Understanding Florida’s New Limited Partnership Act

Richard R. Thames

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Abstract

Last year, the Florida Legislature responded to a need to replace Florida’s antiquated limited partnership laws with the Revised Uniform Limited Partnership Act.

KEYWORDS: voting, rights, partnership
Understanding Florida's New Limited Partnership Act

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I. Introduction

Last year, the Florida Legislature responded to a need to replace Florida's antiquated limited partnership laws with the Revised Uniform Limited Partnership Act. The new legislation, entitled the Florida Re-

* J.D., Florida State University School of Law, 1987. Mr. Thames was serving as Legislative Intern for the Florida House of Representatives Commerce Committee when this legislation was introduced. The author would like to thank Dawn Cannon for her assistance in preparing this article and Wyatt T. Martin, Staff Director, House Commerce Committee, for assigning him this bill.

1. REVISED UNIF. LIMITED PARTNERSHIP ACT §§ 101-1106, 6 U.L.A. 205 (1985 & Supp. 1987). The Official Comments to this Act have not been released at this time.
vised Uniform Limited Partnership Act (hereinafter referred to as "FRULUPA"), is much more accommodating to modern business practice and represents a significant improvement in the capacity of a limited partnership to serve the needs of its partners. This article will attempt to explain these changes and how they differ from Florida's former limited partnership statutes.

II. Historical Background

The notion of limited investor liability can be traced back to the early days of the Roman empire. There, limited partnerships, or societas as they were then called, were used as a device for avoiding the religious prohibitions against collecting interest by allowing the participating lender to share in the rewards of commercial trade without any personal risk. The ancient Genoan and Venetian families took advantage of this invention to establish what was then a global trading empire.

After the fall of the Roman Empire, there was a significant drop-off in world trade coupled with gradual abatement in the recognition of limiting investor liability. Indeed, the limited liability concept was not recognized in early English law; instead, common law agency principles were applied to partnerships so that all partners were jointly liable for the actions of each partner and their agents. In such an environment, there was virtually no method through which ordinary investors could combine their resources without subjecting their entire personal wealth to liability.

It was not until 1822 that limited partnerships were formally introduced into this country. Then, the New York legislature adopted a limited partnership statute (based on the Societe en Commandite concept in France) which provided for a class of special partners in a partnership whose liability extended only to the extent of their partnership

10. White v. Eisenman, 134 N.Y. 101, 31 N.E. 276 (1892). "The next and incidental object was to furnish reasonable protection to those dealing with the concern, by requiring certain acts to be done, and public notice thereof given, so that all who dealt might know the essential features of the arrangement." Id. at 103, 31 N.E. at 277.
12. Final Staff Analysis, CS/HB 347, supra note 2.
13. I.R.C. § 701 (1986). The existence of the tax flow-through mechanism was a prime factor in motivating the Legislature to adopt the Uniform Act in order to attract more business to Florida. "It is a plain fact that few for this tax, flow-through characteristic of limited partnerships, many risky, yet socially desirable projects, could not be undertaken." Final Staff Analysis, CS/HB 347, supra note 2, at 2.
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Published by NSUWorks, 1987

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It was not until 1822 that limited partnerships were formally introduced into this country. Then, the New York legislature adopted a limited partnership statute (based on the Societe en Commandite except in France) which provided for a class of special partners in a partnership whose liability extended only to the extent of their partnership contributions. The primary purpose of New York’s statute was to encourage those having capital to become partners with those having skills, by limiting the liability of the former to the amount actually contributed to the firm.

By the early 1900s, a number of states had adopted limited partnership statutes of their own. However, limited liability was not a favored concept in the law, and most statutes demanded strict compliance with statutory regulations in order to achieve this protected status. Often, a mere technical deviation from the statutory scheme was seen as an appropriate opportunity to hold the limited partners liable as general partners. Such treatment of limited partners tended to inhibit the formation of capital and called for a re-examination of the whole limited liability issue. The National Conference of Commissioners on Uniform State Laws responded to this need and approved the original Uniform Limited Partnership Act in 1916. This act has since been adopted by 49 states, including Florida.

Even though the limited partnership form of business organization was readily available in most states, limited partnerships did not enjoy widespread recognition until the early 1960s when they came to be recognized for their usefulness as tax-shelter investment vehicles. One of the attractions of limited partnerships is that it items of income, deduction, and credit “flow through” the partnership level and are taxed against the individual partner’s own income. Thus, limited partnerships were able to pass through their depreciation deductions, their interest expense deductions, and their investment tax credits to the partners themselves, creating an ideal situation for high tax-bracket

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individuals to offset other items of ordinary income.

With the rapid expansion of limited partnerships, it soon became apparent that the original Uniform Limited Partnership Act was inadequate to serve the needs of modern business practice. Thus, the National Conference of Commissioners on Uniform State Laws again met and approved a revised version of the Uniform Limited Partnership Act in 1976.14 This act was subsequently adopted by some 30 states.15

By 1985, this revised act was in need of another revision, so the Uniform Law Commissioners met and approved the Revised Uniform Limited Partnership Act (1985).16 Several states, including Florida, were quick to adopt this new act and to add new provisions of their own.17 This article, in addition to explaining the overall act, will explain these improvements and why they were thought to be an improvement over the Uniform Act.

III. Formation

FRULPA defines a limited partnership as a "partnership formed by two or more persons under the laws of this state and having one or more general partners and one or more limited partners."18 It goes on to define "person" as "a natural person, partnership, limited partnership . . ., trust, estate, association, or corporation."19

Under FRULPA, "[a] limited partnership is formed at the time of the filing of the certificate of limited partnership with the [Department of State] or at any later time specified in the certificate of limited partnership . . ."20 In either case, there must be substantial compliance with this section before a limited partnership is recognized.

17. In fact, several modifications of the Uniform Act inherent in FRULPA were derived from Delaware's Limited Partnership Act, DEL. CODE ANN. tit. 6, §§ 17-101 et seq. (1985 Interim Supp.). For an explanation of Delaware's Act, see Basile, The 1985 Delaware Revised Uniform Limited Partnership Act, 41 BUS. LAW. 571 (1986).

IV. Filing and Record-Keeping Requirements

A. Certificate of Limited Partnership

One of the most important changes in Florida's new limited partnership act concerns the content and execution requirements of the certificate of limited partnership. Under FRULPA, the certificate of limited partnership becomes a mere notice filing, reflecting only the most basic matters to which government officials, creditors, and other interested parties need to be put on notice.21 The statutory scheme envisioned by FRULPA is meant to reflect the existing statutory procedure for the filing of corporate documents.

21. Id. This might preclude such findings as that in Winiweski v. Johnson, 223 Va. 141, 268 S.E.2d 223 (1982), where the failure to "swear to" the certificate was found to be such a substantial non-compliance with the statute to render the limited partnership's filing ineffective.
23. See Garrett v. Koecke, 569 S.W.2d 568, 570-71 (Tex. Ct. App. 1978); "[W]here a party has knowledge that the entity with which he is dealing is a limited partnership, that status is not changed by failing to file . . . ." But see Dwinell's Cent. Neon v. Cosmopolitan Chinook Hotel, 21 Wash. App. 929, 587 P.2d 191 (1978), which held that a third party's knowledge regarding the status of a limited partnership is irrelevant when the partners have made no attempt to comply with the statutory information and filing requirements of the Limited Partnership Act.
25. FINAL STAFF ANALYSIS, CS/1B 347, supra note 2, at 3-4.
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compliance with this section before a limited partnership is recog-
nized.21 This section clarifies somewhat the uncertainty in the prior law
over whether a limited partnership was formed notwithstanding the
failure to file a certificate by limiting the formation to these two situa-
tions.22 Nevertheless, an argument might still be made that a creditor
who extends credit to the partnership with the understanding that the
organization is a limited partnership is estopped from claiming that a
limited partnership does not exist merely because the certificate is not
filed.23 This is even more true since the limited partners are no longer
required to be listed on the certificate.24

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found to be such a substantial non-compliance with the statute to render the limited
partnership’s filing ineffective.

22. Some courts have held that a limited partnership cannot exist until the certif-
icate is filed. See Allen v. Amber Manor Apartments Partnership, 95 Ill. App. 3d 341,
420 N.E.2d 440 (1981); Grenada Bank v. Willey, 705 F.2d 176 (6th Cir.), cert. de-
died, 446 U.S. 849 (1983); Ruth v. Crane, 392 F. Supp. 724 (E.D. Pa. 1975), aff’d,
564 F.2d 90 (3d Cir. 1977). Other courts have reached an opposite conclusion. See

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25. Final Staff Analysis, CS/HB 347, supra note 2, at 3-4.

14. REVISED UNIF. LIMITED PARTNERSHIP ACT, §§ 101-1106, 6 U.L.A. 205
(1985 & Supp. 1987). This act supersedes the original Uniform Limited Partnership
Act approved by the Conference in 1916.

1987), Table of Jurisdictions Wherein Act Has Been Adopted.

16. REVISED UNIF. LIMITED PARTNERSHIP ACT §§ 101-1106, 6 U.L.A. 206

17. In fact, several modifications of the Uniform Act inherent in FRULPA were
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Published by NSUWorks, 1987
Whereas the prior law required the disclosure of fourteen specific items of information in the certificate, FRULPA now only requires six.26 Included in the list are the name and address of the limited partnership and its record-keeping office, the name and address of the agent for service of process, the name and address of each general partner and the latest date upon which the limited partnership is to dissolve.27 No longer must the certificate contain a statement of the rights of the limited partners to share in partnership profits, to admit additional limited partners or to assign partnership interests.28 The general partners may still set forth in the certificate any other matters which they feel are important, but they would be charged with the added burden of maintaining the accuracy of such information.29

Similarly, FRULPA has done away with the burdensome requirement that the certificate set forth the name and address of each limited partner and his capital contribution.30 However, because filing fees in Florida are based on these contributions, Florida stood to lose some three to four million dollars in general revenues.31 To solve this problem, a provision was added which requires that an affidavit disclosing the anticipated contributions of the limited partners be filed with the Department of State.32 Fees would then be assessed against this amount, thus ensuring no loss in state revenues.

This provision serves the intent that there be an easing of the ad-

26. Id.
27. Id. (replacing FLA. STAT. 620.02(1) (1985)).
28. Id. § 620.117.
29. Id. § 620.108. Formerly, § 620.02(1)(6)(6) required the certificate to state: "The amount of cash contributed by each limited partner and a description of, and the agreed value of, the other property contributed by each limited partner."
30. FLA. STAT. § 620.182 (Supp. 1986) provides: The fees of the Department of State under this act are as follows: (2) For filing an original certificate of limited partnership, an amount based upon the anticipated amount of capital contributions of the limited partners, calculated at the rate of $4 per $1000 of such contributions; but the amount of such filing fee may not be less than $30 or more than $1000.
31. The House Commerce Committee reports that there are currently 12,110 limited partnerships registered in this state. FINAL STAFF ANALYSIS, CS/HB 347, supra note 2, at 10. Since it presumably costs the Department of State the same amount of time and money to file a certificate of limited partnership for a limited partnership with a large amount of capital contributions as it does for a limited partnership with fewer capital contributions, this provision amounts to nothing more than a disguised tax on limited partnerships which discriminates in favor of the larger limited partnerships.
32. FLA. STAT. § 620.112 (Supp. 1986).

ministrative burden placed on limited partnerships by allowing the partnership to estimate the contributions of the limited partners and to pay fees accordingly.33 Anytime the actual contributions of the limited partners exceed this anticipated amount, a supplemental affidavit must be filed with fees assessed on the difference.34 There is no incentive to file an artificially low anticipated capital contribution figure because of this "catch."

B. Amendments of the Certificate of Limited Partnership

Corresponding to a reduction in the information contained in the certificate of limited partnership is a reduction in the circumstances that would require amendment of the certificate. Under FRULPA, amendment of the certificate is necessary only when there is a change in the limited partnership name, a change in the address of the record-keeping office, a change in the name or address of the agent for service of process, or upon the continuation of business after an event of withdrawal of a general partner.35 The most important change FRULPA makes with respect to amendments is the elimination of the necessity for amendment every time there is a change in the amount or character of a limited partner's contribution or when there is an admission or substitution of a limited partner.36 This should substantially ease the administrative burden placed on the larger limited partnerships by the former provision.

Amendments must be filed within 30 days of the specified event to avoid potential liability and all such amendments may, whenever desired, be integrated into a single instrument which will supersedes the original certificate.37 This thirty-day time period will create a safe-harbor for the protection of the general partners and will eliminate a great deal of uncertainty in the prior law over what is a sufficient time in which to amend the certificate.38 However, the general partners are still

33. See FINAL STAFF ANALYSIS, CS/HB 347, supra note 2, at 9.
34. FLA. STAT. § 620.112 (Supp. 1986).
35. Id. § 620.109(2)(a).
36. Id. § 620.24 (1985).
37. Id. § 620.109 (Supp. 1986).

Paragraph (e) provides a "safe harbor" against claims of creditors or others who assert that they have been misled by the failure to amend the certificate of limited partnership to reflect changes in any of the important
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charged with the responsibility of amending the certificate whenever they become aware of a false statement in the certificate or of a change in circumstances which would make the certificate inaccurate in any respect. 48

C. Execution of the Certificate of Limited Partnership

FRLUPA has also solved what has become a serious logistics problem for the larger limited partnerships by providing that the certificate need only be signed by the general partners instead of by all the partners. 49 Similarly, the signature of only one general partner is needed to execute a certificate of amendment or of cancellation, except when there is an addition of a new general partner. 50 In such case, the new general partner must also sign. 51 Limited partners are no longer responsible for signing any such documents.

This streamlining of the certificate and easing of execution requirements is intended to significantly reduce the administrative costs inherent in the prior act. The major criticism directed at these provisions is that investors will no longer have access to important information before they invest. This criticism overstates any such problems in that certain offerings are required to comply with this state's "blue-sky" laws and because potential investors should generally be able to demand relevant information as a condition of their investment. 52 Similarly, law enforcement officials will have access to a list of the limited partners by serving the agent for service of process with an appropriate subpoena. 53

facts referred to in paragraph (b) if the certificate of limited partnership is amended within 30 days of the occurrence of the event, no creditor or other person can recover for damages sustained during the interim.

39. Fla. Stat. § 620.106(2)(b) (Supp. 1986). The Official Comment to the Uniform Act provides: "that the certificate of limited partnership is intended to be an accurate description of the facts to which it relates at all times and does not speak merely as of the date it is executed." REVISED UNIFORM LIMITED PARTNERSHIP ACT, § 1.2(4) (U.L.A. 1983 & Supp. 1987), Official Comment.
41. Id. § 620.114.
42. Id.
43. Id. §§ 517.01-517.32 (1985).
44. Id. § 620.192 (Supp. 1986).
45. Id. § 620.104.
46. Id. § 620.103.
47. Id. § 607.024 (1985).
48. Id. § 620.103 (Supp. 1986).
49. Id. § 620.105.
50. Id.
51. Id. § 620.106(1)(a), (b), (c) and (d).
52. Id. § 620.106(1)(d).
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D. Limited Partnership Name

FRULPA specifically permits persons intending to organize a limited partnership to exclusively reserve a name for that limited partnership by filing appropriate documents with the Department of State.\(^{40}\) This name must not be the same as, and must be distinguishable from, any corporation or limited partnership organized or authorized to do business in this state.\(^{40}\) This provision is similar to that found in Florida’s corporation statute, Chapter 607 of the Florida Statutes.\(^{40}\) Further, while the Uniform Act requires that the name of the limited partnership contains the words “Limited Partnership” in its name, FRULPA has retained the older concept of allowing the abbreviated “Ltd.” form to be included in the partnership’s name.\(^{40}\)

E. Office for Record Keeping

Under a new provision of FRULPA, each limited partnership is required to maintain an office for keeping records and an agent for service of process.\(^{40}\) This office need not be maintained in this state.\(^{40}\) Records required to be kept at this office would include a current list of all partners, a copy of the certificate of limited partnership and any amendments thereto, tax returns for the last three years, and a copy of the partnership agreement.\(^{40}\) A formal writing, which may be included in the partnership agreement, must also be maintained at this office and shall set forth a statement of the value of each limited partner’s contribution, the times at which contributions are to be made, any rights to distributions, and any events which would require the limited partnership to dissolve.\(^{40}\) This is essentially the same information that was formerly required to be included in the certificate of limited partnership. Under Section 620.134 of the Florida Statutes, each limited partner has the right to copy and inspect any of the partnership records required to be maintained at this office and may request copies of the

41. Id. § 620.114.
42. Id.
43. Id. §§ 517.011-517.32 (1985).
44. Id. § 620.192 (Supp. 1986).
45. Id. § 620.104.
46. Id. § 620.103.
47. Id. § 607.024 (1985).
48. Id. § 620.103 (Supp. 1986).
49. Id. § 620.105.
50. Id.
51. Id. § 620.106(1)(a), (b), (c) and (d).
52. Id. § 620.106(1)(e).
limited partnership's federal, state, and local income tax returns as soon as they become available. Additionally, the limited partners may obtain, from time to time and subject to reasonable standards as may be set forth in the partnership agreement, any information the general partners may have regarding the state of the business and financial condition of the limited partnership.83

V. The Limited Liability Feature

Perhaps the most significant change FRULPA has made comes in the area of a limited partner's liability to third parties.84 Under the new law, limited partners are given two levels of protection. First, the limited partners are given a codified list of activities they may engage in without being held to have so significantly participated in the control of the business that they acquire the liability of a general partner.85 Secondly, limited partners participating in the control of the business are liable only to those persons transacting business with the limited partnership who reasonably believed, based on the limited partner's conduct, that the limited partner was a general partner.86 These changes are consistent with the broad purposes of the original Uniform Limited Partnership Act, which was "not to assist creditors, but to enable persons to invest their money in partnerships and to share in profits without being liable for more than the amount of money they contributed."87

To fully appreciate the significance of these changes, one must be reminded of the problems inherent in the prior statutes. For example, section 620.07 of Florida's prior limited partnership statute provided 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 control of the business."

One does not have to be very familiar with partnership law to recognize that this section is fairly ambiguous. For example, just what does "taking part in the control" of the partnership business mean? Second, what are the rights and powers that a limited partner may safely exercise under this section?

The case law on the subject was equally confusing and did not provide such guidance. Most cases held that a limited partner may not be involved in the everyday business affairs of the partnership, yet others permitted the limited partners some input into the everyday affairs.88

FRULPA has gone a long way towards eliminating these ambiguities by providing a "laundry list" of safe-harbor activities that a limited partner may engage in without being held to have so significantly participated in the control of the partnership business that he may be held liable as a general partner. Specifically, section 620.129 of the Florida Statutes provides that a limited partner may now become a contractor for or an agent or employee of the limited partnership or of a general partner, or an officer, director, or shareholder of a general partner that is a corporation. Additionally, a limited partner may now consult with or advise a general partner with respect to any matter, may now act as surety, guarantor or endorser for the limited partnership, or may assume any number of the specific obligations of the limited partnership.89 The limited partner may also take any action required or permitted by law to bring a derivative action and may request, attend, participate in, or serve on a committee of the limited partnership or of the limited partners.90

Limited partners are also given the authority to approve or disapprove any one of the following matters without losing their protected status:

1. The dissolution and winding up of the limited partnership.

53. Id. § 620.134 (Supp. 1986). For further information regarding a limited partner's access to partnership information, see Comment, Investor Protection and the Revised Uniform Limited Partnership Act, 56 WASH. L. REV. 99 (1980).


55. FLA. STAT. § 620.129(2) (Supp. 1986).

56. Id. § 620.129(1).


59. Company Dwayne's Cent. Neon v. Cosmopolitan Chinook Hotel, 21 Wash. App. 929, 587 P.2d 191 (1978) (in determining whether a limited partner is liable as a general partner, the key question is the "control" that the limited partner has in the day-to-day function and the operations of the business) with Well v. Diversified Properties, 319 F. Supp. 779 (D.D.C. 1970) (limited partners may offer advice and suggestion to the general partner about the partnership's everyday affairs).

60. FLA. STAT. § 620.129 (Supp. 1986).

61. Id.
limited partnership’s federal, state, and local income tax returns as soon as they become available. Additionally, the limited partners may obtain, from time to time and subject to reasonable standards as may be set forth in the partnership agreement, any information the general partners may have regarding the state of the business and financial condition of the limited partnership.\(^5\)

V. The Limited Liability Feature

Perhaps the most significant change FRULPA has made comes in the area of a limited partner’s liability to third parties.\(^4\) Under the new law, limited partners are given two levels of protection. First, the limited partners are given a codified list of activities they may engage in without being held to have so significantly participated in the control of the business that they acquire the liability of a general partner.\(^8\) Secondly, limited partners participating in the control of the business are liable only to those persons transacting business with the limited partnership who reasonably believed, based on the limited partner’s conduct, that the limited partner was a general partner.\(^9\) These changes are consistent with the broad purposes of the original Uniform Limited Partnership Act, which was “not to assist creditors, but to enable persons to invest their money in partnerships and to share in profits without being liable for more than the amount of money they contributed.”\(^9\)

To fully appreciate the significance of these changes, one must be reminded of the problems inherent in the prior statutes. For example, section 620.07 of Florida’s prior limited partnership statute provided 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 control of the business . . . .”\(^8\)

One does not have to be very familiar with partnership law to recognize that this section is fairly ambiguous. For example, just what does “taking part in the control” of the partnership business mean? Second, what are the rights and powers that a limited partner may safely exercise under this section?

The case law on the subject was equally confusing and did not provide such guidance. Most cases held that a limited partner may not be involved in the everyday business affairs of the partnership, yet others permitted the limited partners some input into the everyday affairs.\(^8\)

FRULPA has gone a long way towards eliminating these ambiguities by providing a “laundry list” of safe-harbor activities that a limited partner may engage in without being held to have so significantly participated in the control of the partnership business that he may be held liable as a general partner. Specifically, section 620.129 of the Florida Statutes provides that a limited partner may now become a contractor for or an agent or employee of the limited partnership or of a general partner, or an officer, director, or shareholder of a general partner that is a corporation. Additionally, a limited partner may now consult with or advise a general partner with respect to any matter, may now act as surety, guarantor or endorser for the limited partnership, or may assume any number of the specific obligations of the limited partnership.\(^8\) The limited partner may also take any action required or permitted by law to bring a derivative action and may request, attend, participate in, or serve on a committee of the limited partnership or of the limited partners.\(^1\)

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56. Id. § 620.129(1).
59. Compare Dwinell’s Cent. Neon v. Cosmopolitan Chinkook Hotel, 21 Wash. App. 929, 587 P.2d 191 (1978) (In determining whether a limited partner is liable as a general partner, the key question is the “control” that the limited partner has in the day-to-day function and the operations of the business) with Well v. Diversified Properties, 319 F. Supp. 779 (D.D.C. 1970) (limited partners may offer advice and suggestion to the general partner about the partnership’s everyday affairs).
61. Id.
2. The sale, exchange, lease, mortgage, assignment, or other transfer or granting of a security interest in any of the assets of the limited partnership.

3. The incurrence, renewal, refinancing, payment or other discharge of indebtedness by the limited partnership other than in the ordinary course of its business.

4. A change in the nature of the business.

5. The admission, removal or retention of a general partner or of a limited partner.

6. An amendment to the partnership agreement or certificate of limited partnership.

7. Any other matter which the partnership agreement states in writing is subject to the approval or disapproval of limited partners.

Arguably, all of these rights and powers were present under the former uniform statutes, but uncertainty and inconsistent judicial determinations of such rights necessitated the creation of a codified list. Fortunately, the drafters of the uniform act recognized that they could not possibly delineate every conceivable action that a limited partner may wish to undertake and accordingly left an open-ended provision where the partnership agreement itself may define such rights.

Another question left unanswered by the original Act concerned who may recover from a limited partner being held liable as a general partner. Many courts looked to the Official Comments to answer this question:

62. Id.
63. For example, in Delaney v. Fidelity Lease, Ltd., 526 S.W.2d 543 (Tex. 1975), the limited partners were held liable as general partners because they were directors of a corporation which was the sole general partner. In Frigidaire Sales Corp. v. Union Properties, Inc., 562 P.2d 244 (Wash. 1977), the opposite result was reached. There, the Supreme Court of Washington held that the two limited partners who had taken part in the control of the partnership business by virtue of being directors, officers and shareholders of a corporation which was the sole general partner could not be held personally liable for the limited partnership’s breach of contract. See Note, Partnership: Liability of a Limited Partner Who Is an Officer, Director, and Shareholder of a Corporate Sole General Partner, 31 Okla. L. Rev. 997 (1978).

64. Fla. Stat. § 620.129 (Supp. 1986), provides: "The enumeration in subsection (2) does not mean that the possession or exercise by a limited partner of any power other than a power enumerated in that subsection constitutes participation by him in the business of the limited partnership."


FRULPA is consistent with this argument and has resolved the ambiguity in the prior act by formally adopting a reliance test for limited partner liability. Under FRULPA, a limited partner who participates in the control of the partnership business is liable only to those persons transacting business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner. However, there is one exception to this test: a limited partner who knowingly permits his name to be used in the name of the limited partnership may become liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

Given the two levels of investor protection provided by FRULPA, it is hard to envision a situation where a limited partner will ever be held liable to a contract creditor short of the limited partner holding himself out to be a general partner. But what about a tort creditor? Would a tort creditor injured by the actions of those in charge of a limited partnership be subject to the same reliance test applied to general creditors? Unfortunately, this question is left unanswered by the latest Uniform Act and reflects the poor consideration given this area by the Uniform Law Commissioners.

VI. Voting Rights

Related to the limited partner’s right to be involved in some aspects of the partnership’s business is the limited partner’s right to vote. Under FRULPA, the partnership agreement may give limited partners

66. UNIF. LIMITED PARTNERSHIP ACT (1916), 6 U.L.A. 564 (1916), Official Comment. Indeed, in Outlet Co. v. Wade, 377 So. 2d 722 (Fla. 5th Dist. Ct. App. 1979), the court fashioned its own reliance test and held that although the liability of the limited partnership to the plaintiff had been established, the limited partner would not be held liable as a general partner where there was no evidence that the plaintiff had relied on the individual credit of certain individuals.

68. Id. § 620.129(4).
2. The sale, exchange, lease, mortgage, assignment, or other transfer or granting of a security interest in any of the assets of the limited partnership.

3. The incurrence, renewal, refinancing, payment or other discharge of indebtedness by the limited partnership other than in the ordinary course of its business.

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64. Fla. Stat. § 620.129 (Supp. 1986), provides: “The enumeration in subsection (2) does not mean that the possession or exercise by a limited partner of any power other than a power enumerated in that subsection constitutes participation by him in the business of the limited partnership.”


No public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business; provided creditors have no reason to believe at the time their credits were extended that such person was so bound.

FRULPA is consistent with this argument and has resolved the ambiguity in the prior act by formally adopting a reliance test for limited partner liability. Under FRULPA, a limited partner who participates in the control of the partnership business is liable only to those persons transacting business with the limited partnership reasonably believing, based upon the limited partner’s conduct, that the limited partner is a general partner. However, there is one exception to this test: a limited partner who knowingly permits his name to be used in the name of the limited partnership may become liable to creditors who extend credit to the limited partnership without actual knowledge that the limited partner is not a general partner.

Given the two levels of investor protection provided by FRULPA, it is hard to envision a situation where a limited partner will ever be held liable to a contract creditor short of the limited partner holding himself out to be a general partner. But what about a tort creditor? Would a tort creditor injured by the actions of those in charge of a limited partnership be subject to the same reliance test applied to general creditors? Unfortunately, this question is left unanswered by the latest Uniform Act and reflects the poor consideration given this area by the Uniform Law Commissioners.

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68. Id. § 620.129(4).
the right to vote separately or together with the general partners on any matter.69 Similarly, classes or groups of limited partners and general partners may also be created and their relative rights and duties as opposed to other groups or future groups of partners may be defined in the partnership agreement.70 These rights are analogous to the ability of a corporation to issue varying classes of stock with different degrees of voting rights.

Partnership agreements granting the right to vote may also set forth provisions relating to the notice of the time, place or purpose of any meeting at which a matter is to be voted on, waiver of such notice, the establishment of a record date, quorum requirements, voting in person or by proxy or by any other matter relating to the right to vote.71 This language was adopted from Delaware's limited partnership act and is generally felt to be an improvement over the language of the Uniform Act.72

Giving the general and limited partners the right to vote has significantly improved the flexibility of the limited partnership. For instance, under the prior law, unanimous consent of all partners was necessary to add new general or limited partners.73 FRULPA has changed this requirement by allowing provisions in the partnership agreement to provide for less than unanimous consent.74 Only when the partnership agreement fails to cover such matters would unanimous consent be necessary, thus insuring that the partnership will not be held up over such relatively simple matters.75

VII. Contributions

Under the provisions of Florida's limited partnership act, a limited partner's contribution was restricted to cash or property.76 FRULPA has broadened the scope of permissible contributions and has eased possible financing problems by allowing contributions in the form of services or promises to contribute cash, property, or services in the future.77 The primary beneficiaries of this provision are likely to be professionals, such as lawyers, who will agree to perform services in exchange for a partnership interest. It should be realized, though, that under the Treasury's rules and regulations, the transfer of a partnership interest in exchange for the contributions of services is a taxable event.78

To enforce the provision of this section, FRULPA allows specific penalties against a defaulting partner to be set forth in the partnership agreement.79 Such penalties may include, but are not limited to, reducing the defaulting partner's proportionate interest in the limited partnership, subordinating his partnership interest to that of non-defaulting partners, or forcing a sale or forfeiture of his partnership interest.80 But in order for such promises to be enforceable, the promises to contribute to the limited partnership must be set forth in writing and signed by the contributing partner.81

Additionally, a limited partner promising to contribute property or services is obligated, at the option of the limited partnership, to contribute cash equal to the value of that portion of the contribution which he has not made.82 The value of such contribution will be determined in accordance with the partnership records.83 This promise to contribute cannot be compromised by consent of all the partners or by a contrary provision of the partnership agreement.84

If a partner receives the return of any part of his contribution without violating the partnership agreement or FRULPA, he will be liable to the limited partnership for the amount of the returned contribution in the event it becomes necessary to discharge the limited partnership's liabilities to creditors who extended credit to the limited partnership while the partnership held the contribution.85 This potential liability extends for a period of one year after the partner receives a

69. Id. § 620.133.
70. Id.
71. Id.
74. Id. §§ 620.123, 620.128 (Supp. 1986).
75. Id.
76. Id. § 620.04 (1985).
77. Id. § 620.133 (Supp. 1986).
78. Under I.R.C. § 61 (1986), a partner who receives a partnership interest in exchange for services generally realizes ordinary income and the timing of such receipt is governed by I.R.C. § 83.
80. Id. § 620.136(4) (Supp. 1986).
81. Id. § 620.136(1).
82. Id. § 620.136(2).
83. As required to be kept pursuant to Fla. Stat. § 620.106 (Supp. 1986).
85. Id.
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To enforce the provision of this section, FRULPA allows specific penalties against a defaulting partner to be set forth in the partnership agreement. Such penalties may include, but are not limited to, reducing the defaulting partner’s proportionate interest in the limited partnership, subordinating his partnership interest to that of non-defaulting partners, or forcing a sale or forfeiture of his partnership interest. But in order for such promises to be enforceable, the promises to contribute to the limited partnership must be set forth in writing and signed by the contributing partner.

Additionally, a limited partner promising to contribute property or services is obligated, at the option of the limited partnership, to contribute cash equal to the value of that portion of the contribution which he has not made. The value of such contribution will be determined in accordance with the partnership records. This promise to contribute can only be compromised by consent of all the partners or by a contrary provision of the partnership agreement.

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81. Id. § 620.136(1).
82. Id. § 620.136(2).
83. As required to be kept pursuant to FLA. STAT. § 620.106 (Supp. 1986).
84. FLA. STAT. § 620.136(3) (Supp. 1986).
85. Id.

Published by NSUWorks, 1987
VIII. Rights to Profits, Losses, and Distributions

FRULPA provides that the allocation of profits and losses may be determined in accordance with the partnership agreement. If the partner had instead received a return of his contribution in violation of the partnership agreement of FRULPA, he would then be liable to the limited partnership for a period of six years for the amount of the contribution wrongly returned.

Distributions of cash and other assets of a limited partnership must also be allocated among the partners in accordance with the partnership agreement. FRULPA then makes it clear that once a partner is entitled to a distribution, he becomes entitled to all the remedies available to a creditor of the limited partnership. The Official Comment to the Revised Uniform Act states:

(1) to the extent partners are also creditors, other than in respect of their interests in the partnership, they share with other creditors,
(2) once the partnership's obligation to make a distribution ac-

95. Id.
96. Id. § 620.152.
97. Id.
98. § 620.152 provides:

Unless otherwise provided in the partnership agreement: (a) A partnership interest is assignable in whole or in part; . . . (c) An assignment entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocations of income, gain, loss, deduction or credit or similar item to which the assignor was entitled, to the extent assigned. . . .

This section is derived from REVISED UNIF. LIMITED PARTNERSHIP ACT § 702, 6 U.L.A. 320 (1985 & Supp. 1987), and DEL. CODE ANN. tit. 6 § 17-702 (1985 Interim Supp.).
VIII. Rights to Profits, Losses, and Distributions

FRULPA provides that the allocation of profits and losses may be determined in accordance with the partnership agreement.66 This feature is quite important in that it allows the limited partnership a great deal of flexibility for financing purposes. For instance, a high-bracket taxpayer may have invested in the limited partnership solely for its tax-shelter benefits. It is unlikely that he will want to participate in the allocations of any profits, but will be concerned mainly with his share of losses and deductions. In another situation, the limited partners may be concerned with the riskiness of a particular project. In such cases, they will want to participate in the upside potential of the venture while wanting to limit their downside risks. Allowing the partnership agreement to allocate profits and losses according to the needs of the particular investor aids considerably the ability of the partnership to raise needed capital. In the event the partnership agreement fails to provide for the allocation of profits and losses, FRULPA provides that the profits and losses will be allocated on the basis of the value of the contributions made by each partner.68

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(1) to the extent partners are also creditors, other than in respect of their interests in the partnership, they share with other creditors;
(2) once the partnership's obligation to make a distribution arises, it must be paid before any other distributions of an "equity" nature are made, and (3) general and limited partners rank on the same level except as otherwise provided in the partnership agreement.69

This provision is significant in that it protects the limited partner from the equity risks associated with the organization.69

Section 620.147, Florida Statutes, provides a second limitation on a partner's right to distributions. It states that a limited partner may not receive a distribution from a limited partnership when the liabilities of the limited partnership exceed the fair market value of the partnership assets.67 In making this determination, the partnership's liabilities to the partners on account of their partnership interests are not included.68

IX. Assignment of Partnership Interest

FRULPA provides that a partnership interest is assignable in whole or in part.67 An assignment of a partnership interest does not dissolve the limited partnership or entitle the assignee to become a partner unless provided otherwise in the partnership agreement.67

Since there was some question under the prior law as to whether limitations could be placed on the right of assignment, FRULPA has specifically permitted such limitations as provided in the partnership agreement.67 An example of such a restriction would be an option to

92. REVISED UNIFORM LIMITED PARTNERSHIP ACT, 6 U.L.A. 330 (1985 & Supp. 1987), Official Comment to § 804. 93. REVISED UNIFORM LIMITED PARTNERSHIP ACT, 6 U.L.A. 317 (1985 & Supp. 1987), Official Comment to § 406. 94. Fla. Stat. § 620.147 (Supp. 1986). 95. Id. 96. Id. § 620.152. 97. Id. 98. § 620.152 provides: Unless otherwise provided in the partnership agreement: (a) A partnership interest is assignable in whole or in part, . . . (b) An assignment entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocations of income, gain, loss, deduction or credit or similar item to which the assignor was entitled, to the extent assigned . . .

repurchase or right of first refusal given to the other partners. Another example would be a restriction on the right of an assignee to share in partnership profits, losses, distributions or other allocations of income, gain, loss, deduction or credit. The partnership agreement may also establish the qualifications for admission into the partnership or the procedure whereby an assignee gains admission. This section was not intended, though, to change the usual rules regarding restraints on the alienation of personal property, but rather to allow a limited partnership to develop its own procedures for assigning partnership interests.\(^99\)

Under FRULPA, the assignment of a general partner’s interest is treated as an event of withdrawal.\(^100\) Such an event may lead to a dissolution of the partnership unless at the time of withdrawal there is at least one other general partner and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining partners.\(^101\) FRULPA has eliminated the requirement that all limited partners consent to the admission of additional general partners in favor of allowing the partnership agreement to prescribe the percentage of partners necessary to approve the admission of a new general partner.\(^102\) This will give the partnership a great deal more flexibility and should result in business operations running more smoothly.

Section 620.154 of the Florida Statutes explains the right of an assignee to become a limited partner. Under this section, an assignee of a partnership interest, including an assignee of a general partner, does not become a limited partner unless the assignee gives the assignee that right pursuant to the partnership agreement or until all other partners consent. This restriction on the assignment of a partnership interest has a significant impact on the classification of partnerships for Federal income tax purposes.\(^103\)

An assignee who eventually becomes a limited partner has, to the extent assigned, the same rights, powers, and liabilities of any other limited partner.\(^104\) He is even subject to liability for the obligations of his assignor to make or to return any contributions. However, the assignee is not obligated for liabilities unknown to him at the time he received his interest which could not be ascertained from the partnership agreement.\(^105\)

X. Withdrawal and Dissolution

Section 620.157 of FRULPA sets out all the events leading to dissolution of the limited partnership.\(^106\) It provides that the partnership is dissolved, and its affairs must be wound up on the occurrence of:

1. the time specified in the certificate of limited partnership;
2. the happening of an event specified in writing in the partnership agreement;
3. all the partners giving their written consent;
4. the withdrawal of a general partner;
5. the entry of a decree of judicial dissolution.\(^107\)

An exception is made to this section where the withdrawal of a general partner does not lead to dissolution of the partnership if there is at least one other general partner remaining and the written provisions of the partnership agreement permit the business of the limited partnership to be carried on by the remaining general partner.\(^108\) The harshness of this section is further softened by the addition of a ninety day grace period in which all the partners may agree in writing to continue the business of the limited partnership and to the appointment of a new general partner if necessary or desired.\(^109\)

Under the prior law, the death, retirement, or insanity of a general partner called for a dissolution of the partnership unless the remaining partners consented to a continuance of the partnership or that right was given to the remaining general partners under the certificate.\(^110\) FRULPA essentially retains this feature but now defines the death, retirement, or insanity of a general partner as an event of withdrawal.\(^111\) Other events of withdrawal include the voluntary withdrawal of a general partner, the assignment of a general partner’s interest, the removal

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101. Id. § 620.157.
102. Id. § 620.123.
103. See infra notes 159-62.
105. Id.
106. Id. § 620.157.
107. Id.
108. Id. § 620.157(4).
109. Id.
110. Id. § 620.20 (1985).
111. Fla. Stat. § 620.124 (Supp. 1986). Although retirement is not specifically mentioned, such an action would be considered a voluntary withdrawal which is also subject to this section.
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An assignee who eventually becomes a limited partner has, to the extent assigned, the same rights, powers, and liabilities of any other limited partner. He is even subject to liability for the obligations of his assignor to make or to return any contributions. However, the assignee is not obligated for liabilities unknown to him at the time he received his interest which could not be ascertained from the partnership agreement.

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Under the prior law, the death, retirement, or insolvency of a general partner, or discharge of any partner, or settlement of an assignee of a general partner as an event of withdrawal. Other events of withdrawal include the voluntary withdrawal of a general partner, the assignment of a general partner’s interest, the removal

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101. Id. § 620.157.
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110. Id. § 620.20 (1985).
111. Fla. Stat. § 620.124 (Supp. 1986). Although retirement is not specifically mentioned, such an action would be considered a voluntary withdrawal which is also subject to this section.
of a general partner pursuant to the partnership agreement, the dissolution of the partnership or corporation that is a general partner, or upon the termination of the trust for general partners who are acting via their trustee capacity.\textsuperscript{118}

Similarly, the assignment of a general partner's interest for the benefit of creditors, the bankruptcy or insolvency of the general partner, or the appointment of a trustee, receiver, or liquidator for all or substantially all of a general partner's property are also treated as events of withdrawal.\textsuperscript{119} However, these latter events do not necessarily have to result in the removal of a general partner if the partners agree otherwise.\textsuperscript{119}

FRULPA has also addressed the right of a general or limited partner to withdraw voluntarily. Under section 620.142, a general partner may withdraw at any time by simply giving the other partners written notice of his intention to do so. However, if the withdrawal violates the partnership agreement, the limited partnership may recover damages from the withdrawing general partner or may offset the damages against any distributions to which the withdrawing general partner was entitled.\textsuperscript{114} Limited partners may not withdraw from the limited partnership unless permitted under the partnership agreement or upon six months' prior notice to the general partners.\textsuperscript{114}

FRULPA has also made provisions relating to judicial dissolution of limited partnerships and provides that the circuit court may order the dissolution of the limited partnership upon the application of any partner, if it determines that it is not reasonably practicable to carry on the business in conformity with the partnership agreement.\textsuperscript{117}

Once a limited partnership is dissolved judicially or otherwise, it is the responsibility of the general partners to wind up the affairs of the limited partnership.\textsuperscript{118} Accordingly, they may prosecute and defend

\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. §§ 620.124(4) and 620.124(5). The Official Comment to § 402 of the 1976 Act states: "unless the limited partners agree otherwise, they ought to have the power to rid themselves of a general partner who is in such dire financial straits that he is the subject of proceedings under the National Bankruptcy Act or a similar provision of law."
\textsuperscript{115} F.LA. STAT. § 620.142 (Supp. 1986).
\textsuperscript{116} Id. § 620.143.
\textsuperscript{117} Id. § 620.158.
\textsuperscript{118} Id. § 620.159. Those general partners who have wrongfully dissolved the limited partnership are precluded from winding up the partnership's affairs.

\textsuperscript{119} Id. §§ 620.159(2).
\textsuperscript{120} Id. § 620.159(1).
\textsuperscript{121} Id. § 620.162.
\textsuperscript{122} REVISED UNIF. LIMITED PARTNERSHIP ACT, 6 U.L.A. 330 (1985 & Supp. 1986). Official Comment to § 804. This changes somewhat the case law which held that upon the dissolution of a limited partnership and distribution of its assets, the rights of the general and limited partners are subordinate and inferior to the rights of creditors of the limited partnership. In Re Dutch Inn of Orlando, Ltd., 2 Bankr. 288 (1979).

suits on behalf of the partnership, may settle and close the partnership's business, may dispose of and convey the limited partnership's property and discharge any remaining liabilities, and may distribute any remaining assets to the partners.\textsuperscript{118} If a general partner is unavailable, the limited partners or a court-appointed liquidating trustee may wind up the partnership affairs.\textsuperscript{118}

Upon the dissolution of a limited partnership, the assets of the partnership must be distributed first to the creditors in satisfaction of the liabilities of the limited partnership, followed by distributions to partners and former partners in accordance with their rights to distribution, and finally to the partners in return of their contributions and in proportion to their share of distributions.\textsuperscript{118} This section also makes it clear that to the extent partners are also creditors, they share equally with other creditors, and establishes that once the partnership's obligation to make a distribution accrues, it must be paid before any other distributions of an "equity" nature are made.\textsuperscript{118} For purposes of this section, general and limited partners rank on the same level unless provided otherwise in the partnership agreement.\textsuperscript{118}

XI. Derivative Actions

For many years, the courts have recognized the right of a corporate shareholder to prosecute a claim on behalf of the corporation if the directors of the corporation are unwilling or unable to do so themselves. However, under the prior law it was unclear whether a limited partner in a partnership had such a right.

Several arguments could be advanced which may have led to the conclusion that they did not. First, it was unclear whether a limited partner's institution of a derivative action would have been considered
of a general partner pursuant to the partnership agreement, the dissolution of the partnership or corporation that is a general partner, or upon the termination of the trust for general partners who are acting via their trustee capacity.112

Similarly, the assignment of a general partner’s interest for the benefit of creditors, the bankruptcy or insolvency of the general partner, or the appointment of a trustee, receiver, or liquidator for all or substantially all of a general partner’s property are also treated as events of withdrawal.113 However, these latter events do not necessarily have to result in the removal of a general partner if the partners agree otherwise.114

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Once a limited partnership is dissolved judicially or otherwise, it is the responsibility of the general partners to wind up the affairs of the limited partnership.118 Accordingly, they may prosecute and defend suits on behalf of the partnership, may settle and close the partnership’s business, may dispose of and convey the limited partnership’s property and discharge any remaining liabilities, and may distribute any remaining assets to the partners.119 If a general partner is unavailable, the limited partners or a court-appointed liquidating trustee may wind up the partnership affairs.120

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participation in control of the partnership business.124 Secondly, since the essence of a derivative suit is the assertion by one person of the rights of another, there was a question under the prior law about whether a limited partner could bring a derivative action on behalf of an aggregation of investors instead of a partnership entity.125 If the court took an aggregate view of a partnership, it would be theoretically impossible for a limited partner to maintain a derivative action on behalf of the partnership because there would be no entity to represent. Fortunately, these questions need not be addressed today because the limited partners are specifically given the right to bring such actions under an important new provision of FRULPA.

A limited partner may bring an action in the right of a limited partnership to recover a judgment in its favor if general partners with authority to do so have refused to bring the action or if an effort to cause those general partners to bring the action is not likely to succeed.126

A limited partner bringing a derivative action is required to set forth in the complaint "the effort of the plaintiff to secure initiation of the action by a general partner or the reasons for not making the effort."127

Section 620.164 sets forth two major requirements of the limited partner before he brings a derivative suit:

In a derivative action: (1) The plaintiff must be a partner at the time of the transaction of which he complains; or (2) The plaintiff must be a partner at the time of bringing the action and his status as a partner must have 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.128

The reason for requiring that the plaintiff be a partner at the time of the suit is that the partner's standing to assert the partnership's cause of action is based on his or her indirect pecuniary interest in the cause of action.129 Without an interest in the action, the limited partner would have no standing. It is interesting to note, however, that this section only requires that the plaintiff be a partner at the time of bringing the action and does not expressly require that the plaintiff remain a partner throughout the litigation.

The justification for requiring the plaintiff to have been a partner at the time of the alleged wrong stems from the notion that a plaintiff who had no proprietary interest in the enterprise at the time of the alleged wrong has not suffered any injury.130 This requirement will also serve to discourage the "purchase and sale" of lawsuits.

There is one exception to the rule that a plaintiff be a partner at the time of the alleged wrong. This exception permits a limited partner to maintain an action if "this status as a partner . . . 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."131 Usuallly, devolution by operation of law means that the property passed to the new owner without any intentional or involuntary action of his own. For instance, the administrator of a limited partner's estate may bring a derivative action on behalf of the estate. Section 620.166 covers expenses in regard to the bringing of a derivative action. It provides:

If a derivative action is successful, in whole or in part, the court may award the plaintiff reasonable attorney's fees. If anything is so recovered by the plaintiff, the court shall make such award of plaintiff's expenses payable out of those proceeds and direct the plaintiff to remit to the limited partnership the remainder thereof and, if those proceeds are insufficient to reimburse plaintiff's reasonable expenses, the court may direct that any such award of plaintiff's expenses or a portion thereof be paid by the

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124. Id. For example, in Riviera Congress Associates v. Wyck, 25 A.D.2d 251, 286 N.Y.S.2d 834 (1966), the court held the limited partners who instituted a suit in the partnership name liable as general partners.

125. For example, in Carle v. Carle Tool Eng'g Co., 33 N.Y. Super. 466, 110 A.2d 568 (1955), the court held that the fact that a limited partnership may have a few characteristics similar to those of a corporation does not create a separate and distinct entity to the end that individuals constituting such limited partnerships have a right to sue the partnership.


128. Id. § 620.164.

129. Hacker, supra note 126, at 362.

130. Id. at 364.

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128. Id. § 620.164.

129. Heckler, supra note 126, at 362.

130. Id. at 364.

limited partnership. 132

It should be noted that any money judgment recovered in a derivative action is not the individual property of the plaintiff, but is to be remitted to the partnership. 133 Section 620.166 also makes it clear that the primary source for the payment of a successful plaintiff's expenses is this fund. This is because the cause of action asserted in the derivative action technically belongs to the limited partnership, and not the individual partners. It is also felt that because a meritorious derivative action is likely to benefit the partnership, it is only fair to award the plaintiff's reasonable expenses. 134

FRULPA departs from the uniform language when it allows the court to order the limited partnership to pay reasonable expenses beyond the amount recovered. 135 This change may have unintended results. By permitting the court to award expenses outside the "fund," this section may result in encouraging unnecessary suits, many of which may involve only miniscule amounts. The practical effect of this rule is that now limited partners may second-guess the general partners' decision not to proceed with a cause of action when they may have determined that it is not in the best business interests of the partnership to pursue such an action.

XII. Foreign Limited Partnerships

FRULPA clearly establishes that a limited partnership organized in another state and doing business in Florida will be recognized as a limited partnership in Florida upon registration. 136 The significance of this section is that it assures the limited partners of a foreign limited partnership that they will be afforded the limited liability protection of their state of origin. 137

132. Id. § 620.166.
133. Id. § 620.163.
134. Hecker, supra note 126, at 378.
136. Id. § 620.167.
137. Fla. Stat. § 620.167 provides in relevant part: "the laws of the state under which a foreign limited partnership is organized govern its organization and internal affairs and the liability of its limited partners." This may not have been the case under Florida's prior statutes. In Lavenhold, Kreutzer, Horwath and Horwath v. Insurance Tax Sheltered Real Estate, Ltd., 338 So. 2d 1082 (Fla. 3d Dist. Ct. App. 1976), the court determined that as a matter of public policy, any partnership having a resident partner in state ought to be liable to citizens of this state for actions out of partnership activities in state.

Before a limited partnership transacts business in this state, it must register with the Department of State and submit an application stating the name of the foreign limited partnership, the state and date of its formation, the name and address of the agent for service of process, the address of the record-keeping office or of its principal office, the name and address of the general partners, and a mailing address for the limited partnership. 138 An affidavit declaring the anticipated capital contributions of the limited partners allocated to doing business in this state must also accompany the application for registration and is subject to the same updating requirements as are domestic limited partnerships. 139

Just as the certificate of limited partnership has been streamlined for domestic limited partnerships, so too is the application for registration of a foreign limited partnership. Foreign limited partnerships are required to disclose the individual contributions of the limited partners, the limited partners' rights to distributions, the rights of assignment or addition of new partners, or the right of the remaining partners to continue the business upon the death, retirement, or insanity of a general partner as was the case under prior law. 140

Foreign limited partnerships are still required to file annual reports and may have their authority to transact business in this state revoked for failure to comply with this provision. 141 All delinquent fees plus a statutory fine must be paid before a limited partnership whose

138. Fla. Stat. § 620.169 (Supp. 1986). The Official Comment to the Uniform Act explains the purposes behind this section:

140. Id. § 620.42 (1985).
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138. Fla. Stat. § 620.169 (Supp. 1986). The Official Comment to the Uniform Act explains the purposes behind this section:

It was thought that requiring a full copy of the certificate of limited partnership and all amendments thereto to be filed in each state in which the partnership does business would impose an unreasonable burden on inter-state limited partnerships and that the information file was sufficient to tell interested persons where they could write to obtain copies of these basic documents.


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XIII. Tax Consequences of FRULPA

The classification of business organizations for federal income tax purposes is premised on different standards than classification for state law purposes.\textsuperscript{143} Under the Internal Revenue Code, a partnership is defined as:

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.\textsuperscript{144}

This definition of partnership is much broader than the definition of partnership under state law. It is in essence a residual category encompassing all business organizations which are not corporations, trusts, or estates.

Under the Internal Revenue Code, an “association” is defined as an organization whose characteristics require it to be classified for tax purposes as a corporation.\textsuperscript{145} The code then lists:

\begin{itemize}
  \item A number of major characteristics ordinarily found in a pure corporation which, taken together, distinguish it from other corporations.
  \item These are: (i) associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interests.\textsuperscript{146}
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The classification of an organization as an “association” is determined by taking into account the presence or absence of each of these corporate characteristics. If an organization is found to possess more corporate characteristics than non-corporate characteristics, it will be classified as an “association” for purposes of taxation.\textsuperscript{147} However, because associates and an objective to carry on the business and divide the gains therefrom are characteristics of all profit seeking ventures, the determination of whether an organization which has such characteristics is to be treated for tax purposes as a partnership or as an association depends on whether there exists (1) centralization of management, (2) continuity of life, (3) free transferability of interests, and (4) limited liability.\textsuperscript{148}

If two or more of these factors are present, the organization will be characterized as an “association” and will not recognize the “flow-through” benefits of a partnership.

“An organization has continuity of life if the death, insanity, bankruptcy, retirement, resignation, or expulsion of any member will not cause a dissolution of the organization.”\textsuperscript{149} But, rather than inquiring into whether a particular partnership possesses continuity of life, the Treasury has developed a “short-hand test” whereby a limited partnership subject to a statute corresponding to either the original Uniform Limited Partnership Act or the 1976 version is automatically deemed to lack continuity of life.\textsuperscript{150}

The Treasury has yet to determine whether limited partnerships subject to the 1985 Uniform Act (e.g. FRULPA) possess continuity of life. The relevant provisions of FRULPA can be found in section 620.157. There, the death, insanity, bankruptcy, retirement, resignation, or expulsion of a general partner dissolves the limited partnership unless the remaining partners agree to continue the partnership business.\textsuperscript{151} However, FRULPA now provides a ninety-day grace period after an event of withdrawal before a limited partnership has to dissolve, thereby raising the question of whether the “short-hand test” is still applicable.\textsuperscript{152} It is doubtful that this provision will be found to create continuity of life, though, because the technical dissolution will still take place.

\textsuperscript{142} Fla. Stat. § 620.178(4) (Supp. 1986).
\textsuperscript{143} For an in-depth analysis of the tax classifications of partnerships, see Wein, The Existence of State and Tax Partnerships: A Primer, 11 Fla. St. U.L. Rev. 1 (1983); Sexton & Osteen, Classification as a Partnership or an Association Taxable as a Corporation, 24 Tul. Tax Inst. 95 (1975).
\textsuperscript{144} I.R.C. § 761(a) (1986).
\textsuperscript{145} Treas. Reg. § 301.7701-2(a)(1) (as amended in 1983).
\textsuperscript{146} Id.

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152. Id.
The Treasury Regulations also provide that "[a]n organization has centralized management if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary" for the running of the business.152 "Centralized management means a concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by [the] members of such organization."153 However, the Treasury has determined that limited partnerships subject to a statute corresponding to the Uniform Limited Partnership Act (1916 and 1976 versions) generally do not have centralized management, but centralized management may yet be found to exist if substantially all the interests in the partnership are owned by the limited partners.154 Again, the Treasury has not passed on the validity of the 1985 Act.

An organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization. Personal liability means that a creditor of an organization may seek personal satisfaction from a member of the organization to the extent that the assets of such organization are insufficient to satisfy the creditor's claim.155

Under the prior uniform acts, personal liability exists with respect to each general partner, except when the general partner has no substantial assets which could be reached by a creditor or the organization and when he is merely a "dummy" acting as the agent of the limited partners.156 If a corporation is a general partner, personal liability exists with respect to such a general partner when the corporation has substantial assets which may be reached by a creditor of the limited partnership.157

An organization has the corporate characteristic of free transferability of interests if all of the members of the organization, or those members owning substantially all of the interests in the organization.

154. Id. § 301.7701-2(c)(3).  
157. See Id. §§ 301.7701-2(d)(1), 301.7701-2(d)(2).  
158. Id. § 301.7701-2(d)(2).

have the power, without the consent of the other members, to substitute for themselves a person who is not a member of the organization.159 In order for this power of substitution to exist, the member must be able, without the consent of the other partners, to confer upon his substitute all the attributes of his interest in the organization.160

Although FRULPA would seem to provide for the free transferability of partnership interests, the fact that the transfer of a general partner's interest technically dissolves the partnership indicates that this right is somewhat restricted.161 This seems consistent with the Treasury Regulations' classification of partnership. Indeed, the regulations provide that there is "no power of substitution and no free transferability of interest if, under local law a transfer of a member's interest results in the dissolution of the old organization and the formation of a new [one]."162

XIV. Conclusion

FRULPA has significantly reduced the administrative burden associated with the upkeep of a limited partnership. It has also returned a significant amount of control to the partnership agreement and has made several improvements that will enhance the flexibility and survivability of the limited partnership under certain conditions. The addition of numerous "safe-harbors" throughout FRULPA will aid in protecting limited partners from liability and will also give them a great deal more freedom to participate in partnership affairs. These changes, coupled with possible changes in the tax code reducing individual tax rates below those of corporations, will make limited partnerships in Florida a much more attractive form of business organization.

159. Id. § 301.7701-2(c)(1).  
160. Id.  
The Treasury Regulations also provide that "[a]n organization has centralized management if any person (or any group of persons which does not include all the members) has continuing exclusive authority to make the management decisions necessary" for the running of the business. 153 "Centralized management means a concentration of continuing exclusive authority to make independent business decisions on behalf of the organization which do not require ratification by [the] members of such organization." 154 However, the Treasury has determined that limited partnerships subject to a statute corresponding to the Uniform Limited Partnership Act (1916 and 1976 versions) generally do not have centralized management, but centralized management may yet be found to exist if substantially all the interests in the partnership are owned by the limited partners. 155 Again, the Treasury has not passed on the validity of the 1985 Act.

An organization has the corporate characteristic of limited liability if under local law there is no member who is personally liable for the debts of or claims against the organization. Personal liability means that a creditor of an organization may seek personal satisfaction from a member of the organization to the extent that the assets of such organization are insufficient to satisfy the creditor's claim. 156

Under the prior uniform acts, personal liability exists with respect to each general partner, except when the general partner has no substantial assets which could be reached by a creditor or the organization and when he is merely a "dummy" acting as the agent of the limited partners. 157 If a corporation is a general partner, personal liability exists with respect to such a general partner when the corporation has substantial assets which may be reached by a creditor of the limited partnership. 158

An organization has the corporate characteristic of free transferability of interests if all of the members of the organization, or those members owning substantially all of the interests in the organization, have the power, without the consent of the other members, to substitute for themselves a person who is not a member of the organization. 159 In order for this power of substitution to exist, the member must be able, without the consent of the other partners, to confer upon his substitute all the attributes of his interest in the organization. 160 Although FRULPA would seem to provide for the free transferability of partnership interests, the fact that the transfer of a general partner's interest technically dissolves the partnership indicates that this right is somewhat restricted. 161 This seems consistent with the Treasury Regulations' classification of partnership. Indeed, the regulations provide that there is "no power of substitution and no free transferability of interest if, under local law a transfer of a member's interest results in the dissolution of the old organization and the formation of a new [one]." 162

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154. Id. § 301.7701-2(c)(3).
156. See 1977-2 C.B. 2, is helpful for understanding this issue.
158. Id. § 301.7701-2(d)(2).
159. Id. § 301.7701-2(c)(1).
160. Id.