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COMMENTS

ALTERNATIVE REMEDIES IN MINORITY PARTNERS' SUITS ON PARTNERSHIP CAUSES OF ACTION

by Helen Hubbard

JAMES Cates had a minority partnership interest in two partnerships organized under the Texas Uniform Partnership Act,¹ SanJac Association and SanJac International. The partnerships designed, marketed, and managed multiple employers' trusts and insurance plans that enabled small employers to enjoy the benefits of group insurance. Under contracts with the partnerships ITT Life Insurance Company² and specified underwriters of Lloyds of London, Ltd. served as insurers and reinsurers, respectively. In January 1979 ITT Life and Lloyds elected to cancel the contracts in accordance with their terms. After completing the administrative handling of claims that had arisen before the contract cancellations, the partnerships became inactive and virtually insolvent.

In September 1979 Cates filed suit on behalf of himself, SanJac Association, and SanJac International, against ITT Life and Lloyds, alleging breach of contract, fraudulent intent not to perform the contracts, and violations of the Clayton and Sherman Anti-Trust Acts.³ The defendants contended that Cates did not have authority to sue on behalf of the partnerships. Cates's partners, after settling individually with the defendants, refused to join as plaintiffs or to consent to suit in the partnership name. Cates alleged that his

1. TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970) [hereinafter referred to in the text as the Texas Act]. The Texas Act is based on the Uniform Partnership Act. Bromberg, *Source and Comments*, TEX. REV. CIV. STAT. ANN. art. 6132b, § 1 (Vernon 1970).

2. Certain affiliates of ITT Life Insurance Company and other related corporations also constituted parties to the contracts. References to ITT Life also apply to these affiliates and related corporations.

3. The Fifth Circuit's opinion, and apparently the plaintiffs' complaint, merely refer to violations of "the Clayton and Sherman Anti-Trust Acts" by "tie-in" provisions in the contracts and by efforts to eliminate or reduce competition from the plaintiffs. *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1165 (5th Cir. 1985). Courts frequently invalidate tying arrangements based on either Sherman Act § 1, 15 U.S.C. § 1 (1982), or Clayton Act § 3, 15 U.S.C. § 14 (1982). See generally L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTI-TRUST* 431-40 (1977) (discussion of tying arrangements under Sherman Act § 1 and Clayton Act § 3). Section 1 of the Sherman Act provides that contracts that restrain trade are illegal. 15 U.S.C. § 1 (1982). Section 1 thus implements the antitrust laws' goal of enhancing competition. L. SULLIVAN, *supra*, at 13-14.

partners had conspired with the defendants to refuse to participate in the suit based on selfish concerns for their individual interests and the possible effects of the suit on their futures in the insurance industry. Cates alternatively requested: (1) appointment of a receiver for the partnerships; (2) permission to sue for his proportionate share of the partnerships' claims; or (3) deferral of the action until he could withdraw from the partnerships and sue individually after receiving his share of the partnerships' assets, including the partnerships' claims against the defendants.

The district court dismissed the suits in which the partnerships were plaintiffs solely on the basis of the long-established Texas rule that a partner cannot sue individually on a partnership contract.⁴ The district court granted the defendants' motion for summary judgment because it found that Cates had no individual cause of action for individual losses, resulting from diminution in value of his partnership interest or his loss of partnership profits. After perfecting an appeal and filing initial briefs in the United States Court of Appeals for the Fifth Circuit, Cates died.

In *Cates v. International Telephone & Telegraph Corp.*⁵ the Fifth Circuit permitted substitution of Cates's widow in her capacity as independent executrix of his estate, but found that Mrs. Cates did not succeed to Cates's managerial rights in the partnerships or to his rights in specific partnership property.⁶ The Fifth Circuit, therefore, did not decide whether Cates could have maintained the suits on the partnerships' causes of action.

The court, however, further held that when some partners wrongfully impede a suit on a well-grounded partnership cause of action, Texas law would provide a remedy for a minority partner plaintiff in addition to an action for damages or accounting against the nonsuing partners, at least when traditional remedies do not adequately protect the plaintiff partner's substantive rights.⁷ Wrongful impediment exists when the nonsuing partners fail to base their actions on good faith beliefs regarding the best interests of the partnership.⁸ The court remanded the case to the district court for consideration of whether this fact situation justified: (1) permitting Mrs. Cates to sue on the partnerships' cause of action, either derivatively or for Cates's proportionate share; or (2) deferring the action until appointment of a receiver or dissolution of the partnerships, after which Mrs. Cates might have a share of the partnerships' causes of action.⁹

This Comment reviews the currently available and potentially available

4. *Speake v. Prewitt*, 6 Tex. 252, 257 (1851); see *infra* notes 24-25 and accompanying text.

5. 756 F.2d 1161 (5th Cir. 1985).

6. *Id.* at 1173-74. See Texas Act § 28-B(1)(B) which provides that the successors in interest of a deceased partner constitute assignees of the partnership interest. TEX. REV. CIV. STAT. ANN. art. 6132b, § 28-B(1)(B) (Vernon 1970). Under Texas Act § 27(1) assignment does not permit the assignee to participate in partnership management. *Id.* art. 6132b, § 27(1). In addition, a deceased partner's right to specific partnership property vests in the surviving partners under Texas Act § 25(2)(d). *Id.* art. 6132b, § 25(2)(d). See 756 F.2d at 1173-75.

7. 756 F.2d at 1178.

8. *Id.* at 1177.

9. *Id.* at 1180.

remedies for individual partners. The currently available remedies include the equitable remedies of accounting and dissolution. As background for a discussion of potentially available remedies, this Comment also reviews the legal limitations on partnership actions under common law, the Uniform Partnership Act,¹⁰ and modern procedural rules. Finally, this Comment reviews the development of the derivative suit as an additional remedy in trusts, corporations, and limited partnerships and suggests that, in appropriate circumstances, a derivative action should also serve in a general partnership organized under the Act.

I. EQUITABLE REMEDIES AVAILABLE TO THE INDIVIDUAL PARTNER

The Act provides two remedies for a dissatisfied partner. He may, under certain limited circumstances, either compel an accounting¹¹ or request dissolution of the partnership under a court order.¹²

A. Action for Accounting

Section 22 of the Act provides that a partner has a right to receive an accounting of the partnership's business when: (1) the other partners impermissibly preclude his participation in partnership affairs or his possession of partnership property; (2) an agreement entitles him to an accounting; (3) another partner has violated his fiduciary duty; or (4) the facts make it fair and logical.¹³ A partner may enforce his right to receive an accounting by filing an equitable action for an accounting.¹⁴ Generally, in a continuing partner-

10. UNIF. PARTNERSHIP ACT, 6 U.L.A. 9 (1969) [hereinafter referred to in the text as the Act and cited as U.P.A.]. The Act, promulgated in 1914, presently governs partnerships in 49 states. See *id.* at 1. The District of Columbia, Guam, and the Virgin Islands have also adopted the Act. *Id.* Louisiana has not adopted the Act. Instead, Louisiana continues to employ its civil law concept, which recognizes partnerships as legal entities. See *Trappey v. Lumberman's Mut. Casualty Co.*, 229 La. 632, 86 So. 2d 515, 516-17 (1956) (discussing Louisiana partnership law). The Act has remained unchanged during the more than 70 years since its adoption. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 5-6 (1982).

11. U.P.A. § 22 (1914).

12. *Id.* § 32(1).

13. *Id.* § 22. See generally 1 J. BARRETT & E. SEAGO, PARTNERS AND PARTNERSHIPS LAW AND TAXATION 626-30 (1956) [hereinafter cited as 1 BARRETT] (discussing accounting actions under common law and U.P.A. § 22); A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIPS 409-14 (1968) (discussing accounting actions under U.P.A. § 22); H. REUSCHLEIN & W. GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP § 190 (1979) [hereinafter cited as REUSCHLEIN] (generally discussing right to accounting). Other sections of the Act provide a right to an accounting under special circumstances. U.P.A. § 43 (1914) provides such a right against the surviving or winding-up partners as of the date of dissolution. *Id.* § 27 provides that an assignee of a partnership interest may receive an accounting at dissolution. Under *id.* § 21 all partners must account for any advantage that they receive from any transaction connected with the partnership or its property. 1 BARRETT, *supra*, at 629-30.

14. A. BROMBERG, *supra* note 13, at 410. In an accounting action the court should consider everything that affects the obligations between the partners. REUSCHLEIN, *supra* note 13, at 281. An accounting action generally cannot include nonpartners as parties. Hecker, *Limited Partners' Derivative Suits Under the Revised Uniform Limited Partnership Act*, 33 VAND. L. REV. 343, 350 (1980).

ship one partner may not sue any other partner on a cause of action arising out of the partnership business until after an accounting.¹⁵ An accounting action, although in some ways a more powerful remedy than a derivative suit,¹⁶ may prove unsatisfactory if the partnership and the other partners have insufficient assets to discharge the claim.¹⁷ In addition, because even a successful suing partner cannot recover his attorney's fees, an accounting action may prove impractical, particularly if the suing partner has a relatively small interest in the partnership.¹⁸

B. Dissolution Under Court Order

Section 32(1) of the Act provides that a partner has the right to request a court-ordered dissolution when another partner has breached his fiduciary duty and under certain other circumstances that make dissolution equitable.¹⁹ If the court finds that one of the specified circumstances is present, it generally must order the requested dissolution.²⁰ A dissolution usually

15. *E.g.*, *Staggers v. Vaughan*, 527 S.W.2d 791, 793-94 (Tex. Civ. App.—Texarkana 1975, writ ref'd n.r.e.) (also recognizing exception allowing suits on agreements to form partnership); *Rice v. Lamberg*, 408 S.W.2d 287, 291 (Tex. Civ. App.—Corpus Christ 1966, no writ) (equitable accounting action was proper remedy for suing partner); *Amberson v. Horton*, 255 S.W.2d 580, 584 (Tex. Civ. App.—San Antonio 1953, writ ref'd n.r.e.) (accounting action required before action on other partnership claims, but failure to plead accounting constituted harmless error under facts of case); see *Coast v. Hunt Oil Co.*, 96 F. Supp. 53, 61 (W.D. La. 1951) (in continuing partnership partner cannot sue another partner regarding a partnership transaction in contract or tort), *aff'd*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952).

16. REUSCHLEIN, *supra* note 13, at 282. In a derivative suit, a shareholder must prove a reasonable need, which may limit his access to corporate financial information. Furthermore, the shareholder may encounter procedural difficulties, and the scope of the suit remains limited. An accounting action, on the other hand, includes an inquiry into all transactions. *Id.* at 282-83.

17. The partnership may have insufficient assets if its assets are in the hands of nonpartners who are not subject to joinder in an accounting action or to suit by an individual partner because only the partnership can sue on the partnership cause of action against the nonpartner. Comment, *Standing of Limited Partners to Sue Derivatively*, 65 COLUM. L. REV. 1463, 1480 (1965).

18. *Millard v. Newmark & Co.*, 24 A.D.2d 333, 266 N.Y.S.2d 254, 258 (1966).

19. U.P.A. § 32(1) (1914) provides:

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

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

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

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

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

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

(f) Other circumstances render a dissolution equitable.

The purchaser of another partner's partnership interest may also seek a judicial dissolution under *id.* § 32(2). *Id.* § 31 provides causes of nonjudicial dissolution. See generally Bromberg, *Partnership Dissolution—Causes, Consequences, and Cures*, 43 TEX. L. REV. 631, 633-37 (1965) (discussing and categorizing judicial and nonjudicial causes of dissolution).

20. See Bromberg, *supra* note 19, at 639 (statutory language not discretionary, but court

ends the partnership business,²¹ causing a loss of the going concern value.²² In addition a dissolution action does not provide compensation for prior losses²³ and, like an accounting action, may thus prove to be an unsatisfactory remedy.

II. A GENERAL PARTNER'S LEGAL REMEDIES

A. Common Law Rule Regarding Partnership Actions

Courts commonly hold that without specific statutory authorization partnerships cannot litigate in the partnership name.²⁴ The corollary to this general common law rule requires naming all partners as plaintiffs in suits for injury to the partnerships.²⁵ Conflicts exist regarding the historical basis and modern justification for the common law rule.

Early decisions denied partners' attempts to sue in the partnership name because such suits constituted an expropriation of the sovereign power to grant corporate franchises.²⁶ Courts have also rejected suits in the partner-

may avoid grant of dissolution by construction of the more broadly stated circumstances entitling partner to request court-ordered dissolution or by application of equitable principles).

21. A. BROMBERG, *supra* note 13, at 419. The Act provides that any partner may force liquidation of the partnership business after a dissolution occurs. U.P.A. § 38(1) (1914). The partners may avoid such forced liquidation by an advance continuation agreement. A. BROMBERG, *supra* note 13, at 419. A partner who shows cause may have the court wind up the partnership business. U.P.A. § 37(1) (1914).

22. See Hillman, *supra* note 10, at 35 (loss of going concern value may make dissolution unsatisfactory remedy).

23. Hecker, *supra* note 14, at 349.

24. A. BROMBERG, *supra* note 13, at 327; Sturges, *Unincorporated Associations as Parties to Actions*, 33 YALE L.J. 383, 383 (1924); see, e.g., *Rose v. Beckham*, 264 Ala. 209, 86 So. 2d 275, 277 (1956) (suits in partnership name not allowed); *International Harvester Co. of Am. v. Clements-Middleton Co.*, 35 S.W.2d 462, 463 (Tex. Civ. App.—El Paso 1931, no writ) (partners cannot sue in firm name even if individual partners are named in description of firm); *Houghton v. Puryear*, 30 S.W. 583, 584 (Tex. Civ. App.—1895, no writ) (partnership cannot sue in partnership name). See generally *infra* text accompanying notes 56-70 (discussing procedural changes to allow suits in common name).

25. A. BROMBERG, *supra* note 13, at 327; Sturges, *supra* note 24, at 384; see, e.g., *Zion v. Sentry Safety Control Corp.*, 258 F.2d 31, 34 (3d Cir. 1958) (individual partner cannot sue individually on partnership cause of action); *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469, 472-73 (6th Cir. 1952) (all partners having interest in partnership debt constitute indispensable parties); *Godwin v. Vinson*, 251 N.C. 326, 111 S.E.2d 180, 181 (1959) (single partner cannot sue individually on partnership cause of action); *Roberson v. McIlhenny, Hutchins & Co.*, 59 Tex. 615, 618 (1883) (naming of all partners as plaintiffs required in actions by partnership); *Speake v. Prewitt*, 6 Tex. 252, 257 (1851) (same); *Morris v. Gwaltney*, 215 S.W. 473, 473 (Tex. Civ. App.—Dallas 1919, no writ) (no recovery available on partnership claim because original suit filed by one partner as sole plaintiff); *Allen v. Fleck*, 118 S.W. 176, 176-77 (Tex. Civ. App.—1909, no writ) (all partners are necessary plaintiff parties in suit for collection of debt due to partnership); *Houghton v. Puryear*, 30 S.W. 583, 584 (Tex. Civ. App.—1895, no writ) (all partners must join in action to recover for conversion of partnership property).

26. Sturges, *supra* note 24, at 404-05; see, e.g., *American Steel & Wire Co. v. Wire Drawers' & Die Makers' Unions Nos. 1 & 3*, 90 F. 598, 600 (C.C.N.D. Ohio 1898) (an association cannot sue or be sued in its common name because right to do so constitutes corporate franchise, which only legislature can bestow); *Richardson v. C.W. Smith & Co.*, 21 Fla. 336, 341 (1885) (government authorization required to grant exclusive corporate privilege of suing in common name); *Crawley v. American Soc'y of Equity of N. Am.*, 153 Wis. 13, 139 N.W. 734, 736 (1913) (government has exclusive capacity to bring corporations into being and endow them with ability to sue).

ship name based on the nonentity status of partnerships.²⁷ Other courts have rejected suits in a common name or suits by fewer than all partners to protect third parties from possible multiple actions and judgments for duplicate payments of the same obligation.²⁸ Courts have also rejected individual partners' attempts to sue for their proportionate share of a partnership's cause of action, but have not stated any rationale for their holdings.²⁹

B. Exceptions to the Common Law Rule Regarding Partnership Actions

Under the common law courts recognize four narrow exceptions to the general rule that requires naming all partners as plaintiffs in suits for injury to the partnership. First, if one partner contracts for the partnership in his own name he can sue individually on that contract.³⁰ Second, the active partners need not join dormant partners³¹ in a suit on a partnership claim.³² Third, in some jurisdictions if the defendant fails to request dismissal at the beginning of an action filed by fewer than all partners, he waives the defect.³³ Fourth, some courts permit suit by fewer than all partners after requiring

27. A. BROMBERG, *supra* note 13, at 331; *see, e.g.*, *Lister v. Vowell*, 122 Ala. 264, 25 So. 564, 565 (1899) (partnerships are not natural or artificial persons and cannot sue in partnership name); *Aronovitz v. Stein Prop.*, 322 So. 2d 74, 75 (Fla. Dist. Ct. App. 1975) (partnership is not entity and thus cannot sue in the partnership name); *Soper v. Clay City Lumber Co.*, 21 Ky. 933, 53 S.W. 267, 267 (Ky. Ct. App. 1899) (defendant was not legal or actual entity that plaintiff could sue in firm name); *Allgeier, Martin & Assocs. v. Ashmore*, 508 S.W.2d 524, 525 (Mo. Ct. App. 1974) (same); *Payne v. Livingston*, 253 S.W. 701, 702 (Tex. Civ. App.—Austin 1923, no writ) (because partnership does not constitute a legal entity it can litigate only in members' names).

Over 60 years ago one commentator suggested that the nonentity status rationale constituted a mere formula to effectuate the historical principle that allowing suits in the partnership name constituted expropriation of the sovereign power to grant corporate franchises. This commentator argued that the bare assertion of nonentity status does not justify denying the power to sue in the partnership name and characterized the common law rule as an unneeded procedural technicality. *Sturges, supra* note 24, at 405.

28. *See Spiritas v. Robinowitz*, 544 S.W.2d 710, 714-15 (Tex. Civ. App.—Dallas 1976, writ *ref'd n.r.e.*) (general rule requiring suits for partnership causes of action in names of all partners does not apply when both partners are parties, one as plaintiff and the other as defendant, because purpose of rule is to protect others from multiple actions); *Edmondson v. Carroll*, 65 S.W.2d 1107, 1108-09 (Tex. Civ. App.—Fort Worth 1933, writ *dism'd*) (purpose of general rule is protection of third parties from multiple actions and payments).

29. *See Vinal v. West Va. Oil & Oil Land Co.*, 110 U.S. 215, 215 (1884) (individual partner cannot sue for his proportionate part of partnership debt in individual action); *Anable v. McDonald Land & Mining Co.*, 144 Mo. App. 303, 128 S.W. 38, 41 (1910) (one partner cannot sue for his part of partnership debt).

30. *Cleaveland v. Heidenheimer*, 92 Tex. 108, 46 S.W. 30, 32 (1898) (partner entering contract in his own name for partnership or subject to ratification by partnership can sue in his name alone, or all the partners can sue on contract together); *Rock Creek Oil Corp. v. Wolfe*, 35 S.W.2d 1072, 1076 (Tex. Civ. App.—Amarillo 1930, writ *dism'd*) (if partner enters contract for his partnership in his name he can sue on the contract alone).

31. A dormant partner shares in profits, but hides his identity. *Speake v. Prewitt*, 6 Tex. 252, 258 (1851).

32. *Id.*; *Miller v. White*, 112 S.W.2d 487, 489 (Tex. Civ. App.—Austin 1937, writ *dism'd*); *American Nat'l Bank v. Haggerton*, 250 S.W. 279, 286 (Tex. Civ. App.—Amarillo 1922, no writ).

33. *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 936 (S.D. Cal. 1958), *aff'd on other grounds*, 330 F.2d 288 (9th Cir. 1964), *rev'd on other grounds*, 382 U.S. 54 (1965); *Hutchinson v. Dubois*, 45 Mich. 143, 7 N.W. 714, 716 (1881). *But see Allgeier, Martin & Assocs. v. Ashmore*, 508 S.W.2d 524, 525 (Mo. Ct. App. 1974) (where no statutory authority permitted

joinder of the nonsuing partner as a defendant.³⁴

C. *The Aggregate and Entity Theories of Partnerships*

The common law rule requiring joinder of all partners as plaintiffs in actions on partnership claims accords with, if it does not result from, the general common law characterization of partnerships as aggregates of individuals rather than as separate entities.³⁵ The conflict between the entity and aggregate theories³⁶ of partnership may have originated with the first partnership. A complete adoption of the aggregate theory results in difficulties with property titles and creditors' claims.³⁷ A total acceptance of the entity theory, including abolition of partners' individual liabilities, however, would eliminate the distinctions between partnerships and corporations.³⁸ Neither the entity nor aggregate theory has, therefore, ever completely prevailed.³⁹

D. *The Uniform Partnership Act*

The National Congress of Commissioners on Uniform State Laws, which was responsible for drafting the Uniform Partnership Act, stated that it had

suits in partnership name, judgment for partnership suing in partnership name was reversed because partnership does not constitute entity).

34. *Howell v. Bartlett*, 19 S.W.2d 104, 105 (Tex. Civ. App.—Amarillo 1929, no writ); *see also Republic Supply Co. v. Colbert*, 70 F.2d 586, 588 (10th Cir. 1934) (court noted common law rule requiring naming of all partners as plaintiffs in suit on partnership cause of action, but found rule was superseded by state statute providing for joinder of nonconsenting plaintiffs as defendants).

35. *See generally* 1 A. WILLIS, J. PENNEL & P. POSTLEWAITE, *PARTNERSHIP TAXATION* § 2.04 (3d ed. 1985) [hereinafter cited as 1 WILLIS]. (discussing historical background of aggregate and entity theories). The very early English common law generally adopted the aggregate theory of partnerships. The procedural difficulties inherent in the early English common law, however, spurred development of the medieval law of merchants. *Id.* The law merchant, controlled in its beginning by distinct courts that were often composed of merchants, 1 Z. CAVITCH, *BUSINESS ORGANIZATIONS* § 11.01[3] (1985), includes common practices of merchants that the courts have occasionally ratified. 4 HALSBURY'S *LAWS OF ENGLAND* ¶ 512 (Lord Hailsham of St. Marylebone 4th ed. 1973). During the early 1600s the English common law courts absorbed the law merchant, including some of its theories of partnership management. 1 WILLIS, *supra*, § 2.04. Because the common law and equitable principles that encompass the law merchant control in situations that are not dealt with in the Act, U.P.A. § 5 (1914), the law merchant retains a strong influence on partnership law. The common law did not, however, incorporate the law merchant's entity theory of partnerships. 1 Z. CAVITCH, *supra*, § 11.01[3].

36. The final drafter of the Act, Dean William Draper Lewis of the University of Pennsylvania Law School, stated that:

The [entity] theory is, that when two or more persons form a partnership, the law should regard the association as having a legal personality distinct from the individual legal personalities of each partner. Under this theory, all partnership rights are vested in this legal personality of the partnership; on it are imposed all partnership obligations. The partners are the agents of the legal entity.

Lewis, *The Uniform Partnership Act*, 24 *YALE L.J.* 617, 639 (1915). Under the aggregate theory "in partnership transactions the individual partners deal directly with each other and with third persons." *Id.* *See generally* A. ARONSOHN, *PARTNERSHIP INCOME TAXES* 1-2 (7th ed. 1978) (defining aggregate and entity theories).

37. Bromberg, *supra* note 1.

38. *Id.*

39. *Id.*

electd to continue the common law aggregate theory in the Act.⁴⁰ The Act's definition of a partnership as "an association of two or more persons to carry on as co-owners a business for profit"⁴¹ reflects the Commissioners' intention to continue the aggregate theory.⁴² Commentators and courts frequently state that the Act adopted the aggregate theory.⁴³

The Act, however, also includes features that are consistent with the entity theory.⁴⁴ Entity characteristics include: (1) ownership of real property in the partnership name;⁴⁵ (2) differentiation between partnership property and an individual partner's interest in the partnership;⁴⁶ (3) inclusion of

40. U.P.A., Commissioners' Prefatory Note, 6 U.L.A. 6 (Supp. 1985). The English Partnership Act is also based on the aggregate theory. 1 BARRETT, *supra* note 13, at 153-54.

41. U.P.A. § 6(1) (1914).

42. The Commissioners originally chose an entity theory proponent, Dean Ames of Harvard Law School, to draft the Act. 1 Z. CAVITCH, *supra* note 35, § 11.02[2]. Dean Ames defined a partnership as "a legal person formed by the association of two or more individuals for the purpose of carrying on business with a view to profit." Lewis, *The Uniform Partnership Act—A Reply to Mr. Crane's Criticism*, 29 HARV. L. REV. 158, 165 (1915). Dean Ames's definition might have prevailed had he lived to complete the drafting of the Act. 1 Z. CAVITCH, *supra* note 35, § 11.02[2]. The second appointed drafter, Dean Lewis, thought it might prove impossible to draft a satisfactory act using the entity theory. He, therefore, decided to prepare alternate drafts under the two theories. After reviewing the alternate drafts, members of a conference, including the Committee on Commercial Law, partnership scholars, and lawyers specializing in partnerships, unanimously recommended that Dean Lewis draft the Act under the aggregate theory. Dean Lewis implemented this recommendation. Lewis, *supra* note 36, at 640; Lewis, *supra*, at 171-72.

Varying tax consequences represent the clearest difference between partnerships and corporations. Partnership tax rules offer significant advantages that may provide the reason for choosing the partnership form. Comment, *supra* note 17, at 1466. Federal tax law reflects problems in dealing with the entity and aggregate theories. The Internal Revenue Code originally viewed partnerships as entities with one important exception: in determining partners' tax liabilities the Code viewed partnerships as aggregates. See Comment, *Are Partnerships Aggregates or Entities When Determining the Availability of Investment Credit for Used Property?*, 35 WASH. & LEE L. REV. 1013, 1013-14 (1978). Amendments that require partners to account separately for various items have, however, shifted the balance of partnership tax law to the aggregate theory. Wolfman, *Level for Determining Character of Partnership Income—"Entity" v. "Conduit" Principle in Partnership Taxation*, 19 INST. ON FED. TAX'N 287, 288-89 (1961).

The partnership concept in the federal income tax laws encompasses associations that are not generally referred to as partnerships, including "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a corporation or a trust or estate." I.R.C. § 761(a) (1982). This expansive partnership definition further complicates analysis of the nature of the partnership. A. ARONSOHN, *supra* note 36, at 3.

43. *E.g.*, 1 BARRETT, *supra* note 13, at 153-55 (also noting that the Act contains elements of the entity theory); 1 Z. CAVITCH, *supra* note 35, § 11.02[2] (same); Hecker, *supra* note 14, at 347-48 (same).

44. See generally 1 BARRETT, *supra* note 13, at 154-55 (discussing entity characteristics and noting courts' inclination to apply entity theory more often); Jensen, *Is a Partnership Under the Uniform Partnership Act an Aggregate or an Entity?*, 16 VAND. L. REV. 377, 378-79 & n.11 (1963) (citing 19 sections of the Act that recognize partnership as entity and concluding that provisions emanate from work of Dean Ames's committee on early drafts).

45. U.P.A. § 8(3) (1914). The Act also provides that property acquired in the firm name must be conveyed in the firm name. *Id.*

46. U.P.A. §§ 25-26 (1914). The Commissioners specifically excepted the ownership of partnership property in a tenancy in partnership from their mandate of the aggregate theory. U.P.A., Commissioners' Prefatory Note, 6 U.L.A. 6 (Supp. 1985).

partnerships in the Act's definition of the term person;⁴⁷ and (4) designation of each partner as the partnership's agent.⁴⁸ These entity characteristics have led some commentators to conclude that, in spite of the expressed intention of the Commissioners, the Act did not definitely adopt either theory.⁴⁹ Professor Alan R. Bromberg stated that the Act tends to follow the entity theory.⁵⁰ Professor Bromberg also stated, in his comments on the Texas Act,⁵¹ that the Texas Act has an even greater tendency toward the entity theory than the Act.⁵²

Although the Act's theoretical ambiguity continues to cause confusion

47. U.P.A. § 2 (1914).

48. *Id.* § 9(1).

49. A. ARONSOHN, *supra* note 36, at 2; Crane, *Twenty Years Under the Uniform Partnership Act*, 2 U. PITT. L. REV. 129, 132 (1936); see E. WARREN, CORPORATE ADVANTAGES WITHOUT INCORPORATION 293-301 (1929) (discussing reasons for ambiguity in the Act); Jensen, *supra* note 44, at 378-79 (uncertainty inherent due to inclusion of numerous substantive entity provisions with an aggregate definition of partnerships). The State of Nebraska enacted legislation to insure greater uniformity of treatment of partnerships. NEB. REV. STAT. § 67-306(1) (1981) provides that "[a] partnership is an association of persons organized as a separate entity to carry on a business for profit." *Id.* § 67-304(4) provides that the Nebraska version of the Act "shall be interpreted and construed in harmony with the entity theory of partnership." Oklahoma recognized partnerships as entities under the common law. Heaton v. Schaefer, 34 Okla. 631, 126 P. 797, 798 (1912). Although Oklahoma adopted the Act's partnership definition, OKLA. STAT. ANN. tit. 54, § 206(1) (West 1969), it continues to recognize partnerships as entities under the Act. C.H. Leavell & Co. v. Oklahoma Tax Comm'n, 450 P.2d 211, 214 (Okla. 1968).

50. Bromberg, *supra* note 1. See generally A. BROMBERG, *supra* note 13, at 26-29 (rationale supporting dominance of entity theory in Act).

51. TEX. REV. CIV. STAT. ANN. art. 6132b (Vernon 1970). The adoption of the Act in Texas became effective January 1, 1962. Texas Uniform Partnership Act, ch. 158, § 45, 1961 Tex. Gen. Laws 289, 303. See generally Bromberg, *Texas Uniform Partnership Act—The Enacted Version*, 15 SW. L.J. 386 (1961) (discussing changes made in proposed Texas Act before enactment); Bromberg, *The Proposed Texas Uniform Partnership Act*, 14 SW. L.J. 437 (1960) (discussing Uniform Partnership Act proposed by Dallas Bar Association Special Committee on Uniform Partnership Act); Sher & Bromberg, *Texas Partnership Law in the 20th Century—Why Texas Should Adopt the Uniform Partnership Act*, 12 SW. L.J. 263 (1958) (discussing Texas partnership common law and advocating adoption of the Act).

52. Bromberg, *supra* note 1, at 300. The Texas Act adds "unless the agreement between the partners provides otherwise," TEX. REV. CIV. STAT. ANN. art. 6132b, § 31(4) (Vernon 1970), to the Act's statement that dissolution results from "the death of any partner." U.P.A. § 31(4) (1914). Texas Act § 28-B requires treatment of the spouse of a partner receiving a partnership interest on divorce and successors in interest to a deceased partner or a partner's deceased spouse as assignees and purchasers of the partnership interest. TEX. REV. CIV. STAT. ANN. art. 6132b, § 28-B (Vernon 1970). Texas Act § 27 allows assignees and purchasers of partnership interests to obtain financial information regarding partnerships. *Id.* art. 6132b, § 27. Texas Act § 28-B(2) provides that the demise of a partner's spouse does not result in dissolution, absent a provision in the partnership agreement requiring dissolution. *Id.* art. 6132b, § 28-B(2). Section 15 of the Texas Act, however, provides that partners are jointly and severally liable on contract claims for partnership debts, *id.* art. 6132b, § 15, although the Act only provides joint liability on such claims. U.P.A. § 15 (1914). Professor Bromberg also suggests that courts use the entity theory to decide questions not specifically dealt with in the Texas Act. Bromberg, *supra* note 1, at 301. See Haney v. Fenley, Bate, Deaton & Porter, 618 S.W.2d 541, 542 (Tex. 1981) (under the Texas Act a partnership is usually treated as a legal entity); Corinth Joint Venture v. Lomas & Nettleton Fin. Corp., 667 S.W.2d 593, 595 (Tex. App.—Dallas 1984, writ dismissed) (quoting Haney, 618 S.W.2d at 542); Seidman & Seidman v. Schwartz, 665 S.W.2d 214, 218 (Tex. App.—San Antonio 1984, writ dismissed) (quoting Haney, 618 S.W.2d at 542).

and litigation,⁵³ it is clear that a partnership may constitute an entity for some purposes and an aggregate for other purposes.⁵⁴ The drafters of the Act did not include any provisions to simplify the difficulties involved in partnership litigation under the common law rules.⁵⁵ Under the Act, the common law aggregate theory continues to apply in determining questions regarding partnership litigation. The Federal Rules of Civil Procedure and many states, however, now have separate provisions that permit partnerships to litigate in the partnership name.⁵⁶

E. Revised Procedural Rules

Federal Rule of Civil Procedure 17(b) allows suit by a partnership in the partnership name to enforce a claim arising under the Constitution or a federal statute.⁵⁷ The rule, however, relates only to procedure and does not affect the substantive law regarding partnerships.⁵⁸ The rule thus does not change the common law rule that one partner cannot bring suit on a partnership cause of action.⁵⁹

53. Jensen, *supra* note 44, at 379; see A. ARONSOHN, *supra* note 36, at 1; 1 BARRETT, *supra* note 13, at 151.

54. Jensen, *supra* note 44, at 381, 384; see Hecker, *supra* note 14, at 347-48 (courts do not have to make an all-or-nothing determination regarding partnership classification).

55. 1 Z. CAVITCH, *supra* note 35, § 11.02[2]; Jensen, *supra* note 44, at 379; see Aronovitz v. Stein Prop., 322 So. 2d 74, 75 (Fla. Dist. Ct. App. 1975) (the Act did not permit suits in partnership name); Allgeier, Martin & Assocs. v. Ashmore, 508 S.W.2d 524, 525 (Mo. Ct. App. 1974) (the Act "did not transform a partnership into a separate or juristic entity"). In contract cases Professors Wright and Miller find support for continuation of the common law procedural rules in the Act's theories of liability. Professors Wright and Miller reason that:

The Uniform Partnership Act states that the liability of partners for an obligation based on a contract entered into by the partnership is a joint liability of all the partners. Therefore, under the act all partners theoretically are indispensable parties in an action against the partnership and must be joined. Conversely, all partners should join in asserting a partnership claim under a contract.

7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1613, at 131 (1972) (footnotes omitted). Professors Wright and Miller also note a trend toward modification of the strict rules regarding joinder of all partners in suits against partnerships by changing the liability rule to joint and several liability, thereby allowing suits against fewer than all partners, or through rules allowing suits against partnerships in the partnership name. *Id.* at 132-33.

56. 1 Z. CAVITCH, *supra* note 35, § 11.02[2]; see REUSCHLEIN, *supra* note 13, at 312 (statutes allowing suit in partnership name are common, and where such statutes apply, partnership appears similar to entity). *But see* Bedolla v. Logan & Frazier, 52 Cal. App. 3d 118, 127, 125 Cal. Rptr. 59, 66 (1975) (although limited partnership can be sued in partnership name, it does not constitute legal entity).

57. FED. R. CIV. P. 17(b). In all other suits in federal court state law controls the partnership's capacity to sue. *Id.*; see Remington's Dairy v. Rutland Ry. Corp., 15 F.R.D. 488, 489 (D. Vt. 1954) (court applied rule 17(b) to allow Rhode Island partnership to sue in firm name in federal court under Vermont statute).

58. 2 W. BARRON & A. HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE WITH FORMS § 487, at 55-56 (1961).

59. See Leh v. General Petroleum Corp., 165 F. Supp. 933, 935-36 (S.D. Cal. 1958), *aff'd on other grounds*, 330 F.2d 288 (9th Cir. 1964), *rev'd on other grounds*, 382 U.S. 54 (1965), *commented on in* 73 HARV. L. REV. 411 (1959) (rule 17(b) does not appear to relate to apportionment between partners of authority to sue); see also Rosen v. Texas Co., 161 F. Supp. 55, 59 (S.D.N.Y. 1958) (where individual partner sued in his own name on partnership claim arising under federal statute, district court required joinder of other partners). *But see* Henson v. First Sec. & Loan Co., 164 Wash. 198, 2 P.2d 85, 86 (1931). In *Henson* the court, citing only 47 C.J. *Partnership* § 947 (1929), allowed one partner to sue in the partnership name on a

Texas Rule of Civil Procedure 28 also allows a partnership to sue or be sued in the partnership name.⁶⁰ Texas Rule of Civil Procedure 815 provides, however, that courts may not interpret the rules, including rule 28, to modify any substantive rights or duties of a plaintiff or defendant in a civil suit.⁶¹ Texas courts have held that, at a minimum, rule 28 requires according entity status to a partnership with regard to enforcing a judgment against it or obtaining a judgment for it.⁶² The El Paso court of civil appeals held that nothing in rule 28 requires naming individual partners in a suit by the partnership,⁶³ but noted that the court could require the partnership to release partners' identities if necessary to protect the rights of the defendant.⁶⁴

In *Spiritas v. Robinowitz*⁶⁵ the Dallas court of civil appeals stated that courts developed the common law rule that requires naming all partners in suits to enforce partnership rights in order to protect third parties from multiple suits.⁶⁶ The court thus found the common law rule inapplicable in a

partnership debt under the "general rule of law that it is within the implied power of a partner to institute ordinary legal proceedings in behalf of a firm by using the names of all of the parties as such as plaintiffs for the enforcement of the rights of the firm." *Henson*, 2 P.2d at 86. The court also noted that the complaint did not state that the other partner objected to the suit. *Id.* The defendant, however, did allege that the other partner would not have agreed to become a plaintiff. *Id.*

60. TEX. R. CIV. P. 28 states that "[a]ny partnership . . . may sue or be sued in its partnership . . . name for the purpose of enforcing for or against it a substantive right, but on a motion by any party or on the court's own motion the true name may be substituted." See generally 1 R. MACDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS §§ 3.06-07 (rev. ed. 1981) (discussing partnership actions under common law and rule 28). A partnership must file a certificate in each county in which it does business or has an office. TEX. BUS. & COM. CODE ANN. § 36.10 (Vernon Supp. 1985). The certificate must state the partnership's and the partners' names and addresses. *Id.* A partnership cannot bring suit in the partnership name under rule 28 until it has filed the required certificate. *Id.* § 36.25; see 8 W. DORSANEY & P. WINSHIP, TEXAS LITIGATION GUIDE § 180.06 (1985).

61. TEX. R. CIV. P. 815. Texas courts have held that rule 28 relates only to procedure and cannot change substantive law that existed before its enactment. *Dillard v. Smith*, 146 Tex. 227, 205 S.W.2d 366, 367-68 (1947); *Allright Auto Park v. Commercial Standard Ins. Co.*, 220 S.W.2d 535, 537 (Tex. Civ. App.—Galveston 1949, no writ).

62. *E.g.*, *Taormina Corp. v. Escobedo*, 254 F.2d 171, 173-74 (5th Cir.), cert. denied, 358 U.S. 827 (1958) (court allowed suit against partnership as entity under rule 28 although only three of ten partners were named as individual defendants; court found naming individual partners as defendants necessary only for purposes of making them individually liable for partnership obligations); *J.A. & E.D. Transp. Co. v. Rusin*, 202 S.W.2d 693, 695-96 (Tex. Civ. App.—San Antonio), modified on other grounds sub nom. *Dillard v. Smith*, 146 Tex. 227, 205 S.W.2d 366, 368 (1947) (rule 28 requires according a partnership entity status with regard to enforcing judgment against it); *Mims Bros. v. N.A. James, Inc.*, 174 S.W.2d 276, 278 (Tex. Civ. App.—Austin), writ ref'd per curiam, 175 S.W.2d 74 (Tex. 1943) (same; in addition, the court noted that partnership judgment remains unenforceable against a partner who is not subject to personal judgment).

63. *Johnson v. Pioneer Mortgage Co.*, 264 S.W.2d 761, 762 (Tex. Civ. App.—El Paso 1954, writ dismissed). But see *Coast v. Hunt Oil Co.*, 96 F. Supp. 53 (W.D. La. 1951), *aff'd*, 195 F.2d 870 (5th Cir.), cert. denied, 344 U.S. 836 (1952). In *Coast* the district court held that Louisiana partnership law, which recognizes partnerships as entities, requires filing of a suit on a partnership's claim in the partnership name "through or by" all partners. 96 F. Supp. at 58-59.

64. *Johnson v. Pioneer Mortgage Co.*, 264 S.W.2d 761, 762-63 (Tex. Civ. App.—El Paso 1954, writ dismissed).

65. 544 S.W.2d 710 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.).

66. *Id.* at 715.

suit naming one partner as a plaintiff and the other partner as a defendant.⁶⁷ The *Spiritas* court did not discuss the applicability of rule 28. In *Cates v. International Telephone & Telegraph Corp.*⁶⁸ the Fifth Circuit criticized *Spiritas* and stated that joining nonsuing partners as defendants to permit suits by fewer than all partners on partnership claims did not accord with the Texas Act's strong preference for the entity theory.⁶⁹ The Fifth Circuit also noted that an individual partner who lacks the consent of the majority generally may not sue in the name of the partnership or in his own name for a proportional part of the partnership cause of action.⁷⁰

III. DEVELOPMENT OF DERIVATIVE SUITS IN TRUSTS, CORPORATIONS, AND LIMITED PARTNERSHIPS

A. Trust Beneficiaries' and Shareholders' Derivative Suits

A trustee has a fiduciary relationship with the trust beneficiary.⁷¹ This relationship imposes duties on the trustee, including a duty to manage the trust exclusively for the benefit of the beneficiary.⁷² A trustee must, therefore, make reasonable efforts to enforce causes of action that he holds for the trust.⁷³ When a trustee unreasonably refuses to sue on a valid claim, courts allow the beneficiary to bring an equitable action against the trustee to force him to institute suit against the third party.⁷⁴

Directors' abuse of corporations under their control provided the impetus

67. *Id.* at 714-15.

68. 756 F.2d 1161 (5th Cir. 1985).

69. *Id.* at 1176. The Fifth Circuit previously rejected joinder of a nonsuing partner as a defendant in *Coast v. Hunt Oil Co.*, 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952). In *Coast*, after finding that one partner could not sue on a partnership cause of action under Louisiana law, which recognizes partnerships as entities, the court rejected the plaintiff's attempts to join the nonsuing partner as a defendant. 195 F.2d 871-72. The court stated that FED. R. CIV. P. 19(a)

relates to *joinder* of parties, it permits a plaintiff under proper circumstances to require another person or persons to *join* with him, but it makes no provision for a plaintiff to require another person to maintain an action vested solely in such other person, even though its maintenance might result in benefit to the plaintiff.

Coast v. Hunt Oil Co., 195 F.2d at 872 (emphasis in original); *see also* *Grant County Deposit Bank v. McCampbell*, 194 F.2d 469, 471 (6th Cir. 1952) (diversity case rejecting classification as defendant of partner who refuses to sue). *But see* *Rose v. Beckham*, 264 Ala. 209, 86 So. 2d 275, 277 (1956) (if one partner refuses to join in suit for partnership claim other partners may name him as co-plaintiff if they indemnify him against costs).

70. 756 F.2d at 1176; *see* *Stevens v. St. Joseph's Hosp.*, 52 A.D.2d 722, 381 N.Y.S.2d 927, 928 (1976) (one partner cannot sue for his proportional share of payments under defendant's contract with partnership because all partners jointly own cause of action).

71. A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS § 170 (1960). Additional fiduciaries include corporate directors or officers and partners. *Id.*

72. *Id.*

73. A. SCOTT, *supra* note 71, § 177. A trustee who fails to pursue a cause of action bears the burden of proving the reasonableness of his action. If the trustee cannot prove the reasonableness of his action, he becomes liable for any resulting loss. *Id.* Ordinarily the trustee has the exclusive right to pursue a trust's claim even though the beneficiary's interest in the trust is also impaired. G.G. BOGERT & G.T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 869, at 87 (rev. 2d ed. 1982) [hereinafter cited as BOGERT].

74. 4 A. SCOTT, THE LAW OF TRUSTS § 282.1 (3d ed. 1967). The beneficiary cannot force the trustee to sue if the court finds the trustee's refusal to be reasonable.

for development of a shareholders' action against corporate management.⁷⁵ Courts originally allowed shareholder actions against directors by imposing a trustee's fiduciary obligations on directors and permitting representative stockholder's actions against directors who breached their trusts.⁷⁶ The representative trustee-beneficiary theory could not, however, permit a shareholder's suit against a third party on a claim arising from corporate transactions with the third party because the third party had no fiduciary obligation to the shareholder. Courts, recognizing the need to provide a remedy, developed the derivative theory to enable shareholders to reach third-party defendants who are outside of corporate management.

In *Dodge v. Woolsey*⁷⁷ the Supreme Court permitted a shareholder action against a third party.⁷⁸ The Court found the required breach of fiduciary duty in the directors' refusal to comply with the shareholder's demands for suit on an admittedly valid corporate claim arising from an illegal state tax.⁷⁹ The Court did not, however, articulate a theoretical rationale for allowing the shareholder to proceed against the third party, a state tax collector, in lieu of requiring a separate action by the normal plaintiff, the corporation.⁸⁰

The concept of a derivative action provides the necessary theoretical rationale for the action allowed in the *Dodge* case.⁸¹ Two somewhat countervailing ideas appear in the *Dodge* situation. First, the corporation constitutes an entity with its own legal rights. Second, the shareholders may require judicial protection when their interests are jeopardized by the directors' default. The theory of the shareholders' suit as a secondary or derivative suit⁸² on the corporate entity's cause of action provides the necessary integration of the corporation's rights and the shareholders' needs and allows the shareholders to proceed against third parties.⁸³

75. Prunty, *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980, 980 (1957).

76. *Id.* at 986; Comment, *supra* note 17, at 1467-69.

77. 59 U.S. (18 How.) 331 (1856). See generally 3B J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE ¶ 23.1.15[1], at 12-14 (rev. 2d ed. 1985) [hereinafter cited as 3B MOORE] (discussing *Dodge*); Prunty, *supra* note 75, at 991-92 (same).

78. 59 U.S. (18 How.) at 345-46. The shareholder also named the directors and the corporation as defendants. *Id.* at 336.

79. *Id.* at 345.

80. The Court merely found a breach of fiduciary duty by the directors and stated that the directors "were properly made parties to the bill, and that the jurisdiction of a court of equity reaches such a case to give such a remedy as its circumstances may require." *Id.* The Court then addressed and rejected the tax collector's assertion that the suit by the shareholder, as opposed to a suit by the corporation, constituted a contrivance to obtain diversity jurisdiction. *Id.* at 346. After *Dodge* a widespread use of shareholder actions to obtain diversity jurisdiction resulted in the FED. R. CIV. P. 23.1 requirement that the shareholder state in a verified complaint that the derivative action is not a collusive attempt to obtain diversity jurisdiction.

81. Prunty, *supra* note 75, at 991-92.

82. Payment of any judgment recovered to the corporation reinforces the secondary nature of derivative actions. See H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES § 358, at 1037 (3d ed. 1983) [hereinafter cited as HENN].

83. Prunty, *supra* note 75, at 992. The shareholder's derivative action has undergone substantial changes during its development. For a discussion of modern actions see HENN, *supra* note 82, §§ 358-59; 1 R. MAGNUSON, SHAREHOLDER LITIGATION §§ 8.01-.28 (1981 & Cum. Supp. 1985).

Subsequently, courts also allowed trust beneficiaries to join third parties as additional defendants in their equitable actions against trustees who refused to sue on a trust claim.⁸⁴ The courts justified the joinder by the necessity of protecting the beneficiary's interests.⁸⁵ Specifically, to require the beneficiary to wait for a court order that compels the trustee to institute suit could result in additional injury to the beneficiary's equitable interest in the trust property due to a change in the ability of the third party to satisfy the claim or to preclusion of the claim by a statute of limitation or laches.⁸⁶ Courts also justified the joinder on grounds of judicial efficiency by noting that joinder allowed resolution of the controversy in a single action.⁸⁷

A derivative suit includes two separate causes of action: the first against the party who impermissibly declines to sue, and the second against the third party who is liable to the entity.⁸⁸ A derivative action, therefore, is only appropriate if the shareholder or trust beneficiary pursues a cause of action that belongs to the entity as opposed to an entirely individual claim.⁸⁹ The distinction between entity and individual claims has often proved difficult.⁹⁰ Generally, however, only the entity possesses the right to sue for injury to or interference with the entity's business or contracts, although the individual shareholder, beneficiary, or partner also suffers damages through loss of earnings or diminution in the value of his investment.⁹¹

B. Limited Partners' Derivative Suits

The development of derivative suits in limited partnerships occurred

84. Prunty, *supra* note 75, at 991-92; see Klebanow v. Funston, 35 F.R.D. 518, 520 (S.D.N.Y. 1964).

85. BOGERT, *supra* note 73, § 869, at 92.

86. *Id.*

87. 4 A. SCOTT, *supra* note 74, § 282.1.

88. See *Riveria Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 548, 223 N.E.2d 876, 880, 277 N.Y.S.2d 386, 392-93 (1966) (discussing separate causes of action in trust context).

89. 3B MOORE, *supra* note 77, ¶ 23.1.16[1]. Examples of derivative claims include claims against officers or controlling stockholders for mismanagement or attempts to recover property of the corporation or to pursue corporate claims. *Id.* See 1 R. MAGNUSON, *supra* note 83, § 8.04 (discussing typical situations giving rise to derivative actions). Examples of individual claims include suits on contracts between the corporation and a shareholder or suits by a shareholder to recover a debt owed him by the corporation. 3B MOORE, *supra* note 76, ¶ 23.1.16[1].

90. 3B MOORE, *supra* note 77, ¶ 23.1.16[1].

91. *E.g.*, *McDonald v. Bennett*, 674 F.2d 1080, 1086 (5th Cir. 1982) (under Texas law even majority shareholder cannot sue for damages incurred by corporation); *Pitchford v. Pepi, Inc.*, 531 F.2d 92, 97 (3d Cir.), *cert. denied*, 426 U.S. 935 (1976) (president and stockholder could not sue under Sherman Act for injuries to corporation); *Mendenhall v. Fleming Co.*, 504 F.2d 879, 881 (5th Cir. 1974) (Sherman Act antitrust action belongs to corporation; shareholder cannot sue for damages that result from sale of stock at depressed price or on corporation's antitrust claim); *Schaffer v. Universal Rundle Corp.*, 397 F.2d 893, 896-97 (5th Cir. 1968) (plaintiff must show breach of duty owed to himself as individual stockholder before he can sue in contract or tort for injury to corporation's business); *Martens v. Barrett*, 245 F.2d 844, 846 (5th Cir. 1957) (corporation, not stockholder, is entitled to recover on injury to corporate business even if stockholder also suffers damages); *Seidman & Seidman v. Schwartz*, 665 S.W.2d 214, 218 (Tex. App.—San Antonio 1984, writ *dism'd*) (under Texas Act's entity theory, partnership owns causes of action for injury to partnership; partners' individual interests in cause of action, if any, are subordinate to partnership's rights).

much later than the analogous developments in trusts and corporations. For this reason and because limited partnerships more closely resemble general partnerships, this Comment reviews the limited partnership development in greater detail. Unlike partnerships, but like corporations, limited partnerships remain statutory creations.⁹² Twenty-seven states continue to apply the Uniform Limited Partnership Act (ULPA)⁹³ that the National Conference of Commissioners on Uniform State Law promulgated in 1916. Twenty-two states have adopted the 1976 revision of the Uniform Limited Partnership Act (RULPA).⁹⁴

Primarily due to their combination of limited liability and favorable tax attributes, the number of limited partnerships has increased dramatically in recent decades.⁹⁵ Although small businesses commonly employed the limited partnership vehicle in the last century,⁹⁶ many of these new generation partnerships include large numbers of partners and invest in speculative areas such as oil and gas and real estate.⁹⁷ Because a limited partner must, by definition, remain a passive investor in the partnership,⁹⁸ and because modern limited partnerships are often large and general partners frequently do not have personal relationships with limited partners, a separation of capital (provided by the limited partners) from management and control (in the

92. *Ruzicka v. Rager*, 305 N.Y. 191, 197, 111 N.E.2d 878, 881 (1953).

93. UNIF. LTD. PARTNERSHIP ACT (1916), 6 U.L.A. 561 (1979) [hereinafter cited as U.L.P.A.]. The following states continue to use the ULPA: Alaska, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Maine, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, and Virginia. 6 U.L.A. 147 (Supp. 1985). The District of Columbia and the Virgin Islands also continue to use the ULPA. *Id.*

Various states adopted limited partnership statutes before the ULPA. These state statutes, however, contained very rigid requirements, and courts construed the statutes narrowly. Limited partnerships, therefore, remained relatively undeveloped until the adoption of the ULPA. *See generally* Hecker, *supra* note 14, at 343, (discussing civil law origins and early state statutes); Taubman, *Limited Partnerships*, CORP. PRAC. COMMENTATOR, Feb. 1962, at 15, 15-19 (same); Comment, *supra* note 17, at 1463-64 (same).

94. REVISED UNIF. LTD. PARTNERSHIP ACT, 6 U.L.A. 216 (Supp. 1985) [hereinafter cited as R.U.L.P.A.]. The following states have adopted the RULPA to replace the ULPA: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Iowa, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, Oklahoma, Washington, West Virginia, Wisconsin, and Wyoming. 6 U.L.A. 200 (Supp. 1985). Although Louisiana has never adopted the ULPA or RULPA, it has under its civil law system recognized a partnership in commendam. *See generally* Comment, *An Examination of Louisiana Limited Partnership—The Partnership in Commendam*, 55 TUL. L. REV. 515, 515-16 (1980) (discussing revisions in Louisiana partnership law).

95. Hecker, *supra* note 14, at 344.

96. Taubman, *supra* note 93, at 38 (also noting that limited partnerships may prove useful in such businesses currently, projecting continued substantial usage in certain fields and discussing reasons for using limited partnerships).

97. *See generally* Hecker, *supra* note 14, at 343-44 (discussing tax aspects and recent usage of limited partnerships); Comment, *supra* note 17, at 1467 (also noting that prohibition of incorporation of certain businesses and partnership's lack of mandatory corporate formalities contribute to the popularity of limited partnerships).

98. U.L.P.A. § 7 (1916) provides that a limited partner foregoes limited liability if he "takes part in the control of the business." *Id.* § 9 gives the general partners the same management authority as a partner in a partnership under the Act.

hands of the general partners) results.⁹⁹ This separation may tempt general partners to engage in mismanagement and self-dealing.¹⁰⁰

The ULPA provides only two remedies for limited partners: (1) the right to compel an accounting;¹⁰¹ and (2) the right to request dissolution of the limited partnership under a court order.¹⁰² A shareholder's ability to force corporate dissolution, however, did not prevent development of shareholder derivative actions. The similar powers of limited partners thus should not defeat the development of partnership derivative actions in appropriate circumstances.¹⁰³

1. Judicially Developed Limited Partner Derivative Suits. Courts in several states have developed procedures for derivative suits to provide an additional remedy to limited partners.¹⁰⁴ Courts have limited the availability of the derivative suit remedy to situations in which the general partner has refused

99. Hecker, *supra* note 14, at 344 (noting similarity to corporations); Comment, *supra* note 17, at 1478 (also noting that separation of capital ownership from control constituted one factor leading to development of derivative suit remedy for corporate shareholders).

100. See, e.g., *Bedolla v. Logan & Frazier*, 52 Cal. App. 3d 118, 124, 125 Cal. Rptr. 59, 63-64 (1975) (general partners engaged in self-dealing and received unauthorized compensation); *Executive Hotels Assocs. v. Elm Hotel Corp.*, 41 Misc. 2d 354, 245 N.Y.S.2d 929, 933-34 (Civ. Ct.) (general partners executed series of transactions that transferred all interest of limited partnerships in its only asset, a lease, to the general partners' corporations), *aff'd mem.*, 43 Misc. 2d 153, 250 N.Y.S.2d 351 (Sup. Ct. 1964); *Starr v. Int'l Realty, Ltd.*, 271 Or. 396, 533 P.2d 165, 169 (1975) (general partner realized excessive syndication fees); Comment, *supra* note 17, at 1478 (recognizing potential mismanagement of self-dealing from separation of capital and management).

101. U.L.P.A. § 10(1)(b) (1916). For discussion of accounting actions under the Act, see *supra* text accompanying notes 13-18.

102. U.L.P.A. § 10(1)(c) (1916). For discussion of judicial dissolution under the Act, see *supra* text accompanying notes 19-23. Dissolution in a limited partnership may have particularly egregious tax consequences when allowable deductions have exceeded capital invested due to the use of nonrecourse debt. Note, *Procedures and Remedies in Limited Partners' Suits for Breach of the General Partner's Fiduciary Duty*, 90 HARV. L. REV. 763, 780-83 (1977).

103. Comment, *supra* note 17, at 1480. A limited partner's ability to obtain court-ordered and supervised dissolution should not preclude derivative action in proper circumstances because derivative action is a quicker and better remedy. *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965).

104. See, e.g., *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 298-99 (2d Cir. 1965) (applying New York law, court found derivative suit allowable when general partner impermissibly will not or cannot sue), *rev'g* 232 F. Supp. 965 (S.D.N.Y. 1964); *Wroblewski v. Brucher*, 550 F. Supp. 742, 748-49 n.8 (W.D. Okla. 1982) (discussing California law, which permits limited partner derivative suits); *Engl v. Berg*, 511 F. Supp. 1146, 1152-53 (E.D. Pa. 1981) (permitted limited partner derivative suit under Pennsylvania law); *Smith v. Bader*, 458 F. Supp. 1184, 1186-87 (S.D.N.Y. 1978) (derivative suit permitted under California law); *Klebanow v. Funston*, 35 F.R.D. 518, 520 (S.D.N.Y. 1964) (applying New York law, court found derivative suit allowable where general partner impermissibly will not or cannot sue); *McCully v. Radack*, 27 Md. App. 350, 340 A.2d 374, 379-80 (1975) (permitting intervention by limited partners and approving, in dictum, limited partners' derivative actions); *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 547, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966) (limited partners could sue on partnership claim because general partner impermissibly refused to sue). See generally Comment, *Limited Partnerships—Derivative Actions—Ability of Limited Partner to Institute a Partnership's Cause of Action*, 50 IOWA L. REV. 954 (1965) (criticizing district court's decision in *Klebanow*); Comment, *Partnership—Limited Partnership—Limited Partners Held Able to Sue Third Parties on Behalf of Partnership When General Partners Are Unable or Improperly Refuse to Sue*, 40 N.Y.U. L. REV. 1174 (1965) (discussing Second Circuit's decision in *Klebanow* in detail).

to sue on behalf of the partnership or has become incapable of suing for the partnership.¹⁰⁵ The courts relied on analogies in their analyses of the issue. Parties who oppose derivative suits compare limited partners to creditors, who cannot maintain derivative actions.¹⁰⁶ Parties who seek approval of such derivative actions rely on the similarities between limited partners and corporate shareholders or trust beneficiaries, both of whom can maintain derivative actions.¹⁰⁷

The limited partner characteristics that one can cite in support of the creditor analogy include: (1) the absence of a property right in partnership assets;¹⁰⁸ (2) the preference received in asset distribution;¹⁰⁹ and (3) the prohibition on inclusion of a limited partner's name in the partnership name.¹¹⁰ Courts have not, however, found the creditor analogy to be convincing.¹¹¹ In fact, the first creditor characteristic, the absence of a property right in partnership assets, can also be employed in an analogy to a corporate stockholder.¹¹² Furthermore, the second creditor characteristic, the preference

105. *E.g.*, *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965) (court should require "strong allegations and proof of disqualification or wrongful refusal," a simple disagreement should not suffice); *Wroblewski v. Brucher*, 550 F. Supp. 742, 748 n.8 (W.D. Okla. 1982) (in cases of fraud or collusion limited partners can institute a derivative suit or intervene in an existing action); *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 547, 223 N.E.2d 876, 277 N.Y.S.2d 368, 391 (1966) (limited partners' derivative suits allowed if general partners impermissibly decline to sue); *Executive Hotel Assocs. v. Elm Hotel Corp.*, 41 Misc.2d 354, 245 N.Y.S.2d 929, 933-34 (Civ. Ct.) (limited partners allowed to initiate derivative suit to recover from general partners who refused to collect rent owed to limited partnership by corporation that the general partners controlled; court found general partners breached their fiduciary duty and violated provisions of the partnership agreement), *aff'd mem.*, 43 Misc.2d 153, 250 N.Y.S.2d 351 (Sup. Ct. 1964). *See generally* Note, *Fiduciary Duties of Partners*, 48 IOWA L. REV. 902, 906-07 (1963) (partner's duty of care evaluated by good faith—gross negligence standard, but much more stringent standard applies to violations of a partner's duty of loyalty).

106. *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965).

107. *See generally id.* (discussing analogies to creditors, shareholders, and trust beneficiaries); *Klebanow v. Funston*, 35 F.R.D. 518, 520 (S.D.N.Y. 1964) (limited partners' position comparable to position of trust beneficiaries); *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 536, 223 N.E.2d 869, 873, 277 N.Y.S.2d 377, 382 (1966) (discussing analogy between limited partner and shareholder); *Hecker*, *supra* note 14, at 350-51 (discussing analogies to shareholders and trust beneficiaries); *Comment*, *supra* note 17, at 1476-81 (discussing analogies to creditors, shareholders, and trust beneficiaries and justifying such reliance based on absence of statutory or judicial direction).

108. A general partner in a limited partnership has the same rights and powers as any partner in a general partnership under the Act. U.L.P.A. § 9(1) (1916). Under the Act a partner's property rights include a co-ownership interest in the partnership property as a tenant in partnership, *id.* §§ 24, 25, and a personal property interest in the partnership, which is his proportionate part of its profits and surplus, *id.* §§ 24, 26. A limited partner, however, has only a personal property interest in the partnership. *Id.* §§ 10, 18.

109. *Id.* § 23. Creditors, however, have preference over limited partners. *Id.*

110. *Id.* § 5.

111. *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965); *see Comment*, *supra* note 17, at 1476-78 (discussing cases involving analogy between limited partners and creditors in other contexts).

112. *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 297 (2d Cir. 1965); *see Comment*, *supra* note 17, at 1476-78 (concluding that classification of limited partners as creditors based on their lack of rights in partnership assets would also require classification of shareholders as creditors and noting that courts generally reject classification of shareholders as creditors).

received in asset distribution, parallels the preference that preferred stockholders receive.¹¹³

The limited partner characteristics that support the shareholder analogy include: (1) participation in profits;¹¹⁴ (2) subordination to creditors in asset distribution;¹¹⁵ (3) the power to veto admission of new partners;¹¹⁶ (4) the privileges of examining the partnership books and demanding information regarding the partnership;¹¹⁷ (5) limitation of liability for partnership debts to the amount of investment;¹¹⁸ and (6) the lack of participation in management.¹¹⁹ These similarities led one court to refer to limited partnerships as "quasi-corporate" entities and to describe limited partners as "quasi-shareholders."¹²⁰ In the corporate context directors and majority stockholders have a fiduciary duty to conduct the corporation's business and manage its assets in view of the best interests of all of its shareholders.¹²¹ Courts of equity originally recognized derivative actions to protect shareholders' interests that no legal or equitable remedy protected.¹²² General partners have a fiduciary duty to limited partners that is comparable to the fiduciary duty that a corporate director owes to a corporate shareholder.¹²³ Absent a substantive distinction that justifies denying the derivative suit remedy in the limited partnership context, a limited partner should have the remedy just as a corporate shareholder does.¹²⁴

The courts encountered four fundamental problems in the development of the derivative suit remedy for limited partners under the ULPA: (a) the necessity of according entity status to partnerships at least for certain purposes; (b) the absence of any provision that authorizes partners' derivative suits; (c) the provision in ULPA section 26 that limited partners do not generally constitute proper parties in actions by or against a partnership; and (d) the potential loss of limited liability if instituting a derivative suit constitutes sharing management and control of the business under section 7 of the

113. *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 298 (2d Cir. 1965).

114. U.L.P.A. § 10(2) (1916).

115. *Id.* § 23(1).

116. *Id.* § 17(4).

117. *Id.* § 10(1)(a), (b).

118. *Id.* §§ 7, 17.

119. *Id.* § 7.

120. *Ruzicka v. Rager*, 305 N.Y. 191, 111 N.E.2d 878, 881 (1953). *But see* Taubman, *supra* note 93, at 21-24. Taubman contends that substantive differences exist between limited partners and shareholders, particularly as to ability to exercise control.

121. *See supra* note 76 and accompanying text.

122. *See supra* notes 75-83 and accompanying text.

123. *Miller v. Schweickart*, 405 F. Supp. 366, 369 (S.D.N.Y. 1975) (general partner's fiduciary duty to limited partner not inferior to that of a corporate director to a shareholder); *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 548, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 392 (1966) (clearly general partner has fiduciary duty to limited partners); *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 536, 223 N.E.2d 869, 873-74, 277 N.Y.S.2d 377, 384 (1966) (business control of either corporation or partnership engenders duty of fair dealing with other investors).

124. Comment, *supra* note 17, at 1479; *see Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 537, 223 N.E.2d 869, 874, 277 N.Y.S.2d 377, 384 (1966) (illogical to allow shareholders to bring derivative suits, but not limited partners); *Ruzicka v. Rager*, 305 N.Y. 191, 197-98, 111 N.E.2d 878, 881 (1953) (limited partner's situation corresponds with corporate shareholder's).

ULPA.¹²⁵ The following paragraphs discuss each of these obstacles in detail.

a. *Entity Status.* A partnership derivative action, by definition, involves one person or entity pursuing a cause of action belonging to another person or entity.¹²⁶ Recognition of limited partners' derivative suits, therefore, requires treatment of limited partnerships as entities at least for certain purposes. The ULPA contains a combination of provisions attributable to the entity and aggregate theories, similar to the combination found in the Act.¹²⁷ Courts often treat a limited partnership, like a general partnership, as an entity at least for some purposes.¹²⁸ Courts have not found the partial aggregate nature of partnerships a bar to limited partners' derivative actions.¹²⁹

b. *Absence of ULPA Authorization.* Derivative actions in trusts and corporations originated in courts of equity without any prior statutory authorization. The actions originated from a demonstrated need that no previously recognized remedy met.¹³⁰ The ULPA provides only two statutory remedies, accounting and judicial dissolution. Both remedies may prove to be inadequate.¹³¹ Although a few courts have rejected derivative suits in limited partnerships because of the absence of statutory authority,¹³² other courts have permitted the suits even without statutory authority.¹³³ Consid-

125. See Hecker, *supra* note 14, at 346-55.

126. See *supra* text accompanying notes 88-89.

127. See *supra* text accompanying notes 40-56, discussing the aggregate and entity characteristics of general partnerships organized under the Act. The ULPA does not include comprehensive provisions on all aspects of partnership operation that are comparable to the provisions of the Act. The entity characteristics discussed *supra* in notes 45-48 are apparently included in limited partnerships, however, because the Act governs in cases not provided for in the ULPA. ULPA § 29 (1916). Section 1 of the ULPA defines a limited partnership as "a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners." *Id.* § 1. The ULPA thus incorporates the Act's aggregate definition. Under *id.* § 7 a limited partner does not become personally liable to the partnership's creditors unless he shares in management and control of the business. Limited liability is often viewed as an entity characteristic. A. BROMBERG, *supra* note 13, at 29.

128. *Ruzicka v. Rager*, 305 N.Y. 191, 197, 111 N.E.2d 878, 881 (partnership treated as legal entity for pleading purposes under procedural rule allowing partnership to sue or be sued in the partnership name); *Mims Bros. v. N.A. James, Inc.*, 174 S.W.2d 276, 278 (Tex. Civ. App.—Austin), *writ ref'd per curiam*, 175 S.W.2d 74 (Tex. 1943) (partnership treated as entity with regard to enforcing judgment against it or obtaining judgment for it under similar procedural rule).

129. See *Miller v. Schweickart*, 405 F. Supp. 366, 369-70 (S.D.N.Y. 1975) (court permitted derivative suit because limited partnership constituted entity under state law); *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 546, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966) (permitting derivative suit under procedural rule allowing suit in partnership name).

130. See *supra* notes 71-87 and accompanying text.

131. See *supra* notes 101-03 and accompanying text.

132. *Klebanow v. New York Produce Exch.*, 282 F. Supp. 965, 968 (S.D.N.Y. 1964), *rev'd*, 344 F.2d 294 (2d Cir. 1965); *Hauer V. Bankers Trust N.Y. Corp.*, 65 F.R.D. 1, 4 (E.D. Wis. 1974); *Millard v. Newmark & Co.*, 24 A.D.2d 333, 336-37, 266 N.Y.S.2d 254, 258-59 (1966). *But see* *Cates v. International Tel. & Tel. Corp.*, 756 F.2d 1161, 1178 (5th Cir. 1985) (criticizing *Hauer*).

133. See, e.g., *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 298-99 (2d Cir. 1965)

ering the history of judicial development in trusts and corporations and the equitable needs in a proper case, permitting derivative suits even without specific statutory authority seems advisable.¹³⁴

c. Section 26 Bar on Limited Partners as Parties to Actions. Section 26 of the ULPA provides that a limited partner does not constitute a proper party to partnership litigation unless the partnership sues to enforce a claim against the limited partner or the limited partner sues to enforce a claim against the partnership.¹³⁵ Although the drafters of the ULPA apparently did not consider the effect of section 26 on limited partners' derivative suits,¹³⁶ the literal terms of the section might prohibit actions by a limited partner against the partnership, as nominal defendant, to enforce a partnership cause of action.¹³⁷ If one views a limited partner's derivative suit as an action to enforce a limited partner's rights against a mismanaging general partner, however, the action could fit within the express exception that section 26 provides.¹³⁸

In *Klebanow v. New York Produce Exchange*¹³⁹ the Second Circuit found the original purposes of section 26 to be fairly clear.¹⁴⁰ Under the section general partners can sue on partnership claims without joinder of the limited partners. Furthermore, section 26 allows third parties to sue the partnership without naming parties who are not subject to personal liability, or the limited partners, as defendants.¹⁴¹ The court noted that section 26 could bar

(applying New York law, court found derivative suit allowable when general partner impermissibly will not or cannot sue), *rev'g* 232 F. Supp. 965 (S.D.N.Y. 1964); *Engl v. Berg*, 511 F. Supp. 1146, 1152-53 (E.D. Pa. 1981) (permitted limited partner derivative suit under Pennsylvania law); *Smith v. Bader*, 458 F. Supp. 1184, 1186-87 (S.D.N.Y. 1978) (derivative suit permitted under California law); *Klebanow v. Funston*, 35 F.R.D. 518, 519-20 (S.D.N.Y. 1964) (derivative suit permitted although defendant pleaded lack of statutory authority).

134. See generally *Hecker, supra* note 14, at 349-50 (discussing effect of absence of statutory authority).

135. U.L.P.A. § 26 (1916) provides that a limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership."

136. See *Klebanow v. New York Produce Exch.*, 344 F.2d 294, 298-99 (2d Cir. 1965). The court noted that even the party arguing that N.Y. PARTNERSHIP LAW § 115 (McKinney 1948) (current version at §§ 115-a to -c (McKinney Supp. 1984)) bars derivative suits did not earnestly assert that the drafters of the Act or the New York legislature considered the section's effect on such actions. *Klebanow*, 344 F.2d at 298-99. Before its amendment, § 115 was identical to § 26 of the Act. The amendment codified derivative actions. See *infra* note 160 and accompanying text.

137. *Hecker, supra* note 14, at 352; see *Kobernick v. Shaw*, 70 Cal. App. 3d 914, 920, 139 Cal. Rptr. 188, 191 (1977) (limited partner unable to bring suit on behalf of partnership under CAL. CORP. CODE § 15526 (West 1977), identical to U.L.P.A. § 26, but could intervene because general partner refused to defend); *Lieberman v. Atlantic Mut. Ins. Co.*, 62 Wash. 2d 922, 385 P.2d 53, 56 (1963) (limited partners cannot institute suit on partnership's cause of action under WASH. REV. CODE ANN. § 25.08.260 (1969), identical to U.L.P.A. § 26 (repealed in 1982 with adoption of R.U.L.P.A. (Supp. 1985)).

138. *Hecker, supra* note 14, at 352 n.57.

139. 344 F.2d 294 (2d Cir. 1965).

140. *Id.* at 298.

141. *Id.* This interpretation of § 26 accords with New York law before enactment of the ULPA. *Id.* See *Hecker, supra* note 14, at 352-53 (suggesting a similar interpretation of § 26); *Comment, supra* note 17, at 1473 (discussing *Klebanow* court's interpretation).

suits by limited partners, which suits would usually constitute impermissible participation in operation of the partnership, but found no reason to construe the section as a bar to suit by limited partners when the general partner could not or would not pursue the partnership's claim.¹⁴² In *Smith v. Bader*¹⁴³ the district court, applying California law, noted that section 29 of the ULPA¹⁴⁴ provides that common law and equitable principles prevail in any case that is not addressed by the ULPA.¹⁴⁵ The *Smith* court found that section 26¹⁴⁶ does not specifically proscribe a derivative suit and held that equity weighed against strictly interpreting section 26 to bar the action.¹⁴⁷ Other courts have reached the same conclusion.¹⁴⁸

d. Potential Loss of Limited Liability. Section 7 of the ULPA provides that a limited partner continues to enjoy limited liability if he does not participate in the control of the partnership.¹⁴⁹ A question exists as to whether filing a derivative action constitutes participation in the control of the venture. The small number of cases on point have not resolved this issue.¹⁵⁰

Courts and commentators disagree on both the proper role of section 7 and an appropriate test to determine whether a limited partner's acts violate the section.¹⁵¹ The majority of courts that have addressed the issue appear to have decided the control question on the basis of facts peculiar to each case without providing any clear test.¹⁵² Some courts have concluded that

142. 344 F.2d at 298.

143. 458 F. Supp. 1184 (S.D.N.Y. 1978).

144. The court applied CAL. CORP. CODE § 15529 (West 1977), identical to U.L.P.A. § 29 (1916).

145. 458 F. Supp. at 1186, citing CAL. CORP. CODE § 15529 (West 1977), identical to U.L.P.A. § 29 (1916).

146. The court applied CAL. CORP. CODE § 15526 (West 1977), which was identical to U.L.P.A. § 26 (1916).

147. 458 F. Supp. at 1186-87.

148. *Engl v. Berg*, 511 F. Supp. 1146, 1152-53 (E.D. Pa. 1981); *McCully v. Radack*, 27 Md. App. 350, 340 A.2d 374, 379-80 (1975); *Riviera Congress Assocs. v. Yassky*, 18 N.Y.2d 540, 546, 223 N.E.2d 876, 879, 277 N.Y.S.2d 386, 391 (1966).

149. U.L.P.A. § 7 (1916) provides that "[a] limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business."

150. *See Bedolla v. Logan & Frazier*, 52 Cal. App. 3d 118, 128, 125 Cal. Rptr. 59, 66-67 (1975) (although filing action on partnership claim usually renders limited partner liable as general partner, under CAL. CORP. CODE § 15526 (West 1977), which is identical to U.L.P.A. § 26 (1916), limited partner may sue general partners or partnership and may join conspiring third parties without losing limited liability); *McCully v. Radack*, 27 Md. App. 350, 340 A.2d 374, 380 (1975) (reserving the question); *Executive Hotel Assocs. v. Elm Hotel Corp.*, 41 Misc. 2d 354, 358-59, 245 N.Y.S.2d 929, 933 (Civ. Ct.), (limited partner who commenced suit chose to "act as general partner," triggering liability under section 7), *aff'd mem.*, 43 Misc. 2d 153, 250 N.Y.S.2d 351 (Sup. Ct. 1964). *See generally Hecker, supra* note 14, at 353-54 (discussing decisions); Note, *supra* note 102, at 775-77 (discussing decisions). New York amended N.Y. PARTNERSHIP LAW § 96 (McKinney 1948 & Supp. 1984), which was previously identical to U.L.P.A. § 7 (1916). Under the amended version of § 96, instituting a derivative suit does not trigger liability as a general partner.

151. *Feldman, The Limited Partner's Participation in the Control of the Partnership Business*, 50 CONN. B.J. 168, 168 (1976).

152. *Id.* at 190; *see Donroy, Ltd. v. United States*, 196 F. Supp. 54, 60 (N.D. Cal. 1961) (control constitutes question of fact), *aff'd*, 301 F.2d 200 (9th Cir. 1962); *J.C. Wattenbarger & Sons v. Saunders*, 216 Cal. App. 2d 495, 500-01, 30 Cal. Rptr. 910, 914 (1963) (trial court

section 7 only imposes personal liability if the limited partner's action results in deception or reliance by a third party.¹⁵³ Other courts do not infer a reliance element.¹⁵⁴ Viewing section 7 as either a penalty for unjustified meddling in management¹⁵⁵ or an appropriate allocation of responsibility for loss of partnership assets¹⁵⁶ can justify the absence of a reliance element. Logically, however, regardless of the interpretation chosen, filing a derivative action should not result in liability under section 7.¹⁵⁷ The Commission stated that a limited partner may have some control of the partnership's activities without incurring personal liability,¹⁵⁸ and the courts have imposed liability under section 7 only in cases of more repetitive acts of control.¹⁵⁹

2. *Statutory Limited Partner Derivative Suits.* Two states, Delaware and New York,¹⁶⁰ codified a limited partner's right to bring a derivative suit.

decides whether facts are legally sufficient to justify belief that defendant assumed liability of general partner).

153. *Western Camps, Inc. v. Riverway Ranch Enters.*, 70 Cal. App. 3d 714, 729, 138 Cal. Rptr. 918, 926-27 (1977); *Delaney v. Fidelity Lease Ltd.*, 517 S.W.2d 420, 425 (Tex. Civ. App.—El Paso 1974), *rev'd*, 526 S.W.2d 543 (Tex. 1975); *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wash. 2d 400, 562 P.2d 244, 247 (1977); *Rathke v. Griffith*, 36 Wash. 2d 394, 218 P.2d 757, 764 (1950); *see Feld, The "Control" Test for Limited Partnerships*, 82 HARV. L. REV. 1471, 1479-84 (1969) (criticizing lack of clear control test, finding reliance interpretation most convincing and recommending reconsideration of U.L.P.A. § 7); 26 WASH. L. REV. 222 (1951) (discussing *Rathke*).

154. *Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543, 545 (Tex. 1975). Under the previous version of TEX. REV. CIV. STAT. ANN. art. 6132a, § 8 (Vernon 1970) (current version at art. 6132a, § 8 (Vernon Supp. 1986)) the court found that a partner exercising control becomes personally liable and that reliance did not constitute a necessary element under the statute. Before amendment art. 6132a, § 8 duplicated U.L.P.A. § 7 (1916). The amended statute specifically requires reliance as a condition to imposition of liability. TEX. REV. CIV. STAT. ANN. art. 6132a, § 8(a) (Vernon Supp. 1986). *See Holzman v. De Escamilla*, 86 Cal. App. 2d 858, 195 P.2d 833, 834 (1948) (not mentioning reliance, court held limited partners liable as general partners for withdrawal of partnership funds from bank account and for removal and selection of partnership manager). *See generally* Note, *Liability of Limited Partners Participating in the Management of the Sole Corporate General Partner*—*Delaney v. Fidelity Lease Ltd.*, 29 Sw. L.J. 791 (1975) (criticizing decision and noting that limited partners now face danger of personal liability in partnerships with a sole corporate general partner even when the corporate general partner is adequately capitalized); Note, *Limited Partnerships—Limited Partners Who Control Corporate General Partner Are Subject to Personal Liability as General Partners*, *Delaney v. Fidelity Lease Ltd.*, 526 S.W.2d 543 (Tex. 1975), 7 TEX. TECH. L. REV. 745 (1976) (intent of ULPA drafters and legislature correctly implemented by decision, including exercises through corporate partner within definition of control).

155. Comment, *Partnership—Limited Partnership—Limited Partners Held Able to Sue Third Parties on Behalf of Partnership When General Partners are Unable or Improperly Refuse to Sue*, 40 N.Y.U. L. REV. 1174, 1178-79 (1965) (purpose of U.L.P.A. § 7 is punitive because the New York equivalents of U.L.P.A. §§ 5 and 6 provide adequate protection for creditors).

156. Hecker, *The Revised Uniform Partnership Act: Provisions Affecting the Relationship of the Firm and Its Members to Third Parties*, 27 U. KAN. L. REV. 1, 47-52 (1978).

157. Hecker, *supra* note 14, at 354. Deception or reliance by a third party appears unlikely, and if courts appropriately limit derivative suits, the suits will result in only justifiable interference without the likelihood of loss of partnership assets. *Id.*

158. U.L.P.A. § 1, Official Comment, 6 U.L.A. 564 (1969); *see Hecker, supra* note 156, at 47 (noting that Official Comment may contradict U.L.P.A. § 7).

159. Hecker, *supra* note 14, at 354.

160. DEL. CODE ANN. tit. 6, § 1732 (1974) (repealed in 1982 in connection with adoption of the R.U.L.P.A. (Supp. 1985)); N.Y. PARTNERSHIP LAW §§ 115-a to -c (McKinney 1984).

Article 10 of the RULPA,¹⁶¹ currently in force in twenty-two states,¹⁶² also codifies a limited partner's right to a derivative action and includes many provisions that are also either found in Federal Rule of Civil Procedure 23.1¹⁶³ or drawn from corporate law.¹⁶⁴ The RULPA permits a derivative suit on a partnership cause of action if: (1) the general partners have refused to institute a suit on a partnership cause of action; or (2) the general partners probably would not agree to sue upon the limited partners' request.¹⁶⁵ The recovery, if any, belongs to the partnership, not to the partner bringing suit.¹⁶⁶ Generally, only a member of the partnership at the time of the occurrence in question and at the time that the suit is instituted may bring a derivative action.¹⁶⁷ Finally, the RULPA provides that a successful plaintiff may recover his expenses.¹⁶⁸

IV. DERIVATIVE SUITS IN PARTNERSHIPS UNDER THE ACT

In *Cates v. International Telephone & Telegraph Corp.*¹⁶⁹ the Fifth Circuit suggested that in an extraordinary situation Texas courts might allow a minority partner to bring a derivative action on behalf of his partnership.¹⁷⁰ The court noted that trust beneficiaries and stockholders may initiate derivative suits.¹⁷¹ Apparently borrowing from the analysis that courts used to allow limited partners' derivative actions,¹⁷² the court analogized partners and shareholders and noted that under the Texas Act a partnership interest closely resembles a share of corporate stock or a trust beneficiary's interest in the trust corpus.¹⁷³

161. R.U.L.P.A. §§ 1001-1004 (Supp. 1985). See generally Hecker, *supra* note 14, at 355-74 (discussing application of the RULPA provisions); Reuschlein, *Limited Partner Derivative Suits*, 9 ST. MARY'S L.J. 443, 455-57 (1978) (same).

162. See *supra* note 94.

163. Reuschlein, *supra* note 161, at 455-57.

164. Kessler, *The New Uniform Limited Partnership Act: A Critique*, 48 FORDHAM L. REV. 159, 182 (1979). Professor Kessler also notes that article 10 does not fully incorporate corporate law, particularly with regard to: (1) a provision requiring a suing partner with a small partnership interest to post a security to pay for defendant general partner's expenses if the partner's claim proves meritless; (2) a provision to indemnify successful defendant general partners; and (3) a provision mandating court approval of settlements. *Id.* at 183.

165. R.U.L.P.A. § 1001 (Supp. 1985). Section 1003 provides that "the complaint shall set forth with particularity the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort." *Id.* § 1003.

166. *Id.* § 1001.

167. *Id.* § 1002. Section 1002 provides an exception to the requirement that the suing partner held his interest at the time of the occurrence in question if the suing partner's "status as a partner had devolved upon him by operation of law or pursuant to the terms of the partnership agreement from a person who was a partner at the time of the transaction."

168. *Id.* § 1004 provides that:

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him.

169. 756 F.2d 1161 (5th Cir. 1985).

170. *Id.* at 1178.

171. *Id.*

172. See *supra* notes 104-24 and accompanying text.

173. 756 F.2d at 1178 (quoting Bromberg, *supra* note 1). A general partner in a partner-

This analogy of a partnership interest appears incomplete for two reasons. First, a partner in a partnership organized under the Act or the Texas Act also has a right, in the form of a tenancy in partnership, in the partnership's specific assets.¹⁷⁴ Second, a partner under either act also has a right to share in the administration of the partnership.¹⁷⁵ Neither of these distinctions, however, justifies denying general partners the right to bring a derivative suit in an appropriate case.

With respect to the first distinction, neither a corporate shareholder nor a limited partner has an interest in his entity's specific assets that is equivalent to the general partner's tenancy in partnership. A trust beneficiary, however, has a proprietary interest in the trust assets.¹⁷⁶ Thus, the additional form or degree of ownership that general partners have in their entity's assets should not constitute a reason to deny general partners the privilege of bringing a derivative action in an appropriate case.

With respect to the second distinction, the general partner's right to share in the administration of the partnership¹⁷⁷ seems comparable to a corporate director's right to participate in corporate management. Directors who also own stock have not, however, been barred from bringing derivative actions merely because of their management rights as directors. To the contrary, some states allow directors to initiate derivative actions without complying with all of the restrictions normally placed on stockholders.¹⁷⁸ Similarly, Professor Bromberg argues that a partner's ability to represent his partnership provides sufficient grounds for additional liberalization of the rules governing actions by individual partners.¹⁷⁹ A general partner's right to share in administration of the partnership should not, therefore, constitute a reason to bar his derivative action. Indeed, if a shareholder having only a slight

ship organized under the Act has four of the six characteristics cited in support of the limited partner and shareholder analogy. See *supra* text accompanying notes 114-19. Specifically, the general partner: (1) participates in profits, U.P.A. § 18(a) (1914); (2) is subordinate to creditors in asset distribution, *id.* § 40; (3) has the power to veto new partner admission, *id.* § 18(g); and (4) has the privileges of examining the partnership books and demanding information regarding the partnership, *id.* §§ 19, 20. A general partner does not have the fifth characteristic noted above, limitation of liability for partnership debts to the amount of investment. Unlimited liability does not, however, justify distinguishing general partners, see A. BROMBERG, *supra* note 13, at 329, and, therefore, does not provide grounds on which to deny them the privilege of bringing a derivative action in an appropriate case. See *infra* text accompanying note 177 for discussion of the sixth limited partner characteristic noted in the shareholder analogy above, the lack of participation in management.

174. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 24(1), 25 (Vernon 1970), identical to U.P.A. §§ 24(1), 25 (1914).

175. TEX. REV. CIV. STAT. ANN. art. 6132b, §§ 24(3), 18(e) (Vernon 1970), identical to U.P.A. §§ 24(3), 18(e) (1914).

176. See *Blair v. Commissioner*, 300 U.S. 5, 13 (1937) (beneficiary has equitable interest in trust's property); *Senior v. Braden*, 295 U.S. 422, 433 (1935) (beneficiary has interest in trust corpus). See generally A. SCOTT, *supra* note 71, § 130 (concluding beneficiary has interest in trust property and discussing history and present character of the beneficiary's interest in the trust property).

177. See U.P.A. § 18(e), (h) (1914).

178. GA. CODE ANN. § 22-714 (1935); N.Y. BUS. CORP. LAW. § 720(b) (McKinney 1963); OKLA. STAT. ANN. tit. 18, § 1.28(b) (West 1953); see 1 R. MAGNUSON, *supra* note 83, § 8.28 (1981 & Cum. Supp. 1985).

179. A. BROMBERG, *supra* note 13, at 329.

interest can bring a derivative suit on a corporate cause of action, the assertion that a partner, although possessing a very direct or immediate interest, cannot do so seems incongruous.¹⁸⁰ The assertion appears even more inappropriate if based on the fact that the partner has a direct interest.

Some courts have stated that all partners must join as plaintiffs in actions on partnership claims to protect third party defendants from multiple actions.¹⁸¹ A partner's ability to represent his partnership, however, should justify barring additional actions by other partners should the suing partner lose.¹⁸² In addition, if the suing partner should win, the judgment should discharge the partnership's claim.¹⁸³

In summary, corporate directors and majority stockholders have a fiduciary duty. Courts of equity originally recognized derivative actions to protect shareholders' interests that were unprotected by any existing remedy.¹⁸⁴ General partners have a comparable fiduciary duty to the partnership.¹⁸⁵ Absent a substantive distinction that justifies denial of the derivative suit remedy in general partnerships, courts should permit partners to bring derivative actions when equity requires, just as a corporate shareholder or director can.¹⁸⁶

Prudence requires limitation of derivative actions in general partnerships to appropriate situations. The *Cates* court did not specifically delineate the circumstances that justify a derivative action.¹⁸⁷ The Fifth Circuit noted that partners may not utilize the derivative remedy to resolve questions of business judgment.¹⁸⁸ The court, however, found that a conspiracy between the majority, nonsuing partners and the third-party defendants to commit the alleged injury, or collusion to block a partnership action contrary to the partnership's best interests were sufficient to justify a derivative action.¹⁸⁹ These criteria resemble those standards articulated by the courts in develop-

180. *Id.* at 329-30.

181. *Spiritas v. Robinowitz*, 544 S.W.2d 710, 714-15 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.); *Edmondson v. Carroll*, 65 S.W.2d 1107, 1108-09 (Tex. Civ. App.—Fort Worth 1933, writ dismissed).

182. A. BROMBERG, *supra* note 13, at 329 n.13.

183. *Leh v. General Petroleum Corp.*, 165 F. Supp. 933, 937 (S.D. Cal. 1958) (prevailing defendants could recover costs from partnership assets and, at minimum, assets of plaintiff partner).

184. *See supra* text accompanying notes 75-83.

185. TEX. REV. CIV. STAT. art. 6132b, § 21(1) (Vernon 1970), identical to U.P.A. § 21 (1914), provides that:

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

186. *See generally* *Lichtyger v. Franchard Corp.*, 18 N.Y.2d 528, 223 N.E.2d 869, 873-74, 277 N.Y.S.2d 377, 383 (1966) (illogical to allow shareholders, but not limited partners, to bring derivative suits); *Ruzicka v. Rager*, 305 N.Y. 191, 197-98, 111 N.E.2d 878, 881 (1953) (limited partner's situation corresponds with corporate shareholder's); Comment, *supra* note 17, at 1479 (distinction between shareholders and limited partners appropriate only if substantive differences justify distinction).

187. 756 F.2d at 1179.

188. *Id.*

189. *Id.*

ing the derivative remedy for limited partners.¹⁹⁰

Of the four problems that the courts encountered in the development of a derivative suit remedy for limited partners under the ULPA, only two appear applicable to development of a derivative suit remedy for general partners under the Act or the Texas Act. First, the need to accord partnerships entity status at least for certain purposes arises. Second, the Act and the Texas Act also lack a provision that authorizes partners' derivative suits.¹⁹¹

1. *Entity Status.* As discussed above, partnerships can be treated as entities at least for certain purposes under the ULPA and the Act.¹⁹² Courts have not found the partial aggregate nature of partnerships a bar to limited partners' derivative actions.¹⁹³ The partial aggregate nature should not, therefore, constitute a bar to general partners' derivative actions. In *Cates* the Fifth Circuit, although noting the entity bias of the Texas Act in another context,¹⁹⁴ did not discuss the entity question in the context of the permissibility of a derivative action.

2. *Absence of Authorization Under the Act.* The *Cates* court noted that generally, as well as in Texas,¹⁹⁵ stockholders' derivative suits have judicial origins.¹⁹⁶ Derivative suits developed in corporations, trusts, and limited partnerships to meet a need that previously existing remedies did not adequately meet.¹⁹⁷ The Act provides only two statutory remedies, accounting and judicial dissolution.¹⁹⁸ These remedies may prove to be inadequate in some situations. The potential inadequacy of the existing remedies and the history of judicial development of derivative actions for corporations, trusts, and limited partnerships support the Fifth Circuit's conclusion that statutory authorization appears to be unnecessary.

V. CONCLUSION

Courts developed the derivative remedy for corporate shareholders, trust beneficiaries, and limited partners to provide a remedy for injury that resulted from a breach of a fiduciary duty when all preexisting remedies proved inadequate. The courts and subsequent statutes have refined the

190. See *supra* note 105 and accompanying text.

191. See *supra* text accompanying note 125. The two remaining problems encountered in development of the derivative suit remedy for limited partners that are not applicable to general partners derivative suits are: (1) the provisions in U.L.P.A. § 26 (1916) that limited partners do not generally constitute proper parties in actions by or against a partnership; and (2) the potential loss of limited liability if instituting a derivative suit constitutes "tak[ing] part in the control of the business" under *id.* § 7.

192. See *supra* text accompanying notes 40-54, 126-29.

193. See *supra* text accompanying notes 126-29.

194. 756 F.2d at 1176. For a discussion of the context of the court's reference, see *supra* text accompanying notes 68-69.

195. *Schwartz v. Mims*, 40 S.W.2d 853, 854 (Tex. Civ. App.—San Antonio 1931, writ *dism'd*).

196. 756 F.2d at 1178.

197. See *supra* notes 71-91, 130-34, and accompanying text.

198. See *supra* notes 11-23 and accompanying text.

remedy to provide relief in appropriate situations, but to limit the availability of the remedy to curb potential abuse. A general partner in a partnership under the Act, the ULP or the RULPA may suffer injury resulting from a breach of the fiduciary duty owed to him by other general partners. All preexisting remedies may prove to be inadequate. In such a situation the equitable principles that led to development of the derivative remedy in corporations, trusts, and in limited partnerships for limited partners should also mandate that the remedy be available to a general partner.

