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Revision of the Uniform Partnership Act, An Analysis and Recommendations

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I. INTRODUCTION

The Uniform Partnership Act was approved by the National Conference of Commissioners on Uniform State Laws in 1914. It has been adopted with some modification by forty-nine states.¹ Other uniform and model acts concerning business organizations have been revised in recent years.² The National Conference of Commissioners on Uniform State Laws has now undertaken a complete revision of the Uniform Partnership Act.³ In an effort to aid in this process, a proposed revision of that Act has been prepared by the Uniform Partnership Act Revision Subcommittee of the Committee on Partnerships and Unincorporated

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1. The Uniform Partnership Act, 6 U.L.A. 9-545 (1969) [hereinafter U.P.A.] has been substantially adopted in all states except Louisiana. Alabama, Nebraska and Georgia vary somewhat from the official text. UNIF. PARTNERSHIP ACT, 6 U.L.A. 1, 2 (Supp. 1986).

2. The Uniform Limited Partnership Act was substantially revised in 1976, and the revised version has now been adopted in over forty states. REV. UNIF. LTD. PARTNERSHIP ACT, 6 U.L.A. 200 (Supp. 1985). In 1981, a Close Corporation Supplement to the Model Business Corporation Act was approved and published by the Committee on Corporate Laws of the American Bar Association. *Reprinted in* 37 BUS. LAW 269 (1981). The Supplement represented a substantial revision of the Model Business Corporation Act regarding close corporations. In 1983, the Model Business Corporation Act itself underwent substantial revision. See Elfin, *A Critique of Portions of the 1983 Revised Model Business Corporation Act*, 28 ST. LOUIS U.L.J. 865 (1984).

3. See U.P.A. Revision Subcommittee of the Committee on Partnerships and Unincorporated Business Organizations, American Bar Association, *Should the Uniform Partnership Act Be Revised?*, 43 BUS. LAW 121 (1987) [hereinafter *Proposed Revisions*]. The decision to revise this uniform act, which was originally drafted in 1914 and which has been substantially adopted in all states except Louisiana, was taken in August of 1987.

Business Organizations of the American Bar Association.⁴ Although the provisions of this long standing act are being reconsidered, I believe that some of its fundamental principles should be challenged.

The purpose of this Article is to propose appropriate revisions of partnership law, and to analyze some of the more significant recommendations of the Committee, or recommendations that the Committee claims to be significant, and to suggest either that the recommendations be adopted as drafted or with modifications. Where I believe the Committee has failed to recommend changes that should be made, such additional changes are suggested. This Article is limited to a discussion of sections 18(f), 25, 31, 32, 38, 40(d), and a new section designated 10A.

II. STATEMENT OF PARTNERSHIP, NEW SECTION 10A

The Committee recommends the adoption of an entirely new section providing for the required central filing of a Statement of Partnership.⁵ This concept, in a more limited form, has been adopted in California, Florida, and Georgia.⁶ The recommendation is that the statement include the name and address of the partnership and the names of the partners. The listing of a name would create a rebuttable presumption as to the liability of that person as a partner. However, "any partner"⁷ has the right to file a document to have his or her name removed and such filing would eliminate this nearly automatic liability. Also included in the statement would be the term of the partnership. The foregoing completes the list of matters that are required to be in the statement. On an optional basis, the Committee recommends a provision in the statement regarding the authority of partners. The statement then could "[s]pecify which partner(s), if fewer than all partners have the authority to execute documents on behalf of the partnership; likewise specify if there are any partner(s) whose agency powers are more restricted than those specified in the UPA."⁸ Finally, there would be permission to give notice of other matters deemed desirable.

The Committee recommends that the Statement of Partnership be required rather than permissive. This will tend to promote uniformity and secure the benefit of the statement on a wider basis. The Committee

4. *Id.* The Committee's proposed revisions have been published. See *Proposed Revisions*, *supra* note 3.

5. *Id.* at 139.

6. CAL. CORP. CODE §§ 15010.5-.6 (West 1977 & Supp. 1987); FLA. STAT. ANN. § 620.605 (Harrison 1977 & 1986 Rev.); GA. CODE ANN. § 14-8-10A (1982 & Supp. 1987).

7. The text should read "any person."

8. *Proposed Revisions*, *supra* note 3, at 140.

wisely does not make the filing of the Statement of Partnership a condition of the existence of a partnership because that could nullify the important concept of partnerships being in fact formed by persons whose actions meet the requirements of a partnership with resultant partnership liability. In an effort to preserve the concept of de facto partnership, the Committee recommends that the only penalty for failure to file the Statement of Partnership be inability to use the state's courts until the statement is filed. The trouble with this being the only penalty for failure to file is that many partnerships would never need to file because they are never engaged in litigation. To put more teeth into the legal requirement for filing I suggest in addition, the imposition of a fine which could be applied on an increasing daily basis after notice, and which would be an incentive for all partnerships to file and hence make more uniform and widespread the advantages of filing the statement.

Interestingly, after making the filing of the Statement a requirement (albeit a requirement without penalty for many partnerships), the Committee then recommends that one of the most important segments of the Statement be included on an optional basis. This is the segment concerning the authority of partners to bind the partnership. Since this aspect of the Statement is of great importance to third parties dealing with the partnership, who need certainty in their business dealings, I recommend that it be a mandatory, not optional, part of the Statement.

Second, the effect of the notice of authority recommended by the Committee needs refinement. The Committee correctly concludes that the grant of authority to act to fewer than all partners should bind the partnership because it represents a conferring of actual authority. However, the Committee states that "persons contracting with a partnership on *routine* matters and without knowledge of restrictions contained in the Statement of Partnership should not be bound by a restriction contained in the statement since this result would make conduct of business in a partnership form subject to too many uncertainties."⁹ This principle will itself lead to uncertainty and litigation in that there will be constant argument over which matters are routine (in which case the third party will not be bound by the limitation of authority) and which matters are not routine (in which case apparently the third party will be bound by the limitation of authority). If partnership law were as the Committee recommends in this respect, persons would have to search the records or deal with the partnership at their peril with respect to a later finding that the matter involved was not routine. I suggest that instead of making a limitation of authority binding or not on a third

9. *Id.* (emphasis added).

party depending upon the elusive question of whether or not the transaction was routine, it should be made binding in transactions involving real estate and not otherwise. In a real estate transaction, the searching of records will take place as a matter of course and the search for one additional document will not be a burden. On the other hand, all persons dealing with the partnership will be relieved of an effective requirement of a record search for all other transactions, which otherwise would be imposed because of a possibility that the transaction will later be held to be not routine. The effect of the suggestion I am making is that all matters set forth in the Statement of Partnership will be binding *against* the partnership. However, any matters set forth are binding on third parties dealing with the partnership only in connection with real estate transactions concerning real property within the state.

III. PARTNER'S RENUMERATION, SECTION 18(F)

Under the present Act, absent any agreement between the partners to the contrary "[n]o partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."¹⁰ The Committee recommends a modification of the general rule and of the exception.¹¹

The general rule that, absent an agreement to the contrary, no partner is entitled to remuneration for acting in the partnership business is a good one. In most cases, the application of this rule works well and no doubt avoids many disputes about compensation that one partner may feel he or she is entitled to for services rendered in excess of services rendered by his or her partners. Furthermore, where it is expected that one partner will perform services in excess of the services performed by another, and where appropriate compensating adjustments have not been made (for example, by varying capital contributions), the partners may, under the general rule, provide in their express agreement for additional compensation to the partner performing excess services. A reversal of this rule would probably be contrary to the expectations of

10. UNIF. PARTNERSHIP ACT § 18(f), 6 U.L.A. at 213. The present text reads in relevant part:

Sec. 18. Rules Determining Rights and Duties of Partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

....

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

11. *Proposed Revisions*, *supra* note 3, at 148.

most partners and is therefore not advisable. However, there are times when one partner performs, or even consistently performs, a disproportionate share of the work under circumstances where this was not originally contemplated and probably would have caused an agreement about disparate compensation if such had been originally contemplated. Some relief should be available in this situation short of a dissolution of the partnership and the frequent monetary loss that accompanies liquidation of the business.

The Committee recommends a revision of section 18(f) to authorize compensation for services by a partner pursuant to court order. I strongly endorse this recommendation. Under it, the general rule, which works well in most cases, remains as it has been under the present act. However, courts will not be precluded by statute from affording relief where one of the partners unexpectedly performs a disproportionate share of the work, or where one of the partners has absented himself from the management of the business.

A remedy should exist to redress these unfair situations, and authorization of compensation for services by court order provides such a remedy. An additional positive result is that the *threat* of court ordered compensation for services by a partner will undoubtedly lead to agreements to pay salaries to partners who are equitably entitled to salaries where such agreements would never be made under the present rigid rule. Because of this, little litigation should result from the Committee's recommendation.

The Committee recommends another modification of section 18(f), which I endorse. The present Act contains one exception to the rule that disallows remuneration for partners, that is "except that a *surviving* partner is entitled to reasonable compensation for his services in winding up the partnership affairs."¹² There is no reason to distinguish between entitlement to compensation of one who winds up a partnership after the death of a partner from one who winds up after a voluntary dissolution. As the Committee correctly points out, the present Act "appears to allow post-dissolution compensation only when the dissolution is caused by the death of a partner."¹³ The section should be amended as the Committee suggests, to allow compensation to a partner for winding up services after a voluntary dissolution.

IV. NATURE OF A PARTNER'S RIGHT IN SPECIFIC PARTNERSHIP PROPERTY, SECTION 25

With respect to section 25,¹⁴ the Committee recommends, as significant, a revision to provide that "a partner has no rights in specific

12. UNIF. PARTNERSHIP ACT § 18(f), 6 U.L.A. at 213 (emphasis added).

13. *Proposed Revisions*, *supra* note 3, at 148.

14. The present text of Section 25 is as follows:

partnership property, other than the right to use such property in the conduct of partnership business.”¹⁵ I support the recommendation because it is clear and direct. However, it does not change the law in any way because the present law has the same meaning. It is not quite as direct, but it is just as clear. The present law states that “a partner has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.”¹⁶ Subsequent sections of the present law reinforce the statute’s adherence to the entity theory in this regard when it is stated that an individual partner may not assign this right, that the creditors of individual partners may not levy upon it, that partnership creditors are not subject to partner’s exemptions, that a deceased partner’s rights in such property vests in the surviving partner, and that the right is not subject to dower or curtesy.¹⁷ A reading of the entire present section 25 clearly reflects that, absent an agreement to the contrary (and certainly such an agreement should be controlling), a partner has no rights in specific partnership property other than the right to use such property in the conduct of

Sec. 25. Nature of a Partner’s Right in Specific Partnership Property.

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner’s right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.

(c) A partner’s right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt, the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner’s right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

UNIF. PARTNERSHIP ACT § 25, 6 U.L.A. at 326.

15. *Proposed Revisions*, *supra* note 3, at 154.

16. UNIF. PARTNERSHIP ACT § 25(2)(a), 6 U.L.A. at 326.

17. *Id.* § 25(2).

partnership business. The Committee's recommendation is therefore benign. Perhaps it is advisable for the sake of directness, but it does not change prior law.

In connection with its recommendation concerning section 25, and the entity theory which is advanced whenever possible by the Committee,¹⁸ the Committee suggests a revision "to make it clear that a partner who misappropriates partnership property is guilty of embezzlement in the same manner and to the same extent that he would be guilty of embezzlement if he misappropriated the property of a corporation, or any other kind of entity in which he had an ownership interest."¹⁹ The Committee could use this wording, limited as it is to the concept of embezzlement. I suggest, instead, that the idea be put in a broader context by wording such as: "A partnership owns its assets in the same way that a corporation owns its assets. Partners, as individuals, have no more claim or interest in partnership assets than the shareholders of a corporation have in corporate assets." Whether the Committee's suggested language is used or my suggested language is used, this is a significant and positive change. The impetus for this recommendation is that under present law, it is generally held that a partner cannot be guilty of embezzlement or larceny of partnership property because the essential element of taking the property of another is lacking.²⁰ This results from an application of the aggregate theory of partnership and the fact that partnership property belongs to all the partners including the accused partner. Therefore, the accused partner is not taking the property of *another*, which is a usual requisite of embezzlement or larceny. The Committee's view is that because, conceptually, a partner is part owner of partnership property, this alone should not be a defense to such a criminal action. The Committee's view in this regard is sound. The entity theory comports with the general expectations of business persons in that theft by a partner of partnership property should be treated no differently than theft by any officer-shareholder from a close corporation or any corporation.

V. CAUSES OF DISSOLUTION, SECTION 31

Under section 31(1)(b) of the present Act, "[d]issolution is caused: (1) Without violation of the agreement between the partners, . . . (b) By the express will of any partner when no definite term or particular

18. *Proposed Revisions, supra* note 3, at 124.

19. *Id.* at 154.

20. *See, e.g., State v. Birch*, 36 Wash. App. 405, 675 P.2d 246 (1984). *See also* Annotation, *Embezzlement, Larceny, False Pretenses or Allied Fraud by a Partner*, 82 A.L.R.3d 822 (1978).

undertaking is specified,”²¹ It is appropriate to discuss also section 38 at this point because by virtue of section 38, each partner under these circumstances may require liquidation of the business.²² The Committee’s recommendation with respect to section 31(1) (and the effect of dissolution by virtue of section 38) is brief to a fault. Section 31(1)(b) is set forth by the Committee under the category “Discussed But No Changes Recommended.”²³ In its introductory discussion concerning dissolution, the Committee recommends that a new statute “authorize the non-withdrawing partners to continue the partnership after dissolution and, if they agree to do so within ninety days of a partner’s withdrawal, limit the withdrawing partner’s rights to receiving the fair value of his capital and his share of undistributed profits less any provable damages.”²⁴ This fundamental change from prior law calls for substantial discussion and analysis not provided by the Committee.

A partnership statute should continue the wise position of the present Uniform Act in allowing the partners by their agreement to vary most of the rules that will govern their business. Thus, by agreement the partners should be able to provide for the maximum liquidity that follows dissolution at will under the present Act, or the much more restrictive rights that result from the specific performance of their agreement as suggested here. However, a partnership statute should provide for the rights of the parties who have not addressed these issues in their agreement. The statute must fill in the blanks that exist in the agreement between the parties. The large, well-financed partnership will undoubtedly address the relevant issues in the partnership agreement, and therefore it is only necessary for the statute to permit such partners to contract freely. With respect to the smaller potential business, the statute should provide for those rights and obligations that will best serve the interests of parties who have not had the foresight to address the issues. The existence of such provisions will often reduce the start-up costs of the business by eliminating the need for custom-tailored agreements. In addition, the statute should provide the framework most likely to be desirable for those who have formed a partnership informally and for those who are legally, although unwittingly, operating a partnership.

A. The Right to Dissolve Where the Parties Have Not Provided for a Definite Term or the Accomplishment of a Particular Purpose

Where the partners have not themselves provided for stability, and hence there exists a partnership at will, the question should be asked—

21. UNIF. PARTNERSHIP ACT § 31, 6 U.L.A. at 376.

22. *Id.* § 38, 6 U.L.A. at 456-57. See *infra* note 25.

23. *Proposed Revisions, supra* note 3, at 165.

24. *Id.* at 126.

is the power of one partner to compel liquidation too powerful, and should not the statute, absent a contractual provision to the contrary, provide for a less drastic result, namely liquidation only upon a failure of the remaining partners to buy out the dissatisfied partner at an agreed value or fair value? Consider the situation where the parties have not provided for a definite term or duration until the accomplishment of a particular purpose, that is where they have purposely established a partnership at will. Here, the advantages of liquidity and the ability to terminate future liabilities created by one's partners, both secured by dissolution, must be balanced against the harm visited on the other partners. This balance indicates a resolution different from one where there is a breach of an agreement not to dissolve. It is submitted that if they considered it, most partners would be unlikely to agree that each of them would have the right to compel liquidation at will. Liquidity of investment is often highly desirable. This factor, however, should be balanced against the costs that dissolution will inflict upon the partners who wish to continue the business. Lying between the absolute power to dissolve granted by the present act, and the total absence of that right, would be a power to dissolve; but only after failure of the other partners to elect to buy out the interest of the partner wishing to exit, at fair value, or a predetermined value. This option addresses the needs of *both* parties better than the approach of the present Act which, by allowing dissolution at will, destroys the business against the wishes of the other partners in order to achieve the objective of the one partner who desires dissolution.

An advantage of a right to cause dissolution at will, which largely remains even when circumscribed by the right of the other partners to buy out at fair value the interest of the partner wishing to exit, is that this right discourages exploitive conduct on the part of managing or majority partners. Exploitive conduct, as making decisions which benefit managing or majority partners personally at the expense of the firm, is discouraged or can be remedied by enforcing fiduciary duties. However, this remedy is not always viable because it involves questions about the authority of managing or majority partners, and proof of damages and the extent thereof, all of which represent an expensive transaction cost in the form of litigation expense. Exploitive conduct will tend to be minimized if the proposed exploiter knows that he or she, as a result of such conduct, will be forced to buy out the interest of his or her partner at that person's option. The advantage of the buy-out right, especially in the common situation where fault or the degree of fault is not clear, is that it prevents one partner from causing dissolution and destroying the business. It is not a perfect solution to the securing of protection for the other partners because they may have to sell off important business assets, or place themselves in a disadvantageous debt

position in order to pay the partner who is leaving the fair value of his or her interest. It is, however, a reasonable compromise between the extremes of an absolute right to dissolve which provides liquidity for the partner leaving but which destroys the business, and the total absence of a right to fair compensation where a specified term or accomplishment of particular purpose has not been agreed upon. It should be noted here that in a typical small firm where one partner desires to exit and several partners remain, in balancing interests and financial ability it is probably an accomplishment of greater good for greater numbers to place some burden upon a remaining group to come up with funds to represent fair value, than to make impossible the exit of one member with fair value in his or her pocket.

Fairness does not result from the provisions of the present Act that permit any partner in a partnership at will to dissolve and cause liquidation of the business.²⁵ The right to leave the partnership in a manner that causes the liquidation of the business should be circumscribed by a right of the other partners to buy out the interest of the partner wishing to exit for fair value, *and thus to keep the business intact for the benefit of the remaining partners* while permitting the partner who wishes to exit to obtain reasonable liquidity. The partner who desires to exit should not be permitted to insist on a sale of the business. Fair value can be established by any method or formula agreed upon beforehand or at the time by the parties. In the absence of agreement, fair value can be determined by a court.

An unfortunate result of the present Uniform Partnership Act is that by allowing a partner to force liquidation of the business there often follows destruction of the going concern value of the business, and this represents a loss to all of the partners. Also upon a forced sale of the assets of the business, the partner who is in the best financial position will have an unfair advantage over the others in purchasing the business. This unfair advantage is lost or at least is diminished if there exists initially only a right to be bought out at a fair value set by agreement or by a court. A right to cause liquidation, on the other hand, can unfairly strengthen the position of a partner who is in a relatively better financial position and wishes to take over the business. The right to cause liquidation increases the possibility that one partner can unfairly squeeze out the other. Thus, justice and fairness will be served by circumscribing any liquidation right with a right of the other partners to avoid liquidation through a buy out at fair value.

In order to protect the liquidity of each partner's investment, forced sale of the business must be permitted if the other partners decline to

25. UNIF. PARTNERSHIP ACT § 38(1), 6 U.L.A. at 456. See *infra* note 45.

exercise a right to buy out or fail to complete a buy out. A partner should also be able to force liquidation in certain limited situations, as where the business has become unlawful. This is provided for by the present Uniform Act and should be continued.²⁶

Dissolution and buy out cannot affect the outgoing partner's obligations to third parties for preexisting debts and duties. Therefore, the outgoing partner should be entitled to an indemnification agreement from the partners who are continuing the business, and the value of this indemnification agreement should be considered when establishing the fair value paid to the outgoing partner.

The purpose behind the modification of the right to dissolve and force sale of the business by a right in the remaining partners to buy the interest of the exiting partner at fair value is to insure that each partner's *investment* is reasonably liquid, without liquidating the business. In addition to serving this purpose, it will also generally be preferable from an economic standpoint not to liquidate the business because the going concern value of the business will usually be greater than the proceeds of a sale of its assets. In most instances it should not be too great a burden for the remaining partners to purchase the interest of the exiting partner if the business is a viable one. If sufficient cash is not available, the remaining partners could borrow, using the assets of the business as security. In the alternative, provisions could be made earlier in the partnership agreement, or it could be required by a court establishing fair value that the purchase price be paid on an installment basis. If all of the remaining partners are not willing to join in the purchase, the interest of the outgoing partner should be offered pro rata to those willing to buy.

The remaining partners who elect to purchase the interest of the outgoing partner, rather than face liquidation of the business, may be required to commit funds to the enterprise beyond what was originally contemplated. However, it is these very persons who will decide whether that investment is preferable to a liquidation. Undoubtedly they would prefer to have this option rather than have liquidation forced upon them. As an alternative to making this additional investment, the buy-out may be accomplished by finding a new investor acceptable to the remaining partners.

The right to prevent liquidation through buy-out should not be frustrated by the failure of the parties to agree beforehand or at the time to a fair value. Therefore, if the parties cannot agree on fair value, it should be established by a court. The determination of fair value of businesses has received considerable attention and will not be a new

26. UNIF. PARTNERSHIP ACT § 31(3), 6 U.L.A. at 376.

burden on the judicial system.²⁷ Courts frequently establish the fair value of businesses with regard to the appraisal right under the Model Business Corporation Act and similar statutes.²⁸ They also do so in connection with businesses that are being reorganized under Chapter 11 of the Bankruptcy Reform Act.²⁹ Courts are therefore familiar with the determination of fair value in connection with the merger and reorganization of corporations, whose businesses are little or no different from those of partnerships.³⁰ Similar standards and procedures can be used to determine the fair value of a business owned by a partnership. To maintain the viability of the business, and to prevent a cash drain on the remaining partners that is too severe or borrowing on terms that are too harsh, the court should be empowered to provide for payment in installments with provision for adequate security. Only if there is a failure to purchase, or failure to complete the purchase as agreed or ordered by a court, should the business be liquidated to pay off the exiting partner.

B. An Agreement Not to Dissolve for a Definite Term Should be Specifically Enforced Under the New Partnership Act

Under present partnership law, even where the partners have agreed that the partnership will remain in existence for a definite period of time or until a particular purpose has been accomplished, any partner has the power, although not the right, to dissolve the partnership.³¹ When such a wrongful dissolution occurs, the partners who have not wrongfully caused dissolution do possess a right against the partner who wrongfully caused dissolution for damages.³² However, the partnership

27. For a discussion of the establishment of fair value in the context of a close corporation, which is not at variance with its establishment for a partnership, see Schreier and Joy, *Judicial Valuation of "Close" Corporation Stock: Alice in Wonderland Revisited*, 31 OKLA. L. REV. 853 (1978).

28. MODEL BUSINESS CORP. ACT § 81 (1981). See also REVISED MODEL BUSINESS CORP. ACT, ch. 13 (1983) (dissenters' rights).

29. Bankruptcy Reform Act, 11 U.S.C. §§ 1101-46 (1978).

30. MODEL BUSINESS CORP. ACT ANN. 2D §§ 80-81 (1977).

31. UNIF. PARTNERSHIP ACT § 31, 6 U.L.A. at 376 provides:

"Dissolution is caused:

....

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time. . . .

See also *Napoli v. Domnitch*, 18 A.D.2d 707, 708, 236 N.Y.S.2d 549, 551-52 (1962), *aff'd*, 14 N.Y.2d 508, 147 N.E.2d 623, 248 N.Y.S.2d 228 (1964); *Campbell v. Miller*, 274 N.C. 143, 150-51, 161 S.E.2d 546, 551 (1968).

32. UNIF. PARTNERSHIP ACT § 38(2)(a)(II), 6 U.L.A. at 456.

has been dissolved, and as the following discussion indicates, frequently damages are not able to place the innocent partners in the position they would have occupied absent the breach. The Committee does not recommend change from the existing law which allows for dissolution in these circumstances. My contention is that the power to dissolve in this circumstance should be largely curtailed by a new statute. It should be noted that by judicial decision, a first crack has appeared in the principle that a court cannot enjoin the dissolution of a partnership. In 1984, the First Circuit stated that this principle is grounded in cases that have a strong personal services flavor. In the case of *Infusaid Corp. v. Intermedics Infusaid, Inc.*,³³ the court held that where the partners are corporations, legal remedies are inadequate, and there is no significant personal service component, a court may order specific performance of a partnership agreement.³⁴ Where a profitable venture can be maintained without requiring any corporate officer to serve against his will, the corporate partners can be ordered to continue the business according to the terms of their agreement.³⁵

In many situations personal services are a component, and specific performance may not be feasible. However, in order to give stability to the greatest extent possible to those partnerships whose partners have bargained for that quality, this Article will propose a more refined and precise group of remedies to replace the absolute power to dissolve.

1. *Protecting Expectations.*—There is little need beyond what has already been suggested to disturb the present position of the Uniform Partnership Act concerning the absolute power of a partner to dissolve the partnership where money damages can be accurately determined and where money damages provide adequate compensation to the partners who have bargained for stability but who are now faced with premature dissolution. The words adequate compensation should embrace the concepts of fairness and ethical behavior. Where money damages cannot be accurately determined or where they do not provide adequate compensation as described, the law should not hesitate to hold a partner to a promise which that person has freely made, to the extent that this is feasible. In this regard it should be noted that authority exists with respect to contract law in general that when the issue arises, “[d]oubts should be resolved in favor of the granting of specific performance or injunction.”³⁶ This principle should have applicability to the breach of a partnership contract where damages may be difficult to prove prospectively.

33. 739 F.2d 661 (1st Cir. 1984).

34. *Id.* at 669.

35. *Id.*

36. RESTATEMENT (SECOND) OF CONTRACTS § 359 comment a (1981).

It is hard to understand why the concept of absolute power of a partner to cause dissolution has remained entrenched in partnership law so long while it does not exist, absent a contract so providing, in the context of the so-called incorporated partnership, the close corporation. The close corporation is recognized as one that has relatively few shareholders who are personally known to one another and who are active in management.³⁷ The transfer of shares in a close corporation to outsiders is generally restricted by contract or through provisions in the articles of incorporation. There is no established market for the shares. The shareholders who are frequently officers and/or directors receive all or a substantial portion of their income from the corporation.³⁸ The close corporation is referred to as an incorporated partnership because it is a business that would have used the partnership vehicle except for a desire to have certain tax or limited liability advantages.³⁹ Absent a contractual provision so providing, no state statute permits the dissolution of a close corporation at the election of a single minority shareholder. Instead, voluntary dissolutions take place upon a vote of a certain percentage of outstanding shares, usually a majority.⁴⁰ There appears to be no reason to distinguish the grant of the power of dissolution to a single partner, and denial of that right to a single shareholder of a close corporation. There ought to be one rule for both of these similar business organizations. Although technically the partner faces unlimited personal liability and the shareholder does not, as a practical matter the shareholder may have invested most of his or her personal wealth in the corporation, and therefore risks as much as the partner.

Partners have an option of creating a partnership at will where, under the present Act, each partner has the right as well as the power to cause dissolution not in contravention of the partnership agreement, and where no damages result from a decision to dissolve.⁴¹ On the other

37. *Wasserman v. Rosengarden*, 84 Ill. App. 3d 713, 716, 406 N.E.2d 131, 134 (1980); 1 F. O'NEAL, *CLOSE CORPORATIONS* §§ 1.02 & 1.07 (2d ed. 1971).

38. *Helms v. Duckworth*, 249 F.2d 482, 486 (D.C. Cir. 1957); *Galler v. Galler*, 32 Ill. 2d 16, 27, 203 N.E.2d 577, 583-84 (1965).

39. *68th St. Apts., Inc. v. Lauricella*, 142 N.J. Super. 546, 557, 362 A.2d 78, 84 (N.J. Super Ct. Law Div. 1976), *aff'd per curiam*, 150 N.J. Super. 47, 374 A.2d 1222 (N.J. Super Ct. App. Div. 1977).

40. *See, e.g.*, CAL. CORP. CODE § 1900 (West 1977) (requires one-half); DEL. CODE. ANN. tit. 8, § 275 (1975) (requires majority).

41. Dissolution is caused:

(1) Without violation of the agreement between the partners,

. . . .

(b) by the express will of any partner when no definite term or particular undertaking is specified . . .

UNIF. PARTNERSHIP ACT § 31(1)(b), 6 U.L.A. 376.

Only when dissolution is caused wrongfully do innocent partners have a right to damages against the partner who caused dissolution. *Id.* § 38(2)(a) II, 6 U.L.A. at 456.

hand, when the partners have agreed to maintain the partnership for a certain period of time or until the purpose for which the partnership was formed has been accomplished, they have done this in order to bring stability to the business organization. If the partners have established a duration, they undoubtedly intended that the exit of a partner prior to the end of the term should be on a different basis than in a partnership at will. The stability which has been bargained for should not be denied by allowing one partner unilaterally to require a premature dissolution. By agreeing to a fixed term, each partner has agreed to subordinate his or her ability to withdraw from the partnership and the risks which partnership entails, to the legitimate expectations of the other partners. This expectation should be specifically enforced.

2. *Enforceability of the Promise.*—Many of the obligations of a partner can be specifically enforced. The single obligation of personal service cannot be specifically enforced, although as will be seen, it can be substantially encouraged. Merely because a court cannot effectively compel a person to perform personal services does not mean that partnership law must terminate a person's *status as a partner* in violation of the partnership agreement. Just because personal service cannot be required, it does not follow that a person in breach of the partnership agreement should be freed of his or her other obligations as a partner.

Some partners by their agreement have no obligation at all to provide services. Such partner's obligation may be strictly to provide capital initially and in the future, and to lend his or her credit and reputation to the business. All of that partner's obligations may be specifically enforced. By specifically enforcing those obligations, the other partners are provided with the elements they bargained for. In addition, because the partner who wanted to exit the business, as a partner, remains liable for losses, a bargained-for consideration is preserved which would be unlikely to have found its way into a computation of damages because it would be speculative. Furthermore, because the partner who wished to exit the business, as a partner, continues to lend his or her credit rating to the business, another bargained-for element of consideration remains in effect which would vanish upon dissolution, and which is often not susceptible to being ascertained as to dollar value and, therefore not included as an element of damages on wrongful dissolution.

If the partner who wishes to exit the business is one who is obligated to provide services, although those services cannot be specifically compelled, a failure to allow dissolution can encourage a voluntary provision of those services. This results from the fact that where that person retains the status of partner, it will behoove that person to provide the services that will achieve profits and avoid losses.

Furthermore, where that person retains the status of partner, he or she retains the fiduciary obligations which would prevent that person

from competing with the partnership and which would require the sharing of opportunities with the partnership. With all of these substantial obligations in mind, the person who could not be *compelled* to render services to the partnership will frequently decide that it is in his or her best interest to remain fully active in all of the aspects of the partnership. It becomes apparent that although a court cannot specifically enforce the single element of personal services, those services will be encouraged by maintaining the status of partner. All other obligations of partners can be specifically enforced.

The parties are entitled to receive the consideration they have bargained for when their agreement provides for a partnership to last for a fixed term or until a particular purpose has been accomplished. To the extent that a law can protect or encourage bargained-for stability, it should do so. A partner should be denied not only the right, but also the power, to dissolve a partnership before the expiration of the agreed term or accomplishment of its purpose.

3. *Exceptions.*—The prohibition against allowing a partner to cause dissolution in violation of an agreement to continue for a definite term or until the accomplishment of a certain purpose is designed to prevent such dissolution by a partner who desires it for business or personal reasons. Fairness and justice require that innocent partners who desire a dissolution should be able to secure dissolution where another partner has seriously breached the partnership agreement, where it has become unlawful to carry on the business of the partnership, where the business cannot be carried on at a profit (and the partnership was not created as a tax shelter where losses were anticipated), and where the partners are deadlocked. Furthermore, a court should be permitted to order dissolution, in spite of an agreement to continue for a definite term or undertaking where a court finds that the expectations of any partner, including the disabled partner, are frustrated because of the disability of a partner. In like manner, a court should be permitted to order dissolution where the expectations of any partner are frustrated because of the bankruptcy of any partner.

VI. DISSOLUTION BY DECREE OF COURT, SECTION 32

The Committee recommends a number of changes in section 32.⁴² Some of the more significant changes which it would endorse include

42. The text of present Section 32 is as follows:

Sec. 32. Dissolution by Decree of Court.

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

(a) A partner has been declared a lunatic in any judicial proceeding

a modernization of the word "lunatic" with the substitution of "incompetent to manage his person or his estate," and a deletion of section 32(1)(e), "[t]he business of the partnership can only be carried on at a loss,"⁴³ as an independent ground for dissolution. There are situations, for example early stages of a business, use of the business as a tax shelter, or tax loss, when mandatory dissolution would not be in the best interest of the partners or some of them. In appropriate circumstances, financial loss could still lead to dissolution under section 32(1)(f) where dissolution is authorized under circumstances that render a dissolution equitable.

A long overdue correction of the second part of section 32 is recommended by the Committee. In its present form, the section consists of only part of a sentence. The subject and part of the predicate are missing. The section presently reads:

- (2) On the application of the purchaser of a partner's interest under section 27 or 28:
 - (a) After the termination of the specified term or particular undertaking,
 - (b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.⁴⁴

Section 32(2) does not convey a meaning. The obvious omission from the text are the words "the court shall decree a dissolution" which must be added at the end of the introductory clause. It is remarkable that

or is shown to be of unsound mind,

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

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

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

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

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 27 or 28:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

UNIF. PARTNERSHIP ACT § 32, 6 U.L.A. at 394.

43. *Id.*

44. *Id.*

of the forty-nine states that adopted the Uniform Partnership Act, only six corrected this obvious error.⁴⁵

The Committee failed to recommend a change in section 32 that would correct the presently misleading impression that sections 32(1)(c) and (d) are mandatory causes of dissolution by court decree. Dissolution appears to be mandatory because of use of the word "shall." The section begins with the phrase, "[o]n application by or for a partner the court shall decree a dissolution whenever"⁴⁶ Under the statute, the court must find, for a section 32(1)(c) dissolution, that "a partner has been guilty of such conduct as *tends to affect prejudicially* the carrying on of the business."⁴⁷ A court necessarily has so much discretion in the weighing and balancing of evidence in order to make a finding that facts "tend to affect prejudicially" that it is a misnomer to state that this action is mandatory. In a similar fashion regarding section 32(1)(d), it is misleading for the Uniform Partnership Act to use the mandatory word "shall," when in order for a court to order dissolution, the court must find that the partner "so conducts himself in matters relating to the partnership business that it is not *reasonably practicable* to carry on the business in partnership with him."⁴⁸ So much leeway exists in a court's determination of what is "reasonably practicable" that it is misleading for the statute by the use of the word "shall" to cast this in the category of mandatory grounds for dissolution.

Realistically, these grounds for dissolution should be recognized as being found in the discretion of the court. This discretion should, moreover, be constrained by the principle that a partner's action which is of a trifling nature or which constitutes only a temporary grievance, not involving permanent damage, cannot be a ground upon which dissolution is ordered. Instead, dissolution should only be ordered when the facts show gross misconduct or lack of good faith or when those facts cause serious and permanent injury.⁴⁹

In order to incorporate the thoughts expressed above, and for honesty of purpose and clarity of meaning, I suggest that the introductory wording to section 32(1)(c) and (d) as it has existed, and as it is still recommended by the committee, be eliminated. Instead of the words, "[o]n application by or for a partner the court shall decree a dissolution,"⁵⁰ the section

45. The states that have corrected this error by adding the phrase "[t]he court shall decree a dissolution" are Arizona, Georgia, Maryland, Montana, New Hampshire and Rhode Island.

46. UNIF. PARTNERSHIP ACT § 32(1), 6 U.L.A. at 394.

47. *Id.* (emphasis added).

48. *Id.* § 32(1)(d) (emphasis added).

49. Wood v. Holiday Mobile Home Resorts Inc., 128 Ariz. 274, 625 P.2d 337, 343 (1980); see also Fuller v. Brough, 159 Colo. 147, 411 P.2d 18 (1966).

50. UNIF. PARTNERSHIP ACT § 32, 6 U.L.A. at 394.

should be changed to read, "On application by or for a partner, the court may decree a dissolution when, in the exercise of its sound discretion, and after balancing the equities involved, the court determines that"

VII. RIGHTS OF PARTNERS TO APPLICATION OF PARTNERSHIP PROPERTY, SECTION 38

The Committee recommends numerous changes to section 38.⁵¹ I will first discuss only briefly the many recommendations with which I

51. The text of present Section 38 is as follows:

Sec. 38. Rights of Partners to Application of Partnership Property.

(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a II) of the section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a II), of this section,

II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved

concur or suggest only minor changes. For support of these changes, the reader is referred to the Committee's own analysis.⁵² The first recommendation is to "clarify that 'wrongful' dissolution in sections 38(1) and (2) includes dissolution resulting from wrongful conduct under sections 32(1)(c) and (d) as well as dissolution in contravention of the agreement under section 31(2)."⁵³ This should be done because a persuasive argument can be made that the situations described in sections 32(1)(c) and (d), previously discussed, would constitute a breach of the implied terms of almost all partnership agreements. The inclusion of these matters as constituting wrongful dissolution (essentially conduct that tends to affect prejudicially the carrying on of the business and willful or persistent breach of the partnership agreement) clarifies what had been somewhat ambiguous. I suggest here just one modification of the Committee's proposal. In order to maximize the flexibility of partnerships, this inclusion should be made specifically subject to the contrary agreement of the partners.

The Act would also be clarified by the Committee's suggestion that it be expressly provided that an expelled partner does not have the power to compel liquidation. Furthermore, adding to section 38(1) the "holding harmless" of an expelled partner as an alternative to "discharge" from partnership liabilities is endorsed, as an expelled partner should not be able to compel liquidation because of the inability of the other partners to secure a discharge of partnership liabilities. The suggested change will normally allow the remaining partners to avoid liquidation by agreeing to hold the expelled partner harmless from partnership liabilities.

The present Act gives to continuing partners, after wrongful dissolution, the right to possess partnership property only during what had been "the agreed term for the partnership." It is the Committee's recommendation that this limitation be deleted.⁵⁴ I concur. Once the continuing partners have paid for the interest of the partner who wrongfully caused dissolution, they should without question be able to possess the partnership property for as long as they desire, and the withdrawing partner should not have the right to cause liquidation of the business after the originally agreed upon term expires. The Committee, however, failed to address what should be one exception to their suggested change.

by the court, and to be released from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

UNIF. PARTNERSHIP ACT § 38, 6 U.L.A. at 456.

52. *Proposed Revisions*, *supra* note 3, at 173-75.

53. *Id.* at 173.

54. *Proposed Revisions*, *supra* note 3, at 175.

The exception I recommend is designed to protect the outgoing partner in those situations where the financial condition of the partnership and the continuing partner(s) is such that the outgoing partner is not adequately protected from partnership liabilities by the indemnification agreement. When this has been demonstrated to a court, the court should be empowered to compel liquidation at the expiration of the originally agreed upon term in order to lessen the outgoing partner's exposure to ongoing risk. The Act should be amended to enable an appropriate court to grant such relief under the circumstances described. The Act should require that this power be exercised in a manner that affects an equitable balancing of interests between the outgoing partner and the continuing partners.

The final more significant recommendation of the Committee with which I agree is to delete from section 38(2)(c)(II) the mandatory exclusion of the value of the goodwill of the business in ascertaining the value of the interest of a partner who has wrongfully caused dissolution.⁵⁵ The Committee does not state its reasons for this recommendation. However, since the Act already provides that the partner who wrongfully caused dissolution is liable for damages,⁵⁶ the loss of the value of goodwill does not serve a legitimate compensatory purpose. It is a windfall to the continuing partners. Furthermore, as used by the Act, the word wrongful (in wrongful dissolution) does not necessarily imply malice. For business or personal reasons, a partner may need to terminate a business relationship before the called-for termination date. He or she should be and is responsible for resultant damages, but there is no good reason to require punishment in addition. Since the loss of value of goodwill does not serve a compensatory or justifiable punitive purpose, in ascertaining the value of the interest of the partner who wrongfully causes dissolution, the mandatory exclusion of the value of goodwill should be deleted.

Section 38 should be amended in two important respects which were not addressed by the Committee. The present Act does not provide for, and the amendments suggested by the Committee do not provide for, reasonable results where there has been a total failure of consideration relative to the partnership agreement. A breach of contract which constitutes a total failure of consideration should result in forfeiture of all interest in the partnership. There are factual situations where a "partner's" actions in breach of the agreement should cause more severe consequences than those provided for by the Uniform Partnership Act. Assume that a partnership agreement called for contributions of capital

55. *Proposed Revisions*, *supra* note 3, at 175.

56. UNIF. PARTNERSHIP ACT § 38(2)(a)(II), 6 U.L.A. at 456.

and services by each of three partners and that two of them fulfilled their obligations while the third did not perform at all. Dissolution would normally be sought for a willful and persistent breach under section 32, which the Committee specifically recommends be considered wrongful dissolution under section 38.⁵⁷ Assume further that a successful business is being carried on by the partners who have not breached the agreement. Under section 38 of the present Act, with no change recommended by the Committee, the party who breached the agreement is entitled to an interest in the business, less damages. However, under these circumstances, the breaching party should not have any right at all to an interest in the partnership, and in addition, he or she should be liable for damages.

Outside of partnership law, a court would find that this scenario amounted to a total failure of consideration, and the other parties would have no obligation to perform their promises. This total failure of consideration would be a legal excuse for the non-breaching parties not to perform their obligations. Yet it has been held under the Uniform Partnership Act that once a partnership has been found to exist, the fact that one partner has failed to make the required contribution is not reason to compel a forfeiture.⁵⁸ However, under the facts assumed above, it is not reasonable to find that a partnership existed. The party who breached should have no claim to an interest in the partnership.⁵⁹ The situation presented by these assumed facts is not addressed by the Committee, and it should be. The Uniform Partnership Act should be amended to provide that where there has been a total failure of consideration as to a partner's contribution, the breaching party should not be entitled to any interest in the partnership. In addition, of course, the breaching party should be liable for whatever actual damages are proven.

When dissolution is caused wrongfully, each partner who did not cause such dissolution has a right to damages for breach of the agreement.⁶⁰ The Act does not provide for mitigation of damages, and the Committee has failed to recommend a requirement of mitigation. However, a revised Uniform Partnership Act should provide that this right to damages be modified by requiring the same mitigation of damages as would exist in an ordinary breach of contract action. The need to apply the principle of mitigation of damages is illustrated by a 1982

57. *Proposed Revisions, supra* note 3, at 173.

58. *Thompson v. McCormick*, 149 Colo. 465, 370 P.2d 442, 446 (1962).

59. *See Staszak v. Romanik*, 690 F.2d 578 (6th Cir. 1982). The United States Court of Appeals for the Sixth Circuit held that where there was a partial failure of consideration the breaching party was entitled to a partner's share of partnership assets.

60. UNIF. PARTNERSHIP ACT § 38(2)(a)(II), 6 U.L.A. at 456.

Missouri decision.⁶¹ It was the purpose of a partnership to obtain buyers for seven tracts of land that the partnership had under contract to purchase. The plan was to establish contracts for sale so that as soon as a closing took place as to one parcel, there could be an immediate profitable resale. Each of three partners were to share equally in expenses and profits. Plaintiff, one of the partners, agreed to personally purchase one of the tracts. The three partners were partially successful in finding buyers for the other tracts. There was a disagreement among the partners, and the court found that the plaintiff wrongfully breached the partnership agreement, causing a dissolution of the partnership. The defendants cross-claimed for damages based on lost profits as a result of plaintiff's wrongful breach. It was plaintiff's position that defendants failed to prove that the lost profits were a direct and proximate result of plaintiff's breach because no damages would have been sustained if defendants had proceeded with the purchase and sale of the tracts. Under a strict reading of the Uniform Partnership Act, the court rejected this argument.⁶² The court held, "[t]he practical effect of adopting this position would be to impose a duty upon the defendants to continue the partnership business if there was a reasonable certainty that it will be profitable."⁶³ The court refused to impose this duty.

The argument rejected by the court is no more than the sound principle of mitigation of damages that would be required outside of current partnership law. Under contract law, a party who has been wronged by a breach generally may not unreasonably remain inactive and allow damages to mount. Damages that the wronged party should have foreseen and that could have been avoided by reasonable effort and without undue risk or expense cannot be recovered.⁶⁴ Instead there is a requirement that reasonable steps be taken to lessen damages and if those steps are not taken, damages are not recoverable. This duty to mitigate damages is just as logical and reasonable in connection with an action for breach of a partnership agreement as it is in connection with the breach of any other agreement. In the suit regarding breach of a partnership agreement discussed above, it does not appear that it would have been unduly burdensome to require the non-breaching partners to fulfill the partnership contracts and thereby prevent the loss. Instead of acting to prevent the loss, they unjustifiably allowed this loss to occur and then sought its recovery from their former partner.

Section 38 of the Uniform Partnership Act should be amended to adopt for partnership law the well-reasoned contract principle of miti-

61. *Ohlendorf v. Feinstein*, 636 S.W.2d 687 (Mo. App. 1982).

62. *Id.* at 690.

63. *Id.*

64. RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

gation of damages. Specifically, section 38(2)(a)(II) should be amended to provide that the innocent partner's right to recover damages from a partner who has caused dissolution wrongfully is subject to a duty to mitigate damages that should have been foreseen and could have been avoided by reasonable effort and without undue risk or expense.

VIII. RULES FOR DISTRIBUTION IN THE EVENT OF INSOLVENCY, SECTION 40(D)

The Committee failed to address a matter that I believe should be changed or at least clarified with respect to contributions by partners to satisfy liabilities in the event of insolvency of some partners, or their absence from the jurisdiction. The portion of the Act involved is Section 18(a)⁶⁵ as modified by Section 40(d).⁶⁶ By virtue of Section 18, its introductory paragraph and sub paragraph (a), during the operation of the partnership, *unless the parties have agreed otherwise*, they share equally in profits. Again, during the operation of the partnership, unless they have agreed otherwise, the parties share losses according to their share of profits. The parties are permitted by their agreement to share profits in one ratio and losses in another ratio. Section 40 specifically addresses the settling of accounts between the partners after dissolution. Section 40, like Section 18, allows the parties to vary its rules by agreement among themselves. Because Section 40 establishes *separate rules* for settling accounts between the partners after dissolution, it is a fair inference that the Act expects that the parties, if they wish to vary from the rules of the Act concerning settling accounts after dis-

65. UNIF. PARTNERSHIP ACT § 18(a), 6 U.L.A. at 213 provides:
Sec. 18. Rules Determining Rights and Duties of Partners.

The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits. . . .

66. UNIF. PARTNERSHIP ACT § 40(d), 6 U.L.A. at 469 provides:

Sec. 40. Rules for Distribution.

In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

. . . .

(d) The partners shall contribute, as provided by section 18(a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other parties shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

solution, will do so separately and specifically. Let us suppose that the parties do not in their agreement address that issue separately and specifically. Let us also suppose that the parties in their agreement, pursuant to Section 18(a), had provided that the parties would during the operation of the partnership share profits in one ratio and losses in a different ratio. Now, by virtue of Section 40(d), after dissolution if one of the partners is insolvent, or is not subject to process and refuses to contribute, and the liabilities of the business exceed its assets, the other partners must contribute their share of the liabilities and *according to Section 40*, they must contribute the additional amount not paid by the insolvent or out-of-jurisdiction partner "*in the relative proportions in which they share the profits.*"⁶⁷

It is submitted that under the circumstances described, most parties would intend and expect that these losses be shared *in accordance with the ratio in which the parties had agreed to share losses* in general, and not in the proportions in which they share profits. Concepts of justice and fairness would lead to the same conclusion. In an amended Uniform Partnership Act, Section 40(d) should be changed to so provide.

IX. CONCLUSION

The Uniform Partnership Act has governed the partnership form of business organization in most of this country for many years. It is very much in need of revision. The movement toward revision is finally underway. Much analysis and discussion is needed in order to facilitate the achievement of a fair and efficient regulation of the rights of the participants in future partnerships. It is hoped that this Article will make a substantial contribution to that process.

67. UNIF. PARTNERSHIP ACT § 40(d), 6 U.L.A. at 469 (emphasis added).

