Cal. Prac. Guide Pass--Through Entities Ch. 5-A

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

A. General Considerations

- 1. [5:2] Governing Law
  - a. [5:3] Exception—partnerships formed before 2008
    - (1) [5:4] Duration
    - (2) [5:5] Dissociation of limited partner
    - (3) Expulsion of general partner
      - (a) [5:7] By all other partners
      - (b) [5:8] By court order
    - (4) [5:9] Dissolution of partnership upon general partner's dissociation
  - b. [5:10] Exception for "right accrued" before 2010
  - c. [5:11] Effect of election to be governed by current law
  - d. [5:12] Compare—law governing foreign partnerships operating in California
  - e. [5:13] Prior law governing limited partnerships
    - (1) [5:14] Derivation of LP Act—sponsors and draftpersons
      - (a) Reasons for enactment of LP Act
        - 1) [5:15] Inappropriate linkage between general partnership law and limited partnership law
        - 2) [5:17] Entrenchment of management
      - (b) [5:19] Caution re Committee "Comments"
- 2. [5:30] Separate Legal Entity
- 3. [5:31] Powers
- 4. [5:32] Perpetual Duration
- 5. [5:33] Partner As Both General and Limited Partner
  - a. [5:33.1] *Caution*—potential loss of limited partner status
- 6. [5:34] Corporation, LLC or Other Entity as General Partner
- 7. [5:35] Tax Treatment
  - a. [5:36] Limitation—$800 minimum franchise tax
    - (1) [5:36.1] First-year exemption
- 8. [5:37] Securities Law Considerations—Limited Partnership Interests Usually "Securities"
- 9. [5:38] Compare—Publicly Traded Partnerships (PTPs) and Master Limited Partnerships (MLPs)
  - a. [5:39] Federal tax requirements

[5:1] A limited partnership is comprised of at least two persons: one or more "general" partners who manage the business and are personally liable for partnership debts; and one or more "limited" partners who contribute capital and share in the profits, but who normally take no part in running the business and incur *no liability* with respect to partnership obligations beyond their capital contributions. [See Corps.C. §§ 15901.02(q), 15903.02, 15903.03, 15904.02, 15904.04, 15904.06; also see *Jay v. Mahaffey* (2013) 218 CA4th 1522, 1541, 161 CR3d 700, 714-715; *Sacramento Suncreek Apts., LLC v. Cambridge Advantaged Properties II, L.P.* (2010) 187 CA4th 1, 12-13, 113 CR3d 661, 669]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

The purpose of this form of business entity is to encourage *passive investors* to invest in the enterprise, allowing them to reap a share of the profits if it succeeds, but without risking more than their capital contributions. [*Evans v. Galardi* (1976) 16 C3d 300, 306, 128 CR 25, 30]

1. [5:2] **Governing Law:** The Uniform Limited Partnership Act of 2008 (LP Act, Corps.C. §§ 15900-15912.07) governs *all* California limited partnerships, with certain exceptions. [Corps.C. § 15912.06]

a. [5:3] **Exception—partnerships formed before 2008:** The following provisions do *not* apply to a partnership formed before 2008 *unless the partners elect otherwise by amending the partnership agreement* in the manner provided in the agreement or by law. [Corps.C. § 15912.06(c)]

(1) [5:4] **Duration:** Partnerships formed after 2007 have *perpetual* duration unless the partnership agreement provides otherwise (Corps.C. § 15901.04(c), *see* ¶ *5:32*). But a partnership formed before 2008 has whatever duration it had under the law applicable immediately before 2008. [Corps.C. § 15912.06(c)(1)]

(2) [5:5] **Dissociation of limited partner:** The present statutory provisions governing dissociation of limited partners (Corps.C. §§ 15906.01 & 15906.02, *see* ¶ *5:532 ff.*) do not apply. Rather, limited partners have the same dissociation rights and powers, with the same consequences, as existed immediately before 2008. [Corps.C. § 15912.06(c)(2)]

[5:6] ***Reserved.***

(3) Expulsion of general partner

(a) [5:7] **By all other partners:** The present statutory provision permitting expulsion of a general partner by the unanimous consent of the other partners upon the occurrence of certain specified events (Corps.C. § 15906.03(d), *see* ¶ *5:575*) does not apply. [Corps.C. § 15912.06(c)(3)]

(b) [5:8] **By court order:** The present statutory provision allowing expulsion of a general partner by court order upon the occurrence of certain specified events (Corps.C. § 15906.03(e), *see* ¶ *5:576*) does not apply. Rather, the court has the same power to expel a general partner as the court had immediately before 2008. [Corps.C. § 15912.06(c)(4)]

(4) [5:9] **Dissolution of partnership upon general partner's dissociation:** The present statutory provision requiring dissolution of the partnership upon a general partner's dissociation in certain designated circumstances (Corps.C. § 15908.01(c), *see* ¶ *5:638*) does not apply. Rather, the connection between a general partner's dissociation and the dissolution of the partnership is the same as existed immediately before 2008. [Corps.C. § 15912.06(c)(5)]

b. [5:10] **Exception for "right accrued" before 2010:** The current law does not affect an action commenced, proceeding brought, or "right accrued" before 2010 with respect to limited partnerships formed before 2008. [Corps.C. § 15912.07]

c. [5:11] **Effect of election to be governed by current law:** Where a limited partnership formed before 2008 elects to be subject to all provisions of current law, the provisions of current law governing the liability of the general partners to third parties (*see* ¶ *5:280*) apply to all third parties. However, with respect to any obligation incurred *in the year before the election took place*, those provisions apply only if the third party *knew or received notification of the election*. (Otherwise, the inapplicability continues as to that obligation.) [Corps.C. § 15912.06(d)]

d. [5:12] **Compare—law governing foreign partnerships operating in California:** *See* ¶ *5:1022*.

e. [5:13] **Prior law governing limited partnerships:** Limited partnerships formed between 1984 and 2008 were governed by the California Revised Limited Partnership Act (CRLPA; repealed Corps.C. §§ 15611-15724), and limited partnerships formed before 1984 were governed largely by the Uniform Limited Partnership Act (ULPA; repealed Corps.C. §§ 15501-15602).

(1) [5:14] **Derivation of LP Act—sponsors and draftspersons:** The LP Act was drafted and sponsored by the Drafting Committee of the Partnerships and Limited Liability Companies Committee (the "California Drafting Committee") of the State Bar's Business Law Section (which split off from the State Bar in 2018 and became part of the California Lawyers Association). The LP Act represents, in large part, a wholesale replacement of California's predecessor law governing limited partnerships (CRLPA, ¶ 5:13). Most of the LP Act is a direct copy of the 2001 *model* Uniform Limited Partnership Act (Model ULPA), which had been prepared by the National Conference of Commissioners on Uniform State Laws (NCCUSL). However, some provisions of CRLPA were retained in the LP Act—primarily, the provisions governing

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

conversion and merger of limited partnerships (see Corps.C. §§ 15911.01-15911.19), dissenters' rights (see Corps.C. §§ 15911.20-15911.33), and furnishing of a bond in limited partner derivative actions (see Corps.C. § 15910.06).

(a) Reasons for enactment of LP Act

1) [5:15] **Inappropriate linkage between general partnership law and limited partnership law:** NCCUSL's primary justification for the Model ULPA was to "de-link" the limited partnership statute from the model Uniform Partnership Act, the law governing *general* partnerships. The NCCUSL Drafting Committee explained that the historical linkage between the LP and GP Acts "has not been completely satisfactory, because the consequences of linkage are not always clear." Moreover, the rules governing general partnerships "can be inappropriate for the fundamentally different relations involved in a limited partnership." [Model ULPA, Preparatory Note; see generally, *Closely-Held 2004 Business Symposium: Uniform Limited Partnership Act*(2004) 37 Suffolk L.Rev. 581; Kleinberger, *A User's Guide to the New Uniform Limited Partnership Act* (2004) 37 Suffolk L.Rev. 583 (2004); Miller, *Linkage and Delinkage: A Funny Thing Happened to Limited Partnerships When the Revised Uniform Limited Partnership Act Came Along* (2004) 37 Suffolk L.Rev. 891]

In presenting the draft LP Act to the Legislature, the Partnerships & LLC Committee likewise explained that the primary justification for replacing California's then-existing limited partnership law was to "delink" the LP Act from California's version of RUPA—i.e., the Uniform Partnership Act of 1994 (Corps.C. § 16100 et seq.). [See letter of 3/31/2005 from State Bar Business Law Section to Chair, Assembly Committee on Banking and Finance, in support of AB 339]

[5:16] ***Reserved.***

2) [5:17] **Entrenchment of management:** The other major objective of NCCUSL in preparing the Model ULPA was to fill a niche in the menu of entities available to entrepreneurs. In a world in which two relatively new forms of entity—LLCs and LLPs—can meet the needs formerly met by limited partnerships, the Model ULPA was designed primarily to accommodate "sophisticated, manager-*entrenched* commercial deals whose participants commit for the long term," a type of enterprise largely *beyond* the scope of LLPs and LLCs. The Model ULPA's "default" provisions were designed to reflect what the NCCUSL Drafting Committee assumed was a desire by business people for:

— "strong centralized management, *strongly entrenched*, and

— "passive investors with little control over or right to exit the entity." [Model ULPA, Preparatory Note (emphasis added)]

The California Drafting Committee adopted this viewpoint, as is apparent from its reliance on the NCCUSL Drafting Committee Comments in drafting the LP Act. [See Corps.C. § 15900, "California Code Comment"; and, e.g., Corps.C. § 15904.06, "Uniform Limited Partnership Act Comment"]

[5:18] ***Reserved.***

(b) [5:19] **Caution re Committee "Comments":** The California Drafting Committee prepared Comments on many LP Act sections. These Comments appear in various published versions of the LP Act. Most of the Comments are verbatim copies of the Comments of the NCCUSL Drafting Committee that prepared the Model ULPA (denoted as "Uniform Limited Partnership Act Comments"), although the California Drafting Committee's Comments do not make clear what substantive editorial changes it made to the NCCUSL Drafting Committee's Comments. (The separate Comments prepared by the California Drafting Committee are denoted as "California Code Comments.")

Moreover, the NCCUSL Drafting Committee's Comments cite to the *Model ULPA's sources*, which are frequently the Uniform *Partnership* Act (1994) prepared by NCCUSL. (NCCUSL refers to this 1994 Act as "RUPA"). The Comments are even further removed from the California legislative history of the LP Act because the NCCUSL Drafting Committee, in preparing the 2001 Uniform LP Act, did not operate in the context of a project to replace CRLPA, California's predecessor statute.

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Most importantly, the California Drafting Committee's Comments and the NCCUSL Drafting Committee's Comments represent the views of the respective Drafting Committees; they are not part of the official legislative history of the LP Act and do not necessarily represent the views of the Legislature or its committees. Although the Comments of the two Drafting Committees may be helpful in illuminating the intent of the respective Drafting Committees in preparing the Model ULPA and the LP Act, they should not be relied upon as authoritative expressions of the Legislature's intent in enacting the LP Act.

[5:20 - 5:29] ***Reserved.***

2. [5:30] **Separate Legal Entity:** A limited partnership is an entity distinct from its partners, who have *no direct ownership interest* in the partnership's assets. [Corps.C. § 15901.04; see *Evans v. Galardi* (1976) 16 C3d 300, 319, 128 CR 25, 31; *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 424, 8 CR3d 31, 40; *PacLink Communications Int'l, Inc. v. Sup.Ct. (Yeung)* (2001) 90 CA4th 958, 963, 109 CR2d 436, 439]

3. [5:31] **Powers:** A limited partnership has the power to do all things necessary "or convenient" to carry on its activities, including the power to sue and be sued in its own name and to maintain an action against a partner for harm to the limited partnership caused by a breach of the partnership agreement or violation of a duty to the partnership (i.e., the partnership itself has standing to enforce the partnership agreement). [Corps.C. § 15901.05]

(*Caution:* The limited partnership agreement may not vary the partnership's power to sue and be sued in its own name; *see ¶ 5:52*.)

4. [5:32] **Perpetual Duration:** A limited partnership has perpetual duration. [Corps.C. § 15901.04(c)]

However, the partnership agreement may alter this by providing for, e.g., a finite existence or termination upon a specified event (*see ¶ 5:51*).

5. [5:33] **Partner As Both General and Limited Partner:** A person may simultaneously be both a general partner and a limited partner. Such a person has the rights and obligations provided by law and the partnership agreement in each of those capacities. [Corps.C. § 15901.13; see *Swart Enterprises, Inc. v. Franchise Tax Bd.* (2017) 7 CA5th 497, 513, 212 CR3d 670, 681, fn. 6—limited partner who becomes general partner does not lose limited partner status with respect to limited partnership interest (dictum)]

But the same person cannot act as both the sole general partner and the sole limited partner because a limited partnership must consist of at least two persons. [See Corps.C. § 15901.02(q); *and ¶ 5:1*]

a. [5:33.1] ***Caution—potential loss of limited partner status:*** Acting as both a general and limited partner in a small partnership could undermine the person's status as a limited partner; *see* ¶ 5:320 ff.

6. [5:34] **Corporation, LLC or Other Entity as General Partner:** As stated, a limited partnership must have one or more general partners who manage the business and are *personally liable* for partnership debts (*see ¶ 5:1*). However, it is not necessary that an individual serve as general partner. Rather, a corporation or LLC (or other entity) may be the general partner. Ordinarily, the corporate shareholders or LLC members will *not* be personally liable for the partnership's debts. And the shareholders, officers and/or directors of the corporate general partner, or the members and/or managers of the LLC general partner, may also serve as limited partners without losing their limited liability. [Corps.C. §§ 15901.02(m), (y), 15903.03(b)(1)]

7. [5:35] **Tax Treatment:** A limited partnership, like a general partnership, is *not* a tax-paying entity. Rather, it is merely a *conduit* for tax purposes, filing an informational return (IRS Form 1065; FTB Form 565) that shows the partnership's income and expenses and each partner's *distributive share* of those items. [IRC §§ 702-704; Rev. & Tax.C. § 18633]

a. [5:36] **Limitation—$800 minimum franchise tax:** The limited partnership is subject to the same $800 minimum annual franchise tax that applies to corporations, limited liability companies, and limited liability partnerships. [Rev. & Tax.C. §§ 17935(a), 23153(d)(1); see Corps.C. § 15902.01(g)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(1) [5:36.1] **First-year exemption:** Limited partnerships that file a certificate of limited partnership and foreign limited partnerships that register with the Secretary of State on or after January 1, 2021, and before January 1, 2024, are exempt from the minimum franchise tax for their *first* taxable year. [Rev. & Tax.C. § 17935(f)(1)]

Cross-refer: See Ch. 8 for a detailed discussion of limited partnership taxation.

8. [5:37] **Securities Law Considerations—Limited Partnership Interests Usually "Securities":** Limited partnership interests are usually held to be "securities" under both federal and California law since, by nature, limited partners are supposed to be passive investors; i.e., their expectation of profits is based *primarily* on the efforts of others (the general partners). *See discussion at* ¶ 7:70 ff.

9. [5:38] **Compare—Publicly Traded Partnerships (PTPs) and Master Limited Partnerships (MLPs):** A publicly traded partnership is a limited partnership whose interests are traded on a national or regional securities exchange (or other established securities market) or readily tradable on a secondary market by means of brokers, dealers or similar "market makers." [IRC § 7704(b); Treas.Reg. § 1.7704-1(a)(1),(b),(c); *see further discussion at ¶ 8:15 ff.*]

Although the terms "publicly traded partnership" and "master limited partnership" are often used interchangeably, MLPs originally arose when limited partnerships that owned individual real estate or energy properties were rolled-up into larger limited partnerships to take advantage of economies of scale and to provide a public market for the limited partners' interests (*see* ¶ *7:134 ff., 7:1529 ff.*).

a. [5:39] **Federal tax requirements:** A PTP is taxed as a *corporation unless* 90% or more of its gross income is derived from qualifying passive income sources—i.e., interest, dividends, income from real property rentals and sales, and income and gains from the exploration, development, mining, production, processing, refining, transportation or marketing of minerals or natural resources. (An exception exists for certain pre-1988 partnerships.) A PTP that satisfies the qualifying passive income test allocates its net income to its limited partners, and as with any pass-through entity, the income is taxable to the limited partners whether it is distributed or not (though it typically is distributed to the limited partners). [IRC § 7704(a),(c),(d),(g); Treas.Reg. §§ 1.7704-2, 1.7704-3, 1.7704-4]

[5:40 - 5:49] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-B

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

B. Formation

1. [5:50] Limited Partnership Agreement
    - a. [5:51] Restrictions on agreement's power to alter law
        - (1) [5:52] Suits by or against partnership
        - (2) [5:53] Relations among partners and partnership (“internal affairs doctrine”)
        - (3) [5:54] Documents filed with Secretary of State
        - (4) [5:55] Partners' access to partnership records
            - (a) [5:56] “Reasonableness” of restrictions
        - (5) [5:57] General partner's duty of loyalty
            - (a) [5:58] Ratification process
        - (6) [5:59] General partners' due care duty
        - (7) [5:60] Good faith and fair dealing
        - (8) [5:61] General partner's dissociation
            - (a) [5:62] Compare—limited partner's dissociation
        - (9) [5:63] Judicial dissolution
            - (a) [5:63.1] No narrowing of grounds for dissolution
            - (b) [5:64] Arbitration permissible
        - (10) [5:65] Winding up following dissolution
        - (11) [5:66] Direct and derivative actions
        - (12) [5:67] Approval of conversion or merger
        - (13) [5:68] Dissenters' rights
        - (14) [5:69] Third party rights
    - b. [5:80] Oral agreement permissible
        - (1) [5:81] Compare—certificate of limited partnership
    - c. [5:83] Name of limited partnership
        - (1) [5:84] Partner's name optional
        - (2) [5:86] LP or similar designation required
        - (3) [5:87] No use of “bank,” “insurance,” “trust,” “corp.,” etc.
        - (4) [5:88] “Olympic” names restricted
        - (5) [5:89] Selecting partnership name
        - (6) [5:90] General naming standard
            - (a) [5:90.1] Comment
            - (b) [5:91] Name “likely to mislead the public” barred
            - (c) [5:92] Name must be “distinguishable” in Secretary of State's records
                - 1) [5:93] Names *not* distinguishable
                - 2) [5:93.1] Examples of names *not* distinguishable
        - (7) [5:95] No consent exception

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(8) [5:96] Compare—conflict with corporate, LLC or fictitious business name
(9) [5:97] Cross-checking with other states
(10) [5:100] Procedure for checking name availability
(a) [5:101] Priority Telephone Service
(b) [5:103] Compare—web check of similar names
(c) [5:104] Cross-checking with other states
(11) [5:105] Reservation of name
(a) [5:106] Certificate of name reservation
(b) [5:108] Renewal of name reservation
(c) [5:110] Transfer of name reservation
(12) [5:111] Compliance with fictitious business name statute
d. Recommended optional provisions
(1) [5:113] Limitation on interests held by ERISA "benefit plan investors"
(a) [5:113.1] "Benefit plan investors"
(b) [5:113.2] "Operating company" exception
(c) [5:113.3] "Venture capital operating company" exception
(d) [5:113.4] Exception for publicly held partnership
(2) [5:114] Post-dissolution surplus distributed in proportion to capital accounts
e. [5:120] Amendment of partnership agreement
(1) [5:121] Caution re provision barring oral amendments
2. [5:130] Certificate of Limited Partnership
a. [5:131] Implied limited partnership where no agreement entered into
b. [5:132] Contents
c. [5:133] Execution by general partners
d. [5:134] Filing fee
e. [5:135] Effect of inconsistency with partnership agreement
f. [5:136] When effective
(1) [5:137] Cancellation if check bounces
(a) [5:138] Effect on partners and transferees
(2) [5:139] Retroactive effect upon resubmission following rejection by Secretary of State
g. [5:140] Recordation optional
h. [5:141] Failure to file certificate—general partnership created
i. [5:142] Amendment of certificate
(1) [5:143] Events *requiring* amendment
(a) [5:144] False statements in certificate
(2) [5:145] Procedure
(a) Execution
1) [5:147] Amendment designating new general partner as successor to last general partner
2) [5:148] Amendment required by appointment of person to wind up partnership
3) [5:149] Other amendment
4) [5:150] Execution pursuant to power of attorney
5) [5:151] Contrary provisions in partnership agreement invalid
(b) [5:152] Filing fee
(3) [5:153] Restated certificate
(a) [5:154] Execution
(b) [5:155] Filing fee
(4) [5:156] When effective
j. [5:157] Certificate of correction
(1) [5:158] Contents

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(2) [5:159] Effective date
(3) [5:160] Filing fee
k. Special concerns re agent for service of process
(1) [5:162] Natural person or corporate agent
(2) [5:163] Address of natural person
(3) [5:164] Changing agent for service of process
(a) [5:165] Agent's resignation or disclaimer of appointment
3. [5:170] Formation by Conversion From Other Entity
a. General provisions governing conversion
(1) [5:172] Plan of conversion
(2) [5:173] Approval of conversion
(3) [5:174] Effective date of conversion
(a) [5:175] Filing fee
(4) [5:176] Conversion from foreign entity—certificate of cancellation not required
b. Provisions specific to converting entity
(1) [5:178] Conversion from general partnership
(2) [5:179] Conversion from LLC
(3) [5:180] Conversion from corporation
4. [5:181] Designation of "Partnership Representative"

1. [5:50] **Limited Partnership Agreement:** The partners have full power to structure and regulate the relations of the partners: Except as provided below (¶ 5:51 ff.), the relations among the partners, and between the partners and the partnership, are determined by the partnership agreement. [Corps.C. § 15901.10(a)]

• ***FORM:*** Limited Partnership Agreement, *see Form 5:A*.

a. [5:51] **Restrictions on agreement's power to alter law:** The statutory restrictions on the partners' ability to alter law are extremely important, because *anything that is not set forth in the enumerated restrictions may be altered by the partnership agreement*.

(1) [5:52] **Suits by or against partnership:** The partnership agreement may not vary the partnership's power to sue, be sued and defend in its own name (Corps.C. § 15901.05). [Corps.C. § 15901.10(b)(1)]

(2) [5:53] **Relations among partners and partnership ("internal affairs doctrine"):** The partners may not vary the California law applicable to a limited partnership with respect to relations among the partners, between the partners and the partnership, and the partners' liability as partners for a partnership obligation (Corps.C. § 15901.06). [Corps.C. § 15901.10(b)(2)]

(3) [5:54] **Documents filed with Secretary of State:** Nor may the agreement vary the law applicable to execution of documents filed with the Secretary of State (Corps.C. § 15902.04). [Corps.C. § 15901.10(b)(3)]

(4) [5:55] **Partners' access to partnership records:** The agreement may not vary the information about the partnership and its business that the partnership is required to maintain at its principal office (Corps.C. § 15901.11), nor may it "unreasonably restrict" the partners' right to access partnership records (Corps.C. §§ 15903.04 & 15904.07). However, the partnership agreement may impose "reasonable restrictions" on the availability and use of information obtained from examining partnership records, including liquidated damages for a breach of any reasonable restriction on use. [Corps.C. § 15901.10(b)(4)]

(a) [5:56] **"Reasonableness" of restrictions:** The NCCUSL Drafting Committee (*see ¶ 5:14*) notes that general and limited partners have sharply different roles. A restriction that is reasonable as to a limited partner may not be reasonable as to a general partner. In determining whether a restriction is reasonable, the NCCUSL Drafting Committee suggests that a court might consider:

• The danger or other problem the restriction seeks to avoid (for example, restrictions on the disclosure and use of competitively sensitive information, or information subject to privacy protections such as the limited partners' tax identification numbers);

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• The purpose for which the information is sought; and

• Whether, in light of both the problem and the purpose, the restriction is reasonably tailored. [Corps.C. § 15901.10, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(5) [5:57] **General partner's duty of loyalty:** The partnership agreement may not eliminate a general partner's duty of loyalty (Corps.C. § 15904.08). But the agreement may:

• Identify specific types or categories of activities that do not violate the duty of loyalty, "if not manifestly unreasonable"; and/or

• Specify the number or percentage of partners who may authorize or ratify, after full disclosure to *all* partners (including any partners excluded from any authorization or ratification process) of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty. [Corps.C. § 15901.10(b)(5)]

(a) [5:58] **Ratification process:** The NCCUSL Drafting Committee (*see ¶ 5:14*) observes that the partnership agreement need not require that authorization or ratification of a general partner's act must be by *disinterested* partners (although the partners may elect to include such a provision in the partnership agreement). The NCCUSL Drafting Committee notes, however, that an interested partner, whether general or limited, who participates in authorization or ratification remains subject to the obligation of *good faith and fair dealing* (Corps.C. §§ 15903.05(b) & 15904.08(d)). [Corps.C. § 15901.10, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(6) [5:59] **General partners' due care duty:** The partnership agreement may not "unreasonably reduce" a general partner's duty of care (Corps.C. § 15904.08(c)). [Corps.C. § 15901.10(b)(6)]

(7) [5:60] **Good faith and fair dealing:** The agreement may not eliminate a general or limited partner's obligation of good faith and fair dealing (Corps.C. §§ 15903.05(b), 15904.08(d). However, the agreement may prescribe the standards by the which the performance of the obligation is to be measured, if "not manifestly unreasonable." [Corps.C. § 15901.10(b)(7)]

(8) [5:61] **General partner's dissociation:** The agreement may not vary the power of a person to dissociate as a general partner (Corps.C. § 15906.04(a)). But it may require that the notice of dissociation (Corps.C. § 15906.03(a)) be "in a record"—i.e., be written or inscribed electronically or in another retrievable medium. [Corps.C. § 15901.10(b)(8); see Corps.C. § 15901.02(ac)]

(a) [5:62] **Compare—limited partner's dissociation:** The partnership agreement may vary—or even eliminate altogether—a limited partner's power to dissociate. [See Corps.C. § 15901.10]

(9) [5:63] **Judicial dissolution:** The partnership agreement may not eliminate a court's power to decree a dissolution of the limited partnership where it is not reasonably practicable to carry on the activities of the limited partnership in conformity with the partnership agreement. (Corps.C. § 15908.02(a)). [Corps.C. § 15901.10(b)(9)]

(a) [5:63.1] **No narrowing of grounds for dissolution:** A provision in the agreement that would narrow the substantive grounds for judicial dissolution by eliminating the ground stated above (¶ 5:63) would not be enforceable. An example would be a provision stating that a partner may seek judicial dissolution *only* upon a showing that the general partner is in material breach of the partnership agreement.

(b) [5:64] **Arbitration permissible:** The NCCUSL Drafting Committee (*see ¶ 5:14*) notes that a partnership agreement may provide for arbitration of disputes, including those relating to dissolution. If an arbitration clause explicitly includes the partners' agreement to submit to arbitration even those matters otherwise subject to resolution by a court of competent jurisdiction under Corps.C. § 15908.02, then the provision should be given effect by reason of federal court decisions finding that the Federal Arbitration Act preempts state statutes that seek to invalidate agreements to arbitrate. [See *AT&T Mobility LLC v. Concepcion* (2011) 563 US 333, 339-342, 131 S.Ct. 1740, 1746-1747; *Marmet Health Care Ctr., Inc. v. Brown* (2012) 565 US 530, 532-533, 132 S.Ct. 1201, 1203 (per curiam); *Allied-Bruce Terminix Companies, Inc. v. Dobson* (1995) 513 US 265, 281, 115 S.Ct. 834, 843; and Corps.C. § 15901.10, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(10) [5:65] **Winding up following dissolution:** The partnership agreement may not vary the requirement to wind up the partnership business following dissolution (Corps.C. § 15908.03). [Corps.C. § 15901.10(b)(10)]

(11) [5:66] **Direct and derivative actions:** Nor may the partnership agreement "unreasonably restrict" a partner's right to bring (a) a direct action against the partnership or another partner to enforce the partner's rights or (b) a derivative action to enforce a right of the partnership (Corps.C. § 15910.01 et seq.). [Corps.C. § 15901.10(b)(11)]

(12) [5:67] **Approval of conversion or merger:** The agreement may not restrict a partner's right to approve a conversion or merger (Corps.C. §§ 15911.03(b), 15911.12(a)). [Corps.C. § 15901.10(b)(12)]

(13) [5:68] **Dissenters' rights:** The agreement may not vary the statutory provisions relating to dissenters' rights (Corps.C. § 15911.20 et seq.) (except to the extent such provisions expressly permit). [Corps.C. § 15901.10(b)(13)]

(14) [5:69] **Third party rights:** Lastly, the agreement may not restrict the rights under the LP Act of a person who is not a partner or transferee. (Of course, any such purported restriction would be unenforceable as a matter of *contract* law, because an agreement can restrict only the rights of parties and persons who derive their rights from the agreement.) [Corps.C. § 15901.10(b)(14)]

[5:70 - 5:79] ***Reserved.***

b. [5:80] **Oral agreement permissible:** The partners are not required to execute a written agreement—i.e., their oral agreement suffices. Indeed, a limited partnership agreement may even be implied, "in a record" (inscribed electronically or in another retrievable medium), or in any combination of these. [Corps.C. § 15901.02(x); see Corps.C. § 15901.02(ac)]

(1) [5:81] **Compare—certificate of limited partnership:** Although the partnership agreement may be oral, the partnership must still file a certificate of limited partnership with the Secretary of State in order to be treated as a limited partnership. *See ¶ 5:130 ff.*

➪ [5:82] ***PRACTICE POINTER:*** Although a limited partnership agreement may be oral, the absence of a written agreement would work against a person's claim of being a *limited* partner, especially where the person took any role in management. Common sense dictates that the partners memorialize their agreement in writing. Oral agreements are an invitation for disputes over the existence and meaning of the terms of the agreement.

c. [5:83] **Name of limited partnership:** Generally, the partnership is free to choose any name for the partnership. However, the limited partnership law imposes several statutory restrictions.

(1) [5:84] **Partner's name optional:** The name *may* (but need not) contain the name of a general or limited partner of the partnership. [Corps.C. § 15901.08(a)]

➪ [5:85] ***PRACTICE POINTER:*** It would not be prudent to use a limited partner's name in the partnership's name. Doing so could be construed as an indication that the limited partner plays a role in partnership *management*, which could undermine the protections against limited partner liability for partnership obligations. *See ¶ 5:320*.

(2) [5:86] **LP or similar designation required:** The name *shall* contain the phrase "limited partnership" or the abbreviation "L.P." or "LP" at the *end* of its name. [Corps.C. § 15901.08(b)]

(3) [5:87] **No use of "bank," "insurance," "trust," "corp.," etc.:** The name *shall not* contain the words "bank," "trust," "trustee," "incorporated," "inc.," "corporation" or "corp." In addition, the name *shall not* contain the words "insurer," "insurance company," or any other words suggesting the limited partnership is in the business of issuing insurance policies and assuming insurance risks. [Corps.C. § 15901.08(g)]

(4) [5:88] **"Olympic" names restricted:** The name must not include "Olympic," "Olympiad," "Citius Altius Fortius," "Paralympic," "Paralympiad," "Pan-American," "Parapan American," "America Espirito Sport Fraternite" or a combination of these words (unless those words were used in the business name before September 21, 1950, or in the case of the word "Olympic," the word is not combined with any of the other foregoing names). [36 USC § 220506(a)(4),(d)(2), (3)]

(5) [5:89] **Selecting partnership name:** Care and advance planning should be used to select a limited partnership name before preparing limited partnership documents. In a large state such as California, even unusual names may already be in use not just by other limited partnerships, but by corporations, LLCs and other business entities.

(6) [5:90] **General naming standard:** The name of a limited partnership shall not be a name that the Secretary of State determines is "likely to mislead the public" (¶ 5:91), and shall be "distinguishable in the records of the Secretary of State" (¶ 5:92 ff.) from the name of any limited partnership that has previously filed a certificate of limited partnership, has registered as a foreign limited partnership, or has been reserved with the Secretary of State. [Corps.C. § 15901.08(d); 2 CCR § 21001.3]

(a) [5:90.1] **Comment:** The 2020 amendments to the Corporations Code streamlined the naming requirements for California entities so that they are the same for domestic and foreign corporations, limited partnerships and limited liability companies. [Corps.C. § 201 (corporations); Corps.C. § 15901.08 (limited partnerships); Corps.C. § 17701.08 (limited liability companies)]

(b) [5:91] **Name "likely to mislead the public" barred:** Under the Secretary of State's regulations adopted in response to the 2020 Corporations Code amendments, a proposed name is likely to mislead the public when:

• It implies a government affiliation;

• It creates a false implication that the entity is a professional corporation;

• It creates a false implication that it is a business entity formed pursuant to a law different than that under which it is actually formed; or

• It creates a false implication that the business entity's purpose is to be an insurer. [2 CCR § 21003(a)-(d)]

(c) [5:92] **Name must be "distinguishable" in Secretary of State's records:** A limited partnership's name is "distinguishable in the records of the Secretary of State" from an existing name when it is not the same as an existing name and, subject to enumerated exceptions (¶ 5:92), it "contains one or more different letters or numerals or has a different sequence of the same letters or numerals that is plainly recognizable by means of sight by the Secretary of State or a designee of the Secretary of State." [2 CCR § 21004(a)]

1) [5:93] **Names *not distinguishable:*** A proposed name is *not* distinguishable in the records of the Secretary of State from an existing name if the names are the same or differ only in one or more of the following ways:

• The difference between the proposed name and existing name is the existence or absence of business entity identifiers;

• The difference between the proposed name and existing name is the use of upper case letters or lower case letters or the use of superscript or subscript letters or numerals;

• The difference between the proposed name and existing name is the addition or omission of distinctive lettering or typeface, punctuation, symbols or spaces; or

• The difference between the proposed name and existing name is the use of an ampersand in place of the word "and" or vice-versa. [2 CCR § 21004(b)(1)-(4)]

2) [5:93.1] **Examples of names *not distinguishable:*** ABC Corp is not distinguishable from A-B-C Corp. or A.B.C. Corp. Good Time Rest Home, LP is not distinguishable from Goodtime Rest Home, LP. D.R.E.A.M. LP is not distinguishable from Dream LP. [2 CCR § 21004(b)(3)]

However, a proposed name might be distinguishable "when the difference between the proposed name and existing name is the addition or omission of a space or spaces so that the proposed name creates a new word or words that have different meanings," e.g. Got Ham LP is distinguishable from Gotham, LP and thus, acceptable. [2 CCR § 21004(b)(5)]

➪ [5:94] ***PRACTICE POINTER:*** That a proposed name of a limited partnership is distinguishable in the records of the Secretary of State from an existing name does not necessarily mean that the name may be lawfully adopted and used. If, for example, a person not the owner or authorized user of Blackacre Property I, L.P. proposes to form a fund with the name Blackacre Property II, L.P., it may be subject to a claim by the owners of Blackacre Property I, L.P. that the adoption and use of the proposed name infringes on the intellectual property rights of the former or would constitute unfair competition.

(7) [5:95] **No consent exception:** The naming requirements streamlining legislation eliminated the provision that permitted a limited partnership to apply to the Secretary of State for authorization to use a name that does not comply with the naming requirements of the LP Act under certain circumstances, including where the present user consents to its use. [See former

Corps.C. § 15901.08(e) (Stats. 2006, Ch. 495)] Additionally, the Secretary of State's regulations setting forth procedures for obtaining permission to use a similar name have been rescinded.

(8) [5:96] **Compare—conflict with corporate, LLC or fictitious business name:** The Secretary of State houses corporations, limited partnerships and LLCs in separate databases, and does not cross-check against the corporate or LLC databases when searching limited partnership names. Thus, a limited partnership could adopt a name that is identical (other than the “LP” designation, ¶ 5:86) to that of an existing corporation or LLC organized (or registered) in California.

A rudimentary search of similar corporate or LLC names may be made using the Business Search function on the Secretary of State's website (¶ 5:103). However, the only sure way to avoid selecting a limited partnership name that is confusingly similar to an existing corporate or LLC name is to request a separate name availability check for that name as a corporation or LLC (*see ¶ 5:100*).

Although unlikely, an available limited partnership name may be confusingly similar to a fictitious business name. Counsel may wish to consider performing a search of fictitious business names filed in the local county clerk's office. *See ¶ 3:74 ff.*

(9) [5:97] **Cross-checking with other states:** In addition to clearing name availability in California, counsel should also make sure the desired name is available in *any other state in which the limited partnership may be required to qualify to do business*. (Such qualification may be refused if the name is too similar to another already on file.)

[5:98 - 5:99] ***Reserved.***

(10) [5:100] **Procedure for checking name availability:** The availability of any limited partnership name can be checked preliminarily by writing to (or appearing in person at) the Secretary of State's Office, Name Availability Unit, 1500 11th Street, 3rd Floor, Sacramento, CA 95814. There is no charge for this service.

(a) [5:101] **Priority Telephone Service:** Persons who establish a *prepaid* account through the Secretary of State's Prepay Priority Telephone Service (minimum deposit of $100) can check the availability of limited partnership names by telephone for a fee of $4 for each name search.

Attorneys who regularly seek name availability information should consider this service. For further information or to set up an account, contact the Secretary of State's Fiscal Office at (916) 653-1233 or email the Secretary of State's Fiscal Office through the Secretary of State's website (*www.sos.ca.gov*).

➪ [5:102] ***PRACTICE POINTERS:*** Unless the limited partnership has a very distinctive name (e.g., 1259 Fairview Terrace Limited Partnership), ask the client to give you a list of several acceptable names, in order of preference. There is a limit of three names per inquiry letter when checking availability by mail, and several attempts may be required before an available name is obtained.

Also, bear in mind that this is only a *preliminary* check. A final name availability determination is made only when the certificate of limited partnership is submitted for filing, at which time the Secretary of State can still reject the name (unless it was reserved by you or your client). [See 2 CCR § 21005(b)]

(b) [5:103] **Compare—web check of similar names:** The Secretary of State's website contains a feature known as Business Search (*bizfileonline.sos.ca.gov*), which permits anyone to obtain basic information about a limited partnership (Secretary of State file number, status, address, agent for service of process). A rudimentary name availability search may be performed by inserting a limited partnership name. A searched name that is the same as the name of an active limited partnership will not be available. But even if no active limited partnership by that or a “nondistinguishable” name appears, the name might still be unavailable: Unlike a name availability search, this feature does *not* track name reservations (¶ 5:105) or certain documents in the Secretary of State's office that await filing and that contain names of new limited partnerships, such as certificates of limited partnership or qualifications of foreign limited partnerships to do business in California.

Business Search can also be used to make a rudimentary search of *corporations* and *LLCs* having names similar to the name selected for the limited partnership (*see ¶ 5:96*). But here again, this is not as reliable as a name availability search.

(c) [5:104] **Cross-checking with other states:** In addition to clearing name availability in California, counsel should also make sure the desired name is available in *any other state in which the limited partnership may be required to qualify to do business*. (Such qualification may be refused if the limited partnership name is too similar to another already on file.)

(11) [5:105] **Reservation of name:** A limited partnership, or a person intending to organize a limited partnership, may submit an application to the Secretary of State to reserve a name that does not conflict with another limited partnership's name. If the name is available, it may be reserved for 60 days, subject to renewal for another 60 days. A name reservation request may be mailed (along with a self-addressed envelope) to the Secretary of State's Office, Business Programs Division, 1500 11th Street, 3rd Floor, Sacramento, CA 95814. There is a $10 fee for each reserved name. [Corps.C. § 15901.09(a), (b)]

• ***FORM:*** The Secretary of State's standard Name Reservation Request Form is available online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:106] **Certificate of name reservation:** Upon payment of the appropriate fee, the Secretary of State will issue a *certificate* reserving the designated name(s) for a 60-day period (¶ 5:105). [Corps.C. § 15901.09(b)]

➪ [5:107] ***PRACTICE POINTER:*** When submitting the certificate of limited partnership (*see ¶ 5:130*), *include a copy of the name reservation*. Otherwise, the Secretary of State may "bounce" the certificate on the ground the name is taken … not realizing it was you who took it.

(b) [5:108] **Renewal of name reservation:** An applicant that has reserved a name may reserve the same name for an additional 60-day period. However the Secretary of State may not issue a certificate reserving the same name for two or more consecutive 60-day periods to the same applicant or for the use or benefit of the same person. [Corps.C. § 15901.09(c)]

➪ [5:109] ***PRACTICE POINTER:*** Although you cannot renew your reservation for two or more consecutive 60-day periods, if you allow one business day to elapse after the first 60-day period, you can file a *new request* to reserve the same name. As long as no one else applied during that one-day interim, you will be able to obtain a new 60-day certificate reserving the name.

(c) [5:110] **Transfer of name reservation:** A name reservation may be transferred to another person by delivery to the Secretary of State of a notice of transfer. [Corps.C. § 15901.09(d)]

(12) [5:111] **Compliance with fictitious business name statute:** A limited partnership that conducts business in a name other than its name on file with the Secretary of State must comply with the fictitious business name statute. [Bus. & Prof.C. § 17900(b)(4); *see detailed discussion at ¶ 3:75 ff.*]

[5:112] ***Reserved.***

d. Recommended optional provisions

(1) [5:113] **Limitation on interests held by ERISA "benefit plan investors":** The general partner may be considered a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA) if *25% or more* of limited partnership interests are held by ERISA "benefit plan investors" (¶ 5:113.1).

The consequences are that certain transactions between the general partner (or its affiliates) and the partnership would be prohibited, and the general partner could be required to undo the transaction, or account to the benefit plan investors for any gains or losses realized on the transaction, or pay penalties in the form of excise taxes based on the amount of the transaction. [See 29 CFR § 2510.3-101(a),(f)(1) & (2)]

To avoid this, many limited partnership agreements contain a provision barring benefit plan investors from holding 25% or more of the limited partnership interests, whether by *original issuance* or *subsequent transfer* of partnership interests. (*See Form 5:A,* Limited Partnership Agreement Art. I ("Benefit Plan Investor" defined), §§ 3.3(d), 10.1(b).)

(a) [5:113.1] **"Benefit plan investors"** include ERISA entities such as employee benefit plans (stock bonus, pension or profit sharing plans), individual retirement accounts (IRAs), individual retirement annuities and Coverdell education savings accounts. [29 CFR § 2510.3-101(f)(2); see IRC § 4975(e)(1)]

(b) [5:113.2] **"Operating company" exception:** The 25% limitation does not apply, and the general partner will not be considered an ERISA fiduciary, where the limited partnership is an "operating company"—i.e., it is primarily engaged in the production or sale of a *product* or of a *service* other than the investment of capital. Under complex rules, an "operating company" includes a company that (i) invests and has management rights in companies that engage in the production or sale of a product or service (other than the investment of capital), or (ii) invests in real estate that it manages or develops. [29 CFR § 2510.3-101(a)(2),(c),(e)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(c) [5:113.3] **"Venture capital operating company" exception:** The operating company exception (¶ 5:113.2) also applies to a "venture capital operating company," defined as an entity that invests at least 50% of its assets in venture capital investments and, in the ordinary course of its business, actually exercises management rights with respect to the operating companies in which it invests. [29 CFR § 2510.3-101(d)]

(d) [5:113.4] **Exception for publicly held partnership:** The 25% limitation does not apply, and the general partner will not be considered an ERISA fiduciary, where, among other conditions, the limited partnership interests are (i) registered under the 1934 Act, (ii) "freely transferable" and (iii) held by 100 or more investors who are independent of the general partner and each other. [29 CFR § 2510.3-101(a)(2), (b)(2)-(4)]

(2) [5:114] **Post-dissolution surplus distributed in proportion to capital accounts:** *See ¶ 5:695 ff.*

[5:115 - 5:119] ***Reserved.***

e. [5:120] **Amendment of partnership agreement:** Amendments to a limited partnership agreement require the consent of all partners (general and limited). However, this default rule may be modified by the terms of the partnership agreement. [Corps.C. § 15904.06(b)(1); see Corps.C. § 15901.10]

Accordingly, the required vote or consent of the partners to amend the partnership agreement may be set forth in the partnership agreement. Indeed, the partnership agreement may even eliminate the right of the limited partners to amend the partnership agreement, granting that right solely to the general partner(s).

(1) [5:121] **Caution re provision barring oral amendments:** While a partnership agreement provision prohibiting oral amendments should be enforceable, as noted by the NCCUSL Drafting Committee (*see ¶ 5:14*) in its comment to Model ULPA § 110 (the source of § 15901.10), principles of estoppel, oral novation, waiver, and oral independent collateral contracts may limit the effect of a *prohibition* on oral amendments. [See Civ.C. § 1698(c), (d); Comm'l C. § 2209(2), (4); *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 CA2d 661, 669-671, 14 CR 523, 527-529; and Corps.C. § 15901.10, "Uniform Limited Partnership Act Comment" (¶ 5:19)]

[5:122 - 5:129] ***Reserved.***

2. [5:130] **Certificate of Limited Partnership:** A limited partnership must file a certificate of limited partnership with the Secretary of State. *Failure to do so precludes treatment of the entity as a limited partnership* (*see ¶ 5:141*). The filed certificate is notice to all persons that the partnership is a limited partnership and the persons designated as general partners are general partners. [Corps.C. §§ 15901.03(c), 15902.01(a), (c)]

a. [5:131] **Implied limited partnership where no agreement entered into:** Although a limited partnership is formed upon the filing of a certificate of limited partnership, the partners must, before or after the filing of the certificate, enter into a partnership agreement. But the partnership agreement may be oral, or even implied. [Corps.C. §§ 15901.02(x), 15902.01(a)]

A limited partnership may be *implied* by the partners' authorization of the filing of a certificate of limited partnership—particularly in a limited partnership with few partners.

b. [5:132] **Contents:** The certificate must be on a form prescribed by the Secretary of State, and must state:

- The partnership's name;
- The street address of the partnership's initial principal office;
- The name and street address of the initial agent for service of process (*see ¶ 5:162 ff.*);
- The name and address of each *general* partner (*limited* partners need *not* be identified);
- The mailing address of the partnership if different from the address of the initial principal office; and
- Any other desired matters (other than those which may not be changed by the limited partnership agreement; *see ¶ 5:51 ff.*). [Corps.C. §§ 15902.01(a), (b)]

FORM: The Secretary of State's standard form Certificate of Limited Partnership (Form LP-1) is available online at the Secretary of State's website (*www.sos.ca.gov*).

c. [5:133] **Execution by general partners:** The initial certificate must be signed by *all* general partners listed in the certificate. (A general partner may sign by an attorney in fact.) [Corps.C. §§ 15902.04(a)(1), 15902.04(b)]

(*Caution:* The limited partnership agreement may not vary the statutory requirements regarding execution of the certificate; *see ¶ 5:54*.)

d. [5:134] **Filing fee:** The fee for filing the certificate is $70 (plus $15 if the certificate is delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(b); 2 CCR § 21903(c)]

e. [5:135] **Effect of inconsistency with partnership agreement:** If any provision of the partnership agreement is inconsistent with the certificate of limited partnership (or with a filed certificate of dissociation, cancellation, amendment, merger or conversion):

• The partnership agreement prevails as to partners and transferees; and

• The filed certificate prevails as to third persons that reasonably rely on the filed record to their detriment. [Corps.C. § 15902.01(d)]

f. [5:136] **When effective:** The certificate is effective when filed by the Secretary of State, i.e., the limited partnership is officially *formed* when the certificate is filed. [Corps.C. § 15902.01(c)]

(1) [5:137] **Cancellation if check bounces:** The Secretary of State may cancel the filing of the certificate if the check or other remittance accepted in payment is not paid upon presentation. [Corps.C. § 15902.01(f)]

(a) [5:138] **Effect on partners and transferees:** "For partners and transferees, the partnership agreement is paramount." I.e., cancellation of the certificate may negate the entity's status as a limited partnership, but it does not necessarily affect the rights and obligations of the partners to each other or to transferees of partnership property. [Corps.C. § 15902.01(f), "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(2) [5:139] **Retroactive effect upon resubmission following rejection by Secretary of State:** Where the Secretary of State declines to file a certificate of limited partnership (or other limited partnership document) for failure to comply with the limited partnership law, the certificate may be resubmitted accompanied by a written opinion of a California attorney that the specific provisions that the Secretary of State found objectionable do in fact conform to law (stating the supporting points and authorities). If the Secretary of State refiles the certificate in reliance on the opinion, the certificate is effective *retroactively as of the date that it was originally delivered* to the Secretary of State. [Corps.C. § 15902.06(d)]

g. [5:140] **Recordation optional:** The certificate *may*, but need not, be recorded with the county recorder. [Corps.C. § 15902.01(e)]

However, recordation conclusively establishes in favor of any bona fide purchaser or encumbrancer for value of the partnership real property located in that county that the persons named as general partners in the certificate are the general partners—and *all* of the general partners—of the partnership. [Corps.C. § 15902.01(e)]

h. [5:141] **Failure to file certificate—general partnership created:** "In order for a limited partnership to be formed, a certificate of limited partnership must be filed with … the Secretary of State," and "[the] limited partnership is formed when the Secretary of State files the certificate." [Corps.C. § 15902.01(a), (c)]

Thus, failure to file the certificate of limited partnership precludes treatment of the entity as a limited partnership, with the result that the entity is treated as a *general* partnership and all partners are treated as *general* partners. This is so even where a creditor reasonably believed that a *limited* partnership existed. [See *American Alternative Energy Partners II v. Windridge, Inc.* (1996) 42 CA4th 551, 561, 49 CR2d 686, 692—purported limited partnership that failed to file certificate could commence and maintain action as general partnership; *Security Nat'l Bank v. Matek* (1985) 175 CA3d 1071, 1075, 223 CR 288, 291; *Tiburon Nat'l Bank v. Wagner* (1968) 265 CA2d 868, 875, 71 CR 832, 837—"A duty is imposed upon limited partners to make sure that the limited partnership has been properly formed, and sanction for failure to perform this duty is liability as a general partner"; see also *Mason v. Unkeless* (9th Cir. 1980) 618 F2d 597, 600, fn. 3 (applying Calif. law)]

i. [5:142] **Amendment of certificate:** The partnership may amend its certificate of limited partnership at any time for any proper purpose. [Corps.C. § 15902.02(d)]

(1) [5:143] **Events *requiring amendment:*** An amended certificate *must* be “promptly” delivered to the Secretary of State upon:

• Admission of a new general partner;

• Dissociation of a person as a general partner;

• Appointment of a person to wind up the partnership's activities when there is no general partner or for other good cause (Corps.C. § 15908.03(c), (d)); or

• There is a change in the agent for service of process designated in the certificate [Corps.C. §§ 15901.16(d)(5), 15902.02(b)]

(a) [5:144] **False statements in certificate:** Additionally, a general partner that knows that any information in the certificate was false when filed, or has become false due to changed circumstances, must “promptly” cause the certificate to be amended or, if appropriate, file a certificate of correction. [Corps.C. § 15902.02(c); see Corps.C. § 15902.07, ¶ *5:157 ff.*]

(2) [5:145] **Procedure:** The partnership must deliver the amendment to the Secretary of State on a prescribed form. The amendment must state:

• The name and the Secretary of State's file number of the partnership;

• The changes being made to the certificate. [Corps.C. §§ 15902.02(a), 15902.06(a)]

FORM: The Secretary of State's standard form Amendment to Certificate of Limited Partnership (Form LP-2) is available online at the Secretary of State's website (*www.sos.ca.gov*).

[5:146] ***Reserved.***

(a) Execution

1) [5:147] **Amendment designating new general partner as successor to last general partner:** An amendment designating a new general partner following the dissociation of the partnership's last general partner must be signed by the new general partner. [Corps.C. § 15902.04(a)(2)]

2) [5:148] **Amendment required by appointment of person to wind up partnership:** An amendment following the appointment of a person to wind up a dissolved partnership's activities must be signed by that person. [Corps.C. § 15902.04(a)(3)]

3) [5:149] **Other amendment:** Any other amendment must be signed by:

• At least one general partner listed in the certificate of limited partnership;

• Each other person designed in the amendment as a new general partner; and

• Each person that the amendment indicates has dissociated as a general partner *unless* (i) the person is deceased or a guardian or general conservator has been appointed for that person and the amendment so states, or (ii) the person previously filed a certificate of dissociation. [Corps.C. § 15902.04(a)(4)]

4) [5:150] **Execution pursuant to power of attorney:** Any person may sign the amendment by an attorney in fact. [Corps.C. § 15902.04(b)]

5) [5:151] **Contrary provisions in partnership agreement invalid:** The limited partnership agreement may not vary the statutory requirements regarding execution of the amendment; *see* ¶ *5:54*.

(b) [5:152] **Filing fee:** The fee for filing the amendment is $30 (plus $15 if the amendment is delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(d); 2 CCR § 21903(c)]

(3) [5:153] **Restated certificate:** An amendment may also be effected by way of a restated certificate of limited partnership on the form prescribed by the Secretary of State. (A restated certificate of limited partnership may also be filed to embody

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

all provisions contained in different certificates on file with the Secretary of State—i.e., to "clean up" the certificate.) [Corps.C. §§ 15902.02(e), 15902.06(a)]

FORM: The Secretary of State's standard form Restated Certificate of Limited Partnership (Form LP-10) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:154] **Execution:** A restated certificate of limited partnership must be signed by at least one general partner listed in the certificate of limited partnership. Additionally, where the restated certificate effects an amendment to the certificate of limited partnership, the restated certificate must be signed by the person or persons who would have been required to sign an amended certificate (*see* ¶ *5:147 ff.*). (Here again, any person may sign by an attorney in fact.) [Corps.C. § 15902.04(a)(5), (b)]

(*Caution:* The limited partnership agreement may not vary the statutory requirements regarding execution of the restated certificate; *see* ¶ *5:54*.)

(b) [5:155] **Filing fee:** The fee for filing the restated certificate of limited partnership is $30 (plus $15 if the certificate is delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(e); 2 CCR § 21903(c)]

(4) [5:156] **When effective:** An amended or restated certificate is effective when filed by the Secretary of State or upon such later time or date (but not more than 90 days after filing) as may be set forth in the amended or restated certificate. [Corps.C. §§ 15902.02(f), 15902.06(b), (c)]

j. [5:157] **Certificate of correction:** The certificate of limited partnership (like any other document filed with the Secretary of State) may be corrected by filing a certificate of correction if the certificate of limited partnership was defectively signed or contained false or erroneous information at the time of *filing*. (A certificate of correction may not be used to correct information that was accurate when filed but that became inaccurate following subsequent events.) [Corps.C. § 15902.07(a) & "Uniform Limited Partnership Act Comment" (*see* ¶ *5:19*)]

(1) [5:158] **Contents:** The certificate of correction must contain the name of the limited partnership and the Secretary of State's file number, and must also:

• Describe the record to be corrected (i.e., the certificate of limited partnership), including the filing date and file number;

• Specify the incorrect information and the reason it is incorrect (or the manner in which the signing was defective); and

• Correct the incorrect information (or defective signature). [Corps.C. § 15902.07(b)]

FORM: The Secretary of State's standard form Certificate of Correction (Form LP-11) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(2) [5:159] **Effective date:** When filed by the Secretary of State, the certificate of correction is effective *retroactively* as of the effective date of the certificate of limited partnership. However, the certificate of correction is effective when *filed* (*not before*) as to persons who *relied* on information in the uncorrected certificate of limited partnership and are adversely affected by the correction, including information regarding the identity of general partners [Corps.C. § 15902.07(c)(2); see Corps.C. § 15901.03(c)]

(3) [5:160] **Filing fee:** The fee for filing the certificate of correction is $30 (plus $15 if the certificate is delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(g); 2 CCR § 21903(c)]

[5:161] ***Reserved.***

k. Special concerns re agent for service of process

(1) [5:162] **Natural person or corporate agent:** The agent designated in the certificate of limited partnership (or application for certificate of registration in the case of a foreign limited partnership, ¶ *5:1001 ff.*) may be either an individual (natural person) *residing in California* or a corporation *having an office in California*. A corporate agent must file with the Secretary of State a certificate designating its offices within California and its employees who can be served, and must otherwise meet the statutory requirements for acting as an agent for service of process. [Corps.C. §§ 15901.16(d)(1), 15902.01(a)(3); see Corps.C. § 1505; and Corps.C. § 15901.14(c) & § 15909.02(a)(5) (foreign limited partnership)]

(2) [5:163] **Address of natural person:** If a natural person is designated as agent, the *complete business or residence street address* must be set forth in the registration (or application for registration of a foreign limited partnership, ¶ *5:1001*

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

ff.). If a corporate agent is designated, no address for the corporation should be shown. (A corporate agent's address is already on file in the Secretary of State's office; *see* ¶ *5:162*.) [Corps.C. § 15901.16(d)(1); see Corps.C. § 15909.02(a)(5) (foreign limited partnership)]

(3) [5:164] **Changing agent for service of process:** If the agent for service of process changes (or if a natural person designated as agent no longer resides in California), the limited partnership must "promptly" file an amended certificate of limited partnership (or amended application for registration of a foreign limited partnership, ¶ *5:1050 ff.*) designating a new agent. [Corps.C. § 15901.16(d)(5); *see* ¶ *5:142 ff.*]

(a) [5:165] **Agent's resignation or disclaimer of appointment:** The agent may *resign* by filing a duly signed and acknowledged statement of resignation with the Secretary of State. This effectively terminates the agent's authority; and the Secretary of State must "forthwith" advise the limited partnership of the resignation by written notice directed to the partnership's principal executive office. [Corps.C. § 15901.16(d)(2)]

The agent may also *disclaim* having been properly appointed as agent for service of process by filing a disclaimer with the Secretary of State. [Corps.C. § 15901.16(d)(3); 2 CCR § 21906]

The resignation or disclaimer must be on a form prescribed by the Secretary of State. [Corps.C. § 15901.16(d)(2), (3); 2 CCR § 21906]

• ***FORM:*** The Secretary of State's standard form Resignation of Agent For Service of Process (RA-100) is available online at the Secretary of State's website (*www.sos.ca.gov*).

➪ [5:166] ***PRACTICE POINTERS RE AGENT FOR SERVICE OF PROCESS***: *See* ¶ *3:111.*

[5:167 - 5:169] ***Reserved.***

3. [5:170] **Formation by Conversion From Other Entity:** A limited partnership may be formed by the conversion of a California general partnership, LLC or corporation into a limited partnership. A limited partnership may also be formed by the conversion of a foreign business entity into a limited partnership if the foreign entity is authorized by the laws under which it is organized to effect the conversion. [Corps.C. § 15911.08(a)]

[5:171] ***Reserved.***

a. General provisions governing conversion

(1) [5:172] **Plan of conversion:** An entity that desires to convert into a limited partnership must approve a plan of conversion or the instrument that is required to be approved to effect the conversion pursuant to the laws under which the entity is organized. [Corps.C. § 15911.08(b)]

(2) [5:173] **Approval of conversion:** The conversion must be approved by the number or percentage of partners, members, shareholders or holders of interest of the converting entity as is required by the laws under which the entity is organized, or such other percentage (subject to applicable law) as may be set forth in the converting entity's "charter" documents (e.g., limited partnership agreement, articles of organization, operating agreement, articles of incorporation). [Corps.C. § 15911.08(c)]

(3) [5:174] **Effective date of conversion:** The conversion is effective at the time set forth under the laws under which the converting entity is organized so long as a statement of limited partnership containing a statement of conversion has been filed with the Secretary of State. If the converting entity's governing law is silent as to the effectiveness of the conversion, the conversion is effective upon the completion of all acts required under the LP Act to form a limited partnership. [Corps.C. § 15911.08(d)]

• ***FORM:*** The Secretary of State's standard form Certificate of Limited Partnership—Conversion (LP-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:175] **Filing fee:** If the converting entity is a California corporation, the filing fee is $150 (plus a $15 special handling fee if the document is delivered in person to the Secretary of State's office). For all other conversions, the filing fee is $70 (plus the special handling fee when applicable). [Gov.C. §§ 12182(a), 12184(a); 2 CCR § 21903(c); Instructions accompanying Form LP-1A (¶ 5:174)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(4) [5:176] **Conversion from foreign entity—certificate of cancellation not required:** In the case of a foreign limited partnership or LLC that converts into a California limited partnership, the filing of a certificate of conversion, or a certificate of limited partnership containing a statement of conversion, has the effect of the filing of a certificate of cancellation (*see ¶ 5:701 ff.*) by the converting foreign limited partnership or LLC. No separate certificate of cancellation is required. [Corps.C. § 15911.08(e)]

If a foreign corporation that is qualified to transact business in California converts into a California limited partnership, the filing of a certificate of conversion, or a certificate of limited partnership containing a statement of conversion, has the effect of an automatic surrender of the foreign corporation's right to transact business in California. (I.e., the foreign corporation's qualification to do business in California is surrendered.) [Corps.C. § 15911.08(e)]

[5:177] ***Reserved.***

b. Provisions specific to converting entity

(1) [5:178] **Conversion from general partnership:** *See* ¶ 3:650 ff.
(2) [5:179] **Conversion from LLC:** *See ¶ 6:900*.
(3) [5:180] **Conversion from corporation:** See Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 8.

4. [5:181] **Designation of "Partnership Representative":** As in a general partnership (*see ¶ 3:130*), every limited partnership is required to designate a "partnership representative" (known as the "tax matters partner" prior to 2018) to deal with any IRS challenges or audits. *See detailed discussion at ¶ 8:250 ff.*

[5:182 - 5:199] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-C

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

C. Partners' Rights, Duties and Liabilities

- 1. [5:200] General Partners
  - a. [5:201] Division into classes
  - b. [5:202] Management rights
    - (1) [5:203] Majority consent ordinarily required
      - (a) [5:203.1] Deadlocked partnership
      - (b) [5:203.2] Compare—actions requiring unanimous consent
    - (2) [5:204] Authority to bind partnership
      - (a) [5:205] Limitation—unauthorized acts with third party's actual or constructive notice
        - 1) [5:205.1] “Received a notification”
          - a) [5:205.2] Comment
        - 2) [5:206] Person not designated as general partner in limited partnership certificate
          - a) [5:207] Compare—notice of general partner's dissociation
          - b) [5:208] Example
      - (b) [5:209] Limitation—acts not in ordinary course of business
        - 1) [5:210] Authorization may be contained in partnership agreement
        - 2) [5:211] Guaranties
    - (3) [5:212] Right to information
      - (a) [5:213] Information required to be given general partner without demand
        - 1) [5:214] General partner's duty to inform other partners
          - a) [5:215] Example
      - (b) [5:216] Information required to be given upon demand
      - (c) [5:217] Compare—dissociated general partner's conditional access
        - 1) [5:218] Partnership's response
        - 2) [5:219] Copying charges
        - 3) [5:220] Demand by former partner's legal representative
      - (d) [5:221] Rights upon general partner's death
      - (e) [5:222] Restrictions
      - (f) [5:223] Examination by attorney
      - (g) [5:224] Transferee not entitled to information
      - (h) [5:225] Restrictions imposed by partnership agreement
    - (4) [5:226] Primacy of general partners' authority
      - (a) [5:227] Delegation of duties
        - 1) [5:228] Analysis
    - (5) [5:230] Reimbursement rights
    - (6) [5:231] No remuneration for services unless agreement permits
    - (7) [5:232] General partner's business discretion

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

- c. [5:240] Duties
  - (1) [5:241] Duty of loyalty
    - (a) [5:242] Trustee of partnership property
    - (b) [5:243] No adverse interests
    - (c) [5:244] No competition
    - (d) [5:245] No elimination of loyalty by agreement
    - (e) [5:246] Comment
  - (2) [5:250] Duty of care
    - (a) [5:251] Business judgment rule
  - (3) [5:255] Good faith and fair dealing
    - (a) [5:256] Not a fiduciary duty per se
  - (4) [5:260] Incidental self-interest permitted
  - (5) [5:261] No fiduciary duty to holder of security interest in limited partnership interest
    - (a) [5:262] Compare—breach of trust or tort claims
      - 1) [5:263] No action for breach of partnership agreement
  - (6) [5:264] Third party's joint and several liability for assisting in breach
  - (7) [5:265] Maintenance of “charter” records
    - (a) [5:266] Partners' names and addresses
    - (b) [5:267] Partnership certificates
    - (c) [5:268] Tax returns and financial statements
    - (d) [5:269] Partnership agreement
    - (e) [5:270] Record of votes and consents
    - (f) [5:271] Partners' contributions; dual partner's transferable interest; dissolution events
      - 1) [5:272] Nonmonetary contributions
      - 2) [5:273] Dual general/limited partner
    - (g) [5:274] Caution—no variation by partnership agreement
- d. [5:280] Liability
  - (1) [5:281] Limitation—prior acts
  - (2) [5:282] Limitation—liability to limited partners
    - (a) [5:283] Comment
  - (3) [5:284] Judgment against partnership not enforceable against general partner
  - (4) [5:285] Limitation on enforcement of judgment against general partner
  - (5) [5:286] Indemnification by partnership
- e. [5:290] Limited partnership's liability for partner's acts

2. [5:300] Limited Partners
- a. [5:301] Division into classes
- b. [5:302] No authority to act for partnership
  - (1) [5:303] Compare—power to act by agreement
  - (2) [5:304] Limited partner's knowledge not attributed to partnership
- c. [5:305] Limited duties/obligations to partnership and other partners
  - (1) [5:306] “Good faith and fair dealing”
  - (2) [5:307] Application
  - (3) [5:311] Comment
  - (4) [5:312] Compare—fiduciary duty arising from management role under partnership agreement
- d. [5:320] Participation in management as creating risk of personal liability for partnership obligations
  - (1) [5:321] Activities *not* constituting participation in management
  - (2) [5:322] Potential liability where limited partner mistaken for general partner
    - (a) [5:323] Correction of erroneous status as general partner
  - (3) [5:324] Liability for tortious conduct

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(4) [5:325] Potential alter ego liability
(a) [5:325.1] Comment
(b) [5:325.2] Amending judgment to add alter ego as judgment debtor
e. [5:326] Guaranty of partnership debt—limited partners' equitable contribution according to ownership interest
(1) [5:327] Adjustment for insolvent guarantors
f. Right to information
(1) [5:329] Information needed to provide consent
(a) [5:330] Partnership's "knowledge" of information
(2) [5:331] "Charter" documents, tax returns, financial statements
(3) [5:332] Other information regarding partnership
(a) [5:333] Good faith requirement
(b) [5:334] Partnership's response
(4) [5:335] Confidential information
(a) [5:336] Comment
(5) [5:337] Includes information possessed by partnership's attorney
(6) [5:338] No required financial statements
(a) [5:338.1] Compare—prior law
(b) [5:338.2] Compare—LLCs
(c) [5:338.3] Comment
(7) [5:339] Dissociated limited partner's right to information
(a) [5:339.1] "Required information"
(b) [5:340] Partnership's response
(8) [5:341] Reasonable restrictions permitted
(a) [5:342] General partner to determine restrictions
(b) [5:343] "Reasonableness"
1) [5:344] Limited partners' names and addresses
(9) [5:345] Copying charges
(10) [5:346] Examination by attorney
(11) [5:347] Transferee not entitled to information
(a) [5:348] Exception for deceased limited partner
(12) [5:349] Caution—power of partnership agreement to limit access to records
(13) [5:350] Enforcement by court order
(a) [5:351] Compare—prior law and LLC law
g. [5:360] Voting and consent rights
(1) [5:361] Compare—removal of general partner
(2) [5:361.1] Compare—prior law
h. [5:362] Limited partner not a party to third-party partnership litigation
3. [5:370] Partner's Action Against Partnership
a. [5:371] Direct action
(1) [5:372] Nature of action
(2) [5:373] Example
b. [5:374] Derivative action
(1) [5:375] Example
(2) [5:375.1] Principles governing corporate derivative actions apply
(3) [5:376] Parties
(a) [5:377] No loss of limited liability
(4) [5:378] Restrictions on plaintiff
(a) [5:379] Alternative upon court order
1) [5:380] Comments

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(5) [5:381] Demand prerequisite
(a) [5:382] Demand alleged in complaint
(6) [5:383] Bond requirement
(a) [5:384] Time for bringing motion
(b) [5:385] Grounds for motion
(c) [5:386] Hearing on motion
(d) [5:387] Determination of motion
(e) [5:388] Dismissal of motion upon pre- or post-motion payment of bond
(f) [5:388.1] Comment
(7) [5:389] Prevailing plaintiff's award of expenses and attorney fees
c. [5:390] Caution—right to sue not impaired by partnership agreement
4. [5:400] False Information in Document Filed with Secretary Of State
a. [5:401] Signer's liability—reliance need not be reasonable
5. [5:402] Partner Liability for Improper Distribution

1. [5:200] **General Partners:** A person becomes a general partner either as provided in the limited partnership agreement or with the consent of *all general and limited* partners. (A person may also become a general partner through partnership merger or conversion from another entity into a limited partnership (*see* ¶ *5:170 ff., 5:800 ff.*) or, where all general partners have dissociated (*see* ¶ *5:571 ff.*), by the consent of a majority in interest of limited partners.) [Corps.C. §§ 15904.01, 15908.01(c)(2)]

a. [5:201] **Division into classes:** The partnership agreement may provide for classes of general partners. If so, the agreement must specify the rights, powers and duties of the classes, including any right to vote separately or with other classes on any matters. [Corps.C. § 15904.09]

b. [5:202] **Management rights:** Of course, a sole general partner has full authority to conduct partnership business. Where there is more than one general partner, each general partner has *equal* rights in the management and conduct of the partnership's activities … unless the partnership agreement provides otherwise. [Corps.C. §§ 15901.10(a), 15904.06(a); see *Jarvis v. Jarvis* (2019) 33 CA5th 113, 138, 244 CR3d 722, 739]

(1) [5:203] **Majority consent ordinarily required:** Ordinarily, a majority of general partners may decide partnership matters (unless the partnership agreement provides otherwise). [Corps.C. §§ 15901.10(a), 15904.06(a)]

(a) [5:203.1] **Deadlocked partnership:** Of course, where the partnership has an even number of general partners who are equally divided and cannot agree on the management of the partnership's affairs, the partnership may become deadlocked. With respect to *corporations*, Corps.C. § 308(a) allows a court to appoint a provisional *director* to break the deadlock. But there is no comparable provision in the LP Act to permit a court to appoint a provisional *general partner* to break a deadlock. And it is not clear whether Corps.C. § 15901.07(a), which provides that "principles of law and equity supplement" the LP Act, may authorize a court to appoint such a provisional general partner. [*Jarvis v. Jarvis* (2019) 33 CA5th 113, 143-144, 244 CR3d 722, 743-744—in dispute between 2 equal general partners, 1 general partner lacked authority to hire separate counsel to represent limited partnership over other general partner's objection]

Also, as a practical matter it would be extremely difficult to find someone willing to act as a provisional general partner in view of the potential liability both as a general partner and in resolving the deadlock.

(b) [5:203.2] **Compare—actions requiring unanimous consent:** Unless the partnership agreement provides otherwise, the consent of *all* partners, both general and limited, is required to:

• Amend the partnership agreement; or

• Sell, lease or otherwise dispose of all or substantially all of the partnership's property other than in the usual and regular course of the partnership's activities. [Corps.C. § 15904.06(b)]

(2) [5:204] **Authority to bind partnership:** Every general partner is an *agent* of the limited partnership. Thus, the partner's acts may bind the partnership when taken in apparently carrying on the activities of the limited partnership in the ordinary course of business. [Corps.C. § 15904.02(a); see *Keller Const. Co., Inc. v. Kashani* (1990) 220 CA3d 222, 228, 269 CR 259, 262—as *agent and beneficiary* of limited partnership, *sole* general partner bound by arbitration clause of contract entered into between partnership and third party]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(a) [5:205] **Limitation—unauthorized acts with third party's actual or constructive notice:** An act by a general partner for apparently carrying on the limited partnership's activities in the ordinary course of business does *not* bind the partnership where the general partner did not have authority in the particular matter *and* the third party knew, had received a notification (*see ¶ 5:205.1*), or had notice (per Corps.C. § 15901.03(d), ¶ 5:207) of the lack of authority. [Corps.C. § 15904.02(a)]

1) [5:205.1] **"Received a notification":** A person (third party) "received a notification" when a notification (i) came to the person's attention, or (ii) was delivered at the person's place of business or at any other place held out by the person as a place for receiving communications. [Corps.C. § 15901.03(f)]

a) [5:205.2] **Comment:** Corps.C. § 15904.02(a) provides that a third party is deemed to know of the general partner's lack of authority where the third party had notice *under Corps.C. § 15901.03(d)* that the general partner lacked authority. The reference to only § 15901.03(*d*) is too narrow. Corps.C. § 15904.02(a) provides that a person is also deemed to know of the general partner's lack of authority when the person "had received a notification" that the general partner lacked authority. The time when a person "receives a notification" is described in Corps.C. § 15901.03(*f*) (¶ 5:205.1).

2) [5:206] **Person not designated as general partner in limited partnership certificate:** The NCCUSL Drafting Committee (*see ¶ 5:14*), in its comments to Model ULPA § 103 (the source of Corps.C. § 15901.03), takes the position that the fact that a person is not listed as a general partner in the certificate of limited partnership filed with the Secretary of State is not notice that the person is not a general partner. (I.e., the partnership may be bound by the act of a general partner who is not identified in the certificate of limited partnership.) This can occur, for example, where there is a delay between election or appointment of a general partner and amendment of the certificate of limited partnership to identify the new general partner. A person *becomes* a general partner (i) as provided in the partnership agreement, (ii) upon the consent of all partners, or (iii) as otherwise provided by law; and this is so whether or not the partner is identified in the certificate of limited partnership. [Corps.C. § 15904.01; see Corps.C. § 15902.02(b) (certificate of limited partnership should be amended "promptly" to reflect any change in identity of general partner); see also Corps.C. § 15901.02, "Uniform Limited Partnership Act Comment" (¶ 5:19)]

Nevertheless, prudence dictates that promptly after the election or appointment of a new general partner, the certificate of limited partnership be promptly amended to identify the new general partner.

a) [5:207] **Compare—notice of general partner's dissociation:** Third parties are deemed to have constructive notice of a general partner's dissociation *90 days* after the effective date of:

— an amendment to the certificate of limited partnership stating that the person has dissociated, or

— a certificate of dissociation pertaining to the person, whichever occurs first. [Corps.C. § 15901.03(d)(1)]

b) [5:208] **Example:** X was a general partner and regularly conducted the XYZ limited partnership's business until he was expelled as a general partner. XYZ promptly files an amendment to the certificate of limited partnership stating that X is no longer a general partner. Thirty days later, a third party who regularly conducted business with X as general partner of XYZ remains unaware that X was expelled as general partner and has no reason to doubt X's bona fides. A transaction entered into by the third party may bind XYZ despite the fact that X was not a general partner at the time. However, if the third party entered into the transaction 90 days or more after the amendment was filed, the transaction does *not* bind XYZ. [Corps.C. § 15904.02, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(b) [5:209] **Limitation—acts not in ordinary course of business:** A general partner's act that is not apparently for carrying on the ordinary course of the partnership's business binds the partnership "*only if the act was actually authorized by all the other partners*." [Corps.C. § 15904.02(b) (emphasis added)]

1) [5:210] **Authorization may be contained in partnership agreement:** All other partners need not specifically authorize or approve each and every act of a general partner that is not in the ordinary course of partnership business. The authorization or approval to carry out acts outside the ordinary course of business may be contained in the partnership agreement or granted pursuant to procedures set out in the partnership agreement (e.g., approval by a majority in interest of the limited partners). [See Corps.C. § 15901.10(a)]

A third party entering into a transaction that may be deemed outside the ordinary course of the partnership's business (e.g., a sale of assets) will want assurance of the general partner's authority to enter into and perform the transaction on behalf of the partnership. Such assurance normally takes the form of (i) an opinion of counsel to the partnership or (ii) certified resolutions from the secretary of a corporate general partner and/or a certificate from an officer of the general partner confirming the general partner's authority to enter into and perform the transaction for the partnership.

2) [5:211] **Guaranties:** A guaranty of the obligations of another entity is generally considered to be outside the ordinary course of business. This is because "[t]he normal partnership is organized to carry on a business for its members, and not to assist other persons by becoming surety for them, or answerable for their debts." Thus, a partner has no authority to execute contracts of guaranty on behalf of the partnership without authority specially given to the partner, or implied from the common course of the partnership's business or from the previous course of dealing between the parties, unless the act of the partner is afterward ratified by his copartners. [*Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 CA4th 74, 93-94, 15 CR2d 585, 594-595]

(3) [5:212] **Right to information:** A general partner may inspect and copy any records maintained by the partnership regarding its activities and financial condition. The general partner need not have any particular purpose for seeking the information. [Corps.C. § 15904.07(a)]

(a) [5:213] **Information required to be given general partner without demand:** Each general partner and the partnership must furnish to a general partner—without demand—any information concerning the partnership's activities and activities reasonably required for the proper exercise of the general partner's rights and duties. The information may be furnished electronically. [Corps.C. § 15904.07(b)(1)]

1) [5:214] **General partner's duty to inform other partners:** Obviously, this provision confers both a right and a corresponding *duty* upon each partner. The extent of the duty to inform other partners of a particular item of information frequently depends on the circumstances. [See Corps.C. § 15904.07(b)(1), "Uniform Limited Partnership Act Comment" (¶ 5:19)]

a) [5:215] **Example:** The NCCUSL Drafting Committee (¶ 5:14) gives the following example to illustrate the operation of Model ULPA § 407 (the source of § 15904.07(b)(1)): Although a partnership has three general partners, one is the managing partner with day-to-day responsibility for running the partnership's activities, and the other two meet periodically with the managing general partner to oversee the business. In these circumstances, the managing general partner would likely, in the NCCUSL Drafting Committee's view, have a duty to draw the attention of the other general partners to important information, even if that information would be apparent from a review of the partnership's records. [Corps.C. § 15904.07(b)(1), "Uniform Limited Partnership Act Comment" (¶ 5:19)]

(b) [5:216] **Information required to be given upon demand:** Each general partner and the partnership must furnish to a general partner—upon demand—any other information concerning the partnership's activities, *except* to the extent the demand is unreasonable or otherwise improper under the circumstances. The information may be furnished electronically. [Corps.C. § 15904.07(b)(2)]

(c) [5:217] **Compare—dissociated general partner's conditional access:** On 10 days' demand made in a record received by the limited partnership, a person dissociated as a general partner may have access, at the partnership's principal office, to information that the partnership is required to maintain at its principal office (see Corps.C. § 15901.11; *¶ 5:265 ff.*), as well as to all other records maintained by the partnership regarding its activities and financial condition, if:

• The information pertains to the period when the person was a general partner;

• The person seeks the information in good faith and for a purpose reasonably related to the person's interest as a former general partner; *and*

• The demand describes with reasonable particularity the information sought and the purpose for seeking the information, and the information sought is directly related to that purpose. [Corps.C. § 15904.07(c); see Corps.C. § 15903.04(b)]

1) [5:218] **Partnership's response:** Within 10 days after receiving a former general partner's demand for information, the partnership must inform the former general partner (in writing, electronically or by comparable form) what information the partnership will provide and when and where the information will be provided. If the partnership

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

declines to provide all or any of the requested information, the partnership must state its reasons for doing so. [Corps.C. § 15904.07(d); see Corps.C. § 15903.04(c)]

2) [5:219] **Copying charges:** A partnership may charge a dissociated general partner reasonable copying costs limited to the costs of labor and material. [Corps.C. § 15904.07(g)]

3) [5:220] **Demand by former partner's legal representative:** The demand may also be exercised by the legal representative of a person who became dissociated as a general partner by reason of the appointment of a guardian or general conservator (Corps.C. § 15906.03(g)(2)) or by reason of a judicial determination that the person otherwise has become incapable of performing the person's duties as a general partner (Corps.C. § 15906.03(g)(3)). [Corps.C. § 15904.07(i)]

(d) [5:221] **Rights upon general partner's death:** A deceased general partner's (or former general partner's) personal representative has the same rights to information as does a *limited* partner. [Corps.C. §§ 15904.07(c), (e), 15907.04; see Corps.C. § 15903.04; *and ¶ 5:329 ff.*]

(e) [5:222] **Restrictions:** The partnership may impose reasonable restrictions on the use of information by a general partner or dissociated general partner. The partnership has the burden of proving reasonableness. [Corps.C. § 15904.07(f)]

(f) [5:223] **Examination by attorney:** A general partner's or dissociated general partner's right to information may be exercised through an attorney or other agent. [Corps.C. § 15904.07(h)]

(g) [5:224] **Transferee not entitled to information:** A transferee of a general partner does not have the rights to information granted by Corps.C. § 15904.07. [Corps.C. § 15904.07(i)]

(h) [5:225] **Restrictions imposed by partnership agreement:** The limited partnership agreement may not "unreasonably restrict" a general partner's right to access partnership records, but it may impose "reasonable restrictions" on the availability and use of information obtained therefrom; *see ¶ 5:55 ff.*

(4) [5:226] **Primacy of general partners' authority:** The LP Act grants the general partner(s) primacy in the conduct of the limited partnership's business. The LP Act is explicit that "any matter" relating to the limited partnership's activities may be decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners. The only exceptions to this rule are those matters requiring limited partner approval or consent as set forth in the partnership agreement or as explicitly granted to the limited partners by the LP Act. [Corps.C. § 15904.06(a); see Corps.C. §§ 15901.10(b)(12) (limited partners' right to approve conversion or merger nonwaivable), 15904.06(b) (consent of each general and limited partner required to amend partnership agreement and to sell, lease, exchange, or otherwise dispose of all or substantially all of limited partnership's property other than in the usual and ordinary course of business, but such rights specified in Corps.C. § 15904.06(b) may be modified or eliminated by partnership agreement)]

(a) [5:227] **Delegation of duties:** Corps.C. § 15904.06 does not address a general partner's right or power to delegate management duties. Nevertheless, the NCCUSL Drafting Committee (*see ¶ 5:14*), in its comment to Model ULPA § 406 (the source of Corps.C. § 15904.06(a)), asserts that § 406 empowers a general partner to delegate one or more of its duties and responsibilities, but points out that any such delegation does not relieve the delegating general partner (or partners) of their duties under the Model ULPA. The NCCUSL Drafting Committee gives the example of a general partner neglecting to renew the partnership's fire insurance coverage, followed by a subsequent loss of the partnership's building through fire, and concludes that the general partner "might" be liable for breach of the duty of care by reason of its possible gross negligence. As a variation of this example, the NCCUSL Drafting Committee then poses the failure of the partnership's "office manager," selected by the general partner, to renew fire insurance coverage. Even assuming that the office manager has been "grossly negligent," the general partner would not necessarily be liable under its duty of care under § 406 (Corps.C. § 15904.08(c) of the LP Act); the NCCUSL Drafting Committee concludes that the question in such instance "is whether the general partner is grossly negligent (or worse) in selecting the general manager, delegating insurance renewal matters to the general manager and supervising the general manager after the delegation." [See Corps.C. § 15904.06, "Uniform Limited Partnership Act Comment" (¶ 5:19)]

1) [5:228] **Analysis:** Although the NCCUSL Drafting Committee did not cite any authority for its conclusion, it may have had in mind *In re Caremark Inc. Derivative Litig.* (Del.Ch. 1996) 698 A2d 959, addressing the responsibilities of a *corporate* board for the misconduct of employees of the corporation. But, in the partnership context, a more appropriate analogy may be to the law of principal and agent. [See Civ.C. § 2338 ("principal's responsibility for agent's

negligence or omission"); Rest.3d Agency §§ 7.07 ("employee acting within scope of employment"), 7.04 ("agent acts with actual authority") & 7.08 ("agent acts with apparent authority")]

If a general partner is charged with the responsibility of maintaining appropriate levels of insurance for the limited partnership and fails to do so, resulting in liability to the limited partnership, it would seem that the general partner would have the same liability where the general partner's *employee* fails to secure that insurance through gross negligence. A general partner's role is greater than that of a corporate director: The general partner effectively acts as *both* a *director* and the *CEO*, and typically shares in the partnership's profits. This may make analogizing the duties and responsibilities of a general partner to those of a corporate director incomplete.

➪ [5:229] ***PRACTICE POINTER:*** If certain personal skills of a general partner are deemed critical, the partnership agreement should limit or even bar the general partner from delegating tasks involving those skills (or hold the general partner responsible for any failure of the delegate to discharge those tasks).

In any event, the partnership agreement may expressly provide for delegation and may modify (but not "unreasonably reduce") the general partner's due care duty with respect to delegation. [See Corps.C. § 15904.06, "Uniform Limited Partnership Act Comment" (¶ 5:19); see also Corps.C. §§ 15901.10(b)(5), 15904.08(c)]

(5) [5:230] **Reimbursement rights:** The partnership must reimburse/indemnify a general partner for payments made and liabilities incurred in the ordinary course of the partnership's activities or for the preservation of its business and property. A general partner is also entitled to reimbursement for advances made to the partnership beyond the amount of capital the general partner agrees to contribute. [Corps.C. § 15904.06(c)-(f)]

A payment or advance by a general partner is treated as a loan that accrues interest from the date of the payment or advance. [Corps.C. § 15904.06(e)]

(6) [5:231] **No remuneration for services unless agreement permits:** A general partner is entitled to remuneration for services performed for the partnership only to the extent (if any) set forth in the partnership agreement. [Corps.C. § 15904.06(f)]

(7) [5:232] **General partner's business discretion:** General partners are generally accorded wide discretion in managing the limited partnership, and may properly determine appropriate partnership expenses such as compensation to employees, subject to any limitations in the partnership agreement. [See *Ariana v. Parker* (1966) 239 CA2d 524, 532, 48 CR 834, 839]

[5:233 - 5:239] ***Reserved.***

c. [5:240] **Duties:** A general partner owes the partnership and other partners the fiduciary duties of *loyalty* and *care* (¶ 5:241 ff.), to be discharged consistently with the obligation of good faith and fair dealing. [Corps.C. § 16904.08(a), (d)]

These duties are virtually the same as those a general partner owes in a general partnership—i.e., a general partner of a limited partnership is subject to the same restrictions, and has the same liabilities to the general partnership and to the other partners, as in a general partnership. [*Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 424, 8 CR3d 31, 40; *BT-I v. Equitable Life Assurance Society of the U.S.* (1999) 75 CA4th 1406, 1411, 89 CR2d 811, 815; compare Corps.C. § 15904.08 (general partner's fiduciary dues to limited partnership and other partners) with Corps.C. § 16404 (general partner's fiduciary duties to *general* partnership and other partners, ¶ 3:150 ff.)]

(1) [5:241] **Duty of loyalty:** The duty of loyalty is limited to the following:

(a) [5:242] **Trustee of partnership property:** The general partner must account to the partnership and hold as trustee any property, profit or benefit derived by the partner in the conduct and winding up of partnership activities or derived from the partner's use of partnership property (including appropriation of a partnership opportunity). [Corps.C. § 15904.08(b)(1)]

(b) [5:243] **No adverse interests:** The general partner must also refrain from dealing with the partnership as (or on behalf of) a party having an interest adverse to the partnership. [Corps.C. § 15904.08(b)(2)]

(c) [5:244] **No competition:** A partner must not compete with the partnership in the conduct of the partnership's activities. [Corps.C. § 15904.08(b)(3)]

(d) [5:245] **No elimination of loyalty by agreement:** The partnership agreement may not eliminate the duty of loyalty. But it may specify types or categories of activities that do not violate the duty of loyalty ("if not manifestly unreasonable") or permit ratification of transactions that would otherwise violate the duty. [Corps.C. § 15901.10(b)(5); *see* ¶ *5:57*]

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(e) [5:246] **Comment:** A general partner's duty of loyalty to the limited partnership and other partners is *confined* to the elements specified at ¶ 5:242 ff. (But the partnership agreement may expand or, subject to the limitations of Corps.C. § 15901.10(b)(5) (¶ 5:245), narrow these elements.) On the other hand, a general partner's duty of loyalty to a *general* partnership and the other partners *includes* all of the foregoing elements: It is *not limited* to these elements. [See Corps.C. § 16404(b) (¶ 3:151, 3:180); *Enea v. Sup.Ct. (3-D)* (2005) 132 CA4th 1559, 1564-1565, 34 CR3d 513, 517-518 (noting that California rejected Uniform Partnership Act's attempt to set forth exclusive fiduciary duties)]

It is unlikely that the difference is unintentional, but why a different "default" standard should apply in the case of a general partner's duties to a *limited* partnership versus a general partner's duties to a *general* partnership is not clear. Corps.C. § 15904.08, specifying the duties of a general partner, is based on Model ULPA § 408. The California Drafting Committee (*see ¶ 5:14*) does not comment on the narrowing of the scope of a general partner's duty of loyalty to a limited partnership, as specified in Corps.C. § 15904.08(b), from a general partner's duty of loyalty to a general partnership, as specified in § 16404(b).

[5:247 - 5:249] ***Reserved.***

(2) [5:250] **Duty of care:** A general partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership's activities is limited to refraining from engaging in *grossly negligent* or *reckless* conduct, *intentional misconduct* or a *knowing violation of law*. A partner does not violate the duty of care by committing simple negligence (unless the partnership agreement provides otherwise). [Corps.C. § 15904.08(c)]

(*Caution:* The limited partnership agreement may not "unreasonably reduce" the duty of care from this "default" standard; *see ¶ 5:59*.)

(a) [5:251] **Business judgment rule:** The business judgment rule, as adapted from corporate law, is a judicial policy of deference to the business judgment of directors in the exercise of their broad discretion in making decisions affecting the corporation's business. The rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith. The business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest. [See *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 429-430, 8 CR3d 31, 45]

The rule generally arises in the context of litigation by shareholders against a corporation, and provides a defense to claims of director malfeasance. The general partners in a *limited* partnership with many limited partners are more analogous to directors of a corporation than to general partners of a closely-held *general* partnership, which tends to lack the inherent centralized management of limited partnerships. It would appear that the business judgment rule would thus be more appropriately applied to general partners in *widely-held limited partnerships* than to general partners of a general partnership.

Cross-refer: For further discussion of the business judgment rule, see Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 6.

[5:252 - 5:254] ***Reserved.***

(3) [5:255] **Good faith and fair dealing:** General partners must discharge their duties to the partnership and the other parties under the LP Act and the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing. [Corps.C. § 15904.08(d)]

(*Caution:* The limited partnership agreement may not eliminate the obligation of good faith and fair dealing, but it may prescribe certain standards for measuring the obligation; *see ¶ 5:60*.)

(a) [5:256] **Not a fiduciary duty per se:** The obligation of good faith and fair dealing, as least with respect to *limited* partners, has not been characterized as a *fiduciary* duty; *see ¶ 5:311*.

[5:257 - 5:259] ***Reserved.***

(4) [5:260] **Incidental self-interest permitted:** The fact that a general partner's conduct furthers the general partner's own interest does not by itself violate any duty or obligation. [Corps.C. § 15904.08(e)]

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(5) [5:261] **No fiduciary duty to holder of security interest in limited partnership interest:** The general partner's fiduciary duties do not extend to a person who is a mere holder of a security interest in a limited partnership interest. This is so even where the secured party is a former limited partner. [*Baldwin v. Marina City Properties, Inc.* (1978) 79 CA3d 393, 406, 145 CR 406, 413]

(a) [5:262] **Compare—breach of trust or tort claims:** A holder of a security interest in a limited partnership interest may assert a claim for damages or equitable relief for torts or breaches of trust committed by the partnership or individual partners so long as the claim arises from breach of a statutory, contractual or common law duty and not from any alleged partnership fiduciary duty. [*Baldwin v. Marina City Properties, Inc*. (1978) 79 CA3d 393, 406, 145 CR 406, 413]

1) [5:263] **No action for breach of partnership agreement:** But the holder of a security interest in a limited partnership interest cannot bring an action for breach of the limited partnership agreement. The holder is not a real party in interest under the agreement and has no standing to pursue such an action. [*Baldwin v. Marina City Properties, Inc*. (1978) 79 CA3d 393, 406, 145 CR 406, 413]

(6) [5:264] **Third party's joint and several liability for assisting in breach:** A nonpartner who aids and abets, or conspires with, a general partner to commit a fraud upon the limited partnership (e.g., third party acting as intermediary in self-dealing transaction between general partner and partnership) is jointly and severally liable with the general partner for the entire amount of the loss. [*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 CA4th 1451, 1473-1478, 171 CR3d 548, 564-569 (discussing distinction between conspiracy to breach fiduciary duty and aiding and abetting breach of fiduciary duty); *Stephenson v. Calpine Conifers II, Ltd.* (9th Cir. 1981) 652 F2d 808, 816 (applying Calif. law) (overruled on other grounds by *In re Washington Pub. Power Supply System Secur. Litig*. (9th Cir. 1987) 823 F2d 1349, 1350-1352 (en banc)); see *Prince v. Harting* (1960) 177 CA2d 720, 728, 2 CR 545, 549]

(7) [5:265] **Maintenance of "charter" records:** The partnership—i.e., the general partner—must maintain the records set forth below (¶ 5:266 ff.) at the partnership's principal office in California. [Corps.C. § 15901.11; see Corps.C. §§ 15901.02(e), 15901.14(a)(1)—duty to "designate and continuously maintain" office in California]

(a) [5:266] **Partners' names and addresses:** The partnership must keep a current list of the full *name* and last known street *and* mailing *address* of each *partner*, separately identifying the general and limited partners (in alphabetical order). [Corps.C. § 15901.11(a)]

(b) [5:267] **Partnership certificates:** The partnership must also maintain a copy of the initial *certificate of limited partnership* and all amendments and restatements, together with signed copies of any powers of attorney under which any certificate, amendment or restatement was signed. A copy of any filed certificate of *conversion* or *merger* must also be kept. [Corps.C. § 15901.11(b), (c)]

(c) [5:268] **Tax returns and financial statements:** The partnership must maintain a copy of its federal, state and local *income tax returns* and reports, and any *financial statements*, for the *six most recent years*. [Corps.C. § 15901.11(d), (f)]

(d) [5:269] **Partnership agreement:** The partnership must maintain a copy of any partnership agreement, to the extent "made in a record" (i.e., made in written, electronic or similarly memorialized form), together with any amendments. [Corps.C. § 15901.11(e); see Corps.C. § 15901.02(ac)]

The NCCUSL Drafting Committee (*see ¶ 5:14*) states that this requirement applies to *superseded* as well as current agreements and amendments. [Corps.C. § 15901.11(e), "Uniform Limited Partnership Act Comment" to Paragraph (5) (now (e)) (¶ 5:19)]

(e) [5:270] **Record of votes and consents:** If the partnership made a record of any consent or vote of any partner during the *past three years*, a copy of that record must be maintained at its principal California office for *three years from the time the record was made* (and not when the consent or vote occurred). [Corps.C. § 15901.11(g), "Uniform Limited Partnership Act Comment" to Paragraph (7) (now (g)) (¶ 5:19)]

(f) [5:271] **Partners' contributions; dual partner's transferable interest; dissolution events:** Unless contained in a written, electronic or similarly memorialized form of partnership agreement, the partnership must maintain a written, electronic or similar record stating:

• The amount of each partner's cash or other *contribution* actually made or agreed to be made, together with a description and statement of the agreed value of any noncash contribution;

• The times or events triggering *additional contributions* that each partner has agreed to make;

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• For each person that is both a *general and limited* partner, a specification of what *transferable interest* the person owns in each capacity; and

• Any events that would trigger *dissolution*. [Corps.C. § 15901.11(h)]

1) [5:272] **Nonmonetary contributions:** If not stated in a written or similar form in the partnership agreement, the value of any partner's nonmonetary contributions must be stated in some other written or similarly memorialized record. (But this provision does not authorize the partnership or its general partner to *set the value* of a contribution *without the contributing partner's concurrence*, though that power may be contained in the partnership agreement.) [Corps.C. § 15901.11(h)(1) (requiring partnership agreement or other record to include statement of "agreed" value of noncash contributions to be made to partnership); "Uniform Limited Partnership Act Comment" to Paragraphs (8)(A) and (B) (now (h)(1) and (2)) (*see ¶ 5:19*)]

2) [5:273] **Dual general/limited partner:** The specification of the transferable interests of a person who is both a general and limited partner is important if the partner dissociates in one capacity but not the other. [Corps.C. § 15901.11(h)(3), "Uniform Limited Partnership Act Comment" to Paragraph (8)(C) (now (h)(3)) (*see ¶ 5:19*)]

(g) [5:274] **Caution—no variation by partnership agreement:** The limited partnership agreement may not vary the statutory requirement that the limited partnership must maintain such "charter records." [Corps.C. § 15901.10(b)(4); *see ¶ 5:55*]

[5:275 - 5:279] ***Reserved.***

d. [5:280] **Liability:** Except as otherwise provided by law or agreement, the general partners of a limited partnership are subject to the same liabilities as partners of a general partnership: i.e., each general partner is jointly and severally liable for all partnership debts and obligations. [Corps.C. § 15904.04(a); see *In re Prestige Ltd. Partnership–Concord* (BC ND CA 1997) 205 BR 427, 433, aff'd (9th Cir. 1999) 164 F3d 1214 (per curiam)]

(1) [5:281] **Limitation—prior acts:** A general partner is not personally liable for a partnership obligation incurred before becoming a general partner. [Corps.C. § 15904.04(b)]

(2) [5:282] **Limitation—liability to limited partners:** Although general partners are jointly and severally liable to *third parties* for tortious acts committed in the course of partnership business by other general partners (*see ¶ 5:280*), they are *not* liable to *limited partners* for another general partner's misdeeds *unless* they participated in the wrongdoing (through consent or otherwise) or negligently permitted it to occur. (Even so, the "innocent" general partners may be forced to *share* in any resulting loss to partnership capital in accordance with the allocation of profits and losses under the partnership agreement; *see ¶ 5:290*). [*Kazanjian v. Rancho Estates, Ltd.* (1991) 235 CA3d 1621, 1625, 1629, 1 CR2d 534, 536, 538—general partner not jointly liable for losses to limited partner resulting from another general partner's misappropriations; compare *Miske v. Bisno* (2012) 204 CA4th 1249, 1258, 139 CR3d 626, 633—general partner jointly liable for losses to limited partner resulting from another general partner's misappropriations occurring *before* limited partner became limited partner]

(a) [5:283] **Comment:** The court in *Miske v. Bisno*, supra, clearly strained to distinguish the holding in *Kazanjian v. Rancho Estates, Ltd*., supra, before concluding that the innocent general partner is jointly and severally liable for fraud committed by its co-general partner in inducing a limited partner to purchase limited partnership units. It is likely that courts will follow *Miske* and conclude that the general partners of a limited partnership are jointly and severally liable not only for the partnership's obligations to *creditors* but also to *limited partners* resulting from a general partner's fraud or misconduct.

(3) [5:284] **Judgment against partnership not enforceable against general partner:** A judgment against a limited partnership is not by itself a judgment against a general partner. A judgment against the partnership may not be satisfied from a general partner's assets unless there is also a judgment against the general partner. [Corps.C. § 15904.05(b), (c)]

(4) [5:285] **Limitation on enforcement of judgment against general partner:** Where a judgment has been obtained against *both* the partnership and a general partner, the judgment creditor may not levy against the general partner's assets based on a claim against the partnership unless the general partner is *personally liable* for the claim by virtue of a general partner's joint and several liability for partnership obligations (Corps.C. § 15905.05(c), ¶ 5:280) *and:*

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• The judgment against the general partner is based on the *same claim* as the judgment against the partnership *and* a writ of execution on the judgment against the partnership has been returned unsatisfied in whole or in part; *or*

• The partnership is a *debtor in bankruptcy; or*

• The general partner has *agreed* that the creditor need not exhaust partnership assets; *or*

• A court permits the judgment creditor to levy against the general partner's assets based on a finding that:

— partnership assets are *clearly insufficient* to satisfy the judgment,

— exhaustion of partnership assets is *excessively burdensome*, *or*

— the levy is an appropriate exercise of the court's *equitable* powers; *or*

• Liability is imposed on the general partner by law or contract *independent* of the existence of the partnership. [Corps.C. § 15904.05(b), (c)]

(5) [5:286] **Indemnification by partnership:** A general partner is entitled to indemnity from the partnership for liabilities incurred in the ordinary course of partnership activities or to preserve partnership property. [Corps.C. § 15904.06(c)]

[5:287 - 5:289] ***Reserved.***

e. [5:290] **Limited partnership's liability for partner's acts:** The limited partnership is vicariously liable for loss or injury caused by a *general* partner acting in the ordinary course of business *or* with partnership authority. Such liability extends to money or property received from a nonpartner and misapplied by the general partner. (This vicarious liability does not diminish the general partner's direct liability to the partnership for the partner's own misconduct; *see* ¶ *5:240 ff.*) [Corps.C. § 15904.03 & "Uniform Limited Partnership Act Comment" (*see* ¶ *5:19*)]

[5:291 - 5:299] ***Reserved.***

2. [5:300] **Limited Partners:** A person becomes a limited partner as provided in the limited partnership agreement *or* with the consent of *all* general and limited partners. (A person may also become a limited partner through a partnership conversion or merger; *see* ¶ *5:170 ff., 5:800 ff.*) [Corps.C. § 15903.01]

a. [5:301] **Division into classes:** The partnership agreement may provide for classes of limited partners having such rights, powers and duties as set forth in the agreement including rights, powers and duties senior to the rights of other classes of limited partners. The agreement may provide that the classes have the right to vote separately or with all or any other class or with the general partners on any matter. [Corps.C. § 15903.07]

b. [5:302] **No authority to act for partnership:** A limited partner is primarily a passive investor. In contrast to general partners, limited partners have no right or power to act for or bind the partnership. [Corps.C. § 15903.02]

(1) [5:303] **Compare—power to act by agreement:** Although a limited partner has no authority *as a limited partner* to act for or bind the partnership, the limited partner may act for the partnership in another capacity—e.g., as an agent pursuant to a separate agreement. Also, the partnership agreement may allocate managerial rights to one or more limited partners *as a matter of contract*. [Corps.C. § 15903.02, "Uniform Limited Partnership Act Comment" (*see* ¶ *5:19*)]

Caution: Care must be exercised in delegating powers to a limited partner in order to avoid granting any "control" over the limited partnership's business to the limited partner and thereby jeopardizing his or her status as a limited partner. *See* ¶ *5:320*.

(2) [5:304] **Limited partner's knowledge not attributed to partnership:** The fact that a limited partner has no power to bind the partnership as a limited partner means that information possessed by a limited partner is not attributed to the partnership (except when the limited partner is also a general partner, ¶ 5:33). [Corps.C. § 15903.02, "Uniform Limited Partnership Act Comment" (*see* ¶ *5:19*); see Corps.C. § 15901.03(h) (limited partner's knowledge of "notification" relating to limited partnership not effective as knowledge of limited partnership)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

c. [5:305] **Limited duties/obligations to partnership and other partners:** A limited partner does *not* have any fiduciary duty to the partnership or any other partner solely by reason of being a limited partner. [Corps.C. § 15903.05(a); see *Mission West Properties, L.P. v. Republic Properties Corp.* (2011) 197 CA4th 707, 716, 129 CR3d 14, 22, fn. 8—"In general, the absence of any responsibility for management of partnership business makes it unlikely that a partner will incur a fiduciary duty to the partnership and partners"]

But a limited partner must discharge any duties to the partnership and the other partners and exercise any rights consistently with the obligation of good faith and fair dealing. [Corps.C. § 15903.05(b); see *Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 CA3d 1139, 1150, 265 CR 330, 335 (*discussed at ¶ 5:307 ff.*)]

Also, a limited partner does not violate any duty or obligation merely because the limited partner's conduct furthers the limited partner's own interest. [Corps.C. § 15903.05(c)]

(1) [5:306] **"Good faith and fair dealing":** Good faith and fair dealing is *not* a fiduciary duty. Limited partners may properly exercise discretion (e.g., in voting on partnership matters put to a vote of the limited partners) even when another partner suffers as a consequence. [Corps.C. § 15903.05, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(2) [5:307] **Application:** A limited partner was also a member of a law firm that acted as counsel to affiliates of the general partner. The limited partner and the law firm used their knowledge of the limited partnership's confidential information to purchase land that was adjacent to land owned by the limited partnership and that the partnership was seriously pursuing for the purpose of developing a single large project on both parcels. In finding that there was a triable factual issue whether the limited partner breached a fiduciary duty to the limited partnership, the court also relied upon the attorney-client relationship between the limited partner's law firm and the limited partnership's affiliates. "The attorney/client relationship is a fiduciary one, binding the attorney to the most conscientious fidelity." [*Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg* (1989) 216 CA3d 1139, 1150, 265 CR 330, 335]

[5:308 - 5:310] ***Reserved.***

(3) [5:311] **Comment:** The purpose of Corps.C. § 15903.05 is not apparent, other than perhaps to negate any broad reading of the holding in *Tri-Growth Centre City,* supra, that limited partners owe fiduciary duties to their limited partnership. *Tri-Growth* stands only for the proposition that a limited partner may owe fiduciary duties to the limited partnership by reason of the limited partner's *other* activities involving the limited partnership, and not by reason solely of his or her status as a limited partner.

In addition, in view of the fact that a limited partner has no right or power to act for or bind a limited partnership (Corps.C. § 15903.02), the purpose of Corps.C. § 15903.05(b) and Corps.C. § 15903.05(c) is not apparent either. The NCCUSL Drafting Committee (*see ¶ 5:14*) cites, as the source of Corps.C. § 15903.05(b) and (c) (*see ¶ 5:305*), RUPA § 404(d) and (e), but those provisions address the duties of the *general* partners of a *general* partnership to the other general partners, not the fiduciary duties of *limited* partners of a *limited* partnership to the limited partnership or to the other partners of the limited partnership. [See Corps.C. § 15903.05, "Uniform Limited Partnership Act Comment" (¶ 5:19)]

In any event, the LP Act is explicit that "[n]othing in this act shall be construed to affect or overturn any decision of law or existing statute regarding the liability of limited partners." So, by its terms, the LP Act does not modify the holding in *Tri-Growth Centre City, Ltd*., supra, that a limited partner, by reason of the limited partner's *other* activities, may have fiduciary duties to fellow partners. [Stats. 2006, Ch. 495, § 37]

(4) [5:312] **Compare—fiduciary duty arising from management role under partnership agreement:** The partnership agreement may give significant managerial authority to a limited partner. In that case, the limited partner has the obligation of good faith and fair dealing arising from contract, and may, depending on the extent of the authority granted to the limited partner, owe fiduciary duties to the limited partnership by reason of the grant of authority or as an agent under agency principles. [Corps.C. § 15903.05(c), "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

[5:313 - 5:319] ***Reserved.***

d. [5:320] **Participation in management as creating risk of personal liability for partnership obligations:** A limited partner is normally not liable for partnership debts; rather, the limited partner's liability is restricted to their investment in the partnership and share of undistributed profits. However, a limited partner who *participates in control* of the partnership business may be personally liable to creditors who *actually knew* of such participation at the time of extending credit and

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

who, based on the limited partner's conduct, *reasonably believed* the limited partner to be a *general* partner. [Corps.C. § 15903.03(a); see *Broffman v. Newman* (1989) 213 CA3d 252, 259, 261 CR 532, 537, fn. 2]

(1) [5:321] **Activities *not constituting participation in management:*** The LP Act does not define what constitutes “participation in the control of the business” so as to make limited partners personally liable to creditors who reasonably believe them to be general partners. However, it does set forth a nonexclusive list of a number of activities that do *not* constitute such participation. These activities include:

- Acting as an employee, agent or independent contractor for the partnership or a general partner;
- Being an officer, director or shareholder of a corporate general partner;
- Being a member, manager or officer of an LLC that is a general partner;
- Being a limited partner of a partnership that is a general partner;
- Being a beneficiary, or a trustee, executor or other administrator, of an estate or trust (including a business trust) that is a general partner;
- Consulting with and advising a general partner on partnership business, or serving on a committee that approves actions of the general partner;
- Being a partnership creditor or debtor, or supplying collateral for the partnership, or guaranteeing partnership debt;
- Approving or voting on various fundamental matters, such as merger, conversions and amendments to the partnership agreement;
- Voting on, proposing, calling or participating in a meeting of general or limited partners;
- Winding up the partnership after dissolution;
- Serving on an audit or similar committee, or a committee approving actions of the general partner;
- Taking any action to bring or terminate a derivative action; and
- Serving as an officer, director, stockholder, partner, member, manager, agent or employee or any person in which the partnership has an interest. [Corps.C. § 15903.03(b), (c); *Gruendl v. Oewel Partnership, Inc.* (1997) 55 CA4th 654, 658-659, 64 CR2d 217, 219-220]

(2) [5:322] **Potential liability where limited partner mistaken for general partner:** An investor who “erroneously but in good faith” believes they are a limited partner may nonetheless be liable as a general partner to a third party that enters into a transaction with the partnership in the good faith belief that the investor is a general partner. [Corps.C. § 15903.06(b)]

(a) [5:323] **Correction of erroneous status as general partner:** The investor is not liable to the third party, or to other persons for the partnership's obligations, if the investor, on ascertaining the mistake, causes to be filed an appropriate certificate of limited partnership, amendment or certificate of correction. If the investor is unable to cause such a filing despite a “diligent effort in good faith,” the investor may withdraw from the partnership by filing a certificate of withdrawal (on a form prescribed by the Secretary of State). Such withdrawal does not result in liability for breach of an agreement with others who are or agreed to become co-owners of the business. [Corps.C. §§ 15902.04(a)(12), 15903.06(a), (c)]

- ***FORM:*** The Secretary of State's standard form Certificate of Withdrawal (Form LP-102) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(3) [5:324] **Liability for tortious conduct:** A limited partner's limited liability does not shield the limited partner from liability to a third party injured by the limited partner's participation in tortuous conduct. [Corps.C. § 15903.03(a)]

(4) [5:325] **Potential alter ego liability:** Pursuant to the alter ego doctrine applicable to corporations and LLCs, shareholders or LLC members may be liable for the entity's debts where (a) there is such a unity of interest and ownership that the separate personalities of the entity and the owners no longer exist, and (b) an inequitable result will follow if the owners were allowed to escape personal liability for the debts. [See *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 CA4th 811, 815-816, 166 CR3d 421, 425; *Greenspan v. LADT, LLC* (2011) 191 CA4th 486, 510-511, 121 CR3d 118, 137; *JPV I L.P. v. Koetting* (2023) 88 CA5th 172, 189, 304 CR3d 550, 564; *see also* ¶ *6:214*]

The alter ego doctrine can apply to limited partnerships. Thus, where limited partners assume an active management role and disregard the limited partnership's separate existence to the detriment of the limited partnership and its creditors, the limited partners may become *personally liable* for the limited partnership's debts. [See *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 CA4th 811, 815-816, 166 CR3d 421, 424-425]

(a) [5:325.1] **Comment:** The facts in *Relentless Air Racing*, supra, were very unusual. The limited partnership had only two limited partners, a husband and wife, who were also the sole officers and directors of the corporate general partner. The couple almost never held formal meetings, and transferred money out of the limited partnership at will to pay their personal expenses to the point that the limited partnership was left with virtually no assets to meet creditors' claims. [*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 CA4th 811, 813-816, 166 CR3d 421, 423-425]

(b) [5:325.2] **Amending judgment to add alter ego as judgment debtor:** Upon motion, a judgment against the limited partnership may be amended to add as a judgment debtor a *nonparty* alter ego who *controlled* the underlying litigation and whose interests were therefore represented in the lawsuit. This is an "equitable procedure" based on the theory that, because the alter ego controlled the underlying litigation to represent its own interests, the court is simply inserting the "correct name of the real defendant" rather than adding a "new defendant." [*Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership* (2013) 222 CA4th 811, 815-816, 166 CR3d 421, 424-425; *JPV I L.P. v. Koetting* (2023) 88 CA5th 172, 189-190, 304 CR3d 550, 564-565; *see* ¶ *6:215*]

Cross-refer: For a comprehensive discussion of the alter ego doctrine, see Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 2.

e. [5:326] **Guaranty of partnership debt—limited partners' equitable contribution according to ownership interest:** Where *all* limited partners guarantee partnership debt in their capacity as limited partners and one or more partners who paid on the guaranty seek contribution from the other partners, the partners' proportionate obligation for contribution is based upon the partners' *ownership interest* in the limited partnership (unless there is express agreement governing contribution rights). This is so whether the partners signed as co-makers or guarantors. Allocating contribution equally among guarantors whose interest in the partnership varied widely would be "palpably unjust." [*Jans v. Nelson* (2000) 83 CA4th 848, 851, 858-861, 100 CR2d 106, 108, 114-115]

(1) [5:327] **Adjustment for insolvent guarantors:** The ownership interests of any insolvent partners must be disregarded when calculating the solvent partners' ownership interest. Thus, absent some other agreement among the co-guarantors, a solvent partner's equitable contribution will be proportionate to the solvent partner's adjusted (increased) percentage of ownership. [*Jans v. Nelson* (2000) 83 CA4th 848, 851, 100 CR2d 106, 108]

[5:328] ***Reserved.***

f. Right to information

(1) [5:329] **Information needed to provide consent:** Whenever a limited partner has the right to give or withhold consent to a matter, the partnership must provide the limited partner with all information material to the limited partner's decision that the partnership knows. [Corps.C. § 15903.04(j)]

(a) [5:330] **Partnership's "knowledge" of information:** The duty to provide information applies only to known, material information. The NCCUSL Drafting Committee (*see* ¶ *5:14*) observes that the disclosure duty applies even if the partnership does not know that the information is material. (Stated otherwise, the obligation to disclose material information concerning a matter put before the limited partners is an *objective* one rather than a subjective one.) [See Corps.C. § 15903.04, "Uniform Limited Partnership Act Comment—Subdivision (i)" (should be Subdivision (j)) (¶ 5:19)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

The partnership is deemed to know what the general partners know. It may also be deemed to know information known by the individual conducting the transaction for the partnership. [Corps.C. § 15903.04, "Uniform Limited Partnership Act Comment—Subdivision (i)" (should be Subdivision (j)) (¶ 5:19); see Corps.C. § 15901.03(g)]

(2) [5:331] **"Charter" documents, tax returns, financial statements:** A limited partner has the right to inspect and copy, during regular business hours, any information required by Corps.C. § 15901.11 (¶ 5:265 ff.) to be maintained at the partnership's principal office. The demand must be in writing, electronic or similar means made at least 10 days in advance of the desired inspection. The limited partner need not have any particular purpose for seeking the information. [Corps.C. § 15903.04(a)]

(3) [5:332] **Other information regarding partnership:** A limited partner has the right to inspect and copy "full" information regarding the state of the partnership's activities and financial condition "and other information regarding the activities of the limited partnership as is just and reasonable" if:

• The limited partner seeks the information for a purpose reasonably related to the partner's interest as a limited partner;

• The limited partner makes a demand in writing, electronically or by similar means describing with reasonable particularity the information sought and the purpose for seeking the information; *and*

• The information sought is directly connected to the limited partner's purpose. [Corps.C. § 15903.04(b)]

The inspection may be made during regular business hours at a reasonable location specified by the partnership. Alternatively, the information may be transmitted electronically to the limited partner. [Corps.C. § 15903.04(b)]

(a) [5:333] **Good faith requirement:** Although Corps.C. § 15903.04(b) does not expressly impose a good faith requirement on the limited partner's demand, the limited partner's general obligation of good faith and fair dealing with respect to the partnership (Corps.C. § 15903.05(b), ¶ 5:305) nonetheless applies. [Corps.C. § 15903.04, "Uniform Limited Partnership Act Comment—Subsection (b)" (*see ¶ 5:19*)]

In view of the fact that information requested by a limited partner pursuant to Corps.C. § 15903.04(b) is subject to a "just and reasonable" test and other standards imposed by Corps.C. § 15903.04(b) (¶ 5:332), it is difficult to see what this "good faith" requirement adds.

(b) [5:334] **Partnership's response:** Within 10 days after receiving the demand, the partnership must inform the limited partner in writing, electronically or by similar means, what information will be provided and when and where the information will be provided. If the partnership declines to provide all or some of the information, it must state its reasons for so declining. [Corps.C. § 15903.04(c)]

(4) [5:335] **Confidential information:** The partnership may withhold from disclosing to its limited partners any information that the partnership "reasonably believes to be in the nature of trade secrets or other information the disclosure of which the limited partnership in good faith believes is not in the best interest of the limited partnership or could damage the limited partnership or its business." Information required to be kept confidential by law or by agreement with a third party may also be withheld. [Corps.C. § 15903.04(g)]

(a) [5:336] **Comment:** This provision, together with the use restrictions that may be imposed by a general partner on information supplied to the limited partners (Corps.C. § 15903.04(h), ¶ 5:341), was enacted in 2006 and operative January 1, 2008. No such restrictions were included in the predecessor statute (CRLPA) or in the corresponding provisions of California's current or past LLC acts. [See former Corps.C. § 15634 (CRLPA); see also Corps.C. § 17704.10 (CRULLCA); former Corps.C. § 17106 (Beverly-Killea LLC Act)]

The source of Corps.C. § 15903.04 is Model ULPA § 304. However, Corps.C. § 15903.04(*g*) was added by the California Drafting Committee (*see ¶ 5:14*). Overall, the "Uniform Limited Partnership Act Comment" to § 15903.04 is that of the NCCUSL Drafting Committee (*see ¶ 5:14*). But the terse explanation of subsection (g)—"The limited partnership may keep trade secrets confidential from its limited partners"—is actually that of the California Drafting Committee. The California Drafting Committee does not otherwise explain the addition of this subsection (g) to § 15903.04. [See Corps.C. § 15903.04, "Uniform Limited Partnership Act Comment—Subsection (g)" (*see ¶ 5:19*)]

While the California Drafting Committee states that Corps.C. § 15903.04(g) permits a limited partnership to keep "trade secrets" confidential, § 15903.04(g) actually goes far beyond that by permitting the "limited partnership" to refuse to disclose any other information the "limited partnership" concludes in good faith is not in the best interest

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

of the limited partnership or could damage the limited partnership or its business. The reference to the "limited partnership" is also odd, because the limited partnership entity includes both the general and limited partners. As noted by the NCCUSL Drafting Committee, decisions made under Corps.C. § 15903.04(b) are to be made by the *general* partner(s), and *not* by the general partner(s) and limited partners jointly pursuant to whatever provisions the partnership agreement provides for actions to be taken by the limited partnership. [See Corps.C. § 15903.04, "Uniform Limited Partnership Act Comment—Subsection (h)" (*see ¶ 5:19*)]

(5) [5:337] **Includes information possessed by partnership's attorney:** The fact that partnership information is in the possession of the partnership's attorney does not thwart a limited partner's information and inspection rights. Although the attorney-client *privilege* may limit or bar disclosure to the limited partner, the privilege "will not bar disclosure of matters related to a partnership business simply because such business was conducted through a law firm." [*McCain v. Phoenix Resources, Inc.* (1986) 185 CA3d 575, 580-581, 230 CR 25, 28]

(6) [5:338] **No required financial statements:** In contrast to prior law (¶ 5:338.1) and the law governing limited liability companies (¶ 5:338.2), there is no requirement under the LP Act that the general partners provide financial statements to the limited partners. Limited partners are permitted, on demand, to inspect the information required to be maintained by a limited partnership under Corps.C. § 15901.11 (¶ 5:265 ff.), but that section requires a limited partnership only to *maintain* "any" financial statement of the limited partnership for the six most recent years; it does *not* require the limited partnership to prepare any financial statements. (Tax returns, of course, must be prepared, filed and maintained pursuant to the Internal Revenue Code and the California Revenue and Taxation Code.)

(a) [5:338.1] **Compare—prior law:** Under the predecessor statute (CRLPA, ¶ 5:13), the general partner(s) of a limited partnership with more than 35 limited partners were required to provide to the limited partners an annual report, containing a balance sheet as of the end of the fiscal year and an income statement and statement of changes in financial condition for the fiscal year. The annual report was to be sent not later than 120 days after the close of the fiscal year. [Former Corps.C. § 15634]

In addition, holders of at least 5% of the limited partners' interests could make a written request to the general partner(s) for an income statement for the initial three-month, six-month or nine-month period of the current fiscal year, and a balance sheet as of the end of each such period. The general partner(s) were then obligated to deliver or mail the statement(s) within 30 days thereafter. [Former Corps.C. § 15634]

The financial statements were to be accompanied by a report of the partnership's independent accountants or, if there was no such report, by a general partner's certificate that the financial statements had been prepared without audit from the partnership's books and statements. [Former Corps.C. § 15634]

(b) [5:338.2] **Compare—LLCs:** Requirements similar to those imposed on limited partnerships under prior law (¶ 5:338.1) are imposed under current LLC law, and were imposed under the prior LLC law, upon an LLC manager. [Corps.C. § 17704.10(c); former Corps.C. § 17106(c) (Beverly-Killea LLC Act)]

(c) [5:338.3] **Comment:** While the NCCUSL and California Drafting Committees (*see ¶ 5:14*) made extensive comments on the partners' access to partnership information (see Corps.C. § 15903.04, ¶ 5:329 ff.), the California Drafting Committee does not comment on or otherwise explain why the LP Act omitted any requirement to provide financial statements to the limited partners. Presumably, the explanation is that if limited partners want financial statements, they can bargain for that in the partnership agreement.

(7) [5:339] **Dissociated limited partner's right to information:** Following a demand made in a writing or electronically (or by comparable form), a person dissociated as a limited partner may inspect and copy, during reasonable business hours in the partnership's principal office, "required information" (¶ 5:339.1) if:

• The information pertains to the period when the person was a limited partner;

• The person seeks the information in good faith;

• The information is sought for a purpose reasonably related to the person's interest as a former limited partner; and

• The demand describes with reasonable particularity the information sought and the purpose for seeking the information, and the information sought is directly related to that purpose. [Corps.C. § 15903.04(d)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(a) [5:339.1] **“Required information”:** “Required information” is only the information that the partnership is required to maintain per Corps.C. § 15901.11 at its principal office (list of partners, copies of agreement and certificate of limited partnership, tax returns, partner voting/consent records, etc.; *see ¶ 5:265 ff.*). This contrasts with the more complete information that a current limited partner is entitled to receive per Corps.C. § 15903.04(b) (“full” information regarding the limited partnership's activities and financial condition, ¶ 5:332). This difference is deliberate. [Corps.C. § 15901.02(ad); see Corps.C. § 15903.04(d), “Uniform Limited Partnership Act Comment—Subsection (d)” (¶ 5:19)]

(b) [5:340] **Partnership's response:** Within 10 days after receiving the demand, the partnership must inform the former limited partner in writing, electronically or by similar means what information will be provided and when and where the information will be provided. If the partnership declines to provide all or some of the information, it must state its reasons for so doing. [Corps.C. § 15903.04(c), (e)]

(8) [5:341] **Reasonable restrictions permitted:** The partnership may impose reasonable restrictions on a current or dissociated limited partner's use of information obtained pursuant to a demand. The burden of proving reasonableness is on the partnership. [Corps.C. § 15903.04(h)]

(a) [5:342] **General partner to determine restrictions:** The NCCUSL Drafting Committee (¶ 5:14) notes that the restrictions need not be in the partnership agreement; the partnership itself has the power to impose restrictions as part of its general business powers. The general partner has the authority to impose reasonable restrictions, although presumably that authority can be modified pursuant to the partnership agreement. [Corps.C. § 15903.04, “Uniform Limited Partnership Act Comment—Subsection (h)” (*see ¶ 5:19*)]

(b) [5:343] **“Reasonableness”:** The NCCUSL Drafting Committee (*see ¶ 5:14*), in its note to Model Act § 304(g) (the source of Corps.C. § 15903.04(h)), suggests that, in assessing the reasonableness of restrictions imposed by a general partner on the use of information, a court might consider:

• The danger or other problem the restriction seeks to avoid;

• The purpose for which the information is sought; and

• Whether, in light of both the problem and the purpose, the restriction is reasonably tailored. [Corps.C. § 15903.04, “Uniform Limited Partnership Act Comment—Subsection (h)” (*see ¶ 5:19*)]

1) [5:344] **Limited partners' names and addresses:** According to the NCCUSL Drafting Committee (*see ¶ 5:14*), a restriction on the use of the limited partners' names and addresses is not per se unreasonable, although the NCCUSL Drafting Committee does not indicate what restrictions would be reasonable. Clearly, prohibiting a limited partner from using the other partners' names and addresses to communicate with them concerning the partnership's business would be *unreasonable*, whereas prohibiting a limited partner from using the other partners' names and addresses for a personal commercial purpose (e.g., soliciting insurance business for a limited partner who is also an insurance broker) would be *reasonable*. [Corps.C. § 15903.04, “Uniform Limited Partnership Act Comment—Subsection (h)” (*see ¶ 5:19*); *see also* ¶ 5:336]

(9) [5:345] **Copying charges:** A partnership may charge current or dissociated limited partners reasonable copying costs, limited to the costs of labor and material. [Corps.C. § 15903.04(i)]

(10) [5:346] **Examination by attorney:** A current or dissociated limited partner's right to information may be exercised through an attorney or other agent. The right may also be exercised by the legal representative of an *individual* current or dissociated limited partner who is under a legal disability. [Corps.C. § 15903.04(k), (*l*)]

(11) [5:347] **Transferee not entitled to information:** A transferee of a current or dissociated limited partner does not have the rights to information granted to Corps.C. § 15903.04. [Corps.C. § 15903.04(*l*)]

(a) [5:348] **Exception for deceased limited partner:** A deceased limited partner's legal representative may exercise the rights of a transferee (Corps.C. § 15907.02, ¶ 5:493 ff.) and, for the purposes of settling the estate, may exercise a current limited partner's information rights. [Corps.C. § 15903.04(f); see Corps.C. § 15907.04]

(12) [5:349] **Caution—power of partnership agreement to limit access to records:** The limited partnership agreement may not “unreasonably restrict” the partners' rights regarding partnership records, but it may impose “reasonable restrictions” on the availability and use of information obtained therefrom; *see ¶ 5:55*.

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(13) [5:350] **Enforcement by court order:** A limited partner denied a request for information or inspection may seek a court order enjoining the general partners and other persons who possess information to grant the request. [*McCain v. Phoenix Resources, Inc.* (1986) 185 CA3d 575, 581, 230 CR 25, 28-29 (decided under prior law)]

(a) [5:351] **Compare—prior law and LLC law:** In contrast to prior law (CRLPA, ¶ 5:13) and to the laws governing limited liability companies (*see ¶ 6:640*), the LP Act does not include a provision specifically permitting limited partners to seek a court order to enforce the limited partnership's obligations to provide information pursuant to Corps.C. § 15903.04. [See former Corps.C. § 15634(f), (g) (CRLPA); see also Corps.C. § 17704.10(f), (g) (CRULLCA); former Corps.C. § 17106(f), (g) (Beverly-Killea LLC Act)]

Indeed, prior law (and both current and prior law governing limited liability companies, *see ¶ 6:643*) granted the Attorney General power to enforce the information rights to which limited partners are entitled. [See former Corps.C. § 15635; see also Corps.C. § 17704.10(j), (k) (CRULLCA); former Corps.C. § 17107 (Beverly-Killea LLC Act)]

It is not known why prior law was changed in this regard. Presumably, a limited partner may seek an enforcement order pursuant to the court's general equitable powers, as permitted in *McCain v. Phoenix Resources, Inc.*, supra.

[5:352 - 5:359] ***Reserved.***

g. [5:360] **Voting and consent rights:** One of the challenges in dealing with the LP Act is finding the provisions that address the limited partners' voting and consent rights. Unfortunately, in contrast to prior law (*see ¶ 5:361.1*), there is no one section that addresses these rights. Instead, they are scattered throughout the LP Act.

Unless the partnership agreement provides otherwise, the consent of limited partners is required to:

- Amend the partnership agreement. [Corps.C. § 15904.06(b)(1), ¶ 5:120]
- Sell, lease, exchange or otherwise dispose of all, or substantially all, of the limited partnership's property, other than in the usual and ordinary course of the limited partnership's business. [Corps.C. § 15904.06(b)(2), ¶ 5:203.2]
- Admit a general or limited partner. [Corps.C. §§ 15903.01(c), 15904.01(d), ¶ 5:200, 5:300]
- Compromise a partner's obligation to make a capital contribution or return an improperly made distribution. [Corps.C. § 15905.02(c), ¶ 5:438]
- Expel a general partner in the circumstances set forth in Corps.C. § 15906.03(d). [Corps.C. § 15906.03(d), ¶ 5:575]
- Use partnership property to redeem a transferable interest that is subject to a charging order. [Corps.C. § 15907.03(c)(3), ¶ 5:504]
- Dissolve the partnership. [Corps.C. § 15908.01(b), (c)(2)(A), ¶ 5:634 ff.]
- Avoid dissolution and appoint a successor general partner following the dissociation of the sole general partner. [Corps.C. § 15908.01(c)(2)(A), ¶ 5:638]
- Appoint a person to wind up the partnership's business when there is no general partner. [Corps.C. § 15908.03(c), ¶ 5:663]

Additionally, the limited partners have the right to approve a conversion or merger, and the partnership agreement may *not waive* this right. [Corps.C. §§ 15911.03(b) (conversion), 15911.12(a) (merger); see Corps.C. § 15901.10(b)(12)]

(1) [5:361] **Compare—removal of general partner:** The LP Act does not grant the limited partners the right to remove the general partner (other than in the limited circumstances set forth in Corps.C. § 15906.03(d), ¶ 5:575). If the limited partners are to be granted that right, it must be set forth in the partnership agreement.

(2) [5:361.1] **Compare—prior law:** Prior law (CRLPA, ¶ 5:13) conveniently included the limited partner's voting rights in one section. These rights were "default" rights that could be modified or even eliminated by the partnership agreement. They included the right to vote on the following matters:

- Dissolution and winding up of the limited partnership;

• Merger of the partnership, or the sale, exchange, lease, mortgage, pledge or other transfer of, or grant of a security interest in, all or a substantial part of the partnership's assets, other than in the ordinary course of business;

• Incurrence of partnership debt other than in the ordinary course of business;

• A change in the nature of the partnership's business;

• Transactions implicating an actual or potential conflict of interest between the general and the limited partner(s) (or between the general partner(s) and the partnership);

• Continuation of the partnership business after a general partner ceases to be a general partner (other than in specified circumstances);

• Removal of a general partner; and

• Admission of a new general partner after a general partner ceases to be a general partner and there is no remaining general partner. [Former Corps.C. § 15636(f); see former Corps.C. § 15618 (permitting "default" provisions to be varied by partnership agreement except where expressly proscribed by CRLPA)]

h. [5:362] **Limited partner not a party to third-party partnership litigation:** A limited partnership is an entity separate and apart from its *limited* partners for the purpose of *suing and being sued*. Thus, a limited partner is not a proper party to a proceeding by or against the partnership by a third party. (But a *general partner* may be joined in an action against the limited partnership or named in a separate action.) [Corps.C. § 15904.05(a); *Evans v. Galardi* (1976) 16 C3d 300, 311, 128 CR 25, 34; *Sacramento Suncreek Apts., LLC v. Cambridge Advantaged Properties II, L.P.* (2010) 187 CA4th 1, 13, 113 CR3d 661, 670]

[5:363 - 5:369] ***Reserved.***

3. [5:370] **Partner's Action Against Partnership:** Like corporate shareholders, partners in a limited partnership may bring direct actions against the partnership or derivative actions against third parties in the partnership's name. [Corps.C. §§ 15910.01, 15910.02]

(*Caution:* The limited partnership agreement may not "unreasonably restrict" a partner's right to bring a direct or derivative action; *see* *¶ 5:66*.)

a. [5:371] **Direct action:** General and limited partners may bring a direct action against the partnership seeking legal or equitable relief to enforce their rights and interests as partners. A direct action by a partner against a partnership, like a direct action by a shareholder against a corporation, requires an actual or threatened injury to the *partners* rather than to the limited partnership. A limited partner may suffer an injury to its interest without the occurrence of any injury to the limited partnership or its assets because the interest of a limited partner in a partnership is separate and apart from the partnership's ownership interest in its assets. [Corps.C. § 15910.01(a), (b); see *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 428, 8 CR3d 31, 44]

(1) [5:372] **Nature of action:** A partner does not have a direct claim against another partner merely because the other partner breached the partnership agreement. Nor does every partner automatically have a direct claim against another partner for a violation of the limited partnership law. Rather, a partner bringing a direct action must show harm to himself or herself *independent of any harm to the partnership*. [Corps.C. § 15910.01, "Uniform Limited Partnership Act Comment" (*see* *¶ 5:19*)]

(2) [5:373] **Example:** The general partner of a real estate limited partnership effected a merger in which the limited partners' interests were liquidated or cashed out. The general partner retained an equity interest in the postmerger entity, which then sold the limited partnership's assets to third parties for more than the assets were valued in the cash-out and merger. The plaintiff limited partner's claim against the general partner—that the merger transaction harmed the limited partner by undervaluing its partnership interest or by depriving it of the future earnings and growth generated by the limited partnership's assets—was *individual* in nature. The claim was not derivative because it was not based on any injury to

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

the limited partnership or its assets, both of which survived the merger transaction intact. [*Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 415-416, 8 CR3d 31, 33]

b. [5:374] **Derivative action:** In contrast, a derivative action is an action by a general or limited partner to enforce a right of the *partnership*—i.e., to redress actual or threatened harm to the *partnership* that the partnership *refuses to enforce*. Any recovery received in the action belongs to the *partnership* and not to the derivative plaintiff (but the plaintiff partner may be awarded reasonable attorney fees and expenses from any recovery received by the partnership; *see ¶ 5:389*). [Corps.C. §§ 15910.02, 15910.05; see *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 425, 8 CR3d 31, 41; *Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 CA4th 1446, 1449, 27 CR2d 834, 836]

(1) [5:375] **Example:** Thus, a limited partner may file a derivative action against general partners who engage in self-dealing and breach of fiduciary duties by leasing partnership property to themselves without paying rent to the limited partnership. [*Wallner v. Parry Professional Bldg., Ltd.* (1994) 22 CA4th 1446, 1449, 27 CR2d 834, 836; see *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 425-427, 8 CR3d 31, 41-43 (discussing analogous cases involving corporate derivative actions)]

(2) [5:375.1] **Principles governing corporate derivative actions apply:** The principles that govern derivative actions involving corporations also apply to limited liability companies and limited partnerships. [*Schrage v. Schrage* (2021) 69 CA5th 126, 150, 284 CR3d 279, 300; *Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 425-426, 8 CR3d 31, 41-42; *PacLink Communications Int'l, Inc. v. Sup.Ct. (Yeung)* (2001) 90 CA4th 958, 963, 109 CR2d 436, 439]

Cross-refer: For a discussion of shareholder derivative actions in the corporations context, see Friedman, Soza & Jann, *Cal Prac. Guide: Corporations* (TRG), Ch. 6. For a discussion of derivative actions involving limited liability companies, *see* ¶ 6:711 ff.

(3) [5:376] **Parties:** Like a derivative suit by a corporate shareholder, a limited partner's derivative suit is filed in the name of a limited partner as plaintiff. The limited partnership is named as a defendant even though the limited partnership, and not the individual limited partner, derives the benefits of the action. [*Everest Investors 8 v. McNeil Partners* (2003) 114 CA4th 411, 425, 8 CR3d 31, 40; *Wallner v. Parry Professional Bldg., Ltd*. (1994) 22 CA4th 1446, 1449, 27 CR2d 834, 836]

(a) [5:377] **No loss of limited liability:** A limited partner's acts in bringing or terminating a derivative action do not constitute participation in management that would jeopardize the limited partner's limited liability. [Corps.C. § 15903.03(b)(11), ¶ 5:321]

(4) [5:378] **Restrictions on plaintiff:** To bring a derivative action, the partner must be a partner both *at the time the action is commenced* and *at the time of the conduct giving rise to the action*. (But this latter requirement may be satisfied where plaintiff's status as a partner devolved upon plaintiff by operation of law or pursuant to the partnership agreement from a person that was a partner at the time of the misconduct—e.g., plaintiff may be the legal representative of a deceased person who was a partner at the time of the misconduct.) [Corps.C. § 15910.03(a); see *Jones v. Wells Fargo Bank* (2003) 112 CA4th 1527, 1534, 5 CR3d 835, 840-841]

(a) [5:379] **Alternative upon court order:** But a person who does not meet the foregoing requirements may nevertheless bring a derivative action where:

• There is a *strong prima facie case* in favor of the claim;

• No other similar action has been or is likely to be instituted;

• The person acquired their partnership interest before the misconduct was *disclosed* to plaintiff *and* to the public;

• Defendant may retain a gain derived from *willful breach of a fiduciary duty* unless the action can be maintained; *and*

• The requested relief will not *unjustly enrich* the partnership or any partner. [Corps.C. § 15910.03(b)]

1) [5:380] **Comments:** The NCCUSL Drafting Committee's citation of Revised Uniform Limited Partnership Act § 1002 as the source of Corps.C. § 15910.03 is incorrect; the source is former Corps.C. § 15702(a)(1) (CRLPA). [See Corps.C. § 15910.03, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

Also, these conditions are so onerous that it is highly unlikely the provision will ever be invoked.

(5) [5:381] **Demand prerequisite:** Before bringing a derivative action, plaintiff must first make a demand on the general partners requesting that they cause the *partnership* to bring an action against a third party to enforce the partnership's

interest. The derivative action can then be brought only if the general partners do not bring the action for and on behalf of the partnership *within a reasonable time*. [Corps.C. § 15910.02(1)]

Alternatively, no demand need be made where plaintiff shows a demand would be *futile*. [Corps.C. § 15910.02(2)]

(a) [5:382] **Demand alleged in complaint:** The complaint in a derivative action *must* state *with particularity* either (i) the date and content of plaintiff's demand and the general partner's response to the demand or (ii) why a demand is excused as futile. [Corps.C. § 15901.04]

(6) [5:383] **Bond requirement:** The partnership or a general partner may bring a motion for an order requiring the derivative plaintiff to furnish a bond to cover the partnership's anticipated costs in defending the action. [Corps.C. § 15910.06(a)]

(a) [5:384] **Time for bringing motion:** The motion (which requires notice on all other parties) must be brought within *30 days* after service of process upon the partnership or the general partner (but the court, for good cause shown, may grant an application to bring the motion up to 60 days beyond the original due date of the motion). The motion automatically stays prosecution of the entire action (i.e., no further pleadings need be filed by the partnership or any other defendant) until 10 days after the motion has been disposed of. [Corps.C. § 15910.06(a), (b), (d)]

(b) [5:385] **Grounds for motion:** The motion must show that there is *no reasonable possibility* that prosecution of the claim alleged in the complaint will benefit the partnership or its partners. [Corps.C. § 15910.06(a)(1)]

Alternatively (or additionally), a moving party that is a general *partner* may show that the general partner did not participate in the transaction complained of in any capacity. [Corps.C. § 15910.06(a)(2)]

(c) [5:386] **Hearing on motion:** A hearing on the motion is required, at which time the court must consider evidence material to (i) the ground on which the motion is based *or* (ii) a determination of the probable reasonable expenses, including attorney fees, that the partnership and the general partner will likely incur in defense of the action. [Corps.C. § 15910.06(b)]

(d) [5:387] **Determination of motion:** If the court determines that the moving party has established "a *probability*" (*see ¶ 5:388.1*) in support of its ground for bringing the motion, the court must fix the amount of the bond to be furnished by plaintiff to cover reasonable attorney fees and other expenses that the moving party and the partnership may incur in connection with the action. The maximum amount of the bond is *$50,000* and must be furnished within a reasonable time as the court fixes. Failure to furnish the bond by that time results in *dismissal* of the action. [Corps.C. § 15910.06(b) (emphasis added)]

(e) [5:388] **Dismissal of motion upon pre- or post-motion payment of bond:** Plaintiff may preclude the motion by furnishing a $50,000 bond before the motion is brought. The furnishing of the bond after the motion is brought results in dismissal of the motion. [Corps.C. § 15910.06(c)]

(f) [5:388.1] **Comment:** Corps.C. § 15910.06 is taken from former Corps.C. § 15702(b) (CRLPA). The California Drafting Committee (*see ¶ 5:14*) mistakenly cites former Corps.C. § 17501 (Beverly-Killea LLC Act) as the source of § 15910.06, although all three sections are virtually identical. [See Corps.C. § 15910.06, "California Code Comment"]

These sections are in turn derived from Corps.C. § 800, including the provision that the moving party must establish "a probability" in support of the grounds for its motion (¶ 5:387). Although none of these Code sections nor any reported California cases describe what is meant by "a probability" in this context, the most sensible reading is that "a probability" means *more likely than not*—i.e., a *more-than-50%* chance.

Where the motion is based upon Corps.C. § 15910.06(a)(1) (¶ 5:385), the moving party must show "a probability" that "there is no reasonable possibility" that the claim will benefit the partnership or its partners. A sensible reading of these two provisions together is that the court must find that it is *more likely than not* that *the claim will not benefit* the partnership or its partners.

(7) [5:389] **Prevailing plaintiff's award of expenses and attorney fees:** If a derivative action results in a recovery for the partnership, the court may award plaintiff reasonable expenses, including reasonable attorney fees, payable out of the recovery. [Corps.C. § 15910.05]

This is a codification of the common law "common fund" theory that courts have applied in *corporate* derivative actions. [See *Cziraki v. Thunder Cats, Inc.* (2003) 111 CA4th 552, 557-558, 3 CR3d 419, 422-423; *Baker v. Pratt* (1986) 176 CA3d 370, 378, 222 CR 253, 257-258]

c. [5:390] **Caution—right to sue not impaired by partnership agreement:** The limited partnership agreement may not unreasonably restrict a limited partner's right to bring a direct or derivative action. [Corps.C. § 15901.10(b)(11), ¶ 5:66]

Cross-refer: For a discussion of the analogous area of direct and derivative actions by *corporate shareholders*, including additional examples of the distinction between direct and derivative actions, see Friedman, Soza & Jann, *Cal. Prac. Guide: Corporations* (TRG), Ch. 6.

[5:391 - 5:399] ***Reserved.***

4. [5:400] **False Information in Document Filed with Secretary Of State:** A general partner may also be liable to persons who suffer damages in reliance upon false information contained in any partnership record filed by the Secretary of State. [Corps.C. § 15902.08(a)]

The liability extends to:

• A person who *signed* the record, or caused another to sign it on the person's behalf, and who knew the information was false at the time it was signed. (Most frequently, that person will be a general partner.) [Corps.C. § 15902.08(a)(1)]

• A *general* partner who has "*notice*" that the information was false when the record was signed or became false because of changed circumstances. But here, a general partner will be liable only if they had notice for a reasonably sufficient time before the information was relied upon to enable the general partner to effect an amendment or otherwise correct the filed record. [Corps.C. § 15902.08(a)(2); see Corps.C. § 15901.03 re "notice"]

a. [5:401] **Signer's liability—reliance need not be reasonable:** Signing a record that is subsequently filed with the Secretary of State constitutes an affirmation under penalty of *perjury* that the facts stated in the record are true. For this reason, according to the NCCUSL Drafting Committee (*see ¶ 5:14*), a party who relied on the record need not demonstrate that the reliance was reasonable. [Corps.C. § 15902.08(b) & "Uniform Limited Partnership Act Comment—Subsection (a)" (*see ¶ 5:19*)]

5. [5:402] **Partner Liability for Improper Distribution:** *See* ¶ 5:456 ff.

[5:403 - 5:429] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-D

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

D. Contributions and Distributions

1. [5:430] Consideration (Contribution) for Partnership Interest
    - a. [5:431] Corporate shares distinguished
    - b. Failure to make promised contribution
        - (1) [5:433] Failure not excused by death or disability
        - (2) [5:434] Cash in lieu of other contribution
            - (a) [5:435] Value set by agreement
            - (b) [5:436] Other remedies available to partnership
                - 1) [5:437] Example
        - (3) [5:438] Partners may excuse failure to contribute
        - (4) [5:439] Partnership agreement provisions re failed contribution
            - (a) [5:440] Loss of economic and other rights
            - (b) [5:441] Unreasonable remedies unenforceable
2. [5:442] Allocation of Profits and Losses
3. [5:443] Distributions
    - a. [5:444] Cash vs. in-kind distributions
    - b. Restrictions on distributions
        - (1) [5:446] No distributions in violation of partnership agreement
        - (2) [5:447] Financial tests—liquidity vs. assets
            - (a) [5:448] Financial statements as basis for test
                - 1) [5:449] Ordinary standard of care
                - 2) [5:450] Partnership agreement may not “unreasonably reduce” standard of care
            - (b) [5:452] Distribution date for financial test purposes
            - (c) [5:453] Issuance of partnership debt
        - (3) [5:454] Special rule for debt distributions
    - c. [5:455] Unpaid distribution—partner as creditor
    - d. [5:456] Partner liability for unlawful distribution
        - (1) [5:457] General partner's liability to partnership for unlawful distribution
            - (a) [5:458] Consent interpreted broadly
            - (b) [5:459] Impleader of other partners
        - (2) [5:460] Recipient partner's liability to partnership
        - (3) [5:461] Four-year statute of limitations
    - e. [5:462] Distributions to non-California partners—withholding required

1. [5:430] **Consideration (Contribution) for Partnership Interest:** A general or limited partner's contribution may consist of tangible or intangible property or other benefit to the partnership, including money, services performed, promissory notes, other agreements to contribute cash or property, and contracts for services to be performed. [Corps.C. § 15905.01]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

a. [5:431] **Corporate shares distinguished:** It is important to bear in mind that the legal consideration for partnership interests differs from the legal consideration for corporate shares. Corporate shares may *not* be issued for services *to be performed*, an *agreement* to contribute property or promissory notes (unless adequately secured by collateral other than the shares themselves or the shares are issued pursuant to an employee stock purchase or option plan). [Corps.C. § 409(a)(1)]

[5:432] ***Reserved.***

b. Failure to make promised contribution

(1) [5:433] **Failure not excused by death or disability:** A general or limited partner's obligation to contribute money or other property or other benefit to, or to perform services for, the partnership is not excused by death, disability or other inability to perform personally. According to the NCCUSL Drafting Committee (¶ 5:14), this statutory provision is intended to override common law principles of impracticality, which may discharge an individual's duty to render performance if the individual dies or becomes incapacitated. [Corps.C. § 15905.02(a) & "Uniform Limited Partnership Act Comment—Subsection (a)" (*see ¶ 5:19*)]

(2) [5:434] **Cash in lieu of other contribution:** Where a partner does not make all or any part of a promised nonmonetary contribution, the partnership has the option of requiring the partner to contribute money equal to the value, as set forth in the information required by the partnership to be maintained at its principal office (*see ¶ 5:265 ff.*), of any portion of the required contribution that was not made. [Corps.C. § 15905.02(b); see Corps.C. §§ 15901.02(ad), 15901.11(h)]

(a) [5:435] **Value set by agreement:** Property contributed or agreed to be contributed by a partner to a limited partnership is to be recorded on the books and records of the limited partnership at the "agreed value" of the property. The "agreed value" should be the *parties' estimate* of the *fair market value* of the property (net of any liabilities that the limited partnership assumes or takes subject to). (It is this "agreed value" that may be sought by the limited partnership if the partner does not perform the partner's obligation to contribute the property to the partnership.) [Corps.C. §§ 15901.11(8)(A), 15905.02(b); Treas.Reg. § 1.704-1(b)(2)(iv)(*b*)]

(b) [5:436] **Other remedies available to partnership:** The option of the limited partnership to recover the stated value of the partner's promised contribution is not the partnership's exclusive remedy against the partner. The partnership may assert a claim against the limited partner for, e.g., breach of contract and recover damages accordingly. [Corps.C. § 15905.02(b)]

1) [5:437] **Example:** The NCCUSL Drafting Committee (*see ¶ 5:14*) presents an example to illustrate the principle of Model ULPA § 502(b) (the source of Corps.C. § 15905.02(b)): A limited partnership, instead of seeking in money the agreed value of property promised to be contributed by a limited partner, claims the actual proceeds realized on a subsequent foreclosure sale of the property. The proceeds in foreclosure exceed the agreed value of the property as between the limited partner and the partnership; nevertheless, the limited partnership is entitled to the greater sum (no mention is made of the proceeds from foreclosure required to pay off the foreclosing creditor). In such event, of course, the limited partner would then be credited, on the books and records of the limited partnership, with a *capital contribution* equal to the proceeds recovered by the limited partnership from the property (thus affecting the defaulting limited partner's right to distributions from operations and in liquidation of the partnership). [Corps.C. §§ 15905.02, "Uniform Limited Partnership Act Comment—Subsection (b)" (*see ¶ 5:19*), 15905.03]

(3) [5:438] **Partners may excuse failure to contribute:** A partner's obligation to make a promised contribution may be compromised by the consent of *all* partners (or as otherwise provided by the partnership agreement). However, a partnership creditor who extends credit or otherwise relies on the partner's obligation without notice of the compromise may enforce the original obligation. [Corps.C. § 15905.02(c)]

(4) [5:439] **Partnership agreement provisions re failed contribution:** The partnership agreement may provide specific remedies for a partner's failure to make a contribution (or other required payment). [Corps.C. § 15905.02(d)]

(a) [5:440] **Loss of economic and other rights:** Among the remedies the partnership agreement may set forth are loss of voting and approval rights, loss of active participation in partnership management and operations, liquidated damages, or a reduction in economic rights. [Corps.C. § 15905.02(d)]

The reduction in the defaulting partner's economic rights may include:

• Diluting, reducing or eliminating the partner's proportionate interest in the partnership;

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

- Subordinating the defaulting partner's interest to that of nondefaulting partners;
- A forced sale of the partnership interest;
- Permitting other partners to lend or contribute the defaulted amount;
- Adjusting the rates of return or priority of other partners' contributions or capital accounts; or
- Valuing the defaulting partner's partnership interest by appraisal, formula and redemption, or selling the interest at a percentage of that value. [Corps.C. § 15905.02(d)]

(b) [5:441] **Unreasonable remedies unenforceable:** The remedies set forth in the partnership agreement are enforceable unless the partner seeking to invalidate them establishes that they are unreasonable under the circumstances existing at the time the agreement was made. [Corps.C. § 15905.02(d)]

2. [5:442] **Allocation of Profits and Losses:** Profits and losses are allocated among the partners in the manner provided in the partnership agreement. If the agreement does not otherwise provide, profits and losses are allocated in the same manner as the partners share distributions (*see ¶ 5:443 ff.*). [Corps.C. § 15905.035; see *Kazanjian v. Rancho Estates, Ltd.* (1991) 235 CA3d 1621, 1629, 1 CR2d 534, 537-538—general and limited partners must share loss of partners' capital contributions in accordance with allocation of profits and losses]

3. [5:443] **Distributions:** A limited partnership may choose to make distributions to its partners. However, unless the partnership agreement provides otherwise, a limited partnership is not obligated to make any distributions to its general or limited partners prior to dissolution. Furthermore, no partner has any right to any distribution on account of that partner's dissociation. [Corps.C. §§ 15905.04, 15905.05]

Unless the partnership agreement provides otherwise, distributions are shared among the partners on the basis of the value of the partners' contributions to the partnership. This is so regardless of the form of the contributions (cash, property, services, etc.). However, in the case of noncash contributions, distributions must be made according to the value of the contributions as stated in the records required to be maintained by the partnership at its principal office (*see ¶ 5:265 ff.*). [Corps.C. § 15905.03; see Corps.C. §§ 15901.02(ad), 15901.11(h)]

Also, the contributions used as the basis for distributions must have been actually received by the partnership. Thus, distributions cannot be made on the basis of promises of future contributions or services to be rendered.

a. [5:444] **Cash vs. in-kind distributions:** A partner has no right to demand any distribution in any form other than cash. But, unless the partnership agreement provides otherwise, the partnership may distribute an asset in kind to the extent each partner receives a percentage of the asset equal to the partner's share of distributions. [Corps.C. § 15905.06]

[5:445] ***Reserved.***

b. Restrictions on distributions

(1) [5:446] **No distributions in violation of partnership agreement:** A partnership may not make a distribution in violation of the partnership agreement. [Corps.C. § 15905.08(a)]

(2) [5:447] **Financial tests—liquidity vs. assets:** Nor may a partnership make a distribution if, after the distribution:

- The partnership would not be able to pay its debts as they become due in the ordinary course of the partnership's activities; *or*
- The partnership's total assets would be less than the sum of its total liabilities plus the amount that would be needed, if the partnership were to be dissolved at the time of the distribution, to satisfy any preferential distribution rights of the partners. [Corps.C. § 15905.08(b)]

(a) [5:448] **Financial statements as basis for test:** When making the determination that a distribution is not prohibited, the partnership may rely on financial statements prepared on the basis of accounting practices and

principles that are "reasonable in the circumstances," or on a "fair valuation or other method that is reasonable in the circumstances." [Corps.C. § 15905.08(c)]

1) [5:449] **Ordinary standard of care:** This appears to impose a standard of ordinary care, which is more stringent than the duty of care imposed on partners under Corps.C. § 15904.08(c) (general partner's duty of care limited to refraining from engaging in "grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law," *see ¶ 5:250*). This distinction is significant, because a general partner is not liable to the partnership for consenting to a distribution prohibited by § 15905.08 unless the general partner failed to comply with its duty of care under § 15905.08. [Corps.C. § 15905.08, "Uniform Limited Partnership Act Comment—Subsection (c)" (*see ¶ 5:19*)]

2) [5:450] **Partnership agreement may not "unreasonably reduce" standard of care:** The partnership agreement may not "unreasonably reduce" the duty of care under Corps.C. § 15904.08(c). [Corps.C. § 15901.10(b)(6)]

➪ [5:451] ***PRACTICE POINTER:*** The statements need *not* be prepared in accordance with generally accepted accounting principles (GAAP). This provision gives the general partner(s) flexibility in determining the lawfulness of a proposed distribution.

(b) [5:452] **Distribution date for financial test purposes:** Ordinarily, the distribution's compliance with the liquidity or asset tests is determined as of the date the distribution is *authorized* so long as payment occurs within 120 days after this date. If payment occurs more than 120 days after the distribution is authorized, compliance with the liquidity or asset test is determined as of the date of *payment*. [Corps.C. § 15905.08(d)]

(c) [5:453] **Issuance of partnership debt:** A partnership's indebtedness, including indebtedness issued in connection with or as part of a distribution, is not considered a liability for purposes of the financial tests if the indebtedness expressly provides that payment of principal and interest are made only to the extent that a lawful distribution could then be made to partners. [Corps.C. § 15905.08(f)]

(3) [5:454] **Special rule for debt distributions:** Where debt is distributed, each payment of interest or principal is treated as a distribution. The lawfulness of the distribution is determined as of the date each payment of principal or interest is made. [Corps.C. § 15905.08(g)]

c. [5:455] **Unpaid distribution—partner as creditor:** A partner (or transferee) who becomes entitled to receive a distribution has the status of a creditor of the partnership with respect to the distribution. However, the partnership's obligation to make the distribution is subject to offset for any amount the partner owes the partnership. [Corps.C. § 15905.07]

The partner's status as a creditor by virtue of entitlement to a lawful distribution is on a par with the partnership's general unsecured creditors. [Corps.C. § 15905.08(e)]

d. [5:456] **Partner liability for unlawful distribution:** To protect creditors of the partnership who may be harmed by unlawful distributions, the LP Act imposes liability on both the general and limited partners. [See Corps.C. § 15905.09]

(1) [5:457] **General partner's liability to partnership for unlawful distribution:** A general partner who acted with gross negligence, recklessness or intentionally in authorizing or consenting to an unlawful distribution is personally liable to the partnership for the portion of the distribution that exceeds the amount that lawfully could have been paid. [Corps.C. § 15905.09(a) & "Uniform Limited Partnership Act Comment—Subsection (a)" (*¶ 5:19*); see Corps.C. § 15904.08(c); *also see ¶ 5:449*]

(a) [5:458] **Consent interpreted broadly:** According to the NCCUSL Drafting Committee (*see ¶ 5:14*), a general partner's liability for consenting to an unlawful distribution encompasses any form of approval, assent or acquiescence, whether formal or informal, express or tacit. [Corps.C. § 15905.09(a), "Uniform Limited Partnership Act Comment—Subsection (a)" (*see ¶ 5:19*)]

(b) [5:459] **Impleader of other partners:** A general partner sued for an unlawful distribution may seek contribution from any other culpable general partner and any general or limited partner who received a distribution in violation of Corps.C. § 15905.09(b) (¶ 5:460). [Corps.C. § 15905.09(c)]

(2) [5:460] **Recipient partner's liability to partnership:** A general or limited partner (or transferee) who received a distribution *knowing that it was unlawful* is liable to the partnership to the extent that the distribution exceeded the amount that could have been lawfully paid. [Corps.C. § 15905.09(b)]

(3) [5:461] **Four-year statute of limitations:** An action to recover an unlawful distribution must be brought within four years after the distribution. [Corps.C. § 15905.09(d)]

e. [5:462] **Distributions to non-California partners—withholding required:** *See ¶ 8:216 ff.*

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

[5:463 - 5:489] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-E

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

E. Transfer of General or Limited Partnership Interest ("Transferable Interest")

1. [5:491] No Transfer in Violation of Partnership Agreement Restriction
    a. [5:491.1] Compare—contract to remit partnership benefits to third party
2. [5:492] Effect of Transfer—No Automatic Dissociation
    a. [5:493] Transferee's rights
        (1) [5:494] Compare—prior law
    b. [5:495] Transferor's rights and continuing duties
    c. [5:496] Exception where partnership agreement or partners consent
    d. [5:497] Rights effective upon notice to partnership
    e. [5:498] Transferee's potential liabilities
        (1) [5:499] Limitation—unknown liabilities
3. [5:500] Deceased Partner's Legal Representative as Transferee
4. [5:501] Execution of Judgment on Partnership Interest
    a. [5:502] Appointment of receiver
        (1) [5:503] Application
    b. [5:504] Redemption by other partners
    c. [5:505] Foreclosure

[5:490] Unless the partnership agreement provides otherwise, the only interest of a general or limited partner that is transferable is the partner's "transferable interest," which is the right of the partner to *receive distributions*. [Corps.C. §§ 15901.02(ak), 15907.01]

1. [5:491] **No Transfer in Violation of Partnership Agreement Restriction:** A partner may not transfer the partner's transferable interest in violation of a restriction on transfer contained in the partnership agreement. And any such transfer is ineffective as to a transferee who has notice of the restriction at the time of transfer. [Corps.C. § 15907.02(f)]

a. [5:491.1] **Compare—contract to remit partnership benefits to third party:** A contract whereby the limited partner agrees to remit to a third party purchaser all economic benefits that the limited partner receives from the partnership, and to consult with the purchaser with respect to voting or taking other actions as a limited partner, may be enforceable between the limited partner and the purchaser notwithstanding any provision in the partnership agreement or applicable law restricting the transfer of the limited partner's limited partnership interest. [*SP Investment Fund I LLC v. Cattell* (2017) 18 CA5th 898, 905-906, 227 CR3d 268, 273-274]

• [5:491.2] A limited partner agreed to sell his limited partnership interest to a third party for a cash amount. The contract obligated the limited partner to take whatever actions would be required to obtain the partnership's approval of the sale. Additionally, the contract provided that, until approval was obtained *and even if no approval were obtained*, the limited partner would hold all economic benefits received from the partnership in trust for the benefit of the purchaser, would deliver to the purchaser all documents and materials received from the partnership, and would vote on partnership matters as instructed by the purchaser. These provisions were enforceable notwithstanding the failure to obtain the partnership's

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

consent to the intended transfer of the limited partnership interest. "There is nothing in any of the cited laws that prohibits a limited partner from entering into a contract with a third party in which the partner agrees to turn over to the third party any distributions, information, or documents he or she receives from the Partnership, or to vote on Partnership matters as instructed by the third party. Instead, those laws merely preclude the third party from being recognized as a limited partner if the partnership agreement requires the partners' approval and that approval has not been given." [*SP Investment Fund I LLC v. Cattell* (2017) 18 CA5th 898, 906, 227 CR3d 268, 274 (footnote omitted)]

• [5:491.3] *Compare:* On facts involving a virtually identical purchase agreement, another California appellate court ruled that a purchase of a limited partner's interest was unenforceable by reason of the failure to secure the general partner's consent to the transfer. As in *SP Investment Fund I LLC v. Cattell*, supra, the purchase agreement provided that if the general partner's consent was not obtained, the limited partner would hold all economic benefits received from the partnership in trust for the benefit of the purchaser, would deliver to the purchaser all documents and materials received from the partnership, and would vote on partnership matters as instructed by the purchaser. The court held that the requirement in the partnership agreement conditioning transfers on the general partner's approval, and the general partner's ability to control with whom it does business, "would be wholly frustrated if we were to enforce the purchase agreement in the present circumstances." The court distinguished *SP Investment Fund I LLC v. Cattell*, supra, on the grounds that *Cattell* was a judgment on the pleadings and the *Cattell* court did not have the evidence available to the court in the case at bar, namely, that the limited partnership agreement conditioned the transfer of limited partnership interests on the general partner's consent. [*SP Investment Fund III, LLC v. Zell*, 2018 WL 6787328, *9-10 (unpublished opinion)]

[5:491.4] **Comment:** These two decisions are clearly in conflict. This reflects a conflict embodied in the LP Act itself which recognizes that, on the one hand, a transfer of a transferable interest is permissible (per Corps.C. § 15907.02(a)(1)) while, on the other hand, the transfer of a transferable interest in violation of a restriction in the partnership agreement is ineffective as to a person having notice of the restriction at the time of transfer (per Corps.C. § 15907.02(f)). Given the explicit language of § 15907.02(f), the *Zell* decision is likely to have more influence, even though unpublished, where a transferee has notice of transfer restrictions notwithstanding that the sale of a transferable interest is theoretically permissible.

2. [5:492] **Effect of Transfer—No Automatic Dissociation:** A transfer of a partner's transferable interest does not itself cause the partner's dissociation or trigger dissolution of the partnership. (But a partner who transfers all or a part of the partner's transferable interest may be *expelled* from the partnership upon the *unanimous consent* of the other partners; see Corps.C. §§ 15906.01(b)(4)(B), 15906.03(d)(2).) [Corps.C. § 15907.02(a)(2)]

a. [5:493] **Transferee's rights:** The transferee has the right to receive distributions to which the transferor would otherwise be entitled. The transferee's right to partnership information is limited to an account of the partnership's transactions upon *dissolution*. The transferee does not have any other rights or powers as a partner, including the right to participate in the management or conduct of the partnership's business. Nor, according to the NCCUSL Drafting Committee (¶ 5:14), do the other partners have an obligation of good faith and fair dealing with respect to a transferee. [Corps.C. § 15907.02(a)(3), (b), (c) & "Uniform Limited Partnership Act Comment—Subsection (a)(3)" (*see ¶ 5:19*)]

(1) [5:494] **Compare—prior law:** Under prior law (CRLPA, ¶ 5:13), an "assignee" (a "transferee" under the LP Act) of a limited partnership interest in a limited partnership with over 100 limited partners was entitled to all of the limited partners' information rights. The LP Act eliminates a transferee's right to information concerning the limited partnership (except upon dissolution or as otherwise provided in the partnership agreement). [See former Corps.C. §§ 15634, 15672(a); compare Corps.C. § 15907.02(a)(3) (transferees have no access to limited partnership information except upon dissolution); and Corps.C. § 17705.02(a)(3)(B) (same for LLCs)]

b. [5:495] **Transferor's rights and continuing duties:** The transferor retains the rights of a partner other than the interest in distributions so transferred. The transferor retains all duties and obligations of a partner. [Corps.C. § 15907.02(d)]

c. [5:496] **Exception where partnership agreement or partners consent:** The transferee (including a transferee of a *general* partner's interest) may become a *limited* partner to the extent that the partnership agreement permits, *or* upon the consent of *all* general partners and a *majority in interest* of the limited partners. [Corps.C. § 15907.02(h); see Corps.C. § 15901.02(t)]

d. [5:497] **Rights effective upon notice to partnership:** A partnership need not give effect to the transferee's rights until the partnership has notice of the transfer. [Corps.C. § 15907.02(e); see Corps.C. § 15901.03—when person has "notice"]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

e. [5:498] **Transferee's potential liabilities:** A transferee who becomes a partner is liable for any obligation of the transferor to make a *contribution* to the partnership (Corps.C. § 15905.02, ¶ 5:430 ff.). The transferee is also liable for any *unlawful distributions* made by the partnership (Corps.C. § 15905.09(b), ¶ 5:460). [Corps.C. § 15907.02(g)]

(1) [5:499] **Limitation—unknown liabilities:** However, the transferee is not obligated for liabilities *unknown to the transferee at the time the transferee became a partner*. [Corps.C. § 15907.02(g)]

3. [5:500] **Deceased Partner's Legal Representative as Transferee:** Upon the death of a partner, the deceased partner's executor, administrator or other legal representative may exercise the rights of a transferee and, for the purpose of *settling the estate*, has the same access to partnership information as a *current* limited partner (Corps.C. § 15903.04; *see ¶ 5:329 ff.*). [Corps.C. § 15907.04]

(*Caution:* The limited partnership agreement may not "unreasonably restrict" the right to access partnership information; *see ¶ 5:55*.)

4. [5:501] **Execution of Judgment on Partnership Interest:** A judgment creditor of a partner (or transferee) may apply to the court for an order charging the partner's transferable interest with payment of the unsatisfied amount of the judgment (plus interest). The charging order constitutes a lien on the transferable interest. The judgment creditor has only the rights of a transferee, and has no right to any property of the partnership. [Corps.C. § 15907.03(a), (b), (f); see *Evans v. Galardi* (1976) 16 C3d 300, 319, 128 CR 25, 31; *Epstein v. Frank* (1981) 125 CA3d 111, 119-120, 177 CR 831, 835]

This procedure balances the needs of a judgment creditor with the needs of the partnership by allowing the creditor to collect on the judgment through the transferable interest while prohibiting interference in the management and activities of the partnership. [Corps.C. § 15907.03, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

a. [5:502] **Appointment of receiver:** The court may appoint a receiver of the distributions to be paid on the transferable interest and make all other orders that may be required *to give effect to the charging order*. [Corps.C. § 15907.03(a), (b)]

(1) [5:503] **Application:** The court's authority is limited to orders that give effect to the charging order. Thus, for example, the court would not have authority to grant the creditor's motion for an order requiring the partnership to invest less of its surplus in operations and leave more for distributions. [Corps.C. § 15907.03, "Uniform Limited Partnership Act Comment —Subdivision (a)" (*see ¶ 5:19*)]

But where the partnership makes a distribution to the limited partner in disregard of the charging order, the court may order the partnership to pay the amount of the distribution to the judgment creditor. [Corps.C. § 15907.03, "Uniform Limited Partnership Act Comment—Subdivision (a)" (*see ¶ 5:19*)]

The court also has power to decide whether a particular payment is a distribution. [Corps.C. § 15907.03, "Uniform Limited Partnership Act Comment—Subdivision (a)" (*see ¶ 5:19*)]

b. [5:504] **Redemption by other partners:** At any time before foreclosure (¶ 5:505), the debtor partner may redeem the transferable interest subject to a charging order. One or more other partners may also redeem the transferable interest so long as they do not use partnership property to do so. The partnership may also redeem the transferable interest using partnership property so long as *all other general and limited partners* consent. [Corps.C. § 15907.03(c)]

c. [5:505] **Foreclosure:** The court may order foreclosure upon the transferable interest. The purchaser at the foreclosure sale has the rights of a transferee. [Corps.C. § 15907.03(b)]

[5:506 - 5:529] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-F

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

F. Partner's Dissociation from Partnership

- 1. Limited Partner
  - a. [5:532] No right to dissociate
  - b. [5:533] Events triggering automatic dissociation
    - (1) [5:534] Partner's withdrawal
    - (2) [5:535] Occurrence of event set forth in partnership agreement
    - (3) [5:536] Expulsion pursuant to partnership agreement
    - (4) [5:537] Expulsion by unanimous consent
    - (5) [5:538] Expulsion by judicial determination
      - (a) [5:539] Modification by partnership agreement?
    - (6) [5:540] Death
    - (7) [5:541] Distribution of trust
    - (8) [5:542] Distribution of estate
    - (9) [5:543] Other termination of nonindividual limited partner
    - (10) [5:544] Conversion or merger
  - c. [5:545] Effect of dissociation
    - (1) [5:546] No statutory buyout right
    - (2) [5:547] Predissociation obligations continue
- 2. General Partner
  - a. [5:571] Events triggering dissociation
    - (1) [5:572] Partner's withdrawal
    - (2) [5:573] Occurrence of event set forth in partnership agreement
    - (3) [5:574] Expulsion pursuant to partnership agreement
    - (4) [5:575] Expulsion by unanimous vote
    - (5) [5:576] Expulsion by judicial determination
    - (6) [5:577] Bankruptcy or similar events
    - (7) [5:578] Death or incapacity
    - (8) [5:579] Distribution of trust
    - (9) [5:580] Distribution of estate
    - (10) [5:581] Other termination of nonindividual general partner
    - (11) [5:582] Conversion or merger
  - b. [5:583] Power to dissociate
    - (1) [5:584] Wrongful dissociation
      - (a) [5:585] Breach of good faith and fair dealing
  - c. [5:586] Effect of dissociation
    - (1) [5:587] No right to participate in business
    - (2) [5:588] Fiduciary duties

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(a) [5:589] Limitation—business opportunities arising before dissociation
(3) [5:591] Certificate of dissociation and amendment to partnership agreement
(a) [5:592] Purpose
(4) [5:594] Transferable interest
(a) [5:595] No statutory buyout right
(5) [5:596] Predissociation obligations continue
d. [5:597] Potentially binding acts of dissociated partner
(1) [5:598] Limitation following dissolution, conversion or merger
(2) [5:599] Dissociated general partner's liability
e. [5:600] Continued liability to third persons
(1) [5:601] Exception for dissociation triggering dissolution
(2) [5:602] Exception for transactions within two years with innocent third parties
(a) [5:603] Not affected by subsequent dissolution
(3) [5:604] Exception where creditor releases former general partner
(4) [5:605] Exception for material alteration of obligation

[5:530] "Dissociation" is the termination of a general or limited partner's status as a partner. This may occur, e.g., by a partner's death, voluntary withdrawal from the partnership, or expulsion from the partnership.

A person may be both a general and a limited partner, and may dissociate in one capacity (e.g., as a limited partner) without dissociating in the other capacity (as a general partner). [See Corps.C. §§ 15906.01 (limited partner's dissociation), 15906.03 (general partner's dissociation)]

[5:531] ***Reserved.***

1. Limited Partner

a. [5:532] **No right to dissociate:** Unless the partnership agreement provides otherwise, a limited partner has no right to dissociate before termination of the partnership. [Corps.C. § 15906.01(a)]

b. [5:533] **Events triggering automatic dissociation:** Dissociation of a limited partner occurs upon any of the several events:

(1) [5:534] **Partner's withdrawal:** The partnership has notice of the limited partner's express will to withdraw as a limited partner (or on a later date specified by the limited partner). [Corps.C. § 15906.01(b)(1); see Corps.C. § 15901.03 re "notice"]

(2) [5:535] **Occurrence of event set forth in partnership agreement:** An event agreed to in the partnership agreement occurs that causes the limited partner's dissociation. [Corps.C. § 15906.01(b)(2)]

(3) [5:536] **Expulsion pursuant to partnership agreement:** The limited partner is expelled pursuant to the partnership agreement. [Corps.C. § 15906.01(b)(3)]

(4) [5:537] **Expulsion by unanimous consent:** The limited partner is expelled by the unanimous consent of the other partners (general and limited) if any of the following apply:

• It is unlawful to carry on the partnership business with that limited partner;

• All or substantially all of the partner's "transferable interest" (¶ 5:490 ff.) is transferred (other than a transfer for security purposes), or a court order charges the limited partner's interest;

• Within 90 days after the partnership notifies a *corporate* limited partner that it will be expelled because it filed a certificate of dissolution (or "the equivalent," e.g., under foreign law), its charter has been revoked, or its right to conduct business has been suspended by its jurisdiction of incorporation, and during that time there is no revocation of the certificate of dissolution or no reinstatement of its charter or right to conduct business; *or*

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

- The limited partner is a general partnership, limited partnership or limited liability company that has been dissolved or its business is being wound up. [Corps.C. § 15906.01(b)(4)(A)-(D)]

  These provisions, including the requirement of unanimous consent of the other partners, may be modified by the partnership agreement. [See Corps.C. § 15901.10]

(5) [5:538] **Expulsion by judicial determination:** The limited partner has been expelled by a judicial determination upon application of the partnership because:

- The limited partner engaged in wrongful conduct that adversely and materially affected the partnership business;

- The limited partner willfully or persistently committed a material breach of the partnership agreement or the obligation of good faith and fair dealing (Corps.C. § 15903.05(b), ¶ 5:60); *or*

- The limited partner engaged in misconduct relating to the partnership business "that makes it not reasonably practicable" to carry on the business with the person as a limited partner. [Corps.C. § 15906.01(b)(5)]

  (a) [5:539] **Modification by partnership agreement?** Corps.C. 15906.01 is not one of the sections identified in Corps.C. § 15901.10(b) as sections of the LP Act that may not be modified by the partnership agreement. The NCCUSL Drafting Committee (*see* ¶ *5:14*) notes, in its comment to § 110(b)(8) (the source of Corps.C. § 15901.10(b)(8)), that the provisions for expulsion of a limited partner upon court order stated in Corps.C. § 15906.01(b)(5) may be varied or even eliminated by the partnership agreement. But the LP Act makes clear that, unless displaced by "particular" provisions of the LP Act, the "principles of law and equity supplement [the LP Act]." [Corps.C. § 15901.07(a); see Corps.C. § 15906.01, "Uniform Limited Partnership Act Comment—Subsection(b)(5)" (¶ 5:19)]

  A superior court may very well entertain a petition for expulsion, notwithstanding any purported elimination of the court's jurisdiction by the limited partnership agreement. [See generally, *In re Carlisle Etcetera LLC* (Del.Ch. 2015) 114 A3d 592, 601-607 (discussion of equity powers based partly on Del. LLC Act provision (6 Del.C. § 18-1104) similar to Corps.C. § 15901.07(a))]

(6) [5:540] **Death:** The death of a limited partner who is an individual partner. [Corps.C. § 15906.01(b)(6)]

(7) [5:541] **Distribution of trust:** In the case of a limited partner that is a trust or is acting as a limited partner by virtue of being a trustee of a trust, the trust's entire transferable interest in the partnership is distributed (other than by reason of substitution of a successor trustee). [Corps.C. § 15906.01(b)(7); *see* ¶ *3:6* re trust vs. trustee as partner]

(8) [5:542] **Distribution of estate:** In the case of a limited partner that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed (other than by reason of substitution of a successor personal representative). [Corps.C. § 15906.01(b)(8)]

(9) [5:543] **Other termination of nonindividual limited partner:** A limited partner that is not an individual, partnership, corporation, trust or estate is terminated. [Corps.C. § 15906.01(b)(9)]

(10) [5:544] **Conversion or merger:** The partnership participates in a conversion or merger and either (a) the partnership is not the converted or surviving entity, or (b) the partnership is the survivor but the limited partner ceases to be a limited partner. [Corps.C. § 15906.01(b)(10)]

c. [5:545] **Effect of dissociation:** Upon dissociation, all of the following apply:

- The person has no further rights as a limited partner (except to the extent that the legal representative of a deceased limited partner may exercise rights under Corps.C. § 15907.04; *see* ¶ *5:221*). [Corps.C. § 15906.02(a)(1)]

- The person's obligation of good faith and fair dealing (Corps.C. § 15903.05(b), ¶ 5:560) continues only as to matters and events arising before dissociation. [Corps.C. § 15906.02(a)(2)]

- The person becomes a mere transferee with respect to the person's interest in the limited partnership (but where the dissociation occurs as a result of a merger or conversion (*see* ¶ *5:582*) the person has whatever status and rights he or she may have upon such conversion or merger). [Corps.C. § 15906.02(a)(3)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(1) [5:546] **No statutory buyout right:** Dissociated limited partners, unlike dissociated general partners in a general partnership (*see ¶ 3:500 ff.*), have no right to have their partnership interests bought out (unless the limited partnership agreement provides otherwise).
(2) [5:547] **Predissociation obligations continue:** Dissociation does not itself discharge the limited partner from any obligation incurred to the partnership or the other partners before the dissociation. [Corps.C. § 15906.02(b)]

[5:548 - 5:570] ***Reserved.***

2. General Partner

a. [5:571] **Events triggering dissociation:** Dissociation of a general partner occurs upon any of several events, which are similar to the events that trigger dissociation of a limited partner:
(1) [5:572] **Partner's withdrawal:** The partnership has notice of the general partner's express will to withdraw as a general partner (or on a later date specified by the general partner). [Corps.C. § 15906.03(a); see Corps.C. § 15901.03 re "notice"]
(2) [5:573] **Occurrence of event set forth in partnership agreement:** An event agreed to in the partnership agreement occurs that causes dissociation of the general partner. [Corps.C. § 15906.03(b)]
(3) [5:574] **Expulsion pursuant to partnership agreement:** The general partner is expelled pursuant to the partnership agreement. [Corps.C. § 15906.03(c)]
(4) [5:575] **Expulsion by unanimous vote:** The general partner is expelled by the unanimous consent of the other general and limited partners if any of the following apply:

• It is unlawful to carry on the partnership business with that general partner;

• All or substantially all of the general partner's "transferable interest" (¶ 5:490 ff.) is transferred (other than a transfer for security purposes), or a court order charges the general partner's interest (which has not been foreclosed);

• Within 90 days after the partnership notifies a *corporate* general partner that it will be expelled because it has filed a certificate of dissolution (or "the equivalent," e.g., under foreign law), its charter has been revoked, or its right to conduct business has been suspended by its jurisdiction of incorporation, and during that time there is no revocation of the certificate of dissolution or no reinstatement of its charter or right to conduct business; or

• The general partner is a general partnership, limited partnership or limited liability company that has been dissolved or its business is being wound up. [Corps.C. § 15906.03(d)]
(5) [5:576] **Expulsion by judicial determination:** The general partner has been expelled by a court order upon application of the partnership because:

• The general partner engaged in wrongful conduct that adversely and materially affected the partnership business;

• The general partner willfully or persistently committed a material breach of the partnership agreement or a duty owed to the partnership or the other partners (Corps.C. § 15904.08, ¶ 5:240 ff.); or

• The general partner engaged in misconduct relating to the partnership business "that makes it not reasonably practicable" to carry on the business with that person as a general partner. [Corps.C. § 15906.03(e)]
(6) [5:577] **Bankruptcy or similar events:** The general partner:

• Becomes a debtor in bankruptcy;

• Executes an assignment for the benefit of creditors;

• Seeks, consents to, or acquiesces in the appointment of a trustee, receiver or liquidator of the general partner or of all or substantially all of the general partner's property; or

• Fails to vacate or stay the appointment of a trustee, receiver or liquidator within 90 days after the appointment where the appointment was obtained *without* the general partner's consent or acquiescence, or fails to vacate the appointment within 90 days after expiration of a stay. [Corps.C. § 15906.03(f)]

(7) [5:578] **Death or incapacity:** In the case of a general partner who is an individual, the general partner dies, or a guardian or general conservator is appointed for the general partner, or a court has determined that the general partner is incapable of performing the general partner's duties under the partnership agreement. [Corps.C. § 15906.03(g)]

(8) [5:579] **Distribution of trust:** In the case of a general partner that is a trust or is acting as a general partner by virtue of being a trustee of a trust, the trust's entire transferable interest in the partnership is distributed (other than by reason of substitution of a successor trustee). [Corps.C. § 15906.03(h); *see ¶ 3:6* re trust vs. trustee as partner]

(9) [5:580] **Distribution of estate:** In the case of a general partner that is an estate or is acting as a general partner by virtue of being a personal representative of an estate, the estate's entire transferable interest in the partnership is distributed (other than by reason of substitution of a successor personal representative). [Corps.C. § 15906.03(i)]

(10) [5:581] **Other termination of nonindividual general partner:** A general partner who is not an individual, partnership, corporation, trust or estate is terminated. [Corps.C. § 15906.03(j)]

(11) [5:582] **Conversion or merger:** The partnership participates in a conversion or merger and either (a) the partnership is not the converted or surviving entity, or (b) the partnership is the converted or surviving entity but the general partner ceases to be a general partner. [Corps.C. § 15906.03(k)]

b. [5:583] **Power to dissociate:** A general partner has the absolute right to dissociate at any time. (The partnership agreement may not vary the general partner's power to dissociate, other than to require that the notice of dissociation be in a written, electronic or similar “record.”) However, the general partner may be liable in damages to the partnership and the other partners if the dissociation is *wrongful* (¶ 5:584 ff.). [Corps.C. § 15906.04(a), (c); see Corps.C. § 15901.10(b)(8)]

(1) [5:584] **Wrongful dissociation:** A general partner who wrongfully dissociates as a general partner is liable to the partnership and the other partners for damages caused by the dissociation. [Corps.C. § 15906.04(c)]

Dissociation as a general partner is wrongful only if:

• It breaches an *express* provision of the partnership agreement; *or*

• It occurs before *final termination* of the partnership *and*

— Withdrawal is by the general partner's express will;

— The general partner is expelled as a general partner by judicial determination (Corps.C. § 15906.03(e));

— The dissociation arose from the general partner becoming a debtor in bankruptcy; *or*

— In the case of a general partner that is not an individual, trust (other than a business trust) or estate, the general partner willfully dissolved or terminated. [Corps.C. § 15906.04(b)]

(a) [5:585] **Breach of good faith and fair dealing:** According to the NCCUSL Drafting Committee (¶ 5:14), a dissociation in breach of general partner's obligation of good faith and fair dealing is not a wrongful dissociation. (But the breach may be actionable on other grounds.) [Corps.C. § 15906.04, “Uniform Limited Partnership Act Comment —Subsection (b)(1)” (*see ¶ 5:19*)]

c. [5:586] **Effect of dissociation:** The following are the consequences of a person's dissociation as a general partner:

(1) [5:587] **No right to participate in business:** A dissociated general partner's right to participate as a general partner in the management and conduct of the partnership business terminates. [Corps.C. § 15906.05(a)(1)]

(2) [5:588] **Fiduciary duties:** A dissociated general partner no longer has a fiduciary duty to refrain from competing with the partnership (Corps.C. § 15904.08(b)(3)). Otherwise, the dissociated general partner's duties of loyalty and care (Corps.C. § 15904.08(b)(1), (2), (c)) continue, but only with regard to matters arising before dissociation. [Corps.C. § 15906.05(a)(1), (2), (3)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(a) [5:589] **Limitation—business opportunities arising before dissociation:** A former partner may not compete with the partnership with respect to a business opportunity that the partnership was *actively pursuing* at the time of the partner's dissociation. [*Leff v. Gunter* (1983) 33 C3d 508, 514-515, 189 CR 377, 381-382, *discussed further at ¶ 3:477*]

➪ [5:590] ***PRACTICE POINTER:*** A dissociated general partner who uses confidential information or trade secrets to compete with the partnership may be liable in tort to the partnership. Or if the partnership agreement (or a separate agreement between the partnership and the general partner) contains confidentiality covenants, the dissociated general partner may be liable in contract to the partnership.

The partnership agreement may contain a provision barring a general partner from competing with the partnership in certain circumstances. Although covenants not to compete are generally unenforceable under California law, there is an exception for a partner who dissociates from a limited partnership. However, the provision must be limited to a specified geographic area and only for such time as the partnership continues to carry on its business. [Bus. & Prof.C. § 16602(b)(2); see *South Bay Radiology Med. Assocs. v. W. M. Asher, Inc.* (1990) 220 CA3d 1074, 1082-1083, 269 CR 15, 19-20 (disapproved on other grounds by *Law Finance Group, LLC v. Key* (2023) 14 C5th 932, 959, 309 CR3d 796, 813, fn. 5)—Bus. & Prof.C. § 16602 does not require any compensation for goodwill by partnership to withdrawing partner to support reasonable restrictions on withdrawing partner's competition with partnership; compare *Hill Med. Corp. v. Wycoff* (2001) 86 CA4th 895, 903-904, 103 CR2d 779, 786—Bus. & Prof.C. § 16601 requires professional corporation purchasing stock pursuant to redemption agreement to include goodwill in order to support resigning physician's covenant not to compete upon his resignation]

(3) [5:591] **Certificate of dissociation and amendment to partnership agreement:** A dissociated general partner may sign and deliver to the Secretary of State, on a prescribed form, a certificate of dissociation. At the partnership's request, the dissociated general partner must sign an amendment to the certificate of limited partnership (*see ¶ 5:142 ff.*) reflecting the dissociation. [Corps.C. §§ 15902.04(a)(11), 15906.05(a)(4)]

• ***FORM:*** The Secretary of State's standard form Certificate of Dissociation (LP-101) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:592] **Purpose:** The certificate of dissociation and the amendment to the certificate of limited partnership each have the effect of providing constructive notice of the dissociation. This benefits the dissociated general partner by curtailing any further personal liability with respect to partnership matters. It benefits the partnership by curtailing any lingering power to bind the partnership. [Corps.C. § 15906.05, "Uniform Limited Partnership Act Comment—Subsection (a)(4)" (*see ¶ 5:19*); see Corps.C. § 15901.03(d)(1)]

➪ [5:593] ***PRACTICE POINTER:*** The partnership is obligated to amend its certificate of limited partnership to reflect a general partner's dissociation. In most circumstances, the amendment requires the dissociated general partner's signature. If a dissociated general partner refuses to sign the amendment, the partnership may petition the superior court to order the dissociated general partner to sign the amendment, or may order the Secretary of State to file the amendment unsigned. (The court may also, if it finds that the failure of the general partner to sign the amendment was without justification, award the partnership reimbursement of its reasonable expenses incurred in bringing the action, including attorneys' fees.) [Corps.C. §§ 15902.02(b)(2), 15902.05(a), (b); see also *Brown v. Panish* (1979) 99 CA3d 429, 433-434, 160 CR 282, 285]

(4) [5:594] **Transferable interest:** Upon dissociation, the dissociated general partner becomes a mere transferee with respect to the dissociated general partner's transferable interest. But where the dissociation occurs as a result of a merger or conversion (*see ¶ 5:582*), the person has whatever status and rights the person may have upon such conversion or merger. And where the dissociation occurs by reason of death, the deceased/dissociated general partner's legal representative has the right of a current limited partner to partnership information (Corps.C. § 15907.04; *see ¶ 5:221*). [Corps.C. § 15906.05(a)(5)]

(a) [5:595] **No statutory buyout right:** Dissociated general partners in a limited partnership, unlike dissociated general partners in a general partnership (*see ¶ 3:500 ff.*), have no right to have their partnership interests bought out (unless the limited partnership agreement provides otherwise).

(5) [5:596] **Predissociation obligations continue:** Dissociation as a general partner does not itself discharge the person from any obligation to the partnership or the other partners which the person incurred while a general partner. [Corps.C. § 15906.05(b)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

d. [5:597] **Potentially binding acts of dissociated partner:** A partnership may be bound by a transaction entered into between a dissociated general partner and a third party only if the act is apparently in the ordinary course of partnership activities *and*, at the time the third party enters into the transaction, (i) less than two years have passed since the dissociation and (ii) the third party does not have notice of the dissociation and reasonably believes that the dissociated general partner is still a current general partner. [Corps.C. § 15906.06; see Corps.C. § 15901.03 re "notice"]

(1) [5:598] **Limitation following dissolution, conversion or merger:** The partnership is not bound by the act of a dissociated general partner occurring after the partnership is dissolved, converted into another entity or merged out of existence. [Corps.C. § 15906.06(a)]

(2) [5:599] **Dissociated general partner's liability:** A dissociated general partner who causes the partnership to be bound by his or her post-dissociation acts may be liable to the partnership for any resulting damage. The dissociated general partner may also be liable to another general partner (or another dissociated general partner) to the extent the general partner is liable for the obligation. [Corps.C. § 15906.06(b)]

e. [5:600] **Continued liability to third persons:** A general partner's dissociation does not itself discharge the general partner's liability for obligations of the partnership incurred before dissociation. However, with certain exceptions described below (¶ 5:601 ff.), the former general partner is not liable for obligations of the partnership incurred after dissociation. [Corps.C. § 15906.07(a)]

(1) [5:601] **Exception for dissociation triggering dissolution:** Where the general partner's dissociation resulted in dissolution of the partnership, the former general partner remains liable for obligations incurred in the course of winding up the partnership. In these circumstances, neither filing a statement of dissociation nor amending the certificate of limited partnership will curtail the former general partner's ongoing exposure to liability. [Corps.C. § 15906.07(b) & "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(2) [5:602] **Exception for transactions within two years with innocent third parties:** Where the general partner's dissociation did *not* result in dissolution of the partnership, the former general partner may still be liable for a post-dissociation transaction entered into between the partnership and a third party, but only if a general partner would be liable on the transaction and, at the time the third party enters into the transaction, (a) less than two years have passed since the dissociation and (b) the third party did not have notice of dissociation and reasonably believed that the former general partner is a current general partner. In these circumstances, filing a statement of dissociation or amendment to the certificate of limited partnership will provide the appropriate "notice" to the third party (*see ¶ 5:592*) and will curtail the former general partner's ongoing liability. [Corps.C. §§ 15906.07(c), 15901.03(d)(1)]

(a) [5:603] **Not affected by subsequent dissolution:** The dissociated general partner's potential liability continues even where the partnership subsequently dissolves as the result of some occurrence other than the general partner's dissociation. If the dissociation results in dissolution, Corps.C. § 15906.07(b) applies (¶ 5:601) and the dissociated general partner will be liable as a general partner on any partnership obligation incurred under Corps.C. § 15908.04 (*see ¶ 5:675*). [Corps.C. § 15906.07, "Uniform Limited Partnership Act Comment" (*see ¶ 5:19*)]

(3) [5:604] **Exception where creditor releases former general partner:** A partnership creditor may agree with the partnership to release a dissociated general partner from liability to the creditor. [Corps.C. § 15906.07(d)]

(4) [5:605] **Exception for material alteration of obligation:** A dissociated general partner is released from liability for a partnership obligation where the creditor, with notice of the dissociation but without the dissociated general partner's consent, agrees to a material alteration in the nature or time of payment of the obligation. [Corps.C. § 15906.07(e)]

[5:606 - 5:629] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-G

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

G. Dissolution of Limited Partnership

- 1. [5:631] Events Triggering Dissolution
  - a. [5:632] Event specified in partnership agreement
    - (1) [5:633] Record requirement
  - b. [5:634] Consent of partners
    - (1) [5:635] How consent given
    - (2) [5:636] Calculating distribution rights
    - (3) [5:637] Example
  - c. [5:638] Dissociation of general partner
    - (1) [5:639] Consent requirement
    - (2) [5:640] Calculating distribution rights
    - (3) [5:641] Example
  - d. [5:642] Dissociation of all limited partners
  - e. [5:643] Modification of dissolution events by partnership agreement
- 2. [5:644] Dissolution Upon Court Order
  - a. [5:645] Averting judicial dissolution by purchasing partnership interests
    - (1) [5:646] Comment
    - (2) [5:647] Determination of purchase price
      - (a) [5:648] Procedure
      - (b) [5:649] Valuation date
    - (3) [5:650] Effecting/rejecting purchase
    - (4) [5:651] Buyout right not averted by partnership agreement
    - (5) [5:652] Buyout procedure supplants dissolution action
- 3. [5:660] Winding Up After Dissolution
  - a. [5:661] Permitted activities
    - (1) [5:662] Discharge of liabilities
  - b. [5:663] No general partner—limited partners' appointment of replacement
    - (1) [5:664] Obtaining limited partners' consent
      - (a) [5:665] How consent given
      - (b) [5:666] Calculating distribution rights
      - (c) [5:667] Example
    - (2) [5:668] Duties and powers of appointee
      - (a) [5:669] Not a general partner
      - (b) [5:670] Amendment of certificate of limited partnership
  - c. [5:671] Potential for judicial supervision
  - d. [5:672] Limited partners' compensation
- 4. [5:673] General Partner's Post-Dissolution Powers

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

a. [5:674] Notice to third parties
b. [5:675] Acts by dissociated general partner
c. Liability for improper acts
(1) [5:677] General partner
(2) [5:678] Dissociated general partner
5. Claims Against Partnership
a. [5:680] Notice to each creditor
(1) [5:681] Contents of notice
b. [5:682] Publication of notice
(1) [5:683] Contents of notice
(2) [5:684] Effect
(a) [5:686] Enforceable claims
(b) [5:687] Exception—taxes, interest and penalties
c. [5:688] Use of assets to satisfy creditors
(1) [5:689] Partners' liability for unsatisfied claims
(a) [5:690] Additional general partner contributions to make up shortfall
(b) [5:691] Liability of deceased general partners' estates
(c) [5:692] Enforcement by creditors
(d) [5:693] No liability for partner's losses
1) [5:694] Example
(2) [5:695] Surplus distributed to partners
d. [5:697] No general partner liability for barred claims
e. [5:700] "Responsible person" liability for unpaid sales taxes
6. [5:701] Filing Certificate of Cancellation
a. [5:702] Contents
b. [5:703] Execution
c. [5:704] Fee
d. [5:705] Effect
7. [5:706] Reinstatement of Terminated Limited Partnership Only Upon Court Order
a. [5:707] Procedure
b. [5:708] Grounds for reinstatement
c. [5:709] Loss of partnership name—amendment of certificate to adopt new name
d. [5:710] Effective date

[5:630] The term "dissolution" can be somewhat confusing. Dissolution is the event that begins final winding up of the partnership in anticipation of its ultimate termination. A dissolved partnership remains in existence for the purpose of winding up. When the winding up is completed, all creditors are paid, and the remaining assets are distributed to the partners, the partnership may then formally *terminate* by filing a certificate of cancellation. Thus, a partnership that is no longer in existence is better described as "terminated" rather than "dissolved." [See *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 CA4th 74, 92, 15 CR2d 585, 594; see also *Boschetti v. Pacific Bay Investments Inc.* (2019) 32 CA5th 1059, 1066-1069, 244 CR3d 480, 485-487—internal affairs doctrine mandates that dissolution of foreign LP doing business in California be governed by foreign LP's jurisdiction of organization (*¶ 5:1022*)]

1. [5:631] **Events Triggering Dissolution:** A partnership is dissolved upon the occurrence of any of the events set forth below (¶ 5:632 ff.). Upon dissolution, the partnership must wind up its activities. [Corps.C. § 15908.01(a)]

a. [5:632] **Event specified in partnership agreement:** The partnership is dissolved upon the happening of an event specified in the partnership agreement. [Corps.C. § 15908.01(a)]

(1) [5:633] **Record requirement:** The partnership agreement may, but need not, set forth the dissolution-triggering events in a written, electronic or similar record. However, if the partnership agreement does not so set forth the events, the events

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

must be stated in a written, electronic or similar record kept at the partnership's office. [Corps.C. §§ 15908.01, 15901.11(8)(D)]

b. [5:634] **Consent of partners:** The partnership is dissolved upon the consent of *all* general partners and of limited partners owning a *majority* of the rights to receive distributions as limited partners at the time the consent is effective. [Corps.C. § 15908.01(b)]

(1) [5:635] **How consent given:** The consents need not be given in the form of a signed record (unless the partnership agreement provides otherwise). [Corps.C. § 15908.01, "Uniform Limited Partnership Act Comment" (*see* ¶ *5:19*)]

The limited partners' consent must be given by *current* limited partners having *distribution* rights. Distribution rights of nonpartner transferees are not relevant: Mere transferees have no consent rights, and their distribution rights are not counted in determining whether the requisite consent of the limited partners has been obtained. [Corps.C. § 15908.01(b), "Uniform Limited Partnership Act Comment" (*see* ¶ *5:19*)]

(2) [5:636] **Calculating distribution rights:** When seeking the consent of limited partners owning a majority of the distribution rights, their distribution rights only as limited partners is taken into account. Distribution rights of the general partners are excluded. Rights to receive distributions owned by a person who is *both* a general and a limited partner figure into the calculation only to the extent those rights are owned in the person's capacity as a *limited* partner. [Corps.C. § 15908.01(b), "Uniform Limited Partnership Act Comment—Paragraph (2)" (should be Paragraph (b)) (*see* ¶ *5:19*)]

(3) [5:637] **Example:** Partnership XYZ has three general partners, each of whom is also a limited partner, and 5 other limited partners. Distribution rights are allocated as follows:

Partner 1 as general partner—3%
Partner 2 as general partner—2%
Partner 3 as general partner—1%
Partner 1 as limited partner—7%
Partner 2 as limited partner—3%
Partner 3 as limited partner—4%
Partner 4 as limited partner—5%
Partner 5 as limited partner—5%
Partner 6 as limited partner—5%
Partner 7 as limited partner—5%
Partner 8 as limited partner—5%
Nonpartner transferees—55%

Distribution rights owned by persons as limited partners amount to 39% of total distribution rights. A majority is therefore anything greater than 19.5%. If only Partners 1, 2, 3 and 4 consent to dissolve, their total distribution rights as *limited* partners come to only 19%, and hence the partnership is *not* dissolved. [Corps.C. § 15908.01(b), "Uniform Limited Partnership Act Comment—Paragraph (2)" (should be Paragraph (b)) (*see* ¶ *5:19*)]

c. [5:638] **Dissociation of general partner:** The partnership is dissolved upon the dissociation of a general partner, but only if:

- The partnership has at least one *remaining* general partner and consent to dissolve the partnership is given within *90 days* after the dissociation by *general and limited* partners owning a *majority* of the rights to receive distributions at the time the consent is effective; *or*

- The partnership has *no* remaining general partner for *90 days* after the dissociation … *unless*, *before that time*, limited partners owning a majority of the rights to receive distributions as limited partners (i) consent to continue the partnership and (ii) admit at least one general partner. [Corps.C. § 15908.01(c)]

(1) [5:639] **Consent requirement:** *See* ¶ *5:634*.

(2) [5:640] **Calculating distribution rights:** *See* ¶ *5:636*.

(3) [5:641] **Example:** *See* ¶ *5:637*.

d. [5:642] **Dissociation of all limited partners:** A partnership is dissolved 90 days after the dissociation of the last limited partner … *unless* before that time the partnership admits at least one limited partner. [Corps.C. § 15908.01(d)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

e. [5:643] **Modification of dissolution events by partnership agreement:** Section 15908.01 is not one of the sections of the LP Act that may not be varied by the partnership agreement. Accordingly, the provisions of Corps.C. § 15908.01 may be varied by the partnership agreement. [See Corps.C. § 15901.10(b)]

2. [5:644] **Dissolution Upon Court Order:** A court may order the partnership's dissolution, on application of any general or limited partner, where carrying on the partnership's activities in conformity with the partnership agreement is "not reasonably practicable." [Corps.C. § 15908.02(a); see *Wallace v. Sinclair* (1952) 114 CA2d 220, 223-229, 250 P2d 154, 156-160—"bitter and antagonistic" feeling between general partner and limited partner together with general partner's mismanagement in operating business that was losing money (while general partner continued to receive salary) justified dissolution by court order (decided under prior law)]

(*Caution:* The limited partnership agreement may not vary a court's power to decree dissolution under § 15908.02(a); *see ¶ 5:63*.)

a. [5:645] **Averting judicial dissolution by purchasing partnership interests:** The other partners may avert dissolution by purchasing the interests owned by the partner or partners who initiated the dissolution proceeding. The purchase price must be in *cash* at "*fair market value*." If initiating the dissolution proceeding constituted a breach of the partnership agreement (or of another agreement with the purchasing partners), damages resulting from the breach may be deducted from the purchase price. [Corps.C. § 15908.02(b) (emphasis added); see *Boschetti v. Pacific Bay Investments Inc.* (2019) 32 CA5th 1059, 1066-1069, 244 CR3d 480, 485-487—§ 15908.02(b) buyout right not applicable to foreign LP doing business in California; *Panakosta Partners, LP v. Hammer Lane Mgmt., LLC* (2011) 199 CA4th 612, 629-635, 131 CR3d 835, 846-851—partner's voluntary dismissal of dissolution action terminated other partners' right to buyout partner's interest; *see ¶ 6:790.1* re "fair value" vs. "fair market value"]

(1) [5:646] **Comment:** If properly pled (e.g., "It is not reasonably practicable to carry on the activities of the limited partnership …" followed by a list of specifics), it is hard to see how the "initiation" of a dissolution proceeding under Corps.C. § 15908.02(a) can be in breach of the partnership agreement or other agreement with the partnership. And a partnership agreement provision that prohibits recourse to the courts for a decree of dissolution would run afoul of Corps.C. § 15901.10(b)(9), which prohibits any such provision (*¶ 5:63*). [See also *In re Carlisle Etcetera LLC* (Del.Ch. 2015) 114 A3d 592, 601-607 (discussing court's inherent equity powers based partly on Del. LLC Act provision (6 Del.C. § 18-1104) similar to Corps.C. § 15901.07(a) (principles of law and equity supplement LP Act; *see ¶ 5:539*))]

(2) [5:647] **Determination of purchase price:** If the partners cannot agree on the purchase price, the purchasing parties may apply to the court to ascertain the purchase price. The purchasing parties must provide a bond sufficient to pay the estimated attorney fees and other reasonable expenses of the partner(s) who initiated the dissolution proceeding. The court will stay the dissolution while determining the purchase price. [Corps.C. § 15908.02(c)]

(a) [5:648] **Procedure:** The court must appoint three disinterested appraisers. The award of the appraisers or a majority of them, when confirmed by the court, is final and binding on the parties. The court must enter a decree providing in the alternative for winding up and dissolution unless payment is made within a specified time. [Corps.C. § 15908.02(d)]

(b) [5:649] **Valuation date:** The determination of the purchase price ("fair market value," ¶ 5:645) is made as of the *date the action for judicial dissolution was commenced*. But the court may designate some other date on the hearing of a motion by any party and for good cause shown. [Corps.C. § 15908.02(f)]

(3) [5:650] **Effecting/rejecting purchase:** To avert dissolution, the purchasing partners must, within the time specified by the court, pay the purchase price in exchange for the partnership interests of the partner(s) who brought the dissolution proceeding. If payment is not made within that time, judgment must be entered against the purchasing partners and on the bond for the amount of the *attorney fees* and *other reasonable expenses* of the partner(s) who initiated the dissolution proceeding. [Corps.C. § 15908.02(d), (e)]

(4) [5:651] **Buyout right not averted by partnership agreement:** As stated earlier (¶ 5:644), the partnership agreement may not vary a court's power to decree dissolution under Corps.C. § 15908.02(a). [Corps.C. § 15901.10(b)(9)] This includes the power of the court to grant appropriate relief. Thus, the partnership agreement may *not* eliminate the ability of partners to *buy out* the interests of the partners who initiated the dissolution proceeding. [*Panakosta Partners, LP v. Hammer Lane Mgmt., LLC* (2011) 199 CA4th 612, 638, 131 CR3d 835, 854]

(5) [5:652] **Buyout procedure supplants dissolution action:** Once the court orders a buyout procedure (¶ 5:645 ff.), the dissolution action is stayed and the buyout procedure "goes forward in its place." The plaintiff cannot voluntarily dismiss the dissolution action to avoid the buyout procedure. [*Guttman v. Guttman* (2021) 72 CA5th 396, 412, 287 CR3d 296, 306-307]

[5:653 - 5:659] ***Reserved.***

3. [5:660] **Winding Up After Dissolution:** After dissolution, the partnership continues only for the purpose of winding up its activities. [Corps.C. § 15908.03(a)]

(*Caution:* The limited partnership agreement may not vary the requirement to wind up the partnership business following dissolution; *see ¶ 5:65*.)

a. [5:661] **Permitted activities:** The partnership may perform all necessary acts to wind up its activities, including prosecuting and defending actions and proceedings, settling disputes, and transferring the partnership property. In doing so, it may preserve its property or business as a going concern for a reasonable time. It may also amend its certificate of limited partnership to state that the partnership is dissolved and file a certificate of cancellation (¶ 5:701 ff.). [Corps.C. § 15908.03(b)(1)]

(1) [5:662] **Discharge of liabilities:** In winding up, the partnership must discharge its liabilities, settle and close the partnership's activities, and marshal and distribute the remaining partnership assets. [Corps.C. § 15908.03(b)(2)]

b. [5:663] **No general partner—limited partners' appointment of replacement:** If there is no general partner, a person to wind up the partnership's activities may be appointed by the consent of limited partners owning a majority of the rights to receive distributions as limited partners. [Corps.C. § 15908.03(c)]

(1) [5:664] **Obtaining limited partners' consent:** The determination of the majority of limited partner distribution rights is the same as when determining consent to dissolution (Corps.C. § 15908.01(b)). [Corps.C. § 15908.03, "Uniform Limited Partnership Act Comment—Subsection (c)" (*see ¶ 5:19*)]

(a) [5:665] **How consent given:** *See ¶ 5:635*.

(b) [5:666] **Calculating distribution rights:** *See ¶ 5:636*.

(c) [5:667] **Example:** *See ¶ 5:637*.

(2) [5:668] **Duties and powers of appointee:** The appointed person has the powers that a general partner has to wind up the partnership business after dissolution (*see ¶ 5:673 ff.*). [Corps.C. § 15908.03(c)(1)]

(a) [5:669] **Not a general partner:** In the view of the NCCUSL Drafting Committee (¶ 5:14), the appointed person does *not* ipso facto become a general partner and therefore does not have the fiduciary duties of a general partner (Corps.C. § 15904.08, ¶ 5:240 ff.). [Corps.C. § 15908.03, "Uniform Limited Partnership Act Comment—Subsection (c)" (*see ¶ 5:19*)]

(b) [5:670] **Amendment of certificate of limited partnership:** The appointed person must "promptly" amend the certificate of limited partnership to state that the partnership does not have a general partner and to set forth the name and address of the appointed person. [Corps.C. § 15908.03(c)(2)]

c. [5:671] **Potential for judicial supervision:** Any general or limited partner may apply to the appropriate court to supervise the winding up, including appointment of a person to wind up the partnership's activities, if:

- The partnership has no general partner and no person has been appointed to wind up the business within a "reasonable time" following dissolution; *or*

- Other *good cause* is established. [Corps.C. § 15908.03(d)]

d. [5:672] **Limited partners' compensation:** Unless the partnership agreement provides otherwise, limited partners who wind up the partnership's affairs are entitled to reasonable compensation. [Corps.C. § 15908.03(e)]

4. [5:673] **General Partner's Post-Dissolution Powers:** The partnership is bound by a general partner's post-dissolution acts that are appropriate for winding up the partnership's activities. But even if an act is beyond the scope of winding up the partnership's activities, the partnership is still bound if the act would have bound the partnership before dissolution (e.g., the act is apparently for carrying on, in the ordinary course, the partnership's business) *and* the third party does not have notice of

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

the dissolution. [Corps.C. § 15908.04(a); see *Tsakos Shipping & Trading, S.A. v. Juniper Garden Town Homes, Ltd.* (1993) 12 CA4th 74, 92-93, 15 CR2d 585, 594-595]

a. [5:674] **Notice to third parties:** A third party is deemed to have notice of the dissolution 90 days after the certificate of limited partnership has been amended to indicate dissolution. Of course, the third party may also have notice of the dissolution if the third party actually knows of the dissolution, has received a notification of it or has reason to know of it from the facts and circumstances. [Corps.C. § 15901.03(a), (b), (d)(2); see Corps.C. § 15908.04]

b. [5:675] **Acts by dissociated general partner:** A dissociated general partner's post-dissociation transaction with a third party binds the partnership where:

• At the time the third party enters into the transaction, less than two years have passed since the dissociation and the third party (i) does not have notice (*see* ¶ 5:674) of the dissociation and (ii) reasonably believes that the dissociated general partner is a current general partner; and

• The transaction is either appropriate for winding up the partnership's activities *or* would have bound the partnership before dissolution and the third party does not have notice (*see ¶ 5:674*) of the dissolution. [Corps.C. § 15908.04(b) & "Uniform Limited Partnership Act Comment—Subsections (b), (b)(1)(B) & (b)(2)(B)" (*see ¶ 5:19*)]

[5:676] ***Reserved.***

c. Liability for improper acts

(1) [5:677] **General partner:** If a general partner having knowledge of the dissolution causes the partnership to incur an obligation by an act that is not appropriate for winding up the partnership, the general partner is liable to the partnership for any resulting damage, as well as to another *general partner* or a *dissociated general partner* held *liable* for the obligation. [Corps.C. § 15908.05]

(2) [5:678] **Dissociated general partner:** If a dissociated general partner causes the partnership to incur a post-dissolution obligation, the dissociated general partner is liable to the partnership for any resulting damages, as well as to any other *general partner* or *dissociated general partner* held liable for the obligation. This is so even if the dissociated general partner had no knowledge of the dissolution and even if the obligation is appropriate for the winding up of the partnership's activities (although it is hard to see how a partnership would be damaged if the obligation is appropriate for winding up the partnership's business). [Corps.C. § 15908.05(b)]

[5:679] ***Reserved.***

5. Claims Against Partnership

a. [5:680] **Notice to each creditor:** The partnership may dispose of known claims against it (other than claims based on an event occurring after the effective date of the dissolution or a liability contingent on that date). To do so, the partnership must give the claimants written, electronic or similar notice of the dissolution. A claim against the partnership is then *barred* if the claim is not received by the deadline set forth in the notice or, if received by the deadline but rejected by the partnership in *writing*, the claimant does not commence an action to enforce the claim within *90 days* after *receipt* of the written notice of rejection. [Corps.C. §§ 15908.06, 15901.02(ac) ("record" defined)]

(1) [5:681] **Contents of notice:** The notice must:

• Specify the *information* that the claim must include;

• Provide a *mailing address* to which the claim is to be sent;

• State the *deadline* for receipt of the claim, which may not be less than 120 days after the date the notice is *received* by the claimant; and

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• State that the claim will be *barred* if not received by the deadline. [Corps.C. § 15908.06(b)]

b. [5:682] **Publication of notice:** The partnership may also dispose of any claims against it by publishing notice of its dissolution at least once in a newspaper of general circulation in the county in which the partnership's principal office is located (or if it has no office in California, in the county in which the partnership's principal office is or was last located). [Corps.C. § 15908.07(a), (b)(1)]

(1) [5:683] **Contents of notice:** The notice must:

• Describe the information required to be contained in a claim and provide a mailing address to which the claim is to be sent; and

• State that a claim against the partnership is barred unless an action to enforce the claim is commenced within four years after publication of the notice. [Corps.C. § 15908.07(b)(2), (3)]

(2) [5:684] **Effect:** Following publication of the notice, all claims against the partnership are barred unless the claimant brings suit against the partnership to enforce the claim within four years after the notice was published. The barred claims include claims that were received by the partnership but not acted upon, claims contingent or based on an event occurring after the effective date of the dissolution, and claims of a claimant who did not receive a written, electronic or similar notice of the dissolution under Corps.C. § 15908.06 (¶ 5:680). [Corps.C. § 15908.07(c), (d)]

➪ [5:685] ***PRACTICE POINTER:*** If practicable, give individual notice to each creditor (¶ 5:680) rather than use publication: This will cut off claims not filed within 120 days versus four years for publication.

(a) [5:686] **Enforceable claims:** A claim that is not barred following the publication may be enforced against the partnership to the extent of its undistributed assets. [Corps.C. § 15908.07(d)(1)]

If the assets have been distributed in liquidation, the claim may be enforced against a partner (or transferee) to the extent of the partner's proportionate share of the claim or the partnership's assets distributed to the partner in liquidation, whichever is *less*. But the partner's total liability for all claims may not exceed the total amount of assets distributed in liquidation to the partner. [Corps.C. § 15908.07(d)(2)]

The claim may also be enforced against any general partner who was a general partner at the time the obligation that formed the basis of the claim arose (per Corps.C. § 15904.04; *see* ¶ *5:280 ff.*). [Corps.C. § 15908.07(d)(3)]

(b) [5:687] **Exception—taxes, interest and penalties:** Publication of the notice does not bar collection of any California franchise (income) taxes, including interest or penalties thereon. [Corps.C. § 15908.07(e)]

c. [5:688] **Use of assets to satisfy creditors:** In winding up, the partnership must apply its assets to satisfy creditors' claims (including, to the extent permitted by law, partners who are creditors). [Corps.C. § 15908.09(a)]

(1) [5:689] **Partners' liability for unsatisfied claims:** If the partnership's assets are insufficient to satisfy all of its obligations to creditors, each person who was a general partner at the time the obligation was incurred (including dissociated general partners whose liability was not released under Corps.C. § 15906.07, ¶ 5:604) must contribute to the partnership for the purpose of satisfying the obligations. The contribution due from each general partner is in proportion to the general partner's right to receive distributions that was in effect when the obligation was incurred. [Corps.C. § 15908.09(c)(1)]

(a) [5:690] **Additional general partner contributions to make up shortfall:** If a general partner does not contribute the amount required, the other general partners must contribute the additional amount necessary to discharge the obligation. Here again, the other general partner's additional contribution is in proportion to the general partner's right to receive distributions as in effect when the obligation was incurred. If a general partner does not make the additional contribution, further additional contributions must be made in the same manner. [Corps.C. § 15908.09(c)(2), (3)]

General partners who made additional contributions may recover the amount from the general partners who failed to make their required contributions. [Corps.C. § 15908.09(d)]

(b) [5:691] **Liability of deceased general partners' estates:** The liability of a general partner who is deceased (or dissociated general partner who is deceased) for an obligation extends to the deceased person's estate. [Corps.C. § 15908.09(e)]

(c) [5:692] **Enforcement by creditors:** An assignee for the benefit of creditors of the partnership or a partner, or a person appointed by a court to represent creditors of the partnership or a partner, may enforce the partner's obligation to make a contribution. [Corps.C. § 15908.09(f)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(d) [5:693] **No liability for partner's losses:** Unless the partnership agreement provides otherwise, a general partner is not required to make a payment for the purpose of equalizing or otherwise reallocating capital losses incurred by the partners. [Corps.C. § 15908.09, “Uniform Limited Partnership Act Comment” (*see ¶ 5:19*)]

1) [5:694] **Example:** In an example provided by the NCCUSL Drafting Committee (*see ¶ 5:14*), Partnership XYZ has one general partner and four limited partners who contributed the following to XYZ:

General Partner — $5,000
Limited Partner 1 — $10,000
Limited Partner 2 — $15,000
Limited Partner 3 — $20,000
Limited Partner 4 — $25,000

XYZ is unsuccessful, makes no distributions and dissolves with no assets. No partner is obliged to make any payment either to XYZ or to fellow partners to adjust their capital losses. But if Limited Partner 4, in addition to the capital contribution, loaned $25,000 to XYZ, the general partner must contribute $25,000 to XYZ to satisfy the loan. [Corps.C. § 15908.09, “Uniform Limited Partnership Act Comment” (*see ¶ 5:19*)]

(2) [5:695] **Surplus distributed to partners:** Any surplus remaining after paying the partnership's creditors is returned to the general and limited partners in the same proportion as they share distributions. [Corps.C. § 15908.09(b)]

➪ [5:696] ***PRACTICE POINTER:*** This “default” rule is often varied by the partnership agreement to make clear that after adjustments for gains and losses realized in the year of dissolution, any surplus is to be distributed to the partners (general and limited) pro rata to their positive capital account balances. *See Form 5A,* Limited Partnership Agreement § 6.3(b).

d. [5:697] **No general partner liability for barred claims:** A claim barred against the partnership following notice to creditors under Corps.C. § 15908.06 (¶ 5:680) or publication of notice under Corps.C. § 15908.07 (¶ 5:682) may *not* be asserted against the general partners. [Corps.C. § 15908.08]

[5:698 - 5:699] ***Reserved.***

e. [5:700] **“Responsible person” liability for unpaid sales taxes:** Upon dissolution, any partner or other person who had control or supervision of, or responsibility for, paying the partnership's sales and use taxes may be personally liable for any unpaid taxes (and interest and penalties) that he or she *willfully* (i.e., “intentionally,” irrespective of motive) failed to pay during the period he or she had such control, supervision or responsibility. (But personal liability attaches only if the partnership included sales tax reimbursement in the selling price of its products.) [Rev. & Tax.C. § 6829; 18 CCR § 1702.5]

6. [5:701] **Filing Certificate of Cancellation:** Once the partnership has been completely wound up, it must file a certificate of cancellation on a form prescribed by the Secretary of State. [Corps.C. § 15902.03]

a. [5:702] **Contents:** The certificate must state:

• The partnership's name and the Secretary of State's file number;

• The date the initial certificate of limited partnership was filed; and

• Any other information desired by the general partners (or other person) completing the certificate. [Corps.C. § 15902.03]

b. [5:703] **Execution:** The certificate of cancellation must be executed by *all* general partners listed in the certificate of limited partnership. If the certificate of limited partnership lists no general partners, the certificate of cancellation must be executed by the person appointed to wind up the partnership's activities (per Corps.C. § 15908.03, ¶ 5:663). [Corps.C. § 15902.04(a)(6)]

(*Caution:* The limited partnership agreement may not vary the statutory requirements regarding execution of the certificate; *see ¶ 5:54*.)

c. [5:704] **Fee:** There is no fee for filing the certificate of cancellation. (But there is a special handling fee of $15 if the certificate is delivered in person to the Secretary of State's office.)

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

d. [5:705] **Effect:** Third persons are deemed to have notice of the partnership's termination 90 days after the effective date of the certificate of cancellation. This effectively terminates any apparent authority to bind the partnership. [Corps.C. § 15901.03(d)(3); see Corps.C. § 15902.03, "Uniform Limited Partnership Act Comment" (¶ 5:19)]

• ***FORM:*** The Secretary of State's standard form Certificate of Cancellation (LP 4/7) is available online at the Secretary of State's website (*www.sos.ca.gov*).

7. [5:706] **Reinstatement of Terminated Limited Partnership Only Upon Court Order:** Once the certificate of cancellation is filed, the partnership no longer exists. It can be reinstated only upon a court order. (The former partners cannot effect reinstatement by filing a "certificate of revocation" or similar document.)

a. [5:707] **Procedure:** A court order for reinstatement may be obtained by filing a petition in superior court containing the legal and factual basis for reinstatement. Alternatively, the court order can be made as part of a civil action for damages or equitable relief. (The Secretary of State shall not be made a party to the action.) [Gov.C. § 12261(c)]

b. [5:708] **Grounds for reinstatement:** The grounds for reinstatement are limited to:

• A partner's factual representations contained in the certificate of cancellation are materially false; or

• The submission of the certificate of cancellation to the Secretary of State was fraudulent. [Gov.C. §§ 12260, 12261(a)]

c. [5:709] **Loss of partnership name—amendment of certificate to adopt new name:** Once the certificate of cancellation has been filed, the partnership's name (or a similar name) becomes "available" and may be adopted by another limited partnership. If the Secretary of State determines that the name of the revived limited partnership would conflict with that of another limited partnership, reinstatement must be conditioned upon the partnership changing its name (by filing an amendment to its certificate of limited partnership) so as to eliminate the conflict. [Gov.C. § 12262]

d. [5:710] **Effective date:** Reinstatement is effective upon the Secretary of State's filing of a certified copy of the court order reinstating the limited partnership. (The Secretary will notify the Franchise Tax Board of the reinstatement.) [Gov.C. § 12263]

[5:711 - 5:739] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-H

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

H. Conversion into Other Entity

1. [5:741] Entities Into Which Limited Partnership May Convert
    - a. Conditions for conversion
        - (1) [5:743] Conversion into general partnership, LLC or foreign limited partnership
        - (2) [5:744] Conversion into other entity
2. [5:745] Plan of Conversion
    - a. [5:746] Approval by partners
        - (1) [5:747] Partnership agreement provision allowing other approval?
    - b. [5:748] Amendment of plan
    - c. [5:749] Abandonment of plan
    - d. [5:750] Retention of plan
        - (1) [5:751] Copies upon request
            - (a) [5:752] Comment
3. [5:753] Dissenters' Rights
4. [5:754] Statement or Certificate of Conversion (Conversion to California LLC, General Partnership or Corporation)
    - a. [5:755] Contents
    - b. [5:756] Execution by all general partners ordinarily required
    - c. When to use statement vs. certificate of conversion
        - (1) [5:759] Conversion into California LLC
            - (a) [5:760] Filing fee
            - (b) [5:761] Articles conclusive evidence of conversion
        - (2) [5:762] Conversion into California general partnership
            - (a) Filing fee
                - 1) [5:764] Statement of conversion
                - 2) [5:765] Certificate of conversion
            - (b) [5:766] Statement of partnership authority conclusive evidence of conversion
        - (3) [5:767] Conversion into California corporation
            - (a) [5:768] Filing in Sacramento office only
            - (b) [5:769] Filing fee
        - (4) [5:770] Conversion into foreign entity
            - (a) [5:771] Filing fee
    - d. [5:772] No certificate of cancellation required
5. [5:773] Effective Date of Conversion
    - a. [5:774] Potential additional requirement when converting into foreign entity
6. [5:775] Effect of Conversion
    - a. [5:776] Nondissenting partner deemed party to new entity's governing documents
    - b. Partner's liability following conversion

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(1) [5:778] Preconversion obligations
(2) [5:779] Postconversion obligations
(3) [5:780] Limited partner's liability for transaction entered into with third party
c. [5:781] Recording of statement or certificate of conversion
7. [5:782] Tax Treatment
8. [5:783] Securities Law Considerations

[5:740] There are circumstances in which a limited partnership may wish to convert into another business entity. For example, the limited partners may wish to assume a more active role in management, and hence use the member-managed limited liability company form. In some cases, a partnership may even wish to convert into a corporation for several reasons:

• The business has become large and the general partners no longer wish to risk personal liability;

• Institutional investors prefer the corporate form for making equity investments; or

• The business desires to engage in a public offering of its securities.

A California limited partnership may have developed business in one or more other states, or may wish to take advantage of more advantageous laws in another state, and thus convert into a *foreign limited* partnership. (This may also be accomplished by means of a merger with a foreign limited partnership.)

1. [5:741] **Entities Into Which Limited Partnership May Convert:** A California limited partnership may convert into an "other business entity"—i.e., a California or foreign *general partnership*, *limited liability company (LLC)*, *corporation*, *business trust*, *real estate investment trust* or *for-profit unincorporated association*. [Corps.C. §§ 15911.01(j), (k), 15911.02(a)]

Of course, in the case of conversion into a foreign entity, the conversion must be expressly permitted by the law of the foreign entity, and the partnership must comply with both California law and the laws of the foreign entity with respect to conversion. [Corps.C. §§ 15911.02(b), 15911.05(a), (b)]

[5:742] ***Reserved.***

a. Conditions for conversion

(1) [5:743] **Conversion into general partnership, LLC or foreign limited partnership:** Conversion into a general partnership or LLC, or a foreign limited partnership, is permitted only if each of the general and limited partners would receive a percentage interest in the profits and capital of the converted (new) entity equal to the partner's percentage interest in the converting limited partnership's profits and capital as of the effective time of conversion. [Corps.C. § 15911.02(a)(1)]

(2) [5:744] **Conversion into other entity:** Conversion into an entity other than a general partnership, LLC or foreign limited partnership is permitted only if:

• Each *limited* partnership interest of the same class is treated *equally* with respect to any distribution of cash, property, rights, interests or securities of the new entity, unless *all* limited partners of the same class consent; *and*

• The nonredeemable *limited* partnership interests of the converting limited partnership are converted only into nonredeemable interests or securities of the converted entity, unless all holders of the nonredeemable interests consent. [Corps.C. § 15911.02(a)(2)]

2. [5:745] **Plan of Conversion:** The partnership must prepare a plan of conversion, which must state:

• The terms and conditions of the conversion;

• The place of organization of the partnership and the converted entity, and the name of the converted entity after conversion;

• The manner of converting the limited and general partnership interests of each of the partners into interests (shares, securities, etc.) of the converted entity;

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• The converted entity's governing documents (e.g., partnership agreement, articles of incorporation, or LLC articles of organization *and* operating agreement);

• Any provisions required by the converted entity's governing laws; and

• Any other provisions that are desired (e.g., the effective date of conversion; *see ¶ 5:773*). [Corps.C. § 15911.03(a)]

a. [5:746] **Approval by partners:** The plan of conversion must be approved by *all general* partners and by a *majority* in interest of each class of *limited* partners, unless a greater or lesser approval is required by the partnership agreement. But if the limited partners would become personally liable for any obligations of the converted entity, the plan must be approved by *all* limited partners *unless* the plan provides that all limited partners will have dissenters' rights (*see ¶ 5:880*). [Corps.C. § 15911.03(b)]

(1) [5:747] **Partnership agreement provision allowing other approval?** The limited partnership agreement may not restrict a partner's right to approve a conversion. [Corps.C. § 15901.10(b)(12), ¶ 5:67]

But it is not clear how § 15901.10(b)(12) would apply in view of the fact Corps.C. § 15911.03(b) expressly permits the partnership agreement to require approval of the limited partners by an amount greater or *lesser* than a majority. Perhaps § 15901.10(b)(12) would bar approval by a lower percentage that would offend notions of good faith and fair dealing —e.g., a partnership agreement provision that requires approval of the conversion by only those limited partnership interests held by the general partner. [See Corps.C. §§ 15901.10(b)(7), 15904.08(d)]

b. [5:748] **Amendment of plan:** A plan of conversion that has been approved may nevertheless be amended before the conversion takes effect if the amendment is approved by *all general* partners. If the amendment changes any of the principal terms of the plan of conversion, the amendment must also be approved by the limited partners in the same manner and extent as was required for approval of the original plan. [Corps.C. § 15911.03(d)]

c. [5:749] **Abandonment of plan:** At any time before the conversion is effective, the plan of conversion may be abandoned upon the approval of *all general* partners. The approval of the limited partners is not required. [Corps.C. § 15911.03(e)]

Abandonment is subject to any contractual rights of third parties (not including the limited partners). [Corps.C. § 15911.03(e)]

d. [5:750] **Retention of plan:** If the converted entity is a *domestic partnership* or a *foreign other business entity*, the plan must be kept at the converted entity's principal office. [Corps.C. § 15911.03(f)]

If the converted entity is a *California corporation*, the plan must be kept at the corporation's principal office or the corporation's registrar or transfer agent. [Corps.C. § 15911.03(f)]

If the converted entity is a *California LLC*, the plan must be kept at its designated office in California. [Corps.C. § 15911.03(f); see Corps.C. § 17701.13(a)(1) (LLC must "designate and continuously maintain" an office in California)]

(1) [5:751] **Copies upon request:** A copy of the plan must be given at no charge to any general or limited partner of the converting partnership at the request of the partner. A partner's waiver of this requirement is unenforceable. [Corps.C. § 15911.03(f)]

(a) [5:752] **Comment:** Corps.C. § 15911.03(f) states that upon request of "a partner of a converting limited partnership," the "converted entity" must deliver a copy of the plan "to the partner or the holder of shares, interests or other securities." While open to varying interpretations, this provision should probably be read as conferring the right to obtain a copy of the plan upon any person who was a *partner at the time the partnership approved the plan of conversion*, including partners who subsequently dissociated. There would be no need to confer this right upon existing holders of interests in the converted entity, because their right to inspect and copy the entity's organic documents, including the plan of conversion, would be governed by the law applicable to the converted entity.

3. [5:753] **Dissenters' Rights:** In a conversion of a partnership having *more than 35 limited partners*, limited partners who do not vote in favor of the conversion may be entitled to have the partnership buy out their limited partnership interests at fair market value. Dissenters' rights may also apply where the partnership *agreement* specifically provides for statutory dissenters' rights or *all* general partners and a *majority* in interest of *limited* partners agree that statutory dissenters' rights apply. [Corps.C. § 15911.32(b); *see further discussion at ¶ 5:880 ff.*]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

4. [5:754] **Statement or Certificate of Conversion (Conversion to California LLC, General Partnership or Corporation):** A *statement* of conversion is a statement setting forth the conversion and is contained in another document, such as a certificate of limited partnership, articles of incorporation or articles of organization. A *certificate* of conversion is a document pertaining only to the conversion and is comprised basically of the statement of conversion.

a. [5:755] **Contents:** The statement or certificate of conversion must set forth:

- The converting partnership's name and the Secretary of State's file number;
- A statement that the principal terms of the plan of conversion were approved by a vote of the partners, that equaled or exceeded the vote required under Corps.C. § 15911.03 (¶ 5:746), specifying each class entitled to vote and the percentage vote required of each class;
- The form of organization of the converted entity (LLC, general partnership, corporation, etc.);
- The name, mailing address and street address of the converted entity's agent for service of process and the mailing address of the converted entity's principal office (but the address of the agent for service of process should *not* be set forth if the agent is a corporation that meets the statutory requirements for acting as an agent for service of process under Corps.C. § 1505). [Corps.C. § 15911.06(b)]

b. [5:756] **Execution by all general partners ordinarily required:** A statement or certificate of conversion must be executed and acknowledged by all general partners. [Corps.C. §§ 15902.04(a)(7), 15911.06(b)]

➪ [5:757] ***PRACTICE POINTER:*** As stated, a statement of conversion is contained within another document, such as articles of incorporation. Thus, the document containing the statement of conversion must be signed by the general partners, who may also sign in the capacity of, e.g., incorporators or general partners of a general partnership.

[5:758] ***Reserved.***

c. When to use statement vs. certificate of conversion

(1) [5:759] **Conversion into California LLC:** If the partnership converts into a California LLC, a *statement* of conversion must be completed on the LLC's articles of organization to be filed with the Secretary of State. [Corps.C. § 15911.06(a)(1)]

- ***FORM:*** The Secretary of State's standard form Limited Liability Company Articles of Organization—Conversion (LLC-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:760] **Filing fee:** The fee for filing the articles of organization containing the statement of conversion is $70 (plus a $15 special handling fee if the articles are delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12190(b); 2 CCR § 21903(c)]

(b) [5:761] **Articles conclusive evidence of conversion:** A copy of the articles of organization, duly certified by the Secretary of State, is conclusive evidence of the conversion of the limited partnership into an LLC. [Corps.C. § 15911.04(b)]

(2) [5:762] **Conversion into California general partnership:** If the partnership converts into a California general partnership, a *statement* of conversion must be completed on the general partnership's statement of partnership authority. But if no statement of partnership authority is filed, a separate *certificate* of conversion must be filed with the Secretary of State. [Corps.C. § 15911.06(a)(2)]

FORMS

- The Secretary of State's standard form General Partnership Statement of Authority—Conversion (GP-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).
- The Secretary of State's standard form Certificate of Conversion (CONV-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).

[5:763] ***Reserved.***

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(a) Filing fee

1) [5:764] **Statement of conversion:** The fee for filing a statement of partnership authority containing a statement of conversion is $70 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12187(a); 2 CCR § 21903(c)]

2) [5:765] **Certificate of conversion:** The fee for filing a certificate of conversion is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(k); 2 CCR § 21903(c)]

(b) [5:766] **Statement of partnership authority conclusive evidence of conversion:** A copy of the statement of partnership authority, duly certified by the Secretary of State, is conclusive evidence of the conversion of the limited partnership in a general partnership. [Corps.C. § 15911.04(b)]

(3) [5:767] **Conversion into California corporation:** If the partnership converts into a California corporation, a *statement* of conversion must be completed on the corporation's articles of incorporation. [Corps.C. § 15911.06(a)(3)]

• ***FORM:*** Sample Articles of Incorporation with Statement of Conversion may be viewed online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:768] **Filing in Sacramento office only:** Ordinarily, articles of incorporation may be filed in either the Sacramento or Los Angeles office of the Secretary of State. However, articles containing a statement of conversion may be filed only in the Sacramento office.

(b) [5:769] **Filing fee:** The fee for filing articles of incorporation containing a statement of conversion is $150 (plus a $15 special handling fee if delivered personally to the Secretary of State's office). [See Gov.C. § 12182(a); 2 CCR § 21903(c)]

(4) [5:770] **Conversion into foreign entity:** If the partnership converts into a foreign limited partnership or other foreign business entity, a *certificate* of conversion must be filed with the Secretary of State. [Corps.C. § 15911.06(a)(4)]

• ***FORM:*** The Secretary of State's standard form Certificate of Conversion (CONV-1A) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(a) [5:771] **Filing fee:** The fee for filing a certificate of conversion is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(k); 2 CCR § 21903(c)]

d. [5:772] **No certificate of cancellation required:** The filing of a statement or certificate of conversion has the effect of filing a certificate of cancellation by the limited partnership. [Corps.C. § 15911.06(c)]

5. [5:773] **Effective Date of Conversion:** The conversion into another entity—regardless of the type entity—is effective upon the *earliest* date that all of the following occur:

• The partners duly approve the plan of conversion;

• All documents required by law to create the converted entity are filed; and

• Any effective date set forth in the plan of conversion occurs. [Corps.C. § 15911.04(a)]

a. [5:774] **Potential additional requirement when converting into foreign entity:** If the partnership converts into a foreign entity, the laws governing the converted foreign entity may impose an additional requirement before the conversion is deemed effective. [Corps.C. § 15911.05(b)]

6. [5:775] **Effect of Conversion:** The converted entity is for all purposes (other than franchise/income taxation) the same entity that existed before the conversion. The conversion is not deemed a transfer of property. Upon conversion, all partnership property and rights vest in the converted entity, and all partnership debts, liabilities and obligations continue as such of the converted entity. Any action or proceeding pending by or against the partnership may be continued against the converted entity as if the conversion had not occurred. [Corps.C. § 15911.09(a), (b)]

a. [5:776] **Nondissenting partner deemed party to new entity's governing documents:** All general partners, and all limited partners who did not exercise dissenters' rights (¶ 5:880 ff.), are deemed parties to any agreements constituting the governing

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

documents for the converted entity that were adopted as part of the plan of conversion (regardless of whether the partner executed the plan of conversion or such documents). [Corps.C. § 15911.03(c)]

[5:777] ***Reserved.***

b. Partner's liability following conversion

(1) [5:778] **Preconversion obligations:** Following conversion, a partner remains liable for all *partnership* obligations for which the partner was personally liable *before* the conversion. [Corps.C. § 15911.09(c)(1), (d)]

(2) [5:779] **Postconversion obligations:** A partner is also liable for all obligations of the *converted entity* incurred *after* the conversion, but those obligations may be satisfied only out of property of the entity where:

- The partner becomes a limited partner in a limited partnership;
- The partner becomes a shareholder in a corporation;
- The partner becomes a member of an LLC (unless the articles of organization or other governing documents provide otherwise regarding liability);
- The partner becomes a holder of equity securities in another type of entity if such a holder is not personally liable for the obligations of that entity under the law under which the entity is organized or under its governing documents. [Corps.C. § 15911.09(c)(2)]

(3) [5:780] **Limited partner's liability for transaction entered into with third party:** Where a limited partner entered into a transaction with a third party who reasonably believed that the limited partner was a general partner, the limited partner is liable for a resulting obligation incurred within 90 days after the conversion takes effect. [Corps.C. § 15911.09(e)]

c. [5:781] **Recording of statement or certificate of conversion:** The converted entity may file a certified copy of the certificate of conversion, or document containing a statement of conversion, in the county recorder's office of any county in which the converting partnership holds real property. Doing so shows record ownership in the converted entity of the converted partnership's interest in the property and creates a conclusive presumption, in favor of bona fide purchasers or encumbrancers for value, that the conversion was validly completed. [Corps.C. § 15911.07]

7. [5:782] **Tax Treatment:** *See* ¶ 8:580 ff.

8. [5:783] **Securities Law Considerations:** *See* ¶ 7:1500 ff.

[5:784 - 5:799] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-I

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

I. Mergers

1. [5:801] Merger With Foreign Entity
    - a. [5:802] Governing law
2. [5:803] No Merger With Limited Liability Partnership
3. [5:804] Agreement of Merger
    - a. Approval of agreement
        - (1) [5:806] By partnership
        - (2) [5:807] By other entity
    - b. [5:808] Contents
        - (1) [5:809] Terms and conditions
        - (2) [5:810] Name and place of organization
            - (a) [5:811] Change of name
        - (3) [5:812] Conversion of partnership interests
            - (a) [5:813] Special provisions where more than 35 limited partners
                - 1) [5:814] Equal treatment of partnership interests
                    - a) [5:815] Exception
            - (b) [5:816] Special provision for more-than-50% owned partnership
                - 1) [5:817] Exception for 90%-owned partnership
        - (4) [5:818] Other provisions
            - (a) [5:819] Amendment of certificate of limited partnership
    - c. [5:820] Amendment of agreement
    - d. [5:821] Abandonment of merger
    - e. [5:822] Amendment or adoption of partnership agreement
        - (1) [5:823] Dissenters' rights where greater number of limited partners required to approve amendment or adoption than required to approve merger
    - f. [5:824] Retention of merger agreement
        - (1) [5:825] Right to copy upon request
4. [5:826] Dissenters' Rights
5. [5:827] Filings With Secretary of State
    - a. [5:828] Certificate of merger
        - (1) [5:829] Contents
            - (a) [5:830] Names and any file numbers
            - (b) [5:831] Partnership approval
            - (c) [5:832] Changes to certificate of limited partnership
            - (d) [5:833] Effective date
            - (e) [5:834] Survivor's name and other information
            - (f) [5:835] Other information

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

1) [5:836] Merger agreement where corporation merges into foreign limited partnership
(2) [5:838] Execution
(3) [5:839] Filing fee
b. [5:840] Agreement of merger
(1) [5:841] Execution by all general partners
(2) [5:843] Filing fee
c. [5:844] Disappearing foreign corporation—no FTB certificate of satisfaction required
6. [5:845] Effective Date of Merger
7. [5:846] Effect of Merger
a. [5:847] Lawsuits or proceedings
b. [5:848] General partner's liability
c. [5:849] Disappearing limited partnership—no certificate of cancellation required
(1) [5:850] Foreign limited partnership
d. [5:851] Disappearing foreign corporation—no certificate of surrender required
e. [5:852] Recording of certificate or agreement of merger
8. [5:853] Tax Treatment
9. [5:854] Securities Law Considerations

[5:800] A limited partnership may merge with one or more other California limited partnerships. It may also merge with California general partnerships, LLCs or corporations. Merger with other California business entities (a business trust, real estate investment trust or for-profit unincorporated association) is permitted so long as the merger is permitted under the laws governing the other entity. [Corps.C. §§ 15901.02(u), 15911.10, 15911.11]

1. [5:801] **Merger With Foreign Entity:** A partnership may merge with one or more *foreign* partnerships or other business entities (corporations, general partnerships, LLCs, business trusts, real estate investment trusts or for-profit unincorporated associations). If the California partnership is the survivor, the foreign entities must not be prohibited from merging by the laws under which they are organized. If a foreign partnership or other business entity is the survivor, the laws of the jurisdiction under which the survivor is organized must authorize the merger. [Corps.C. §§ 15901.02(*l*), (u), 15911.11(c), 15911.17(a), (b)]

a. [5:802] **Governing law:** If the survivor is a California business entity, the limited partnership must comply with the merger provisions contained in the LP Act. [Corps.C. § 15911.17(b)]

If the survivor is a foreign business entity, the merger may be performed in accordance with the laws governing the foreign entity (but the provisions regarding dissenters' rights continues to apply to the limited partnership). [Corps.C. § 15911.17(b), (f)]

2. [5:803] **No Merger With Limited Liability Partnership:** A limited partnership may not merge with a limited liability partnership … because the law governing limited liability partnerships does not permit a limited liability partnership to merge with another entity. [Corps.C. § 16910(a)(3); *see* ¶ *4:270*]

3. [5:804] **Agreement of Merger:** The parties to the merger must approve an agreement of merger. Persons other than the merging entities, such as a parent of a constituent limited partnership, may be parties to the agreement. [Corps.C. § 15911.12(a)]

[5:805] ***Reserved.***

a. Approval of agreement

(1) [5:806] **By partnership:** The merger *agreement* must be approved by *all* general partners. [Corps.C. § 15911.12(a)]

The *principal terms* of the merger must be approved a *majority in interest* of each class of *limited* partners (unless the partnership agreement requires a *greater* approval). But if the limited partners are to become personally liable for any obligations of a constituent limited partnership or any other constituent business entity, the principal terms of the merger must be approved by *all* limited partners unless the merger agreement provides that all limited partners will have dissenters' rights (Corps.C. § 15911.20 et seq., ¶ 5:880 ff.). [Corps.C. § 15911.12(a)]

WESTLAW © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(*Caution:* The limited partnership agreement may not restrict a partner's right to approve the merger; *see ¶ 5:67*.)

(2) [5:807] **By other entity:** The agreement must be approved by each other constituent entity by those persons required to approve the merger by the laws under which it is organized. [Corps.C. § 15911.12(a)]

b. [5:808] **Contents:** The merger agreement must contain all the following:

(1) [5:809] **Terms and conditions:** The merger agreement must state the terms and conditions of the merger. [Corps.C. § 15911.12(a)(1)]

(2) [5:810] **Name and place of organization:** The merger agreement must state the name and place of organization of all constituent entities, and which is to be the surviving entity. [Corps.C. § 15911.12(a)(2)]

(a) [5:811] **Change of name:** The agreement may change the name of the surviving limited partnership, which may be the same as or similar to the name of a disappearing limited partnership. [Corps.C. § 15911.12(a)(2)]

(3) [5:812] **Conversion of partnership interests:** The agreement must state the manner of converting the partnership interests into interests or other securities of the surviving limited partnership or other entity. If partnership interests are not to be converted solely into interests or other securities of the surviving entity, the agreement must set forth the cash, property, rights, interests or securities which the partners are to receive in exchange for their interests. [Corps.C. § 15911.12(a)(3)]

Alternatively, the agreement may state that the partner's partnership interests are canceled without consideration. (This may occur, for instance, if a "merger sub" is organized to participate in the merger of constituent limited partnerships and/or other business entities and its outstanding interests are canceled upon consummation of the merger.) [Corps.C. § 15911.12(a)(3)]

(a) [5:813] **Special provisions where more than 35 limited partners:** Some special provisions apply to constituent limited partnerships having more than 35 limited partners unless the Commissioner of Financial Protection and Innovation approves the fairness of the terms and conditions of the merger. [Corps.C. §§ 15911.12(b), 15911.13]

1) [5:814] **Equal treatment of partnership interests:** Each limited partnership interest of the same class must be treated equally with respect to any distribution of cash, property, rights, interests or securities unless all limited partners of the class consent otherwise. This "equal rights" requirement does not apply to constituent limited partnerships with 35 or fewer limited partners. [Corps.C. § 15911.12(b)]

a) [5:815] **Exception:** Equal treatment does not apply to a limited partnership interest that is being canceled *and* that is held by a constituent limited partnership, its parent or "subsidiary." [Corps.C. § 15911.12(b)]

(b) [5:816] **Special provision for more-than-50% owned partnership:** Unless all limited partners of the same class consent otherwise, unredeemable limited partnership interests may be converted only into unredeemable interests or securities of the surviving entity or a parent if a constituent limited partnership or constituent other business entity owns, directly or indirectly, prior to the merger, interests or securities of a another constituent business entity representing more than 50% of the interests or securities entitled to vote with respect to the merger of the other business entity (or more than 50% of the "general" voting power—i.e., the power to vote on election of directors (see Corps.C. § 194.5)—of a constituent business entity that is a domestic corporation). [Corps.C. § 15911.12(b)]

1) [5:817] **Exception for 90%-owned partnership:** But this provision does not apply in a merger of a limited partnership with a limited partnership in which it controls at least 90% of the limited partnership interests entitled to vote with respect to the merger. [Corps.C. § 15911.12(b)]

(4) [5:818] **Other provisions:** The agreement may also contain any other provisions required by the laws under which any other constituent business entity is organized, as well as any other provisions that are desired (including a provision for the treatment of fractional partnership interests). [Corps.C. § 15911.12(a)(4), (5)]

(a) [5:819] **Amendment of certificate of limited partnership:** The merger agreement may provide for amendment of the certificate of limited partnership of a survivor limited partnership. In such circumstances, the agreement must be approved by the vote required to amend the certificate of limited partnership. The filing of a certificate of merger effects the amendment, and no separate certificate of amendment need be filed. [Corps.C. § 15911.14(a)(3)]

c. [5:820] **Amendment of agreement:** A merger agreement that has been duly approved may be amended before the certificate of merger or the merger agreement is filed if the amendment is approved:

• By the general partners in the same manner as was required for approval of the original merger agreement;

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• If the amendment changes any of the principal terms of the merger agreement, by the limited partners in the same manner and to the same extent as required for the approval of the original merger agreement; and

• By each other constituent business entity. [Corps.C. § 15911.12(c)]

d. [5:821] **Abandonment of merger:** At any time before the merger is effective, the general partners may abandon the merger without further approval by the limited partners. Abandonment is subject to any contractual rights of other parties to the merger and third parties. [Corps.C. § 15911.12(d)]

e. [5:822] **Amendment or adoption of partnership agreement:** A merger agreement may effect any *amendment* to the partnership agreement. It may also effect the adoption of a *new* partnership agreement for the *survivor* limited partnership. Any such amendment, or adoption of a new partnership agreement, is effective at the effective time or date of the merger. [Corps.C. § 15911.12(e)]

(1) [5:823] **Dissenters' rights where greater number of limited partners required to approve amendment or adoption than required to approve merger:** If a greater number of limited partners is required to approve an amendment to the partnership agreement than is required to approve the merger agreement, and the number of limited partners that approve the merger agreement is less than the number required to approve an amendment to the partnership agreement, then any amendment to the partnership agreement or adoption of a new partnership agreement made in the merger agreement is effective only if the merger agreement provides that *all* limited partners have dissenters' rights (Corps.C. § 15911.20 et seq., ¶ 5:880). [Corps.C. § 15911.12(e)]

f. [5:824] **Retention of merger agreement:** If the survivor is a *California limited partnership*, the merger agreement must be kept at its designated office in California. [Corps.C. § 15911.12(f); see Corps.C. § 15901.14(a) (limited partnership must "designate and continuously maintain" an office in California)]

If the survivor is another business entity or a foreign limited partnership, the merger agreement must be kept at its principal place of business. [Corps.C. § 15911.12(f); see Corps.C. § 15911.14(a)(5)]

(1) [5:825] **Right to copy upon request:** Upon request, a copy of the agreement of merger must be given "promptly" without charge to any limited partner or holder of shares, interests or other securities of a constituent business entity. Any waiver of this requirement is unenforceable. [Corps.C. § 15911.12(f)]

4. [5:826] **Dissenters' Rights:** A limited partner who does not vote in favor of the merger may be entitled to have his or her interest bought out at fair market value. *See discussion at* ¶ 5:880 ff.

5. [5:827] **Filings With Secretary of State:** A certificate of merger is required if the survivor is an entity other than a corporation, while an agreement of merger is filed if the survivor is a California corporation or a foreign corporation in a merger in which a California corporation was a disappearing entity.

a. [5:828] **Certificate of merger:** A *certificate* of merger *must* be filed on the form prescribed by the Secretary of State in a merger involving a California limited partnership and another business entity in which the partnership or other business entity (other than a corporation) is the *survivor*. [Corps.C. § 15911.14(a); see Corps.C. § 15911.17(c)]

• ***FORM:*** The Secretary of State's standard form Certificate of Merger (OBE MERGER-1) is available online at the Secretary of State's website (*www.sos.ca.gov*).

(1) [5:829] **Contents:** The certificate of merger must set forth the following information:

(a) [5:830] **Names and any file numbers:** The certificate must contain the names and the Secretary of State's file numbers (if any) of each of the constituent entities, separately identifying the surviving entity and the disappearing entity or entities. [Corps.C. § 15911.14(a)(1)]

(b) [5:831] **Partnership approval:** If a vote of the limited partners was required, the certificate must contain a statement setting forth the total number of outstanding interests of each class entitled to vote on the merger and that the principal terms of the agreement of merger were approved by a vote of the number of interests of each class, which equaled or exceeded the vote required. The certificate must specify each class entitled to vote and the percentage vote required of each class. [Corps.C. § 15911.14(a)(2)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(c) [5:832] **Changes to certificate of limited partnership:** Where a limited partnership is the survivor, the certificate of merger must set forth any change required to the information set forth in the survivor's certificate of limited partnership (*see ¶ 5:130 ff.*) resulting from the merger, including any change in the survivor's name. (The filing of a certificate of merger setting forth any changes to a filed certificate of limited partnership has the effect of filing of a certificate of amendment of the certificate of limited partnership, and no separate certificate of amendment need be filed.) [Corps.C. § 15911.14(a)(3)]

(d) [5:833] **Effective date:** Where the certificate is not to be effective upon filing, the certificate must set forth the future effective date or time, which must be a specified date or time *not more than 90 days* after the filing. [Corps.C. § 15911.14(a)(4)]

(e) [5:834] **Survivor's name and other information:** Where the survivor is another business entity or a foreign limited partnership, the certificate of merger must set forth the survivor's name, type of entity, jurisdiction in which the entity was organized and by whose laws its internal affairs are governed, and the entity's principal place of business. [Corps.C. § 15911.14(a)(5)]

(f) [5:835] **Other information:** The certificate must also contain any other information required by the laws under which each other constituent entity is organized. [Corps.C. § 15911.14(a)(6)]

1) [5:836] **Merger agreement where corporation merges into foreign limited partnership:** If the survivor is a foreign limited partnership in a merger in which a California corporation is a disappearing entity, a copy of the agreement of merger (including officers' certificates; see Corps.C. § 1113(g)(1)) must be filed simultaneously with the certificate of merger. [Corps.C. § 15911.14(a)(6); *see ¶ 5:840 ff.*]

➪ [5:837] ***PRACTICE POINTER:*** The agreement of merger should be filed as an attachment to the certificate of merger. The certificate of merger permits attachments to be incorporated by reference.

(2) [5:838] **Execution:** The certificate of merger must be executed and acknowledged by:

• Each California limited partnership by *all* general partners (unless a lesser number is provided in the certificate of limited partnership);

• Each foreign limited partnership by *one or more* general partners; and

• Each other business entity by those persons required to execute the certificate by the laws under which the entity is organized. [Corps.C. §§ 15902.04(a)(8), 15911.14(a)]

(3) [5:839] **Filing fee:** The fee for filing the certificate of merger is $70 if only limited partnerships are merged (regardless of the number of constituent limited partnerships) and $150 for all other mergers (plus, in either situation, a $15 special handling fee if the certificate is delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(i), (j); 2 CCR § 21903(c)]

b. [5:840] **Agreement of merger:** A copy of the agreement must be filed if the survivor is a California corporation or a foreign corporation in a merger in which a California corporation is a constituent entity. The agreement of merger must include officers' certificates (per Corps.C. § 1113(g)(1)). [Corps.C. § 15911.14(b); see Corps.C. § 15911.17(c)]

(1) [5:841] **Execution by all general partners:** The agreement of merger must be executed and acknowledged by all general partners unless a lesser number is provided in the certificate of limited partnership. (Of course, the agreement must also be appropriately executed and acknowledged by the constituent corporation and any other business entities.) [Corps.C. § 15911.14(b)]

[5:842] ***Reserved.***

(2) [5:843] **Filing fee:** The fee for filing the agreement of merger is $150 (plus a $15 special handling fee if the agreement is delivered in person to the Secretary of State's Office). [Gov.C. §§ 12182(a), 12186(*l*); 2 CCR § 21903(c)]

c. [5:844] **Disappearing foreign corporation—no FTB certificate of satisfaction required:** The LP Act provides that if a foreign corporation qualified to transact California business disappears as a result of the merger, a certificate of satisfaction from the Franchise Tax Board, as required by Rev. & Tax.C. § 23334, must be filed with the certificate of merger or agreement of merger. [Corps.C. § 15911.14(d)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

This is a holdover from the days when the Secretary of State could not file an agreement of merger between *corporations* without a certificate of satisfaction stating that all of the disappearing corporation's tax liabilities have been paid or secured. However, Rev. & Tax.C. § 23334 was repealed, and the certificate of satisfaction is no longer required in corporate mergers or in mergers involving LLCs. Instead, after filing the merger documents, the Secretary of State notifies the Franchise Tax Board of the merger, and the survivor is deemed to assume the disappearing entity's franchise tax obligations. [See Corps.C. §§ 1107.5 (corporations), 17710.19 (LLCs)]

6. [5:845] **Effective Date of Merger:** The merger is effective upon the filing of the certificate of merger or agreement or merger *unless* the certificate or agreement specifies a later effective date or time. [Corps.C. § 15911.15(a); See Corps.C. § 15911.17(c)]

If the survivor is a foreign entity, the merger becomes effective in accordance with the law governing the foreign entity; but the merger continues to be effective as to the limited partnership upon the filing of the certificate of merger or agreement of merger. [Corps.C. § 15911.17(d)]

7. [5:846] **Effect of Merger:** When the merger becomes effective, the separate existence of the disappearing entities cease and the surviving entity automatically succeeds to all of the disappearing entity or entities' property, rights, debts and liabilities. [Corps.C. § 15911.16(a), (b)]

a. [5:847] **Lawsuits or proceedings:** Any action or proceeding pending by or against any disappearing entity may proceed against that entity to judgment, and the judgment is binding upon the survivor. [Corps.C. § 15911.16(c)]

Alternatively, the action or proceeding may be brought against the survivor, or the survivor may be substituted in place of the disappearing entity. [Corps.C. § 15911.16(c)]

b. [5:848] **General partner's liability:** The general partner of a disappearing limited partnership continues to have the same liability for the debts and obligations of the disappearing limited partnership that existed before the merger. [Corps.C. § 15911.16(d)]

c. [5:849] **Disappearing limited partnership—no certificate of cancellation required:** The filing of a certificate of merger or agreement of merger has the effect of filing a certificate of cancellation of a disappearing limited partnership's certificate of limited partnership. [Corps.C. § 15911.14(c)]

(1) [5:850] **Foreign limited partnership:** The filing of a certificate of merger or agreement of merger also has the effect of a cancellation of registration for any *foreign* limited partnership, and no separate certificate of cancellation is required. [Corps.C. § 15911.17(e)]

d. [5:851] **Disappearing foreign corporation—no certificate of surrender required:** By filing the certificate of merger or agreement of merger, a disappearing foreign corporation automatically surrenders its right to transact business in California. The corporation need not file a certificate of surrender of its certificate of qualification. [Corps.C. § 15911.14(d); see Corps.C. §§ 2105(a), 2112, 2113]

e. [5:852] **Recording of certificate or agreement of merger:** The filing of a certified copy of the certificate of merger or the filed agreement of merger in the county recorder's office of any county in which a disappearing entity holds real property shall evidence record ownership in the survivor of the disappearing entity's interest in the property. [Corps.C. § 15911.18]

8. [5:853] **Tax Treatment:** *See ¶ 8:600 ff.*

9. [5:854] **Securities Law Considerations:** *See ¶ 7:1500 ff.*

[5:855 - 5:879] ***Reserved.***

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-J

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

J. Dissenters' Rights

- 1. [5:881] "Reorganization"
  - a. [5:882] Conversion
  - b. [5:883] Merger
  - c. [5:884] "Exchange reorganization"
    - (1) [5:885] "Control" requirement
      - (a) [5:886] Compare—no "reorganization" where no "control"
      - (b) [5:887] Compare—law applicable to corporations
      - (c) [5:888] "Control" of another limited partnership
      - (d) [5:889] "Control" of LLC
      - (e) [5:890] "Control" of corporation
    - (2) [5:891] "Boot" permitted
  - d. [5:892] "Sale of assets reorganizations"
- 2. [5:893] When Applicable
  - a. [5:894] Post-1990 partnerships
  - b. [5:895] Foreign partnerships
  - c. [5:896] By agreement of partners
  - d. [5:897] Partnerships having buyout provisions
  - e. [5:898] Partnerships with fewer than 35 limited partners
- 3. [5:899] Buyout Price
- 4. [5:900] Includes "Assignees"
  - a. [5:901] Comment
- 5. [5:902] Exception for "Listed" Limited Partnership Interests
- 6. Procedure
  - a. [5:904] Partnership's notice to nonapproving limited partners
    - (1) [5:906] Compare—"listed" limited partnership interests
    - (2) [5:907] Caution—potential attorney and expert witness fees award against partnership
  - b. [5:908] Dissenting limited partner's purchase demand
    - (1) [5:909] Special rule for "listed" limited partnership interests
    - (2) [5:910] Contents of demand
      - (a) [5:912] Certificate representing partnership interest
        - 1) [5:913] Exchange for certificates of "appropriate denominations"
        - 2) [5:914] Subsequent transferees bound
          - a) [5:915] Transferee may exercise buyout right
      - (b) [5:916] No withdrawal of demand without partnership consent
  - c. [5:917] Buyout
    - (1) [5:918] Written agreement retained by partnership

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(2) [5:919] Lawsuit to determine buyout price where parties cannot agree
(a) [5:920] Deadline for suit
(b) [5:921] Joinder/intervention of other limited partners
(c) [5:922] Stay of litigation re approval of reorganization
(d) [5:923] Court determination
1) [5:924] Procedure where one appraiser or all appraisers agree
2) [5:925] Judgment
3) [5:926] Apportionment of costs; potential attorney fees award
7. [5:927] Distributions Offset Against Buyout Price
8. [5:928] Continuation of Limited Partners' Rights Pending Buyout
9. [5:929] Limitation—No Buyout Payment if Constituting Unlawful Distribution or Voidable Transaction
10. [5:930] Loss of Dissenting Status
11. [5:931] Restrictions on Challenges to Reorganization
a. Exceptions permitting suit
(1) [5:933] Suit challenging vote
(2) [5:934] Suit against general partner (or partnership)
(3) [5:935] Suit involving reorganizations between related entities
(a) [5:936] "Control"
(b) [5:937] Inapplicable where majority of other limited partners approve reorganization
(c) [5:938] Burden of proof in suit
12. [5:939] Payment of Limited Partner's Court Costs and Attorney Fees if Reorganization Abandoned

[5:880] Ordinarily, dissenters' rights apply whenever the approval of partners is required for a "reorganization" (¶ 5:881 ff.) of a partnership having *more than 35 limited partners*. In these circumstances, each *limited* partner who did *not vote in favor* of the reorganization (or, if the outstanding partnership interests are publicly traded, each limited partner who voted *against* the reorganization) may require the partnership to buy out the limited partnership interest for cash in accordance with the procedure set forth in the LP Act. [Corps.C. §§ 15911.21(a), (b)(3), 15911.32(b)]

(*Caution:* The limited partnership agreement may not vary the statutory provisions relating to dissenters' rights except to the extent the provisions expressly permit; *see ¶ 5:68*.)

1. [5:881] **"Reorganization":** For dissenters' rights purposes, a "reorganization" means any of the following:

a. [5:882] **Conversion:** Dissenters' rights apply in conversions (¶ 5:740 ff.). [Corps.C. § 15911.20(a)(1)]

b. [5:883] **Merger:** Dissenters' rights also apply in a merger (¶ 5:800 ff.). [Corps.C. § 15911.20(a)(2)]

c. [5:884] **"Exchange reorganization":** Dissenters' rights also apply in what may be called an "exchange reorganization," a term borrowed from the law applicable to corporations.

Such an "exchange reorganization" occurs when a limited partnership exchanges (in whole or in part) its partnership interests for partnership interests (or equity securities) of another limited partnership (or other business entity) if, immediately after the acquisition, the acquiring limited partnership has *control* of the other limited partnership (or other business entity). An "exchange reorganization" also occurs when a limited partnership exchanges, in return for ownership interests of the acquired entity, partnership interests or equity securities of a limited partnership or other business entity that *controls* the acquiring limited partnership (i.e., a "parent" entity). [Corps.C. § 15911.20(a)(3)]

Thus, the limited partnership effectively acquires another limited partnership (or other business entity, such as a corporation) which it operates as a "subsidiary" through ownership of the other limited partnership's partnership interests (or of the other business entity's equity securities, such as a corporation's stock). No merger or consolidation is effected between the limited partnership and the other entity: Both entities continue to retain their separate identities. The owners of the "subsidiary" receive limited partnership interests (either of the acquiring limited partnership or its "parent" limited partnership, or alternatively, other equity securities of the acquiring limited partnership's "parent" entity), and thus become limited partners in the acquiring limited partnership (or holders of other equity securities of the acquiring limited partnership's "parent" entity).

(1) [5:885] **"Control" requirement:** After the exchange reorganization, the limited partnership must "control" the "subsidiary"—i.e., the limited partnership must possess, directly or indirectly, the power to direct or cause the direction of the "subsidiary's" management and policies. [Corps.C. § 15911.20(b)]

(a) [5:886] **Compare—no "reorganization" where no "control":** There are no dissenters' rights where a limited partnership that issues limited partnership interests in return for ownership interests in another entity does not obtain "control" of the other entity.

It may seem anomalous that dissenters' rights would hinge on "control" rather than on issuance of limited partnership interests (which may dilute the limited partners' investments in the partnership). But this in fact parallels the law applicable to corporations. (One explanation is that, with the change in control, those limited partners who do not accept interests in the acquiring limited partnership should be offered the opportunity to "bail out" of their investment now that it is controlled by a party they neither selected when they invested in the acquired partnership nor may now desire.) [See Corps.C. § 160(b)]

(b) [5:887] **Compare—law applicable to corporations:** The "control" requirement is much more straightforward with respect to corporations. When a corporation engages in an exchange reorganization with another corporation (effectively acquiring a subsidiary), "control" means, quite simply, direct or indirect ownership of *more than 50%* of the target corporation's voting shares. [Corps.C. § 160(b)]

Determining when a limited partnership has "control" of another limited partnership or other business entity can be problematic, as described below (¶ 5:888 ff.).

(c) [5:888] **"Control" of another limited partnership:** A limited partnership would appear to have clear "control" of another limited partnership only if the limited partnership can remove and replace the general partner of the "subsidiary" limited partnership with a person or entity of its own choosing (e.g., by the general partner of the "parent" limited partnership). That, in turn, will depend on the terms of the "subsidiary" limited partnership's partnership agreement. Presumably, no exchange reorganization would be launched without the acquiring limited partnership having done its homework and being confident that it would, upon acquiring a certain percentage of the outstanding partnership interests of the target limited partnership, acquire effective control.

(d) [5:889] **"Control" of LLC:** Similarly, an acquiring LLC would acquire control of a "target" LLC only if it could remove and replace the LLC manager or managers in a manager-managed LLC, or acquire a controlling interest of the outstanding LLC membership interests in a member-managed LLC. Again, it is unlikely that an exchange reorganization would be launched by an acquirer unless it has done its homework and is confident it can achieve such control by acquiring a certain minimum of the outstanding membership interests in the target LLC.

(e) [5:890] **"Control" of corporation:** A limited partnership would have "control" of a corporation so long as it owns more than 50% of the corporation's voting stock. But this might not be the situation where a voting trust or shareholder agreement skews power over corporate management in the hands of the holders of less than a majority of the outstanding voting stock.

(2) [5:891] **"Boot" permitted:** As stated above (¶ 5:884), the exchange must be in whole or *in part* for the limited partnership's limited partnership interests (or the partnership interests or equity securities of a partnership or other business entity that is in control of the acquiring limited partnership). [Corps.C. § 15911.20(a)(3)]

Thus, the limited partnership may offer the owners of the target entity limited partnership interests plus cash (or other property).

➪ [5:891.1] ***PRACTICE POINTER:*** The dissenters' rights provisions are the only statutory provisions dealing with limited partnership exchange reorganizations, which are extremely rare. As stated above (¶ 5:884), the concept of exchange reorganizations is taken from the laws applicable to corporations, which have specific IRC provisions that allow *nontaxable* reorganizations (see IRC §§ 354(a), 361, 368(a)(1)(B)). These IRC provisions do *not* apply to pass-through entities. (The taxation of limited partnership exchange reorganizations is governed by the federal tax provisions applicable to pass-through entities generally; *see Ch. 8*.)

d. [5:892] **"Sale of assets reorganizations":** Dissenters' rights also apply in what may be called a "sale of assets reorganization," another term borrowed from the law applicable to corporations.

Such a "sale of assets reorganization" occurs when a limited partnership acquires all or substantially all the *assets* of another limited partnership or other business entity in exchange (in whole or in part) for either its partnership interests *or its debt*

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

securities that are not adequately secured and that have a maturity date in excess of *five years* after consummation of the acquisition. [Corps.C. § 15911.20(a)(4)]

A "sale of assets reorganization" also occurs when a limited partnership exchanges, in return for assets, partnership interests, equity securities or debt securities of a limited partnership or other business entity that *controls* the acquiring limited partnership (i.e., a "parent" entity). The debt securities must meet the same requirements (i.e., not adequately secured and have a maturity in excess of five years). And the "parent" is in "control" of the acquiring limited partnership if it possesses direct or indirect power to direct the limited partnership's management and polices. [Corps.C. § 15911.20(a)(4), (b)]

The "sale of assets reorganization" provision parallels the sale of assets reorganization provisions applicable to corporations that acquire assets in exchange for stock (or debt securities). [See Corps.C. § 181(c)]

➪ [5:892.1] ***PRACTICE POINTER:*** The dissenters' rights provisions are the only statutory provisions dealing with limited partnership "sale of assets reorganizations." As with exchange reorganizations (¶ 5:891.1), *corporate* "sale of assets reorganizations" have specific IRC provisions that allow *nontaxable* reorganizations (see IRC §§ 354(a), 361, 368(a)(1)(C)). These IRC provisions do *not* apply to pass-through entities. (The taxation of limited partnership "sale of assets reorganizations" is governed by the federal tax provisions applicable to pass-through entities generally; *see Ch. 8*.)

2. [5:893] **When Applicable:** As set forth below (¶ 5:894 ff.), dissenters' rights do not apply in all reorganizations.

a. [5:894] **Post-1990 partnerships:** Dissenters' rights apply to partnerships formed after 1990. [Corps.C. § 15911.32(a)(1)]

b. [5:895] **Foreign partnerships:** Dissenters' rights apply to foreign limited partnerships (1) formed or that filed an application to qualify to do business in California after 1990 and (2) having limited partners holding more than 50% of the voting power who reside in California. [Corps.C. § 15911.32(a)(2)]

c. [5:896] **By agreement of partners:** Dissenters' rights apply if the partnership agreement so provides, or if *all* general partners and a *majority* in interest of limited partners so agree. [Corps.C. § 15911.32(a)(3)]

d. [5:897] **Partnerships having buyout provisions:** Dissenters' rights do *not* apply if the partnership agreement specifically sets forth the amount to be paid for dissenting interests in the event of a reorganization. [Corps.C. § 15911.32(b)]

e. [5:898] **Partnerships with fewer than 35 limited partners:** Most significantly, dissenters' rights do *not* apply to partnerships having 35 or fewer limited partners *unless* the partnership agreement provides that statutory dissenters' rights apply or *all* general partners and a majority in interest of limited partners agree that statutory dissenters' rights apply. [Corps.C. § 15911.32(b)]

3. [5:899] **Buyout Price:** The buyout amount is the *fair market value* of the limited partnership interests as determined as of the *day before the first announcement* of the terms of the proposed reorganization, excluding any appreciation or depreciation in consequence of the proposed reorganization. The buyout price is paid in *cash* (or cash equivalent)—i.e., no installment payments, debts instruments or securities. [Corps.C. § 15911.21(a)]

4. [5:900] **Includes "Assignees":** Dissenters' rights apply to the "recordholder" of a limited partnership interest, including an "assignee of record" of a recordholder. [Corps.C. § 15911.21(c)]

a. [5:901] **Comment:** Corps.C. § 15911.21(c) is taken word-for-word from prior law (former Corps.C. § 15679.2(c)). However, the term "assignee" is not otherwise used in the LP Act. The LP Act uses the term "transferee" instead. [See Corps.C. § 15901.02(a*l*) & "Uniform Limited Partnership Act Comment—Paragraph (ak)" (should be Paragraph (al) (*see* ¶ *5:19*)]

An assignee (or transferee) of a limited partnership interest does not have voting rights. [Corps.C. § 15907.02(a)(3)] Accordingly, for an assignee to exercise dissenters' rights, the assignor, if a limited partner, must not have voted in favor of the reorganization (or, if the outstanding limited partnership interests are publicly traded, must have voted against the reorganization). Since most limited partnerships are not publicly traded, this should not prove to be an impediment in most cases because assignor limited partners typically want nothing further to do with the partnership and will not participate in the vote on a reorganization.

5. [5:902] **Exception for "Listed" Limited Partnership Interests:** Special rules apply where limited partnership interests are listed either on a national securities exchange (as certified by the Financial Protection and Innovation Commissioner under

Corps.C. § 25100(o)) or on the list of OTC margin stocks issued by the Federal Reserve System Board of Governors. In such circumstances, the partnership must, in the notice requesting the partners' approval of the reorganization, provide a summary of the relevant statutory provisions regarding dissenters' rights (i.e., Corps.C. §§ 15911.21-15911.25). Limited partners holding a class of "listed" partnership interests have dissenters' rights only if *at least 5%* of the outstanding interests of that class demand to be bought out. [Corps.C. § 15911.21(b)(1)]

Additionally, limited partners seeking to be bought out must have voted *against* the reorganization (i.e., failure to vote in favor is not sufficient) *unless* approval was sought by *written consent* rather than at a meeting. If approval was sought by written consent, the limited partner is entitled to dissenters' rights if the limited partner *did not vote in favor* of the reorganization. [Corps.C. § 15911.21(b)(3)]

[5:903] ***Reserved.***

6. Procedure

a. [5:904] **Partnership's notice to nonapproving limited partners:** Within 10 days after approval of the plan of reorganization by the limited partners, the partnership must send notice of the approval to each limited partner who did not approve the reorganization (including "assignees" of limited partners who did not approve the reorganization; *see ¶ 5:900*). The notice must include:

• A copy of Corps.C. §§ 15911.21 through 15911.25;

• A statement of the price determined by the partnership to represent the fair market value of its outstanding interests; and

• A "brief description" of the procedure to be followed if the limited partner wishes to be bought out. [Corps.C. § 15911.22(a)]

The statement of price constitutes an *offer* to purchase any dissenting interests. [Corps.C. § 15911.22(a)]

➪ [5:905] ***PRACTICE POINTER:*** The notice of approval typically includes a transmittal letter or like form by which the limited partner accepts the offer, provides contact information, attests to the ownership of the interests held of record by the limited partner, and provides a social security or tax identification number (or completes an enclosed IRS Form W-9).

Although the partnership's notice to the nonapproving limited partners does not trigger the limited partners' buyout rights, it does serve other purposes, such as to begin the six-month period for bringing an action for judicial determination of the buyout price (*see ¶ 5:919 ff.*).

(1) [5:906] **Compare—"listed" limited partnership interests:** As stated, a limited partnership with "listed" interests must include a summary of the statutory buyout provisions in its notice requesting the limited partners' *approval* of the reorganization. Dissenting limited partners desiring to be bought out must make a written demand not later than the *date of the limited partners' meeting to vote on the reorganization* (*see ¶ 5:908 ff.*). [Corps.C. §§ 15911.21(b)(1)(A), 15911.22(b)]

(2) [5:907] **Caution—potential attorney and expert witness fees award against partnership:** A partnership that "lowballs" dissenting partners may be liable for all court costs, including fees of attorneys, appraisers and expert witnesses, if a court awards the dissenting partners a higher price than the partnership offered. *See ¶ 5:926*.

b. [5:908] **Dissenting limited partner's purchase demand:** A dissenting partner who wishes to be bought out must make a *written* demand on the partnership for the purchase of the partner's interest. The demand must be *received* by the partnership (or its transfer agent) within *30 days* after the date on which the notice of approval was *mailed* to the limited partners. [Corps.C. §§ 15911.21(b)(4), 15911.22(b)]

(1) [5:909] **Special rule for "listed" limited partnership interests:** In the case of "listed" limited partnership interests (*see ¶ 5:902*), the written demand to be bought out must be made upon the partnership *not later than the date of the limited partners' meeting to vote upon the reorganization*. [Corps.C. § 15911.22(b)]

(2) [5:910] **Contents of demand:** The demand must state the number or amount of the limited partner's interest in the partnership and must also contain a statement of what the limited partner claims to be the fair market value of that interest

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

as of the day before the "announcement" of the proposed reorganization. The statement of fair market value constitutes an *offer* by the limited partner to sell the interest at that price. [Corps.C. § 15911.22(c)]

➪ [5:911] ***PRACTICE POINTER:*** The limited partner's offer will, for all but listed partnerships, be in response to the partnership's notice of approval of the reorganization. In effect, the limited partner's offer represents a *counteroffer* to the partnership's offer, at which point negotiations between the limited partner and the partnership will commence (unless the partnership accepts the counteroffer—an unlikely possibility.).

(a) [5:912] **Certificate representing partnership interest:** If the limited partner's interest is represented by a certificate, the certificate must accompany the written demand. The certificate is to be stamped or endorsed with a statement that the interest is a dissenting interest. [Corps.C. §§ 15911.21(b)(5), 15911.23]

1) [5:913] **Exchange for certificates of "appropriate denominations":** The certificate may also "be exchanged for certificates of appropriate denominations," to be stamped or endorsed with a statement that the interest is a dissenting interest. [Corps.C. § 15911.23]

Section 15911.23 is based on prior law (former Corps.C. § 15679.4), which in turn was based on the corporate provision (Corps.C. § 1302). The above-quoted language may be apposite in the corporate context, but would be highly unusual in the partnership context, because most interests in limited partnerships are either uncertificated or represented by plain certificates embodying all of the interests held by a particular limited partner. This language is more suitable to partnerships whose outstanding interests are publicly traded.

2) [5:914] **Subsequent transferees bound:** Upon any subsequent transfers of the dissenting interest on the partnership's books, any new certificate (or other written statement issued therefor) must also bear a statement that the interest is a dissenting interest together with the name of the original holder of the dissenting interest. [Corps.C. § 15911.23]

a) [5:915] **Transferee may exercise buyout right:** As noted above (¶ 5:900), "dissenting limited partners" include "assignees." Although the general thrust of the LP Act severely limits the rights of "*transferees*" of limited partnership interests, "assignees" of dissenting interests may nevertheless obtain the fair market buyout price for their interests.

(b) [5:916] **No withdrawal of demand without partnership consent:** A dissenting limited partner may not withdraw the buyout demand unless the partnership consents. [Corps.C. § 15911.29]

c. [5:917] **Buyout:** If the partnership and the dissenting limited partner agree on the purchase price, the limited partner is entitled to the agreed price together with interest at the legal rate on judgments (10%, per CCP § 685.010(a)) from the date of *consummation* (i.e., the *effective date*) of the reorganization. Unless the partnership and the limited partner agree otherwise, payment is due within the latest of:

- 30 days after the date the amount was agreed to;
- 30 days after any statutory or contractual conditions to the reorganization are satisfied; or
- When any certificates representing the bought-out limited partner's interest are surrendered. [Corps.C. § 15911.24(a), (b)]

(1) [5:918] **Written agreement retained by partnership:** All agreements fixing the fair market value of any dissenting limited partners' interest as between the partnership and the dissenting limited partner must be in *writing* and filed in the partnership's records. [Corps.C. § 15911.24(a)]

(2) [5:919] **Lawsuit to determine buyout price where parties cannot agree:** If the partnership and a dissenting limited partner fail to agree upon the fair market value of a dissenting interest, or if the partnership denies that a partnership interest meets the qualifications for a dissenting interest, then the limited partner or the partnership may bring an action to determine the fair market value and/or whether the partner's interest qualifies as a dissenting interest. [Corps.C. § 15911.25(a)]

(a) [5:920] **Deadline for suit:** The action must be commenced within *six months* after the date that *notice of approval* of the reorganization was *mailed* to the limited partner. [Corps.C. § 15911.25(a)]

(b) [5:921] **Joinder/intervention of other limited partners:** Two or more dissenting limited partners may join as plaintiffs or be joined as defendants. [Corps.C. § 15911.25(b)]

In lieu of filing an independent action, the partnership or the dissenting partner may join or intervene in any existing action between the partnership and a dissenting partner. [Corps.C. § 15911.25(a)]

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

Multiple actions between the partnership and dissenting partners may be consolidated. [Corps.C. § 15911.25(b)]

(c) [5:922] **Stay of litigation re approval of reorganization:** The court action is suspended (stayed) pending any resolution of any litigation brought challenging the sufficiency or regularity of the limited partner's vote or consent in approving the reorganization. [Corps.C. § 15911.31]

(d) [5:923] **Court determination:** If the status of the limited partner's interest as a dissenting interest is in dispute, the court must first determine that issue. The court may then determine the issue of the fair market value of the dissenting interest, or may appoint one or more impartial appraisers to determine fair market value (¶ 5:924). [Corps.C. § 15911.25(c)]

1) [5:924] **Procedure where one appraiser or all appraisers agree:** If the court appoints one or more appraisers, the appraiser, or a majority of the appraisers, must determine fair market value within the time fixed by the court. Upon filing of the appraisal report, either party may move to submit the report to the court. The court will consider the report, together with any additional evidence as the court considers relevant. The court may confirm the report if it is found "reasonable." [Corps.C. § 15911.26(a)]

If the court does not confirm the report, or if a majority of appraisers fails to file a report within 30 days from the date of their appointment or such later date as the court allows, the court must determine the fair market value of the dissenting interests. [Corps.C. § 15911.26(b)]

2) [5:925] **Judgment:** The court must enter judgment against the partnership for payment of the buyout price of each dissenting partner who is a party, together with interest at the legal rate (10%, per CCP § 685.010(a)) from the date of *consummation* of the reorganization. The judgment is payable "forthwith," subject to endorsement and delivery to the partnership of any certificates representing dissenting interests. [Corps.C. § 15911.26(c), (d)]

3) [5:926] **Apportionment of costs; potential attorney fees award:** The court may apportion costs, including reasonable compensation for the appraisers, as it considers equitable. [Corps.C. § 15911.26(e)]

However, if the appraisal exceeds the price offered by the partnership, the partnership *must* pay the costs of the action, including the compensation awarded by the court to the appraisers. If the value awarded by the court is more than 125% of the price offered by the limited partnership, the court has *discretion* to include *attorney fees* and *expert witness fees* in the costs awarded against the partnership. [Corps.C. § 15911.26(e)]

7. [5:927] **Distributions Offset Against Buyout Price:** Any cash distributions made by the partnership to a dissenting limited partner between the date of consummation of the reorganization and the date of payment of the partner's dissenting interest are credited against the total amount to be paid by the partnership for the dissenting interest. [Corps.C. § 15911.28]

8. [5:928] **Continuation of Limited Partners' Rights Pending Buyout:** Dissenting limited partners continue to have all the rights and privileges incident to the interests until payment by the partnership for their dissenting interests. (For "assignees" (¶ 5:900), those rights and privileges would be limited to those of a "transferee" under Corps.C. § 15907.02, ¶ 5:493 ff.) [Corps.C. § 15911.29]

9. [5:929] **Limitation—No Buyout Payment if Constituting Unlawful Distribution or Voidable Transaction:** A buyout payment may not be made to the extent the payment constitutes an unlawful distribution (Corps.C. § 15905.09, ¶ 5:446 ff.) or a voidable transaction (per Civ.C. § 3439 et seq.). The dissenting partners shall become partnership creditors for the amount not paid, together with interest at the legal rate on judgments (10%, per CCP § 685.010(a)) until the date of payment, but subordinate to all other creditors in any proceeding relating to the dissolution of the partnership. [Corps.C. § 15911.27]

10. [5:930] **Loss of Dissenting Status:** A dissenting interest loses its status as a dissenting interest, and the holder of the interest ceases to be a dissenting limited partner entitled to buyout of their interest, upon any of the following:

- The partnership *abandons* the reorganization;
- The dissenting limited partner's interest is represented by a certificate, and the limited partner *transfers* the interest *prior to its submission for endorsement* (Corps.C. § 15911.23, ¶ 5:912);

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• The partnership and the limited partner cannot agree to a buyout and neither files suit within the requisite six-month deadline (¶ 5:920); or

• The dissenting limited partner withdraws the buyout demand (with partnership consent, ¶ 5:916). [Corps.C. § 15911.30]

11. [5:931] **Restrictions on Challenges to Reorganization:** Dissenters' rights are intended in part to promote conversions, mergers and other reorganizations. Dissenters' rights thus replace many other rights a dissenting limited partner may have to block the reorganization. Specifically, a limited partner having dissenters' rights may not bring suit to attack the *validity* of the reorganization or have the reorganization *set aside or rescinded*. [Corps.C. § 15911.33(a)]

[5:932] ***Reserved.***

a. Exceptions permitting suit

(1) [5:933] **Suit challenging vote:** A limited partner having dissenters' rights may nevertheless bring suit to test whether the vote or consent of limited partners required to authorize or approve the reorganization was obtained in accordance with the procedures established therefor in the partnership agreement. [Corps.C. § 15911.33(a)]

(2) [5:934] **Suit against general partner (or partnership):** A limited partner having dissenters' rights may also bring an action against a general partner, the partnership, or any person controlling a general partner for breach of fiduciary duty, fraud or any other matter so long as the suit does not attack the validity of the reorganization or seek to set aside or rescind the reorganization. [Corps.C. § 15911.33(e)]

(3) [5:935] **Suit involving reorganizations between related entities:** If a partnership is directly or indirectly controlled by, or under common control with, another party to the reorganization, a limited partner of the controlled partnership may, *in lieu of* exercising the right of a dissenting limited partner to be bought out, bring suit to attack the validity of the reorganization or have it set aside or rescinded. The limited partner loses the right to be bought out regardless of the outcome of the suit. [Corps.C. § 15911.33(b)]

(a) [5:936] **"Control":** "Control" has the same meaning as used in exchange reorganizations (¶ 5:884)—i.e., possession of the direct or indirect power to *direct the management and policies* of the partnership (or other business entity). [Corps.C. § 15911.20(b); *see ¶ 5:885*]

(b) [5:937] **Inapplicable where majority of other limited partners approve reorganization:** But this exception does not apply (i.e., a dissenting limited partner is barred from bringing an action challenging the validity of the reorganization) where a majority in interest of the limited partners *other than limited partners directly or indirectly controlled by, or under common control with, another party to the reorganization*, approve or consent to the reorganization. In these circumstances, the fact that "neutral" or "unaffected" limited partners approved the transactions provides sufficient assurance of its overall fairness. [Corps.C. § 15911.33(d)]

(c) [5:938] **Burden of proof in suit:** In any action to attack the validity of the reorganization or to set aside or rescind the reorganization, a party controlling another party to the reorganization has the burden of proving that the transaction is "just and reasonable" as to the limited partners of the controlled party. Also, in any such action, a person who controls *two or more* parties to the reorganization has the burden of proving the transaction is "just and reasonable" as to the limited partners of *any* party so controlled. [Corps.C. § 15911.33(c)]

12. [5:939] **Payment of Limited Partner's Court Costs and Attorney Fees if Reorganization Abandoned:** If the limited partnership abandons the reorganization, then it must pay, on demand, all reasonable expenses, including attorney's fees, incurred by any dissenting limited partner who has initiated a permitted suit in good faith, including a suit seeking a determination of the fair market value of the limited partner's dissenting interests (¶ 5:919 ff.). [Corps.C. § 15911.30(a)]

[5:940 - 5:999] ***Reserved.***

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Ch. 5-K

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

K. Foreign Limited Partnerships Operating in California

1. [5:1001] "Transact Intrastate Business"
   a. [5:1002] Activities *not* constituting intrastate business
   b. [5:1003] Status as partner of limited partnership
   c. [5:1004] Penalties for unlawfully transacting business in California
      (1) [5:1005] Limitation—partner liability for partnership debts unaffected
      (2) [5:1006] Limitation—partnership acts/contracts valid
   d. [5:1007] Compare—"doing business" for tax purposes; franchise taxes payable
      (1) [5:1008] $800 minimum franchise tax imposed on limited partnership
         (a) [5:1008.1] First-year exemption
         (b) [5:1009] California tax returns and reporting requirements
2. [5:1020] Eligible Foreign Limited Partnerships
   a. [5:1021] Includes limited liability limited partnership
3. [5:1022] Governing Law ("Internal Affairs" Doctrine)
   a. [5:1023] Treatment of foreign LLLP as limited partnership
   b. [5:1024] No effect on registration
   c. Special provisions applicable to foreign limited partnerships
      (1) [5:1025] False information in document filed with Secretary of State
      (2) [5:1026] Recordation with county recorder
      (3) [5:1027] Dissenters' rights
4. [5:1030] Registration with Secretary of State
   a. [5:1031] Contents of application
      (1) [5:1032] Name
         (a) [5:1033] Choice of name showing limited partnership status
         (b) [5:1034] Name change
      (2) [5:1036] State and date of formation
      (3) [5:1037] Address
      (4) [5:1038] Agent for service of process
      (5) [5:1040] General partners
      (6) [5:1041] Limited liability limited partnership
   b. [5:1042] Execution
   c. [5:1043] "Certificate of Good Standing"
   d. [5:1044] Filing fee
      (1) [5:1045] Cancellation by Secretary of State if check bounces
   e. [5:1046] Effectiveness
5. [5:1050] Amended Registration to Correct or Update Information
   a. [5:1051] Compare—certificate of correction

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

b. [5:1052] Additional requirement when changing name
c. [5:1053] Execution
d. [5:1054] Filing fee
6. [5:1060] Cancellation of Registration
a. [5:1061] Effective date
b. [5:1062] Secretary of State appointed agent for service of process
c. [5:1063] Filing fee

[5:1000] A limited partnership organized in a state or jurisdiction other than California may register with the Secretary of State to do business in California (¶ *5:1030 ff.*). A foreign limited partnership that transacts intrastate business in California (*see* ¶ *5:1001 ff.*) risks penalties if it fails to register (*see* ¶ *5:1004*).

Registration with the Secretary of State does not authorize a foreign limited partnership to engage in any business or exercise any power that a limited partnership may not engage in or exercise in California. I.e., the foreign limited partnership must still obtain any necessary licenses or comply with any other laws that its business may require. [Corps.C. § 15909.01(c)]

1. [5:1001] **"Transact Intrastate Business":** "Transact intrastate business" means "entering into repeated and successive transactions of business in this state, *other than interstate or foreign commerce*." [Corps.C. § 15901.02(ai)(1) (emphasis added)]

A foreign limited partnership also transacts business in California if it owns income-producing real property or tangible personal property in California (other than property excluded under Corps.C. § 15909.03(a), ¶ *5:1002*). [Corps.C. § 15909.03(b)]

a. [5:1002] **Activities *not constituting intrastate business:*** A foreign limited partnership is not considered to be transacting intrastate business solely because of its status as:

- A shareholder of a California corporation or of a foreign corporation transacting intrastate business;
- A limited partner of a California limited partnership or of a foreign limited partnership transacting intrastate business; *and/or*
- A member or manager of a California LLC or of a foreign LLC transacting intrastate business. [Corps.C. § 15901.02(ai)(2)]

Nor is a foreign limited partnership considered to be transacting intrastate business solely by engaging in one or more of the following activities in California:

- Maintaining or defending any action, suit or administrative or arbitration proceeding, or effecting a settlement of claims or disputes;
- Holding meetings of its partners or "carrying on any other activities concerning its internal affairs";
- Maintaining bank accounts;
- Maintaining offices or agencies for the transfer, exchange and registration of its securities, or maintaining trustees or depositaries with respect to those securities;
- Effecting sales through independent contractors;
- Soliciting or procuring orders, whether by mail or through employees or agents or otherwise, where those orders require *acceptance outside of California* before becoming binding contracts;
- Creating or acquiring evidences of debt or mortgages, liens or security interests on real or personal property;
- Securing or collecting debts or enforcing mortgages and security interests in property securing the debts;
- Conducting an isolated transaction completed within 180 days and not in the course of a number of repeated transactions of a like nature;

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• Transacting business in interstate commerce. [Corps.C. §§ 15901.02(ai)(3)(A)-(J), 15909.03(a)]

b. [5:1003] **Status as partner of limited partnership:** A *person* (individual, corporation, partnership, LLC or other entity) is not deemed to be transacting intrastate business in California solely because of its status as a limited partner of a California limited partnership or of a foreign limited partnership registered in California. (But this does not apply in determining the contacts or activities that may subject a foreign limited partnership to service of process, taxation, jurisdiction or other regulation under any other California law.) [Corps.C. §§ 15901.02(ai)(4), 15909.03(c); see Corps.C. § 15901.02(y) ("person" defined)]

c. [5:1004] **Penalties for unlawfully transacting business in California:** A unregistered foreign limited partnership that transacts business in California:

• May not *maintain* (but may *defend*) an action or proceeding in California. [Corps.C. § 15909.07(b), (d)]

• Is subject to a fine of $20 per day, up to a maximum of $10,000. [Corps.C. § 15909.07(c)]

• Is deemed to appoint the Secretary of State as its agent for service of process for rights of action arising out of transacting business in California. [Corps.C. § 15909.07(f)]

• May be the subject of an action by the Attorney General to restrain the partnership from transacting business in California. [Corps.C. § 15909.08]

(1) [5:1005] **Limitation—partner liability for partnership debts unaffected:** A partner of an unregistered foreign limited partnership that transacts business in California is not liable for the partnership's obligations solely by reason of the partnership's failure to register. [Corps.C. § 15909.07(e)]

(2) [5:1006] **Limitation—partnership acts/contracts valid:** The failure of a foreign limited partnership to register in California does not impair the validity of the partnership's contracts or acts. [Corps.C. § 15909.07(d)]

d. [5:1007] **Compare—"doing business" for tax purposes; franchise taxes payable:** *See ¶ 3:783 ff.*

(1) [5:1008] **$800 minimum franchise tax imposed on limited partnership:** In addition to any California franchise taxes that the partners may owe, the foreign limited partnership itself is subject to the $800 minimum annual franchise tax. [Rev. & Tax.C. §§ 17935(b)(1), 17936, 23153(d)(1); see *¶ 5:36*]

(a) [5:1008.1] **First-year exemption:** Foreign limited partnerships that register with the Secretary of State on or after January 1, 2021, and before January 1, 2024, are exempt from the minimum franchise tax for their *first* taxable year. [Rev. & Tax.C. § 17935(f)(1)]

(b) [5:1009] **California tax returns and reporting requirements:** *See ¶ 8:209 ff.*

[5:1010 - 5:1019] ***Reserved.***

2. [5:1020] **Eligible Foreign Limited Partnerships:** To qualify as a foreign limited partnership eligible for registration as such in California, the partnership must be required by the laws of its jurisdiction of formation to have one or more general partners and one or more limited partners. The general partner(s) must have rights, powers and obligations similar to those of a general partner in a California limited partnership; and the limited partners must have rights, powers and obligations similar to those of a limited partner in a California limited partnership. [Corps.C. § 15901.02(k), (m)(2), (p)(2)]

a. [5:1021] **Includes limited liability limited partnership:** A foreign limited partnership includes a foreign limited liability limited partnership—that is, a foreign limited partnership whose *general* partners have *limited liability for the partnership's obligations.* [Corps.C. § 15901.02(j), (k)]

Thus, although California law does not permit the formation of limited liability limited partnerships, it permits a foreign limited liability limited partnership to do business in California as a foreign *limited partnership*. *See ¶ 5:1022 ff.*

3. [5:1022] **Governing Law ("Internal Affairs" Doctrine):** The laws of the jurisdiction under which a foreign limited partnership is organized govern:

• Relations among the partners and between the partners and the partnership, and

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

• The liability of partners as partners for partnership obligations … except as to foreign *limited liability* limited partnerships (*¶ 5:1021*), which are treated as if they were foreign *limited* partnerships (*see ¶ 5:1023*). [Corps.C. § 15909.01(a)]

This is essentially a codification of the "internal affairs" doctrine which, as applied to limited partnerships, provides that only one state should have the authority to regulate a limited partnership's internal affairs in order to prevent conflicting demands upon the partnership. [See *Boschetti v. Pacific Bay Investments Inc.* (2019) 32 CA5th 1059, 1065-1069, 244 CR3d 480, 484-487—internal affairs doctrine precludes California court from ordering dissolution of foreign LP doing business in California because dissolution governed by LP's jurisdiction of organization (*see ¶ 5:630*)]

In all other respects, the LP Act applies to foreign limited partnerships. [See Corps.C. § 15912.04, Uniform Limited Partnership Act Comment (*see ¶ 5:19*)—LP Act applies to foreign limited partnerships whether formed before or after LP Act's 2008 effective date (*see ¶ 5:2 ff.*)]

a. [5:1023] **Treatment of foreign LLLP as limited partnership:** As stated above (*¶ 5:1022*), Corps.C. § 15909.01(a) provides that foreign *limited liability* limited partnerships are treated as foreign *limited* partnerships with regard to the liability of partners as partners for partnership obligations. This implies that the general partners of a foreign limited liability limited partnership are jointly and severally liable for all partnership debts and obligations to the same extent as general partners of a California limited partnership (*¶ 5:280*). However, such a claim would inevitably invite a challenge that the general partner's limited liability should be recognized under the "internal affairs" doctrine (*¶ 5:1022*). [See Corps.C. § 15901.02(m)(2)—general partner of foreign limited partnership defined as "person that has rights, powers, and obligations similar to those of a general partner in a limited partnership"; see also *VantagePoint Venture Partners 1996 v. Examen, Inc.* (Del. 2005) 871 A2d 1108, 1112-1116]

b. [5:1024] **No effect on registration:** A foreign limited partnership may not be denied registration in California (*see ¶ 5:1030 ff.*) by reason of any difference between California law and the laws of the foreign limited partnership's jurisdiction of organization. [Corps.C. § 15909.01(b)]

c. Special provisions applicable to foreign limited partnerships

(1) [5:1025] **False information in document filed with Secretary of State:** Corps.C. § 15902.08, which imposes liability upon a general partner for false information contained in any partnership record filed with the Secretary of State (*see ¶ 5:400 ff.*), applies to foreign limited partnerships. Limited liability limited partnership status (*¶ 5:1021*) is irrelevant to this section. The shield provided by limited liability limited partnership status protects only to the extent that (a) the obligation involved is an obligation of the foreign limited partnership, and (b) a partner is claimed to be liable for that obligation by reason of being a partner. Corps.C. § 15902.08 does not address the obligations of a foreign limited *partnership* and instead imposes *direct* liability on *signers* and *general partners*. [Corps.C. § 15902.08, Uniform Limited Partnership Act Comment (*see ¶ 5:19*)]

(2) [5:1026] **Recordation with county recorder:** A foreign limited partnership may record with the county recorder a certified copy of its application for registration to transact business, together with the certificate of registration (*see ¶ 5:1030 ff.*). Recordation conclusively establishes in favor of any bona fide purchaser or encumbrancer for value of the partnership real property located in that county that the persons named as general partners in the certificate are the general partners—and *all* of the general partners—of the partnership. [Corps.C. § 15902.01(e); *see ¶ 5:140*]

(3) [5:1027] **Dissenters' rights:** *See ¶ 5:895*.

[5:1028 - 5:1029] *Reserved.*

4. [5:1030] **Registration with Secretary of State:** A foreign limited partnership may apply for a certificate of registration to transact business in California by delivering an application to the Secretary of State on a prescribed form. [Corps.C. § 15909.02(a)]

• ***FORM:*** The Secretary of State's standard form Application for Registration—Foreign Limited Partnership (LP) (Form LP-5) is available online at the Secretary of State's website (*www.sos.ca.gov*).

a. [5:1031] **Contents of application:** The application must contain the following information:

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

(1) [5:1032] **Name:** The application must state the limited partnership's name *exactly as it is shown on the accompanying "Certificate of Good Standing"* (*¶ 5:1043*). [Corps.C. § 15909.02(a)(1); see Instructions for Completing the Application for Registration of a Foreign Limited Partnership (Form LP-5), available on the Secretary of State's website (*www.sos.ca.gov*)]

(a) [5:1033] **Choice of name showing limited partnership status:** When selecting a name, a foreign limited partnership is subject to the same restrictions and requirements as a California limited partnership (*see ¶ 5:83 ff.*) with the exception that the foreign limited partnership's name need not end with "limited partnership," "L.P." or "LP." However, in that event the partnership must, for the purpose of transacting business in California, adopt an alternate name that ends with "limited partnership," "L.P." or "LP" (or, in the case of a limited liability limited partnership (*¶ 5:1021*), an alternate name that ends with "limited liability limited partnership," "L.L.L.P." or "LLLP"). [Corps.C. §§ 15901.08(f) and accompanying Uniform Limited Partnership Act Comment (*see ¶ 5:19*), 15909.02(a)(1), 15909.05(a); see Corps.C. §§ 15901.08(b) & (c), 15901.09(a)(6); and Instructions for Completing the Application for Registration of a Foreign Limited Partnership (Form LP-5), available on the Secretary of State's website (*www.sos.ca.gov*)]

(b) [5:1034] **Name change:** A post-registration change in the partnership's name requires an amended certificate of registration from the Secretary of State (*see ¶ 5:1050 ff.*). The new name, like the old, must comply with the same restrictions and requirements applicable to a foreign limited partnership's name (*see ¶ 5:1033*).

➪ [5:1035] ***PRACTICE POINTER*:** Do not submit an application or amendment without first checking to see if the name is available in California; *see ¶ 5:100 ff.* Counsel may also wish to *reserve* an available name to be sure it is not taken by someone else in the time between the name check and submission of the application or amendment; *see ¶ 5:105 ff.*

(2) [5:1036] **State and date of formation:** The application must set forth the name of the state or other jurisdiction under which the limited partnership is organized and its date of formation. [Corps.C. § 15909.02(a)(2)]

(3) [5:1037] **Address:** The application must set forth the *street* address of the limited partnership's principal office (which need not be in California) and, if different, the mailing address of its principal office. Additionally, if the laws of the limited partnership's jurisdiction of organization require it to maintain an office in that jurisdiction, the application must state the address of that office. [Corps.C. § 15909.02(a)(3) & (4); see Corps.C. § 15901.02(e)(2), (aa)]

(4) [5:1038] **Agent for service of process:** The application must set forth the limited partnership's initial agent for service of process in California (*see ¶ 5:162 ff.*). (A foreign limited partnership transacting intrastate business in California (*see ¶ 5:1001 ff.*) must continuously maintain a California agent for service of process.) [Corps.C. §§ 15901.14(b), (c), 15909.02(a)(5)]

➪ [5:1039] ***PRACTICE POINTERS re agent for service of process*:** *See ¶ 3:111*.

(5) [5:1040] **General partners:** The application must state the name and address of each *general* partner (*limited* partners need not be identified). [Corps.C. § 15909.02(a)(6)]

(6) [5:1041] **Limited liability limited partnership:** The application must state whether the limited partnership is a foreign limited liability limited partnership (*see ¶ 5:1021*). [Corps.C. § 15909.02(a)(7)]

b. [5:1042] **Execution:** The application must be signed and acknowledged by a general partner. [Corps.C. §§ 15902.04(a)(13), 15909.02(a); see Corps.C. § 15901.02(a) ("acknowledged" defined)]

c. [5:1043] **"Certificate of Good Standing":** The application must be accompanied by a "Certificate of Good Standing" (or "record of similar meaning") issued within the preceding six months by the agency where the foreign limited partnership is formed and certifying that the partnership "is in existence, in active status, or in good standing." [Corps.C. § 15909.02(b); Instructions for Completing the Application for Registration of a Foreign Limited Partnership (Form LP-5), available on the Secretary of State's website (*www.sos.ca.gov*)]

d. [5:1044] **Filing fee:** The fee for filing the application is $70 (plus a $15 special handling fee if hand delivered to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(c); 2 CCR § 21903(c)]

(1) [5:1045] **Cancellation by Secretary of State if check bounces:** The Secretary of State may cancel the application and registration if a check or other form of payment of the filing fee is not paid upon presentation. (The Secretary of State will first give the foreign limited partnership an opportunity to submit a cashier's check or equivalent.) [Corps.C. § 15909.05(c)]

e. [5:1046] **Effectiveness:** Unless the Secretary of State determines that the application does not comply with the filing requirements, the Secretary of State, upon payment of the filing fee (*¶ 5:1044*), will file the application and issue a certificate

 © 2024 Thomson Reuters. No claim to original U.S. Government Works.

of registration stating the date of filing of the application and that the foreign limited partnership is qualified to transact intrastate business in California. [Corps.C. § 15909.04]

[5:1047 - 5:1049] ***Reserved.***

5. [5:1050] **Amended Registration to Correct or Update Information:** If any statement in its application for registration was false when made or becomes erroneous (e.g., change of general partners, partnership's address, agent for service of process), the partnership must "promptly" file an amendment to its application for registration on a form prescribed by the Secretary of State. [Corps.C. § 15909.06]

• ***FORM:*** The Secretary of State's standard form Foreign Limited Partnership—Amendment to Application for Registration (Form LP-6) is available online at the Secretary of State's website (*www.sos.ca.gov*).

a. [5:1051] **Compare—certificate of correction:** To correct any information in the foreign limited partnership's application that was erroneous when made, it is more common to use a certificate of correction (per Corps.C. § 15902.07); *see ¶ 5:157 ff.*

b. [5:1052] **Additional requirement when changing name:** If the foreign limited partnership files an amendment changing its name in its jurisdiction of organization, it must annex to the amendment a certificate from an authorized public official of that jurisdiction to the effect that the partnership is in good standing (*see ¶ 5:1043*) and that the change of name was made in accordance with the laws of that jurisdiction. If the laws of that jurisdiction do not permit the issuance of such a certificate, the partnership must provide a statement to that effect. [Corps.C. § 15909.06]

Unless the Secretary of State determines that the amendment does not comply with the California filing requirements, the Secretary of State, upon payment of the requisite fee (*¶ 5:1054*), will file the amended application and issue a new certificate of registration. [Corps.C. § 15909.06]

c. [5:1053] **Execution:** The amended application must be signed and acknowledged by a general partner. [Corps.C. §§ 15902.04(a)(13), 15909.06; see Corps.C. § 15901.02(a) ("acknowledged" defined)]

d. [5:1054] **Filing fee:** The fee for filing the amendment is $30 (plus a $15 special handling fee if delivered in person to the Secretary of State's office). [Gov.C. §§ 12182(a), 12188(f); 2 CCR § 21903(c)]

[5:1055 - 5:1059] ***Reserved.***

6. [5:1060] **Cancellation of Registration:** A foreign limited partnership that ceases doing business in California will nevertheless continue to be assessed California franchise taxes unless it cancels its registration by filing a certificate of cancellation on a prescribed form with the Secretary of State. The certificate must contain the partnership's name and Secretary of State's file number, and must be acknowledged by a general partner. [Rev. & Tax.C. §§ 17935(b), 17937, 23153(a), (d)(1); Corps.C. § 15909.07(a); see Corps.C. § 15901.02(a) ("acknowledged" defined)]

• ***FORM:*** The Secretary of State's standard form Certificate of Cancellation—Limited Partnership (LP) (Form LP-4/7) is available online at the Secretary of State's website (*www.sos.ca.gov*).

a. [5:1061] **Effective date:** The cancellation becomes effective on the date the certificate is *filed* (as evidenced by the Secretary of State's endorsement of the date on the certificate) or upon such *later* date (but not more than *90 days after filing*) as may be *set forth in the certificate*. [Corps.C. §§ 15902.06(b), 15909.07(a)]

b. [5:1062] **Secretary of State appointed agent for service of process:** A foreign limited partnership that cancels its registration is deemed to appoint the Secretary of State as its agent for service of process for rights of action arising out of transacting business in California. [Corps.C. § 15909.07(f)]

c. [5:1063] **Filing fee:** There is no fee for filing the certificate of cancellation. (However, there is a $15 special handling fee if the certificate is delivered in person to the Secretary of State's office.) [Gov.C. §§ 12182(a), 12188(n); 2 CCR § 21903(c)]

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.

Cal. Prac. Guide Pass--Through Entities Form 5:A

California Practice Guide--Pass-Through Entities | August 2024 Update
Current Edition Authors: Jeffrey C. Soza and Matthew Jann; Original Authors: James F. Fotenos and Edward C. Rybka

Chapter 5. Limited Partnership

Forms

[Form 5:A] Limited Partnership Agreement

Image 1 within document in PDF format.

© 2024 by The Rutter Group, a Thomson Reuters Business. No Claim to Orig. U.S. Govt. Works.

End of Document

© 2024 Thomson Reuters. No claim to original U.S. Government Works.