Your Partner's Keeper: The Duty of Good Faith and Fair Dealing under the Revised Uniform Partnership Act

Elisa Feldman

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Comments

**YOUR PARTNER'S KEEPER: THE DUTY OF GOOD FAITH AND FAIR DEALING UNDER THE REVISED UNIFORM PARTNERSHIP ACT**

*Elisa Feldman*

"'Where is your brother Abel?' 'I do not know,' he replied. 'Am I my brother's keeper?'"1

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I. INTRODUCTION

THE Uniform Partnership Act ("UPA") has remained unchanged since its inception in 1914. Significant changes in entire areas of law which have occurred since the UPA's enactment have forced a reconsideration of the long standing statute. Important changes in the federal income tax code, federal securities law, federal bankruptcy code and the nationwide adoption of the Uniform Commercial Code ("UCC") have made it necessary to harmonize partnership law with new developments in other areas.

Additionally, changes in the political atmosphere have added a new perspective to the way partnership law is viewed. These changes reflect an evolving world view that previously embraced a fiduciary perspective of partnership law. The general belief was that each of the participants in a partnership owes a special duty to the others due to the partnership relationship. The emerging view in the Revised Uniform Partnership Act ("RUPA") reflects a marked departure from the philosophy of the UPA in that the RUPA embraces a contractarian outlook that defines the core of the relationship between the partners according to the contract. Further, the duties each partner owes to the others arises only from the terms of that particular contractual arrangement.

This comment addresses the recent attempt to revise the Uniform Partnership Act. More specifically, this comment will focus on the new provision of "good faith and fair dealing" recently adopted by the drafters of the RUPA. In addition, this comment provides an overview of the nature of fiduciary duties in partnership law as they existed under the UPA, explores the intentions of the RUPA's drafters for creating the changes to this relatively static and coherent body of law and examines some of the controversy surrounding the revisions. Finally, this comment will try to predict the ultimate impact the new provisions will have on partnership law.

II. THE ADOPTION OF A CONTRACTARIAN RATHER THAN A FIDUCIARY VIEW OF PARTNERSHIP

Much of the current debate surrounding the revision of the Uniform Partnership Act has centered around the question of whether to adopt a

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2. Donald J. Weidner, The Revised Uniform Partnership Act Midstream: Major Policy Decisions, 21 U. Tol. L. Rev. 825, 825 (1990). Professor Weidner, the Reporter for the Revised Uniform Partnership Act, wrote three articles in which he sets forth his purpose and vision for the Revised Uniform Partnership Act. These articles reflect a moderate approach toward the revision of the Partnership Act. Weidner speaks of moving away from a "parentalistic" approach to partnership law; however, he regards the obligation of "good faith and fair dealing" as a strict provision of the new statute which will serve as an effective policing mechanism of all partnership arrangements.

3. Id. at 825.

GOOD FAITH UNDER RUPA

contractarian or fiduciary view of partnership. Under the fiduciary view, partners may advance their own self-interest through the partnership only if the other partners understand that the interests of the partnership may be subordinated and the other partners give their informed consent. This *weltanschauung* ("ideal") is the basis for the Uniform Partnership Act and the common law of partnerships. Under a contractarian view, partners may always advance their own self-interest without notice or consent of the other partners, unless there is an express agreement to the contrary. Under the contractarian view, the partnership is simply "a bundle of mutable contractual rights and obligations." By adopting the contractarian perspective, the RUPA heralds the beginning of a fundamental change in the way that partnership law formerly existed in the common law and in the UPA.

III. FIDUCIARY DUTIES UNDER SECTION 21 OF THE UNIFORM PARTNERSHIP ACT

Section 21 of the UPA states:

*Partner Accountable as a Fiduciary*

(1) 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.

Partners are fiduciaries among themselves and may delegate the power to manage the partnership to a few partners or even to one. Because of this delegation of authority, it is necessary to have a rule that defines the discretion granted to the partner acting as the managing partner so that the fiduciary may effectively exercise power on behalf of the other partners. The goal of section 21 is to prevent the abuse of fiduciary powers while still allowing sufficient flexibility. The fiduciary should have adequate discretion to operate in a way that will allow the beneficiary to reap the full benefit of the fiduciary's activities.

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5. Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. Rev. 523, 523 (1993). Professor Vestal is one of a large number of commentators who believe that the changes to the Uniform Partnership Act will be detrimental to the future development of partnership law. In particular, Professor Vestal complains that the conversion from a fiduciary to a contractarian approach in partnership law will operate in a manner that is contrary to the best interest of society. Since the law ought to be aspirational in nature, any move away from high standards towards a more cynical view of human nature and human relationships is by definition a step in the wrong direction. *Id.*

6. *Id.* at 524.

7. *Id.*

8. *Id.*


11. *Id.*
The primary elements of a partner's fiduciary duties, as set forth in Newburger, Loeb & Co. v. Gross, are "utmost good faith, fairness, [and] loyalty." Partners owe each other fiduciary duty unless the fiduciary duties are waived or altered by the partnership agreement. The fiduciary duties which developed in the common law and were codified in section 21 of the UPA, are general terms supplied by law to fill the gaps in the partners' agreement. Partners are free to alter the standard form of fiduciary duties by agreement.

In Latta v. Kilbourn the Supreme Court stated the general principles governing the fiduciary duties of partners:

One partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

The drafters of the RUPA have potentially altered the nature of the relationship between partners. Under the UPA, partners were bound to each other by "the duty of the finest loyalty." Now the duty partners owe each other is not as clearly defined. Potentially, the relationship may not change because the courts may decline the invitation to alter the existing rules governing the nature of the relationship between partners. The possibility exists, however, that the changes in the RUPA may herald

13. Id. at 1078 (citation omitted). Further, "the principle of utmost good faith covers not only dealings and transactions occurring during the partnership but also those taking place during the negotiations leading to the formation of the partnership." Herring v. Of-futt, 295 A.2d 876, 879 (Md. 1972) (citing Allen v. Steinberg, 223 A.2d 240, 246 (Md. 1966)). See also MD. CODE ANN., CORPS. & ASS'NS § 9-404 (1994):

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.

The expression "good faith" has a "well-defined and generally understood meaning, being ordinarily used to describe that state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one's duty or obligation." Efron v. Kalmanovitz, 57 Cal. Rptr. 248, 251 (Cal. Dist. Ct. App. 1967) (citing People v. Nunn, 296 P.2d 813, 818 (Cal. 1956), cert. denied, 352 U.S. 883; People v. Bowman, 320 P.2d 70, 76 (Cal. Dist. Ct. App. 1958)).

16. 150 U.S. 524 (1893).
17. Id. at 541.
18. Vestal, supra note 5, at 527-28 n.15 (quoting Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928)).
a veritable revolution in the nature of the partnership relationship and convert partners from allies to antagonists.\(^1\)

**A. Partners Owe Each Other the Duty of Full Disclosure**

A partner who engages in self-dealing but discloses the self-dealing to the other partners, who do not object, is generally regarded as having obtained sufficient consent under section 21(1). Consent to the waiver of fiduciary duties must be made with full disclosure.\(^2\) In some jurisdictions, disclosure alone may not be sufficient without demonstrating the existence of circumstances which indicate that informed consent was obtained prior to undertaking the self-dealing action.\(^3\)

Under the UPA, the fiduciary relationship of the partners was derived from the status of the parties rather than defined by contract. "Simply by virtue of being partners, the participants owed each other certain general obligations of conduct: 'The duty of each partner to exercise toward the others the highest integrity and good faith is the very basis of their mutual rights in all partnership matters.' "\(^4\)

By agreeing to join the partnership, under the fiduciary view, the individual partners are bound by a general obligation to advance the collective interest of the partnership rather than their own individual interests. By acting collectively rather than individually, the partners hope to achieve a greater return on capital.\(^5\)

**IV. The Revised Uniform Partnership Act ("RUPA"): A Product of the Changing Legal Environment**

In August 1992, the Uniform Partnership Act was revised for the first time since 1914. The revisions were approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"). Rather than applause, the new partnership statute immediately became the target of an enormous amount of criticism. Among the most controversial provisions of the RUPA is section 404, which affirmatively states that partners have an unwaivable obligation of "good faith and fair dealing."\(^6\)

When the NCCUSL sought the American Bar Association's ("ABA") endorsement of the RUPA in its current form, the NCCUSL was sorely disappointed because the ABA refused to endorse the RUPA. The ABA believed that the RUPA created too many uncertainties that will ultimately give rise to substantial litigation in an effort to clarify the RUPA's

\(^{19}\) *Id.* at 535.


\(^{21}\) See Russell v. Truitt, 554 S.W.2d 948 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e).


\(^{23}\) *Id.*

ambiguous provisions. The ABA directed the committee to act quickly to revise the perceived flaws in the RUPA. The prompt revisions are necessary because the RUPA has already been partially adopted in Montana, Wyoming and Texas. Further, other states are considering adopting the RUPA in the near future.

V. THE UNIFORM PARTNERSHIP ACT REFLECTS AN AGGREGATE THEORY OF PARTNERSHIP

Dean Lewis, the Reporter for the UPA, rejected the entity theory of partnership law at the turn of the century partly because "those with the largest practical experience present were opposed to regarding the partnership as a 'legal person' because of the effect of the theory in lessening the partner's sense of moral responsibility for partnership acts." Under an aggregate theory of partnership, the partnership itself does not have a separate legal identity. The partnership is nothing more than a conduit for the collection of the individuals that it encompasses. Each partner is regarded as directly owning a portion of the partnerships assets and as though each partner is conducting a pro-rata share of the partnership business.

VI. THE RUPA REFLECTS A MOVE TOWARDS AN ENTITY THEORY OF PARTNERSHIP

For both state law and tax reasons, the changes in partnership law move away from an aggregate theory and closer to an entity theory of partnership. Under an entity theory, the partnership is treated as a "distinct, almost tangible, entity interposed between partners and partnership assets." Further, the partners' interest is treated "as a separate bundle of rights and liabilities associated with his participation in the organization, analogous to the interest of a corporate stockholder in his shares of stock." Acceptance of the entity approach was resisted due to the nineteenth-century common law preconceptions that a separate legal personality relieved the partners from the threat of personal liability and that organizational personality was a special privilege to be dispensed only by the legislature.

Partnerships are often perceived by business people more as business entities than aggregations of individuals. Yet accommodating business
reality by moving closer to an entity theory arguably means the narrowing of fiduciary duties that was feared by Dean Lewis at the inception of the UPA.\textsuperscript{33} Under the UPA, fiduciary duties govern partnerships "in the absence of a contrary agreement."\textsuperscript{34} Fiduciary duties are general terms that are supplied by law to fill the gaps in a partnership agreement.\textsuperscript{35} The standard form of fiduciary duties imposed by the UPA can be altered by agreement of the individual parties.\textsuperscript{36}

In \textit{Meinhard v. Salmon}\textsuperscript{37} Justice Cardozo eloquently defined the fiduciary duty of a partner as that of a trustee "held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."\textsuperscript{38} In \textit{Sorenson v. Nielsen}\textsuperscript{39} the court stated that, "[t]he principle that the partnership relation is one of trust and confidence is so firmly established it is needless to cite authority."\textsuperscript{40} The Supreme Court of Oregon in \textit{Fouchek v. Janicek}\textsuperscript{41} held partners to an "uncompromising rigidity" of standards for a trustee.\textsuperscript{42} In 1957 in \textit{Libby v. L.J. Corp.}\textsuperscript{43} the court recognized:

The relationship of joint adventurers gives rise to certain reasonably well-defined fiduciary duties and obligations. 'The duty imposed is essentially one of good faith, fair and open dealing and the utmost of candor and disclosure to all concerned. 'The relationship imposes upon the parties an obligation of loyalty to the joint enterprise and utmost good faith, fairness and honesty in their dealings with each other with respect to the subject matter.'\textsuperscript{44}

Although the standards partners were held to under the UPA and the developing case law was strict, the strict fiduciary duties could be waived by the agreement of the parties. Later commentators charged that the strict fiduciary duties that developed during the reign of the UPA were not derived from the statute itself. The ABA subcommittee charged with

\begin{itemize}
  \item \textsuperscript{33} Weidner, \textit{supra} note 27, at 434-35.
  \item \textsuperscript{34} \textit{Bromberg & Ribstein, supra} note 10, § 6.07(a), at 6:68.
  \item \textsuperscript{35} \textit{Id.} § 6.07(a), at 6:68-69.
  \item \textsuperscript{37} 164 N.E. 545 (N.Y. 1928).
  \item \textsuperscript{38} \textit{Id.} at 546.
  \item \textsuperscript{39} 240 N.Y.S. 250 (N.Y. Sup. Ct. 1930).
  \item \textsuperscript{40} \textit{Id.} at 253.
  \item \textsuperscript{41} 225 P.2d 783 (Or. 1950).
  \item \textsuperscript{42} \textit{Id.} at 789.
\end{itemize}

The partnership relationship is of a fiduciary character which carries with it the requirement of utmost good faith and loyalty and the obligation of each member of the partnership to make full disclosure of all known information that is significant and material to the affairs or property of the partnership. Herring v. Offutt, 295 A.2d 876, 879 (Md. 1972) (citing Allen v. Steinberg, 223 A.2d 240 (Md. 1966); Hambleton v. Rhind, 36 A. 597 (Md. 1897)).

The duty of loyalty resulting from the fiduciary position of a partner is so uncompromising that "the severity of a partner's breach will not be questioned. The question is only whether there has been any breach at all." Bassan v. Investment Exch. Corp., 524 P.2d 233, 238 (Wash. 1974) (en banc) (citing Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928)).

\begin{itemize}
  \item \textsuperscript{43} 247 F.2d 78 (D.C. Cir. 1957).
  \item \textsuperscript{44} \textit{Id.} at 81 (citation omitted).
\end{itemize}
the task of revising the UPA believes section 21 of the UPA has been viewed as the foundation for "broad fiduciary duties" when in fact section 21 could be read "merely as an anti-theft provision." The committee recommended a revision of the section "to incorporate the full range of fiduciary duties developed by the cases (due care, good faith, loyalty, and full disclosure of all material facts)." In an attempt to accomplish their stated goals, the NCCUSL incorporated into the RUPA a mandatory obligation of "good faith and fair dealing." The mandatory duties introduced by the RUPA alters a body of law that developed over decades under the UPA. Under the UPA the only section that imposed substantive fiduciary duties was UPA section 21, which provides that a partner must account only for profits derived "without the consent of the other partners." Under section 21 of the UPA the courts permitted individuals to form partnership agreements that allowed partners to compete with the partnership and to engage in self-dealing. Partners under the UPA could enter partnership agreements permitting copartners to pursue outside opportunities to avoid the greater expense of compensating partners to forego these opportunities and the cost of litigating partnership opportunity questions. "Under the UPA section 21, such agreements are clearly permissible." Under the "good faith and fair dealing" provisions of the RUPA, agreements such as these will create litigation over whether "these agreements breach a fundamental 'good faith' duty."

According to one commentator, the RUPA "turns the world upside down with respect to the fiduciary relations of partners inter se." The source of this change is the replacement of the fiduciary nature of partnership law with a contractarian view, altering the place of self-interest in partnership law. The comments to the RUPA state, "[a] partner does not violate a duty or obligation under this [Revised Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."

46. Id.
47. Id. See also Klein v. Weiss, 395 A.2d 126 (Md. 1978) (applying fiduciary duties to limited partnerships); Newburger, Loeb & Co. v. Gross, 563 F.2d 1057, 1074 (2d Cir. 1977) (finding a violation of limited partners' rights in a securities action). But see Roper v. Thomas, 298 S.E.2d 424, 427 (N.C. Ct. App. 1982) (holding that limited partners have limited duties in partnership agreements).
50. Id.
51. Ribstein, supra note 48, at 138.
52. Id. at 139.
53. Vestal, supra note 5, at 535.
54. Id. at 535 (quoting R.U.P.A. § 404(f) (1992)).
The contractarian point of view is also a product of the common law. The court in Exxon Corp. v. Burglin55 cited Bromberg & Ribstein on Partnership for the proposition that a "[p]artner[s]' fiduciary duties are aspects of the 'standard form' of partnership. As with respect to the other rights and duties among the partners, the partners may alter the standard form fiduciary duties to suit their particular relationship."56 For this reason, courts should refrain from interfering with the bargained for terms of the partnership agreement.57 Further, in Exxon, it is apparent that partners are not being held to the "punctilio of honor"58 that Justice Cardozo held out as the appropriate standard. In Exxon the court upheld a bargained for agreement by sophisticated parties that granted "the limited partners the right to 'engage in or own an interest in other business ventures engaged in the same or similar business as the Partnership.' "59 The court reasoned that since this provision of the agreement "abrogates the fiduciary duty of loyalty by allowing partners to compete with their partnership, it is reasonable to expect some limitation on the fiduciary duty of disclosure."60

The ABA Subcommittee approached the duty of good faith and fair dealing with a contractarian view in that "the duty of good faith and fair dealing is a concept of general contract law and is not to be confused as creating a special relationship duty - a fiduciary duty."61 One possible effect of the contract-based approach is a change in the nature of the remedy available in the case of a breach. Contract based remedies tend to be narrower than fiduciary remedies that tend to provide plaintiffs with greater recourse.62

The contractarians argue that parties should be allowed to explicitly make informed changes to the statutory form of fiduciary obligations because in the partnership context the negotiations are usually conducted fairly by knowledgeable and sophisticated parties with the assistance of counsel. Under these types of circumstances "mandatory rules are [not] necessary to protect unwary parties."63

55. 4 F.3d 1294 (5th Cir. 1993).
56. Id. at 1298 (quoting Bromberg & Ribstein, supra note 10, § 6.07(h), at 6:89 (1991); id. § 6.06, at 6:67 (arguing that "parties could at least circumscribe the right to information"); id. § 6.05(d), at 6:59 (partners can bargain over access to information)).
57. Exxon, 4 F.3d at 1298; Betz v. Chena Hot Springs Group, 657 P.2d 831, 835 (Alaska 1982).
58. Meinhard, 164 N.E. at 546.
59. Exxon, 4 F.3d at 1299 (quoting § 4.03 of the parties' Partnership Agreement).
60. Id.
61. Vestal, supra note 5, at 543 (quoting Letter from Gerald V. Niesar, Chair, Subcommittee on the Proposed Revised Uniform Partnership Act of the ABA Committee on Partnerships and Incorporated Business Organizations, to Lane Kneedler, Chair, Drafting Committee to Revise the Uniform Partnership Act, NCCUSL 3 (Mar. 17, 1992) (on file with the Boston University Law Review)).
62. Vestal, supra note 5, at 544-45.
63. Id. at 561 (quoting Ribstein, supra note 48, at 138); see also, Kenneth B. Davis, Jr., Judicial Review of Fiduciary Decisionmaking - Some Theoretical Perspectives, 80 Nw. U. L. Rev. 1, 21 (1985).
A. "The Obligation of Good Faith and Fair Dealing"\textsuperscript{64}

Under the most recent version of the RUPA, the obligation of good faith and fair dealing is set out in section 404(e): "A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing."\textsuperscript{65} Section 103(b)(5) of the RUPA states, "A partnership agreement may not: eliminate the obligation of good faith and fair dealing under section 404(e);" but the partnership agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.\textsuperscript{66} The implication of these provisions is not yet completely clear because the concept of a mandatory obligation that may not be waived by agreement of the parties has not been previously tested in partnership law.

Since the "obligation of good faith and fair dealing" is new to the Act, there is substantial debate as to how the new statutory obligation will impact partnership law. Some commentators believe that the obligation simply codifies existing case law. For example, in a 1977 case, the Court of Appeals of New York in \textit{Gelder Medical Group v. Webber}\textsuperscript{67} treated the obligation of good faith and fair dealing as a settled area of the law. A partner in a medical group was forced out of the partnership in accordance with the partnership agreement and later engaged in his own medical practice in violation of a noncompete agreement. The expelled doctor contended that he was entitled to practice medicine in violation of the partnership agreement because he was expelled in "bad faith," rendering the original agreement void. The court recognized that "in the time-honored language of the law, there is an implied term of good faith."\textsuperscript{68} Because the doctor in question failed to demonstrate bad faith on the part of his former partners, he failed to properly raise the issue of good faith in this case.\textsuperscript{69}

In a 1982 case from the Supreme Court of Kentucky, \textit{Marsh v. Gentry}\textsuperscript{70} the obligation of good faith was litigated in the partnership context. \textit{Marsh} involved a partnership that owned race horses. The partnership consigned one of the horses for sale and, without the knowledge of Marsh, Gentry secretly bought the race horse. Marsh repeatedly questioned Gentry on the identity of the new owner, but never received an honest answer. Gentry told Marsh that the horse had been sold to someone in California and refused to provide the name of the owner. Marsh

\textsuperscript{64} R.U.P.A. § 404 (1992).
\textsuperscript{65} Id. § 404(e) (1992).
\textsuperscript{67} 363 N.E.2d 573 (N.Y. 1977).
\textsuperscript{68} Id. at 577 (citing Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., 281 N.E.2d 142, 144-45 (N.Y.), cert. denied, 409 U.S. 875 (1972); 10 N.Y. Jur. 2d Contracts § 203 (1982)).
\textsuperscript{69} Webber, 363 N.E.2d at 577.
\textsuperscript{70} 642 S.W.2d 574 (Ky. 1982).
learned that Gentry owned the horse eleven months later when the horse won the Kentucky Derby.\textsuperscript{71}

In Kentucky, the statute governing the conduct of partners in this circumstance is section 362.250(1) (1954).\textsuperscript{72} The statute provides that:

Every partner must account to the partnership for any benefit and hold as trustee for it any profit 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 profit.\textsuperscript{73}

The Supreme Court of Kentucky held that by both misleading and withholding information from his partner, Gentry violated the statute.\textsuperscript{74} Under the UPA, even prior to its revision, partners are required "to maintain a higher degree of good faith due to the partnership agreement. The requirement of full disclosure among partners as to partnership business cannot be escaped."\textsuperscript{75} Prior to the RUPA the Supreme Court of Kentucky interpreted the obligation of good faith as it applies to partnership law to mean that partners may not withhold information or mislead partners because good faith requires full disclosure. The court added that if Gentry had fully disclosed to Marsh his intentions to buy the horse prior to the purchase, Marsh would not have had a claim against Gentry.\textsuperscript{76}

Similarly, in Wyler v. Feuer\textsuperscript{77} the California Court of Appeals found that in a limited partnership the general partner owes a duty of good faith and fair dealing to the other partners.\textsuperscript{78} Under the duty of good faith, the general partner may not be held liable for honest mistakes made in the exercise of business judgment.\textsuperscript{79} Further, general partners cannot be held liable "for losses incurred in the good faith performance of their duties when they have used such care as an ordinarily prudent person would use."\textsuperscript{80} In addition, the good faith of the business judgment and management of the general partner will not be measured in hindsight,\textsuperscript{81} but rather from the point of view of the general partner at the time she made the decision.

More recently, in Schluter v. United Farmers Elevator\textsuperscript{82} the UCC obligation of good faith and fair dealing under Minnesota law was held to be

\textsuperscript{71} 1d. at 575.
\textsuperscript{72} KY. REV. STAT. ANN. § 362.250(1) (Mitchie/Bobbs-Merrill 1954).
\textsuperscript{73} 642 S.W.2d at 575 (quoting § 362.250(1)).
\textsuperscript{74} Id. at 575-76.
\textsuperscript{75} Marsh v. Gentry, 642 S.W.2d 574, 576 (Ky. 1982) (citing Van Hooser v. Keenon, 271 S.W.2d 270 (Ky. Ct. App. 1954); Smith v. Gibson, 220 S.W.2d 104 (Ky. Ct. App. 1949)).
\textsuperscript{76} Id.
\textsuperscript{77} 149 Cal. Rptr. 626 (Cal. Ct. App. 1978).
\textsuperscript{78} Id. at 632 (citing CAL. CORP. CODE § 15021 (West 1991); Laux v. Freed, 348 P.2d 873 (Cal. 1960) (en banc); Dennis v. Gordon, 125 P. 1063 (Cal. 1912)).
\textsuperscript{80} Wyler, 149 Cal. Rptr. at 633 (citing CAL. CORP. CODE § 309(a)).
\textsuperscript{81} Id.
\textsuperscript{82} 479 N.W.2d 82 (Minn. Ct. App. 1991).
a subjective test, meaning that good faith requires "honesty of intent rather than of diligence or negligence."83 Another way of phrasing the subjective good faith test is the "white heart, empty head" test, meaning that "subjective good faith is simply 'the honest belief that [your] conduct is rightful.' "84

The Reporter of the RUPA, Donald Weidner, expresses concern that "the only mandatory fiduciary duty in RUPA is taken from the contract law governing relations not generally seen as involving mutual confidence. One wonders whether there should be a higher floor for a relationship widely considered as far more intimate."85 Weidner continues to note that although good faith might be regarded as fairly weaker in the UCC context "there is authority that suggests that the duty of good faith will be given a much more powerful reading in the partnership context."86

Grand Light & Supply Co. v. Honeywell, Inc.87 is typical of courts’ holdings on the obligation of good faith and fair dealing in the UCC context. In this case, the Second Circuit held that under Connecticut law, parties may rely on the express terms of the contract and that the implied obligation of good faith may not replace any express contractual terms.88 Similarly, in L.C. Williams Oil Co. v. Exxon Corp.89 the court found that in the context of the UCC, "[t]he purpose of the good faith obligation is to determine the terms to be implied in the contract when the terms are not expressly provided."90

In La Sara Grain Co. v. First National Bank of Mercedes91 the Supreme Court of Texas held that in the context of the UCC, the "obligation of good faith is imposed on the performance of every contract or duty within the Code."92 Further, the court found that good faith is measured by a subjective test: "the actual belief of the party in question."93 Whether the actual belief of the party is reasonable is not relevant to the test of good faith.94

The Official Comment to the RUPA section 103 explains that

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83. Id. at 85 (citing Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, 207 N.W.2d 282, 287 (Minn. 1973)).
84. Schuler, 479 N.W.2d at 85 (citing Wohlrabe v. Pownell, 307 N.W.2d 478, 483 (Minn. 1981)).
85. Weidner, supra note 27, at 460-61.
86. Id. at 461 (citing Page v. Page, 359 P.2d 41 (Cal. 1961) (en banc); Levy v. Disharoon, 749 P.2d 84, 89 (N.M. 1988); Donahue 328 N.E.2d at 505).
87. 771 F.2d 672 (2d Cir. 1985).
88. Id. at 679 (citing Triangle Mining Co. v. Stauffer Chem. Co., 753 F.2d 734, 740 (9th Cir. 1985); Cardinal Stone Co. v. Rival Mfg. Co., 669 F.2d 395, 396 (6th Cir. 1982); Corenswet, Inc. v. Amana Refrigeration, Inc., 594 F.2d 129 (5th Cir.), cert. denied, 444 U.S. 938 (1979); Zullo v. Smith, 427 A.2d 409, 412 (Conn. 1980)).
90. Id. at 481 (emphasis omitted) (citing Cardinal Stone, 669 F.2d at 395; Corenswet, 594 F.2d at 129).
91. 673 S.W.2d 558 (Tex. 1984).
92. Id. at 563.
93. Id. (citing Riley v. First State Bank, 469 S.W.2d 812 (Tex. Civ. App.—Amarillo 1971, writ ref’d n.r.e.)).
94. Id.
The RUPA attempts to provide a standard that partnerships can rely upon in drafting exculpatory agreements and that courts will respect in enforcing them. It is not necessary that the agreement be restricted to a particular transaction. This would mean bargaining over every deal, which is inefficient. The agreement may be drafted in terms of types or categories of activities or transactions, but it should be reasonably specific. Context may be significant. Ultimately, the courts must decide the outer limits of validity of such agreements. It is intended that the risk of judicial refusal to enforce manifestly unreasonable exculpatory clauses will discourage sharp practices while accommodating the legitimate needs of the parties in structuring their relationship.95

Commentators have predicted that section 103(b)(5) of the RUPA, allowing partners to determine the standard by which the “performance of the obligation” of good faith and fair dealing may be measured, can be established by the partners by selecting a single standard applicable to all of the dealings and transactions of the partners. The partners could elect a high standard such as “utmost good faith,” or a low standard of “honesty in fact” to govern the agreement. The standard chosen may not be “manifestly unreasonable” nor can the obligation be waived in its entirety.96

Contractarian theorists believe that a partnership is essentially a “nexus of contracts”97 because the partners substantially agree to the terms of the partnership.98 In general, contractarians argue that a default system of fiduciary duties is appropriate for a partnership.99 In Singer v. Singer100 the Oklahoma Court of Appeals concluded that if a partnership agreement contains a provision allowing the partners to compete with each other, in effect, contracting away a fiduciary relationship between the partners, the partners are bound by their agreement so long as it was not entered into under conditions of “fraud, illegality or overreaching.”101 The Singer court even regarded predatory competition between partners permissible so long as the drafters of the partnership agreement intended to achieve that result.102

98. Id.
99. Id.
101. Id. at 772 n.16.
102. Furthermore, as the Supreme Court of Washington explained:
Partners may include in the partnership articles practically any agreement they wish and if the asserted self-dealing was actually contemplated and specifically authorized with a method for determining, in advance, the amount of the profit it would not, ipso facto, be impermissible and deemed wrongful.
Under the new provision of the RUPA creating a mandatory obligation of good faith and fair dealing, a jurisdiction that adopts the RUPA in its present form would arguably be unable to render a holding similar to Singer because freedom of contract will be greatly diminished by the creation of the nonwaivable and undefined provision of good faith and fair dealing. Confronted with facts similar to the facts in Singer, a court in a jurisdiction that has adopted the RUPA would be obligated to nullify a partnership agreement that explicitly allowed predatory competition between partners because of the omnipresent existence of good faith as the policing mechanism that will be implied into every agreement regardless of the express intent of the parties.103 Further, it can be argued that the obligation of good faith is not a fiduciary duty because an individual can be subject to the requirements of the UCC good faith without being a fiduciary. Therefore, the obligation of good faith and fair dealing has the potential of having a greater reach and scope than the fiduciary duties that “good faith” is purportedly replacing. Despite the grand expectations of the drafters of RUPA, however, it is likely that courts will follow the lead of decisions on good faith made in the context of the UCC and will be reluctant to use the implied obligation of good faith to override any explicit contractual terms.104 The courts tend to decline invitations to reanalyze negotiated terms of contracts for evidence of good faith. Therefore it seems unlikely that the courts will engage in the wholesale revision of bargained for terms in partnership agreements.105

Once the question of law as to whether the partnership agreement itself is ambiguous has been settled, however, “it is within the province of the jury to determine the intention of the parties.”106 The question of good faith is an issue for the jury to decide.107 The jury determines whether an action was undertaken in good faith by “weigh[ing] the credibility of the witnesses, gaug[ing] nuances of voice and expression, and

103. However, although the obligation of good faith may not be disclaimed by the agreement of the parties, the parties may “determine the standards by which the performance of such obligations are to be measured only ‘if such standards are not manifestly unreasonable.’” Eckstein v. Cummins, 321 N.E.2d 897, 905 (Ohio Ct. App. 1974) (citation omitted).


105. Id. The law in Connecticut is that the parties to a contract “may rely on the express terms of their contract.” Grand Light, 771 F.2d at 679 (citing Zullo v. Smith, 427 A.2d 409, 412 (Conn. 1980)). Further, when a contract is negotiated by experienced business persons the courts refuse to use the U.C.C. requirement of good faith to override the express terms of a contract. Cardinal Stone, 669 F.2d at 396.

106. Froemming v. Gate City Fed. Sav. & Loan Ass'n, 822 F.2d 723, 729 (8th Cir. 1987) (quoting Stetson v. Investors Oil, Inc., 140 N.W.2d 349, 357 (N.D. 1966)).

107. Froemming, 822 F.2d at 731.
sift[ing] through competing and conflicting versions of what occurred and what state of mind each actor brought to the occurrence.\textsuperscript{108}

In \textit{Bauer v. Blomfield Co./Holden Joint Venture}\textsuperscript{109} the Supreme Court of Alaska was unwilling to find that partners owe a duty of good faith and fair dealing to assignees of a partner's interest.\textsuperscript{110} In the dissenting opinion, two justices observed that when the Blomfield Company/Holden Joint Venture was formed, a contractual relationship was formed among the partners. Based on the court's previous holdings that an implied covenant of good faith exists in all contracts,\textsuperscript{111} the dissenters concluded that the duty of good faith and fair dealing is also operative in a partnership contract.\textsuperscript{112} In this context, the implied covenant of good faith and fair dealing means that "neither party . . . may do anything which will injure the right of the other to receive the benefits of the agreement."\textsuperscript{113} As the dissent noted in \textit{Bauer}, a partnership has the right to decide not to make distributions, but that decision must be made in good faith, reflecting legitimate business concerns.\textsuperscript{114} Since the assignee in \textit{Bauer} stepped into the shoes of the partner in accordance with a contract right, the other partners owe a duty of good faith to the assignee in deciding whether to make the distribution. The determination of whether the decision was made in good faith is a question of fact for the jury.\textsuperscript{115} In a motion for summary judgment, the burden should be on the moving party to show that no issue as to material fact existed as to whether the decision to make the distribution was made in good faith. Since the court held that the obligation of good faith does not apply to the facts of this case, the assignee was effectively left without a remedy to enforce his partnership profits, rendering the assignment a worthless transaction and culminating in a result which the dissenting judge believed was contrary to fundamental contract and assignment law.\textsuperscript{116}

The holding of the Supreme Court of Alaska in \textit{Bauer} conforms with the libertarian camp, which resists implying good faith in every partnership agreement and argues for freedom of contract and fiduciary duties that are waivable by agreement of the parties. The dissent in \textit{Bauer} closely reflects the rationale that led to the adoption of the good faith and

\textsuperscript{108} \textit{Id.}
\textsuperscript{109} 849 P.2d 1365 (Alaska 1993).
\textsuperscript{110} \textit{Id.} at 1367 n.2.
\textsuperscript{111} \textit{Id.} at 1368-69 (Matthews, J. & Rabinowitz, C.J., dissenting). \textit{See also} Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 982-83 (8th Cir. 1991) (holding that, under Nebraska law, there exists the implied obligation of good faith and fair dealing in every contract, but that when acting under the express terms of the contract, there is no breach of the obligation of good faith and fair dealing).
\textsuperscript{112} \textit{Bauer}, 849 P.2d at 1369 (Matthews, J. & Rabinowitz, C.J., dissenting).
\textsuperscript{113} \textit{Id.} (quoting Guin v. Ha, 591 P.2d 1281, 1291 (Alaska 1979)).
\textsuperscript{114} \textit{Id.} at 1369; \textit{see} Brooke v. Mt. Hood Meadows Oreg., Ltd., 725 P.2d 925, 929 (Or. Ct. App. 1986); \textit{see also} Betz v. Chena Hot Springs Group, 657 P.2d 831, 835 (Alaska 1982) (holding that a partner may be involuntarily retired if it is in the best interest of the firm).
\textsuperscript{116} \textit{Id.} at 1370.
fair dealing provision of the RUPA. The drafters of the RUPA envisioned a good faith provision that would be implied in every partnership regardless of the intent of the individual parties, drawing from contract law and the UCC provision of good faith as merely a starting point for the partnership context. In fact, the drafters of the RUPA believe the duty of good faith outlined in the UCC is too narrow for partnership law, where the nature of the relationship is inherently one of mutual trust and heightened responsibility towards the partners to the agreement.

The commentators who adhere to a contractarian world view believe that mandatory fiduciary duties are "bad policy." They believe the existence of fiduciary duties may impede an agent from exercising her discretion out of fear of breaching her fiduciary duty and potential exposure to subsequent liability. These commentators believe there are better means available to control partners such as employing incentive compensation. Therefore it may be preferable for a firm to have the ability to "contract out of fiduciary duties" rather than to impose a parentalistic standard blanket provision on all partnerships regardless of the surrounding circumstances.

In the opinion of one commentator, the RUPA will not enforce the obligation of good faith with the same high level of expectations with which Cardozo imbued the standard. Instead, the RUPA mandates that the standard may not fall below a "manifestly unreasonable" standard, a standard that is arguably higher than the standard of good faith in contract law.

By adopting the RUPA, arguably the generally defined expectations enunciated in Meinhard v. Salmon will be replaced with a "contract-based regime with more precisely defined obligations." Replacing the historic fiduciary attitude with a rule narrowly defining the partnership relationship will be dangerous because rules tend to invite evasion. Although narrowly defined rules may prove to be more efficient from a business stand point, such rules may prove not to benefit society because fiduciary law more than contract law tends to induce fiduciaries to work to promote the collective good.

Weidner, the Reporter of the RUPA, notes in his three articles that the RUPA was drafted with the intention of replacing parentalism with freedom of contract as the overarching principle of the Act. In doing so, the

119. Weidner, supra note 2, at 854.
120. Vestal, supra note 5, at 539.
121. Id.
drafters assumed that, in most cases, partnership agreements are not adhesion contracts involving inequality of bargaining power. Rather, most partnerships involve "relative equals" joining together, with each contributing to the goal of starting a business and making money.123

The fact that the obligation of good faith and fair dealing is a mandatory provision of the RUPA does not seem remarkable on its face. By their very nature, partnerships entail a great deal of trust. Partnerships involve long-term, complex interpersonal relationships. Therefore, good faith appears to be the minimum that one should expect from partners. The only flaw in this reasoning is that, because the obligation of good faith and fair dealing has intentionally been left undefined in the RUPA, it is subject to a wide range of interpretations by the courts.124

The fear that the courts will read an extremely high standard into the obligation of good faith can render parties who litigate partnership agreements susceptible to coerced, excessive settlements.125 The uncertainty in the meaning of the standard will inevitably lead to litigation, especially when the stakes are high.126

The RUPA allows the parties to "identify specific conduct that does not violate the duty if the conduct is not manifestly unreasonable."127 This provision permits the partners to define good faith within the context of their specific partnership agreement as long as the identified conduct is not manifestly unreasonable. In Eckstein v. Cummins128 the court noted that under the Uniform Commercial Code the obligation of good faith "may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."129 Perhaps the goal of this provision was to create an equilibrium between freedom of contract and the public policy of not tolerating bad faith among partners.

In an attempt to provide a lifeline to aid in the interpretation of the obligation of good faith and fair dealing, the Reporter suggested that the formula for good faith in the UCC offers a fair basis of comparison, yet the UCC definition of good faith is too narrow for the purposes of partnership law.

The official comments to RUPA state "[t]he obligation of good faith and fair dealing is a contract concept, imposed on the partners because of the consensual nature of a partnership."130 Comment 4, in a further attempt to clarify this new provision, states:

124. Id. at 755-56.
125. Id. at 757.
126. Id. at 756.
129. Id. at 905 n.9 (quoting OHIO REV. CODE ANN. § 1301.02(C) (Anderson 1973)).
The meaning of “good faith and fair dealing” is not firmly fixed under present law. “Good faith” clearly suggests a subjective element, while “fair dealing” implies an objective component. It was decided to leave the term undefined in the Act and allow the courts to develop its meaning based on the experience of real cases.  

The comment references a law review article which provides the following equitable definition of good faith: “good faith has pervasive and distinctive relevance. It is natural for two parties to assume that each will act in good faith toward the other throughout the course of their contractual dealings.”

Further, “good faith, as used in the case law, is best understood as an ‘excluder’ - it is a phrase which has no general meaning or meanings of its own, but which serves to exclude many heterogenous forms of bad faith.” Prior to the RUPA, the partnership relationship was recognized as being governed by “utmost good faith.” Further, the obligation was recognized of “each member of the partnership to make full disclosure of all known information that is significant and material to the affairs or property of the partnership.”

The UCC defines “good faith” as “honesty in fact.” For a merchant, good faith includes “the observance of reasonable commercial standards of fair dealing in the trade.” The comments to the RUPA reject the UCC definition as overly narrow and suggest that the UCC honesty in fact is but one aspect of a broader and farther reaching definition of good faith that will apply to partnerships. The comments explain that “[i]n some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative disclosure obligation that supplements the section 403 duty to render information on demand.”

Further, in the RUPA section 103(b)(5) “the obligation of good faith and fair dealing” becomes a mandatory provision that governs all partnership agreements. Comment 2 to section 103 states that the purported reason for nonwaivability:

[is to] ensure a fundamental core of fiduciary responsibility. Neither the fiduciary duties of loyalty or care, nor the obligation of good faith and fair dealing, may be eliminated entirely. However, the statutory requirements of each can be modified by agreement.

Subsection (b)(3)(i) permits the partners [by agreement] to identify specific types or categories of partnership activities that do not violate the duty of loyalty . . . while subsection (b)(5) authorizes the
partners to determine the standards by which the performance of the obligation of good faith and fair dealing is to be measured. The language of subsection (b)(5) is based on UCC section 1-102(3). Under those provisions, the partners can negotiate and draft specific contract provisions tailored to their particular needs, but blanket waivers [of duty] are unenforceable.\textsuperscript{139}

In either case, the modifications must not be manifestly unreasonable. This should tend to “discourage overreaching by a partner with superior bargaining power since the courts may refuse to enforce an overly broad exculpatory clause.”\textsuperscript{140}

**VII. THE NCCUSL RESPONDS TO COMMENTS ON RUPA**

After the drafting committee revised the Uniform Partnership Act, many groups and individuals issued reports suggesting various changes to the RUPA. A Working Group (“WG”) appointed by the chair of the drafting committee considered a wide variety of reports and comments. After considering all of the commentary, the WG made a report of its recommendations to amend the RUPA to the full Drafting Committee.\textsuperscript{141}

The WG considered suggestions revising the RUPA so that all of the duties of section 404 should be waivable by the partnership agreement. The WG also heard contrary arguments such that section 404 already grants excessive freedom of contract. Therefore, the WG chose not to abandon the careful balance that already exists in the RUPA section 404.\textsuperscript{142} It was further suggested that the new inclusion of the obligation of good faith and fair dealing is a bad idea because the courts will inevitably construe the obligation of good faith and fair dealing as a fiduciary duty despite carefully drafted language to the contrary. Yet, the WG decided to retain the obligation of good faith and fair dealing “[b]ecause the first sentence of the subsection makes it very clear that good faith and fair dealing is a dependent obligation and not an independent fiduciary duty.”\textsuperscript{143}

**VIII. THE OBLIGATION OF GOOD FAITH IN THE CONTEXT OF THE UCC**

Section 1-203 of the Uniform Commercial Code states that every contract which falls within the ambit of the UCC “imposes an obligation of good faith in its performance or enforcement.”\textsuperscript{144} Once a contract has

\textsuperscript{139} R.U.P.A. § 103 cmt. 2 (1992).
\textsuperscript{140} Id.
\textsuperscript{141} Working Group of the Drafting Committee to Revise the Uniform Partnership Act, Response to Comments on the Revised Uniform Partnership Act iv-v (1992).
\textsuperscript{142} Working Group of the Drafting Committee to Revise the Uniform Partnership Act National Conference of Commissioners on Uniform State Laws, Response to Comments on the Revised Uniform Partnership Act (1992) and Recommended Amendments 16 (1993).
\textsuperscript{143} Id. at 18.
\textsuperscript{144} U.C.C. § 1-203 (1992).
been formed, a binding obligation of good faith will be implied into every contract. Section 1-201(19) of the UCC defines "good faith" as "honesty in fact in the conduct or transaction concerned." The Official Comments explain that whenever good faith is mentioned in the UCC, it means at a minimum "honesty in fact," in addition to the minimal definition of "good faith." Other sections of the UCC supplement the definition with additional specific components. For example, in section 2-103(1)(b) good faith is defined for a merchant to include the "observance of reasonable commercial standards of fair dealing in the trade." The Official Comments to section 1-203 state that the "section sets forth a basic principle running throughout this Act. The principle involved is that in commercial transactions good faith is required in the performance and enforcement of all agreements or duties." The Official Comment further states that the concept of "good faith" is a broad duty that applies to every contract or duty within the ambit of the UCC.

A demonstration of a narrow view of good faith in the UCC context can be seen in *L.C. Williams Oil Co. v. Exxon Corp.* where the court held that good faith under the UCC was simply a filler term—a method of determining the implied terms when terms were not expressly provided in the contract. Once again, the courts made it clear that the purpose of good faith, in context of the UCC, is not to override the express terms of the contract or to alter the terms in a manner inconsistent with the intent of the parties. The purpose of the concept of the obligation of good faith, however, is "to determine the terms to be implied in the contract when the terms are not expressly provided."

Robert Summers, in his article on the subject of good faith, explains that good faith in the context of the UCC, is not limited to the requirement of honesty. Good faith includes honesty but it is a broader concept that "is not to be measured by a man's own standard of right, but by that which it has adopted and prescribed as a standard for the observance of all men in their dealings with each other." In fact, good faith is such a broad concept that a judge may rely on it as an independent doctrine or as a theory of liability for misconduct which is not fraudulent or negligent. Similarly, Timothy Muris has defined good faith in the context of

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149. Id.
150. 625 F. Supp. at 477.
152. Williams Oil, 625 F. Supp. at 481 (citing Cardinal Stone, 669 F.2d at 395; Corensweet, 594 F.2d at 129).
153. Summers, supra note 132, at 204 (citing First Nat'l Bank v. F.C. Trebein Co., 52 N.E. 834, 837 (Ohio 1898)).
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the UCC as a means of preventing "opportunistic behavior." The obligation of good faith in general, can be described as an "excluder" of behavior by a party to a contract that would undermine the spirit of the contract even though the conduct was not expressly forbidden by the contract itself.

In *Kirke La Shelle Co. v. Paul Armstrong Co.*, the New York Court of Appeals stated:

"[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing."

Under this "fruits of the contract" approach, Steven Burton describes bad faith as an attempt by a party to recapture "forgone opportunities." Burton describes "forgone opportunities" as possibilities that present themselves during the course of dealings between the parties to realize a gain that the party should have recognized as proscribed by the relevant contract.

In *First Texas Savings Ass'n v. Comprop Investment Properties*, the court found that a covenant of good faith and fair dealing was implied in every contract. To determine the nature of the covenant of good faith and fair dealing, the courts measure the "justifiable expectations of the parties. As a result, where one party acts arbitrarily, capriciously or unreasonably, that conduct exceeds the justifiable expectations of the second party and consequently, the second party should be compensated for its damages and/or excused from performance."

In essence, good faith is a question of fact in which the determination depends upon "the parties' standing, events which occur during the contractual relationship between the parties, and the degree of performance tendered by the parties to the agreements as a condition precedent to any subsequent modifications or waivers."

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156. See KNAPP & CRYSTAL, supra note 145, at 377; Summers, supra note 132, at 196.
157. 188 N.E. 163 (1933).
158. Id. at 167.
162. Id. at 1573; *See Restatement (Second) of the Law of Contracts § 205* (1981); U.C.C. §§ 1-201(19), 1-203, 2-103(1) (1992); Department of Ins. v. Teachers Ins. Co., 404 So. 2d 735 (Fla. 1981); City of San Antonio & City Water Bd. v. Forgy, 769 S.W.2d 293 (Tex. App.—San Antonio 1989, writ denied).
164. Id. at 1572.
In Farmers Coop. Elevator, Inc., Duncombe v. State Bank\textsuperscript{165} the Supreme Court of Iowa interpreted good faith in the context of the UCC very restrictively. The court would not permit the provision of good faith to extend beyond "honesty in fact."\textsuperscript{166} The court explicitly stated that "[w]here the Uniform Commercial Code requires for good faith more than 'honesty in fact' it explicitly so states."\textsuperscript{167} It appears as though the courts are very reluctant to initiate extensions of "good faith" beyond the explicitly enunciated scope of the language of the statute itself. Therefore, when the official comments of the RUPA suggest that good faith will remain undefined and the courts should independently arrive at their own definition of good faith, it appears the courts which follow the Duncombe holding will continue to manifest a conservative approach to the definition of good faith. Despite fears to the contrary, the courts will most likely avoid an expansive view of good faith that will do violence to the existing, well developed body of partnership case law. The definition of good faith is likely to continue to evolve in a manner akin to its pre-RUPA treatment.

**IX. GOOD FAITH AND FAIR DEALING IN THE PARTNERSHIP CONTEXT AS INTERPRETED BY THE COURTS**

Reid v. Bickel & Brewer\textsuperscript{168} was a partnership case characterized by bitterness and disillusionment on all sides and ultimately culminated in the expulsion of Reid, a partner in the firm of Bickel & Brewer. Reid alleged that he was wrongfully expelled from the firm in bad faith. Since the partnership agreement contained an expulsion without cause provision, the allegation would survive a motion for summary judgment only if Reid could demonstrate that a bad faith issue existed.\textsuperscript{169} First, the Reid court stated that "Texas courts have routinely upheld termination-at-will provisions in employment contracts."\textsuperscript{170} Next, the court cited Gelder Medical Group v. Webber\textsuperscript{171} where the New York Court of Appeals explained that a partnership agreement with a termination-at-will provision is regarded as:

(common and acceptable . . . [w]hile there is no common-law or statutory right to expel a member of a partnership, partners may provide, in their agreement, for the involuntary dismissal, with or without cause, of one of their number . . . on the majority vote of the partners, the Court may not frustrate the intention of the parties at least

\textsuperscript{165} 236 N.W.2d 674 (Iowa 1975).
\textsuperscript{166} Id. at 678.
\textsuperscript{167} Id.
\textsuperscript{169} Id. at *9-*11.
\textsuperscript{171} 363 N.E.2d 573 (N.Y. 1977).
so long as the provisions for dismissal work no undue penalty or unjust forfeiture, overreaching, or other violation of public policy.\textsuperscript{172}

The language of \textit{Gelder} suggests that the New York Court of Appeals recognized bad faith going to the essence of the contract might have limited the otherwise absolute language of the expulsion provision.\textsuperscript{173} Further, it was recognized that "[a]s with any contractual agreement, in the time-honored language of the law, there is an implied term of good faith."\textsuperscript{174} The court in \textit{Reid} went on to speculate that "[b]ecause a partnership creates a fiduciary relationship among the partners, there may exist an implied good faith covenant in a partnership agreement under Texas law."\textsuperscript{175}

Ultimately the court held that regardless of whether Texas would recognize an implied good faith covenant in the partnership agreement, Reid failed to present a genuine issue of material fact over whether Bickel & Brewer acted in bad faith. There was no evidence that the defendants expelled Reid for personal benefit, or that they did not comply with the express terms of the agreement that Reid voluntarily and willingly signed.\textsuperscript{176} In addition, the court recognized that under both California and New York law the doctrine of implied good faith "may not obliterate rights, such as an at-will termination, expressly embodied in a written contract."\textsuperscript{177} In essence, the language of the court in \textit{Reid} seems to fit neatly within the definition of good faith in a partnership context as defined by the official comments to the RUPA in section 404. In \textit{Reid} the court recognized the doctrine of good faith and fair dealing as an implied obligation in every partnership agreement, but narrowed the purview of the obligation in a way that rendered good faith relevant to only the most egregious of circumstances.

In \textit{Lawlis v. Kightlinger & Gray}\textsuperscript{178} the Indiana Court of Appeals recognized that the Indiana Uniform Partnership Act mandates that expulsion of a partner must be in good faith.\textsuperscript{179} If the partner is expelled for "predatory purposes" or in bad faith, the partnership agreement itself is violated.\textsuperscript{180} Lawlis, the plaintiff, was a partner in a law firm and was addicted to alcohol. From the time that Lawlis's partners knew of his condition they tried to help him through the medical crisis, despite the fact that Lawlis was absent from work for a considerable amount of time.

\begin{footnotes}
\textsuperscript{172} Id. at 576.
\textsuperscript{173} Id. at 577.
\textsuperscript{174} Id.
\textsuperscript{176} Id. at *14.
\textsuperscript{177} Id. at *15 (citing Page v. Page, 359 P.2d 41, 44-45 (Cal. 1961)); see also Caton v. Leach Corp., 896 F.2d 939, 946 (5th Cir. 1990) (holding that an implied duty of good faith can not override an at-will termination clause); Broad v. Rockwell Int'l, 642 F.2d 929, 957 (5th Cir.), cert. denied, 454 U.S. 965 (1981) (following New York in upholding a termination at will clause).
\textsuperscript{179} Id. at 440 (citing \textit{IND. CODE} § 23-4-1-31(1)(d) (1977)).
\textsuperscript{180} Id.
\end{footnotes}
due to the time he spent in sanotariums. Lawlis tried to conceal his condition from the other partners in his firm for many months. For a number of years, the law firm allowed Lawlis to continue drawing money from the partnership account even though Lawlis's productivity continually declined. Lawlis received a number of warnings yet resumed the consumption of alcohol. Finally, a recommendation was made to allow Lawlis to remain a partner for another eight months while drawing up to $25,000 while looking for a new job. Under the facts of the case, the court found that the partners lacked a predatory purpose and held that the partners acted in good faith as a matter of law. The court went on to provide a definition of good faith in the partnership context:

[w]here the remaining partners in a firm deem it necessary to expel a partner under a no cause expulsion clause in a partnership agreement freely negotiated and entered into, the expelling partners act in "good faith" regardless of motivation if that act does not cause a wrongful withholding of money or property legally due the expelled partner at the time he is expelled. Used in this context, "good faith" means . . . a state of mind indicating honesty and lawfulness of purpose: belief in one's legal title or right: belief that one's conduct is not unconscionable . . . : absence of fraud, deceit, collusion, or gross negligence.

In expelling Lawlis, the remaining partners were acting within their rights under a terminable-at-will agreement. The partners dealt with Lawlis compassionately even though they were not obligated to do so by the terms of the partnership agreement or by the obligation of good faith and fair dealing.

In Holman v. Coie the court held that the express language of the partnership agreement itself must be controlling: that language clearly does not contain any of the requirements plaintiffs now seek to assert as impliedly applicable. Where terms of a contract, taken as a whole, are plain and unambiguous, the meaning is to be deduced from the contract alone.

The court further held that while most cases of involuntary ouster involve controversy, "[i]t is not the province of the court to alter a contract by

181. Id. at 441.
182. Id. at 442-43 (citations omitted).
184. Id. at 519.
185. Id. at 521.
186. Id. (citing Dickson v. Hausman, 413 P.2d 378 (Wash. 1966); Hastings v. Continental Food Sales, Inc., 376 P.2d 436 (Wash. 1962)).
construction or to make a new contract for the parties; its duty is confined
to the interpretation of the one which they have made for themselves.” 187

The court went on to recognize that “the general rule of law is that the
partners in their dealings with each other must exercise good faith.” 188
The relationship between copartners “requires the exercise of the utmost
good faith.” 189 Therefore, “no individual or group may take unconscio-
able advantage of another.” 190 However, the court found that relation-
ships to which “good faith” relates are limited to those involving a
property or a business aspect. Since Holman’s claims did not involve a
business or property right of the partnership, there was no breach of good
faith. 191

The court agreed that every partnership agreement contains an implied
covenant of good faith 192 and that in this context good faith means “[a]n
honest intention to abstain from taking any unconscientious advantage of
another, even through technicalities of law, together with an absence of
all information, notice or benefit or belief of facts which would render
transaction unconscientious.” 193 The sudden expulsion of the partner is
not a sufficient reason to find a breach of the duty of good faith. 194 The
“guillotine” method of expulsion was expressly agreed to in the partner-
ship agreement. The mere utilization of an agreed upon procedure,
therefore, does not constitute a violation of the provision of good faith. 195

In Rosenthal v. Rosenthal 196 the court held that in evaluating whether
conduct amounted to bad faith, the court may not intrude into the deci-
sionmaking process beyond the determination of whether the decision
was improperly motivated. 197 Whether the decision itself was wise or ju-
dicious is governed by the business judgment rule. In other words, “hon-
est and unselfish decision(s)” exercised for the interest of the corporation
may not be second guessed by the court, unless the business decision was
motivated by fraud or bad faith. 198

The Supreme Court of Maine decided that the fiduciary duties parties
owe to each other are judged under the business judgment rule at the
time the decision was made. In Rosenthal, members of a family owned
business had a dispute over a policy of profit payments and reinvestment
into the business. Ultimately, Theodore Rosenthal sold his share of the

1945)).
984 (1975).
189. Id.
190. Id. (citing Danich v. Culjack, 66 P.2d 860, 863 (Wash. 1937)). Cf. Karle v. Seder,
191. 522 P.2d at 523.
192. Id.
193. Id. (citing BLACK’S LAW DICTIONARY 822 (4th ed. 1951)).
194. Id.
195. Id.
196. 543 A.2d 348 (Me. 1988).
197. Id. at 353.
198. Id.
business and then later claimed to have been forced out by Rona and Robert Rosenthal. Theodore alleged that he was compelled to sell his portion of the business at an unfairly low price. 199

In evaluating the transaction of which Theodore Rosenthal complained, the court recognized that it was not within its domain to inquire into “the prudence of business decisions honestly reached by those entrusted with the authority to determine what course of action best advances the well-being of the enterprise.” 200 As long as the business was run in a manner that was “honest and unselfish,” 201 the court will not question the results “although the results show that what they did was unwise or inexpedient.” 202 However, if the business decision was motivated by fraud or bad faith, it will not receive the protection of the business judgment rule. 203 “The courts do not intrude upon the process of business decision making beyond assuring that those decisions are not improperly motivated.” 204 Therefore, unless Theodore can demonstrate that Robert and Rona Rosenthal’s conduct was primarily motivated by fraud or bad faith, the business judgment rule will insulate the defendants from a finding of liability for violation of their fiduciary duties. 205

199. Id. at 350.

200. Id. at 353; see Gay v. Gay’s Super Markets, Inc., 343 A.2d 577, 580 (Me. 1975) (quoting Bates Street Shirt Co. v. Waite, 156 A. 293, 298 (Me. 1931)); see also Radol v. Thomas, 772 F.2d 244, 257 (6th Cir. 1985), cert. denied, 477 U.S. 903 (1986) (holding that many corporate decisions are made under conditions of uncertainty); Norlin Corp. v. Rooney, Face Inc., 744 F.2d 255, 264 (2d Cir. 1984) (following New York case law and the business judgment rule); Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979) (following the business judgment rule).

201. Rosenthal, 543 A.2d at 353.


203. Id.; see Gay’s Super Markets, 343 A.2d at 580; Radol, 772 F.2d at 257; Norlin, 744 F.2d at 265; Panter v. Marshall Field & Co., 646 F.2d 271, 293 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); Treadway Co. Inc. v. Care Corp., 638 F.2d 357, 382 (2d Cir. 1980); Auerbach, 393 N.E.2d at 1000; see also PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (pt. iv) at 4-5 (Tent. Draft No. 4 1985) (supporting the use of judicial restraint in evaluating business decisions).

204. Rosenthal, 543 A.2d at 353.

In a business transaction both sides presumably try to get the best of the deal. That is the essence of bargaining and the free market. And in the context of this case, no legal rule bounds the run of business interest. So one cannot characterize self-interest as bad faith. No particular demand in negotiations could be termed dishonest, even if it seemed outrageous to the other party. The proper recourse is to walk away from the bargaining table, not to sue for “bad faith” in negotiations.


In Wyler v. Fever\textsuperscript{206} the appellate court held as long as a partner is exercising discretion in the reasonable use of “honest business judgment,”\textsuperscript{207} the partner will not be held liable for mistakes or losses incurred as the result of her “good faith exercise of reasonable business judgment.”\textsuperscript{208} In Wyler the plaintiff asserted that the general partner breached his fiduciary duty to the plaintiff when the movie in which plaintiff invested was a “flop.” While there are never any guarantees that an investment will ultimately be profitable,\textsuperscript{209} as long as the defendant made business decisions in good faith, and with the care of an ordinarily prudent person, the defendant will not be liable for the lack of success of the movie.\textsuperscript{210} Further, the court assessed the reasonableness of the decision from the perspective of the time when the business decision was originally made and “said it would not be scrutinized by the courts with the cold clarity of hindsight.”\textsuperscript{211}

In Froemming v. Gate City Federal Savings & Loan Ass’n\textsuperscript{212} the court held that good faith is essentially a question of fact to be determined by the factfinder.\textsuperscript{213} In that assessment, the finder of fact must evaluate “the credibility of the witnesses, gauge nuances of voice and expression, and sift through competing and conflicting versions of what occurred and what state of mind each actor brought to the occurrence. These are all emphatically matters for the jury.”\textsuperscript{214} In the partnership context, good faith depends on the “knowledge, understanding, and intent of the partner who is charged with breach of fiduciary duty, as well as the understanding, knowledge, and intent of his co-partners.”\textsuperscript{215}

Good faith also applies to partnership dissolutions.\textsuperscript{216} To some commentators, the obligation of good faith in the decision to dissolve a partnership, adds an unnecessary complication to the process.\textsuperscript{217} The additional uncertainty created by the obligation of good faith can be seen in a series of California cases: Page v. Page,\textsuperscript{218} Leff v. Gunter,\textsuperscript{219} and Rosenfeld, Meyer & Susman v. Cohen.\textsuperscript{220}

\begin{thebibliography}{99}
\bibitem{206} 149 Cal. Rptr. 626 (Cal. Ct. App. 1978).
\bibitem{207} Id. at 633.
\bibitem{208} Id.
\bibitem{209} Id.
\bibitem{210} Id.
\bibitem{211} Wyler, 149 Cal. Rptr. at 633.
\bibitem{212} 822 F.2d at 723.
\bibitem{213} Id. at 731; see also First Texas Savings, 752 F. Supp. at 1572 (finding good faith is a factual matter to be determined by the totality of the circumstances existing during the contractual relationship of the parties and further because of the factual nature of good faith, it is not a matter which can be decided summarily).
\bibitem{214} Froemming, 822 F.2d at 731.
\bibitem{215} Id.
\bibitem{217} Id.
\bibitem{218} 359 P.2d 41 (Cal. 1961).
\bibitem{219} 658 P.2d 740 (Cal. 1983).
\end{thebibliography}
In *Page* the California Supreme Court first announced the good faith doctrine. In this case, a partner in a linen supply company sought to oust another partner because he realized that the success of the partnership did not depend on the continued participation of this particular partner. The Supreme Court of California held that even though the partnership was terminable-at-will, partnership law prohibits the dissolution of terminable-at-will partnerships in bad faith. Then, in *Leff*, the Supreme Court of California affirmed the principle of good faith introduced in *Page*, though it did not find an actionable wrong. This holding heightened the perception of good faith as a regulator of partnership dissolutions.

In *Rosenfeld* partners of a law firm left the partnership to form their own law firm. The California Second District Court of Appeals held that partners do not have the right to dissolve terminable-at-will partnerships in bad faith. Further, the court held that even nonfiduciaries have the obligation to exercise their rights in good faith, avoiding injury to the other partners and generally, dealing fairly with each other. Three implications can be drawn from this series of California holdings: 1) existing partnership clients constitute the income expectancy for the partnership; 2) it is not permissible to pursue private advantage at the expense of the other partners by threats to withdraw in order to gain concessions from other partners such as a larger division of the partnership income; and, 3) actual withdrawal that results in the transfer of clients from the former firm to the firm of the partner who is withdrawing is not in good faith and may be challenged.

*Rosenfeld*, together with *Page* and *Leff*, seem to indicate that the good faith doctrine would preclude partners from withdrawing from a law firm and taking clients with them to the new firm. This application of the good faith doctrine could increase the amount of litigation in connection with partnership dissolution because it creates an area of intense ambiguity that can only be resolved through litigation.

**X. CONCLUSION**

The RUPA's adoption of a contractarian approach to partnership law coupled with a non-waivable obligation of good faith and fair dealing has created the potential for intense ambiguity in an area where the law had been fairly clear. The new provisions of the RUPA can ultimately upset a
relatively settled area of the law and force the courts to reconsider the manner in which partnership law works.

Significantly, the drafters of the RUPA stated in the comments that they intentionally did not supply a definition of the mandatory obligation of good faith and fair dealing, leaving the definition of that provision to the courts. The official comments suggest the UCC as a starting place for the definition but suggest that the UCC's definition of good faith and fair dealing is too narrow for the purpose of partnership law. The comments fail, however, to provide any other guidance on this issue.

It is also quite possible that the courts will decline the invitation to make significant departures from the existing body of law essentially ignoring the new changes; or, more euphemistically, to interpret the new provisions in a manner that comports with the existing body of partnership law. It is also true that there is a general trend in modern case law reflecting the same step away from the strict fiduciary relationship calling for the "punctilio of an honor"\textsuperscript{230} and towards a more pragmatic and Darwinian outlook on the relationship between partners. Increasingly, the courts have declined the parentalistic role of reinterpreting negotiated terms of contracts, unless the agreements were entered into in bad faith. In the absence of fraud or bad faith, the courts will enforce the terms of the partnership agreement as they were written, even when the partnership agreement permits the pursuit of self-interest.

It is still too early to predict the outcome of the changes with certainty. Currently, in the face of the ever-increasing controversy over the changes to the Partnership Act, it is likely that more changes will soon be forthcoming.

\textsuperscript{230} Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). This opinion represents the most famous of the classical view of partnership relationships.