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Corporate Natural Law: The Dominance of Justice in a Codified World

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WILL THE REVISED UNIFORM PARTNERSHIP ACT (1994) EVER BE UNIFORMLY ADOPTED?

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In August 1992, with great fanfare, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved the Revised Uniform Partnership Act (1992). Now, five years and several revisions later, only eleven states have approved the act, known colloquially as "RUPA," and then usually with significant modifications.[1] At present, it appears likely that the substantial uniformity in partnership law which existed for almost eighty years will be a thing of the past and that many, if not most, states will refuse to adopt RUPA at all. This essay examines the reasons for RUPA's lukewarm acceptance and discusses the lessons that might be learned from the process in the hope that future uniform lawmaking efforts will be more likely to achieve their intended goal of uniformity.

I. BACKGROUND

The original version of the Uniform Partnership Act (UPA) was approved by the NCCUSL in 1914.[2] It was the joint result of Dean James Barr Ames and, following his death, of William Draper Lewis.[3] It is one of the most successful pieces of uniform legislation ever drafted, having been adopted in forty-nine states (all except Louisiana).[4] Furthermore, very few amendments were made by the states during the adoption process so that it is almost completely uniform in content.[5] It is a concise, highly conceptual act which left many details to be fleshed out by the courts. This may be one reason for its longevity since it lends itself to evolutionary change through the process of interpretation by the courts. Thus, over eighty years of case law has developed under UPA which has aided in clarification of the ambiguities. Further, due to the

1. The new act was referred to colloquially as "RUPA" throughout the drafting process, but that term is not part of the title of the new act as officially approved by NCCUSL. For convenience, the term "RUPA" will be used in this essay to distinguish the new act from the original 1914 Uniform Partnership Act. The 1997 Cumulative Annual Pocket Part to 6 Uniform Laws Annotated 1 (1995) states that RUPA has been adopted in the following states: Alabama (1996), Arizona (1996), California (1996), Connecticut (effective 1997), Florida (1996), Montana (1993), North Dakota (1996), Texas (1993), Virginia (1996), West Virginia (1995), and Wyoming (1994). Montana, Texas, and Wyoming adopted an earlier version of RUPA. Also, Colorado adopted RUPA in 1997, effective 1998. J. DENNIS HYNES, AGENCY, PARTNERSHIP AND THE LLC: SELECTED STATUTES AND FORM AGREEMENT 31 (1997).

2. *See* UPA Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organization, *Report: Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW. 121, 122 (1987) [hereinafter Revision Subcommittee Report].

3. William D. Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617 (1915).

4. *See* Uniform Partnership Act, 6 U.L.A. 1-2 (master ed. 1985 & Supp. 1991) (table) (listing the adopting states).

5. J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727, 728 (1991).

uniformity among the states, courts readily look to authority in other jurisdictions as an aid in interpretation when authority in the forum jurisdiction is lacking. The fact that the act has survived intact for such a long period of time, despite major changes in the taxation laws and in the popularity of various forms of business entities, testifies to its basic soundness.

Nonetheless, dissatisfaction with various provisions gradually grew to the point where an ABA subcommittee created to study the act finally concluded in a 1986 report that UPA should be revised.[6] The Subcommittee recommended a complete revision of UPA as opposed to relatively minor "patching up" amendments.[7] In retrospect, this fateful decision had two important detrimental effects. First, it considerably lengthened the duration of the revision process. Second, it may have led to the revision of many areas that the clamor for change was not strong enough to justify, thus resulting in a more controversial act. The revision subcommittee report proceeded through UPA section by section, indicating areas where clarifying language or major modifications were needed.[8] Had the NCCUSL Drafting Committee followed this report as a model for its own revisions, the process almost certainly would have been expedited.

In 1987, the NCCUSL appointed a drafting committee chaired by Professor (later Dean) Donald Weidner of Florida State University Law School.[9] The American Bar Association appointed an advisory committee to assist the NCCUSL drafting committee.[10] Although the drafting committee included many experienced and talented individuals, the general expertise of those individuals was in the area of drafting uniform legislation rather than in the law of partnership.[11] The ABA advisory committee, however, included a number of practitioners with extensive experience in the partnership area.[12] This led to considerable differences between the two committees and almost certainly delayed and complicated the drafting process.[13] The project, which commenced in 1987, continued for five years and culminated in the approval of the

6. *See* Revision Subcommittee Report, *supra* note 2, at 122, 184.

7. *Id.* at 123.

8. *See id.* at 127-84.

9. ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED PARTNERSHIPS (CASES AND MATERIALS) 3 (5th ed. 1994).

10. *See id.*

11. *See id.*

12. For a description of the drafting process, see generally ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS AND THE REVISED UNIFORM PARTNERSHIP ACT 383-84 (1997).

13. *See* HAMILTON, *supra* note 9, at 3.

1992 version of RUPA.[14] Successive amended versions of RUPA caused the process to continue for two more years until finally concluding in 1994.

The first "final version" of the new statute known as the Uniform Partnership Act (1992) was approved by the NCCUSL in 1992.[15] However, the ABA committee had many objections to it, and the statute was plagued by a number of embarrassing drafting errors.[16] This led to the approval of a number of revisions including the "Uniform Partnership Act (1992) with 1993 Amendments," the "Uniform Partnership Act (1993)" and the "Uniform Partnership Act (1994)."[17] Finally, after a two-year period of stability, the 1996 amendments to the Uniform Partnership Act (1994) were adopted, adding to the statute provisions authorizing formation of "Limited Liability Partnerships."[18]

As of early 1997, it appears probable that the era of uniformity in the law of general partnerships is coming to a close. Texas adopted its own partnership statute in 1993 which includes some provisions similar to RUPA (1992) but has significant differences as well.[19] In 1993, Wyoming and Montana specifically enacted RUPA (1992).[20] Subsequently, Connecticut, Florida, and West Virginia enacted RUPA (1994) but incorporated several significant amendments during the process of adoption.[21] As of October 1997, sixteen states had adopted RUPA in one form or another.[22] While it is possible that RUPA (1994) eventually will be widely adopted, the controversy surrounding some of its substantive changes coupled with a general lack of compelling need for the adoption of the revised act makes its widespread acceptance appear unlikely. Before discussing the reasons why RUPA has not generated

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14. *See id.* at 3-4.

15. *See id.* To avoid confusion with the original 1914 version of the Uniform Partnership Act, the various versions of the Uniform Partnership Act adopted in 1992 through 1994 will be referred to collectively in this essay as the Revised Uniform Partnership Act or "RUPA," although that term was dropped from the title of the act following the conclusion of the drafting process. Footnote citations to the original Uniform Partnership Act are styled "U.P.A. (1969)." Footnote citations to the Revised Uniform Partnership Act are styled "U.P.A. (1994)."

16. *See* HAMILTON, *supra* note 9, at 4.

17. *See id.*

18. *See* Allan W. Vestal, *The Disclosure Obligations of Partners Inter Se Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559, 1561 n.13 (1995).

19. BROMBERG & RIBSTEIN, *supra* note 12, at xvii.

20. *Id.*

21. *Id.*

22. Based on an e-mail report from Professor Donald Weidner, Reporter for the RUPA Drafting Committee, Oct. 23, 1997.

more enthusiasm, this essay examines briefly the major innovations contained in RUPA.

II. SIGNIFICANT CHANGES MADE BY RUPA

A. *Characterization of Partnership as an Entity*

RUPA attempts to end the confusion over whether a partnership is best characterized as an aggregate of its individual members or as a distinct entity by expressly stating "[a] partnership is an entity distinct from its partners."[23] Several specific provisions implement this philosophy. The act provides that: (1) property is partnership property when acquired in the name of the partnership;[24] (2) a partnership can sue or be sued in its own name;[25] (3) a judgment against a partnership is not necessarily a judgment against an individual partner;[26] (4) a partnership creditor must first levy unsuccessfully against the partnership's assets before levying on the partner's individual property;[27] and (5) a partnership no longer automatically dissolves due to a change in its membership, but rather the existing partnership may be continued if the remaining partners elect to buy out the dissociating partner.[28]

It would be a mistake, however, to conclude that a partnership formed under RUPA is a legal entity to the same extent as a corporation because, even under RUPA, the partnership is still treated as an aggregate in several important respects. Most importantly, the partnership, unlike a corporation, is not a taxable entity for federal income tax purposes; indeed, the drafters were careful not to take any action which could jeopardize the pass-through tax status of the partnership and limited partnership under the Internal Revenue Code.[29] Also, as under UPA, partners are personally liable for debts of the partnership;[30] the only significant change under RUPA is that now a creditor must normally exhaust her remedies against the partnership prior to pursuing a partner's individual assets.[31] Furthermore, although RUPA provides that a partnership may be continued by the surviving partners following dissociation of a partner, this occurs only if the surviving partners elect

23. U.P.A. § 201 (1994).
24. U.P.A. § 204(a)(1).
25. U.P.A. § 307(a).
26. U.P.A. § 307(c).
27. U.P.A. § 307(d).
28. U.P.A. §§ 701-801.
29. Revision Subcommittee Report, *supra* note 2, at 124.
30. U.P.A. § 306.
31. U.P.A. § 307(d).

to do so; continuation is not automatic as with a corporation.[32] Thus, the much touted change to "entity status" in RUPA is, in many important respects, more apparent than real.

B. *Filing a Statement of Partnership Authority*

One of the most helpful innovations of RUPA is its provision for the voluntary filing by the partnership of a "statement of partnership authority" indicating the authority of its partners to bind the partnership.[33] This statement must include the names of partners authorized to execute an instrument transferring title to real property held in the name of the partnership, and it may state the authority, or limitations on the authority, of some or all of the partners to enter into transactions on behalf of the partnership.[34]

The statement of partnership authority provision constitutes one of the real innovations of RUPA since it provides for a greater degree of certainty than was previously possible in determining the authority of a partner to act on behalf of the partnership. The uncertainties resulting from the vague language of section 9 of the old UPA had led to much litigation on the authority issue.[35]

C. *Creditors' Rights to Execute Against Non-Partnership Assets*

RUPA makes significant modifications concerning a partner's liability for partnership debts. First, it provides that a partner's liability is joint and several for all partnership debts, whether contractual or non-

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32. U.P.A. §§ 701-801.

33. U.P.A. § 303.

34. U.P.A. § 303(a)(1)(iv)-(a)(2). Under RUPA, the effect of a filed statement differs depending on whether the transaction involves real property or other types of transactions. *See* U.P.A. § 303(d) & (e). With respect to real property, the effect of a properly executed and recorded statement is virtually conclusive against a third party dealing with the partnership unless the third party has actual knowledge that the partner executing the conveyance in fact has no authority to do so. U.P.A. § 303(d)(2). This is consistent with the general rule of real property conveyancing that charges third parties with knowledge of all documents of record in the chain of title. Transactions not involving real property are treated differently. U.P.A. § 303(d)(1).

35. *See* U.P.A. § 9 (1914), which provides in part:

> [t]he act of every partner . . . for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

contractual in nature.[36] In contrast, under section 15 of UPA, liability is joint and several for tort liabilities but joint for contractual claims.[37]

Another, more controversial, change is the requirement that, prior to levying against the assets of individual partners, the creditors must first levy against all partnership assets or convince the court that such a levy, if undertaken, would be unsuccessful.[38] This provision, while consistent with the shift in emphasis to the entity status in RUPA, has troubled many who argue that it may be inconsistent with the expectations of creditors[39] and possibly unconstitutional to the extent that RUPA is retroactively applied to pre-existing partnerships.

D. *Fiduciary Duties of Partners*

One of the most controversial areas of RUPA is its treatment of fiduciary duties. The key provision states that "[t]he only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)."[40] The specified duty of care provision simply restates the existing

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36. U.P.A. § 306(a) (1994).

37. U.P.A. § 15 (1969). The pitfalls of joint liability are well-recognized and may impose undesirable hurdles upon a deserving plaintiff, particularly in jurisdictions requiring that all partners must be located and served in order to obtain jurisdiction. Another potential pitfall is that, if all partners are not served in the original action, it may be held to be res judicata even as to other partners not parties to the original action.

38. U.P.A. § 307(d) (1994). The drafting committee's justification for this change is that it is consistent with the expectations of the partners that any obligations of the partnership first be satisfied out of partnership assets and that the partners, in effect, serve only as guarantors of partnership liabilities. Thus, requiring exhaustion of partnership assets before levying on individual assets of the partner may save an individual the expense of paying a creditor and then seeking indemnification from the partnership. *See* BROMBERG & RIBSTEIN, *supra* note 12, at 304. The drafting committee also has argued that this change is not inconsistent with the expectations of most creditors who typically look primarily at the partnership in deciding whether to extend credit to the partnership.

The above arguments notwithstanding, the change has been criticized strongly by some on the grounds that it will increase costs for tort creditors who previously could levy directly on the assets of an individual partner of known solvency and who have no opportunity to contract around the rule. *See* BROMBERG & RIBSTEIN, *supra*, at 304. With respect to contract creditors, to the extent that the rule is retroactive, it may defeat their expectations as well.

39. *See* Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45 (1993).

40. U.P.A. § 404(a) (1994). The issue of fiduciary duties of partners was dealt with concisely in U.P.A. § 21(1) (1969) which provides simply:

> 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.

common law in providing that partners are only liable for gross negligence or willful misconduct.[41] The duty of loyalty provisions are more explicit. They include a general duty not to appropriate benefits without copartner consent and specific duties to refrain from self dealing or competition with the partnership.[42] These duties are stated to be the *only* fiduciary duties owed by one partner to another.[43]

In addition, section 404(d) adds a new and undefined obligation of "good faith and fair dealing," and section 103(b)(5) provides that this duty may not be eliminated by the partnership agreement, although the partners may determine the standards by which performance of the obligation is to be met, as long as the standards are not "manifestly unreasonable."[44] These provisions have been among the most controversial of the changes in RUPA for reasons discussed later.

E. *Partnership Property*

One of RUPA's strongest points is its simplified treatment of partnership property.[45] Consistent with its adoption of the entity theory

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A large body of case law has grown up under this section dealing with almost every conceivable type of breach of fiduciary duty.

41. U.P.A. § 404(c) (1994).

42. U.P.A. § 404(b).

43. U.P.A. § 404(b) (specifically limiting the duty of loyalty).

44. U.P.A. § 103(b)(5). This provision has been criticized because it subjects partners to a new and undefined standard in addition to the duties of loyalty and care. These changes cast doubt upon decades of case law interpreting a partner's fiduciary duty.

Another criticism of the fiduciary duty provisions of RUPA is that they cannot be waived in all cases. Thus, RUPA may unduly deter an agent from exercising his discretion in a manner that may benefit all partners. While RUPA does permit waivers of "specific types or categories of activities" if not "manifestly unreasonable," this standard is so vague that it invites litigation and thus may deter many transactions of potential benefit to an individual partner or to the partnership.

RUPA § 404 has been criticized by others on the grounds that RUPA's exclusive list of fiduciary duties may preclude the courts from applying the traditional flexibility of equity in finding fiduciary duties in situations where a transaction does not seem to fall within the specific categories listed in § 404.

45. In contrast, § 24(1) of U.P.A. (1969) provides that every partner has "rights in specific partnership property." Section 25(1) elaborates by providing that a partner "is co-owner with his partners of specific partnership property holding as a tenant in partnership." Thus, the general statement of ownership contained in § 24 is substantially qualified by § 25, which severely limits the ordinary incidents of ownership in property by an individual partner and effectively lodges most of the normal incidents of ownership in the partnership itself. This circuitous treatment is necessary because UPA does not recognize the partnership as an entity, yet it recognizes that, for the partnership to function successfully as a going concern, it is necessary to lodge most of the normal incidents of ownership of property in the partnership rather than in the individual partners. This has occasionally caused judicial confusion concerning just what rights an individual partner has.

of partnership, RUPA explicitly recognizes that the partnership, not the partners, own the partnership property,[46] thus avoiding UPA's unnecessarily confusing concept of "tenancy in partnership."[47] Furthermore, the act clarifies that a partner's interest in the partnership is similar to a shareholder's stake in a corporation by providing that the only transferable interest of a partner in the partnership is the partner's interest in receiving distributions.[48] This should eliminate prior confusion concerning a partner's right to transfer his interest in specific partnership assets. There also are helpful provisions designed to provide more certainty as to whether property is or is not partnership property.[49]

F. *Dissociation, Dissolution and Winding Up*

One of the major innovations of RUPA is in its handling of the dissolution and winding up process. RUPA attempts to distinguish clearly between two possible tracks down which a partnership may travel when a partner withdraws or dies. One leads to the winding up and termination of the partnership and the other to continuation of the partnership and purchase of the departing partner's share.[50] Section 601 lists ten events which cause dissociation (the most common being the death, withdrawal or expulsion of a partner) and contains other rules that apply to all dissociations. Section 701 deals with cases in which the partner's dissociation results in a buyout by the remaining partners. Finally, section 801 deals with situations where the dissociation results in a dissolution and winding up.

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46. U.P.A. § 501 (1994). Section 402 of RUPA reinforces this by cutting partners off from particular partnership assets—even those which they have contributed—by providing that a partner has no right to receive a distribution in kind. U.P.A. § 402. Section 502 of RUPA makes it clear that a partner's interest in a partnership is akin to a share of stock by providing that "[t]he only transferable interest of a partner in the partnership is the partner's . . . right to receive distributions." U.P.A. § 502.

47. *See* discussion *supra* note 45.

48. U.P.A. § 502.

49. Property acquired in the name of the partnership is conclusively deemed to be partnership property. U.P.A. §§ 203 & 204(a)(1). This promotes reliance on record title by both the partnership and third parties. RUPA also contains helpful provisions designed to clarify when property not acquired in the name of the partnership should be considered to be property of the partnership. *See* U.P.A. § 204. Most importantly, it provides that property acquired with partnership funds is presumptively partnership property. U.P.A. § 204(a). If it is acquired otherwise, it is presumed to be property of the named partner, even though used for partnership purposes. U.P.A. § 204(d). Further, § 303, discussed *supra* in text accompanying notes 32-34, provides for the filing of a certificate of authority to clarify which partners may transfer partnership property, which should be of significant help in increasing certainty in dealings concerning partnership property.

50. *See generally* U.P.A. §§ 601-807 (concerning dissociation and winding up).

Despite the rather elaborate restructuring of the sections dealing with dissociation, dissolution and buyouts, the only major substantive change that RUPA makes in this area is its provision that a partnership does not automatically terminate on the death or withdrawal of a partner,[51] something that can be done under UPA by providing for it in a written partnership agreement.[52] A significant change that the drafters of RUPA debated, but eventually decided not to make, concerns the right of a partner to dissociate in violation of the partnership agreement.[53] UPA section 31(2) allows a partner to dissolve at any time, even if it violates the partnership agreement. RUPA retained this, a move that has been strongly criticized by some as contrary to the expectations of most partners.[54]

G. *Conversions and Mergers*

The last major change in RUPA is found in Article 9, which contains helpful provisions dealing with the conversion of a partnership into a limited partnership, or vice versa, and mergers of partnerships. These provisions are entirely new, having no counterparts in UPA and generally seem to be desirable innovations which should eliminate existing uncertainties in the law concerning the consequences of the change in form of a business entity.

III. SOME LESSONS FROM THE RUPA EXPERIENCE

RUPA's strongest points are its simplified and clarified treatment of the subject of partnership property and its clarification of the authority of partners to bind the partnership by providing for the filing of a statement of authority. The clarifications of the law of conversions and mergers are also helpful. On the other hand, RUPA's attempt to redefine the fiduciary duties of partners and its requirement that a judgment creditor exhaust his remedies against partnership assets before proceeding against a partner individually have proved quite controversial. Also,

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51. Ribstein, *supra* note 39, at 52.

52. *Id.*

53. *Id.*

54. It can be argued that a partner who voluntarily enters into a partnership for a certain time should not have the right to dissociate prior to the end of that term since it violates the expectations of the partners at the time the partnership was formed. Furthermore, although a damage remedy is theoretically available to the partnership, damages may in fact be difficult to prove. The RUPA drafting committee's justification for retaining the status quo was that, since a partnership exposes its participants to unlimited liability, a partner should be free to withdraw at any time since unforeseen circumstances may arise during the course of the operation of the partnership.

RUPA's new provisions dealing with dissociation and dissolution are needlessly complex and confusing. Further, the provision for retroactive application of RUPA is troubling.

While it may be premature to conclude that the entire RUPA saga was a failure, it appears unlikely at this time that the statute will achieve the near universal acceptance of its predecessor. What are the lessons to be learned from RUPA that might aid future uniform law revision efforts?

A. *Major Revisions of Uniform Legislation Should Not Occur Unless There Is Widespread Dissatisfaction with the Existing Law*

One of the fateful decisions made early in the revision process was to undertake a major bottoms-up revision of UPA. While there was an increasing number of minor areas of dissatisfaction with UPA, there did not seem to be any urgent areas requiring immediate attention as was true with the Uniform Limited Partnership Act when it was revised in the 1970s.[55] Thus, it may have been a foregone conclusion that any wholesale revision of UPA would be doomed since there was no urgent need for it, and thus it would be more difficult to persuade the states to abandon the status quo. Piecemeal amendments of or additions to the existing law would have been sufficient. Instead, RUPA is an entirely new statute which runs more than twice the length of UPA. Furthermore, many of the widely touted changes, such as the move to the entity theory of partnership and the revision of the dissolution and winding up provisions, are more cosmetic than substantive.[56]

B. *Controversial Changes in Existing Uniform Legislation Are Likely to Doom Its Chances for Widespread Adoption*

In some areas where RUPA did make significant changes, those changes were controversial. The best illustration of this is RUPA's attempt to define more specifically the fiduciary duties of a partner. While the existing language of UPA was vague, a significant body of case law had developed so that the general character of a partner's fiduciary duties could be determined with reasonable certainty in most

55. The changes made in that act contained much-needed clarifications in a number of key areas which resulted in the widespread adoption of the Revised Uniform Limited Partnership Act (1976) by 48 states. HYNES, *supra* note 1, at 157-59.

56. For a defense of the revisions made in RUPA, see generally Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1 (1993).

cases. However, RUPA's attempt to define the standard and to limit fiduciary duties to those defined in the act met with criticism on both sides. The "contractarians" charged that RUPA was too restrictive in its attempt to limit the partner's ability to contract out of the default rule of fiduciary duty.[57] On the other side, some charged that RUPA was too limiting because it prohibited the courts from finding the existence of fiduciary duties beyond those specifically defined by statute, and thus it was feared that various types of inequitable conduct might escape sanction if not specifically covered by the statute.[58] In areas such as this where no consensus exists on what the default rule should be, a uniform act which takes a strong stand on a controversial issue may have decreased chances of adoption or may be varied considerably from the uniform model by individual states during the adoption process.[59]

C. *Uniform Legislation Drafting Committees Must Include Individuals with a Strong Background in the Subject Matter*

The NCCUSL Drafting Committee, while including many talented individuals, did not include any persons from the academy who specialized in partnership law. Thus, however skilled the committee members were in drafting uniform legislation, they did not possess the depth of experience in the relevant area of law which might have expedited the drafting process. This is illustrated by the fact that no authors of major casebooks or treatises in the area of agency and partnership law served on the drafting committee although the ABA advisory committee did include practitioners with considerable experience in partnership law. The difference in the collective experiential background of the two committees may have contributed to the substantial differences of opinion between them, which led to the successive revisions of the statute after its original promulgation in the fall of 1992.

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57. *See, e.g.*, Ribstein, *supra* note 39, at 45.

58. *See* Vestal, *supra* note 18, at 1559; Claire M. Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993).

59. For a compromise position which attempts to take into account the merits of both the contractarian and the mandatory fiduciary duty points of view, see J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry Into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29 (1995).

D. *Uniform Legislation Should Be Widely Circulated for Comment Prior to Release*

Before the final version of any body of uniform legislation is released, it should be circulated for comment by all interested parties in order to build a base of support which will aid in its widespread adoption. Perhaps because the initial drafting process was more lengthy than anticipated and generated more controversy than was the norm, the drafting committee chose not to have a lengthy comment period prior to submitting the final draft to NCCUSL for approval in 1992. This is surprising since that practice often has been followed with other drafts of uniform legislation, and some commentators had urged that it be done with RUPA.[60] In retrospect, this decision was clearly a mistake since many of the changes which took place in the various "final" versions of RUPA released between 1992 and 1994 could have been avoided had there been a period of comment prior to adoption. Also, the controversial nature of some of RUPA's significant changes—particularly its treatment of fiduciary duties and its retroactivity—might have become more apparent prior to its adoption.

Uniform legislation needs to have a broad base of support in order to have a reasonable chance of surviving the rigors of the legislative process in the several states and achieving the goal of widespread adoption. The best way to achieve this is to ensure that all groups having an interest in the legislation perceive that their voices have been heard and their needs responded to during the drafting process. Perhaps many provisions of RUPA were simply too controversial for a lengthy comment period to have made any difference in the degree of support received. However, given the embarrassing events of 1992-1994, clearly a lengthy comment period at least could have allowed the drafting committee to consider the opposing views prior to its adoption, thus giving the act more credibility when finally released.

E. *A Uniform Act Released During a Time of Ferment Likely Does Not Respond to the Consensus View*

At the time the drafting committee was formed in 1987, probably no one foresaw the revolution in unincorporated business entities that would take place in the ensuing decade. Since Revenue Ruling 88-76[61] was issued, we have seen the Limited Liability Company and lately the Limited Liability Partnership and Limited Liability Limited Partnership

60. *See* Hynes, *supra* note 5, at 759.
61. Rev. Rul. 88-76, 1988-2 C.B. 360.

come into existence and achieve great popularity. By the time that RUPA was being considered for adoption in the states in the early 1990s, it already was obsolete in at least one major respect—it did not include provisions for limited liability partnerships. In Florida, RUPA was adopted only after being amended to include provisions for limited liability partnerships which, by definition, were non-uniform since there were no such provisions in RUPA.[62] The lesson is that it is difficult to adopt uniform legislation in the midst of significant changes in tax law and resulting changes in preferred forms of business organization.

F. *The Wholesale Change in the Form of the Statute Was Unnecessary*

Although RUPA purports to make many significant changes in the laws of partnership, many of the changes are more cosmetic than real. For example, although the statute purports to declare a partnership an entity, the partnership remains an aggregate in many of the most important respects, including for purposes of personal liability of partners for partnership debts and obligations and for purposes of federal income taxation. Similarly, the complicated changes in the dissolution provisions do not, in fact, result in major changes in the rights of a partner to dissolve the partnership upon the bankruptcy, death or withdrawal of a partner or by a partner's own will even where exercising those rights violates the partnership agreement. Thus, the complexities of the new provisions may not be worth the minor substantive changes wrought by them.

A well-developed body of case law existed under UPA and, because of the substantial uniformity among the states, it was largely transferable from one state to another. Where little authority existed in a particular state, the courts typically gave considerable weight to interpretations of the same provision in other jurisdictions. The costs in rendering such precedent largely obsolete probably were not outweighed by the scope of the benefits achieved by RUPA. In effect, those jurisdictions adopting RUPA abandon a skeletal statute fleshed out by a considerable body of case law in favor of a more detailed statute having essentially no body of case law arising under it. It appears that most legislatures thus far have not perceived this to be a good exchange.

The attempt to make RUPA retroactive also may have made it more controversial than necessary.[63] The drafters (presumably following the precedent of developing various versions of the Model Business

62. FLA. STAT. § 620.78-.789 (1995).

63. Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994 Really be Retroactive?*, 50 BUS. LAW. 267, 273-85 (1994).

Corporation Act) probably thought that retroactivity would ensure uniformity. However, whereas most state corporate codes contain a clause expressly reserving to the state legislature the right to alter or amend the code, UPA contains no such statement. Thus, major changes in areas such as the fiduciary duty of partners, joint and several liability of partners, and the need of a creditor to exhaust her remedies against the partnership before proceeding against the individual assets of the partners may alter significantly the expectations of the parties (and of creditors) and perhaps raise constitutional due process issues.

In conclusion, RUPA contains many desirable changes. The changes in the law regarding partnership property, the provisions for filing a statement of partnership authority clarifying who may act on behalf of the partnership, and the sections dealing with conversions and mergers, among others, are desirable modifications; however, they easily could have been incorporated into the framework of the existing UPA without creating the uncertainties of a wholesale revision. Many of the other changes, however, are largely cosmetic and could have been eliminated. While it may be premature to conclude that RUPA has failed in its original goal of supplanting the 1914 UPA, if true uniformity is to be achieved, further drafts of RUPA must be forthcoming. Perhaps the recent popularity of the new limited liability partnership form of business entity, coupled with the 1996 amendments of RUPA authorizing such business entities, will, in the end, provide the impetus for many states to approve RUPA. If that occurs there is hope that we may once again have a truly uniform law of partnership.