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# Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency

J. Dennis Hynes\*

## I. Introduction

The topic of freedom of contract and waivers of or substantial inroads into fiduciary duties in the context of unincorporated business associations has enjoyed widespread attention lately.<sup>1</sup> In part, this is the result of a bold

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\* Professor of Law, University of Colorado School of Law. My thanks to Clifford Calhoun, Bill Callison, Wayne Gazur, Mark Loewenstein, and Dale Oesterle for their comments on an earlier draft of this Article, and to Adrian Villaseñor, my research assistant. This Article is based on an address presented at the Washington and Lee School of Law on November 15, 1996, in connection with *The Future of the Unincorporated Firm* Symposium.

1. See, e.g., Claire Moore Dickerson, *Cycles and Pendulums: Good Faith, Norms, and the Commons*, 54 WASH. & LEE L. REV. 399 (1997); Claire Moore Dickerson, *Equilibrium Destabilized: Fiduciary Duties Under the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 417 (1995); Claire Moore Dickerson, *From Behind the Looking Glass: Good Faith, Fiduciary Duty & Permitted Harm*, 22 FLA. ST. U. L. REV. 955 (1995); Claire Moore Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111 (1993); J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29 (Spring 1995) [hereinafter Hynes, *Freedom of Contract*]; J. Dennis Hynes, *The Revised Uniform Partnership Act: Some Comments on the Latest Draft of RUPA*, 19 FLA. ST. U. L. REV. 727 (1992); Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465 (1997); Larry E. Ribstein, *Fiduciary Duty Contracts in Unincorporated Firms*, 54 WASH. & LEE L. REV. 537 (1997) [hereinafter Ribstein, *Fiduciary Duty*]; Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45 (1993) [hereinafter Ribstein, *Not Ready*]; Allan W. Vestal, *Advancing the Search for Compromise: A Response to Professor Hynes*, 58 LAW & CONTEMP. PROBS. 55 (Spring 1995) [hereinafter Vestal, *Advancing the Search*]; Allan W. Vestal, *"Assume a Rather Large Boat . . .": The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487 (1997); Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219 (1994); Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523 (1993) [hereinafter Vestal, *Contractarian Error*]; Allan W. Vestal, *The Disclosure Obligations of Partners Inter*

sally made by the revised Uniform Partnership Act (1994) (RUPA),<sup>2</sup> which directly influenced the Uniform Limited Liability Company Act (1995) (ULLCA).<sup>3</sup> This Article will describe and briefly comment on the relevant

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*See Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559 (1995); Donald J. Weidner, *RUPA and Fiduciary Duty: The Texture of Relationship*, 58 LAW & CONTEMP. PROBS. 81 (Spring 1995) [hereinafter Weidner, *RUPA*]; Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1 (1993); Donald J. Weidner, *Three Policy Decisions Animate Revision of Uniform Partnership Act*, 46 BUS. LAW. 427 (1991) [hereinafter Weidner, *Policy Decisions*].

2. REVISED UNIF. PARTNERSHIP ACT (1994) (RUPA), 6 U.L.A. 1 (1995). The word "revised" is not in the official title to the 1994 Act. Nevertheless, references to the Act as RUPA are widespread in literature on the Act, in part because RUPA is a convenient and easily pronounced acronym and in part because RUPA indeed is a revision (of a substantial nature) of the Uniform Partnership Act (1914) (UPA).

3. UNIF. LIMITED LIABILITY COMPANY ACT (ULLCA), 6A U.L.A. 425 (1995). The limited liability company (LLC) is a relatively new form of doing business in an unincorporated format. Statutes authorizing the LLC are now adopted in all fifty states. *See* 3 LIMITED LIABILITY COMPANY REPORTER 96-301, 96-301 (1996). The recently promulgated ULLCA serves as a useful point of reference for discussions of the LLC. The ULLCA is based heavily on RUPA, even to the extent of common section numbers on some matters. This may in part reflect the fact that the internal operation of an LLC is informal and unstructured, which also is true of a partnership. This leads naturally to use of the partnership form as a guide in creating the statute underlying the LLC.

The ULLCA distinguishes between member-managed and manager-managed LLCs. *See* ULLCA §§ 301-303. The distinction has relevance for a discussion of fiduciary duties. The treatment in the ULLCA of member-managed LLCs is very close to the treatment of partners in RUPA. ULLCA Section 409 defines fiduciary duties in language nearly identical to RUPA Section 404, including confining fiduciary duties to the duties of loyalty and care and defining those two duties in language identical in all material respects to RUPA Section 404. *See infra* text accompanying notes 33-40. Also, ULLCA Section 103 characterizes those duties (and the duty of good faith, again expressed in language borrowed from RUPA) as nonwaivable. The same structure exists for the managers of manager-managed LLCs. ULLCA Section 409(h)(2) states: "[A] manager is held to the same standards of conduct prescribed for members in subsections (b) through (f)."

The dichotomy between member-managed LLCs and manager-managed LLCs raises the issue whether contracts concerning fiduciary duties should be treated differently depending on the nature of the LLC. With regard to member-managed LLCs, there appears to be little distinction between the operation of a member-managed LLC and a partnership. Although each LLC has articles of organization that must be filed with the secretary of state in order to create the entity — and in that sense the LLC differs from a partnership, which is a default form of doing business and can come into existence without any filing — the articles play largely a notice role. The operating agreement is the basic governing document. *See* ULLCA § 203 cmt. ("The articles serve primarily a notice function and generally do not reflect the substantive agreement of the members regarding the business affairs of the company. Those matters are generally reserved for an operating agreement . . ."). It thus serves fundamentally the same function as a partnership agreement, further strengthening

provisions of RUPA. Its main focus, however, will be on the argument that the law of agency provides a compelling analogy for the use of the bargain principle in the context of defining fiduciary relationships among partners.<sup>4</sup> This Article will conclude that, absent special circumstances, contracts addressing fiduciary duties should enjoy the same treatment as contracts on other matters.

## II. Fiduciary Duties

A leading authority defines a fiduciary as "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking."<sup>5</sup> The usual expectation, based on the nature of the relationship, is that a fiduciary will discharge this undertaking to act on behalf of<sup>6</sup> another in a selfless manner and will indeed act

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the parallel between the LLC and the partnership. Also, the nonwaivable provisions of Section 103 of ULLCA refer to the operating agreement, not the articles of organization.

One could argue that the situation differs for manager-managed LLCs. Managers are merely agents of the firm and not necessarily owners. One could further assert that this makes relevant the unqualified endorsement of the bargain principle set forth in *Restatement (Second) of Agency* Section 376. See RESTATEMENT (SECOND) OF AGENCY § 376 (1958); *infra* text accompanying note 20. But the argument fails by virtue of the language of Section 409, holding managers to the same duties as owners. Granted, the language of Section 103 does not refer expressly to managers, but one can easily imagine a court reading it to include managers.

4. Although this Article focuses on the partnership form of doing business, much of its analysis would apply to the LLC and other forms of doing business in unincorporated form, on the assumption that the context is that of a closely held business.

5. RESTATEMENT (SECOND) OF AGENCY § 13 cmt. a. A specialist in corporate law may argue that this definition is too narrow because it does not include the majority shareholder in a close corporation. The majority shareholder does not agree to act primarily for the benefit of the minority shareholders in the usual case, yet is subject to fiduciary duties in some jurisdictions. See Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675, 1701 (1990). This raises an issue about the wisdom of imposing duties labeled as fiduciary upon a mere shareholder, who has not agreed to act on behalf of others. Perhaps the solution in some jurisdictions of granting dissolution powers to a minority shareholder who is caught in a freezeout by an opportunistic majority shareholder would be a more appropriate remedy because it avoids the awkwardness of calling a mere shareholder a fiduciary. In any event, the point is not material to the topic of this paper, which deals with partnerships in which mere ownership does not by itself signal a passive role. See also ULLCA § 409(h)(1) (underscoring this point by stating that "a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member"). The denial of fiduciary duties under that circumstance obviously turns on the passive role of the member who agreed to put management in the hands of others.

6. See RESTATEMENT (SECOND) OF AGENCY §§ 1, 14J (using phrases "on his behalf"

"primarily" for the benefit of the other, which includes keeping the interests of the other foremost in mind (through loyalty and full disclosure) and acting with care.<sup>7</sup>

A fiduciary relationship is a relationship of trust, which necessarily involves vulnerability for the party reposing trust in another. One's guard is down. One is trusting another to take actions on one's behalf. Under such circumstances, to violate a trust is to violate grossly the expectations of the person reposing the trust. Because of this, the law creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them.<sup>8</sup> One can call this the fiduciary principle. To recognize such duties and enforce a reasonable expectation of trust, requiring a person granted the trust of another to honor and respect that trust is both understandable and of utmost importance. The law would be abandoning one of its most basic functions if it were to overlook the importance of recognizing and enforcing relationships of trust.<sup>9</sup>

### III. *The Default Nature of Fiduciary Duties*

One feature of the law of fiduciary duties is that it is open-textured and uncertain.<sup>10</sup> The very breadth of the fiduciary principle and the indetermi-

and "primarily for the benefit of" interchangeably and synonymously).

7. See *infra* text accompanying note 8 (discussing customary fiduciary duties, which reflect this expectation).

8. The duties of loyalty and care are usually described as the core fiduciary duties. Sometimes good faith and full disclosure are added to this list. See 2 ALAN BROMBERG & LARRY RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* 6:67-6:68 (1996) (after mentioning that duty of full disclosure is consequence of fiduciary relationship among partners, it is stated that: "The main elements of the partners' fiduciary duties are well recognized: utmost good faith, fairness, and loyalty.").

9. This Article focuses on relationships of trust in a commercial context. Relationships of trust extend well beyond a commercial context, of course, yet fiduciary law does not always apply to them. The marriage relationship involves a great deal of trust and confidence between spouses, but the law does not provide a cause of action for an act of disloyalty within the relationship. Of course, if the facts involve a specific undertaking by one spouse to act on behalf of a spouse or another family member, one is on the road to creating an agency relationship, which changes the legal relationship of the parties.

10. See Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 879 (discussing fiduciary obligation). Professor DeMott asserts that:

Fiduciary obligation is one of the most elusive concepts in Anglo-American law. Applicable in a variety of contexts, and apparently developed through a jurisprudence of analogy rather than principle, the fiduciary constraint on a party's discretion to pursue self-interest resists tidy categorization. Although one can identify common core principles of fiduciary obligation, these principles apply with greater or lesser force in different contexts involving different types of

nate number and kind of relationships that it touches lead to such a consequence. This results in considerable vagueness and ambiguity,<sup>11</sup> creating an incentive under some circumstances to attempt to reduce the risks posed by vague and ambiguous standards by agreeing to redefine or even waive some or all fiduciary duties. Does the law allow this?

The thesis of this Article is that the special status of fiduciary duties, as important as it is, should be of a default nature only.<sup>12</sup> Fiduciary duties reflect the unspoken expectations of persons entering into a relationship of trust and thus exist in every such relationship when nothing specific is said about such duties. If, however, people choose to bargain expressly on this matter, their bargain should be respected, assuming that the parties observe the customary limits on contract bargaining. The very existence of an agreement on the nature and the extent of fiduciary duties tempers and qualifies the degree of trust one places in another. Expectations have changed. To ignore this is to raise fiduciary duties almost to the status of natural law,<sup>13</sup> an approach inconsistent with the fundamental tenets of American law.

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parties and relationships. Recognition that the law of fiduciary obligation is situation-specific should be the starting point for any further analysis.

*Id.*

11. See Mitchell, *supra* note 5, at 1696. Professor Mitchell notes:

The language [of Judge Cardozo in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928), a famous partnership fiduciary case] expressing these [fiduciary] norms is aspirational and studiously imprecise. The very ambiguity of the language conveys its moral content as the court's refusal to set lines is designed to discourage marginal conduct by making it difficult for a fiduciary to determine the point at which self-serving conduct will be prohibited, and thus to encourage conduct well within the borders.

*Id.*

12. It is recognized that default rules in themselves impose costs on contracting parties by requiring them to incur the costs of negotiating variations from the rules. But the expectation of special responsibilities for fiduciaries based on the trust placed in them is so widespread that it would be inappropriate to deny their existence. Also, the existence of default rules provides a structure for a fiduciary relationship. Proposals by the fiduciary for modification of the rules should serve to warn the other party that he may be placing trust in the wrong person.

13. That is, the argument that fiduciary duties are mandatory in the partnership relationship could be seen to rest on a moral sense that overrides the agreement of the parties without regard to the circumstances of the agreement. For a discussion of natural law, see GEORGE C. CHRISTIE & PATRICK H. MARTIN, *JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW* 125 (2d ed. 1995) ("With respect to the basic epistemological question of how do we come to know the natural law, . . . [some lawyers] have laid considerably more stress on our natural human instincts, on a natural moral sense implanted in human beings.").

#### IV. *The Bargain Principle*

The bargain principle lies at the core of contract law. It states that courts will enforce a bargain according to its terms, with the object of putting the promisee in as good a position as if the bargain had been performed, assuming that the traditional defenses of fraud, undue influence, duress, or unconscionability do not exist to undermine the validity of the contract.<sup>14</sup> Because an agreement among persons to carry on a business for profit as co-owners is a contract,<sup>15</sup> the bargain principle is directly applicable to a discussion of the enforceability of agreements among partners, including agreements defining their relationship.<sup>16</sup>

#### V. *The Law of Agency and the Bargain Principle*

The law of agency is relevant to a discussion of the fiduciary duties among partners because the element of trust is common to both agency and partnership settings; also, partnership relationships include agency relationships.<sup>17</sup> Thus, the law of agency provides a useful analogy in a discussion

14. See Melvin A. Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 742 (1982). Professor Eisenberg notes that a bargain is

an exchange in which each party views the performance that he undertakes as the price of the performance undertaken by the other. . . . By the bargain principle, I mean the common law rule that, in the absence of a traditional defense relating to the quality of consent (such as duress, incapacity, misrepresentation, or mutual mistake), the courts will enforce a bargain according to its terms, with the object of putting a bargain-promisee in as good a position as if the bargain had been performed.

*Id.* Bargains generate wealth because each party values what he receives more than what he gives up; enforcement of bargains develops confidence in markets and private planning, and "implicates the state's interest in the smooth functioning of its economy." Eisenberg, *supra*, at 744.

15. See 1 ALAN BROMBERG & LARRY RIBSTEIN, *BROMBERG AND RIBSTEIN ON PARTNERSHIP* 2:63 (1996) (describing partnership agreement as contract).

16. Fiduciary relationships come in great variety and form. Some relationships involve fiduciaries who have never met the person on whose behalf they are acting. This includes trustees under public indentures and bond issues and trustees of large pension plans. In some fiduciary relationships the beneficiary has no choice over the fiduciary, like guardians and executors appointed by a court. Such relationships raise different issues about the impact of the bargain principle. In some of them, it seems hardly applicable at all. See generally Tamar Frankel, *Fiduciary Duties as Default Rules*, 74 OR. L. REV. 1209 (1995) (drawing distinction between public and private fiduciaries). This Article focuses, however, on more intimate fiduciary relationships, like those in a partnership, in which the parties usually meet and bargain expressly with each other.

17. See UNIF. PARTNERSHIP ACT (1914) (UPA) § 9(1), 6 U.L.A. 400-01 (1995) (declaring that "[e]very partner is an agent of the partnership for the purpose of its busi-

of the contractual freedom to tailor relations among co-owners of unincorporated businesses.<sup>18</sup>

The law of agency contains an elaborate treatment of fiduciary duties based on the trust a principal places in its agent, who acts on the principal's behalf.<sup>19</sup> This relationship of trust has generated a substantial body of case law. *The Restatement (Second) of Agency (Restatement)* devotes over twenty sections to the topic, covering over eighty pages, with numerous illustrations of the fiduciary principle at work.

One of the striking features of this body of law, in addition to its length and complexity, is encompassed in the clear position taken by the *Restatement* in favor of the freedom of principal and agent to define contractually this aspect of their relationship. The extensive treatment of fiduciary duties in the *Restatement* is introduced by Section 376, entitled "General Rule." It reads as follows:

The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made, except to the extent that fraud, duress, illegality, or the incapacity of one or both of the parties to the agreement modifies it or deprives it of legal effect.<sup>20</sup>

The language of Comment a of Section 376 clarifies and reinforces the position taken in the above text. It reads in relevant part as follows:

Ordinarily, the duties of the agent are the result of inferences from the conduct of the parties. Thus, the duties, described in Section 379 as duties of care, those stated in Section 385 as duties of obedience, and those stated in Sections 387-398 as duties of loyalty, are inferences drawn from the conduct of the parties in light of common experience and what reasonable men regard as fair. The rules stated in such Sections are the rules applicable to the normal case, in which the parties have not made a different agreement. Since the parties can

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ness"); *see also* RUPA § 301 (expressing same idea).

18. Agency relationships are also involved in LLCs. *See* ULLCA § 301 (1995) (stating with some qualifications that "[e]ach member is an agent of the limited liability company for the purpose of its business"). The ULLCA draws a distinction between member-managed and manager-managed LLCs, and notes in its Section 301(b)(1) that in a manager-managed company a member is not an agent solely by reason of being a member, but that each manager is an agent of the company. *Id.*

19. The other elements of the agency relationship are consent of both parties and control by the principal over the actions of the agent. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

20. *Id.* § 376.



make what agreements they please, and since, with the exceptions stated in Comment b [addressing illegality,<sup>21</sup> fraud, duress, and incapacity], such agreements are enforceable, the rules stated in Sections 378-398 are, with the same exceptions, dependent upon the nonexistence of an agreement to the contrary.<sup>22</sup>

The above language constitutes an unmistakable endorsement of the bargain principle. In addition, the phrase "unless otherwise agreed" is contained in the text of section after section of the *Restatement* setting forth in exhaustive detail the fiduciary duties of the agency relationship.<sup>23</sup> The law of agency thus takes a clear position on the issue of contracting away customary fiduciary duties.<sup>24</sup>

### VI. *The Partnership Relationship*

The characterization of partners as fiduciaries<sup>25</sup> is consistent with the definition set forth above because a partner undertakes to act primarily for the benefit of the partnership in matters connected with the business of the firm.<sup>26</sup> A partner occupies a position of trust. One is entrusted with information,<sup>27</sup> authority,<sup>28</sup> and opportunity because of one's status as a partner.

21. One could argue that the qualification of illegality undermines the assumption that Section 376 endorses the bargain principle because any contract eliminating a fiduciary duty would contravene public policy and thus be illegal. The text in Comment b developing the reference to illegality gives no hint of this broad and circular reading, however. Instead, it refers to Sections 411 and 412, which address such matters as appointing agents to sell liquor during prohibition, to purchase goods in a foreign country in contravention of import restrictions, and so forth. *See id.* §§ 376, 411-12.

22. *Id.* § 376 cmt. a.

23. *See, e.g., id.* §§ 379, 381, 385, 387 (setting forth duty of care, duty to give information, duty to obey, and duty of loyalty, respectively).

24. For an example of a case citing to and applying Section 376, see *Wave Electronics v. UPS*, 603 A.2d 143, 145 (N.J. Super. Ct. Law Div. 1991), in which the court held that the contract between the parties "relieve[d] the [agent] of the duty to exercise reasonable care."

25. *See generally* 2 BROMBERG & RIBSTEIN, *supra* note 8.

26. *See supra* text accompanying note 5.

27. *See* UPA §§ 19, 20 (establishing partner's right of access to partnership books and to demand information of all things affecting partnership). The counterpart provision in RUPA is Section 403, which adds a duty to supply without demand information to partners "concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties."

28. *See* UPA § 9 (characterizing partner as agent of partnership and elaborating on partner's apparent authority to bind firm). The counterpart provision in RUPA is Section 301.

As a result, partners are held to high standards of behavior, which include making full disclosure to fellow partners under appropriate circumstances and acting primarily for the benefit of the firm when acting as a partner in the business. These fiduciary responsibilities reflect the unspoken but universal expectation of people entering into such relationships. Their trust should be honored and courts should play a vigorous role in making sure that it is honored.

It is quite a different matter, however, when the partners make a specific agreement about the amount and the degree of trust they will place in each other. Such agreement qualifies the expectation of trust, as noted above.<sup>29</sup> People may want to make such agreements in order to avoid the risks of judicial interference in this aspect of their relationship. As noted, fiduciary duties are necessarily vague and open-ended,<sup>30</sup> applying to a wide variety of relationships and fact situations. Courts can sometimes misunderstand situations. There is a danger of judicial overreaction to how a situation subsequently turns out and a corresponding underappreciation of the risk previously undertaken by agreement of the parties.<sup>31</sup> There is a risk that a disgruntled partner can use fiduciary law as a weapon to exploit ambiguity, claim abuse of trust, impose litigation and other costs on the firm, and coerce a settlement from fellow partners. Also, some people may see their relationship differently than most people and place no value on loyalty.<sup>32</sup> Are partners free to make these choices?

#### A. *The Mandatory Nature of Fiduciary Duties in RUPA*

RUPA contains several innovative provisions with regard to fiduciary duties among partners. For the first time in partnership law, the drafters defined fiduciary duties in an exclusive manner. RUPA Section 404 establishes the exclusive nature of partnership fiduciary duties, specifying that "the only" fiduciary duties are those of loyalty and care.<sup>33</sup> Also, through

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29. See *supra* text accompanying note 13.

30. See DeMott, *supra* note 10, at 879.

31. See Dale A. Oesterle, *Subcurrents in LLC Statutes: Limiting the Discretion of State Courts to Restructure the Internal Affairs of Small Business*, 66 U. COLO. L. REV. 881, 912 (1995).

32. For a case in which the partners appear to place no value on loyalty, see *Singer v. Singer*, 634 P.2d 766, 768 (Okla. Ct. App. 1981). See *infra* text accompanying notes 92-96 (discussing *Singer*).

33. See RUPA § 404(a) ("The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care as set forth in subsections (b) and (c).").

use of the words "is limited to" in Section 404, RUPA defines the duties of loyalty<sup>34</sup> and care<sup>35</sup> in a way that forecloses their subsequent expansion by courts. This is a sharp departure from the Uniform Partnership Act (1914) (UPA),<sup>36</sup> which merely alluded to fiduciary duties<sup>37</sup> and left development of that body of law up to the courts.<sup>38</sup> The evident purpose of the RUPA approach is to encourage certainty and reliability of partnership agreements<sup>39</sup> by limiting the definition and scope of fiduciary duties to those

34. See *id.* § 404(b). The duty of loyalty is defined in Section 404(b) as follows:

(b) A partner's duty of loyalty to the partnership and the other partners is limited to the following:

(1) to account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and

(3) to refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

*Id.*

35. See *id.* § 404(c). The duty of care is defined in Section 404(c) as follows: "A partner's duty of care to the partnership and the other partners in the conduct and winding up of the partnership business is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law." *Id.*

36. The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the UPA in 1914. It is set forth in 6 U.L.A. 125 (1995).

37. See UPA § 21. The only reference in the UPA to the word "fiduciary" is in the title to Section 21. *Id.* That section reads as follows:

§ 21. Partner Accountable as a Fiduciary.

(1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

*Id.*

38. See also *id.* § 20 (placing duty on partners to render on demand information of all things affecting partnership).

39. See Weidner & Larson, *supra* note 1, at 23. Dean Weidner was the Reporter for RUPA. He states:

It was suggested [in meetings in which RUPA was drafted] that overly broad judicial language has left practitioners uncertain about whether their negotiated agreements will be voided. It was said the lawyers and their clients want to be able to negotiate transactions, reduce their agreements to writing, and have some

stated in Section 404 of the Act.<sup>40</sup>

Section 103 of RUPA delineates what duties in the Act are mandatory and what duties are default in nature.<sup>41</sup> The fiduciary duties described in Section 404 are included within the list of mandatory duties set forth in Section 103.<sup>42</sup> Section 103(b) states that the "partnership agreement may

comfort that those agreements will not be undone by "fuzzy" notions of fiduciary duties.

*Id.*

40. See Weidner, *Policy Decisions*, *supra* note 1, at 462. Dean Weidner explains: RUPA [Section 404(b)] appears to have been motivated in part by a sense that vague, broad statements of a powerful duty of loyalty cause too much uncertainty. It was suggested that, even if there were no bad holdings, overly broad judicial language has left practitioners uncertain about whether their negotiated agreements will be voided.

*Id.*

41. See RUPA § 103. The title to Section 103 contains the phrase "nonwaivable provisions." *Id.* The text of Section 103 does not use the words "mandatory" and "default." *Id.* Instead, they are found in the comments. See RUPA § 103 cmt. 1. If a rule in RUPA is intended to apply regardless of the agreement of the partners, it is mandatory. If a rule can be eliminated by agreement of the partners, it is a default rule.

42. See *id.* § 103. The list contains nine separate items. It is of interest that most of the items deal with fairly specific matters, in which the concern expressed above, *supra* notes 39-40, about introducing uncertainty of agreement would not appear to play a major role. Section 103 reads in full as follows:

Section 103. Effect of Partnership Agreement; Nonwaivable Provisions.

(a) Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership.

(b) The partnership agreement may not:

(1) vary the rights and duties under Section 105 [dealing with recording statements] except to eliminate the duty to provide copies of statements to all of the partners;

(2) unreasonably restrict the right of access to books and records under Section 403(b);

(3) eliminate the duty of loyalty under Section 404(b) or Section 603(b)(3) [addressing dissociation of a partner], but:

(i) the partnership agreement may identify specific types or categories of activities that do not violate the duty of loyalty, if not manifestly unreasonable; or

(ii) all of the partners or a number or percentage specified in the partnership agreement may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty;

(4) unreasonably reduce the duty of care under Section 404(c) or

not . . . eliminate the duty of loyalty" or "unreasonably reduce the duty of care."<sup>43</sup> This restriction is another innovation in RUPA. For the first time in partnership law, fiduciary duties are declared nonwaivable by statute.<sup>44</sup> The list of mandatory provisions also includes the duty of good faith and fair dealing<sup>45</sup> described in Section 404(d),<sup>46</sup> which RUPA does not describe as a fiduciary duty, but is closely related thereto and raises equal problems of uncertainty.<sup>47</sup>

603(b)(3);

(5) eliminate the obligation of good faith and fair dealing under Section 404(d), but the partnership agreement may prescribe the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable;

(6) vary the power to dissociate as a partner under Section 602(a), except to require the notice under Section 601(1) to be in writing;

(7) vary the right of a court to expel a partner in the events specified in Section 601(5);

(8) vary the requirement to wind up the partnership business in cases specified in Section 801(4),(5), or (6); or

(9) restrict rights of third parties under this [Act].

*Id.*

43. *Id.*

44. Professor Vestal takes issue with the characterization of the duties of loyalty and care as mandatory in any meaningful sense. See Vestal, *Advancing the Search*, *supra* note 1, at 61-70. In a careful and detailed parsing of the language of Section 103, he argues that partners are granted extensive contractual freedom under RUPA to define their fiduciary duties up to the point of elimination of the duties, without in some instances having to cope with the manifestly unreasonable standard set forth in Section 103(b)(3) and (5). *Id.* Professor Vestal admits, however, that the language is imprecise and is subject to a more restrictive reading: "In all candor, the language of the statute is not precise, and substantial arguments exist for both sides." *Id.* at 64. And, in any event, it is clear that the freedom to deny altogether a duty of loyalty or care is prohibited. No matter how one characterizes it, this introduces an element of compulsion in the partnership contract.

45. See RUPA § 103(b)(5); *supra* note 42 (providing full text of Section 103).

46. See RUPA § 404(d). The language of Section 404(d) reads as follows: "A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." *Id.*

47. See Hynes, *Freedom of Contract*, *supra* note 1, at 46-49. The duty of good faith receives somewhat curious treatment in RUPA. It is characterized by some authorities as part of the fiduciary duties of partners. See 2 BROMBERG & RIBSTEIN, *supra* note 8, at 6:67-6:68. Yet in RUPA it is excluded from the definition of fiduciary duties. See RUPA § 404(a). It is classified as a mandatory duty in Section 103(b)(5), yet it is not defined. See *id.* § 404(d) cmt. 4 (stating that it was decided not to define good faith and fair dealing). This poses substantial problems of uncertainty because of the vagueness of the phrase "good faith and fair dealing." This is paradoxical considering the concerns for reliability and certainty of agreement expressed by the Reporter when dealing with the traditional fiduciary

RUPA thus seems to pull in opposite directions. In one section (Section 404) it constricts the ability of courts to expand the concept of fiduciary duties. As noted, the evident purpose of this constriction is to increase the certainty and reliability of partnership agreements, a worthy goal.<sup>48</sup> Yet, in another section (Section 103) it creates a barrier to the freedom of partners to define their relationship. It does this by classifying fiduciary duties as mandatory duties and allowing qualification of those duties by agreement only under vaguely defined circumstances, creating blurred edges and setting the stage for uncertainty regarding contracts on this matter.<sup>49</sup>

How one responds to this seeming paradox depends in part on how one views the partnership relationship. Is it in essence a contract among persons who carry on a business together in joint ownership form?<sup>50</sup> Or is

duties. *See supra* notes 39-40. A broad definition of good faith as a default duty is one thing; a broad definition of a mandatory term is quite another. It creates a risk of litigation over difficult decisions that may involve conflicting interests, and it can be exploited by a partner disappointed in the relationship who takes advantage of ambiguity and complexity and generates a dispute by claiming fellow partners acted in bad faith.

The author has no quarrel with a mandatory duty of good faith. The problem instead is posed by its undefined nature in RUPA. *See Hynes, Freedom of Contract, supra* note 1, at 46-49 (arguing for definition of honesty in fact on reasoning that it would be least intrusive on agreement of partners, who can always bargain for higher standard if they want one and noting that if this were done, it would be necessary to amend language of Section 103(b)(5), which contemplates broader definition than honesty in fact). It is of interest that the definition of good faith in the Model Employment Termination Act, 7A U.L.A. 83 (Supp. 1996), in Section 1(5) is "honesty in fact." Good faith is used as part of the good cause standard for discharge of employees in Section 1(4), with good cause defined as including "the exercise of business judgment in good faith by the employer." *Id.* at 82. The Act, which addresses relationships that usually are viewed as enjoying far less equal bargaining power than that of partners, seems written to reduce uncertainty.

48. *See supra* notes 39-40 (containing statements to that effect by Reporter for RUPA).

49. The edges are blurred and uncertainty introduced because of the "manifestly unreasonable" limitation on agreements tailoring the duties of loyalty and good faith that are set forth in Sections 103(b)(3) and (5). *See supra* note 42 (providing full text of Section 103). When is a limitation manifestly unreasonable? The answer seems to be when a jury decides that it is. *See Trailmobile Div. of Pullman, Inc. v. Jones*, 164 S.E.2d 346, 348 (Ga. Ct. App. 1968); *see also Hynes, Freedom of Contract, supra* note 1, at 52-53 (arguing that language of unconscionability be substituted for "manifestly unreasonable" on reasoning in part that unconscionability issues are regarded as questions of law, thus making possible formulation of standards for at least some situations as result of resolution of disputes over period of time). Also, unconscionability is a wide-gauge "snarl word." *See* Authur Allen Leif, *Unconscionability and the Code — The Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 n.10 (1967). It defines a more extreme situation than the milder "manifestly unreasonable," according greater deference to an agreement.

50. Of course, this question is being posed in a particular context, that of the freedom

it something more than that, a status that the parties are not free to change? If the latter, mandatory fiduciary duties make sense, and indeed, the restrictions in RUPA Section 404 on further judicial development of fiduciary concepts are misguided. If the former, it was a mistake to even address the waivability of fiduciary duties in RUPA Section 103. Instead, the drafters of RUPA should have adopted the hands-off approach of the UPA,<sup>51</sup> leaving the development of the law to the courts on a case by case basis.<sup>52</sup>

### B. Contract or Status

The partnership relationship is viewed most appropriately as essentially contractual in nature.<sup>53</sup> This interpretation surely reflects the expectations of most people who enter into a partnership — that they will be able to agree on the parameters of their internal relationship. It is true that the topic at issue, waiving fiduciary duties, is serious and troubling. It does not come easily to this author to urge freedom of contract in this situation because of the extreme nature of the bargain the parties are contemplating.<sup>54</sup> Yet the limitations and protections described below<sup>55</sup> make palatable an argument for freedom of contract even in this area. Also, the great variety of partnership relationships, from the small business to the international

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of partners to define their relationship. It is undeniable that the law of partnership is subject to a host of rules and regulations that operate independently of the agreement of the partners. This Article has as its topic the narrow question of the right of partners to define one aspect of their relationship among themselves.

51. For over one thousand years, the law of partnership, first in common-law form and then under the UPA, took no position on the mandatory nature of fiduciary duties. This approach is consistent with the philosophy that the state should be cautious about the legislative imposition of mandatory terms on private relationships. This does not mean that a state should never interfere, but that a minimalist approach to this issue should prevail. Under this approach, the actions of the Commonwealth of Virginia, which recently enacted RUPA, in deleting fiduciary duties from the Section 103 list of nonwaivable provisions is to be applauded. 1996 Va. Acts ch. 292 (to be codified at VA. CODE ANN. § 50-73.81.B (Michie)).

52. See generally Ribstein, *Fiduciary Duty*, *supra* note 1 (concluding after exhaustive analysis of partnership case authority that, aside from some dicta, courts deciding cases under UPA have recognized freedom of contract in this area, including freedom to waive fiduciary duties).

53. In support of this approach, see Ribstein, *Not Ready*, *supra* note 1, at 57-58.

54. This did not frighten the Virginia legislature, however, which recently enacted an amended RUPA into law. Among the Virginia amendments was the deletion of fiduciary duties from Section 103, thus presumably making fiduciary duties waivable on the agreement of the partners. See *supra* note 51.

55. See *infra* Part VII (discussing limitations of specificity and unconscionability).

joint venture, makes legislation that imposes mandatory duties on all relationships inappropriate.

The law of agency provides an important comparison in this context. As noted above, the law of agency enforces the expectations of persons entering into an agency relationship — that they are free to tailor their relationship as they wish.<sup>56</sup> The language of *Restatement* Section 376 and its comment<sup>57</sup> assumes without question that the parties can by agreement tailor or eliminate fiduciary duties, reasoning that the agency relationship is consensual and thus that the bargain principle should apply. Why should an agreement relating to fiduciary duties between partners be treated differently than a similar agreement between principal and agent, when both relationships are consensual relationships of trust?

One can argue that the analogy to agency law is false because there is a distinction between the principal-agent and the partnership relationships. In the partnership relationship, partners are co-owners of the business; in the agency relationship, the principal is the owner of the business and the agent merely an actor. Related to this point is the fact that, in the agency relationship, the party waiving fiduciary duties is the principal, who is the party with superior bargaining power in the great majority of cases. In the partnership relationship, one can assume that the partner waiving fiduciary duties is rarely in a superior bargaining position, and thus, the law of agency should not serve as a persuasive analogy.

The above distinctions, however, do not compromise the underlying common elements of trust and consent in the two relationships. Also, the law does not enforce bargains only when the party surrendering a right is in a superior bargaining position. To accept such a proposition would be to undermine the reliability of nearly all bargains. For the same reason, the law does not even insist on equality of bargaining power.<sup>58</sup> Contracts would become too fragile, making it unsafe to rely upon them. In addition, the principal is not always in a superior bargaining position. Consider *Wave Electronics v. UPS*, a case involving an effective waiver of the

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56. See *supra* text accompanying notes 19-24.

57. See *supra* text accompanying note 20 (providing language of Section 376).

58. Cf. U.C.C. § 2-302 cmt. 1, 1 U.L.A. 16 (1989) ("The principle [of unconscionability] is one of the prevention of oppression and unfair surprise *and not of disturbance of allocation of risks because of superior bargaining power.*") (citation omitted) (emphasis added). Although the author argues that partners ordinarily occupy positions of near equal bargaining power, see *infra* text accompanying note 65, this is not intended to suggest that the existence of an imbalance in bargaining power constitutes a breakdown in the bargaining process. The assertion of near equal bargaining power is intended merely to underscore the presumptive validity of a bargain among partners, not to identify a condition for valid contracts.



agent's fiduciary duty of care when the agent was United Parcel Service, hardly a party of weak bargaining power.<sup>59</sup>

It is noteworthy that the law of partnership accords partners certain protections that militate against concerns raised by allowing waiver of fiduciary duties. Partners have equal management rights<sup>60</sup> and broad rights to information,<sup>61</sup> and a partner can leave the partnership at any time by act of will and thus can leave a situation in which a fellow partner abuses a waiver of fiduciary duties.<sup>62</sup> Even if the partnership is a term partnership, and thus ordinarily the act of suddenly leaving would be a breach of contract, the UPA provides that a partner can petition a court for dissolution without any liability "if a fellow partner so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business with him."<sup>63</sup> This remedy should address the problem of a partner taking unfair advantage of a waiver of a fiduciary duty. It is not a perfect remedy,<sup>64</sup> but it does provide the innocent partner with some options. Also, the bargaining status of partners is presumptively equal, arising from the fact that ordinarily each partner has something of near equal value to exchange with the other partners, which may play a role in unconscionability deliberations.<sup>65</sup> All of these factors weigh on the side of allowing partners to define their relationship as they wish, assuming the parties observe the normal decencies of the bargaining process.

59. See generally *Wave Elec. v. UPS*, 603 A.2d 143 (N.J. Super. Ct. Law Div. 1991).

60. See RUPA § 401(f); UPA § 18(e).

61. See RUPA § 403; UPA § 20.

62. See UPA § 31(1)(b), (2) (providing for dissolution of partnership at will by partner at any time); see also RUPA §§ 601, 801 (allowing partner to leave partnership at any time). A partner thus has the *power* under either Act to leave a partnership at any time. See RUPA §§ 601, 801; UPA § 31(1)(b), (2). The issue of a partner's *right* to leave depends on the contractual relationship of the partner and the firm.

63. See RUPA §§ 601(5)(iii), 801(5)(ii); UPA § 32(1)(d).

64. The remedy is not perfect because the opportunistic party usually will have already caused some harm. A tradeoff is involved: greater freedom and certainty of contract versus the risk that an opportunistic partner will abuse the agreement prior to dissolution of the partnership.

65. See *infra* text accompanying notes 83-98 (discussing unconscionability). With regard to the assumption in the text of near equal bargaining status of partners, this receives some support from the fact that entering into a partnership relationship is a serious matter for all parties. An incoming partner becomes a general agent for the firm, is entitled to a share of the profits, has equal management rights, and possesses dissolution powers. Because of this, the existing partners ordinarily would hesitate to accord partnership status to a newcomer who did not bring substantial benefits to the firm. That, in turn, should enhance the bargaining power of the incoming partner in the usual case.

### C. Arguments in Favor of Status

Professor Allan Vestal argues in opposition to the above conclusion, urging that the partnership relationship be regarded as one of status, not contract.<sup>66</sup> Dean Weidner apparently joins Professor Vestal in this assertion, analogizing the partnership relationship to a marriage.<sup>67</sup> It is easy to see why the marriage relationship is classified as one of status, with the state playing a major role in its creation and dissolution, in large part with a view to protecting the children of a marriage. The interest of the state in the welfare of children is obvious. The state's interest in the internal relationship of a group of people trying to make a mutual profit from each other's labor and capital is far more difficult to see.<sup>68</sup>

Dean Weidner supports the mandatory fiduciary rules of RUPA in part<sup>69</sup> on the reasoning that "[t]he language stating the minima [of fiduciary rules] ought to reflect the texture of their relationship, which is one of a powerful mutual agency, ill-defined hierarchy, and joint and several liability."<sup>70</sup> One can challenge each of these factors. There is no doubt that there is a powerful mutual agency among partners, but as noted above, the law of agency unmistakably embraces the bargain principle.<sup>71</sup> This undermines an argument for mandatory minima based on mutual agency. The factor of ill-defined hierarchy is difficult to support in the usual case because both the UPA and RUPA establish an equal right to management among partners, not a hierarchy.<sup>72</sup> That right must be contracted away before a hierarchy arises.<sup>73</sup>

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66. See Vestal, *Advancing the Search*, *supra* note 1, at 70.

67. See Weidner, *RUPA*, *supra* note 1, at 84.

68. Also, the analogy to marriage is somewhat suspect in this context because the law does not provide marital partners with a cause of action against each other for acts of disloyalty or lack of full disclosure.

69. See Weidner, *RUPA*, *supra* note 1, at 99. Dean Weidner also argues that: "Because it is impossible to draft a statute that successfully isolates all agreements induced by fraud, the second-best solution is to draft mandatory minima that can serve as efficient surrogates for more precise restraints on fraudulent behavior." *Id.* This justification for mandatory fiduciary duties seems overinclusive because it mandates terms for the many agreements that have no basis in fraud. Also, it appears superfluous because it is aimed at behavior against which the law has provided remedies — including rescission and damages — for centuries.

70. *Id.* at 82.

71. See *supra* text accompanying note 23.

72. See RUPA § 401(f); UPA § 18(e).

73. For a discussion of hierarchical partnerships, see Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 441-42 (1987).

The third factor, that of joint and several liability, is also unpersuasive as a justification for mandatory fiduciary rules. First, it is quickly fading, even in the partnership context, due to the rapid rise of the limited liability partnership.<sup>74</sup> Second, the relevance of fiduciary law to joint and several liability is obscure to this author. Fiduciary law appears aimed at personal enrichment at the expense of a relationship of trust, not at a partner's exposure to liability to third parties. The issue of liability to others rests upon a different set of principles.

A final argument for mandatory duties<sup>75</sup> put forth by Dean Weidner is that, for many, the bargaining process for partnerships is flawed by "different behaviors and dramatic information asymmetries. Some 'bargainers' are unlikely to bargain. Some bargainers are less likely to attend to the language of an agreement or to appreciate the significance of language, even if their attention is directed specifically to it."<sup>76</sup> These concerns are genuine and accurate. It is unappealing to see the naive, the unsophisticated, and the inattentive held to bargains they really did not appreciate.<sup>77</sup> But to impose mandatory terms in order to avoid this result creates a cure that is worse than the disease.

To allow people to escape from contracts because they did not bargain or did not pay attention to the language of the agreement treats too lightly the expectancy of the other party and the social interest in the reliability of contracts.<sup>78</sup> To reach the same end by mandating duties is

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74. See Elizabeth G. Hester, *Practical Guide to Registered Limited Liability Partnerships*, in 5 STATE LIMITED LIABILITY COMPANY & PARTNERSHIP LAWS LLP-2 (Michael A. Bamberger & Arthur J. Jacobsen eds., 1997) ("As of July 1, 1996, forty-six states, plus the District of Columbia, had adopted statutes permitting the formation of LLPs in their jurisdictions."). The LLP is an acronym for the words "limited liability partnership." As the name suggests, partners are by statute able to limit their vicarious liability for obligations of the partnership by filing a certificate so stating in one of the forty-six states that have adopted LLP legislation. The extent of protection from vicarious liability depends on the breadth of the statute in the particular jurisdiction.

75. For a discussion of other arguments in favor of mandatory duties, see Hynes, *Freedom of Contract*, *supra* note 1, at 43-46.

76. See Weidner, *RUPA*, *supra* note 1, at 100.

77. The doctrine of unconscionability may play a role when addressing questions of information asymmetries and the bargaining disabilities of unsophisticated people, but it requires more than inattention to the language of a contract before terms will be set aside. See *infra* text accompanying notes 83-98.

78. Also, the danger of exploitation and abuse of the naive and unsophisticated does not seem great in the partnership context. The incentive to grant partnership status to a naive, unsophisticated, inattentive person surely is diminished by the prospect that such person would become a general agent of the firm and would enjoy co-owner rights, including rights to information and management, and possession of dissolution powers.

also costly because it imposes terms on competent bargainers who do not want them.

VII. *Protections from Abuse: The Need for Specificity of Agreement and the Doctrine of Unconscionability*

Terms waiving fiduciary duties in the partnership context can be a little unnerving. There is a danger of unforeseen consequences and the risk that a person will waive such duties without really relinquishing trust in fellow partners. It is true that partners have means to protect themselves and to extricate themselves from abusive situations.<sup>79</sup> Nevertheless, a decision to waive fiduciary duties is unusually serious in nature. Because of this, courts are likely to impose two primary limitations on bargains of this nature: specificity and a broad view of unconscionability.

A. *Specificity*

With regard to specificity, there is little doubt that courts would require that a waiver of fiduciary duties be clear and unambiguous.<sup>80</sup> General language in a partnership agreement that is susceptible to an interpretation of waiver would not be sufficient.<sup>81</sup> This is appropriate because partners should clearly be put on notice of an erosion of trust before a court holds them to the consequences of such an agreement. A suggestion by a partner that other partners waive fiduciary duties should alert the other partners that something may be wrong, that this may not be the right person with whom to go into business or to continue business. In order for that warning to be effective, courts will and should insist upon clarity and specificity. Thus, courts should not construe broad statements in a partnership agreement, such as "[Partner A] will have full responsibility and exclusive and complete discretion in the management and control of the business and

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79. See *supra* text accompanying notes 60-65.

80. There is a line of authority mandating specificity for the abnegation of fiduciary duties. See Ribstein, *Not Ready*, *supra* note 1, at 59.

81. The case of *Union Carbide Corp. v. Montell, N.V.*, 944 F. Supp. 1119 (S.D.N.Y. 1996), provides a clear example of this. Several manufacturers and licensors of complex plastic technology entered into an agreement entitled "Cooperative Undertaking Agreement." *Id.* at 1132. The agreement specified that "this Agreement does not create a partnership or joint venture between the parties." *Id.* In subsequent litigation, one of the parties to the agreement argued that this language meant that there were no fiduciary duties between the parties. *Id.* The court rejected this argument, stating that all of the elements of a joint venture have been alleged in the suit and that the agreement "d[id] not expressly state that no fiduciary duty exists between [the parties thereto]." *Id.*

affairs of the partnership," to allow any waiver of the customary fiduciary duties.<sup>82</sup>

### B. Unconscionability

The doctrine of unconscionability arguably should play a significant role when dealing with waivers of fiduciary duties. Although courts differ in their definition and application of the doctrine, in general a finding of unconscionability requires a two-step process.<sup>83</sup> The most widely accepted version of the unconscionability doctrine requires that the party seeking to set aside a term of a contract first prove a flaw in the bargaining process (sometimes referred to as procedural unconscionability) and then prove that the term under attack is unfair (sometimes referred to as substantive unconscionability).<sup>84</sup> Most courts require that both elements be satisfied before a term or an entire contract is set aside on the ground of unconscionability.<sup>85</sup> Usually, the greater the case to be made for one element, the more lenient a court is with respect to proof satisfying the other.

The requirement of procedural unconscionability is designed to ensure respect for the bargain principle. Ordinarily, it is up to the parties themselves to evaluate the fairness of the terms of their contracts. Judicial intervention and judgment about the fairness of the terms of a contract is justified only after a court is satisfied that the bargaining process was flawed and thus that it cannot fairly infer that consent was given. Mere inattentiveness to the bargain, the point made above by Dean Weidner, would not qualify as a flaw in the bargaining context. Instead, courts require something more serious, like unfair surprise or the imposition of a term on a party who has no choice in the matter. An unfair term sufficient

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82. This language is contained in *Labovitz v. Dolan*, 545 N.E.2d 304, 306 (Ill. App. Ct. 1989). The court rejected an argument that this broad language amounted to a waiver of fiduciary duties. *Id.*

83. See E. ALLAN FARNSWORTH, *CONTRACTS* 332 (2d ed. 1990) (noting that courts "continue to focus on both 'unreasonably favorable' terms and 'an absence of meaningful choice.' It has become fashionable to designate the former as 'substantive' and the latter as 'procedural' unconscionability."). Unconscionability issues are regarded as matters of law for the court to decide. *Id.* at 325.

84. See Leff, *supra* note 49, at 487.

85. For a frequently quoted expression of this concept, see *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965): "Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Farnsworth has described this sentence as "the most durable dictum on the meaning of unconscionability." FARNSWORTH, *supra* note 83, at 332. Farnsworth adds that: "There has been relatively little refinement of this description." *Id.*

to constitute substantive unconscionability is sometimes defined as a term that is unreasonably favorable to one party or excessively one-sided.<sup>86</sup>

Courts would likely regard an agreement dispensing with fiduciary duties as both unusual and somewhat suspect because parties in vulnerable positions are relinquishing rights the law has developed for their protection. Because of this, courts probably would be more inclined to scrutinize carefully bargains waiving fiduciary duties, looking more closely at the bargaining context and at the commercial sensibility of a waiver under the circumstances presented to the court. This is the broad view of unconscionability suggested by the author.

The advantage of using the doctrine of unconscionability is that it is situation-specific and thus provides a much more refined tool for dealing with these issues than the blunt tool of imposing mandatory terms on all relationships. It is not a perfect tool, of course. The doctrine of unconscionability involves its own limitations and uncertainties.<sup>87</sup> However, it is an improvement over mandatory rules, which operate indiscriminately to destroy inoffensive as well as offensive agreements. Courts can usefully apply the doctrine of unconscionability to address some of the concerns expressed by Dean Weidner and Professor Vestal.

Dean Weidner sets forth an example of an agreement that he suggests courts might enforce in the absence of mandatory fiduciary duties. The example reads as follows:

[Consider] the example of a partnership agreement between Investor and Manager. The agreement provides that Investor will put up money to be managed by Manager, that Investor will have no information rights, no right to monitor Manager, and no right to any return of or on the investment unless and until Manager, in its sole discretion, if ever, provides. The agreement also provides that Manager can act on Manager's own behalf, taking from and competing with the partnership without limit, and that Investor has no right to seek judicial review of the behavior of Manager, unless Manager has violated the express language of the partnership agreement. In further particular, the agreement says Investor will remain a partner until Investor is dismissed by Manager and that, under no circumstances, will Manager be treated as a fiduciary of Investor.<sup>88</sup>

It is difficult to imagine a court enforcing such an extremely one-sided agreement. In the absence of special facts involving unusually sophisticated

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86. *Id.* at 228, 332.

87. See Richard Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294-95 (1975) (arguing that doctrine of unconscionability be confined to narrow limits).

88. Weidner, *RUPA*, *supra* note 1, at 101.

investors in a setting in which it makes commercial sense, courts almost certainly would declare such an agreement unconscionable on its face, without more than a cursory inquiry into the bargaining process. With regard to the need to inquire into the bargaining process under these circumstances beyond ascertaining whether or not the parties are unusually sophisticated, consider the following language from a well-known case:

Inquiry into the relative bargaining power of the two parties is not an inquiry wholly divorced from the general question of unconscionability, since a one-sided bargain is itself evidence of the inequality of the bargaining parties. This fact was vaguely recognized in the common law doctrine of intrinsic fraud, that is, fraud which can be presumed from the grossly unfair nature of the terms of the contract. See the oft-quoted statement of Lord Hardwicke in *Earl of Chesterfield v. Janssen*, 28 Eng. Rep. 82, 100 (1751): "[Fraud] may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make."<sup>89</sup>

As an example on the other side, consider the situation of two large corporations that decide to enter a joint venture together for a long-term project.<sup>90</sup> They agree to forgo fiduciary duties in order to avoid the risk of future litigation over vague and fact-specific concepts. They do not trust each other, and they never will trust each other to keep the other party's interests in mind. Their expectations go no further than expecting honesty in response to specific questions. The law should respect that bargain.<sup>91</sup>

A final example is based on the case of *Singer v. Singer*.<sup>92</sup> The partnership agreement in *Singer* stated in relevant part that:

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89. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449, n.7 (D.C. Cir. 1965).

90. Joint ventures are regarded as partnerships when resolving legal issues. See *Groff v. Citizens Bank*, 898 F.2d 1475, 1478 (10th Cir. 1990).

91. Indeed, even Professor Vestal, a strong proponent of mandatory and unqualified fiduciary duties, supports the waiver of fiduciary duties in a setting very close to this one. See Vestal, *Contractarian Error*, *supra* note 1, at 578 (proposing statute that would allow parties to waive fiduciary duties in sophisticated joint venture enterprise). He would require that the parties be sophisticated, represented by counsel, and have their agreement in writing. The only problem the author has with this proposal is its accompanying formalities, including the need for a statute authorizing such an arrangement. It may be that Professor Vestal's approach to the issue of waiver of fiduciary duties and that of the author are really not so different in substance, once one factors in the protections provided by the doctrine of unconscionability for unsophisticated persons who are taken advantage of by sharp dealers.

92. 634 P.2d 766 (Okla. Ct. App. 1981).

Each partner shall be free to enter into business and other transactions for his or her own separate individual account, even though such business or other transaction may be in conflict with and/or competition with the business of this partnership. Neither the partnership nor any individual member of this partnership shall be entitled to claim or receive any part of or interest in such transactions, it being the intention and agreement that any partner will be free to deal on his or her own account to the same extent and with the same force and effect as if he or she were not and never had been members of this partnership.<sup>93</sup>

The partnership (Josaline) was a family partnership in the oil production business. Two young members of the family (Stanley and Andrea) took unscrupulous advantage of their position as partners in the following way. Prior to a meeting of the partners, a senior partner requested that Stanley look into the possibility of purchasing a particular parcel of land containing minerals. At the meeting, the partners briefly discussed the land, but deferred further action. After the meeting, Stanley and his sister Andrea formed a separate partnership and bought the land for themselves. When these facts were discovered, Josaline brought an action to have the land held in constructive trust for the original family partnership. A trial court decision in favor of the plaintiff was reversed on appeal; the appellate court stated as follows:

We find the defendants had a contract right to do precisely what they did, namely, compete with the partners of Josaline and with Josaline itself "as if there had never been a partnership." . . . Josaline contracted away its right to expect a noncompetitive fiduciary relationship with any of its partners. We find paragraph 8 is designed to allow and is uniquely drafted to promote spirited, if not outright predatory competition between the partners.<sup>94</sup>

Although the Josaline partnership may not have continued much longer after this event, the decision of the court is justifiable. The plaintiffs signed an agreement that was sufficiently specific on the subject of competition and loyalty, and there is no hint of abuse of the bargaining process (indeed, here the young and less experienced took advantage of their seniors). The court sent a signal to the business world that courts will enforce definite and specific agreements among partners defining their relationship according to their terms. This constitutes useful reinforcement of the values reflected in certainty and reliability of contracts.<sup>95</sup>

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93. *Singer v. Singer*, 634 P.2d 766, 768 (Okla. Ct. App. 1981).

94. *Id.* at 772.

95. Professor Robert W. Hamilton raised an interesting point about the *Singer* contract



It is likely that the *Singer* result would not be possible in a jurisdiction that adopts RUPA. Even if somehow the language of "paragraph 8" was construed not to be a waiver of the duty of loyalty, it likely would fail under RUPA's manifestly unreasonable limitation on amendments to fiduciary duties.<sup>96</sup> This would be unfortunate because it would detract from the range, reliability, and certainty of agreements without advancing an interest of equal, competing strength.

As noted above, a partner who discovers that the decision to waive fiduciary duties was a mistake, perhaps because events unforeseen at the time of waiver have occurred,<sup>97</sup> has remedies available that can soften the blow.<sup>98</sup> In addition, the customary limitations of fraud, duress, and unconscionability provide protection against flawed agreements. This protection is sufficient. The interest in freedom of contract, so confined, prevails over any interest gained through mandatory terms.

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during the discussion at this Symposium. He argued that the partners probably signed the agreement with no intention of actually abandoning mutual trust and loyalty. Instead, the language of "paragraph 8" is a result of overly broad drafting that was intended merely to contract away marginal claims relating to remote collateral opportunities. Perhaps so, but a claim by the aggrieved partners that the clause should be rewritten because they did not really mean it when they signed it is unpersuasive. To rewrite the contract to express a far more limited scope to the paragraph would be to treat too lightly the interest of certainty and reliability of agreements. If the parties truly had intended only a narrow exception addressing marginal claims, they should have said so. The remedy of reformation would be available in some circumstances, but not in *Singer*. Reformation addresses the situation in which a mutual mistake is made in reducing an agreement to writing (a "scrivener's error"), not the situation in *Singer* in which the mistake instead related to a poor prediction of the future, that is, things subsequently turned out differently than some of the partners had hoped. The risk that an agreement will not turn out to be as advantageous as the parties wished is a risk that is run by all contracting parties.

96. See *supra* note 42 (quoting RUPA § 103(b)(3), which sets forth manifestly unreasonable standard).

97. See Letter from Melvin A. Eisenberg to NCCUSL 7 (July 17, 1992) (on file with author), quoted in Hynes, *Freedom of Contract*, *supra* note 1, at 37 n.38. The letter notes that:

Persons who enter into a relationship of trust and confidence, in which a contractual override of fiduciary duties originally seems acceptable, may later find that one of their numbers has abused that trust and confidence in a manner that was not and probably could not have been anticipated. More generally, it is almost impossible for contracting parties to adequately assess the future costs and benefits in a fluid long-term relationship, because events will branch far beyond the ideas of the future that will be conceived when a contract is made. . . . An opportunistic partner could often find ways to exploit a contractual provision that eliminated a fiduciary duty even though the provision seemed fair at the time of the contract.

*Id.*

98. See *supra* text accompanying notes 60-63.

If one is concerned about giving away too much fiduciary protection when entering into a partnership, one can simply refuse to sign an agreement eliminating those duties. At some point, it is appropriate for courts to call on people to protect their own interests and to take personal responsibility for their agreements. That point is reached when the interest in freedom and certainty of contract outweighs the interests described above for imposing mandatory duties.

### VIII. *Efficiency or Justice*

Professor Vestal contrasts the efficiency gained by not having mandatory fiduciary duties<sup>99</sup> with fairness and justice.<sup>100</sup> He argues that the changes made in Section 404 of RUPA constricting judicial discretion to expand fiduciary duties<sup>101</sup> "are not simply abstract effects of a desire for efficiency; these are costs of substantial proportions in terms of individual fairness and justice."<sup>102</sup> He makes a related point in a separate article,<sup>103</sup> stating that: "It is detrimental to substitute rules that invite evasion, for social principles that foster broad compliance. Abandonment of fiduciary principles may be efficient for some participants, but it is not beneficial to society."<sup>104</sup> In support of this statement, he quotes the following from an article by Professor Tamar Frankel: "To the extent that the law induces fiduciaries to work for the collective good, the law helps shape desirable social trends."<sup>105</sup>

The above quotations are troubling. First, the dichotomy that Professor Vestal asserts between efficiency and justice appears false. It is unclear to this author why the value reflected in certainty and reliability of contracts is not considered to be part of justice. Surely the concept of justice, a word that has many meanings and that for content depends a great deal on the perspective of the viewer, has room to include enforcement of contracts that meet the essential decencies of bargaining. By that process, the courts are honoring the reasonable expectations of those who enter into contracts. Indeed, one can turn the argument around and argue that the refusal to

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99. By this he means the efficiency gained in terms of reliability and certainty of agreements among partners or other members of unincorporated businesses. See Vestal, *Advancing the Search*, *supra* note 1, at 70-72.

100. *Id.* at 72.

101. See *supra* text accompanying notes 33-35.

102. Vestal, *Advancing the Search*, *supra* note 1, at 72.

103. See Vestal, *Contractarian Error*, *supra* note 1, at 539.

104. *Id.*

105. See Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 832 (1983).

enforce contracts that are untainted by misbehavior or incapacity is unjust because it imposes costs on persons who had bargained their way free of such costs.

Second, the language quoted above that fiduciaries should work for the collective good is disturbing. It destroys the individualized nature of the fiduciary relationship and transforms it into an engine for the social good. This places inappropriate burdens on an essentially private relationship. Also, who decides what is the "collective good"? What fairness is achieved by imposing this external and vague standard upon two parties to a private fiduciary relationship who are bargaining for their own interests and have no interest in or even understanding of the collective good?<sup>106</sup> It is misguided to place such additional burdens on the private fiduciary relationship.

### *IX. Conclusion*

The issue whether to allow waiver of fiduciary duties generates inquiries into root matters of policy, including determining the underlying nature of private business relationships, the weight to be given to personal responsibility for agreements, and the appropriate role of the law in this context. Strong arguments exist on both sides of this matter. An argument for freedom of contract rests on the bargain principle as reflected in the law of agency when addressing similar issues and on the unique situation of partners, who have bargaining status and many tools available to them for protection from an opportunistic partner. When coupled with a requirement of specificity and a broad view of unconscionability, this argument carries the greater weight.

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106. Also, recognizing and enforcing untainted bargains generates wealth, *see supra* note 14, a result that itself contributes to the collective good.