the fiduciary duty to disclose. Professor Ribstein's observation that, "[n]otably . . . the agreement did not waive the defendant's disclosure duty, but rather stated an affirmative obligation to disclose," *id.*, is remarkable; at issue was whether the contractual provision waived the common-law duty to disçlose. *Appletree*, 494 N.W.2d at 893. In *Labovitz*, the court correctly decided that a broad delegation of authority did not carry with it a broad-form waiver of fiduciary duties. *Labovitz*, 545 N.E.2d at 310. The court observed that such fiduciary duties do not depend on expression in the partnership agreement and cited *Saballus* for the proposition "that although 'partners are free to vary many aspects of their relationship *inter se*, . . . they are not free to destroy its fiduciary character.'" *Id.* Professor Ribstein notes that "[t]his is different from saying that the partners may not contract to enforce fiduciary obligations other than through legal fiduciary duties and remedies." Ribstein, *supra*, at 579. Of course, the *Labovitz* court also observed that: "Defendants cite no authority, and we find none, for the proposition that there can be an *a priori* waiver of fiduciary duties in a partnership — be it general or limited." *Labovitz*, 545 N.E.2d at 313.

Finally, Professor Ribstein's own treatise is at odds with his pronouncement that "this contractual view of fiduciary duties is, in fact, nearly universally accepted by state statutes and the courts." Ribstein, *supra*, at 570. Ribstein stated that:

> Although a partner may retain a benefit where the other partners consented to the particular transaction or the agreement permitted a certain type of copartner profit, an across-the-board waiver presents a more serious question. Because the fiduciary duty among the partners is so basic a part of the partnership standard form, a court may interpret an across-the-board waiver strictly and apply even a clear waiver cautiously.

With respect to general partnerships, RUPA overall adopts a much more contractarian orientation than does the UPA, although the transition is imperfect.[202] The fiduciary duties owed partners illustrate the trend. It seems clear that the fiduciary duties of partners under the UPA and the common law are matters essentially of status and not of agreement, of tort and not of contract. Simply by virtue of being a partner, one owes the other partners and the partnership certain duties. And, except for narrow and specific waivers following full disclosure, those status-based fiduciary duties are not amendable by the parties. This is the best analysis of the historical state of the law,[203] notwithstanding Professor Hynes's interpretation of *Singer*[204] and *Riviera*,[205] and Professor Ribstein's desire that it not be so.[206]

> There is some authority for nonenforcement or incomplete enforcement of such waivers in the corporate and limited partnership contexts.
>
> . . . .
>
> Despite the corporate and limited partnership authority hostile to broad waivers of fiduciary duty, such waivers should arguably be enforced in a general partnership where there is direct and equal dealing between the partners and co-management power, at least where the waiver is explicit and there are no equitable reasons for nonenforcement in the given case.

2 ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 6.07, at 6:91-6:92 (1994) (citations omitted). That courts arguably should enforce broad-form waivers when there is direct and equal dealing, comanagement power, and an explicit waiver, and no equitable reasons for nonenforcement is hardly universal acceptance of the contractual view of fiduciary duties. Vestal, *supra*, at 58-60 n.16.

202. Vestal, *supra* note 201, at 57-70 (comparing UPA and RUPA fiduciary regimes). The failure to make the fiduciary regime fully contractarian has been lamented by commentators of that persuasion. Ribstein, *supra* note 117, at 51, 57-61. And the contractarian failure is not isolated to the fiduciary duty sections; it is conspicuous in the information disclosure provisions of RUPA. *See generally* Vestal, *supra* note 100.

203. Vestal, *supra* note 201, at 58 n.16.

204. Professor Hynes interprets *Singer v. Singer*, 634 P.2d 766 (Okla. Ct. App. 1981), decided under the UPA and the common-law regime, as permitting the complete elimination of the duty of loyalty, a result he thinks could not be reached under RUPA. Hynes, *supra* note 117, at 42. I believe he reads the case incorrectly, and that it is not at all clear that the result reached in *Singer* under the UPA and the common-law regime could not be reached under RUPA. Vestal, *supra* note 201, at 57 n.11. Dean Weidner reaches the same result. Weidner, *supra* note 201, at 92-93.

205. Professor Hynes interprets *Riviera Congress Associates v. Yassky*, 223 N.E.2d 876 (N.Y. 1966), decided under the UPA and the common-law regime, as enforcing a provision that might be found manifestly unreasonable and thus not enforceable under RUPA. Hynes, *supra* note 117, at 43. I think his prediction is wrong, based on the overall tenor and tone of the opinion. Vestal, *supra* note 201, at 57 n.11. Dean Weidner reaches the same result. Weidner, *supra* note 201, at 91-92.

206. Vestal, *supra* note 201, at 58 n.16. In that discussion, I trace the treatment of fiduciary duties in the present regime in Professor Ribstein's treatise. Although the

The details of fiduciary duties under RUPA are not perfectly clear, but the well-established outlines show us a range of fiduciary duties that starts out as statutory and exclusive,[207] restrictively defined[208] and temporally limited,[209] and is then broadly amendable.[210] The precise range of options to

---

authors characterize the UPA as a "'standard form' contract, which controls the rights and duties among the partners in the absence of contrary agreement," 2 BROMBERG & RIBSTEIN, *supra* note 201, § 6.01, at 6:2, thus inviting the inference that such duties are fully amendable, they do acknowledge that "[t]he partners, among themselves, are fiduciaries," *id.* § 6.07, at 6:67, and that "specific duties and restrictions . . . are imposed on the partners by reason of the fiduciary nature of their relationship," *id.* § 6.07, at 6:67-6:68. On the question of whether such fiduciary duties may be waived or otherwise modified by contract, the tone of the treatment is contractarian: "Fiduciary duties are essentially part of the standard form contract that governs partnerships in the absence of contrary agreement." *Id.* § 6.07, at 6:68. But other than a discussion of the UPA Section 21 duty to account, which is, by its terms subject to modification by the agreement of the partners, the treatment is equivocal. It starts with some contractarian overstatement: "Partner fiduciary duties are aspects of the 'standard form' of partnership. As with respect to the other rights and duties among the partners, the partners may alter the standard form fiduciary duties to suit their particular relationship." *Id.* § 6.07, at 6:89. Then comes the tighter, more careful analysis:

> Although a partner may retain a benefit where the other partners consented to the particular transaction or the agreement permitted a certain type of copartner profit, *an across-the-board waiver presents a more serious question.* Because the fiduciary duty among the partners is so basic a part of the partnership standard form, a court may interpret an across-the-board waiver strictly and apply even a clear waiver cautiously.
>
> There is some authority for nonenforcement or incomplete enforcement of such waivers in the corporate and limited partnership contexts.
>
> . . . .
>
> Despite the corporate and limited partnership authority hostile to broad waivers of fiduciary duty, such waivers should arguably be enforced in a general partnership where there is direct and equal dealing between the partners and comanagement power, at least where the waiver is explicit and there are no equitable reasons for nonenforcement in the given case.

Id. § 6.07, at 6:91-6:92 (emphasis added) (citations omitted). That such general modifications "should arguably be enforced" is an argument from policy, not precedent — and a pretty weak one at that when limited to situations in which there is an explicit waiver that is the product of direct and equal dealing between partners with comanagement power and in which there are no equitable reasons for nonenforcement.

207. HILLMAN ET AL., *supra* note 87, at 147-48; Vestal, *supra* note 59, at 532, 537-45.

208. HILLMAN ET AL., *supra* note 87, at 148-54; Vestal, *supra* note 59, at 532-33, 545-55.

209. HILLMAN ET AL., *supra* note 87, at 154-57; Vestal, *supra* note 59, at 534, 555-56.

210. HILLMAN ET AL., *supra* note 87, at 23-27, 157-58; Vestal, *supra* note 59, at 534, 556-63.

which the partners may bargain is not well settled, but the power certainly is broad.[211]

As to the other forms, there is some confusion and a great deal of latitude concerning the contours of fiduciary duties. With respect to limited partnerships, the situation is somewhat unclear because it is not well settled how RUPA will interconnect with limited partnerships,[212] leaving room for confusion as to whether limited partnerships will be subject to the UPA and common-law fiduciary duty formulation, or RUPA. With respect to limited liability partnerships, the degree of contractarian influence is dependent on the partnership statute from which the limited liability partnership regíme departs. Those based on the UPA retain traditional limits on participant modifications of the statutory terms; those based on RUPA adopt a more contractarian approach.[213] The ULLPAA adopts the RUPA fiduciary duty

---

211. Much of the confusion arises from the formulation of RUPA Section 103(b)(3), which is an exception to the default rule that gives primacy to the partnership agreement over the statute on matters of internal organization:

> Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

RUPA § 103(a). The exception as to fiduciary rules provides:

> The partnership agreement may not:
>
> . . . .
>
> (3) eliminate the duty of loyalty under Section 404(b) or 603(b)(3), but:
>
> (i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or
>
> (ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty.

RUPA § 103(b)(3). The meaning of this exception is rather unclear. *See* HILLMAN ET AL., *supra* note 87, at 23-27; Hynes, *supra* note 117, at 39-41; Vestal, *supra* note 201, at 61-70.

212. HILLMAN ET AL., *supra* note 87, at 5-9, 56-58; Vestal, *supra* note 142.

213. Virginia illustrates both approaches. The Commonwealth has a UPA-based LLP mechanism. VA. CODE ANN. §§ 50-43.1 to -43.12 (Michie 1996). It also has a RUPA-based LLP mechanism. *Id.* §§ 50-73.132 to -73.143. The former applies to LLPs formed prior to July 1, 1997 that do not opt into the new regime, until the retroactive application of the new statute to all partnerships, in 2002. *Id.* § 50-73.147. LLPs under the old regime are subject to UPA-based and common-law fiduciary duties. *Compare* UPA § 19 (books), *id.* § 20 (render information), *id.* § 21 (account as fiduciary), *and id.* § 22 (right to accounting), *with* VA. CODE ANN. § 50.19 (books), *id.* § 50.20 (render information), *id.* § 50.21 (account as fiduciary), *and id.* § 50.22 (right to accounting). LLPs under the new regime are subject to RUPA-based fiduciary duties, subject to Virginia's underlying modifications

formulation without modification,[214] together with the RUPA restrictions on partner-agreement modifications of the fiduciary duty provisions.[215]

With respect to limited liability companies, the trend is certainly toward a more contractarian approach. The fiduciary duty and modification provisions of the ULLCA follow those of RUPA, with the exception of members in manager-managed LLCs that are not also managers, who have no fiduciary obligations to the firm.[216]

The academic proponents of atomization and, to the extent that they have any thoughts of the underlying policy, the legislators who have enacted RUPA and the LLP and LLC enabling statutes, seem to be proceeding from the assumptions that multiplicity of forms is not harmful, that intraform uniformity is not desirable, and that the extension of limited liability to the members of unincorporated firms is a positive good. The haphazard atomization of partnership law is the direct result of those flawed assumptions.

---

of the RUPA duties. *Compare* RUPA § 103(b), *with* VA. CODE ANN. § 50-73.81.B.

214. *Compare* ULLPAA § 404, *with* RUPA § 404.

215. *Compare* ULLPAA § 103(b)(3)-(4), *with* RUPA § 103(b)(3)-(4). Neither does the ULLPAA change the nonfiduciary obligation of good faith and fair dealing from the RUPA formulation. *Compare* ULLPAA § 404(d), *with* RUPA § 404(d), *and* ULLPAA § 103(b)(5), *with* RUPA § 103(b)(5).

216. The fiduciary duty provisions of the ULLCA parallel those of RUPA, with one qualification. The ULLCA differentiates between two types of LLCs; those that are "member-managed," in which the statutory default is that each member has equal rights in management, ULLCA § 404(a), and those that are "manager-managed," in which the right to manage the company is vested in the managers. ULLCA § 404(b). The managers may be members, but need not be such. ULLCA § 101(9). The statute does provide for a list of actions as to which consent of all the members is required. ULLCA § 404(c). The fiduciary obligations of managers in manager-managed LLCs, and of members in member-managed LLCs are similar to those of partners under RUPA. In a member-managed LLC, the provisions are parallel. *Compare* ULLCA § 409(a)-(g), *with* RUPA § 404(a)-(g). In a manager-managed LLC, the duties of the manager are intended to be parallel. ULLCA § 409(h)(2) (noting that "a manager is held to the same standards of conduct prescribed for members in subsections [409] (b) through (f)"). An interesting question is whether the fiduciary duties of a manager in a manager-managed LLC are broader than those of a member in a member-managed LLC by virtue of the fact that, under ULLCA Section 409(h)(2), the common-law displacement language of Section 409(a) does not apply to the manager. This is clearly not the intention of the drafters. *See* ULLCA § 409 cmt. As to members in manager-managed LLCs, the rule is different: "[A] member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member." ULLCA § 409(h)(1).

Conclusion

An ethicist, a political scientist, and an economist were stranded on a desert island. They had no food or water, no means of transportation or communication. Sitting on the beach, they pondered their fate. The ethicist declared that it would be acceptable for them to eat one of their number if that would enable the others to live. The political scientist suggested that they vote on whether to eat one of their number, and if so, who. The economist laughed and announced that she had a way to get them off the island without having to eat anybody. She cleared her throat and began: "First, assume a rather large boat . . . ."[217]

The assumptions we make in this debate matter. At best, they shape the debate over significant policy changes. At worst, when there is inadequate debate, our assumptions substitute for analysis and lead unexamined to undesirable and erroneous conclusions. My hope is that this Symposium will advance the process by which we examine the assumptions of both the advocates and opponents of change, and thereby help us chart a different and better path for the evolution of the law.

The UPA and common-law regime of partnership law is based on assumptions about the nature of collective enterprise, the importance of personal responsibility, and the desirability of uniform laws. These assumptions too often have been unarticulated and, as Professor Mitchell correctly observes, too rarely defended in all their richness.

The RUPA, LLP, and LLC regimes are based on assumptions about the conflict between economic and social goals and the primacy of the former, the desirability of broad contractual powers to reach efficient results as to noneconomic terms, the efficiency effects of limited liability, and, lately, the acceptability of nonuniformity — not as an inefficient cost of freedom of contract or as a prerequisite for an efficient market in partnership law, but rather as an evolutionary stage on the path to spontaneous, efficient uniformity.

We need to re-examine these assumptions and to see if we can achieve some consensus on the new directions in the law of the unincorporated firm to replace the abandoned historical consensus. Professor Mitchell's work on the compatibility of fiduciary rules and economic efficiency is helpful in this regard, as is Professors Bratton and McCahery's work on limited

217. A very old academic joke, told in many forms, but with economists almost always taking the hit. I do not mean to so limit the observation here. Although I take issue with the assumptions built into the model presented by Professors Ribstein and Kobayashi, I am also troubled by the various assumptions adopted by the noneconomics-based commentators in the field.

liability and economic efficiency. It is not going to be an easy task, given how far out in front of any compelling theoretical justification the enacting jurisdictions have gotten. But the mess we have made of partnership law is a sufficient reason to attempt the task.

Or perhaps we should just let the chaos go unchallenged and see if any order comes from the present disorder. This path has some attraction, if for no other reason than that some of the actors seem to get what they deserve — or almost. Remember John Fritts, the co-chair of Cadwalader, Wickersham & Taft's management committee? As if to confirm his assertion that "life . . . is made up of fear, greed and money,"[218] it is reported that the insurgents at Cadwalader who maneuvered for the wrongful ouster of James Beasley, also were maneuvering for the removal of John Fritts from the management committee:

> According to a Cadwalader memo selectively circulated in the firm in late 1993, a band of 40-something partners that one partner dubbed "The Good Guys" aimed to rid the management committee of the "overpaid" and "underproductive," replacing them with partners "willing to lead by example." Within a year, according to papers, they drew up plans to shed one-fifth of Cadwalader's partners, about 20, and award $1.2 million in bonuses to 20 other profitable partners. The insurgents dubbed this plan "Project Rightsize."
>
> . . .
>
> The memo advises care in pushing John F. Fritts off the management committee: "Treat him as unfortunate victim of upheaval, that removal is not a negative reflection on him personally."[219]

Fritts apparently outmaneuvered the insurgents; he remains to this day on the management committee of the partnership.[220] But with the mess we have made of partnership law, it must be an increasingly uneasy perch.

218. Beasley v. Cadwalader, Wickersham & Taft, No. CL-94-8646 "AJ," 1996 WL 438777, at *7 (Fla. Cir. Ct. July 23, 1996) (quoting deposition of John Fritts at 95, ll. 10-25, docket no. 132).

219. *See* Davis, *supra* note 75, at A6.

220. *Id.*