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DISPUTES AMONG PARTNERS: PROBLEMS IN REBUTTING THE PRESUMPTIONS OF THE U.P.A. AND THE U.L.P.A. AND MODIFYING A PARTNERSHIP AGREEMENT

by

LEONARD CHARLES SCHWARTZ*

The Uniform Partnership Act (U.P.A.)¹ and the Uniform Limited Partnership Acts (U.L.P.A.)² contain many presumptions on the mutual rights and duties of partners. These presumptions create many problems regarding the formation and modification of partnership agreements. This article concerns some of the problems. Section I discusses the issue of whose consent is necessary to rebut a presumption or modify a partnership agreement. Section II discusses the issue of what evidence is sufficient to rebut a presumption or modify a partnership agreement.

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¹ The Uniform Partnership Act (1914) [hereinafter U.P.A.] has been adopted by every state except Louisiana. 6 U.L.A. 1-2 (Supp. 1989).

² The Uniform Limited Partnership Act was initially approved in 1916 and was revised in 1976 and 1985. In 1976, when the first revision was approved, the National Conference of Commissioners of Uniform State Law treated the revision as a separate new act called "the Revised Uniform Limited Partnership Act." In 1985, when the second revision was initially approved, the Commissioners treated the changes as a separate new act called "the Uniform Limited Partnership Act (1985)." But in 1986 the Commissioners decided to treat the revision as merely an amended version of the Uniform Limited Partnership Act (1976). UNIF. LIM. PARTNERSHIP ACT historical note, 6 U.L.A. 221 (Supp. 1989). These changes create a problem regarding the proper title of each version and the proper form of citation. (For an exposition of the standard rules of citation, see A UNIFORM SYSTEM OF CITATION rule 12.8.4 (14th ed. 1986).) Since the new version is not a separate new act, calling it "the Uniform Limited Partnership Act (1985)" seems inappropriate. Nonetheless, the Commissioners themselves call it "the 1985 Act" and call the previous versions "the 1976 Act" and "the 1916 Act." UNIF. LIM. PARTNERSHIP ACT, 6 U.L.A. 220-385 (Supp. 1989). This article likewise calls the new version "the 1985 Act" [hereinafter U.L.P.A. (1985)] and calls the previous versions "the 1976 Act" [hereinafter U.L.P.A. (1976)] and "the 1916 Act" [hereinafter U.L.P.A. (1916)].

The 1916 Act is used in eight jurisdictions: Alaska, Hawaii, Maine, New York, Pennsylvania, Utah, Vermont, and the Virgin Islands. U.L.P.A. (1916), 6 U.L.A. 172 (Supp. 1989).

The 1976 Act is used in seventeen states: Alabama, Arizona, Arkansas, California, Colorado, Idaho, Iowa, Massachusetts, Michigan, Missouri, Montana, Nebraska, New Jersey, North Dakota, Oklahoma, Wisconsin, and Wyoming. See U.L.P.A. (1976 & 1985), 6 U.L.A. 220-385 (Supp. 1989).

The 1985 Act is used in twenty-six jurisdictions: Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Minnesota, Mississippi, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, and West Virginia. See *id.*

I. WHOSE CONSENT IS NECESSARY TO REBUT A PRESUMPTION OR MODIFY A PARTNERSHIP AGREEMENT?

Uniform Partnership Act

Nearly all the sections regarding the relationship among the partners contain phrases such as "subject to any agreement between the partners" or "unless otherwise agreed."³ Thus, the U.P.A. gives virtually complete freedom of contract among the partners.⁴

The U.P.A. seems to divide partnership decisions into two categories: ordinary and extraordinary. Unless otherwise agreed, ordinary decisions need the approval of only the majority of the partners.⁵ Extraordinary decisions presumably must be unanimous. The U.P.A. does not give any general test for deciding whether a particular decision is extraordinary. But the U.P.A. clearly indicates that certain decisions must be unanimous. First, any act that, in a dispute with a non-partner, would not be binding on the partnership unless there is unanimous consent requires unanimous consent.⁶ Second, any decision to make a partnership agreement whose terms differ from those of the presumptions of the U.P.A. requires unanimous consent.⁷ Third, any "act in contravention of any

³ U.P.A. §§ 18-19, 37-38, 40, 42-43.

⁴ *Riviera Congress Assoc. v. Yassky*, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966); Schwartz, *Freedom of Contract among the Owners of a Partnership or Limited Partnership*, 36 MERCER L. REV. 701, 702-03 (1985).

⁵ Section 18:

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 . . .

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business . . .

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

U.P.A. § 18.

⁶ Section 9(3):

Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,

(b) Dispose of the good-will of the business,

(c) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(d) Confess a judgment,

(e) Submit a partnership claim or liability to arbitration or reference.

U.P.A. § 9(3).

⁷ *Waite v. Salestrom*, 206 Neb. 578, 294 N.W.2d 338 (1980); U.P.A. § 18.

agreement between the partners” requires unanimous consent.⁸

The rule allowing ordinary decisions by majority rule can be modified by unanimous agreement.⁹ Thus the partners can agree that some types of ordinary matters require the approval of more than a mere majority.

Likewise, the rule requiring unanimous approval of extraordinary decisions can be modified by a unanimous agreement.¹⁰ Thus the partners can agree that some types of extraordinary matters need less than unanimous approval.

Although the requirement of unanimity can be waived, one court has challenged the validity of a general waiver of any further need for unanimity. In *McCallum v. Ashbury*¹¹ the court stated that fundamental changes in a partnership agreement cannot be made without the consent of all partners, even if the agreement provides that it can be amended by majority rule. This statement is dictum, however, as the court held that the change in the partnership agreement was not fundamental.¹²

But another court has upheld the validity of a general waiver of any further need for unanimity. In *Aztec Petroleum Corp. v. MHM Co.*, the court held that an agreement allowing amendments to the partnership agreement with merely 70% approval is binding even regarding fundamental changes.¹³

Regarding “acts in contravention of any agreement between the partners,” it is not clear whether “any agreement” refers to any decision made unanimously. Is unanimity required to change (1) an ordinary decision that happened to be made unanimously or (2) a unanimous decision to deviate from the presumptions of the U.P.A.?

⁸ U.P.A. § 18(h).

⁹ U.P.A. § 18(h).

¹⁰ *Waite v. Salestrom*, 206 Neb. 578, 294 N.W.2d 338 (1980); *Aztec Petroleum Corp. v. MHM Co.*, 703 S.W.2d 290 (Tex Ct. App. 1985); U.P.A. §§ 9(3), 18. *But see infra text* accompanying notes 11-13. *See generally*, Comment, *U.P.A. Section 18(h): Majority Control, Dissenting Partners, and the Need for Reform*, 13 U.C. DAVIS L. REV. 903 (1980).

¹¹ 238 Or. 257, 393 P.2d 774 (1964).

¹² The court's presentation of the facts and issues of this case is confusing. The case involved a partnership of ten doctors. One clause in the partnership agreement allowed a majority to expel a partner. Another clause prohibited competition for ten years within thirty miles. The case is unclear on whether the covenant not to compete applied only to a partner who withdrew or also to one who was expelled. Furthermore, it is unclear on whether the plaintiff withdrew, was expelled, or was seeking dissolution under U.P.A. section 32. The court's statement on the need for unanimity does not arise in a discussion of these issues, however. Rather, it concerns a decision by the majority creating an executive committee to manage the partnership.

¹³ 703 S.W.2d 290 (Tex Ct. App. 1985). Although this case involves a limited partnership, the rules on unanimous consent are similar to those for an ordinary partnership. *See U.L.P.A. §§ 9, 29 (1916) (under which this case was decided); U.L.P.A. §§ 403, 1105 (1976 & 1985).*

In several cases courts have stated that unanimity is not required to change a previous unanimous agreement in some circumstances. In *Cotton Plant Oil Mill Co v. Buckeye Cotton Oil Co*,¹⁴ a pre-U.P.A. case, Pearce and five other persons formed a partnership. By unanimous agreement the partners gave Pearce exclusive authority to buy and sell cotton seed. In violation of this agreement, four of the other five partners made a contract, on behalf of the partnership, selling cotton seed to the plaintiff. Although the plaintiff knew that the partners had given Pearce exclusive authority, the plaintiff was allowed to enforce the contract. The court held that delegation of exclusive agency power to one partner was revocable by a majority of the partners.¹⁵

In *Glassell v. Prentiss*¹⁶ the plaintiff and the four defendants formed a partnership. The partners made a unanimous agreement that the plaintiff would be the field superintendent, with a salary of \$200 a week.¹⁷ The four defendants later decided to terminate the plaintiff's position, dissolve the partnership, and liquidate the assets.¹⁸ In an action for an accounting, the court gave two reasons for rejecting the plaintiff's claim for loss of the salary. First, dissolution terminates the plaintiff's right to the salary.¹⁹ Second, even if there were no dissolution, the plaintiff's position and salary were revocable by the majority of the partners because the decision to create the position and salary was an ordinary decision.²⁰

The court's second explanation, which perhaps is dictum, is clearly wrong. The U.P.A. creates a presumption that each partner has an equal right in the management and conduct of the business.²¹ Therefore, the delegation of exclusive authority to the plaintiff (like the granting of exclusive authority to Pearce in *Cotton Plant Oil*) was an extraordinary decision and requires unanimous consent.²² The U.P.A. also creates a presumption that no partner is entitled to any compensation for services.²³ Therefore, the granting of a salary to the plaintiff likewise was an extraordinary decision and requires unanimous consent.

¹⁴ 192 Ark. 271, 122 S.W. 658 (1909).

¹⁵ The fact that this case involved a suit between a third person and a partnership is not important, because the validity of the plaintiff's claim depended on whether the majority had the right to revoke Pearce's exclusive authority. "No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction." U.P.A. § 9(4).

¹⁶ 175 Cal. App. 2d 599, 346 P.2d 895 (1959).

¹⁷ *Id.* at 601, 346 P.2d at 898.

¹⁸ *Id.*

¹⁹ *Id.* at 609, 346 P.2d at 903.

²⁰ *Id.*

²¹ U.P.A. § 18(e).

²² See *supra* text accompanying notes 11-12.

²³ U.P.A. § 18(f). See generally, Schwartz, *Compensation of a Partner for Services: Problems in Interpreting the U.P.A. and Partnership Agreements*, 18 Sw. U.L. REV. ____ (1990).

In *Rosenfeld v. Rosenfeld*²⁴ the plaintiff and the four defendants formed a partnership.²⁵ The partners made a unanimous agreement regarding the salary of each partner.²⁶ When the defendants wanted an increase in their salaries, the plaintiff originally consented, but later objected.²⁷ The court held that each partner has the power to terminate the salary agreement.²⁸

In *Horn v. Builders Supply Co.*,²⁹ Horn was one of two general partners in a limited partnership.³⁰ By unanimous agreement Horn received a \$700 salary and a \$100 expense account a month.³¹ Later, all the partners except Horn voted to fire Horn and eliminate Horn's salary and expense account.³² In an action for dissolution and an accounting, the court denied Horn's claim for loss of salary.³³ The court stated that unanimous consent is not necessary to terminate the salary of a partner.³⁴ This statement perhaps is dictum, because unanimous consent is not necessary to dissolve a limited partnership and a partner's salary generally terminates upon dissolution.³⁵

These cases assert (although often only in dicta) that unanimity is not required to cancel a deviation from the presumptions created by the U.P.A. This view is inconsistent with the plain meaning of the U.P.A.³⁶ Furthermore, this view is unfair to any partner who detrimentally relied on the terms of the partnership agreement.³⁷ Thus courts generally have supported the better view that unanimous consent is needed to modify a partnership agreement.³⁸

²⁴ 390 Pa. 39, 133 A.2d 829 (1957).

²⁵ *Id.* at 42, 133 A.2d at 830.

²⁶ *Id.* at 43-44, 133 A.2d at 831.

²⁷ *Id.*, 133 A.2d at 831-32.

²⁸ *Id.* at 49, 133 A.2d at 834.

²⁹ 401 SW.2d 143 (Tex. Civ. App. 1966).

³⁰ Although this case involves a limited partnership, the rules on unanimous consent are similar to those for an ordinary partnership. See U.L.P.A. §§ 9, 29 (1916) (under which this case was decided); U.L.P.A. §§ 403, 1105 (1976 & 1985).

³¹ *Horn v. Builders Supply Co.*, 401 SW.2d at 145.

³² *Id.*

³³ *Id.* at 149.

³⁴ *Id.* at 148.

³⁵ *Glassell v. Prentiss*, 175 Cal. App.2d 599, 346 P.2d 895 (1959). See U.P.A. §§ 18, 29, 31, 32; U.L.P.A. §§ 9, 20, 29 (1916); U.L.P.A. §§ 403, 801, 1105 (1976 & 1985). *But see Tucker v. Tucker*, 370 Pa. 8, 87 A.2d 650 (1952) (express salary continues after dissolution as compensation for winding up).

³⁶ "[N]o act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners." U.P.A. § 18(h).

³⁷ See Schwartz, *supra* note 23.

Uniform Limited Partnership Act (1916)

The 1916 Act often is unclear on whether a provision refers only to disputes among the members,³⁹ only to disputes between the partnership and a non-partner, or to both types of disputes.⁴⁰ The 1916 Act also is unclear on whether a provision merely creates a presumption.⁴¹ Regarding disputes among the members, some courts have held that there is virtually complete freedom of contract.⁴²

To create a limited partnership, the members must file a certificate of limited partnership with a state government.⁴³ Under the 1916 Act, the certificate must contain much information about the partnership.⁴⁴

³⁹ Waite v. Salestrom, 206 Neb. 578, 294 N.W.2d 338 (1980); Ben-Dashan v. Plitt, 58 A.D.2d 244, 396 N.Y.S.2d 542 (1977). This is in accord with pre-U.P.A. case law. See Gage v. Parmelee, 87 Ill. 329 (1877); Keiley v. Turner, 81 Md. 269, 31 A. 700 (1895).

³⁹ In the 1916 Act the owners of a limited partnership are called "general partners," "limited partners," or, collectively, "members." But they are not called "partners." Under the 1916 Act, "[t]he person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner. He is, however, a member of the association." U.L.P.A. § 1 comment (1916), 6 U.L.A. 564 (1969). See also Lewis, *The Uniform Limited Partnership Act*, 65 U. PA. L. REV. 715 (1917).

⁴⁰ Schwartz, *supra* note 4, at 703.

⁴¹ *Id.*

⁴² Riviera Congress Assoc. v. Yassky, 18 N.Y.2d 540, 223 N.E.2d 876, 277 N.Y.S.2d 386 (1966); Lanier v. Bowdoin, 282 N.Y. 32, 24 N.E.2d 732 (1939).

⁴³ U.L.P.A. § 2 (1916).

⁴⁴ Section 2(1):

Two or more persons desiring to form a limited partnership shall:

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated,

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

U.L.P.A. § 2(1) (1916).

The 1916 Act explicitly requires the unanimous consent of the members to amend the certificate⁴⁶ or to do anything inconsistent with the certificate.⁴⁷ Unanimous consent is also necessary (1) to possess partnership property for other than partnership purposes, (2) to continue the business after the death, retirement, or insanity of a general partner, and (3) for some acts involving non-partners that would not be binding unless there is unanimous consent.⁴⁸ The need for unanimous consent is subject to contrary agreement among the members.⁴⁹ But for all other types of decisions, the general partners have the power to do anything that the partners in an ordinary partnership can do, except as provided by the certificate.⁵⁰ Thus, the general partners can, by unanimous consent, change other aspects of the partnership agreement, unless the certificate restricts the power of the general partners.⁵¹

Uniform Limited Partnership Act (1976)

The 1976 Act eliminated much of the confusion of the 1916 Act.⁵² Nearly all the sections regarding the relationship among the partners⁵³ contain phrases such as "unless otherwise provided in the partnership agreement."⁵⁴ Thus, the 1976 Act gives virtually complete freedom to contract

⁴⁵ U.L.P.A. prefatory note (1985), 6 U.L.A. 221-23 (Supp. 1989); Schwartz, *The Uniform Limited Partnership Act: Are the Recent Changes Improvements?* 93 DICK. L. REV. 555, 560-61 (1989).

⁴⁶ U.L.P.A. §§ 24-25 (1916).

⁴⁷ Section 9(1):

A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

- (a) Do any act in contravention of the certificate,
- (b) Do any act which would make it impossible to carry on the ordinary business of the partnership,
- (c) Confess a judgment against the partnership,
- (d) Possess partnership property, or assign their rights in specific property, for other than a partnership purpose,
- (e) Admit a person as a general partner,
- (f) Admit a person as a limited partner, unless the right to do so is given in the certificate,
- (g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right to do so is given in the certificate.

U.L.P.A. § 9(1) (1916).

⁴⁸ *Id.* Compare with U.P.A. §§ 9(3), 18(g).

⁴⁹ *Aztec Petroleum Corp. v. MHM Co.*, 703 SW.2d 290 (Tex Ct. App. 1985).

⁵⁰ *See* U.L.P.A. §§ 2, 9, 24 (1916).

⁵¹ *See id.* But the power of the general partners is subject to the duty of good faith. *Bassan v. Investment Exch. Corp.*, 83 Wash. 2d 922, 524 P.2d 233 (1974).

⁵² Schwartz, *supra* note 4, at 708.

⁵³ In the 1976 Act the owners of a limited partnership are called "partners" rather than "members," as in the 1916 Act. This change apparently is not merely a change in terminology, but involves an abandonment of the view that a limited partner "is not in any sense a partner." *See supra* note 39.

⁵⁴ U.L.P.A. §§ 107, 301-02, 403-05, 502-04, 601-05, 702, 803-04 (1976).

among the partners.⁵⁵

The 1976 Act explicitly requires the unanimous consent of the partners to add a new general partner.⁵⁶ Also, contributions to be made by a limited partner cannot be increased without the consent of that partner.⁵⁷ But for all other types of decisions, the general partners have the power to do anything that the partners in an ordinary partnership can do, except as provided by the partnership agreement.⁵⁸ Thus, the general partners can by unanimous consent change other aspects of the partnership agreement, unless the partnership agreement restricts the power of the general partners.⁵⁹

Uniform Limited Partnership Act (1985)

The 1985 Act made few changes regarding the presumptions on the mutual rights and duties of the partners.⁶⁰ The 1985 Act generally requires the unanimous consent of the partners to add a new general partner.⁶¹ But for all other types of decisions, the 1985 Act gives the general partners the power to do anything that the partners in an ordinary partnership can do, except as provided by the partnership agreement.⁶² Thus, the general partners can by unanimous consent change other aspects of the partnership agreement, unless the partnership agreement restricts the power of the general partners.⁶³

II. WHAT EVIDENCE IS SUFFICIENT TO REBUT A PRESUMPTION OR MODIFY A PARTNERSHIP AGREEMENT?

Uniform Partnership Act

To rebut a U.P.A. presumption on the mutual rights and duties of the partners, must there be evidence of a written agreement or even an express oral agreement? The U.P.A. does not expressly discuss this issue.

⁵⁵ But the right of each limited partner to "reasonable" access to information about the partnership perhaps is absolute. U.L.P.A. § 305 (1976); Schwartz, *supra* note 4, at 709.

⁵⁶ U.L.P.A. § 401 (1976).

⁵⁷ U.L.P.A. § 204(a)(2) (1976).

⁵⁸ "Except as provided in this Act or in the partnership agreement, a general partner of a limited partnership has the rights and powers and is subject to the restrictions and liabilities of a partner in a partnership without limited partners." U.L.P.A. § 403 (1976 & 1985).

⁵⁹ *Id.* But the power of the general partners is subject to a duty of good faith. *Jerman v. O'Leary*, 145 Ariz. 397, 701 P.2d 1205 (1985); *Mahon v. Harst*, 738 P.2d 1190 (Colo. App. 1987); *Roeschlein v. Watkins*, 686 P.2d 1347 (Colo. App. 1983); *Ebest v. Bruce*, 734 S.W.2d 915 (Mo. App. 1987).

⁶⁰ Schwartz, *supra* note 45.

⁶¹ U.L.P.A. § 401 (1985).

⁶² U.L.P.A. § 403 (1976 & 1985).

⁶³ *Id.* But the power of the general partners is subject to a duty of good faith. See *supra* note 59.

But the U.P.A. does incorporate by reference the general rules of contract law.⁶⁴

The general rules of contract law do not require evidence of a written agreement unless the contract is covered by the Statute of Frauds.⁶⁵ Furthermore, a presumption can be rebutted not only by express terms, but also by terms that are implied by conduct and usages.⁶⁶

Prior to the U.P.A., case law followed general contract law, and presumptions were readily rebutted, not only by express oral agreements, but also by agreements implied by conduct.⁶⁷ And an express agreement could be rebutted by conduct and usages.⁶⁸ Likewise, under the U.P.A., presumptions often were rebutted, not only by express oral agreements, but also by agreements implied by conduct.⁶⁹ Also, express agreements often were rebutted by conduct and usages.⁷⁰

But some courts require an express agreement to rebut a presumption of the U.P.A. For example, several courts have held that an express agreement is required to rebut the presumptions (1) that no partner is entitled to compensation for services,⁷¹ (2) that each partner has an equal right to participate in partnership affairs,⁷² and (3) that profits are divided equally.⁷³

⁶⁴ U.P.A. § 5.

⁶⁵ See RESTATEMENT (SECOND) OF CONTRACTS § 110 (1979).

⁶⁶ *Id.* §§ 202, 203, 219-23 (1979).

⁶⁷ *E.g.*, *Dugan v. Forster*, 104 Cal. App. 117, 285 P. 384 (1930) (salary implied by course of performance); *Lewis v. Moffett*, 11 Ill. 392 (1849) (salary implied by course of performance); *Gallivan v. O'Donnell*, 54 R.I. 194, 171 A. 911 (1934) (salary implied by course of performance); *Montgomery v. Burch*, 11 S.W.2d 545 (Tex. Civ. App. 1928); *Schwartz*, *supra* note 23.

⁶⁸ *Gage v. Parmelee*, 87 Ill. 329 (1877) (express agreement on a salary rebutted by course of performance); *Keiley v. Turner*, 81 Md. 269, 31 A. 700 (1895) (express agreement on a salary rebutted by course of performance).

⁶⁹ *E.g.*, *Van Ruiten v. Van Ruiten*, 268 Cal. App. 2d 619, 74 Cal. Rptr. 186 (1969) (oral agreement on a salary); *Knauss v. Hale*, 64 Idaho 218, 131 P.2d 292 (1942) (implied agreement on salary); *Flannery v. Flannery*, 320 Ill. App. 421, 51 N.E.2d 349 (1943) (implied agreement on share of profits); *Petersen v. Petersen*, 284 Minn. 61, 169 N.W.2d 228 (1969) (implied agreement on settlement of accounts upon dissolution); *Smith v. Daub*, 219 Neb. 698, 365 N.W.2d 816 (1985) (implied agreement on share of profits); *Fortugno v. Hudson Manure Co.*, 51 N.J. Super. 482, 144 A.2d 207 (1958) (implied agreement on salary).

⁷⁰ *Shulkin v. Shulkin*, 301 Mass. 184, 16 N.E.2d 644 (1938) (express agreement on salary rebutted by course of performance); *Ben-Dashan v. Plitt*, 58 A.D.2d 244, 396 N.Y.S.2d 542 (1977) (express agreement on compensation rebutted by course of performance); *Harding v. Haas*, 428 P.2d 390 (Wyo. 1967) (express agreement on share of profits rebutted by course of performance).

⁷¹ *Yoder v. Hooper* 695 P.2d 1182, 1186 (Colo. App. 1984) ("Absent an express agreement, no partner may take a salary for partnership business."); *Barthuly v. Barthuly*, 192 Neb. 610, 223 N.W.2d 429, 432 (1974) ("A partner is not entitled to charge the partnership account for his services unless there is an express agreement that he shall be compensated for such services."); *Cohen v. Erdle*, 282 A.D. 569, 126 N.Y.S.2d 32 (1953); *Baker v. McGrane*, 198 Wis. 512, 224 N.W. 737 (1929); *Schwartz*, *supra* note 23.

⁷² *Covalt v. High*, 100 N.M. 700, 675 P.2d 999, 1002 (1983) ("Except where the partners expressly agree to the contrary, . . . all partners have equal rights in the management and conduct of the business of the partnership.")

⁷³ *Presutti v. Presutti*, 270 Md. 193, 310 A.2d 791 (1973).

Furthermore, one court has stated, in dictum, that the rebuttal of a presumption sometimes requires written evidence. In *Jensen v. Schreck*,⁷⁴ a farm was owned by the Schreck brothers and Randolph. The Schreck brothers provided the labor and Randolph provided the land and most of the machinery, livestock, and financial capital. A dispute arose on whether Randolph was entitled to receive interest on his contributions. The court, in enforcing a written agreement that Randolph would receive interest, stated that written evidence generally is required to rebut the presumption of no interest on contributions.⁷⁵

Some courts, although not actually requiring written evidence, merely give lip service to arguments based on express oral arguments. For example, in *Wind v. Herbert*⁷⁶ the general partners of a limited partnership paid themselves a salary. In an action ancillary to an accounting, the limited partners sought a preliminary injunction to stop the receipt of the salary. Despite the uncontroverted evidence that there was an oral agreement to pay the salary to the general partners, the court allowed the injunction.⁷⁷

The view requiring written evidence, or even an express oral agreement, is inconsistent with the provisions of the U.P.A. and has been rejected by most case law.⁷⁸ Furthermore, this view is unfair to any partner who detrimentally relied on an express oral agreement or an agreement implied by conduct.

Uniform Limited Partnership Act (1916)

Rebuttal of some of the presumptions of the 1916 Act seems to require certain formalities: either a statement in the certificate or specific consent (which sometimes must be written). The presumptions on the limitation of the powers of a general partner can be rebutted only by written consent of the limited partners to a specific act or, sometimes, by a statement in the certificate.⁷⁹ The presumption that all limited partners have equal rights can be rebutted only by a statement in the certificate.⁸⁰ The presumption that the return of a limited partner's contribution

⁷⁴ 275 N.W.2d 374 (Iowa 1979).

⁷⁵ "The general rule is that interest on contributions of partnership assets is not allowed in the absence of a written agreement to the contrary, until a 'balance has been struck,' but that interest may be charged in a particular case if the equities require." *Id.* at 380.

⁷⁶ 186 Cal. App. 2d 276, 8 Cal. Rptr. 817 (1960).

⁷⁷ Although this case involves a limited partnership, the rules on rebuttal of the presumption of no compensation for services are the same as those for an ordinary partnership. See U.L.P.A. §§ 9, 29 (1916) (under which this case was decided); U.L.P.A. §§ 403 & 1105 (1976 & 1985).

⁷⁸ See *supra* notes 64-70 and accompanying text.

⁷⁹ U.L.P.A. § 9 (1916).

⁸⁰ U.L.P.A. § 14 (1916).

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will be made only in cash can be rebutted only by a statement in the certificate or by the specific consent of all members.⁸¹

The presumption that a limited partner is liable to the partnership for unpaid contributions can be rebutted only by the specific consent of all members.⁸² The presumption that an assignee of a limited partnership interest has no right to become a substituted limited partner can be rebutted only by a statement in the certificate or by the specific consent of all members (except the assignor).⁸³ The presumption that, after the retirement, death, or insanity of a general partner, the remaining general partners have no right to continue the business, can be rebutted by a statement in the certificate or by the specific consent of all members.⁸⁴ Also, the presumptions on settling accounts after dissolution can be rebutted only by a statement in the certificate or by the specific consent of all members.⁸⁵

Despite the absolute language of the 1916 Act, some courts have held that the specified formalities need not always be followed.⁸⁶ But other courts have held that the formalities must be followed.⁸⁷

Uniform Limited Partnership Act (1976)

The 1976 Act greatly reduced the formalities for rebutting presumptions. But the addition of a general partner requires the specific written

⁸¹ U.L.P.A. § 16(3) (1916).

⁸² U.L.P.A. § 17(3) (1916).

⁸³ U.L.P.A. § 19(4) (1916).

⁸⁴ U.L.P.A. § 20 (1916).

⁸⁵ U.L.P.A. § 23(2) (1916).

⁸⁶ In *Wasserman v. Wasserman*, 7 Mass. App. Ct. 167, 386 N.E.2d 783 (1979), the certificate allowed the general partner to choose a new general partner without the consent of the limited partners. The general partner assigned his general partnership rights to the plaintiff. The court held that the plaintiff was the sole general partner, although the limited partners did not give specific consent as seemingly required by U.L.P.A. section 9(1)(e) (1916). *Id.* at 175, 386 N.E.2d at 788-89.

In *Mist Properties, Inc. v. Fitzsimmons Realty Co.*, 228 N.Y.S.2d 406 (N.Y. Sup. Ct. 1962), an agreement among the members gave the general partners broad discretion to sell partnership property. In a dispute with a mortgagee, indirectly involving a sale that did not conform with the formalities of U.L.P.A. section 9 (1916), the court said that the agreement among the members was binding on them. *Id.* at 410.

⁸⁷ In *Newburger, Loeb & Co. v. Gross*, 365 F. Supp. 1364 (S.D.N.Y. 1973), *rev'd in part*, 563 F.2d 1057 (2d Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978), the court stated that the requirement of consent to a specific act, under U.L.P.A. section 9(1)(a)-(e) (1916), cannot be waived by a provision in the certificate. This statement is dictum, however, since the certificate did not waive the requirement of specific consent.

In *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 619 P.2d 1219 (1980), the general partner signed an agreement for the sale of substantially all assets of the partnership to the plaintiff. The court held that the buyer could not enforce the agreement, because the limited partners did not either give written consent or ratification, as required by U.L.P.A. section 9 (1916).

See generally, *Id.* Schwartz, *supra* note 4, at 707-08.

consent of all partners.⁸⁸ The presumptions on events that terminate a person's status as a general partner can be rebutted only by the specific written consent of all partners or, sometimes, by a statement in the certificate.⁸⁹ Also, the presumption that a partner has a right to demand a distribution only in cash can be rebutted only by a statement in the certificate.⁹⁰

Uniform Limited Partnership Act (1985)

The 1985 Act made a few changes in the formalities for decisions among the partners. A new general partner can be admitted as provided by a written partnership agreement or with the written consent of all partners.⁹¹ The presumptions on events that terminate a person's status as a general partner can be rebutted only by the specific written consent of all partners or, sometimes, by a written partnership agreement.⁹² And the presumptions on distributions in kind can be rebutted only by a written partnership agreement.⁹³

⁸⁸ "After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted only with the specific written consent of each partner." U.L.P.A. § 401 (1976).

⁸⁹ U.L.P.A. § 402 (1976).

⁹⁰Section 605:

Except as provided in the certificate of limited partnership, a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership.

U.L.P.A. § 605 (1976).

⁹¹ Section 401:

After the filing of a limited partnership's original certificate of limited partnership, additional general partners may be admitted as provided in writing in the partnership agreement or, if the partnership agreement does not provide in writing for the admission of additional general partners, with the written consent of all partners.

U.L.P.A. § 401 (1985).

⁹² U.L.P.A. § 402 (1985).

⁹³ Section 605:

Except as provided in writing in the partnership agreement, a partner, regardless of the nature of his contribution, has no right to demand and receive any distribution from a limited partnership in any form other than cash. Except as provided in writing in the partnership agreement, a partner may not be compelled to accept a distribution of any asset in kind from a limited partnership to the extent that the percentage of the asset distributed to him exceeds a percentage of that asset which is equal to the percentage in which he shares in distributions from the limited partnership.

U.L.P.A. § 605 (1985).

III. CONCLUSION

Uniform Partnership Act

Unanimous consent of the partners is required to rebut a presumption of the U.P.A. or modify a partnership agreement.⁹⁴ But a few cases assert that unanimity is not required to cancel a deviation from the presumptions of the U.P.A.⁹⁵ This view is inconsistent with the U.P.A. and has been rejected by most case law.⁹⁶ Furthermore, this view is unfair to any partner who detrimentally relied on the terms of the partnership agreement. Although dissolution provides a remedy to a dissatisfied partner, the burden of seeking this harsh remedy should be on the partners who want to breach the agreement, not on the partner who is a victim of the breach.

Evidence based on conduct or usages is sufficient to rebut a presumption of the U.P.A. or modify a partnership agreement.⁹⁷ But a few cases assert that rebuttal of a presumption of the U.P.A. requires an express agreement, which sometimes must be written.⁹⁸ This view is inconsistent with the U.P.A. and has been rejected by most case law.⁹⁹ Furthermore, this view is unfair to any partner who detrimentally relied on an express oral agreement or an agreement implied by conduct or usages.

Uniform Limited Partnership Acts

To rebut a presumption of the U.L.P.A. or modify a partnership agreement always requires the unanimous consent of the general partners and generally requires the unanimous consent of the limited partners.¹⁰⁰ But rebuttal of some of the presumptions seems to require certain formalities: a statement in the certificate, a written partnership agreement, or specific consent.¹⁰¹ The 1976 Act greatly reduced the formalities for rebutting presumptions.¹⁰² The 1985 Act eliminated the need for statements in the certificate.¹⁰³ These changes are desirable, since they reduce the expense and inconvenience of modifying a limited partnership and increase the flexibility of limited partnerships.¹⁰⁴

⁹⁴ See *supra* notes 7-8 and accompanying text.

⁹⁵ See *supra* notes 16-35 and accompanying text.

⁹⁶ See *supra* notes 7-8 and accompanying text.

⁹⁷ See *supra* notes 64-70 and accompanying text.

⁹⁸ See *supra* notes 71-77 and accompanying text.

⁹⁹ See *supra* notes 64-70 and accompanying text.

¹⁰⁰ See *supra* notes 46-63 and accompanying text.

¹⁰¹ See *supra* notes 79-93 and accompanying text.

¹⁰² See *supra* notes 88-90 and accompanying text.

¹⁰³ Schwartz, *supra* note 45, at 568-70. See *supra* notes 91-93 and accompanying text.

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Schwartz, *supra* note 45, at 568-70.

