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THE REVISED UNIFORM PARTNERSHIP ACT BREAKUP PROVISIONS: STABILITY OR HEADACHE?

Who's on first, What's on second, I Don't Know is on third.¹

After almost eight decades of virtually no change to the Uniform Partnership Act (UPA),² the National Conference of Commissioners on Uniform State Laws (Conference) will consider a final and complete revision, the Revised Uniform Partnership Act (RUPA),³ in August of 1993.⁴ The Conference originally approved the UPA in 1914,⁵ and eventually every state in the nation except Louisiana adopted the UPA.⁶ Because the UPA

1. Bud Abbott & Lou Costello, *The Naughty Nineties* (1945).

2. UNIF. PARTNERSHIP ACT, 6 U.L.A. 5 (Master ed. 1969) [hereinafter UPA].

3. All references to specific Revised Uniform Partnership Act (RUPA) provisions are taken from the 1992 Proposed Official Draft. However, the only available official comments to the RUPA are taken from a 1991 draft. Presently, the Drafting Committee to Revise the Uniform Partnership Act (Drafting Committee) is working on the final Official Comment to the RUPA.

4. Telephone Interview with Professor John W. Larson, Assoc. Prof. of Law, Florida State University (Apr. 22, 1993). Professor Larson is the Assistant Reporter for the RUPA and has been closely affiliated with the writing of the RUPA. The Drafting Committee continues to amend and revise the RUPA and has been working closely with a small working committee of the American Bar Association (ABA). *Id.* Final action may take place in December of 1993, when the Conference will submit the RUPA to the ABA's Partnership Committee for final comments. *Id.* The Conference does not have to adopt any amendments suggested by the ABA. *Id.* The Conference's official meeting with the Partnership Committee of the American Bar Association will occur on April 16, 1993. *Id.* The Conference does not have to adopt any amendments suggested by the Partnership Committee of the ABA. *Id.*

5. HAROLD G. REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* § 174, at 249 (2d ed. 1990). Prior to the formation of the UPA, case law governed partnerships in the United States. *Id.* at 248. For that reason, the law in many jurisdictions differed regarding various issues. *Id.* Because of uncertainty and confusion in case law, demand grew for statutory development and uniformity. ALAN R. BROMBERG, CRANE & BROMBERG ON PARTNERSHIP § 2, at 12-13 (1968). The response was the Conference's development of the UPA, one stated purpose of which was to standardize state partnership law. UPA § 4(4), 6 U.L.A. at 16. The original drafters of the UPA saw a distinct need for uniformity in partnership law because of the confusion between theory and practice. *See* UPA Commissioner's Prefatory Note, 6 U.L.A. at 7 (describing some early problems associated with desirability of forming uniform national law on partnerships). In addition, the drafters noted the lack of authority regarding important matters of business law related to partnerships and the uncertainty that this lack of authority generated. *Id.* All of these early catalysts for statutory revision—inequity, lack of uniformity, need for standardization and source of authority—show that confusion in the law of partnership may often drive further revision.

6. *See* UPA, 6 U.L.A. at 1 (Supp. 1992) (listing statistics in tabular form of when various states adopted UPA); REUSCHLEIN & GREGORY, *supra* note 5, § 174, at 249 (noting general adoption of UPA in United States, as well as Guam and Virgin Islands).

has had such an immense impact on partnership law,⁷ a complete revision may have a similar effect for years to come.⁸

The Drafting Committee, appointed by the Conference, has completely revised the UPA sections covering partnership breakups.⁹ The RUPA provisions relating to partnership breakups govern the rights of the partners during and after a breakup.¹⁰ The breakup provisions are especially important to those partnerships lacking a partnership agreement because the Drafting Committee intends most of the RUPA provisions to act as default rules, provisions that take effect in the absence of a contrary agreement.¹¹ Accordingly, the RUPA will have the greatest effect upon those businesses

7. See *supra* note 6 and accompanying text (giving reference to statistical support and discussing virtually unanimous enactment of UPA in United States).

8. See ALAN R. BROMBERG & LARRY E. RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* § 1.01(b), at 1:2 to :6 (1988) (outlining general position and importance of partnership relative to corporate and proprietorship forms); *id.* at 1:6 to :10 (listing helpful statistics for comparative analysis of partnerships to other major business forms); The UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121, 121-22 (1987) [hereinafter UPA Revision Subcommittee, *Revision?*] (noting importance of partnership form of business and giving helpful partnership revenue statistics in United States).

9. Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427, 431 (1991).

This Note will use "breakup" to denote a generic situation in which partners either have acted in a manner to dissolve a partnership or have dissociated themselves from the partnership. Furthermore, this Note will attempt to use the more precise terms—dissociation, dissolution, winding up, termination, and liquidation—when they specifically apply and according to the particular, statutory discussion.

10. See Larry E. Ribstein, *A Mid-Term Assessment of the Project to Revise the Uniform Partnership Act*, 46 BUS. LAW. 111, 142 (1990) (noting great need of revision to existing provisions involving partner dissociation and discussing dependence of RUPA success on any revisions to breakup provisions of UPA).

11. See Weidner, *supra* note 9, at 453 (defining "default" and "mandatory" rule); *id.* at 454-56 (describing how Drafting Committee minimized RUPA's mandatory rules).

Some information on default and mandatory rule systems may aid the reading of the subsequent analysis. If the partners do not create a partnership agreement, the UPA currently acts as a backup system of default rules governing each party's rights and the obligations of each partner. See Donald J. Weidner, *The Revised Uniform Partnership Act Midstream: Major Policy Decisions*, 21 U. Tol. L. Rev. 825, 827-29 (1990) (describing definition and effect of UPA and RUPA as default or backup systems of rules). On the other hand, a mandatory rule applies regardless of an agreement to the contrary. *Id.* at 827. Whether certain UPA provisions are mandatory or default rules is sometimes unclear. *Id.* However, section 103 of the RUPA expressly notes those provisions that are mandatory and somewhat variable. See REVISED UNIF. PARTNERSHIP ACT § 103 (Proposed Official Draft 1992) (listing all RUPA provisions not subject to contrary agreement and rules that partnership agreement may not "unreasonably" vary). The remaining provisions of the RUPA will serve as default rules. See *id.* § 103(a) (stating general rule that partnership agreement will govern relations among partners, and between partners and partnership and that RUPA will govern other aspects of relationship not covered in partnership agreement). Important to subsequent analysis, default rules sometimes have had unforeseen and unintended effects, especially after a partnership breakup. See *infra* notes 31-39 and accompanying text (discussing *Fairway Dev. Co. v. Title Ins. Co.*, 621 F. Supp 120 (N.D. Ohio 1985)).

lacking a written agreement—mainly small partnerships.¹² Therefore, the small business community and the attorneys who serve it should carefully scrutinize the proposed act.¹³

The RUPA should reflect the particular needs and interests of the small business community because of the potentially adverse effects the new default rules may have on that community.¹⁴ Further, the RUPA should clearly define and use any new terminology in order to avoid confusion.¹⁵ The primary theses of this Note are: (1) some sections of the RUPA breakup provisions do not reflect the particular needs of the closely held partnership; and (2) the RUPA breakup provisions will cause confusion in partnership law because they use key UPA terminology in an entirely different fashion and add new terminology that has the same function as previous UPA terms. In reviewing the breakup provisions of the RUPA, critical analysis will therefore focus on the needs of the small business community and whether the RUPA clearly defines and uses new terminology. However, because of extensive revisions to the UPA and the increased size of the RUPA,¹⁶ this review and analysis will focus on the effect of the new breakup provisions to closely held partnerships in only four contexts: (1) old and new terminology; (2) causes of dissolution (UPA) and dissociation (RUPA); (3) authority and control of the withdrawing partner; and (4) continuing liability of the withdrawing partner.

I. AGGREGATE VS. ENTITY THEORY OF PARTNERSHIP

A brief discussion of the conceptual theories that drive and support the

12. See *Stout v. Ridgway*, 658 S.W.2d 420, 421 (Ark. Ct. App. 1983) (holding that because partnership agreement did not provide for dissolution and termination of partnership, UPA provisions applied); Larry E. Ribstein, *A Statutory Approach to Partner Dissociation*, 65 WASH. U. L.Q. 357, 364 (1987) (stating that due to high transaction costs large partnerships are more likely to enter into elaborate partnership agreements and, thus, closely held or small partnerships are proper model for statutory law governing partnership breakups).

Notably, § 802 of the RUPA, which enforces a ninety day delay for dissolution of an at-will partnership, is literally the only section in the entire RUPA that is not retroactive. See REVISED UNIF. PARTNERSHIP ACT § 1006(b) (Proposed Official Draft 1992) (excluding § 802 from affecting existing partnerships). Because § 802 is the only nonretroactive provision, it is also the only "opt in" provision of the RUPA for existing partnerships. *Id.* See *infra* notes 267-86 and accompanying text (analyzing § 802 and its effect upon small partnership dissolution under RUPA).

13. See *infra* note 261 (noting importance of small partnership in formation of RUPA and general consensus that RUPA is for small partnerships).

14. See *infra* notes 267-86 and accompanying text (discussing importance of RUPA default provisions to small partnership and withdrawing partner in hypothetical situation).

15. See Weidner, *supra* note 9, at 435-38 (discussing confusion caused by UPA terminology); Weidner, *supra* note 11, at 847 (giving assurances of clarity to small business community).

16. See Weidner, *supra* note 9, at 453 (stating that RUPA is larger than UPA, although increased size supposedly adds specificity and clarity).

rules governing partnerships will clarify later analysis. Even before the original formation of the UPA,¹⁷ two major theories vied for recognition as the conceptual framework that most accurately or properly reflects the way partnerships do business.¹⁸ The aggregate theory treats the partnership as a conglomerate of unique individuals and a "vehicle" through which the partners conduct business.¹⁹ Moreover, the aggregate theory views each partner as having an undivided, pro rata share of partnership assets.²⁰ The entity theory treats the partnership as a separate legal entity, completely distinct from the individual partners.²¹ Similar to the treatment of a corporate shareholder, under the entity theory each partner has separate legal rights, and ownership of partnership assets is in the partnership entity.²² However, unlike a corporate shareholder, each partner has unlimited liability for partnership debts.²³

Commentators and courts have been divided in their approach to and opinion of the UPA and its reflection of either theory of partnership.²⁴ Although supposedly an aggregate approach to partnership law,²⁵ the UPA also contains provisions that demonstrate a reliance on the entity theory of partnership.²⁶ However, the original drafters of the UPA may have based

17. See generally William D. Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915) (giving helpful background information and insight into debate involving aggregate and entity theories of partnership).

18. See REUSCHLEIN & GREGORY, *supra* note 5, § 174, at 249 n.7 (listing articles comprising early debate surrounding formation of UPA, most of which discuss two major theories of partnership).

19. See Weidner, *supra* note 9, at 428 (explaining general characteristics of aggregate theory of partnership).

20. *Id.*

21. See *id.* (discussing general characteristics of entity theory of partnership).

22. *Id.*

23. See UPA § 15, 6 U.L.A. at 174 (stating joint and several liability for each partner); REUSCHLEIN & GREGORY, *supra* note 5, § 182, at 265 (noting difficulty of viewing partnership as separate entity because each partner has unlimited personal liability for all partnership debt).

24. See *Helvering v. Smith*, 90 F.2d 590, 591-92 (2d Cir. 1937) (providing amusing example of how Judge Learned Hand took his usual subtle approach in stating that it would be "palpable perversion" to consider UPA as creating new and separate legal entity for partnership form of business); BROMBERG, *supra* note 5, § 3(b), at 18 (noting considerable disagreement in courts and commentators over UPA's use of either aggregate or entity theories). See generally Gary S. Rosin, *The Entity-Aggregate Dispute: Conceptualism and Functionalism in Partnership Law*, 42 ARK. L. REV. 395 (1989) (discussing both theories of partnership and criticizing strict emphasis of either as conceptual framework for construction of partnership law).

25. See REUSCHLEIN & GREGORY, *supra* note 5, § 174, at 249 (stating that Conference decided to stress aggregate theory of partnership); *id.* § 182, at 264 (asserting that drafters used aggregate approach in final draft of UPA).

26. See A. Ladru Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377, 379 (1963) (stating that UPA contains provisions reflecting both aggregate and entity theories of partnership). However, it is this author's view that the UPA wisely takes a straightforward and practical approach to partnership affairs and, in this way, reflects characteristics of both conceptual theories of partnership.

the breakup provisions²⁷ on an extreme aggregate theory of partnership, because under the UPA a partnership dissolves immediately upon almost any substantive change in relation among the original partners.²⁸ Dean Donald J. Weidner, Reporter for the RUPA, and other academicians view the UPA breakup provisions as an example of reliance on the aggregate theory of partnership.²⁹

A strict conceptual approach, using either the aggregate or entity theory, may have a fundamental effect on case law and unintended consequences for businesses.³⁰ For example, in *Fairway Development Co. v. Title Insurance Co.*,³¹ a real estate partnership purchased a title insurance policy before two of the original partnership members sold their interests in the business.³² The resulting partnership, consisting of one original partner and one new member, filed suit against the title insurance company for damages sustained due to an undiscovered easement on the relevant property.³³ The district court reasoned that because Ohio views a partnership as a distinct group of individuals, any change of membership extinguishes the original partner-

27. See generally UPA §§ 29-43, 6 U.L.A. at 365-544 (providing breakup provisions of UPA).

28. BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(a), at 7:3 to :4; Weidner, *supra* note 9, at 436-38; see *infra* notes 87-96 and accompanying text (noting major causes of partnership dissolution and offering case examples).

29. Weidner, *supra* note 9, at 436-38; see BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(a), at 7:3 to :4 (pointing out UPA's apparent reflection of aggregate theory of partnership).

30. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(a), at 7:3 to :4 (relating that easy dissolvability of partnership reflects extreme aggregate theory of partnership in UPA); REUSCHLEIN & GREGORY, *supra* note 5, § 182, at 264 (noting importance of viewing partnership as either aggregate or entity and legal consequences of choosing either theory); Weidner, *supra* note 9, at 437-38 (stating that fundamental problem of UPA is emphasis of aggregate theory of partnership, resulting in instability of partnership); *infra* notes 77-86 and accompanying text (discussing *Fidelity Trust Co. v. BVD Assocs.*, 492 A.2d 180 (Conn. 1985), which involves effect of partnership dissolution on loan acceleration clause and conceptual result of viewing partnership as separate legal entity).

United States v. A & P Trucking Co., 358 U.S. 121 (1958), is another interesting example of how a conceptual viewpoint of the partnership form of business may affect the outcome of litigation. The United States Supreme Court considered whether the federal government can hold a partnership liable for violation of criminal laws that require proof of intentional conduct. *Id.* at 121-22. The Supreme Court likened the partnership form of business to that of a corporation and reasoned that the two were both entities for purposes of the federal statute. *Id.* at 124-26. The Supreme Court noted that even though the common law did not treat a partnership as a separate legal entity from the partners, Congress was free to change the definition of a partnership and conceive of a partnership as a separate and distinct entity. *Id.* at 124-25. The Supreme Court held that partnership *entities* may knowingly violate criminal statutes, and therefore, the partnerships in *A & P Trucking* were subject to criminal liability. *Id.* at 126-27. Arguably, if the Supreme Court had not treated the partnership as an entity, the government would have been limited to prosecuting the individual partners. *Id.* at 127.

31. 621 F. Supp. 120 (N.D. Ohio 1985).

32. *Fairway Dev. Co. v. Title Ins. Co.*, 621 F. Supp. 120, 121 (N.D. Ohio 1985).

33. *Id.* at 120-21.

ship.³⁴ The district court explained that after the original partners sold their interests in the business, the original partnership dissolved and a "new" partnership began.³⁵ The district court found that the plaintiff, the new partnership, was not the original party to the insurance policy.³⁶ For this reason the district court held that the subsequent partnership had no standing to bring suit and ordered summary judgement for the defendant insurance company.³⁷ The court did not find persuasive the plaintiff's argument that all parties to the transfer intended for the partnership to continue without dissolution.³⁸ Arguably, if the court had viewed the partnership as an entity, the insurance policy would have transferred and protected the plaintiff partnership.³⁹

Dean Weidner and the other drafters have emphasized the entity theory of partnership in the RUPA.⁴⁰ While some vestiges of the aggregate approach will remain in the RUPA,⁴¹ the RUPA will stress an entity approach to partnership law.⁴² Indeed, the RUPA, unlike the UPA, actually defines a partnership as an entity.⁴³ One reason for emphasis of the entity theory

34. *Id.* at 124.

35. *Id.*

36. *Id.*

37. *Id.* at 125.

38. *Id.* at 121-22, 124-25.

39. See Weidner, *supra* note 9, at 437-38 (using *Fairway Development* as example in demonstrating that because UPA relies on aggregate theory of partnership, UPA destabilizes partnerships that have contracted for stability).

40. See REVISED UNIF. PARTNERSHIP ACT § 201 (Proposed Official Draft 1992) (stating definition of partnership as entity); REVISED UNIF. PARTNERSHIP ACT § 201 cmt. (Proposed Official Draft 1991) (stating that net effect of RUPA is to move towards entity theory of partnership); Weidner, *supra* note 9, at 428-30 (stating that RUPA will shift towards entity approach because of ABA recommendations, simplicity, and concordance with business expectations).

41. Weidner, *supra* note 9, at 433. Dean Weidner stated the following in regards to the RUPA's handling of the fiduciary duty of partners:

The text of RUPA anticipates that an aggregate approach will continue to be applied in certain situations. . . . With respect to both large and small partnerships, however, an aggregate approach is particularly useful to state the traditional fiduciary duties among partners. Therefore, despite RUPA's major move toward the entity theory, RUPA section 21(a) [now § 404(e)] states that a partner has a duty of good faith and fair dealing "towards the partnership and the other partners." Similarly, RUPA section 21(b) [now § 404(b)] states that a partner has a duty of loyalty "to the partnership and the other partners." Not only must partners be concerned about the effect of their conduct on the partnership as an entity, but also they must avoid oppressive behavior toward individual partners.

Id. (clarification added).

42. See *id.* at 428-32 (explaining general debate over entity versus aggregate theory and discussing how RUPA moves closer to entity theory in breakup provisions). See generally Committee on Uniform State Laws, *The Entity Theory of Partnership and the Proposed Revisions to the Uniform Partnership Act*, THE REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 563 (1991) [hereinafter Committee on Uniform State Laws, *Entity Theory of Partnership*] (discussing RUPA's express definition of partnership as entity and how RUPA moves closer to entity theory of partnership in various sections).

43. REVISED UNIF. PARTNERSHIP ACT § 201 (Proposed Official Draft 1992). Section 201 of the RUPA states in full: "A partnership is an entity." *Id.*

may be that the courts favor the entity theory because it is more "realistic" and in accord with usual business practices.⁴⁴

Not all scholars agree with a strict conceptual approach to the structuring of rules governing partnerships,⁴⁵ and some practitioners do not agree with strictly and expressly defining a partnership as an entity.⁴⁶ Some scholars and practitioners favor a practical or functional approach to addressing partnership problems.⁴⁷ A functional approach recognizes the underlying business interests or "realities" of the involved parties and appropriately adopts either of the two theories of partnership.⁴⁸ Indeed, the UPA already may reflect such a functional approach to partnership law.⁴⁹ A flexible approach not tied to a dogmatic conception of business partnership, either aggregate or entity theory, may better reflect the real interests of business partners.⁵⁰ Furthermore, a functional approach to solving partnership problems might ask what the business expectations are according to each particular type of partnership—small, large, contractual, or inadvertent.⁵¹

II. UNIFORM PARTNERSHIP ACT BREAKUP PROVISIONS

Before critically analyzing the new RUPA provisions governing partnership breakups, a brief review of the existing UPA breakup provisions will also aid subsequent analysis.

A. UPA Dissolution

The UPA changed the legal terminology used to describe partnership breakups.⁵² Furthermore, the UPA employs terminology and definitions not

44. See REUSCHLEIN & GREGORY, *supra* note 5, § 182, at 264 (stating opinion that entity theory of partnership continues to keep its attractiveness to courts because theory is seen as realistic and supposedly reflects business expectations).

45. See REUSCHLEIN & GREGORY, *supra* note 5, § 182, at 264 (supporting pragmatic approach to solving partnership problems); Ribstein, *supra* note 10, at 115-16 (criticizing strict conceptual approach of either aggregate or entity theory of partnership and suggesting contextual definition of partnership in order for legal consequences to control characterization and not other way around). See generally Rosin, *supra* note 24 (discussing merits of both theories of partnership, criticizing entity theory of partnership, and recommending functional approach to partnership problems).

46. See Committee on Uniform State Laws, *Entity Theory of Partnership*, *supra* note 42, at 570-71 (discussing flexible approach to solving dilemma of defining partnership as either aggregate or entity and recommending use of judicial standards and consideration of various interests of different parties in resolving partnership problems).

47. *Id.*; see Rosin, *supra* note 24, at 400-01 (stating central thesis of using functional approach in revising UPA).

48. See Rosin, *supra* note 24, at 436-59 (describing potential implementation of functional approach to partnership law and flexibility of such system).

49. See *id.* at 415-36 (suggesting that UPA already has characteristics of functional approach); *id.* at 421-22 (discussing UPA's functional approach to handling transfer of partnership property upon dissolution and UPA's recognition of real interests of creditors of partnership upon dissolution).

50. See *infra* notes 281-91 and accompanying text (analyzing potential need of flexibility for small business partner in context of hypothetical case study).

51. See *infra* note 291 and accompanying text (demonstrating in context of hypothetical breakup what might be business expectations of partners in closely held partnership).

52. See REUSCHLEIN & GREGORY, *supra* note 5, § 227, at 343 (noting UPA's moderate

in accord with common usage today.⁵³ The three key terms used in the breakup provisions of the UPA are "dissolution," "winding up," and "termination."⁵⁴ Within the meaning of the UPA, dissolution refers to the point in time when some fundamental change in relation occurs between the original partners.⁵⁵ Thus, dissolution, literally defined as a change in relation between the partners,⁵⁶ acts as the trigger to the UPA breakup provisions.⁵⁷ Winding up refers to the process by which members of the original partnership complete the affairs of the old partnership.⁵⁸ Termination refers to the completion of all previous business affairs of the original partnership and designates the end of the partnership.⁵⁹ Importantly, a partnership does not terminate upon dissolution, but continues until all the affairs of the old partnership are wound up.⁶⁰

Although the original drafters used relatively precise language to define the key terms, both attorneys and courts have indiscriminately used and confused dissolution, winding up, and termination.⁶¹ One fundamental problem has been judicial misunderstanding of the unique meaning of the UPA "dissolution."⁶² The unique definition of the UPA "dissolution" embodies

change to partnership law at time of its original creation, but adding that UPA did change legal terminology of partnership law).

53. See *id.* (stating that UPA uses definitions in different manner than common usage).

54. See UPA §§ 29-30, 6 U.L.A. at 364-76 (giving definitions of major terms and offering helpful case examples using all terms). The Official Comment of the UPA states, "In this act dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all the partnership affairs are wound up; winding up, the process of settling partnership affairs after dissolution." *Id.* § 29.

55. See *id.* (defining dissolution); REUSCHLEIN & GREGORY, *supra* note 5, § 227, at 343-47 (explaining definition of dissolution and giving helpful case examples and hypothetical situations).

56. See *infra* text accompanying note 64 (stating complete UPA § 29 definition of dissolution).

57. See Weidner, *supra* note 9, at 435 (stating that dissolution activates all UPA provisions governing partnership breakups).

58. See *Simmons v. Quick-Stop Food Mart, Inc.*, 296 S.E.2d 275, 280 (N.C. 1982) (noting that winding up of partnership affairs generally involves paying creditors of partnership and settling of accounts between partners); REUSCHLEIN & GREGORY, *supra* note 5, § 227, at 343 n.4 (stating that although original drafters did not specifically define "winding up" in text of UPA, §§ 29-30 and 33-35 all give meaning to term); *supra* note 54 (quoting Official Comment's explanation of all three key terms within UPA).

59. See UPA § 30, 6 U.L.A. at 367 (stating that termination occurs at end of winding up process); REUSCHLEIN & GREGORY, *supra* note 5, § 227, at 343-47 (explaining definition of termination and giving helpful case examples and hypothetical situations).

60. See *Steeby v. Fial*, 765 P.2d 1081, 1083 (Colo. Ct. App. 1988) (noting that partnership does not terminate upon dissolution but only when partnership affairs are completed); *Bass v. Dalton*, 355 N.W.2d 225, 227 (Neb. 1984) (stating that dissolution is only preparatory step to termination and that partnership business continues until winding up is completed); UPA § 30, 6 U.L.A. at 367 (stating negative definition of § 30); REUSCHLEIN & GREGORY, *supra* note 5, § 227, at 343-47 (explaining usage of § 30 of UPA).

61. BROMBERG, *supra* note 5, § 73, at 416.

62. See Weidner, *supra* note 9, at 436 n.25 (citing three cases in which court restricts dissolution as to some partners and not to others, in clear contravention of UPA provisions regarding dissolution).

dual concepts of cause and effect.⁶³ Section 29 of the UPA defines dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."⁶⁴ Some commentators believe that section 29 confuses the cause and effect of dissolution.⁶⁵ Section 29 of the UPA may not only generate confusion regarding the cause and effect of dissolution, but it may also correspond imperfectly to the other breakup provisions of the UPA.⁶⁶ For example, some partnership dissolutions do not involve partner dissociations or withdrawals.⁶⁷ Likewise, under various statutory provisions and case law, some dissociations or withdrawals of partners do not necessarily cause a dissolution of the partnership.⁶⁸

It is important to distinguish dissolution from winding up under the UPA.⁶⁹ Dissolution of a partnership does not automatically signify a discontinuance of the partnership business.⁷⁰ In reality, most partnerships continue after a dissolution.⁷¹ Only at the end of the winding up process,

63. See RIBSTEIN & BROMBERG, *supra* note 8, § 7.01(a), at 7:2 (noting confusion engendered by dual embodiment of cause and effect within § 29 of UPA).

64. UPA § 29, 6 U.L.A. at 364.

65. See BROMBERG, *supra* note 5, § 73, at 416-17 (stating that courts and attorneys use terms indiscriminately and that UPA is imprecise in internal coordination between sections and that § 29 definition confuses cause and effect); RIBSTEIN & BROMBERG, *supra* note 8, § 7.01(a), at 7:2 (discussing confusion caused by dissolution).

66. See BROMBERG, *supra* note 5, § 73, at 416 (discussing how sections of UPA do not precisely work together); RIBSTEIN & BROMBERG, *supra* note 8, § 7.01(a), at 7:2 (same).

67. See UPA § 31(3), 6 U.L.A. at 376 (listing supervening illegality of partnership activity as cause of dissolution of partnership); *id.* § 31(5) (listing bankruptcy of partner as cause of dissolution of partnership); *id.* § 31(6) (listing possible dissolution of partnership by adjudication).

68. See *Osborne v. Workman*, 621 S.W.2d 478, 480-81 (Ark. 1981) (using ARK. CODE ANN § 65-129 and § 65-131, which allow partners in Arkansas to dissociate and not violate partnership agreement and therefore avoid damages payable under UPA § 38); *Cagnolati v. Guinn*, 189 Cal. Rptr 151, 155 (Cal. Ct. App. 1983) (applying CAL. CORP. CODE § 15031, which adds subsection to California's adoption of UPA, allowing partners to create agreement providing for partner withdrawal or admission that does not trigger dissolution).

69. See REUSCHLEIN & GREGORY, *supra* note 5, § 227, at 344 (noting that fiduciary duty of partner to partnership continues during UPA winding up process but not after partnership terminates).

70. See *Wilzig v. Sisselman*, 442 A.2d 1021, 1025 (N.J. Super. Ct. App. Div. 1982) (noting that death or withdrawal of partner does not preclude remaining partners from continuing business per partnership agreement, regardless of adding or not adding new partners); *Lonning v. Kurtz*, 291 N.W.2d 438, 441 (N.D. 1980) (holding that liquidation need not occur if partnership agreement provides for continuation of partnership after dissolution and withdrawing partner is paid both share of partnership profits and for capital contribution); *Woodruff v. Bryant*, 558 S.W.2d 535, 539 (Tex. Civ. App. 1977) (stating that dissolution is change in legal relationship of original partners and has no significance to continuation or winding up of partnership business).

71. ROBERT W. HAMILTON, *CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS* 83 (4th ed. 1990). Professor Hamilton stated:

It is an observable fact of the modern business world that most partnership dissolutions are not followed by a period of winding up and termination even when

or upon termination, does the partnership cease to exist.⁷² Section 30 of the UPA states that the partnership continues after dissolution and terminates only upon the completion of all partnership affairs.⁷³ Simply stated, dissolution is a distinct and separate step from the winding up process.⁷⁴ A dissolution of a partnership generally affects only future transactions of the business, not past transactions.⁷⁵ The authority of a partner ceases upon dissolution except for the proper winding up of partnership affairs and, in this way, continues until termination of the partnership.⁷⁶

Fidelity Trust Co. v. BVD Associates,⁷⁷ which involved a mortgage foreclosure suit against a limited partnership, demonstrates the importance of a judicial finding of partnership dissolution.⁷⁸ In *Fidelity Trust* the Supreme Court of Connecticut considered whether the replacement of any or all of the original partners in a limited partnership triggered an acceleration clause in a mortgage on partnership property.⁷⁹ The membership of the original partnership had changed through a series of transactions, adding a general partner and other limited partners and eliminating some limited partners.⁸⁰ The plaintiff mortgage lender argued that the change in mem-

there is no agreement to continue the business. Rather the partnership business is continued by one or more of the former partners, perhaps with the infusion of new blood, while the interest of any partners falling by the wayside is liquidated by the continuing business in some way. The former partners may consent to the continuation or merely accept the fact that it has continued. The reason for this is that usually the continuation of the business is more sensible, as a matter of simple business economics, than a piece-meal liquidation and sale of the business assets.

Id.

72. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(b), at 7:6 (stating that upon termination partnership cannot sue or be sued, all authority of partners to act on behalf of partnership ceases, and partners no longer have joint rights in partnership property).

73. UPA § 30, 6 U.L.A. at 367.

74. See *Ramseyer v. Ramseyer*, 558 P.2d 76, 79 (Idaho 1976) (stating that "dissolution" in partnership law is legal term of art and does not refer to other stages of process by which all partnership affairs are completed); *Babray v. Carlino* 276 N.E.2d 435, 442 (Ill. App. Ct. 1971) (noting that dissolution of partnership is entirely distinct from winding up of old partnership affairs); *Ross v. Walsh*, 629 S.W.2d 823, 825 (Tex. Ct. App. 1982) (asserting that dissolution is only single step in larger process of concluding partnership agreement; other necessary steps are winding up, termination, and accounting).

75. See *Cotten v. Perishable Air Conditioners*, 116 P.2d 603, 604 (Cal. 1941) (holding that partnership continues as to all past transactions but not future); *Wilzig v. Sisselman*, 442 A.2d 1021, 1024 (N.J. Super. Ct. App. Div. 1982) (same).

76. See *Shepherd v. Griffin*, 776 S.W.2d 119, 121 (Tenn. Ct. App. 1989) (stating that all authority of partner to act for partnership ceases at time of dissolution except for acts proper to wind up partnership affairs); *infra* notes 106-07 and accompanying text (discussing limitation of partner authority upon dissolution pursuant to UPA § 33).

77. 492 A.2d 180 (Conn. 1985).

78. See *Fidelity Trust Co. v. BVD Assocs.*, 492 A.2d 180, 183 (Conn. 1985) (stating that provisions of UPA apply to limited partnerships except where inconsistent).

79. See *id.* at 182 (stating that mortgage deed contained acceleration clause triggered by transfer in property ownership).

80. *Id.*

bership caused a dissolution of the partnership and represented a conveyance of the property sufficient to trigger the acceleration clause.⁸¹

The supreme court noted that the relevant state legislative history demonstrated intent to treat limited partnerships more like a separate legal entity.⁸² Next, the court reasoned that because the limited partnership is related more closely to a separate legal entity, a change in membership does not effect a dissolution according to state statutory law, and therefore the mortgage lender could not accelerate under the terms of the mortgage.⁸³ If the partnership in *Fidelity Trust* had been a general partnership governed purely by the UPA, a dissolution would have occurred under section 31 of the UPA,⁸⁴ and arguably the creditor could have accelerated the payments under the mortgage terms because the change in membership would have represented a transfer of the property.

The UPA describes a broad range of situations that result in a dissolution of the partnership.⁸⁵ Most situations that cause a dissolution may be

81. *Id.*

82. *Id.* at 184-86.

83. *Id.* at 186.

84. *See* UPA § 31(1)(b), (2), 6 U.L.A. at 376 (stating that dissolution may occur by withdrawal of partner either in at-will partnership or in partnership with definite purpose or life span).

85. *Id.* §§ 31-32, 6 U.L.A. at 376, 394. Section 31, Causes of Dissolution, of the UPA states in full:

Dissolution is caused:

(1) Without violation of the agreement between the partners, (a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

Id. § 31.

Section 32, Dissolution by Decree of Court, states in part:

Dissolution is caused:

(1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of

thought of as changes in relation between the partners.⁸⁶ For example, if the partners have no agreement to continue the partnership for a specific period of time or undertaking—an at-will partnership—a partner may withdraw and cause a dissolution without penalty.⁸⁷ Also, a partner may withdraw from a partnership in violation of an agreement for a specific period of time or purpose, but the partner must pay any damages caused to the partnership by the withdrawal.⁸⁸ Hostile conduct between partners may trigger dissolution.⁸⁹ The death of a partner also triggers dissolution.⁹⁰ Furthermore, a dissolution may occur in accordance with a partnership agreement⁹¹ or by supervening illegality of partnership activity.⁹² Partnerships

the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner willfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

Id. § 32.

86. See Weidner, *supra* note 9, at 444 (explaining UPA definition of dissolution as change in relation between partners and that nature of continued relationship after dissolution is complicated).

87. See *Ford v. Lafayette Life Ins. Co.*, 362 F.2d 970, 971 (D.C. Cir. 1966) (holding that withdrawal of one partner from two-person partnership effected dissolution of business); *Medd v. Medd*, 291 N.W.2d 29, 33 (Iowa 1980) (holding that voluntary withdrawal of partner triggered dissolution of partnership); UPA § 31(1)(b), 6 U.L.A. at 376 (stating that partner may effect dissolution by expressly withdrawing in at-will partnership); *infra* notes 127-38 and accompanying text (discussing *Robertson v. Southwood*, 417 N.W.2d 616 (Neb. 1989), which involves withdrawal of partner in at-will partnership).

88. See UPA § 31(2), 6 U.L.A. at 376 (noting that partner may withdraw from partnership in contravention of partnership agreement); *id.* § 38(2) (stating that remaining partners have right to damages from withdrawing partner for breach of agreement).

89. See *Tembrina v. Simos*, 567 N.E.2d 536, 540 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 924 (Ill. 1991) (holding that apparent animosity between partners, refusal of partners to pay share of real estate taxes, transfer of partnership property to individual partner, and general unwillingness to cooperate constitute proper grounds for dissolution of partnership); *Susman v. Venture*, 449 N.E.2d 143, 148 (Ill. App. Ct. 1982) (holding that actions of general partners in treating limited partner as if limited partner had no interest in business necessitated partnership dissolution).

90. UPA § 31(4), 6 U.L.A. at 376; see *United States v. Hankins*, 581 F.2d 431, 436 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979) (holding that under Mississippi law and in absence of continuation agreement, partnership dissolves upon death of partner); *Turner v. Turner*, 305 A.2d 592, 596 (Vt. 1973) (stating that death of partner dissolved partnership but that partnership was not terminated until winding up of business affairs).

91. See UPA § 31(1)(a), 6 U.L.A. at 376 (stating that expiration of definite term or purpose of partnership causes dissolution); *id.* § 31(1)(d) (stating that expulsion of partner in accordance with partnership agreement causes dissolution); *supra* note 85 (restating UPA § 31(1)(a) and (d), involving dissolution upon termination of time or undertaking and dissolution due to expulsion of partner per partnership agreement).

92. See UPA § 31(3), 6 U.L.A. at 376 (stating that illegality of partnership business causes dissolution); *supra* note 85 (restating UPA § 31(3), involving dissolution caused by illegality of partnership activity).

may be dissolved by cooperative action of the partners,⁹³ by operation of law,⁹⁴ or by judicial action.⁹⁵ Importantly, dissolution under the UPA triggers all the UPA breakup provisions.⁹⁶

Some key breakup provisions show concern for a withdrawing partner's ability to choose investment opportunities freely. Because a partner may at any time dissolve the partnership, including a partnership for a definite term, by expressly withdrawing, the drafters of the UPA arguably intended to design a rule protecting an individual partner's interests in the partnership.⁹⁷ The UPA breakup rules also increase a partner's flexibility to choose how to invest personal and capital resources.⁹⁸ The UPA's approach to the partnership breakup is consistent with an extreme aggregate theory of partnership: a partnership is a group of unique individuals and any change in membership must result in dissolution.⁹⁹ In this way, the aggregate theory of partnership best reflects how a partner in a small business would view a partnership breakup.¹⁰⁰ Notably, the UPA breakup provisions act as default rules that automatically declare dissolutions under various circumstances, although the dissolution may not result in a termination of the partnership itself.¹⁰¹

93. See UPA § 31(1)(c), 6 U.L.A. at 376 (stating that express will of all partners to dissolve effects dissolution of partnership); *supra* note 85 (restating UPA § 31(1)(c), involving dissolution caused by complete agreement of all remaining partners, regardless of termination date or completion of partnership purpose).

94. See UPA § 31(5), 6 U.L.A. at 376 (stating that bankruptcy of partner causes dissolution of partnership); *supra* note 85 (restating UPA § 31(5), involving dissolution caused by bankruptcy of partner or partnership).

95. See UPA § 31(6), 6 U.L.A. at 376 (referring to UPA § 32 for dissolution by court order); *id.* § 32 (listing various situations by which court may order dissolution upon partner application); *supra* note 85 (restating UPA § 31(6), addressing dissolution caused by partner initiating judicial proceeding to dissolve partnership through pertinent subsection of UPA § 32); *supra* note 85 (restating UPA § 32, which lists various causes of action, such as criminal guilt of partner or adverse mental condition of partner, for which partner may apply to court for decree dissolving partnership).

96. See Weidner, *supra* note 9, at 435 (discussing definitions of what dissolution is and what it is not and noting that all UPA breakup provisions are activated by dissolution).

97. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(d)(1), at 7:9 (stating that without dissolution at will partner may be "hostage" of hostile partnership and that fiduciary duties may not satisfactorily protect interests of hostage partner); Rodman Elfin, *Revision of the Uniform Partnership Act, An Analysis and Recommendations*, 23 IND. L. REV. 655, 663 (1990) (noting that advantage of right to cause dissolution at will is protection against exploiting conduct by managing partner or majority of partners).

98. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(d)(1), at 7:10 (noting that benefit of dissolution at will is increased marketability of partnership interest, and dissolution at will also protects partner's monetary and human resources because individual partner can best determine investment of these resources).

99. See *id.* § 7.01(a) (explaining that concept of *delectus personarum*—partners may select their associates—underlies ease with which partnership may be dissolved and stating that ease of dissolution is consistent with extreme aggregate theory of partnership).

100. See Weidner, *supra* note 9, at 433 (stating that small partnerships are more personal, as is aggregate theory of partnership); *id.* (stating that small business parties often document their arrangements in "aggregate" terms).

101. See *Rich v. Class*, 643 S.W.2d 872, 875-76 (Mo. Ct. App. 1982) (stating that under

The instability of a partnership under the UPA has been the major source of criticism of the breakup provisions.¹⁰² Indeed, Dean Weidner believes that the UPA actually destabilizes partnerships, especially those with continuation agreements.¹⁰³ A related criticism is that the costs of allowing dissolution at will are too high in comparison with the benefits.¹⁰⁴ The aggregate theory of partnership underlying the UPA breakup provisions may cause this instability.¹⁰⁵

B. UPA Authority of Partner upon Dissolution

The effects of dissolution on the authority of a partner are fairly straightforward.¹⁰⁶ All authority of any partner to act for the partnership and therefore to bind the other partners ceases upon dissolution of the partnership, except to the extent necessary to wind up the partnership affairs.¹⁰⁷ *Daniels Trucking, Inc. v. Rogers*¹⁰⁸ illustrates the importance of

partnership agreement partners may continue partnership when normally partnership would dissolve due to event of dissolution); *supra* note 71 and accompanying text (noting continuation of most partnerships after dissolution).

102. See UPA Revision Subcommittee, *Revision?*, *supra* note 8, at 125-26 (summarizing proposed amendments to breakup provisions of UPA); Weidner, *supra* note 9, at 437-38 (stating that UPA destabilizes partnerships, especially those that have partnership agreements providing for continuation after dissolution). Some of the recommendations from the UPA Revision Subcommittee are: (1) specifically authorizing through partnership agreement ability of remaining partner(s) to buy out withdrawing partner(s) interest; (2) deleting bankruptcy of a partner as cause of dissolution; (3) specifically allowing admission of new partner to partnership without causing dissolution; (4) eliminating right of assignee of partnership interest to obtain court ordered dissolution; and (5) specifically authorizing court in dissolution suit to order remedies other than dissolution. UPA Revision Subcommittee, *Revision?*, *supra* note 8, at 124-26.

103. Weidner, *supra* note 9, at 437-38.

104. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(d)(2), at 7:11 (criticizing UPA for allowing withdrawing partner to inflict high costs on remaining partners who wish to continue business and theorizing that withdrawing partner may take over partnership through threat of dissolution or result in forced sale of substantial firm assets or enable withdrawing partner to renegotiate original partnership agreement at unfair advantage); Elfin, *supra* note 97, at 662-66 (analyzing benefits and costs of present UPA allowance of forced liquidation of at-will partnership by withdrawing partner and comparing benefits in proposed option of buyout of withdrawing partner(s) interest at fair market value).

105. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(d)(2), at 7:12 (stating that threat of dissolution destabilizes initial partnership bargaining process); Weidner, *supra* note 9, at 435-38 (discussing instability of partnership business caused by aggregate theory of partnership in UPA).

106. See UPA § 33, 6 U.L.A. at 423 (giving general statement limiting authority of all partners after dissolution). Section 33, General Effect of Dissolution on Authority of Partner, of the UPA states in part: "Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership. . . ." *Id.*

107. See *Egner v. States Realty Co.*, 26 N.W.2d 464, 468-69 (Minn. 1947) (stating that dissolution ends ability of partner to represent partnership and only during the existence of partnership can partner execute authorization for partnership); *Shepherd v. Griffin*, 776 S.W.2d 119, 121 (Tenn. Ct. App. 1989) (stating that upon dissolution all authority of any partner to

terminating partner authority upon dissolution. In *Daniels Trucking* the Kansas Court of Appeals considered whether a partner of a dissolved partnership had authority to convey title of partnership property to a creditor of the partnership.¹⁰⁹ The two partners operated a trucking company and had leased a trailer to Daniels Trucking.¹¹⁰ Subsequently, the partners decided to dissolve the partnership, and the partners agreed to divide the partnership property.¹¹¹ One partner, Rogers, took possession of the leased trailer and secured title in his personal name.¹¹² The other partner, Noble, became an employee of Daniels Trucking, and without Roger's compliance, transferred title of the trailer to Daniels Trucking for repayment of a debt owed by the partnership.¹¹³ Because the agreement to split the partnership property did not prejudice Daniels Trucking, the court of appeals found the agreement valid.¹¹⁴ Consequently, the court held that Noble had no authority to convey title to Daniels Trucking after dissolution.¹¹⁵ The termination of every partner's authority to act on behalf of the partnership protects the interests of partners after dissolution under the UPA.

C. UPA Continuing Liability of Partners

Section 36 of the UPA is basically a codification of the common-law rule of continuing liability for partners: dissolution by itself does not discharge a withdrawing partner's personal liability for predissolution debts.¹¹⁶ A partner may withdraw from the partnership, but still incur personal liability for transactions begun before withdrawal or for liabilities incurred

act for partnership business terminates except as to winding up partnership affairs); Shannon v. Monasco, 632 S.W.2d 946, 948 (Tex. Ct. App. 1982) (stating that both authority of partner to act on behalf of partnership and agency relationship emanating from partnership relationship ended immediately upon dissolution).

108. 643 P.2d 1108 (Kan. Ct. App. 1982).

109. Daniels Trucking, Inc. v. Rogers, 643 P.2d 1108, 1110 (Kan. Ct. App. 1982).

110. *Id.* at 1109.

111. *Id.* at 1109-10.

112. *Id.* at 1110.

113. *Id.*

114. *Id.*

115. *Id.*

116. See Reuschlein & Gregory, *supra* note 5, § 234, at 360-61 (stating that UPA § 36 is basic codification of common-law rules and that dissolution does not extinguish liability).

Section 36 of the UPA, Effect of Dissolution on Partner's Existing Liability, states in part:

(1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

in the process of winding up.¹¹⁷ Moreover, under section 35, a creditor who extends credit to the partnership without notice or knowledge of a partner's withdrawal or of dissolution can rightfully assert a claim against a withdrawn partner.¹¹⁸ However, a withdrawing partner may escape future liability by entering into an agreement, or novation, with the partnership or person continuing the business and the creditor.¹¹⁹ A court also might infer such a novation from a course of dealing between a creditor who knows of the dissolution and the persons continuing the partnership.¹²⁰

117. See *Delfin v. Harry Liss & Assocs., Inc.*, 365 F.2d 74, 76-77 (9th Cir. 1966) (holding that partner may be held personally liable for purchase of furniture and equipment and finding that purchase was transaction appropriate for winding up partnership affairs because negotiations were begun before dissolution and because after negotiations, plaintiff sent goods on open account); *Redman v. Walters*, 152 Cal. Rptr. 42, 44-45 (Ct. App. 1979) (holding that attorney who resigned from law partnership was liable for plaintiff malpractice claim because case was acquired during time of partner's association with business and liability continues on any unfinished business of partnership, including the plaintiff client's case with law partnership); *Hartford Fin. Sys. v. Florida Software Serv., Inc.*, 550 F. Supp. 1079, 1089 (D. Me. 1982), *appeal dismissed*, 712 F.2d 724 (1st Cir. 1983) (holding that for purposes of UPA § 36 the term "existing liability" refers to every obligation incurred by partnership, regardless of type and ultimate time of maturity, so long as obligation is incurred before termination of partnership).

118. UPA § 35 (b)(I), 6 U.L.A. at 429; see *Sta-Rite Indus., Inc. v. Taylor*, 492 P.2d 726, 727 (Ariz. Ct. App. 1972) (finding that partnership would be bound if creditor extended credit without notice or knowledge of partnership's dissolution).

Section 35 of the UPA, Power of Partner to Bind Partnership to Third Persons after Dissolution, states in part:

(1) After dissolution a partner can bind the partnership . . .

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

UPA § 35, 6 U.L.A. at 429.

119. See *Colo-Tex Leasing, Inc. v. Neitzert*, 746 P.2d 972, 974-75 (Colo. Ct. App. 1987) (stating that agreement between partner, remaining partners, and partnership creditor discharges partner from existing liability); *Wester & Co. v. Nestle*, 669 P.2d 1046, 1048 (Colo. Ct. App. 1983) (holding that dissolution itself does not exempt withdrawing partner from liability but agreement can discharge liability); *Longley Supply Co. v. Styron*, 214 S.E.2d 777, 779 (N.C. Ct. App. 1975) (finding that because partnership dissolution agreement failed to address resulting liability after dissolution, agreement was inapplicable and relevant UPA section applied, which stated that partners were liable for losses in proportion to their share in profits); UPA § 36(2), 6 U.L.A. at 436 (stating that agreement between withdrawing partner, partners continuing business, and partnership creditor will discharge partner from liability).

120. See *Wester & Co. v. Nestle*, 669 P.2d 1046, 1048 (Colo. Ct. App. 1983) (stating that agreement discharging partner from liability may be inferred from course of dealing between creditor having knowledge of dissolution and partners continuing business).

Sections 35 and 36, which concern partner liability after dissolution, reflect two factors that tend to complicate the continued liability of a withdrawing partner.¹²¹ First, partners are personally liable to contract and tort creditors of the partnership.¹²² Second, a general agency relationship exists between a partner and the partnership.¹²³ This means that a partner cannot merely quit and thereby immediately end the relationship.¹²⁴ Again, a partner's liability continues as to unfinished business and for business obligations incurred in any winding up.¹²⁵ The partnership relation continues, although the nature of the relation has changed.¹²⁶

Robertson v. Southwood,¹²⁷ which involved a real estate partnership, illustrates the continued liability of partners under the UPA. In *Robertson* the Supreme Court of Nebraska considered whether a withdrawing partner, Robertson, was free from partnership liability incurred during the winding up period.¹²⁸ *Robertson* involved an at-will partnership¹²⁹ between twelve real estate agents.¹³⁰ During the course of business, the partnership became insolvent, and a creditor demanded payment on an overdue note.¹³¹ After notice of the debt, Robertson wrote a letter resigning from the partnership.¹³² Although the partnership agreement required equal capital contributions from the partners, Robertson failed to pay, forcing the remaining partners

121. See Weidner, *supra* note 9, at 443 (stating that two features—personal liability on all partnership debts and agency relationship between partner and partnership—of partnership relationship tend to make buyout of partnership interest more complicated and winding up of partnership more complicated than analogous situations within corporate form of business).

122. See UPA § 15(a), 6 U.L.A. at 174 (stating joint and several liability for each partner); Weidner, *supra* note 9, at 443 (noting that as opposed to shareholder of corporation, partners are personally liable for business debts).

123. UPA § 31 cmt., 6 U.L.A. at 377; see Weidner, *supra* note 9, at 443 (stating that partners are general agents of partnership). The Official Comment of the UPA § 31 states:

The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, if it is submitted, be recognized.

UPA § 31 cmt., 6 U.L.A. at 377.

124. See Weidner, *supra* note 9, at 443 (discussing difficulty of partner to immediately sever self from liability of obligations entered into before dissolution).

125. See *supra* note 117 and accompanying text (giving several examples of continuing liability).

126. See Weidner, *supra* note 9, at 443-44 (discussing complicated nature of change in relationship of partner after withdrawal); *supra* notes 85-87, 89-96 and accompanying text (discussing UPA § 29 and change in relation concept of dissolution).

127. 417 N.W.2d 616 (Neb. 1989).

128. *Robertson v. Southwood*, 447 N.W.2d 616, 618-19 (Neb. 1989).

129. See *supra* note 87 and accompanying text (giving examples of withdrawal in at-will partnership and giving definition of at-will partnership).

130. *Robertson*, 447 N.W.2d at 618; see UPA § 31(1)(b), 6 U.L.A. at 376 (showing that in at-will partnership, partner may dissolve partnership at any time without violating agreement).

131. *Robertson*, 447 N.W.2d at 618-19.

132. *Id.* at 619.

to extend his share of the debt.¹³³ Subsequently, the partnership incurred further debt.¹³⁴

The *Robertson* court stated that absent a dissolution agreement discharging Robertson from liability, Robertson would be liable for the debts of the partnership regardless of dissolution.¹³⁵ However, the partnership did have such an agreement, and so the supreme court also considered whether Robertson satisfied the appropriate provisions discharging him from liability.¹³⁶ The supreme court reasoned that Robertson's letter effected a dissolution, but until Robertson paid his equal share of the partnership debt, which was a condition of the agreement discharging liability, the partnership was not terminated.¹³⁷ Because the supreme court found that Robertson did not satisfy the dissolution requirements in the agreement, the court held that Robertson was liable for his share of losses and remanded the case for a proper accounting.¹³⁸

III. REVISED UNIFORM PARTNERSHIP ACT BREAKUP PROVISIONS

A. *In General*

The RUPA completely revises the rules governing partnership breakups.¹³⁹ The language of the RUPA is different and some fundamental terms are new.¹⁴⁰ The Drafting Committee intended the new breakup provisions to provide greater clarity in distinguishing between breakups or dissociations that trigger a buyout and those that trigger a termination of the partnership business.¹⁴¹ By adding clarity, the Drafting Committee also hoped to increase stability for partnerships that had contracted for stability.¹⁴² Furthermore, because the Drafting Committee intended to increase the importance of the

133. *Id.* at 618-19.

134. *Id.* at 619.

135. *Id.* at 620.

136. *Id.*

137. *Id.*

138. *Id.* at 620-22.

139. Weidner, *supra* note 9, at 431 (stating that RUPA contains complete revision of breakup rules).

140. See REVISED UNIF. PARTNERSHIP ACT § 601 (Proposed Official Draft 1992) (listing various events of RUPA's "dissociation"); REVISED UNIF. PARTNERSHIP ACT § 601 cmt. (Proposed Official Draft 1991) (stating that upon dissociation partnership is not "dissolved"); *infra* notes 238-47 and accompanying text (comparing UPA's "dissolution" and RUPA's "dissociation").

141. Weidner, *supra* note 9, at 439 (discussing intent of RUPA breakup provisions). Dean Weidner stated: "A partnership breakup can result in a winding up of the partnership business or in a buyout of the departing partner. RUPA attempts to identify and clearly define these two tracks." *Id.*

142. *Id.*

partnership agreement, only a limited number of the RUPA's breakup provisions will act as mandatory rules.¹⁴³

The RUPA contains the breakup provisions in three separate articles.¹⁴⁴ Article six lists all the events that cause the dissociation of a partner.¹⁴⁵ Article seven is the residual or "clean-up" section that mandates a buyout of the dissociated partner's interest if no winding up occurs under article eight.¹⁴⁶ Article eight lists a limited number of events that cause a winding up and termination of the partnership—in other words, a true liquidation of the assets.¹⁴⁷ Together, the three articles encourage buyouts of partnership interests rather than a winding up and termination.¹⁴⁸ The RUPA provisions are greater in length and more detailed than those of the UPA, supposedly adding clarity to the rules.¹⁴⁹

Perhaps the most fundamental change of the RUPA is a greater emphasis on the entity theory of partnership.¹⁵⁰ Of course, such a fundamental shift in the theoretical foundations of partnership law will have a key effect on subsequent statutory enactments of the RUPA and the outcome of case law relying on the new and fundamentally different partnership statute.¹⁵¹

143. See REVISED UNIF. PARTNERSHIP ACT § 103 (Proposed Official Draft 1992) (listing various mandatory provisions and provisions that partners may not "unreasonably" vary); Weidner, *supra* note 9, at 454 (stating that Drafting Committee intended partnership agreement to be supreme in almost all situations, and professing that mandatory rules are parentalistic and undesirable because adults should be held to their bargains).

144. See REVISED UNIF. PARTNERSHIP ACT arts. 6-8 (Proposed Official Draft 1992) (dividing separate breakup procedures).

145. *Id.* art. 6.

146. *Id.* § 701. The order of the paths or processes seems somewhat awkward because one might expect a "cleanup" provision to be at the end of the breakup provisions. The Drafting Committee may have chosen to place the "cleanup" section, § 701, before the rules governing dissolution and termination, article 8, because article 8 supposedly deals with a definite dissolution of the partnership.

147. See *id.* § 801 (listing events of RUPA "dissolution").

148. See *id.* § 701(a) (stating that if partnership is not "dissolved" pursuant to § 801, remaining partners must buyout withdrawing partner's interest); REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 116 (Proposed Official Draft 1991) (stating that ninety day "cooling off" period mandated by § 802 encourages buyouts of withdrawing partner by allowing negotiations between remaining partners and withdrawing partners).

149. See Weidner, *supra* note 9, at 453 (stating that RUPA's greater length adds specificity and clarity).

150. See *id.* at 430-32 (discussing general changes and fundamental changes to breakup provisions that reflect entity theory of partnership).

Other authority calling for greater emphasis of the entity theory of partnership predates the RUPA. See Ribstein, *supra* note 12, at 364-68 (describing new statutory approach to partner dissociation versus dissolution that would reduce dissolvability of partnerships); UPA Revision Subcommittee, *Revision?*, *supra* note 8, at 124-26 (recommending increased emphasis on entity approach and summarizing recommended revisions to UPA dissolution rules, many of which are apparent in RUPA); Weidner, *supra* note 9, at 427 (noting similarity of 1986 ABA subcommittee recommendations to changes incorporated in Georgia's enactment of UPA in 1984).

151. See *supra* note 30 and accompanying text (discussing fundamental effect conceptual theories of partnership may have on partnership law).

Businesses that use the partnership form will have to adapt business practices or contract around the new RUPA default rules.¹⁵² For instance, many new partnerships will want to avoid the ninety day delay provisions of section 802, which affect the withdrawal of partners in an at-will partnership.¹⁵³

1. RUPA Terminology: Dissociation vs. Dissolution

The RUPA introduces a new term in partnership law: dissociation.¹⁵⁴ Dissociation indicates that an event involving a partner has occurred that fundamentally changes the partner's willingness or ability to continue business as usual.¹⁵⁵ Some of the events listed in article six include: (1) a partner's notice of withdrawal; (2) a specified event in the partnership agreement; (3) a partner's expulsion either in accordance with the partnership agreement or by unanimous agreement among the partners due to another event, such as a transfer of the partner's interest, or expulsion by judicial decree; (4) a partner's bankruptcy; and (5) a partner's death or incapacity to carry on business in accordance with the partnership agreement.¹⁵⁶ Importantly, if the partners do not contract otherwise, section 601 of the RUPA does not automatically declare a winding up and termination¹⁵⁷ and, in effect, potentially notifies third parties that one of two processes will occur.¹⁵⁸ The resulting process is either a buyout under article seven or actual termination and liquidation of partnership assets under article eight.¹⁵⁹

152. See *supra* note 30 and accompanying text (discussing importance and effect of theoretical approaches to partnership form of business). In order for partnerships to avoid any undesired results under the RUPA, attorneys will have to contract "around" the RUPA rules.

153. See REVISED UNIF. PARTNERSHIP ACT § 802 (Proposed Official Draft 1992) (discussing ninety day delay period).

154. See *id.* § 601 (listing events of dissociation); REVISED UNIF. PARTNERSHIP ACT § 601 cmt. (Proposed Official Draft 1991) (stating that § 601 lists all events that cause dissociation).

155. See REVISED UNIF. PARTNERSHIP ACT § 601 (Proposed Official Draft 1992) (listing events of dissociation; examples of which include express withdrawal, expulsion, and bankruptcy of partner).

156. *Id.*

157. See *id.* § 103 (listing exclusive number of RUPA provisions that are mandatory); *supra* note 11 and accompanying text (discussing difference between mandatory and default rules).

158. See REVISED UNIF. PARTNERSHIP ACT § 603(a) (Proposed Official Draft 1992) (stating that either buyout process or termination process will occur). Section 603(a), entitled Effect of Partner's Dissociation, states in full: "A dissociated partner's interest in the partnership must be purchased pursuant to Article 7 unless the partner's dissociation results in a dissolution and winding up of the partnership business under Article 8." *Id.*

159. *Id.*; see *supra* note 158 (quoting language of § 603(a)). The 1991 Proposed Official Comment to the RUPA stated in part:

Under RUPA, the dissociation of a partner does not necessarily cause a dissolution and winding up of the business of the partnership. Section 801 identifies the situations in which the dissociation of a partner causes a winding up of the business. Section 701 provides that in all other situations there is a buyout of a partner rather than a windup of the partnership business.

REVISED UNIF. PARTNERSHIP ACT § 601 cmt. (Proposed Official Draft 1991).

Notably, dissociation, instead of dissolution, now acts as the trigger for the breakup provisions of the RUPA.¹⁶⁰

Dissolution no longer has the change in relation meaning that it had under the UPA.¹⁶¹ Instead, dissolution indicates the beginning of a definite winding up and termination of a partnership.¹⁶² Initial drafts of the RUPA did not contain the term dissolution, but subsequent drafts do contain the term in several sections.¹⁶³ Apparently, a split among the Drafting Committee members regarding the inclusion of "dissolution" caused the vacillation.¹⁶⁴

2. Two Paths to RUPA Breakup

One of the "paths" a partnership may follow after an event of dissociation, listed in section 601, is a liquidation of the partnership under article eight.¹⁶⁵ Section 801 lists a limited number of events that result in a liquidation.¹⁶⁶ A wrongfully dissociating partner has no access to an article eight liquidation.¹⁶⁷ Perhaps the most important provision is a dissociating partner's right under section 801(1) to force a liquidation in an at-will

160. See REVISED UNIF. PARTNERSHIP ACT § 601 (Proposed Official Draft 1992) (listing exclusive number of events that cause dissociation, which in turn triggers effects of either article seven or eight); *supra* note 57 and accompanying text (discussing how dissolution triggers effects of UPA breakup provisions).

161. See *supra* note 55 and accompanying text (discussing change in relation definition of UPA dissolution); *infra* notes 227-60 and accompanying text (analyzing similarities and differences between new and old terminology and potentially confusing results).

162. See REVISED UNIF. PARTNERSHIP ACT art. 8 (Proposed Official Draft 1992) (governing dissolution and winding up of partnership); Weidner, *supra* note 9, at 452-53 (discussing continued use of RUPA's dissolution and noting new meaning of term as definite beginning of windup); Weidner, *supra* note 11, at 847 (same).

163. See REVISED UNIF. PARTNERSHIP ACT §§ 603, 801-07 (Proposed Official Draft 1992) (using "dissolution" or "dissolved" as part of terminology).

164. See Weidner, *supra* note 9, at 448-53 (discussing background of continued use of dissolution in RUPA); *infra* notes 227-60 and accompanying text (criticizing continued use of dissolution in RUPA and discussing split in Drafting Committee).

165. See REVISED UNIF. PARTNERSHIP ACT § 601 cmt. (Proposed Official Draft 1991) (stating: "Section 801 identifies the situations in which the dissociation of a partner causes a winding up of the business").

166. See REVISED UNIF. PARTNERSHIP ACT § 801 (Proposed Official Draft 1992) (governing dissolution and winding up of partnership business). Section 801 states that the following events, among others, will cause a dissolution and winding up of the business: (1) express will of a partner in an at-will partnership; (2)(i) express will of a partner in a partnership for a definite term or purpose after another partner has wrongfully dissociated pursuant to § 602; (2)(ii) the express will of all partners in a partnership for a definite term or purpose; (3) a specified event agreed to in partnership agreement; (4) an event that makes any part of partnership business illegal; and (5) the application of a partner to a court for a variety of reasons, including frustration of economic purpose and impracticability due to another partner's conduct. *Id.*

167. See *id.* (listing limited number of events resulting in winding up and termination). Notably, § 801 does not offer a wrongfully dissociating partner, pursuant to § 603(a), an opportunity to force a liquidation. *Id.* However, after a wrongful dissociation, another partner may force a termination of the partnership under § 801(2)(i) without penalty, although it is subject to ninety day delay pursuant to § 802. *Id.* § 801(2)(i).

partnership upon giving express notice.¹⁶⁸ The Official Comments to the RUPA state that section 801(1) is supposed to continue the rule under the UPA that a member of an at-will partnership may force a liquidation.¹⁶⁹ Similarly, by not allowing a wrongfully dissociating partner access to article eight, the RUPA continues the rule that a partner cannot force a liquidation of a partnership before the expiration of an agreed upon date or in contravention of the partnership agreement.¹⁷⁰ Also, under section 801(2)(i), a partner in a partnership for a definite term or particular undertaking may force a liquidation if another partner wrongfully dissociates¹⁷¹ or if another fundamental change occurs in a partner's ability or willingness to carry on as usual.¹⁷²

Section 802 is a wholly new provision and acts as a "break" before a dissolution and forced liquidation pursuant to sections 801(1) and 801(2)(i).¹⁷³ Section 802 provides for a mandatory, ninety day delay of the dissolution prescribed under sections 801(1) and 801(2)(i).¹⁷⁴ Section 802(a) supposedly

168. *See id.* § 801(1) (governing dissolution of partnership after withdrawal of partner in at-will partnership). Section 801 states in part:

A partnership is dissolved, and its business must be wound up, only upon: except as provided in Section 802, receipt by a partnership at will of notice from a partner, other than a partner who is dissociated under Section 601(2) to (10), of that partner's express will to withdraw as a partner, or upon any later date specified in the notice. . . .

Id.

169. *See* REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 115-16 (Proposed Official Draft 1991) (discussing disagreement between Drafting Committee and ABA Ad Hoc Committee regarding ability of partner in at-will partnership to dissolve partnership).

170. *See id.* § 801 commentary at 114 (discussing continuation of rule that in partnership for definite term, remaining partners may buyout wrongfully dissociating partner).

171. *See* REVISED UNIF. PARTNERSHIP ACT § 801(2)(i) (Proposed Official Draft 1992) (governing dissolution after another partner wrongfully dissociates pursuant to § 602).

172. *See id.* (referring to §§ 601(2)-601(10) for possible trigger of dissolution); *id.* §§ 601(2)-601(10) (listing various events, such as expulsion, death, or bankruptcy of partner, that would in accordance with § 801(2)(i) allow another partner to dissolve partnership).

173. *See id.* § 802 (governing ninety day delay period pursuant to § 801(1) and § 801(2)(i)). The Proposed Official Comments to the RUPA state in part:

Simply put, in two situations it (section 802) defers for 90 days a partner's right under Section 801 to have the partnership dissolved and its business wound up. First and foremost, it defers for 90 days the right of a partner at will to have the business wound up. In this regard, Section 802 represents something of a compromise between the two divergent views regarding the right of a partner at will to have the partnership business liquidated upon her dissociation.

REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (clarification added).

174. REVISED UNIF. PARTNERSHIP ACT § 802(a) (Proposed Official Draft 1992). Section 802(a) states in part:

(a) Except as provided in subsection (b) (allowing immediate dissolution by one-half of all partners), a partnership of more than two persons is not dissolved until 90 days after receipt by the partnership of notice from a partner under Section 801(1) or (2)(i) and its business may be continued until that date as if no notice were received.

Id. (clarification added).

effects a compromise that maintains the right of the partner to force a liquidation, but slows down the process in order to give the partnership time to evaluate the situation and possibly offer to buy the dissociating partner's interest.¹⁷⁵ The Drafting Committee had some concerns with avoiding a technical dissolution that might set off an undesired effect, such as triggering a loan acceleration clause, and therefore expressly stated that the partnership "is not dissolved until 90 days after receipt by the partnership of notice from a partner."¹⁷⁶ Notably, all the provisions under section 802 are default rules.¹⁷⁷

Some events leading to liquidation listed in section 801 are not subject to delay pursuant to section 802.¹⁷⁸ These events partially include: (1) a specified event in the partnership agreement; (2) illegality of partnership business; (3) judicial determination that the economic purpose will be unreasonably frustrated; and (4) judicial determination that it is not otherwise practicable to continue business according to the partnership agreement.¹⁷⁹ Most of the provisions of section 801 are default rules and therefore variable under a partnership agreement.¹⁸⁰

The other path that a partnership may follow after a dissociation is a partnership buyout of the dissociating partner's interest.¹⁸¹ Section 701 is the primary provision and provides that a mandatory purchase of the dissociating partner's interest shall occur if there is no termination and winding up under section 801.¹⁸² In effect, section 701 is the residual or

175. See REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (discussing delay provisions of § 802). The Proposed Official Comments state in part:

Section 802 effects a compromise which preserves the absolute right of a partner at will to have the business liquidated, but slows down the dissolution process to give the remaining partners an opportunity to assess the effect of the dissociating partner's departure and to negotiate with her about a buyout in lieu of a liquidation if they wish to continue the business.

Id.

176. REVISED UNIF. PARTNERSHIP ACT § 802(a) (Proposed Official Draft 1992); see REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (discussing intent of Drafting Committee to avoid technical dissolutions).

177. See REVISED UNIF. PARTNERSHIP ACT § 103(b) (Proposed Official Draft 1992) (discussing mandatory RUPA provisions); *infra* notes 269-73, 281-85 and accompanying text (discussing potentially adverse effect of default rules on small partnerships).

178. Compare REVISED UNIF. PARTNERSHIP ACT §§ 801(2)(ii)-(iii), (3)-(6) (Proposed Official Draft 1992) (noting those events triggering dissolution that are not subject to delay period) with *id.* § 802(a) (applying ninety day delay period to § 801(1) and § 801(2)(i)).

179. See *id.* §§ 801(2)(ii)-(iii), (3)-(6) (listing those events not triggering delay period).

180. See *id.* § 103(b) (discussing those RUPA provisions that are mandatory). The Proposed Official Comments state in part: "With the exception of subsections (4), (5), and (6), the provisions of Section 801 are merely default rules and may be varied in the partnership agreement." REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 114 (Proposed Official Draft 1991).

181. See REVISED UNIF. PARTNERSHIP ACT § 701 (Proposed Official Draft 1992) (governing buyout of partnership interest).

182. *Id.* § 701. Section 701(a) states in full: "(a) If a partner is dissociated from a partnership without resulting in a dissolution and winding up of the partnership business under

clean-up section for partnership breakups because it takes effect if the breakup does not qualify under section 801.¹⁸³ Section 701 also provides for a method of valuing a dissociating partner's interest.¹⁸⁴ If the partnership and dissociating partner do not reach an agreement regarding payment within 120 days of a written demand, the partnership must pay to the dissociating partner the partnership's estimate of the buyout price and accrued interest.¹⁸⁵

B. RUPA Actual Authority of Partner Upon Dissociation

Section 603(b) is the primary section governing the authority of a dissociating partner.¹⁸⁶ Under section 603(b), the dissociating partner's right to participate in the control of the partnership terminates immediately upon dissociation.¹⁸⁷ This narrower result is in contrast to the UPA's cessation of partnership authority.¹⁸⁸ The UPA generally provides that every partner's authority ceases to exist upon dissolution, except for those acts deemed necessary to wind up existing business.¹⁸⁹ However, similarly to the UPA, section 603(b) allows a dissociating partner to participate in the winding up of the partnership pursuant to section 804.¹⁹⁰ A partner giving notice of an express will to withdraw under section 801(1) or 801(2)(i)¹⁹¹ incurs the same restriction of management control, except as to the winding up of the partnership.¹⁹²

Although the termination of a partner's right to participate in the control of the partnership is similar under section 603(b) and sections 801(1) and 801(2)(i), the RUPA does not release—or allay—a dissociating partner under sections 801(1) and 801(2)(i) from duties delineated in section 404 of

Section 801, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b).'' *Id.*

183. See REVISED UNIF. PARTNERSHIP ACT § 701 cmt. (Proposed Official Draft 1991) (stating that § 701 applies when no dissolution and winding up occurs pursuant to § 801).

184. See REVISED UNIF. PARTNERSHIP ACT § 701(b) (Proposed Official Draft 1992) (giving fairly detailed procedure for valuing departing partner's interest in partnership business); REVISED UNIF. PARTNERSHIP ACT § 701 cmt. (Proposed Official Draft 1991) (stating that Drafting Committee intended to give more specific guidance than UPA in valuing partnership interest).

185. See REVISED UNIF. PARTNERSHIP ACT § 701(e) (Proposed Official Draft 1992) (stating that in-cash buyout must occur within 120 days if parties cannot agree).

186. See *id.* § 603(b) (extinguishing only dissociating partner's authority after dissociation).

187. *Id.*

188. See *supra* note 106 and accompanying text (discussing and quoting language of UPA § 33).

189. See *supra* note 107 and accompanying text (giving examples of UPA cessation of all partners' authority except for purposes of winding up partnership affairs).

190. See REVISED UNIF. PARTNERSHIP ACT § 603(b) (Proposed Official Draft 1992) (referring to § 804 to allow dissociating partner right to participate in winding up).

191. See *supra* notes 165-72 and accompanying text (discussing RUPA §§ 801(1), 801(2)(i)).

192. See REVISED UNIF. PARTNERSHIP ACT § 802(c)(1) (Proposed Official Draft 1992) (extinguishing departing partner's authority to act for partnership during ninety day delay period).

the RUPA—entitled “General Standards of Partner’s Conduct.”¹⁹³ Section 603(b) terminates a dissociating partner’s duty pursuant to section 404(b)(3) to refrain from competing against the former partnership “in the conduct of the partnership business.”¹⁹⁴ However, section 802(c), which generally governs the rights of the departing partner during the ninety day delay period, has no similar provisions allowing a partner to compete.¹⁹⁵ In other words, a withdrawing partner in an at-will partnership cannot compete and remains fully duty-bound during the ninety day delay period of section 802. Interestingly, the RUPA does afford a wrongfully dissociating partner access to the duty terminations of section 603(b).¹⁹⁶ Neither section 603(b) or section 801(1) or 801(2)(i) are mandatory rules.¹⁹⁷

C. RUPA Continuing Liability of Partner

1. Continuing Liability Under Articles Seven and Eight

Dean Weidner has stated that the Drafting Committee did not intend to change the result of cases involving the continuing liability of partners.¹⁹⁸ Instead, the RUPA seeks to state more directly the obligations of partners in regards to unfinished business.¹⁹⁹ Article seven and article eight have separate provisions for the continuing liability of partnerships, although the general outcome of continued liability for previously incurred obligations under each article is the same.²⁰⁰

Section 703 continues the rule that the departure of a partner does not by itself release the partner from liability.²⁰¹ The Drafting Committee based

193. See *id.* §§ 404(b)(1)-(3), 404(d) (listing partner duties, some of which § 603(b) relaxes or terminates for departing partner).

194. *Id.* § 404(b)(3); see *id.* § 603(b) (terminating duty under § 404(b)(3) not to compete with partnership).

195. See *id.* § 802(c) (listing rules governing withdrawing partner’s rights during ninety day delay period); *id.* (lacking any mention of release from duty not to compete).

One could argue that § 603(b) applies to those partners caught in the “limbo” of § 802’s delay period. In this way, a partner might be able to compete. However, this is not consistent with the theoretical idea behind § 802—keeping partners involved in the partnership for purposes of encouraging buyouts while simultaneously protecting their rights under § 802.

196. See *id.* § 602 (listing no restriction on wrongfully dissociating partner not to compete); *id.* § 603(b) (same).

197. See *id.* § 103(b) (discussing mandatory RUPA provisions).

198. See Weidner, *supra* note 9, at 445-46 (discussing partnership liability case example and stating that Drafting Committee did not intend to change liability rule under RUPA).

199. See *id.* at 446 (stating that RUPA § 30, now § 803, attempts to clearly define continuing obligation of partner after dissociation).

200. See REVISED UNIF. PARTNERSHIP ACT §§ 703(a), 803 (Proposed Official Draft 1992) (stating provisions governing continued liability for withdrawing partner in buyout situation under article seven and dissolution under article eight); *infra* notes 201-18 and accompanying text (discussing continued liability of withdrawing partner under articles seven and eight).

201. See REVISED UNIF. PARTNERSHIP ACT § 703 cmt. (Proposed Official Draft 1991) (stating that § 703 continues rule that departing partners are not discharged from liability). Section 703(a) states in part: “A partner’s dissociation does not of itself discharge the partner’s liability for a partnership obligation incurred *before* dissociation.” REVISED UNIF. PARTNERSHIP ACT § 703(a) (Proposed Official Draft 1992) (emphasis added).

section 703 of the RUPA on section 36 of the UPA.²⁰² The Drafting Committee intended section 703(a) to clarify the rule that a dissociated partner is liable only for obligations incurred before dissociation, except those liabilities described in section 703(b).²⁰³ Section 703(b) protects third parties who believe the dissociated partner is still a partner and extend credit to the partnership.²⁰⁴ For example, a third party creditor's extension of credit to the partnership might rely substantially on the credit history and strength of the newly dissociated partner. Creditors attempting to hold a dissociated partner liable must demonstrate reliance and lack of notice.²⁰⁵ Section 703(b) holds dissociated partners liable to third parties for two years.²⁰⁶ However, section 704(b) serves to limit dissociating partners' continuing liability by shortening the period for which they can be held liable from two years to ninety days.²⁰⁷ In effect, filing under section 704 gives third party creditors constructive notice of the dissociation.²⁰⁸ Dissociating partners therefore have incentive to file a statement of dissociation in accordance with section 704.²⁰⁹ Notably, section 703(c) continues the basic rule of UPA section 36(2),²¹⁰ allowing a dissociating partner to contract for indemnity of partnership obligations if all parties to the transaction agree.²¹¹ Section 701 provides that a partnership shall indemnify a dissociating partner from all liability, except unknown liabilities incurred before dissociation and liabilities incurred due to the dissociating partner's action after a dissociation.²¹²

202. See REVISED UNIF. PARTNERSHIP ACT § 703 cmt. (Proposed Official Draft 1991) (stating that Drafting Committee based § 703 on UPA § 36).

203. See *id.* (stating that RUPA § 703(a) amends UPA § 36 in order to clarify rule that withdrawing partner is liable for obligations entered into before dissociation).

204. See REVISED UNIF. PARTNERSHIP ACT § 703(b) (Proposed Official Draft 1992) (stating that dissociating partner is liable to third party creditors for two years if reasonable belief and notice requirements are satisfied by third party).

205. See *id.* (stating that creditor must satisfy three requirements, two of which are reasonable belief and lack of notice, in order to hold dissociated partner liable).

206. See *id.* (stating that continued liability period for dissociated partner under § 703(b) is two years).

207. See *id.* § 704(b) (stating that third parties are deemed to have notice of dissociation after ninety days from filing).

208. See REVISED UNIF. PARTNERSHIP ACT § 703 cmt. (Proposed Official Draft 1991) (stating that statement of dissociation under § 704 acts as constructive notice to third parties of dissociation after ninety days from filing).

209. See *id.* § 704 cmt. (stating that partners have incentive to file statements of dissociation and that such filings will likely become routine after dissociation). Such filings will raise transaction costs for those creditors doing business with partnerships.

210. See UPA § 36(2), 6 U.L.A. at 436 (stating that partner may be discharged from liability by agreement between partner, third party creditor, and partnership).

211. See REVISED UNIF. PARTNERSHIP ACT § 703(c) (Proposed Official Draft 1992) (stating that departing partner may escape liability if partner secures agreement with partnership and creditor to that effect).

212. See *id.* § 701(d) (mandating indemnification for dissociating partner for liabilities "known" to partnership and for partnership liabilities incurred after dissociation). Section 701(d), which applies to buyouts, states in part: "(d) A partnership shall indemnify a dissociated

Section 803 sheds light on the continuing liability of partners after a RUPA dissolution or beginning of a winding up and termination.²¹³ The Drafting Committee patterned section 803 after UPA section 30.²¹⁴ Section 803 states in full: "A partnership continues after dissolution until the winding up of its business is completed, at which time the partnership is terminated."²¹⁵ As previously stated, the Drafting Committee did not intend the RUPA to alter the outcome of cases concerning the continued liability of partners previously handled by the UPA.²¹⁶ To explain the idea, Dean Weidner, in discussing the UPA continued liability scheme, stated that upon dissolution under the UPA the scope of partnership business narrows, but "perhaps only very slightly."²¹⁷ Therefore, even a partner who dissociates in an at-will partnership, effecting a dissolution, and who subsequently forces a winding up and termination at the end of the ninety day waiting period—instead of accepting a buyout under article seven—is subject to continuing liability until all previous business obligations are wound up.²¹⁸

2. Special Rules of Section 802(c)

Section 802(c) lists three rules governing the rights of a dissociating partner during the ninety day delay of dissolution prescribed by section 802.²¹⁹ First, section 802(c)(1) immediately acts to cut off any management control previously held by the withdrawing partner, except for participation in a winding up on or before the expiration date of the ninety day period.²²⁰

partner against all partnership liabilities incurred before the dissociation, except liabilities then unknown to the partnership, and against all partnership liabilities incurred after the dissociation, except liabilities incurred by an act of the dissociated partner under Section 702." *Id.*

213. *See id.* § 803 (stating basic rule of continued relationship between partnership and dissociating partner after dissolution).

214. *See* REVISED UNIF. PARTNERSHIP ACT § 803 cmt. (Proposed Official Draft 1991) (stating that Drafting Committee drew § 803 from UPA § 30); *supra* note 73 and accompanying text (explaining definition of UPA § 30).

215. REVISED UNIF. PARTNERSHIP ACT § 803 (Proposed Official Draft 1992).

216. *See supra* note 198 and accompanying text (noting intent of Drafting Committee to continue rule of UPA § 36 concerning partner liability for transactions entered into prior to dissociation).

217. Weidner, *supra* note 9, at 444.

218. *See supra* notes 127-38 and accompanying text (discussing *Robertson* case that demonstrates continued liability concept under UPA); *infra* notes 279-86 and accompanying text (discussing continued liability under RUPA by way of hypothetical case example).

219. *See* REVISED UNIF. PARTNERSHIP ACT § 802(c) (Proposed Official Draft 1992) (listing three rules governing rights and liabilities of partner subject to ninety day delay period of § 802). In explanation of § 802, the Proposed Official Comments to the RUPA state:

Basically, it treats the dissociated partner as if she were dissociated under section 601 and being bought out under Article 7, rather than liquidating under Article 8.

If, after 90 days, the business is dissolved and wound up, her usual rights and duties as a partner are reinstated.

REVISED UNIF. PARTNERSHIP ACT § 802 commentary at 125 (Proposed Official Draft 1991).

220. *See* REVISED UNIF. PARTNERSHIP ACT § 802(c)(1) (Proposed Official Draft 1992) (cutting off withdrawing partner's right of management and control).

Second, section 802(c)(2) supposedly balances this loss of control by limiting liability to third parties as prescribed by section 703(b).²²¹ Section 703(b) requires third party creditors to show reasonable belief and lack of notice in order to hold a dissociated partner personally liable.²²² The partnership must indemnify the dissociating partner from partner conduct deemed inappropriate for winding up the partnership business.²²³ However, and most important, the dissociating partner may still be liable to third parties for those transactions entered into during the ninety day period.²²⁴ Third, section 802(c)(3) freezes the dissociating partner's capital account in the following manner: the partnership must credit the partner's account for the relative share of any profits made during the ninety day period and can deduct losses incurred during the period only from that share of profits.²²⁵ In this manner, section 803(c)(3) protects the dissociating partner from incurring any further losses than those at the beginning of the period—in other words, section 803(c)(3) provides a floor below which the partner's capital account may not drop.²²⁶

IV. ANALYSIS OF RUPA BREAKUP PROVISIONS

At this point, critical analysis and commentary on the latest version of the RUPA breakup provisions are scarce. Even Dean Weidner's latest article, which considered the breakup provisions in detail, used a different version of the RUPA than considered here and was written over two years before the date of this analysis. Nevertheless, analysis may proceed in at least two directions: (1) comparative analysis of present UPA terminology and provisions with the new RUPA rules handling related breakup situations, and (2) determination of possible adverse effects to a withdrawing partner in a closely held partnership under the RUPA breakup provisions.

221. See *id.* § 802(c)(2) (limiting liability of withdrawing partner to that prescribed in RUPA § 703(b) for third party creditors); *supra* note 204 and accompanying text (discussing liability under § 703(b)).

222. *Id.* § 703(b).

223. *Id.* § 802(c)(2); see REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (noting that concept of conduct not appropriate for winding up partnership affairs has been well developed under UPA § 35(1)(a), which is continued separately by RUPA § 805(1)).

224. See REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (explaining continued liability of withdrawing partner in relation to third parties).

225. See REVISED UNIF. PARTNERSHIP ACT § 802(c)(3) (Proposed Official Draft 1992) (explaining procedure by which RUPA attempts to protect withdrawing partner's capital account). Section 803(c)(3) states in full: "[W]ith respect to profits or losses incurred during the period, [the withdrawing partner] shall be credited with a share of any profits but shall be charged with a share of any losses only to the extent of profits credited for the period." *Id.*

226. See REVISED UNIF. PARTNERSHIP ACT § 802 commentary at 125 (Proposed Official Draft 1991) (explaining procedure of § 802(c)(3) and noting potential difficulty of distinguishing between transactions entered into during period as either ongoing or winding up).

A. *The UPA vs. RUPA: Terminology and Confusion*

Commentators, including Dean Weidner, when discussing the UPA breakup provisions, commonly lament the confusion caused by the UPA definition of dissolution.²²⁷ In fact, confusion in the law governing partnerships seems to be the catalyst for legal revision in the area.²²⁸ In addressing the need for revision, Dean Weidner strongly argued that the UPA definition of dissolution created instability for partnerships.²²⁹ Dean Weidner further stated that the UPA does not sufficiently distinguish breakups that cause a winding up and termination and those that do not.²³⁰ Therefore, one can justifiably ask if the new terminology of the RUPA will lower confusion involving partnership breakups and if the RUPA successfully distinguishes between dissociations that effect partnership termination and those that effect a buyout of the departing partner's interest with a continuation of the partnership business.

The primary source of confusion under the UPA breakup provisions has been the misuse of terminology by attorneys and courts.²³¹ The UPA uses unique definitions of dissolution, winding up, and termination.²³² Under the UPA, dissolution activates all the relevant breakup provisions.²³³ However, the RUPA redefines dissolution²³⁴ and uses another new term, dissociation, as the trigger to the breakup provisions of the RUPA.²³⁵

Because confusion in the law of partnership may cause partnership instability, clarity in the law of partnership is of fundamental importance.²³⁶ Dean Weidner believed the continued use of dissolution in the RUPA will cause further confusion because the term "dissolution" always has caused

227. See Weidner, *supra* note 9, at 435 (noting that UPA § 29 definition has caused much confusion since original drafting of UPA); *supra* notes 61-68 and accompanying text (discussing confusion caused by indiscriminate use of UPA terminology and dual concepts of cause and effect within UPA § 29 definition of dissolution).

228. See *supra* note 5 (discussing early confusion over diverse case law governing partnerships and need for uniformity that caused development of UPA).

229. See Weidner, *supra* note 9, at 435-38 (arguing that aggregate conceptual theory of partnership causes confusion over dissolution).

230. See *id.* at 437-38 (stating that UPA actually destabilizes partnerships by not adequately distinguishing between types of partnership breakups).

231. See *supra* notes 61-62 and accompanying text (discussing confusion of terminology by business people, attorneys, and courts).

232. See *supra* notes 52-60 and accompanying text (discussing unique definitions and use of terminology in UPA).

233. See *supra* note 57 and accompanying text (stating that dissolution activates all breakup provisions under UPA).

234. See Weidner, *supra* note 9, at 452-53 (stating new general meaning and effect of RUPA term "dissolution"); *supra* notes 161-64 and accompanying text (discussing new RUPA meaning of "dissolution").

235. See *supra* notes 154-60 and accompanying text (discussing use of term "dissociation" as beginning of partnership breakup under RUPA).

236. See Weidner, *supra* note 9, at 435-38 (discussing how confusion involving UPA has caused instability to partnerships); *supra* note 5 (describing early history of UPA and how confusion may generate need for legal reform).

confusion and the RUPA now defines dissolution in a different manner.²³⁷ However, the new RUPA terminology will increase confusion not only for the causes noted by Dean Weidner, but also for the following reasons: (1) the RUPA adds a new term, dissociation, to the primary lexicon of partnership law; (2) the RUPA, while redefining dissolution, substitutes dissociation for dissolution as the primary trigger to the breakup provisions; and (3) the distinction between a dissociation that definitely effects a buyout and one that results in a termination of the partnership is not always clear.

The meaning of the RUPA's "dissociation" is analogous to the present UPA definition of dissolution. The dissolution of a partnership under the UPA indicates a change in the relationship between the partners.²³⁸ Although dissociation is not expressly defined in the RUPA, the various "events" of dissociation indicate the meaning behind the term.²³⁹ For example, the withdrawal or expulsion of a partner is an event of dissociation under the RUPA.²⁴⁰ Under the UPA one would label these events as dissolutions because they indicate a changed relation among the partners, and the UPA lists these events as causes of dissolution.²⁴¹ Although the RUPA has declined to define the term "dissociation," the RUPA's dissociation now has virtually the same meaning as the UPA's dissolution: the occurrence of some event altering a partner's willingness or ability to continue in the business.²⁴²

The effect of the RUPA's "dissociation" is also similar to the effect of dissolution under the UPA. Like the UPA's "dissolution," dissociation under the RUPA does not indicate the termination of the partnership business.²⁴³ Dissociation indicates either that the partners continuing the partnership will purchase the departing partner's interest²⁴⁴ or that the partnership will terminate and its assets liquidated.²⁴⁵ Of course, under the

237. See Weidner, *supra* note 9, at 452 (stating that confusion likely will occur with RUPA due to continued use of term "dissolution").

238. See *supra* note 55 and accompanying text (explaining definition of UPA "dissolution").

239. See REVISED UNIF. PARTNERSHIP ACT § 601 (Proposed Official Draft 1992) (listing events of dissociation); *supra* text accompanying note 156 (discussing and noting various events of dissociation under RUPA).

240. See *id.* § 601 (listing withdrawal and expulsion of partner as two events of dissociation).

241. See UPA § 31, 6 U.L.A. at 376 (listing "events" of dissolution under UPA, including express will and expulsion of partner).

242. See *supra* note 64 and accompanying text (stating definition of UPA "dissolution"); *supra* note 155 and accompanying text (describing usage and meaning of RUPA "dissociation").

243. See REVISED UNIF. PARTNERSHIP ACT § 701 (Proposed Official Draft 1992) (providing mechanism by which remaining partners may buy departing partner's interest, if no dissolution occurs under article eight); *id.* § 803 (stating that partnership continues after dissolution until winding up is complete); *supra* notes 158-59 and accompanying text (describing two paths under RUPA after dissociation).

244. See REVISED UNIF. PARTNERSHIP ACT § 701 (Proposed Official Draft 1992) (providing procedure for buyout of partner's interest if no dissolution under article eight).

245. See *id.* § 801 (listing events of RUPA dissolution).

UPA, dissolution may or may not result in a termination of the partnership²⁴⁶ and often does not.²⁴⁷

Under the RUPA, the term “dissolution” indicates the definite beginning of the winding up process.²⁴⁸ Section 801 of the RUPA lists withdrawal of a partner in an at-will partnership as one of the “[e]vents Causing Dissolution and Winding Up of Partnership Business.”²⁴⁹ However, pursuant to section 802, the withdrawal of a partner in an at-will partnership does not effect a dissolution—beginning of the windup—until ninety days have passed, which allows partners who wish to continue the business an opportunity to buy out the departing partner’s interest.²⁵⁰ Thus, under the RUPA, the termination or liquidation of the partnership may or may not occur after an event of dissolution under section 801(1) (withdrawal of a partner in an at-will partnership) or 801(2)(i) (withdrawal of a partner after the wrongful dissociation of another partner). For example, if a partner in an at-will partnership expressly withdraws under section 801(1), section 802 delays the dissolution for ninety days, allowing partners wishing to continue the business an opportunity to purchase the departing partner’s interest.²⁵¹ The Drafting Committee decided to delay dissolution in order to avoid a technical dissolution in the case of a negotiated buyout of a partner or waiver by the departing partner of the liquidation right under section 801 of the RUPA.²⁵² Thus, it is not always clear that an event of dissolution under section 801 will effect a definite partnership winding up and termination.

The potential for confusion created by the terminology of the RUPA breakup provisions seems astronomical given the similarity between UPA “dissolution” and the RUPA “dissociation,” the RUPA’s new definition of dissolution, and the RUPA’s substitution of dissolution with dissociation as the trigger for the breakup provisions. Further, the structure of the RUPA is awkward in its seemingly desperate continuation of the term “dissolution,” and this is especially curious when one considers that a seeming consensus existed among the drafters that the term causes confu-

246. See *supra* note 68 (giving examples of cases explaining that partners may continue business after dissolution under valid partnership agreement).

247. See *supra* note 71 and accompanying text (asserting that most partnerships continue after dissolution, regardless of existence of partnership agreement).

248. See *supra* note 162 and accompanying text (discussing RUPA’s new use of dissolution).

249. See REVISED UNIF. PARTNERSHIP ACT § 801(1) (Proposed Official Draft 1992) (listing withdrawal of partner in at-will partnership as event causing dissolution and winding up).

250. See *id.* § 802 (delaying dissolution of partnership after withdrawal of partner in at-will partnership); REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (noting that delay period slows down process of dissolution in order for partnerships to purchase departing partner’s interest).

251. See REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (noting that delay period slows down process of dissolution in order for partnerships to purchase departing partner’s interest).

252. *Id.*

sion.²⁵³ Why not just leave dissolution out of section 801 and indicate that only those events of dissociation described in section 801 result in a definite windup and termination?²⁵⁴

A brief, historical review of Drafting Committee action in writing the RUPA sheds light on the "dissolution" dilemma.²⁵⁵ A split existed between members of the Drafting Committee in that one group wished to maintain the use of dissolution and another group did not.²⁵⁶ The Drafting Committee first completed drafts of the RUPA that did not contain the term dissolution.²⁵⁷ Then, in the spring of 1990, the Drafting Committee decided to add dissolution back into the statute *without* any revision of the structure of the RUPA or change in the substantive decisions underlying the structure of the RUPA.²⁵⁸ Indeed, Dean Weidner deemed the continued use of dissolution "surplusage."²⁵⁹ Because the RUPA may not add clarity to the law governing partnerships breakups, and may therefore not add stability, surplusage actually may be the least of future problems involving the "dissolution" dilemma.²⁶⁰

B. Hypothetical Situation Demonstrating Potential Problems for Withdrawing Partner in an At-Will, Closely Held Partnership

For many reasons the small partnership is the best model for consideration and analysis of the RUPA.²⁶¹ In fact, Dean Weidner and members of the Drafting Committee believe that the model act is designed for the small partnership.²⁶² Of primary importance is the fact that small partner-

253. See Weidner, *supra* note 9, at 435-38 (discussing confusion caused by UPA dissolution); *supra* notes 61-68 and accompanying text (discussing confusion caused by UPA term "dissolution").

254. See discussion *infra* part V (offering suggestion to Drafting Committee to revise RUPA without dissolution).

255. See Weidner, *supra* note 9, at 448-53 (discussing history of drafting, continued use of dissolution in RUPA, and possible tax classification problem feared by some commentators of RUPA).

256. See *id.* at 448 (noting split among Drafting Committee members over continued use of dissolution).

257. See *id.* (noting that Drafting Committee first completed RUPA without using "dissolution").

258. See *id.* (stating that Drafting Committee neither changed structure or substantive decisions behind structure after "dissolution" was reinserted).

259. *Id.*

260. See *supra* notes 141-42 and accompanying text (discussing Drafting Committee's intent to add stability to partnerships by increasing clarity of provisions handling partnership breakups).

261. See REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 116 (Proposed Official Draft 1991) (stating that many members of Drafting Committee believe that default rules are designed for small partnerships); Ribstein, *supra* note 12, at 364 (stating that small business is suitable model for statutory dissociation provisions because large partnerships are more likely to enter into customized agreements that control effects of dissociation).

262. See REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 116 (Proposed Official Draft 1991) (stating that many members of Drafting Committee believe that default rules of

ships often do not execute written partnership agreements because of the high transaction costs or the informal and optimistic environment surrounding the formation of a small partnership.²⁶³ Also, partners in small businesses may make an agreement that lacks specificity or coverage of breakup issues.²⁶⁴ On the other hand, large partnerships usually have elaborate agreements covering almost all facets of the partnership business, including partnership breakups.²⁶⁵ Therefore, because the Drafting Committee intends most of the RUPA to act as default rules,²⁶⁶ the RUPA will have the greatest effect on small partnerships.

A hypothetical situation involving a closely held partnership will help to demonstrate the breakup scheme of the RUPA and some unforeseen, adverse results to a withdrawing partner. Alvin, Jeeves, and Susan have decided to work together ranching cattle in eastern Iowa. Susan supplied two thirds of the initial capital and Jeeves secured a loan for the remaining amount. The three partners agreed orally to equal shares of management control. However, each of them brought a different expertise to the partnership. Alvin graduated from business school at a local university and specialized in marketing. Jeeves acquired cattle expertise after spending much of his young adult life on various ranches. Susan holds doctoral degrees in microbiology and veterinarian medicine.

After three years of difficult and unprofitable operations, the atmosphere surrounding the partnership became tense. Susan then discovered that a parasitic virus had been plaguing the cattle. Next, Susan researched the possible adverse effects to humans. Susan was not sure, but she told Jeeves that the virus might harm human consumers. Almost simultaneously, Alvin potentially secured several large and expectedly profitable sales of the cattle. The sales could occur immediately. Alvin convinced Jeeves that Susan's research was speculative and that the partnership should continue business.

RUPA are designed for small partnerships); Weidner, *supra* note 11, at 847 (stating that "partnership statute is for the small business people of America, for ranchers, farmers, merchants, and small manufacturers").

263. See Ribstein, *supra* note 12, at 362 (stating that many partners when forming partnership often underestimate benefits of breakup provisions in partnership agreement because of optimistic attitudes at beginning of business).

264. See *Longley Supply Co. v. Styron*, 214 S.E.2d 777, 779 (N.C. Ct. App. 1975) (finding that because partnership dissolution agreement failed to address resulting liability after dissolution, agreement was inapplicable and relevant UPA section applied, which stated that partners were liable for losses in proportion to their share in profits); REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 116 (Proposed Official Draft 1991) (stating that default rules—provisions that apply only in absence of partnership agreement—are designed for small partnerships); Ribstein, *supra* note 12, at 362 (noting that casual partnerships may not have partnership agreements and may give no consideration to statutory rules governing partnerships).

265. See Ribstein, *supra* note 12, at 364 (stating that large partnerships usually have customized partnership agreements).

266. See REVISED UNIF. PARTNERSHIP ACT § 103 (Proposed Official Draft 1992) (listing limited number of RUPA provisions not subject to contrary agreement and rules that partnership agreement may not "unreasonably" vary); Weidner, *supra* note 9, at 454-56 (describing how Drafting Committee minimized RUPA's mandatory rules).

Susan then became convinced of her research and decided that such a sale could result in widespread illness and death to many people. Susan decided to pull out of the partnership before the sales were finalized in hopes of lowering her exposure to liability. She also hoped to take her two-thirds of the cattle and use them in a different venture. Susan consulted local attorney "X" who is a self-professed "expert" on the new partnership law, the RUPA, enacted by Iowa.

Susan discovered the following unfortunate results of her association with Alvin and Jeeves. Attorney X told Susan that she is a member of a legal partnership²⁶⁷ and because the partnership never created a partnership agreement, the partnership laws—RUPA—of the State of Iowa govern her affairs by default.²⁶⁸ First, Susan must wait for at least ninety days to receive any share of the partnership assets.²⁶⁹ Second, Susan has no control or authority in partnership affairs for the ninety day period²⁷⁰ and she may be bound or liable to third parties by the acts of her former partners for the same period.²⁷¹ Susan then realized that her former partners, now hostile to her, hold and control her assets—a majority of which she contributed—"hostage" for at least three months.²⁷² Third, Alvin and Jeeves may continue the regular business of cattle ranching, including sales, as if nothing has occurred.²⁷³ Attorney X explained that the delay provisions are completely new²⁷⁴ and the previous partnership statute, the UPA, would have declared an immediate dissolution of the partnership.²⁷⁵ The UPA dissolution would

267. See REVISED UNIF. PARTNERSHIP ACT § 202(a) (Proposed Official Draft 1992) (continuing traditional rule of UPA that parties who carry on common business may form legal partnership regardless of absence of written agreement); REVISED UNIF. PARTNERSHIP ACT § 202(a) cmt. (Proposed Official Draft 1991) (stating that Drafting Committee intended language of RUPA § 202(a) to codify traditional judicial construction of UPA § 6(1) that persons may form partnership through common enterprise regardless of intent).

268. See *supra* note 11 and accompanying text (discussing effect of default rule on partnership without agreement to contrary).

269. See REVISED UNIF. PARTNERSHIP ACT § 802(a) (Proposed Official Draft 1992) (delaying withdrawal of partner in at-will partnership); *supra* notes 173-77 and accompanying text (discussing effects of RUPA § 802).

270. See *supra* note 220 and accompanying text (discussing effects of RUPA § 802(c)(1)).

271. See *supra* note 224 and accompanying text (discussing potential liability of withdrawing partner pursuant to § 802(c)(2)).

272. See BROMBERG & RIBSTEIN, *supra* note 8, § 7.01(d), at 7:9 (stating that without dissolution at will partner may be "hostage" of hostile partnership and that fiduciary duties may not satisfactorily protect interests of hostage partner); Elfin, *supra* note 97, at 663 (noting that advantage of right to cause dissolution at will is protection against exploiting conduct by managing partner or majority of partners).

273. See REVISED UNIF. PARTNERSHIP ACT § 802(c)(1) (Proposed Official Draft 1992) (extinguishing departing partner's authority to act for partnership during ninety day delay period after withdrawal from at-will partnership).

274. See REVISED UNIF. PARTNERSHIP ACT § 802 cmt. (Proposed Official Draft 1991) (stating that § 802 is new and effects compromise that preserves right of partner in at-will partnership to dissolve partnership, but slows down process of liquidation).

275. See *supra* notes 106-07 and accompanying text (discussing immediate effect of UPA § 33 to extinguish all authority of all partners to act on behalf of partnership except for purposes of winding up business).

have stopped an inconclusive cattle sale because all the partners would lose authority to act for the partnership except for actions necessary to wrap up the existing business affairs of the partnership.²⁷⁶ Attorney X explained that the former rules of the UPA, declaring a dissolution and extinguishing the authority of partners, not only protected the withdrawing partner's capital investment, but also increased the flexibility or liquidity of the investment.²⁷⁷ These rules therefore increased an individual's ability to freely choose where to invest potentially scarce monetary and human resources.²⁷⁸

Next, Susan asked attorney X about her liability to the buyers of the cattle and to those who might become ill from consuming the cattle. Attorney X thought that Alvin and Jeeves might have to indemnify Susan for any contractual liability to the cattle buyers.²⁷⁹ Susan responded that indemnification from Alvin and Jeeves is useless because they have nothing with which to indemnify her and that she was the partner who contributed the bulk of the capitalization. Attorney X told Susan that she has seen this problem before, especially with failing partnerships that have no substantial assets except those of the withdrawing partner. Attorney X told Susan that she normally advises all new client partnerships, especially small partnerships, to draft around the default provisions that mandate a ninety day delay.²⁸⁰ Attorney X related that it is typically those partners in small businesses, not quite as sophisticated as others in large partnerships, that find themselves at the mercy of the delay provisions.

Next, attorney X explained that because section 802(c) cuts off Susan's right to participate in the business, Susan has no statutory power to stop the remaining partner's from making any financial move.²⁸¹ Furthermore, attorney X related that she is sure that Susan cannot lower her contractual liability during the ninety day delay period by filing a statement of dissociation²⁸² or dissolution²⁸³ because both take effect ninety days after

276. See UPA § 33, 6 U.L.A. at 423 (stating rule that all authority for partners ends upon dissolution); *supra* notes 108-15 and accompanying text (discussing *Daniels Trucking*, which involves case of extinguishment of partner's authority after UPA dissolution).

277. See *supra* note 98 and accompanying text (asserting that liquidity of partner's investment in partnership is increased by easy dissolution of business).

278. See *supra* note 98 and accompanying text (stating that ease of dissolution of at-will partnership serves to better protect partner's investment and personal human resources).

279. See REVISED UNIF. PARTNERSHIP ACT § 802(c)(2) (Proposed Official Draft 1992) (stating that remaining partners must indemnify withdrawing partner for obligations not appropriate for winding up business).

280. See *id.* § 802(a) (mandating ninety day delay for dissolution upon withdrawal of partner in at-will partnership); *supra* note 12 (discussing unique nonretroactive treatment of § 802 by Drafting Committee that demonstrates awareness of potentially adverse effects § 802 may have upon partnerships).

281. See REVISED UNIF. PARTNERSHIP ACT § 802(c)(1) (Proposed Official Draft 1992) (extinguishing withdrawing partner's right to management).

282. See *id.* § 704 (providing for filing of statement of dissociation in order to limit possible liability under § 703(b)); *supra* notes 201-12 and accompanying text (discussing potential liability of partner pursuant to § 703).

283. See REVISED UNIF. PARTNERSHIP ACT § 806 (Proposed Official Draft 1992) (providing

filing.²⁸⁴ Attorney X also told Susan that Susan is still liable to any unfortunate consumer of the cattle.²⁸⁵ However, attorney X explained that this rule of liability is the same as the previous one under the UPA.²⁸⁶

Ever practical, Susan asked why her elected representatives would enact such a statute. Attorney X responded that the original writers of the RUPA believed the former partnership statute destabilized partnerships because of the statute's reliance on a conceptual—aggregate—theory of partnership.²⁸⁷ Therefore, the writers decided to emphasize another theory called the entity theory of partnership.²⁸⁸ The writers probably created the three month delay period to encourage the sale of a departing partner's interest before the liquidation of the partnership.²⁸⁹ The delay period therefore furthers the conceptual theory that the partnership is a separate legal entity. Attorney X also explained that some legal commentators had proposed a practical

for filing of statement of dissolution in order to limit possible liability under § 803); *supra* notes 213-18 and accompanying text (discussing potential liability of partner pursuant to § 803).

284. See REVISED UNIF. PARTNERSHIP ACT §§ 704(b), 806(c) (Proposed Official Draft 1992) (stating that notice takes effect ninety days after filing).

285. See *id.* § 802(c)(2) (stating that withdrawing partner is still liable as to third parties).

286. See *supra* notes 219-26 and accompanying text (discussing continued liability under § 802(c)); *supra* notes 213-18 and accompanying text (discussing continued liability under § 803 and intent of Drafting Committee to retain general continuing liability rule of UPA).

287. See Weidner, *supra* note 9, at 436-38 (stating that aggregate theory of partnership inherent in UPA destabilizes partnerships).

288. See REVISED UNIF. PARTNERSHIP ACT § 201 (Proposed Official Draft 1992) (defining partnership as entity); REVISED UNIF. PARTNERSHIP ACT § 201 cmt. (Proposed Official Draft 1991) (stating that RUPA makes net move towards entity theory of partnership); Weidner, *supra* note 9, at 431-32 (discussing how breakup rules reflect entity theory of partnership).

Dean Weidner stated that the policy goals of the Drafting Committee were as follows: (1) to move further towards an entity theory of partnership; (2) to increase the stability of partnerships by revising the breakup provisions; and (3) to increase the importance of the partnership agreement by lowering the number of mandatory rules in the RUPA. *Id.* at 428.

Because these policy decisions should drive and direct the various revisions to the UPA, these policy goals should also undergo critical analysis. Dean Weidner stated that "the consensus seems to be that a revised UPA should more directly adopt an entity model," *id.* at 429, and that there is "virtual unanimity that RUPA should make a major move away from the aggregate theory and closer to the entity theory." Weidner, *supra* note 11, at 858. Yet, Dean Weidner only cites *one* scholar as support for both of these statements, Weidner, *supra* note 9, at 429 n.8, and *one* other commentator who is actually critical of conceptual emphasis in structuring model reform. Weidner, *supra* note 11, at 858 n.56. See generally Rosin, *supra* note 24 (advancing argument against strict conceptual approach to statutory reform). Furthermore, the Committee on Uniform State Laws of the Association of the Bar of the City of New York published a recent article concluding that the RUPA should not define a partnership as an entity. Committee on Uniform State Laws, *Entity Theory of Partnership*, *supra* note 42, at 571. The Committee on Uniform State Laws favors a more flexible approach, using judicial consideration of the interests of various parties involved, in determining whether an entity or aggregate approach should be adopted in particular partnership problems. *Id.* at 570. At best, the "virtually unanimous" consensus may not be so unanimous.

289. See *supra* note 148 and accompanying text (discussing how RUPA encourages buyouts of withdrawing partner's interest in business).

approach to creating a model partnership statute.²⁹⁰ Attorney X rationalized that such a flexible approach to partnership problems might have alleviated the strict conceptual problem in which Susan finds herself.

Still confused, Susan asked why would the writers make a statute that seems to penalize small partnerships, which are the businesses most likely not to have the resources or inclination to create an agreement reflecting the reality of their viewpoint: that the partnership *is* made up of unique individuals and *should* break up if a partner leaves.²⁹¹ Attorney X shrugged her shoulders and Susan's headache began.

V. SUGGESTIONS

Some relatively minor revisions to the RUPA may reduce confusion and prevent some potential problems for partners in closely held partnerships.

I. Delete all references to partnership "dissolution."²⁹² The Drafting Committee reinserted dissolution without any simultaneous amendment to either the structure of the RUPA or the substantive decisions underlying an earlier version of the RUPA that did not contain the term "dissolution."²⁹³ In light of this information and because dissolution as a legal term has caused much past confusion, revising the RUPA without "dissolution" makes enormous sense. The Drafting Committee could accomplish this amendment by deleting the references to dissolution in article eight and by indicating that only those events of "dissociation" listed in section 801 lead to a definite winding up and termination.

II. Add an additional subsection to section 802 of the RUPA that would limit the type of activity a partnership may conduct during the ninety day negotiation period envisioned by the Drafting Committee. For example,

290. See *supra* notes 45-48 and accompanying text (discussing functional approaches suggested by several commentators to various partnership problems).

291. See REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 116 (Proposed Official Draft 1991) (stating that partners, especially those in small businesses, probably think partnership will break up upon departure of any partner); Weidner, *supra* note 9, at 433 (stating that aggregate theory is more suitable for small businesses and that small businesses design agreements reflecting aggregate concept of partnership).

Notably, the ABA Ad Hoc Committee reviewing the RUPA strongly believes that a partner in an at-will partnership should not have the right to liquidate the partnership. In this way, no ninety day delay would be necessary at all and the withdrawing partner would only have a buyout right under the RUPA. REVISED UNIF. PARTNERSHIP ACT § 801 commentary at 116 (Proposed Official Draft 1991). However, one may appropriately inquire as to how the members of the ABA Ad Hoc Committee view partnerships—in other words, through the eyes of small or large partnerships.

292. See *supra* notes 255-60 and accompanying text (discussing background of "dissolution" amendments).

293. See Weidner, *supra* note 9, at 448 (stating that Drafting Committee made no simultaneous amendment to either structure or underlying decisions of structure after the Drafting Committee reinserted "dissolution"). Unfortunately, Dean Weidner did not explain exactly which "substantive" decisions were "hung" on the structure of the RUPA version that did not contain dissolution. *Id.*

restrain the remaining partners from “substantially” depleting the partnership assets or potentially risking the entire capital base of the partnership. The RUPA could list general criteria by which a court could restrict the remaining partners. Such a flexible approach might better protect withdrawing partners in closely held, at-will partnerships. To further protect withdrawing partners, the RUPA could expressly grant court authority to issue an injunction against such partnership activity during the delay period.

VI. CONCLUSION

The RUPA completely revises the basis of almost eight decades of partnership law in the United States. Because the RUPA breakup provisions use old terminology in an entirely new fashion and add new terms to the primary lexicon of partnership law, the RUPA breakup provisions will almost assuredly cause greater confusion in the partnership business community and the legal profession. Furthermore, the RUPA’s shift to the entity theory of partnership, reflected in the breakup provisions, will have potentially unforeseen, adverse effects on small partnerships. In order to avoid these problems, the Drafting Committee might reconsider those provisions that potentially condemn the RUPA to become the Revised Revised Uniform Partnership Act.

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