AMENDMENTS TO THE PENNSYLVANIA CONSOLIDATED STATUTES WITH COMMITTEE COMMENTS

ADOPTING

UNIFORM PARTNERSHIP ACT (1997)
(Last amended 2013)
as NEW CHAPTER 84 OF TITLE 15

UNIFORM LIMITED PARTNERSHIP ACT (2001)
(Last amended 2013)
as NEW CHAPTER 86 OF TITLE 15

UNIFORM LIMITED LIABILITY COMPANY ACT (2006)
(Last amended 2013)
as NEW CHAPTER 88 OF TITLE 15

REVISING

CHAPTER 82 OF TITLE 15 on LIMITED LIABILITY PARTNERSHIPS AND LIMITED LIABILITY LIMITED PARTNERSHIPS

and

MAKING CONFORMING AND RELATED AMENDMENTS AND REPEALS TO TITLES 15 AND 54

To accompany House Bill 1398

PREPARED BY THE TITLE 15 / BUSINESS ASSOCIATIONS COMMITTEE OF THE SECTION ON BUSINESS LAW OF THE PENNSYLVANIA BAR ASSOCIATION

Version of September 12, 2016
# PENNSYLVANIA BAR ASSOCIATION
## SECTION ON BUSINESS LAW
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Title 15
Corporations and Unincorporated Associations

Part I
Preliminary Provisions

Chapter 1
General Provisions

Subchapter A
Preliminary Provisions

§ 101. Short title and application of title.

(a) Short title of title. – This title shall be known and may be cited as the Associations Code.

(b) Application of title. – Except as otherwise provided in the scope provisions of subsequent provisions of this title, this title shall apply to every association heretofore or hereafter incorporated or otherwise organized or formed.

(c) References to prior statutes. – A reference in the [articles or bylaws or other organic documents] organic rules of an association to any provision of law supplied or repealed by this title shall be deemed to be a reference to the superseding provision of this title.

Amended Committee Comment (2016):

Subsection (c) is a transitional rule that protects the intent of the parties involved with an association whose organic rules refer to a specific provision of Title 15 that is subsequently replaced by a new provision of Title 15. For example, some limited liability companies organized under former Chapter 89 provided in their operating agreements that former 15 Pa.C.S. § 8933 would not apply in the event of a dissociation of a member. Former section 8933 has been supplied by new 15 Pa.C.S. § 8844(e), and thus a provision in an operating agreement making former Section 8933 inapplicable will mean that new Section 8844(e) will not apply to the limited liability company. The best practice, when possible, is to change references to former provisions of law so that they refer to currently effective provisions, but in the absence of such a change, subsection (c) will protect the agreement of the parties. Specific applications of the general rule in subsection (c) are found in 15 Pa.C.S. § 2541(a) and 2551(b).

A statute is “supplied” as that term has traditionally been employed in Pennsylvania legislation when it has been effectively superseded by a later statute which comprehensively covers the same subject matter, but which does not contain an express repeal of the supplied statute. 1 Pa.C.S. § 1971.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“association”
“organic rules”
§ 102. Definitions.

(a) Defined terms. – Subject to additional or inconsistent definitions contained in subsequent provisions of this title that are applicable to specific provisions of this title, the following words and phrases when used in this title shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

* * *

"Association." A corporation for profit or not-for-profit, a partnership, a limited liability company, a business or statutory trust, an entity or two or more persons associated in a common enterprise or undertaking. The term does not include:

(1) a testamentary trust or an inter vivos trust as defined in 20 Pa.C.S. § 711(3) (relating to mandatory exercise of jurisdiction through orphans' court division in general);

(2) an association or relationship that:

(i) is not a person that has:

(A) a legal existence separate from any interest holder of the person; or

(B) the power to acquire an interest in real property in its own name; and

(ii) is not a partnership under the rules stated in section [8312 (relating to rules for determining the existence of partnership)] 8422(c) (relating to formation of partnership) or a similar provision of the laws of another jurisdiction;

(3) a decedent’s estate; or

(4) a government or a governmental subdivision, agency or instrumentality.

* * *

"Charitable purposes." The relief of poverty, the advancement and provision of education, including postsecondary education, the advancement of religion, the prevention and treatment of disease or injury, including mental retardation and mental disorders, governmental or municipal purposes and any other purpose the accomplishment of which is recognized as important and beneficial to the public.

* * *

"Debtor in bankruptcy." A person that is the subject of:

(1) an order for relief under 11 U.S.C. (relating to bankruptcy) or a comparable
order under a successor statute of general application; or

(2) a comparable order under Federal, State or foreign law governing insolvency.

* * *

“General partnership.” [A domestic or foreign partnership as defined in section 8311 (relating to partnership defined), whether or not it is a limited liability partnership or electing partnership.] Either of the following:

(1) A partnership as defined in section 8412 (relating to definitions).

(2) An association whose internal affairs are governed by the laws of a jurisdiction other than this Commonwealth which would be a partnership if its internal affairs were governed by the laws of this Commonwealth.

* * *

“Limited liability company.” [A domestic or foreign limited liability company as defined in section 8903 (relating to definitions and index of definitions).] Either of the following:

(1) A limited liability company as defined in section 8812 (relating to definitions).

(2) An association whose internal affairs are governed by the laws of a jurisdiction other than this Commonwealth which would be a limited liability company if its internal affairs were governed by the laws of this Commonwealth.

* * *

“Limited partnership.” [A domestic or foreign limited partnership as defined in section 8503 (relating to definitions and index of definitions), whether or not it is a limited liability limited partnership or electing partnership.] Either of the following:

(1) A limited partnership as defined in section 8612 (relating to definitions).

(2) An association whose internal affairs are governed by the laws of a jurisdiction other than this Commonwealth which would be a limited partnership if its internal affairs were governed by the laws of this Commonwealth.

* * *

Amended Committee Comment (2016):

The definitions in this section apply to all of Title 15. As the introductory paragraph to this section states, it is necessary to consider the context in which a defined term is used in Title 15.
“Association.” This is the generic term that encompasses all of the various types of organizations subject to Title 15. It includes the following types of organizations formed under Pennsylvania law whose internal affairs are largely governed by statutes outside of Title 15 because those organization are subject to this chapter and, in some instances, portions of Chapters 2, 3, and 4:

- banks (Banking Code of 1965, 7 P.S. § 101);
- credit unions (Title 17);
- fraternal benefit societies (40 P.S. § 991.2401).

Subparagraph (2)(i) was added by the GAA Amendments Act of 1990 and makes clear that trusts subject to the jurisdiction of the orphans' court are not subject to the provisions of Title 15. Thus, such trusts are not authorized to be a party to a transaction under Chapter 3. A related provision is found in 20 Pa.C.S. § 711(3), as amended by the General Association Act of 1988, which excludes from the definition of an inter vivos trust subject to the jurisdiction of the orphans' court “a business trust, including a trust subject to 15 Pa.C.S. Ch. 95 (relating to business trusts); and ... similar trusts or fiduciary relationships.” The Uniform Business Organizations Code (2011) (Last Amended 2013) § 1-102(10)(B)(ii) excludes from the definition of an entity “a trust with a predominately donative purpose or a charitable trust.” Those types of trusts are included within the types of trusts excluded from the definition of “association,” but the definition also excludes other types of trusts that are within the jurisdiction of the Orphan’s Court. Paragraphs (2) through (4) were added in 2014 by the Association Transactions Act and were patterned after Uniform Business Organizations Code (2011) (Last Amended 2013) § 1-102(10)(B).

The definition of “association” in this section was made generally applicable to all of Pennsylvania's statutory law by an amendment to the general definitional section of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1991, which was made by the Limited Liability Company Act, act of December 7, 1994 (P.L. 703, No. 106). However, because the prior definition excluded from the concept of an association “a partnership or limited partnership,” the prior definition was continued with respect to statutes finally enacted before the date of enactment of the Limited Liability Company Act in order to avoid an unintended change in the law. For example, section 1633 of the Pennsylvania Election Code, 25 P.S. § 3253, prohibits political contributions by corporations or unincorporated associations; but since the prior definition of “association” 1 Pa.C.S. § 1991 excluded partnerships, contributions from partnership funds were not prohibited. By continuing the prior definition of “association” in effect with respect to preexisting statutes, no change in the law was made; and, in the example given, political contributions from partnership funds continue to be permissible, although section 1633 was subsequently amended to prohibit contributions from partnership funds made from funds of a partner that is a corporation.

“Business trust.” Pennsylvania business trusts are included within the scope of Title 15 by Chapter 95, but 15 Pa.C.S. § 9501(c) provides that a Pennsylvania business trust will not be viewed as organized or incorporated by or under any statutory laws of this Commonwealth so as to subject it to any tax imposed on associations so organized or incorporated. The purpose of 15 Pa.C.S. § 9501(c) was to preserve the tax-exempt status of business trusts at the time that provision was first enacted in 1988. However, 15 Pa.C.S. § 9501(c) was subsequently repealed by Section 42(c) of Act 1994-48 to the extent that 15 Pa.C.S. § 9501(c) would affect any tax imposed under Articles III, IV and VI of the Tax Reform Code of 1971 for any taxable year beginning on or after January 1, 1995.

“Charitable purposes.” This definition was transferred in 2016 from 15 Pa.C.S. § 5103, where it was only applicable to nonprofit corporations, to this section so that it would apply to other forms of association such as limited partnerships and limited liability companies which may be organized for a nonprofit purpose.

“Court.” This definition provides a rule on venue in actions under Title 15, but the rule is subject
to any applicable rule of court. A merely permissive rule of court will not control over the rule in this

definition.

“Electronic.” This definition is patterned after the definition of the same term in Uniform

Electronic Transactions Act § 2(5). While not all of the technologies listed are technically “electronic” in

nature (e.g., optical fiber technology), the term was chosen in the Uniform Electronic Transactions Act as

the most descriptive term available to describe current technologies. The term should be construed

broadly to include developing technologies arguably within any aspect of the definition. But the use of

electronic technology will not always be in “record form” as defined in this section. An unrecorded

telephone conversation between two people will involve electronic technology, but will not be in “record

form” because the conversation will not later be “retrievable” as required by the definition of “record

form.” A message on voicemail, however, will be in record form if the voicemail message is retrievable

and capable of reproduction in perceivable form.

“Entity.” The term is limited to those forms of associations whose organic laws appear in Title 15.

Thus, “entity” has a narrower scope than “association” as defined in this section. It is important to

observe the distinction between the terms “association” and “entity” because they affect the scope of

Chapters 2, 3, and 4. The provisions of Chapters 5 and following apply only to domestic entities, but

Chapters 2, 3, and 4 apply more broadly to foreign associations and in some instances to domestic

entities.

The Model Entity Transactions Act (2007) (Last Amended 2013) includes in its definition of

“entity” a broad catch-all provision that the term:

(A) includes:

* * *

(x) any other person that has:

(I) a legal existence separate from any interest holder of that person; or

(II) the power to acquire an interest in real property in its own name;

and

(B) does not include:

(i) an individual;

(ii) a trust with a predominantly donative purpose or a charitable trust;

(iii) an association or relationship that is not listed in paragraph (A) and is not a partnership

under the rules stated in [Section 202(c) of the Uniform Partnership Act (1997) (Last Amended

2011)] [Section 7 of the Uniform Partnership Act (1914)] or a similar provision of the law of any

other jurisdiction;

(iv) a decedent’s estate; or

(v) a government or a governmental subdivision, agency, or instrumentality.

Consistent with the limited scope of the term “entity” in Title 15, that clarification of the scope of the

category of “entities” has been omitted from the definition of “entity” in this section. But a similar

provision has been included in the definition of “association.”

Inter vivos and testamentary trusts are excluded from the definition of “association” in this section

and are not included in the definition of “entity.” Those types of trusts are thus not able to engage in

transactions under Chapter 3. Trusts that carry on a business, however, such as a Massachusetts trust, real

estate investment trust, Illinois land trust, Delaware statutory trust organized under 12 Del. Code Ch. 38,
other common law or statutory business trusts are “entities” and eligible to be parties to transactions

under Chapter 3.
Limited liability partnerships and limited liability limited partnerships are “entities” because they are general partnerships and limited partnerships, respectively, that have made the additional required election claiming LLP or LLLP status. A limited liability partnership is not, therefore, a separate type of entity from the underlying general or limited partnership that has elected limited liability partnership status. Thus, for example, the election of a general partnership to become a limited liability partnership is not a conversion subject to 15 Pa.C.S. Subch. 3E. Similarly, electing partnerships are also “entities” because they are also general or limited partnerships, and the election of electing partnership status is not a conversion.

“Filing entity.” Whether an entity is a filing entity is determined by reference to whether its legal existence requires the filing of a document with the Department of State or a similar office in another jurisdiction. While the definition refers to the “formation” of an entity, it is intended to encompass corporations which are “incorporated” and limited liability companies which are “organized.”

The term does not include a limited liability partnership because an election filed by a general partnership claiming that status is not required to form the entity. A limited liability limited partnership, on the other hand, is a filing entity because the formation of the underlying limited partnership requires the filing of a certificate of limited partnership.

“Foreign entity.” The term “foreign entity” includes any non-domestic entity of any type. Where a foreign entity is a filing entity, the internal affairs of the entity will be governed by the laws of the jurisdiction of filing. The jurisdiction whose laws will govern the internal affairs of a nonfiling foreign entity will be determined by other factors. It is a factual question whether a general partnership whose internal affairs are governed by the Uniform Partnership Act (1914) (“UPA”) is a domestic or foreign partnership. A UPA partnership will likely be deemed to be a domestic entity where the greatest nexus of contacts are found. The domestic or foreign characterization of a partnership under the Uniform Partnership Act (1997) (Last Amended 2013) (“RUPA”) that has not registered as a limited liability partnership will be governed by RUPA § 106(a) (“the law of the jurisdiction in which a partnership has its chief executive office”).

“Governance interest.” A governance interest is typically only part of the interest that a person will hold in an unincorporated association and is usually coupled with a transferable interest (or economic rights). However, memberships in some unincorporated nonprofit associations consist solely of governance interests and in others may not include either governance interests or distributional interests. In some unincorporated business associations, there is a more limited right to transfer governance interests than there is to transfer distributional interests. An interest holder in such an unincorporated business association who transfers only a distributional interest and retains the governance interest will also retain the status of an interest holder.

Governors of an association have the kinds of rights listed in the definition of “governance interest” by reason of their position with the association. For a governor to have a “governance interest” requires that the governor also have those rights for a reason other than the governor’s status as such. A manager who is not a member in a limited liability company, for example, will not have a governance interest, but a manager who is a member will have a governance interest arising from the ownership of a membership interest.

“Governor.” This term has been chosen to provide a way of referring to a person who has the authority under an association’s organic law to make management decisions regarding the association that is different from any of the existing terms used in connection with particular types of associations. Depending on the type of association or its organic rules, the governors of an association may have the power to act on their own authority, or they may be organized as a board or similar group and only have
the power to act collectively, and then only through a designated agent. A person having only the power
to bind the association pursuant to the instruction of the governors is not a governor. Under the organic
rules, particularly those of unincorporated associations, most or all of the management decisions may be
reserved to the members or partners.

Cooperative corporations are treated as either corporations for profit or corporations not-for-profit.
15 Pa.C.S. § 7102. Thus paragraphs (1) and (2) of the definition of “governor” include directors of
cooperative corporations.

“Interest.” In the usual case, the interest held by an interest holder in an unincorporated entity will
include both a governance interest and a distributional interest (or economic rights). Members in
unincorporated nonprofit associations generally do not have any transferable interest because they do not
receive distributions, but they nonetheless may hold a governance interest in which case they would have
the status of interest holders.

“Interest holder.” This chapter does not refer to “equity” interests or “equity” owners or holders
because the term “equity” could be confusing in the case of a nonprofit entity whose members do not
have an interest in the assets or results of operations of the entity but only have a right to vote on its
internal affairs.

“Licensed person.” This definition was added by the Limited Liability Company Act which
patterned it after the definition of the same term formerly found in 15 Pa.C.S. § 2902. In general, a
person who is licensed to practice a profession in a jurisdiction other than Pennsylvania is permitted to
own an equity interest in a Pennsylvania professional practice. , , the use of the term “licensed
person” in 15 Pa.C.S. §§ 2923, 8105 and 9506(f). Being such an equity owner, however, does not exempt
the person from the requirement of being licensed in Pennsylvania if he or she practices in Pennsylvania.

“Obligation.” This definition is an example of the breadth involved in the use of the term
“includes” in Title 15 definitions. In addition to a secured or unsecured note or other form of
indebtedness, the term also includes, for example, a secured or unsecured undertaking, guarantee, lease
obligation, or duty to pay or perform.

“Officially publish.” To qualify as a newspaper for publishing corporate and other association
notices, general circulation in a county is sufficient, whether or not the place of publication is in the
county.

“Private organic rules.” The term private “organic rules” is intended to include all governing
rules of an association that are binding on all of the holders of an interest in the association, whether or
not those rules are in record form, except for the provisions of the association’s public organic document,
if any. Thus the term includes oral partnership agreements and oral operating agreements among LLC
members. Because the term includes all of the governing rules that are binding on the interest holders, it
includes any amendment or restatement of those rules.

“Profession.” This definition was added by the GAA Amendments Act of 2001 which patterned it
generally after the definition of the same term formerly found in 15 Pa.C.S. § 2902. Instead of defining
professions with reference to the need to obtain authorization from the Supreme Court of Pennsylvania or
the Department of State as this definition does, professions were described in the source provision as:

“... all personal services that prior to the enactment of the act of July 9, 1970 (P.L. 461, No.
160), known as the Professional Corporation Law, could not lawfully be rendered by means
of a corporation. By way of example, and without limiting the generality of the foregoing,
the term includes for the purposes of [Chapter 29] personal services rendered as an architect, chiropractor, dentist, funeral director, osteopath, podiatrist, physician, professional engineer, veterinarian, certified public accountant or surgeon and, except as otherwise prescribed by general rules, an attorney at law.”

The Committee decided that the quoted language was too indefinite and that the new definition would provide greater certainty.

“Property.” The term “property” is intended to have as broad a meaning as possible. The last clause of the definition confirms that it includes, among other things, contract rights and choses in action.

“Public organic record.” A “public organic record” is a document the filing of which as a public record is required to form, organize, incorporate, or otherwise create an association. The term does not include a statement of registration as a limited liability partnership filed under 15 Pa.C.S. § 8201 because that statement does not create a new association. Similarly, the term does not include a statement of authority filed under Subchapter 91B by an unincorporated nonprofit association or a statement appointing an agent filed under that subchapter.

“Receipt.” This definition was added in 2014 by the Association Transactions Act which patterned it after Uniform Business Organizations Code (2011) (Last Amended 2013) § 1-102(40). 15 Pa.C.S. § 112 with respect to what actual receipt means in the case of an electronic transmission. 15 Pa.C.S. § 113 with respect to what constitutes delivery of a notice or other communication.

“Record form.” This definition was patterned after the definition of “record” in the Electronic Transactions Act, 73 P.S. § 2260.103. It was added by the GAA Amendments Act of 2013 to provide a way of referring generally to records of an association and other documents that includes both paper documents and also documents that are created or maintained in electronic form. In addition to paper documents, which are included in the reference to “inscribed on a tangible medium,” any other form of record or document is acceptable so long as it is in a form that permits its retrieval in a tangible and reasonably legible form. One important effect of the use of the term is to validate records and documents that are kept in a form other than on paper. Although a number of sections of Title 15 refer expressly to “written” documents or “written” provisions of agreements or other documents, 15 Pa.C.S. § 107(b) provides that those references will be satisfied by a document or provision in record form.

Title 15 does not include a separate definition of what constitutes a “record.” It is intended that the concept of a “record” will be applied expansively. 15 Pa.C.S. § 107(a) makes clear that “shareholder or membership records, books of account and minute books” are part of an association’s records. The term “record” also includes, without limitation, contracts, leases, proxies, and certifications.

“Sign.” This definition was added by the GAA Amendments Act of 2013 and is the standard definition developed by the Uniform Law Commission for this concept. The definition is also intended to apply to other forms of the verb, such as “signed,” and noun forms, such as “signature.”

Title 15 has historically used the term “execute” to refer to the authentication of documents being filed with the Department of State. As opportunities arise, the Committee intends to propose substituting “sign” for “execute.” In the meantime, this section defines “execute” to be synonymous with “sign.”

“Type.” The term “type” is used to distinguish different legal forms of associations. It is sometimes difficult to decide whether one is dealing with a different form of association or a variation of the same form. For example, a limited partnership, although it has been defined as a partnership, is a different type of association from a general partnership, while a limited liability partnership is not a
different type of association from a general partnership nor is a limited liability limited partnership a
different type of association from a limited partnership. Similarly, nonstock corporations, statutory close
corporations, registered corporations, management corporations, professional corporations, and insurance
corporations are all forms of business corporations and are not a separate “type” of association from a
business corporation.

“Unincorporated nonprofit association.” The definition of this term in 15 Pa.C.S. § 9112
includes both domestic and foreign unincorporated nonprofit associations.


A domestic association other than a business corporation shall be subject to section 1510
(relating to certain specifically authorized debt terms) with respect to obligations, as defined in
the section, governed by the laws of this Commonwealth or affecting real property situated in
this Commonwealth, to the same extent as if the domestic association were a domestic business
corporation.

Committee Comment (2016):

This section extends to all domestic associations the policy in 15 Pa.C.S. § 1510 that a domestic
business corporation may not plead usury as a defense. 15 Pa.C.S. § 402(g) extends the same policy to
foreign associations.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“business corporation”
“domestic association”

Subchapter B
Functions and Powers of Department of State

§ 139. Tax clearance of certain fundamental transactions.

(a) Requirement. Except as provided in subsection (c) or (d), clearance certificates
from the Department of Revenue and the Department of Labor and Industry, evidencing the
payment by the association of all taxes and charges due the Commonwealth required by law,
must be delivered to the department for filing when any of the following is delivered to the
department for filing:

(1) Articles or a statement or certificate of merger merging a domestic association
into a nonregistered foreign association.

(2) Articles or a statement or certificate of conversion or domestication effecting a
conversion or domestication of a domestic association into a nonregistered foreign
association.
(3) Articles [or] of dissolution, a certificate of dissolution or termination or a statement of revival of a domestic association.

(4) An application for termination of registration, statement of withdrawal or similar document by a registered foreign association.

(5) Articles or a statement or certificate of division dividing a domestic association solely into foreign associations.

(b) Tax clearance in judicial proceedings. — Until the clearance certificates described in subsection (a) have been filed with the court:

(1) The court shall not order the dissolution of a domestic business corporation, nonprofit corporation or business trust.

(2) The court shall not approve a final distribution of the assets of a domestic general partnership, limited partnership, electing partnership or limited liability company if the court is supervising the winding up of the association.

(c) [Alternative provisions. — If clearance certificates are filed with the court as required under subsection (b), it shall not be necessary to file the clearance certificates with the Department of State.] Exceptions. — It shall not be necessary to file tax clearance certificates with the Department of State:

(1) If clearance certificates are filed with the court as required under subsection (b).

(2) With articles of dissolution under section 1971 (relating to voluntary dissolution by shareholders or incorporators).

(3) With a certificate of dissolution under section 8482(b)(2)(i) (relating to winding up and filing of certificates).

(4) With a certificate of termination under section 8681.1 (relating to voluntary termination by partners).

(5) With a certificate of dissolution under section 8872(b)(2)(i) (relating to winding up and filing of certificates).

(6) With a certificate of termination under section 8878 (relating to voluntary termination by members or organizers).

(d) Registration of foreign associations. — It shall not be necessary to deliver clearance certificates under subsection (a) if simultaneously with the delivery of the articles, statement or certificate of merger, conversion, division or domestication:

(1) the foreign association that is the surviving, converted or domesticated
association registers to do business in this Commonwealth; or

(2) at least one of the new foreign associations resulting from the division registers
to do business in this Commonwealth.

Amended Committee Comment (2016):

Subsections (b) and (c)(1) - Subsections (b) and (c)(1) were added by the GAA Amendments Act of 2001 for the purpose of calling attention to the tax clearance procedure in judicial dissolution proceedings that was already the law. Subsection (b) is patterned after section 32 of the act of June 1, 1889 (P.L. 420, No. 332) (72 P.S. § 3323), which provides that:

No corporation, company, joint-stock association, association or limited partnership made taxable by this act, shall hereafter be dissolved by the decree of any court of common pleas, nor shall any judicial sale be valid or a distribution of the proceeds thereof be made, until all taxes due the commonwealth have been fully paid into the state treasury, and the certificate of the auditor general, state treasurer and attorney general to this effect filed in the proper court, with the proceedings for dissolution or sale.

Prior to the enactment of subsections (b) and (c)(1), there was confusion about the requirements for tax clearance certificates in connection with judicial dissolutions because of the express statements in 15 Pa.C.S. §§ 1989(b) and 5989(b) that tax clearance certificates were not required when articles of dissolution were filed by the clerk of a court of common pleas after an order was entered dissolving a business corporation or a nonprofit corporation. Because the requirement of section 32 of the 1889 Act that tax clearance certificates were to be filed with the court was not widely known, many people assumed that tax clearance certificates were not required at all in connection with judicial dissolutions. To call attention to the need to file tax clearance certificates with the court in connection with a judicial dissolution, the GAA Amendments Act of 2001 enacted subsections (b) and (c)(1), repealed the statements in 15 Pa.C.S. §§ 1989(b) and 5989(b) that tax clearance certificates were not required to be filed in the Department of State, and added cross references to subsection (b) in 15 Pa.C.S. §§ 1989 and 5989.

In the case of general partnerships, limited partnerships and limited liability companies, 15 Pa.C.S. §§ 8481(a)(5), 8681(a)(6), and 8871(a)(4), respectively, provide that a court may order dissolution of the association on application of a partner or a member under certain circumstances. However, unlike a judicial dissolution of a corporation or business trust, where the order dissolving the association comes at the end of the dissolution and winding up process, a judicial decree dissolving a limited partnership or limited liability company only commences the winding up process. Following an order dissolving a general partnership, limited partnership or limited liability company, the winding up process may or may not be conducted under judicial supervision pursuant to 15 Pa.C.S. §§ 8482(e), 8682(d), and 8872(e).

Subsection (b)(2) provides that if a court supervises the winding up proceedings, the required tax clearance certificates are to be filed with the court. By implication, if the winding up is not supervised by the court, the general rule in subsection (a) will continue to apply to the dissolution of a limited partnership or a limited liability company and tax clearance certificates must be filed with the Department of State along with the dissolution filing.

Subsection (b)(2) expands on the rule in section 32 of the 1889 Act to the extent that subsection (b)(2) requires the submission of tax clearance certificates in connection with the judicial supervision of the distribution of the assets of a general partnership. Tax clearance certificates are not required, however, where the partners of a general partnership wind up its affairs without judicial supervision.
Subsection (c)(2) through (6) - Tax clearance certificates are not required in connection with the filing of a certificate of dissolution by a general partnership under 15 Pa.C.S. § 8482(b)(2)(i) or a limited liability company under 15 Pa.C.S. § 8872(b)(2)(i) because those filings are made after the entity has dissolved but before its winding up has been completed. When a certificate of termination is filed by a general partnership under 15 Pa.C.S. § 8482(b)(2)(vi) or a limited liability company under 15 Pa.C.S. § 8872(b)(2)(vi), tax clearance certificates are required because those filings mark the termination of the existence of the entity.

Tax clearance certificates are not required in connection with the filing of articles of dissolution under 15 P.C.S. § 1971 or a certificate of termination under 15 Pa.C.S. §§ 8681.1 (limited partnerships) and 8878 (limited liability companies) because those documents are filed in situations where an entity is dissolved before it has commenced business and the filed document must state under the penalties of perjury that the entity has never transacted business or held assets other than money received in connection with its initial capitalization.

Rules on what constitutes delivery of documents to and by the Department of State are set forth in 15 Pa.C.S. § 113.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

"association"
"court"
"nonregistered foreign association"
"registered foreign association"

Subchapter C
Corporation Bureau and UCC Fees

§ 152. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Ancillary transaction." Includes:

(1) preclearance of document;

(2) amendment of articles, charter, certificate or other organic document, restatement of articles, charter, certificate or other organic document;

(3) dissolution, cancellation or termination of an association;

(4) withdrawal or transfer of registration by foreign association;

(5) [withdrawal by] dissociation as a partner;
(5.1) statement or certificate of authority and denial or negation of authority;

(6) any transaction similar to any item listed in paragraphs (1) through [(5)] (5.1);

(6.1) withdrawal, abandonment or termination of a document which has been
delivered to the department for filing but has not yet become effective; or

(7) delivery to the department for filing in, by or with the department or the
Secretary of the Commonwealth of any articles, statements, proceedings, agreements or
any similar papers affecting associations under the statutes of this Commonwealth for
which a specific fee is not set forth in section 153 (relating to fee schedule) or other
applicable statute.

“Bureau.” (Deleted by amendment).

[There is no Committee Comment to 15 Pa.C.S. § 152.]

§ 153. Fee schedule

(a) General rule. – The nonrefundable fees of the bureau, including fees for the public
acts and transactions of the Secretary of the Commonwealth administered through the bureau,
shall be as follows:

(1) Domestic corporations:
   (i) Articles of incorporation, letters patent or similar instruments
       incorporating a corporation $125
   (ii) Each ancillary transaction 70

(2) Foreign associations:
   (i) Registration statement or similar qualifications to do business 250
   (ii) Amendment of registration statement or similar change in
        qualification to do business 250
   (iii) Domestication of alien association under section 161
        (relating to domestication of certain alien associations) 250

   [(iv) Statement of merger, division or conversion or similar
       instrument reporting occurrence of merger, division or conversion
       not effected by a filing in the department 70]

   (v) Additional fee for each [qualified] registered foreign
       association which is named in a statement of merger or similar
       instrument 40
(vi) Each ancillary transaction

(3) Partnerships and limited liability companies:
   (i) Certificate of limited partnership or certificate of
   organization of a limited liability company

   (ii) Statement of registration of [registered] limited liability
   partnership or limited liability limited partnership or statement of
   election as an electing partnership

   (iii) Each ancillary transaction

* * *

Chapter 2
Entities Generally

Subchapter A
Names

§ 206. Requirements for foreign association names.

(a) General rule. – The department shall not file a registration statement pursuant to
section 412 (relating to foreign registration statement) for a foreign association that, except as
provided under subsection (b), has a name that is rendered unavailable for use by a covered
association [under section 202(a), (b) or (c)(1)(i), (iii), (iv) or (v) or (2) (relating to
requirements for names generally)] by any provision of this subchapter.

(b) Exception. – The provisions of section 202(b) and (c) (relating to requirements for
names generally) shall not prevent the filing of a registration statement of a foreign association
[setting forth a name that is prohibited] whose name in its jurisdiction of formation would be
prohibited from use in this Commonwealth by section 202(b) and (c) if the foreign association
[delivers to the department for filing a resolution of its governors adopting] adopts a name
for use in registering to do business in this Commonwealth that is available for use by a covered
association.

Amended Committee Comment (2016):

This section was added in 2014 by the Association Transactions Act and is a generalization of
former 15 Pa.C.S. § 4123.

If a foreign association cannot register to do business under its own name by reason of the prior and
valid appropriation of that name in Pennsylvania, this section permits the association to adopt for use in
Pennsylvania and register under some other available name.

The manner in which an alternate name is adopted by a foreign association will be determined by
its organic law and organic rules. Registration to do business as a foreign association is usually a routine matter. A adoption of an alternate name for that purpose will almost always not require action by the interest holders and often may not require action by the governors either.

Rules on what constitutes delivery of documents to and by the Department of State are set forth in 15 Pa.C.S. § 113.

The term “covered association” used in this section is defined in 15 Pa.C.S. § 201.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“foreign association”
“governors”
“jurisdiction of formation”

Chapter 3
Entity Transactions

Subchapter A
Preliminary Provisions

§ 314. Regulatory conditions and required notices and approvals.

(a) Regulatory approvals. - If the law of this Commonwealth other than this chapter requires notice to or the approval of a governmental agency or officer of the Commonwealth in connection with the participation under an organic law that is not part of this title by a domestic or foreign association in a transaction which is a form of transaction authorized by this chapter, the notice must be given or the approval obtained by the association before it may participate in any form of transaction under this chapter.

(b) Certain regulated businesses. - A domestic converted association, domestic domiciled entity, domestic new association, domestic resulting association or domestic surviving association may not acquire as a result of a transaction under this chapter the power to engage in the business of banking, insurance or acting as a trust company unless an association of that type is authorized to have and exercise that power under the laws of this Commonwealth.

(c) Charitable assets. - Property held for a charitable purpose under the laws of this Commonwealth by a domestic or foreign association immediately before a transaction under this chapter becomes effective may not, as a result of the transaction, be diverted from the objects for which it was donated, granted, devised or otherwise transferred unless, to the extent required by or pursuant to the laws of this Commonwealth concerning cy pres or other laws dealing with nondiversion of charitable assets, the domestic or foreign association obtains an appropriate order of a court of competent jurisdiction specifying the disposition of the property.

(d) Preservation of transfers. - Subject to subsection (c) and section 5550 (relating to...
devises, bequests and gifts after certain fundamental changes), a bequest, devise, gift, grant or promise contained in a will or other instrument of donation, subscription or conveyance that is made to:

(1) a merging association that is not the surviving association and that takes effect or remains payable after the merger inures to the surviving association; and

(2) a dividing association may be allocated in the division as if it were an asset of the dividing association and, if the bequest, devise, gift, grant or promise takes effect or remains payable after the division, vests as provided in section 367(a)(4) (relating to effect of division).

(e) Trust obligations. – A trust obligation that would govern property:

(1) if transferred to a merging association that is not the surviving association applies to property that is transferred after a merger to the surviving association; and

(2) if transferred to a dividing association that is not a resulting association applies to property that is transferred after a division to a resulting association.

[(e)](f) Cross reference. – See section 318 (relating to excluded entities and transactions).

Amended Committee Comment (2016):

1. This section was added in 2014 by the Association Transactions Act. Subsections (a), (c), and (d) are patterned after Model Entity Transactions Act (2007) (Last Amended 2013) § 104. Subsection (c) is also patterned after 15 Pa.C.S. § 5547(b).

2. The purpose of subsection (a) is to ensure that transactions under this chapter will be subject to appropriate regulatory approval. If an association must obtain regulatory approval under Pennsylvania law to participate in a fundamental transaction pursuant to an organic law outside of Title 15, subsection (a) requires the same approval to be obtained if the association participates in any form of transaction under this chapter. The regulatory approvals that subsection (a) makes applicable are found outside of this title.

The consequence of violating subsection (a) should be the same as in the case of a transaction consummated without the required approval under the organic law outside of Title 15.

15 Pa.C.S. § 318(b) prohibits certain regulated nonprofit corporations from engaging in a transaction under this chapter that would change the corporation to a different type of entity.

The requirement to obtain tax clearance certificates is governed by section 139 (relating to tax clearance of certain fundamental transactions) and not by subsection (a).

3. This chapter permits certain associations organized under an organic law outside of Title 15 to participate in a transaction with an entity organized under an organic law found within Title 15. For example, a bank may acquire a computer consulting firm organized as a limited partnership for the purpose of bolstering the bank’s internal data processing capabilities by means of a merger of the limited
partnership with the bank pursuant to this chapter but only if the bank is the surviving association. Subsection (b) provides that if the limited partnership were the surviving association in the merger it could not exercise the banking powers of the merging bank because a limited partnership is prohibited by 15 Pa.C. § 8102 from engaging in the business of banking; thus effectively prohibiting the limited partnership from being the surviving association.

4. This chapter applies generally to nonprofit corporations and unincorporated nonprofit associations. To prevent the procedures in this chapter from being used to avoid restrictions on the use of property held by nonprofit associations, subsection (c) requires court approval if a transaction under this chapter would divert property held for charitable purposes from the objects for which it was transferred to the nonprofit association. An approval or order obtained under subsection (c) may impose conditions or specify the disposition of property or liabilities in a manner different than would otherwise be the case. In such an instance, the approval or order will control over the provisions of this chapter specifying the effects of a transaction. 15 Pa.C.S. §§ 336, 346, 356, 367, and 376.

5. Subsection (d) only applies to bequests, etc. that have been made to a merging association that does not survive a merger or to a dividing association. It was not considered necessary to provide a rule for bequests, etc. that have been made to an association that is the acquired association in an interest exchange, the converting association in a conversion, or the domesticating entity in a domestication because in those situations the association survives the transaction, albeit sometimes of a different type.

Subsection (d) provides that a bequest, etc. does not fail merely because the entity that is the designated recipient of the bequest, etc. participates in a merger or division. However, subsection (e) makes clear that the terms of the bequest, etc. will still need to be satisfied. Thus, if the terms of a bequest, etc. state that the bequest, etc. must be used for a particular purpose and the surviving association in the merger or the resulting association in the division to which the bequest, etc. is allocated cannot perform that purpose, the bequest, etc. will fail.

EXAMPLE: The terms of a gift that will be made to Corporation A state that it is to be used to support the operation of a home for disadvantaged children in Harrisburg. At the time the instrument of gift is signed, operating the home in Harrisburg is the principal activity of Corporation A. As time moves on, most of the activities of Corporation A become focused on supporting learning programs for disadvantaged children in Philadelphia. Corporation A divides into two corporations: Corporation B which is allocated the home in Harrisburg and Corporation C which is allocated the learning programs in Philadelphia. Because the learning programs are underfunded, the gift is allocated to Corporation C. The allocation of the gift is valid under subsection (d), but the gift will fail at the time it becomes payable unless Corporation C is operating the home in Harrisburg at that time.

6. The following terms used in this section are defined in 15 Pa.C.S. § 312:

- converted association
- domesticated entity
- merger
- merging association
- new association
- resulting association
- surviving association
The following terms used in this section are defined in 15 Pa.C.S. § 102:

“domestic association”
“foreign association”
“organic law”
“transfer”

§ 315. Nature of transactions.

(a) General rule. – The fact that a sale or conversion of the interests in or assets of an association or a transaction under a particular subchapter produces a result that could be accomplished in any other manner permitted by a different subchapter or other law shall not be a basis for recharacterizing the sale, conversion or transaction as a different form of sale, conversion or transaction under any other subchapter or other law.

(b) Business purpose not required. – A transaction under this chapter does not require an independent business purpose in order for the transaction to be lawful.

Amended Committee Comment (2016):

Subsection (a) was added in 2014 by the Association Transactions Act and is patterned in part after Model Entity Transactions Act (2007) (Last Amended 2013) § 106. Subsection (b) was added in 2016 and is patterned after 15 Pa.C.S. § 1907.

Subsection (a) - Subsection (a) protects a transaction that has the same end result as a second type of transaction, but is not accomplished under the provisions of Title 15 applicable to the second type of transaction, from being recharacterized as the second type of transaction. For example, a sale of assets and transfer of liabilities by two entities to a third entity followed by the liquidation of the two transferring entities does not need to be structured as a merger under Subchapter C and should not be recharacterized as a merger, even though the end result of the transaction is essentially the same as if the two entities had merged into the third entity.

Subsection (a) confirms that Pennsylvania law includes what is known under Delaware law as the doctrine of independent legal significance. As stated by the Supreme Court of Delaware in 195 A.2d 375, 377 (Del. 1963):

... action taken in accordance with different sections of [the Delaware General Corporation Law] are acts of independent legal significance even though the end result may be the same under different sections. The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirement of the second section.

Subsection (a) also is intended to have the same meaning as 6 Del. Code § 18-1101(h) which provides with respect to limited liability companies:

Action validly taken pursuant to 1 provision of this chapter shall not be deemed invalid solely because it is identical or similar in substance to an action that could have been taken pursuant to some other provision of this chapter but fails to satisfy 1 or more requirements...
prescribed by such other provision.

Subsection (b) - Subsection (b) rejects, with respect to all fundamental transactions under Chapter 3 involving any type of association, the dictum in, 771 A.2d 835, 840 (Pa. Super. 2001), that there must be a business purpose for a merger in order to sustain its legality under Pennsylvania law. It is intended that the rule on this subject established in, 457 A.2d 701 (Del. 1983), will be applicable instead.

In, the Supreme Court of Delaware rejected the requirement of an independent business purpose for a merger as that requirement had developed in its previous decisions in, 380 A.2d 969 (Del. 1977), 379 A.2d 1121 (Del. 1977), and, 407 A.2d 1032 (Del. 1979). The valuation standard articulated in was previously incorporated into the definition of “fair value” in 15 Pa.C.S. § 1572. Subsection (b) confirms that the independent business purpose test rejected by is also inapplicable in Pennsylvania.

To the extent that the decisions in, 412 A.2d 1099 (Pa. 1980), and, 648 F.2d 183 (3d Cir. 1981), both of which were decided before, are inconsistent with subsection (b), they are abrogated.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“association”
“business corporation”
“interests”

Subchapter B
Approval of Entity Transactions

§ 324. Approval by limited partnership.

(a) Proposal of plan.— Except as provided in the organic rules, a plan shall be proposed in the case of a domestic limited partnership by the adoption by a unanimous vote of the general partners of a resolution approving the plan. Except where the approval of the limited partners is unnecessary under this chapter or the organic rules, the general partners shall submit the plan to a vote of the limited partners entitled to vote thereon at a regular or special meeting of the limited partners.

(b) Notice of meeting of limited partners. - Notwithstanding any other provision of the organic rules, notice in record form of the meeting of limited partners called for the purpose of considering the proposed plan shall be given to each limited partner, whether or not entitled to vote thereon, of each domestic limited partnership that is a party to the transaction under the
plan. A copy of the proposed plan or a summary thereof shall be included in or enclosed with the notice. The notice shall state that a copy of the organic rules of the surviving, acquired, converted, new or resulting association or domesticated entity as they will be in effect immediately following the transaction will be furnished to any limited partner of the limited partnership giving the notice on request and without cost.

(c) Required vote by limited partners. - Except as provided in the organic rules:

(1) A plan shall be adopted upon receiving a majority of the votes cast by all limited partners, if any, entitled to vote thereon the affirmative vote or consent of limited partners owning the rights to receive a majority of the distributions as limited partners of each domestic limited partnership that is a party to the proposed transaction under the plan and, if any class of limited partners is entitled to vote thereon as a class, a majority of the votes cast the affirmative vote or consent of limited partners owning the rights to receive a majority of the distributions as limited partners in each class vote.

(2) A proposed plan may not be deemed to have been adopted by the limited partnership unless it has also been approved by the general partners, regardless of the fact that the general partners have directed or suffered the submission of the plan to the limited partners for action.

(d) Merger by action of general partners only. - Except as provided in the organic rules, a plan of merger shall not require the approval of the limited partners of a domestic limited partnership that is a merging association and shall be deemed adopted by the limited partnership when it has been adopted by the general partners pursuant to subsection (a) if:

(1) whether or not the limited partnership is the surviving association, the surviving association is a domestic limited partnership and its organic rules are identical to the organic rules of the merging limited partnership, except for changes that could be made without action by the limited partners; and

(2) each partnership interest outstanding immediately before the effectiveness of the merger is to continue as or to be converted into, except as may be otherwise agreed by the holder thereof, an identical partnership interest in the surviving limited partnership after the effectiveness of the merger.

(e) Cross reference. - See section 3304(b) (relating to election of benefit corporation status).

[No change to Committee Comment (2014).]

Subchapter C
Merger

§ 336. Effect of merger.
(a) General rule. - When a merger under this subchapter becomes effective, all of the following apply:

* * *

(2) [Each] The separate existence of each merging association that is not the surviving association ceases [to exist].

* * *

[No change to Committee Comment (2014).]

Subchapter F
Division

§ 366. Statement of division; effectiveness.

(a) General rule. - A statement of division shall be signed by the dividing association and delivered to the department for filing along with the certificates, if any, required by section 139 (relating to tax clearance of certain fundamental transactions).

(b) Contents. - A statement of division shall contain all of the following:

(1) With respect to the dividing association:

(i) its name;

(ii) its jurisdiction of formation;

(iii) its type;

(iv) if it is a domestic filing association, domestic limited liability partnership or registered foreign association, the address of its registered office, including street and number, if any, in this Commonwealth, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address);

(v) if it is a domestic association that is not a domestic filing association or limited liability partnership, the address, including street and number, if any, of its principal office; and

(vi) if it is a nonregistered foreign association, the address, including street and number, if any, of:

(A) its registered or similar office, if any, required to be maintained by
the laws of its jurisdiction of formation; or

(B) if it is not required to maintain a registered or similar office, its principal office.

(2) A statement as to whether the dividing association will survive the division.

(3) With respect to each resulting association created by the division:

(i) its name;

(ii) its jurisdiction of formation;

(iii) its type;

(iv) if it is a domestic filing association, domestic limited liability partnership or registered foreign association, the address of its registered office, including street and number, if any, in this Commonwealth, subject to section 109;

(v) if it is a domestic association that is not a domestic filing association or limited liability partnership, the address, including street and number, if any, of its principal office; and

(vi) if it is a nonregistered foreign association, the address, including street and number, if any, of:

(A) its registered or similar office, if any, required to be maintained by the laws of its jurisdiction of formation; or

(B) if it is not required to maintain a registered or similar office, its principal office.

(4) If the statement of division is not to be effective on filing, the later date or date and time on which it will become effective.

(5) A statement that the division was approved in the following ways:

(i) By a dividing association that is a domestic entity, in accordance with this chapter.

(ii) By a dividing association that is a foreign association, in accordance with the laws of its jurisdiction of formation.

(6) If the dividing association is a domestic filing entity and survives the division, any amendment to its public organic record approved as part of the plan of division.
(7) For each resulting association created by the division that is a domestic entity, its public organic record, if any, as an attachment. The public organic record does not need to state the name or address of an incorporator of a corporation, organizer of a limited liability company or similar person with respect to any other type of entity.

(8) For each new association that is a domestic limited liability partnership or a domestic limited liability limited partnership that is not using the alternative procedure in section 8201(f) (relating to scope), its statement of registration as an attachment.

(9) For each new association that is an electing partnership, its statement of election as an attachment.

(10) The property and liabilities of the dividing association that are to be allocated to each resulting association, but it shall not be necessary to list in the statement of division each individual liability or item of property of the dividing association to be allocated to a resulting association so long as the liabilities and property are described in a reasonable manner.

(c) Other provisions. – In addition to the requirements of subsection (b), a statement of division may contain any other provision not prohibited by law.

(d) New domestic entity. – If a new association is a domestic entity, its public organic record, if any, must satisfy the requirements of the laws of this Commonwealth, except that it does not need to be signed and may omit any provision that is not required to be included in a restatement of the public organic record.

(e) Filing of plan. – A plan of division that is signed by the dividing association and meets all of the requirements of subsection (b) may be delivered to the department for filing instead of a statement of division and on filing has the same effect. If a plan of division is filed as provided in this subsection, references in this chapter to a statement of division refer to the plan of division filed under this subsection.

(f) Effectiveness of statement of division. – A statement of division is effective as provided in section 136(c) (relating to processing of documents by Department of State).

(g) Effectiveness of division. – A division takes effect as follows:

(1) If the division is one in which all of the resulting associations are domestic associations, the division is effective when the statement of division is effective.

(2) If the division is one in which one or more of the resulting associations is a foreign association, the division is effective on the later of:

(i) the effectiveness of the statement of division; or

(ii) when the division is effective under the laws of each of the jurisdictions of
formation of the foreign resulting associations.

(h) Coordination of transactions. – A new association may be a party to another transaction under this chapter that takes effect simultaneously with the division. The new association shall be deemed to exist before the effectiveness of the other transaction, but solely for the purpose of being a party to the other transaction. The plan relating to the other transaction shall be deemed to have been approved by the new association if the plan is approved by the dividing association in connection with its approval of the plan of division. The statement that is delivered to the department for filing with respect to the other transaction shall state that it was approved by the new association pursuant to this subsection.

[(h)] (i) Cross references. – See sections 134 (relating to docketing statement) and 135 (relating to requirements to be met by filed documents).

Amended Committee Comment (2016):

This section was added in 2014 by the Association Transactions Act and is a generalization of former 15 Pa.C.S. §§ 1954, 1955, and 1956. Subsection (h) was added in 2016.

The filing of a statement of division makes the transaction a matter of public record. The mandatory requirements for a statement of division are set forth in subsection (b). They are similar to the requirements for a statement of merger in 15 Pa.C.S. § 335.

A division involving a regulated entity may require approval of a government agency before it can become effective. 15 Pa.C.S. § 103.

Rules on what constitutes delivery of documents to and by the Department of State are set forth in 15 Pa.C.S. § 113.

Subsection (h) permits a division transaction to occur simultaneously with another transaction under Chapter 3. For example, an association may wish to divide and simultaneously with the division have a new association merge into another association. Subsection (h) provides special provisions that address the logical inconsistencies that would otherwise arise from the fact that in a customary division the new association does not come into existence until the time when the division takes effect.

The following terms used in this section are defined in 15 Pa.C.S. § 312:

“division”
“dividing association”
“new association”
“resulting association”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“domestic association”
“domestic entity”
“domestic filing association”
“domestic filing entity”
§ 367. **Effect of division.**

(a) General rule. – When a division becomes effective, all of the following apply:

* * *

(2) If the dividing association is not to survive the division, the separate existence of the dividing association ceases **[to exist]**.

* * *

(6) The liabilities of the dividing association are allocated between or among the resulting associations as provided in section 368 (relating to allocation of liabilities in division) and the resulting associations to which liabilities are allocated are liable for those liabilities as successors to the dividing association, and not by transfer, whether directly, indirectly or by operation of law.

* * *

[No change to Committee Comment (2014).]

§ 368. **Allocation of liabilities in division.**

(a) General rule. – Except as provided in this section, when a division becomes effective, a resulting association is responsible:

(1) Individually for the liabilities the resulting association undertakes or incurs in its own name after the division.

(2) Individually for the liabilities of the dividing association that are allocated to or
remain the liability of that resulting association to the extent specified in the plan of division.

(3) Jointly and severally with the other resulting associations for the liabilities of the dividing association that are not allocated by the plan of division.

(b) Joint and several liability. - If an allocation of property or liabilities in a division is ineffective or voidable pursuant to fraudulent transfer or similar law, both of the following apply:

(1) The allocations of liabilities in the plan of division are ineffective and the liabilities of the dividing association become liabilities of all of the resulting associations, jointly and severally.

(2) The validity and effectiveness of the division are not affected thereby.

(c) Breach of obligation. - If a division breaches an obligation of the dividing association, all of the resulting associations are liable, jointly and severally, for the breach, but the validity and effectiveness of the division are not affected thereby.

(d) Application of fraudulent transfer law. - In applying the law governing fraudulent transfers to a division:

(1) The law applies to the dividing association as follows:

   (i) If it does not survive the division, it is not subject to that law.

   (ii) If it survives the division, it is subject to that law only in its capacity as a resulting association.

(2) The law applies to each resulting association as follows:

   (i) The association is treated as a debtor.

   (ii) The liabilities allocated to the association are treated as an obligation incurred by the debtor.

   (iii) The association is treated as not having received a reasonably equivalent value in exchange for incurring the obligation.

   (iv) The property allocated to the association is treated as remaining property.

(e) Distribution tests not applicable. - A direct or indirect allocation of property or liabilities in a division is not a distribution for purposes of the organic law of the dividing association or any of the resulting associations.

(f) Liens and other charges. - Liens, security interests and other charges on the property
of the dividing association are not impaired by the division, notwithstanding any otherwise
enforceable allocation of liabilities of the dividing association.

(g) Security agreements. – If the dividing association is bound by a security agreement
governed by 13 Pa.C.S. Div. 9 (relating to secured transactions) as enacted in any jurisdiction
and the security agreement provides that the security interest attaches to after-acquired collateral,
each resulting association is bound by the security agreement.

(h) Creditors and guarantors. – An allocation of a liability does not:

(1) Affect the rights under other law of a creditor owed payment of the liability or
performance of the obligation that creates the liability, except that those rights are available
only against an association responsible for the liability or obligation under this section.

(2) Release or reduce the obligation of a surety or guarantor of the liability or
obligation.

(i) Regulatory approvals. – The conditions in this section for freeing one or more of the
resulting associations from the liabilities of the dividing association and for allocating some or
all of the liabilities of the dividing association shall be conclusively deemed to have been
satisfied if the plan of division has been approved by the Department of Banking and Securities,
the Insurance Department or the Pennsylvania Public Utility Commission in a final order issued
after August 21, 2001, that is not subject to further appeal.

(j) Taxes. – Any taxes, interest, penalties and public accounts of the Commonwealth
claimed against the dividing association for periods prior to the effective date of the division that
are settled, assessed or determined prior to or after the division shall be the liability of all of the
resulting associations and, together with interest thereon, shall be a lien against the franchises
and property of each resulting association. Upon the application of the dividing association, the
Department of Revenue, with the concurrence of the Department of Labor and Industry, shall
release one or more, but less than all, of the resulting associations from liability and liens for all
taxes, interest, penalties and public accounts of the dividing association due the Commonwealth
for periods prior to the effective date of the division if those departments are satisfied that the
public revenues will be adequately secured.

[No change to Committee Comment (2014).]

Subchapter G
Domestication

§ 376. Effect of domestication.

***

(f) Service of process.--When a domestication becomes effective, a foreign
domesticated entity may be served with process in this Commonwealth for the collection and enforcement of any of its debts, obligations and other liabilities in accordance with applicable law."

* * *

[No change to Committee Comment (2014).]

Chapter 4
Foreign Associations

Subchapter A
General Provisions

§ 402. Governing law.

* * *

(g) Defense of usury. – A foreign association shall be subject to section 1510 (relating to certain specifically authorized debt terms) with respect to obligations, as defined in the section, governed by the laws of this Commonwealth or affecting real property situated in this Commonwealth, to the same extent as if the foreign association were a domestic business corporation.

Committee Comment (2016):

This section was added in 2014 by the Association Transactions Act. Subsections (a) – (c) are patterned after Uniform Business Organizations Code (2011) (Last Amended 2013) § 1-501. Subsections (d) – (f) are substantially a reenactment of former 15 Pa.C.S. § 4142. Subsection (g) was added in 2016.

Subsection (a) provides that the law of the jurisdiction of formation of a foreign association, rather than the law of Pennsylvania, governs both the internal affairs of the association and the liability of its interest holders and governors for the obligations of the association.

Unincorporated associations of certain types are authorized by the law of some states to create series. If series are properly created, a debt, obligation, or liability associated with the property of a particular series is enforceable only against property of that series, and not against the property of the trust generally or any other series thereof. Subsection (a)(3) respects that type of internal shield in any form of unincorporated association that is authorized to create series.

Subsections (b) and (c) together make clear that although a foreign association may not be denied registration simply because of a difference between the laws of its jurisdiction of formation and the laws of Pennsylvania, the foreign association may not engage in any activity or exercise any power in Pennsylvania that a domestic entity of the same type may not engage in or exercise. Thus subsection (c) puts a registered foreign association on the same, but no better, footing as a domestic entity.
The effect of qualification in Pennsylvania of a foreign association is, in effect, to domesticate the 1344 association under Pennsylvania law with respect to external matters (as opposed to internal affairs). Thus 1346 the association acquires the privileges of a domestic association vis a vis third parties, even in such an 1347 exceptional area as the acquisition of the power of eminent domain. 21 1348 Pa.Dist. 367 (1911), 9 Del.Co. 295 (1904), 1349 6 Pa.Dist. 200 (1897), 194 So.2d 527 (Ala.1967), 29A C.J.S. 1348 Eminent Domain § 25 at pp. 242-43 (1965). And the association is subject to the burdens of domestic 1351 status, process may be served on it under 42 Pa.C.S. § 5301(a)(2)(i) with respect to any cause of 1352 action, including a cause of action not qualifying for service of process under 42 Pa.C.S. § 5322 or 1353 another similar long arm statute. Of course, this concept of equality can be superseded by express 1354 statutory provision, in the area of state corporate taxation. Registration under this chapter has no 1355 effect on the application of Pennsylvania law to the internal affairs of a foreign association. 15 1356 Pa.C.S. §§ 4145 and 4146.

It is the intention of this section to equalize the rights of licensed foreign insurers to hold and invest 1358 in real estate and other property with the rights of nonlicensed foreign insurers, which for many years 1359 have had the same investment and property owning powers in Pennsylvania as business corporations 1360 generally. Subsection (e), in reverting to the law of insurance regulation, is not intended to make licensed 1362 foreign insurers subject to investment restrictions expressly applicable under Pennsylvania insurance 1363 regulatory law to domestic insurers.

Subsection (g) extends to all foreign associations the policy in 15 Pa.C.S. § 1510 that a domestic 1365 business corporation may not plead usury as a defense. 15 Pa.C.S. § 114 extends the same policy to 1367 domestic associations.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

"association"
"domestic association"
"domestic entity"
"foreign association"
"governor"
"insurance corporation"
"interest holder"
"jurisdiction of formation"
"obligations"
"registered foreign association"
"type"

Part II
Corporations

Subpart A
Corporations Generally

Chapter 5
Corporations
§ 521. Pensions and allowances.

A banking institution [or a savings association] may grant allowances or pensions to officers, directors and employees for faithful and long-continued services and, after the death of the officer, director or employee either while in the service of the corporation or after retirement, pensions or allowances may be granted or continued to their dependents. The allowances to dependents shall be reasonable in amount and paid only for a limited time and, unless part of an employee benefit plan or employment contract in effect at the time of retirement or death of the officer, director or employee, shall not exceed in total the amount of the compensation paid to the officer, director or employee during the 12 months preceding retirement or death.

[There is no Committee Comment to 15 Pa.C.S. § 521.]

§ 522. Indemnification of authorized representatives.

A banking institution [or a savings association] shall be governed by the provisions of Subchapter D of Chapter 17 (relating to indemnification).

[There is no Committee Comment to 15 Pa.C.S. § 522.]

§ 523. Actions by shareholders or members to enforce a secondary right.

(a) General rule. – In any action brought to enforce a secondary right on the part of one or more shareholders or members against any officer or director or former officer or director of a banking institution [or a savings association], because the corporation refuses to enforce rights which may properly be asserted by it, the plaintiff or plaintiffs must aver and it must be made to appear that the plaintiff or each plaintiff was a shareholder or was a member of the corporation at the time of the transaction of which he complains or that his stock or membership devolved upon him by operation of law from a person who was a shareholder or member at that time.

(b) Security for costs. – In any such action instituted or maintained by a holder or holders of less than 5% of the outstanding shares of any class of the corporation or voting trust certificates therefor, or by a member or members of a corporation organized without capital stock which has outstanding contracts or accounts with its members if the value of the contracts or accounts held or owned by the member or members instituting or maintaining the suit is less than 5% of the value of all the contracts or accounts outstanding, the corporation in whose right the action is brought shall be entitled, at any stage of the proceedings, to require the plaintiff or plaintiffs to give security for the reasonable expenses, including attorneys’ fees, which may be incurred by [it] the corporation in connection therewith [and] or for which it may become liable pursuant to section 522 (relating to indemnification of authorized representatives) (but only insofar as relates to mandatory indemnification in actions by or in the right of the corporation) to
which security the corporation shall have recourse in such amount as the court having
jurisdiction shall determine upon the termination of the action. The amount of the security may,
from time to time, be increased or decreased in the discretion of the court having jurisdiction of
the action upon showing that the security provided has or [may] is likely to become inadequate
or excessive. The security may be denied or limited by the court if the court finds after an
evidentiary hearing that undue hardship on plaintiffs and serious injustice would result.

(c) Definitions. – As used in this section, the following words and phrases shall have the
meanings given to them in this subsection:

“Director.” Includes any individual performing the function of director, regardless of title.

“Member.” Includes depositors in a mutual banking institution.

[There is no Committee Comment to 15 Pa.C.S. § 523.]

Subpart B
Business Corporations

Chapter 15
Corporate Powers, Duties and Safeguards

Subchapter C
Corporate Finance

§ 1551. Distributions to shareholders.

* * *

(b) Limitation. – A distribution, including a distribution under Subchapter F (relating to
voluntary dissolution and winding up) or H (relating to postdissolution provision for liabilities)
of Chapter 19, may not be made if, after giving effect thereto:

(1) the corporation would be unable to pay its debts as they become due in the usual
course of its business; or

(2) the total assets of the corporation would be less than the sum of its total
liabilities plus (unless otherwise provided in the articles) the amount that would be needed,
if the corporation were to be dissolved at the time as of which the distribution is measured,
to satisfy the preferential rights upon dissolution of shareholders whose preferential rights
are superior to those receiving the distribution.

* * *
(d.1) Distributions in winding up. – In measuring the effect of a distribution under Subchapter F or H of Chapter 19, the liabilities of a dissolved corporation do not include any liabilities for which adequate provision has been made or any claim that has been barred under those subchapters.

* * *

Amended Committee Comment (2016):

Without question, the most urgently needed change in the 1933 BCL was the elimination of the requirement that a dual set of books be kept: one under current accounting practices as required by tax and regulatory authorities, and the other to comply with the 1957-period accounting concepts “frozen” into the statutory language of the 1933 BCL. Under the modern equity method of accounting, for example, earnings of a subsidiary in which a parent corporation has a significant investment automatically appear in the retained earnings of the parent, but for 1933 BCL purposes either an actual dividend had to be declared or complex capital surplus tests had to be met, and even this latter option was not available if the subsidiary was a Canadian or other non-U.S. corporation.

The Model Business Corporation Act (the “Model Act”), upon which the 1957-era financial provisions in the 1933 BCL were largely modeled, was revised since that time to eliminate the dual bookkeeping concept. The 1988 BCL continues the historic Pennsylvania policy of largely conforming the business corporation law financial provisions to the Model Act approach.

The revisions to the financial provisions of the Model Act reflect a complete modernization of all provisions of the Model Act concerning financial matters, including (i) the elimination of the outmoded concepts of stated capital and par value, (ii) the definition of “distribution” as a broad term governing dividends, share repurchases and similar actions that should be governed by the same standard, (iii) the reformulation of the statutory standards governing the making of distributions, (iv) the elimination of references to treasury stock, and (v) the making of a number of technical and conforming changes which were necessary or advisable in connection with the basic revisions.

It has long been recognized by practitioners and legal scholars that the pervasive statutory structure in which “par value” and “stated capital” are basic to the state corporation statutes does not today serve the original purpose of protecting creditors and senior security holders from payments to junior security holders, and may, to the extent security holders are led to believe that it provides some protection, tend to be misleading. In light of this recognized fact, the Model Act has deleted the mandatory concepts of stated capital and par value. This section follows the approach of the Model Act and eliminates the concepts of capital surplus, earned surplus, stated capital and surplus that were central to the financial provisions in the 1933 BCL. It is anticipated that most existing corporations with stock having a stated par value will not immediately convert to no par stock and that many new corporations will continue to be incorporated with stock having a stated par value. The second sentence of subsection (a), which is not found in the Model Act, has accordingly been added to make clear that a stated par value is not relevant to the application of this section.

In the Model Act, like the 1933 BCL, one test of the legality of dividends and stock repurchases is whether, after giving effect thereto, the corporation would be insolvent in the equity sense, , unable to
pay its obligations as they become due in the ordinary course of business. The Committee believes that this is the fundamentally important test and has retained it without change.

In most cases involving a corporation operating as a going concern in the normal course, information generally available will make it quite apparent that no particular inquiry concerning the equity insolvency test is needed. While neither a balance sheet nor an income statement can be conclusive as to this test, the existence of significant shareholders’ equity and normal operating conditions are of themselves a strong indication that no issue should arise under this test. Indeed, in the case of a corporation having regularly audited financial statements, the absence of any qualification in the most recent auditor’s opinion as to the corporation’s status as a “going concern,” coupled with a lack of subsequent material adverse events that would cause such a qualification, should normally be decisive.

It is only when circumstances indicate that the corporation is encountering difficulties or is in an uncertain position concerning its liquidity and operations that the board of directors or, more commonly, the officers or others upon whom the directors may rely under 15 Pa.C.S. § 1712(a), may need to address the issue. Because of the overall judgment required in evaluating the equity insolvency test, no one or more “bright line” tests can be employed. However, in determining whether the equity insolvency test has been met, certain judgments or assumptions as to the future course of the corporation’s business are customarily justified, absent clear evidence to the contrary. These include the likelihood that (a) based on existing and contemplated demand for the corporation’s products or services, it will be able to generate funds over the next several years sufficient to satisfy its existing and reasonably anticipated obligations as they mature during that period of time, and (b) indebtedness which matures in the near-term will be refinanced where, on the basis of the corporation’s financial condition and future prospects and the general availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may be accomplished. There may be occasions when it would be useful to consider a cash flow analysis, based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that known obligations of the corporation can reasonably be expected to be satisfied over the period of time that they will mature.

In determining whether a corporation is insolvent, or as a result of a proposed distribution would be rendered insolvent, the board of directors may rely, as noted above, on information supplied by the officers of the corporation and others. 15 Pa.C.S. § 1712(a). It is not necessary for the directors to know of the details of the various analyses or market or economic projections that may be relevant. Judgments, further, must of necessity be made on the basis of information in the hands of the board of directors when a distribution is authorized. “Time of Measurement of Distributions,” below. The directors should not, of course, be held responsible as a matter of hindsight for unforeseen developments. This is particularly true with respect to assumptions as to the ability of the corporation to refinance or repay long-term obligations that do not mature for several years, since the primary focus of the directors’ decision to make a distribution should normally be on the corporation’s prospects and obligations in the shorter term, unless special factors concerning the corporation’s prospects require the taking of a longer term perspective.

The 1988 BCL establishes the validity of distributions from the corporate law standpoint and 15 Pa.C.S. § 1553 determines the potential liability of directors and shareholders for improper distributions. The federal Bankruptcy Code and the law on fraudulent or voidable transfers, on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds transferred to others in cases of actual or constructive fraud. In light of these diverse purposes, it was not thought necessary to make the tests of this section identical with the tests for insolvency under those statutes.
The Model Act also contains a balance sheet test, which has been modified in subsection (c) to continue the provision of the prior law permitting unrealized appreciation and depreciation of assets to be considered when measuring the legality of a dividend and to clarify in other respects the application of the balance sheet test.

To avoid the problem encountered under the prior law as the statutory provisions diverged from developing accounting principles, this section does not incorporate technical accounting terminology or specific accounting concepts. Accounting terminology and concepts are constantly under review and subject to revision by the Public Company Accounting Oversight Board, Financial Accounting Standards Board, American Institute of Certified Public Accountants, Securities and Exchange Commission, and others. In making determinations under this section, the board of directors may make judgments about accounting matters, giving full effect to its right to rely upon professional or expert opinion.

In a corporation with subsidiaries, it is intended that the board of directors may rely on unconsolidated statements prepared on the basis of the equity method of accounting as to the corporation’s investee corporations, including corporate joint ventures and subsidiaries, although other evidence may be relevant in the total determination.

The board of directors is entitled to rely upon reasonably current financial statements prepared on the basis of generally accepted accounting principles in determining whether or not the balance sheet test of subsection (b)(2) has been met, unless the board is aware at the time that it would be unreasonable to rely on the financial statements because of newly-discovered or subsequently arising facts or circumstances. Subsection (c), however, does not mandate the use of generally accepted accounting principles, and the board may base its determination that a distribution satisfies the test of subsection (b)(2) on other factors, including any method that is reasonable in the circumstances. While publicly-owned corporations subject to registration under the Securities Exchange Act of 1934 must, and many other corporations in fact do, utilize financial statements prepared on the basis of generally accepted accounting principles, a great number of smaller corporations do not. Some of these corporations maintain records solely on a tax accounting basis and their financial statements are of necessity prepared on that basis. Others prepare financial statements that substantially reflect generally accepted accounting principles but may depart from them in some respects ( , footnote disclosure). These facts of corporate life indicate that a statutory standard of reasonableness, rather than stipulating generally accepted accounting principles as the normative standard, is appropriate in order to achieve a reasonable degree of flexibility and to accommodate the needs of the many different types of business corporations which might be subject to these provisions. Subsection (c) contemplates that generally accepted accounting principles are always “reasonable in the circumstances” and that other accounting principles may be perfectly acceptable, under a general standard of reasonableness.

Subsection (c) permits the validity of a distribution to be tested on the basis of various forms of valuations other than under accounting principles, including any other method that is reasonable in the circumstances. The intent of paragraphs (2), (3), and (4) of subsection (c) is to prohibit a distribution only when the value of the corporation’s total assets is less than its liabilities; and it is commonly recognized that asset values on a balance sheet prepared in accordance with GAAP, being normally based on historical costs, do not purport to represent current values. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal and current value methods to determine the amount available for distribution. Decisions as to whether to use a basis other than historical cost
accounting and the choice of a particular alternative basis that may be appropriate are left to the judgment of the directors. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a “quick-sale liquidation” method to value an on-going enterprise, particularly with respect to the payment of normal dividends. On the other hand, a “quick-sale liquidation” valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily a corporation should not selectively revalue assets. It should consider the value of all of its material assets, whether or not reflected in the financial statements (a valuable executory contract). Likewise, all of the corporation’s material obligations should be considered and revalued to the extent appropriate and possible. However, as the last sentence of subsection (c) makes clear, contingent liabilities need to be considered in applying the test of subsection (b)(2) only where they are required to be reflected on the corporation’s balance sheet (other than the notes thereto).

Subsection (c)(4) also refers to “any other method that is reasonable in the circumstances.” This phrase is intended to comprehend within subsection (c) the wide variety of possibilities that might not be considered to fall under a “fair valuation” or “current value” method but might be reasonable in the circumstances of a particular case.

Subsection (b)(2) provides that a distribution may not be made unless the total assets of the corporation exceed its liabilities plus the amount that would be needed to satisfy any shareholder’s superior preferential rights upon dissolution if the corporation were to be dissolved on the date as of which the distribution is measured. This requirement in effect treats preferential dissolution rights of classes or series of shares for distribution purposes as equivalent to liabilities rather than as equity interests. In making the calculation of the amount that must be added to the liabilities of the corporation to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be determined pursuant to the articles of incorporation (or resolution creating a series having preferential dissolution rights) as of the date the distribution or proposed distribution is to be measured. The amount so determined must include arrearages in preferential dividends if the articles of incorporation or resolution require that they be paid upon the dissolution of the corporation. In the case of shares having both a preferential right upon dissolution and additional nonpreferential rights, only the preferential portion of the rights should be taken into account. The treatment of preferential dissolution rights of classes of shares set forth in subsection (b)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of subsection (b)(1). The treatment of preferential rights mandated by this section may always be eliminated by an appropriate provision in the articles of incorporation.

A definition of “distribution,” which is designed to include dividends, stock redemptions and all other similar payments in respect of a corporation’s own stock, was added to the Model Act and has been included in 15 Pa.C.S. § 1103 on the generally recognized ground that the same fundamental tests should apply to all. The definition of “distribution” in 15 Pa.C.S. § 1103 deals specifically with the following:

(a) , purchases of parent company stock by a subsidiary whose actions are controlled by the parent. These are “distributions” by the parent and are covered by the
general term “indirect.”

(b) These transactions, which do not remove assets from the corporation, are excluded from the definition of distribution.

(c) If a corporation distributes its own promissory obligations as a dividend and receives nothing in return, the transaction is a distribution.

15 Pa.C.S. § 7112 which exempts rebates and similar payments by cooperative corporations from treatment as a distribution.

Subsection (d), which specifies how to determine the date as of which the legality of a distribution is measured, is a new provision modeled generally after the Model Act. It departs somewhat from the Model Act, however, by permitting the board of directors to designate the date as of which the legality of any distribution is to be tested if the distribution is subsequently made within 125 days of the earlier of the date specified or the date of authorization. 15 Pa.C.S. § 1712(a) expressly contemplates that the board may rely in performing its duties on the financial statements of the corporation and the cross reference in subsection (g) is intended to emphasize, among other things, that 15 Pa.C.S. § 1712(a) will be applicable to the declaration of a distribution under this section. Since the preparation of financial statements necessarily lags the date as of which they are prepared, the protection of 15 Pa.C.S. § 1712(a) would almost never be available to the board if the date for measuring the legality of a dividend were the same as the date on which the board takes action.

If the board fails to specify the measuring date when it authorizes a distribution, the measuring date will be the date the distribution is made. The date of distribution will also be the measuring date if the distribution is not made within 125 days of the earlier of the measuring date specified by the board or the date of authorization.

The liability of directors under 15 Pa.C.S. § 1553 for a violation of this section would ordinarily arise upon payment of a dividend or distribution of property and the statute of limitations would then begin to run. the Committee Comment to 15 Pa.C.S. § 1553. It is not intended that the validity of the action be judged by hindsight, but as the facts appeared to the board of directors at the time of authorization, or at any later date when the board possessed and failed to use the capacity to rescind or appropriately modify the terms of the distribution.

In an acquisition or redemption of its shares, a corporation may transfer property or incur debt to the former holder of the shares. Share purchase agreements involving payment for shares over a period of time are of special importance in smaller, non-public corporate enterprises, as well as in some restructurings by large, publicly held corporations. Subsection (d) provides a clear rule for this situation: the distribution is deemed to occur at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid, except as provided in subsection (f) ( Comment 7, below). Of course, this does not preclude a later challenge of a payment on account of redemption-related debt by a bankruptcy trustee on the ground that it constitutes a preferential payment to a creditor under the bankruptcy laws.

Subsection (e) provides that indebtedness created to acquire the corporation’s shares or issued as a distribution (if permitted under subsection (b)), is at least on a parity with the indebtedness of the
corporation to its general, unsecured creditors, except to the extent subordinated by agreement. General
creditors are better off in these situations than they would have been if cash or other property had been
paid out for the shares or distributed (which is proper under the statute), and no worse off than if cash had
been paid or distributed and then lent back to the corporation, making the shareholders (or former
shareholders) creditors. The reference to redemption related debt being “at least” on a parity with debts
owed to general creditors is a departure from the Model Act formulation to make clear that security may
be given for the repayment of redemption related debt.

Subsection (f) provides that indebtedness, including indebtedness issued as a distribution, need not
be taken into account as a liability in determining whether the tests of subsection (b) have been met if the
terms of the indebtedness provide that payments of principal and interest can be made only if and to the
extent that payment of a distribution could then be made under this section. This has the effect of making
the holder of the indebtedness junior to all other creditors but senior to the holders of all classes of shares,
not only during the time the corporation is operating but also upon dissolution and liquidation. It should
be noted that the creation of such indebtedness, and the related limitation on payments of principal and
interest, may create tax problems or raise other legal questions.

Although subsection (f) is applicable to all indebtedness meeting its tests, regardless of the
circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the
reacquisition of shares of the corporation at a time when the deferred purchase price exceeds the net
worth of the corporation. This type of reacquisition will often be necessary in the case of businesses in
early stages of development or service businesses whose value derives principally from existing or
prospective net income or cash flow rather than from net asset value. In such situations, it is anticipated
that net worth will grow over time from operations so that when payments in respect of the indebtedness
are to be made the two tests of subsection (b) will be satisfied. In the meantime, the fact that the
indebtedness is outstanding will not prevent distributions that could be made under subsection (b) if the
indebtedness were not counted in making the determination.

The Model Act has eliminated the concept of treasury stock, and provides that reacquired shares are
automatically restored to the status of authorized but unissued stock, unless the articles prohibit
reissuance. This was based upon the judgment that treasury stock should have no meaningful or valid
status of any substance, particularly in view of the elimination of par value and stated capital and of
surplus as a measuring limitation. A specific provision eliminating treasury shares has not been included
in the 1988 BCL, but no references to treasury shares as such are set forth. Unless the articles prohibit
reissuance, reacquired shares will be deemed under 15 Pa.C.S. § 1552 to be issued but not outstanding,
except that (unless otherwise provided in the bylaws) the board may restore such shares to the status of
authorized but unissued shares. Thus treasury shares may exist for accounting and regulatory purposes, if
desired. The resale of reacquired shares is subject to the same principles as the issuance of authorized but
unissued shares, since 15 Pa.C.S. § 1103 defines “issue” to include the sale or other disposition of
reacquired shares. 15 Pa.C.S. § 507.

The provisions cited in subsection (d.1) provide methods for cutting off or securing the debts of a
corporation that is winding up its affairs and activities, and thus those debts do not need to be considered
when determining under subsection (b) if a distribution can be paid during winding up.
As originally enacted, subsection (b) contained a cross reference to 15 Pa.C.S. § 1721(b) (now 15 Pa.C.S. § 1712(a) and (b)). That provision has been replaced by the cross reference in subsection (g) to all of 15 Pa.C.S. Subch. 17B to emphasize that the actions of the directors when authorizing a distribution are subject to all of the provisions of Subchapter 17B, not just the provision permitting reliance by the directors on officers and other persons.

The tests for measuring the legality of distributions are modified in the case of insurance corporations by 15 Pa.C.S. § 3122 which provides that the amount of capital received by an insurance corporation upon its stock shall be deemed a liability of the corporation for purposes of this section.

Under 15 Pa.C.S. § 1504(c), the restrictions that subsection (a) authorizes to be set forth in the bylaws may also be set forth in the articles.

Under 15 Pa.C.S. § 1731(c), any action that may be taken by the board of directors under this section may be taken by a duly authorized committee thereof, subject to compliance by the committee with any procedure applicable to action by the full board.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”
“board of directors”
“business corporation”
“bylaws”
“distribution”
“obligation”
“shareholder”
“shares”
“unless otherwise provided”
“unless otherwise restricted”

Chapter 17
Officers, Directors and Shareholders

Subchapter F
Derivative Actions

§ 1781. Derivative action.

(a) General rule. – Subject to section 1782 (relating to eligible shareholder plaintiffs and security for costs) and subsection (b), a plaintiff may maintain a derivative action to enforce a right of a business corporation only if:

(1) the plaintiff first makes a demand on the corporation or the board of directors requesting that it cause the corporation to bring an action to enforce the right, and:
(i) if a special litigation committee is not appointed under section 1783 (relating to special litigation committee), the corporation does not bring the action within a reasonable time; or

(ii) if a special litigation committee is appointed under section 1783, a determination is made:

(A) under section 1783(e)(1) that the corporation not object to the action; or

(B) under section 1783(e)(5)(i) that the plaintiff continue the action;

(2) demand is excused under subsection (b);

(3) the action is maintained for the limited purpose of seeking court review under section 1783(f); or

(4) the court has allowed the action to continue under the control of the plaintiff under subsection 1783(f)(3)(ii).

(b) Prior demand excused. –

(1) A demand under subsection (a)(1) is excused only if the plaintiff makes a specific showing that immediate and irreparable harm to the business corporation would otherwise result.

(2) If demand is excused under paragraph (1), demand shall be made promptly upon commencement of the action.

(c) Contents of demand. – A demand under this section must be in record form and give notice with reasonable specificity of the essential facts relied upon to support each of the claims made in the demand.

(d) Additional claims. – If a derivative action is commenced after a demand has been made under this section and includes a claim that was not fairly subsumed under the demand, a new demand must be made with respect to that claim. The new demand shall not relate back to the date of the original demand for purposes of subsection (e).

(e) Statute of limitations. – The making of a demand tolls any applicable statute of limitations with respect to a claim asserted in the demand until the earlier of the date:

(1) the plaintiff making the demand is notified either:

(i) that the board of directors has decided not to bring an action and not to appoint a special litigation committee; or
(ii) of a determination under section 1783(e) after the appointment of a special litigation committee under section 1783; or

(2) the plaintiff commences an action asserting the claim.

(f) Certain provisions of articles ineffective. – This section may not be relaxed by any provision of the articles.

Committee Comment (2016):

This section is patterned in part after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) (the “ALI Principles”) § 7.03. In 1042 (Pa. 1997), the Pennsylvania Supreme Court adopted Sections 7.02 – 7.10 and 7.13 of the ALI Principles and thus filled a void in Pennsylvania statutory law at the time. This subchapter generally follows those sections of the ALI Principles, while elaborating and revising certain portions of those sections of the ALI Principles as they apply to business corporations.

Subsections (a) and (b) follow Section 7.03 of the ALI Principles in adopting a “universal demand” requirement subject to an exception for irreparable injury. Except in the limited situation described in subsection (b)(1), a plaintiff must always demand that the board of directors bring an action and allow the corporation to respond as provided in this subchapter before the plaintiff may commence a derivative action. This section thus rejects the law as it has developed in Delaware and other states that excuse pre-suit demand in circumstances where it is alleged that demand would be futile.

Section 7.02(c) of the ALI Principles provides that a director has standing to bring a derivative action unless the court finds that the director is unable to represent fairly and adequately the interests of the shareholders; and Section 7.03(a) of the ALI Principles requires a director to make demand in the same manner as a shareholder. Consistent with those sections of the ALI Principles, it is intended that the plaintiffs who are subject to this section will include a director plaintiff.

The rights that may be enforced in a derivative action include the right to seek redress for a wrong to the corporation.

If “immediate and irreparable injury” is shown as required by subsection (b), that will not excuse the plaintiff altogether from making demand; judicial review will begin with the response of the board. If “immediate and irreparable injury” justifies the commencement of the action without demand and the court grants an injunction to preserve the status quo, subsection (b) contemplates that the board would still be given an appropriate time to respond and that further inquiry by the court will focus on the response of the board, or a special litigation committee if one is appointed as provided in 15 Pa.C.S. § 1783.

If a derivative action is commenced before demand has been made and the failure to make demand is not excused under subsection (b), under the ALI Principles the appropriate sanction will not be dismissal of the action, but rather an award of costs against the responsible attorney under Section 7.04(d) of the ALI Principles.

Subsection (c) requires that a demand be in record form, but this section does not prescribe the manner in which the demand must be delivered to the board of directors. The plaintiff should verify that the demand was received to avoid a challenge that demand was not made.
If the board of directors does not appoint a special litigation committee in response to a demand, further action by the board and demanding plaintiff will be subject to ALI Principles §§ 7.04 – 7.10 and 7.13, as modified by 15 Pa.C.S. §§ 1782 and 1784. If the board does appoint a special litigation committee, further action by the board, committee and plaintiff will be subject to those sections of the ALI Principles, as modified by this subchapter including specifically 15 Pa.C.S. § 1783 with respect to special litigation committees.

If a derivative action is commenced after a demand has been made and the action includes a claim that was not fairly subsumed under the original demand, subsection (d) requires that a new demand must be made with respect to that claim. With respect to the new claim, the tolling of the statute of limitations under subsection (e) will begin with the date of the new demand and not the date of the original demand.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“board of directors”
“business corporation”
“record form”

§ 1782. [Actions against directors and officers.] Eligible shareholder plaintiffs and security for costs.

(a) General rule. – Except as provided in subsection (b), in any action or proceeding brought to enforce a secondary right on the part of one or more shareholders of a business corporation against any present or former officer or director of the corporation because the corporation refuses to enforce rights that may properly be asserted by it, each plaintiff must aver and it must be made to appear that each plaintiff was a shareholder of the corporation or owner of a beneficial interest in the shares at the time of the transaction of which he complains, or that his shares or beneficial interest in the shares devolved upon him by operation of law from a person who was a shareholder or owner of a beneficial interest in the shares at that time.

(b) Exception. – Any shareholder or person beneficially interested in shares of the corporation who, except for the provisions of subsection (a), would be entitled to maintain the action or proceeding may, nevertheless in the discretion of the court, be allowed to maintain the action or proceeding on preliminary showing to the court, by application and upon such verified statements and depositions as may be required by the court, that there is a strong prima facie case in favor of the claim asserted on behalf of the corporation and that without the action serious injustice will result.

(c) Security for costs. – In any action or proceeding instituted or maintained by holders or owners of less than 5% of the outstanding shares of any class of the corporation, unless the shares held or owned by the holders or owners have an aggregate fair market value in excess of $200,000, the corporation in whose right the action or proceeding is brought shall be entitled at any stage of the proceedings to require the plaintiffs to give security for the reasonable expenses, including attorneys' fees, that may be incurred by the corporation in connection therewith or for which it may become liable pursuant to section 1743 (relating to mandatory indemnification) (but only insofar as relates to actions by or in the right of the corporation) to which security the corporation shall have recourse in such amount as the court determines upon the termination of
the action or proceeding. The amount of security may, from time to time, be increased or decreased in the discretion of the court upon showing that the security provided has or [may] is likely to become inadequate or excessive. The security may be denied or limited [in the discretion of] by the court [upon preliminary showing to the court, by application and upon such verified statements and depositions as may be required by the court, establishing prima facie that the requirement of full or partial security would impose] if the court finds after an evidentiary hearing that undue hardship on plaintiffs and serious injustice would result.

(d) Cross reference. – See section 4146 (relating to provisions applicable to all foreign corporations).

Amended Committee Comment (2016):

Subsections (a) and (b) were suspended by Pennsylvania Rule of Civil Procedure No. 1506(e), amended April 12, 1999, insofar as inconsistent with Rule No. 1506 relating to stockholder’s derivative action. Rule No. 1506(e) further provided that subsections (c) and (d) shall not be deemed suspended or affected by Rule No. 1506.

This section is applicable to every derivative action brought in a Pennsylvania court against a foreign corporation for profit, whether or not the corporation is required to register to do business in Pennsylvania under 15 Pa.C.S. Ch. 4. 15 Pa.C.S. § 4146.

The term “verified” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“business corporation”
“officer”
“shareholder”
“shares”

The reference in this section to “court” implies any court of competent jurisdiction and not merely the court as defined in 15 Pa.C.S. § 102.

§ 1783. Special litigation committee.

(a) General rule. – If a business corporation or the board of directors receives a demand to bring an action to enforce a right of the corporation, or if a derivative action is commenced before demand has been made on the corporation or the board, the board may appoint a special litigation committee to investigate the claims asserted in the demand or action and to determine on behalf of the corporation or recommend to the board whether pursuing any of the claims asserted is in the best interests of the corporation. The corporation shall send a notice in record form to the plaintiff promptly after the appointment of a committee under this section notifying the plaintiff that a committee has been appointed and identifying by name the members of the committee. A committee may not be appointed under this section if every shareholder of the corporation is also a director of the corporation.
(b) Discovery stay. – If the board of directors appoints a special litigation committee and an action is commenced before a determination has been made under subsection (e):

1. On motion by the committee made in the name of the business corporation, the court shall stay discovery for the time reasonably necessary to permit the committee to complete its investigation, except for good cause shown.

2. The time for the defendants to plead shall be tolled until the process provided for under subsection (f) has been completed.

(c) Composition of committee. – A special litigation committee shall be composed of two or more individuals who:

1. are not interested in the claims asserted in the demand or action;

2. are capable as a group of objective judgment in the circumstances; and

3. may, but need not, be shareholders or directors.

(d) Appointment of committee. – A special litigation committee may be appointed:

1. by a majority of the directors not named as actual or potential parties in the demand or action; or

2. if all the directors are named as actual or potential parties in the demand or action, by a majority of the directors so named.

(e) Determination. – After appropriate investigation by a special litigation committee, the committee or the board of directors may determine that it is in the best interests of the business corporation that:

1. an action based on some or all of the claims asserted in the demand not be brought by the corporation but that the corporation not object to an action being brought by the party that made the demand;

2. an action based on some or all of the claims asserted in the demand be brought by the corporation;

3. some or all of the claims asserted in the demand be settled on terms approved by the committee;

4. an action not be brought based on any of the claims asserted in the demand;

5. an action already commenced continue under the control of:

   (i) the plaintiff;
(ii) the corporation; or

(iii) the committee;

(6) some or all the claims asserted in an action already commenced be settled on terms approved by the committee; or

(7) an action already commenced be dismissed.

(f) Court review and action. – If a special litigation committee is appointed and a derivative action is commenced either before or after a determination is made under subsection (e):

(1) The business corporation shall file with the court after a determination is made under subsection (e) a statement of the determination and a report of the committee supporting the determination. The corporation shall serve each party with a copy of the determination and report. If the corporation moves to file the report under seal, the report shall be served on the parties subject to an appropriate stipulation agreed to by the parties or a protective order issued by the court.

(2) The corporation shall file with the court a motion, pleading or notice consistent with the determination under subsection (e).

(3) If the determination is one described in subsection (e)(2), (3), (4), (5)(ii), (6) or (7), the court shall determine whether the members of the committee met the qualifications required under subsection (c)(1) and (2) and whether the committee conducted its investigation and made its recommendation in good faith, independently and with reasonable care. If the court finds that the members of the committee met the qualifications required under subsection (c)(1) and (2) and that the committee acted in good faith, independently and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall:

(i) dissolve any stay of discovery entered under subsection (b);

(ii) allow the action to continue under the control of the plaintiff; and

(iii) permit the defendants to file preliminary objections, other appropriate pleadings and motions.

(g) Certain provisions of articles ineffective. – The provisions of this section may not be varied by the articles.

Committee Comment (2016):

This section is patterned in part after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 805.
This section is intended to supersede those provisions of American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) §§ 7.03 – 7.10 and 7.13 that deal with the same subjects as this section.

**Subsection (a)** - The statement in subsection (a) that a special litigation committee may “determine... whether pursuing any of the claims asserted is in the best interests of the corporation” means that a committee appointed under this section may be given the authority to act on behalf of the corporation without further action by the full board of directors.

**Subsection (f)** - Subsection (f) provides for review of the determination of a special committee in two scenarios: (i) where the plaintiff commences a derivative action before the committee has made a determination, or (ii) where the committee makes its determination before an action is commenced. If an action is commenced before the committee makes its determination, judicial review of the committee’s determination will occur in the context of that action. In the second scenario, where an action has not been commenced before the committee makes its determination, the plaintiff may seek review of the determination under this subsection by filing a derivative action.

The standard stated for judicial review of the determination of a special litigation committee follows, 393 N.E.2d 994 (N.Y. 1979) rather than, 430 A.2d 779 (Del. 1981), because the latter’s reference to a court’s business judgment has generally not been followed in other states. In essence, a special litigation committee is intended to function as a surrogate decision-maker, allowing the corporation to make what is fundamentally a business decision. If a court determines that the members of the committee met the qualifications required under subsection (c)(1) and (2) and that the committee conducted its investigation and made its recommendation in good faith, independently and with reasonable care, it makes no sense to substitute the court’s legal judgment for the business judgment of the committee.

, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court’s role in reviewing a decision of a special litigation committee:

The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]’s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. ... [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff’s derivative suit. ... The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof--the [entity].

For an extensive discussion of how a court should approach the question of independence, 612 N.W.2d 78, 91 (Wis. 2000).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“business corporation”
“director”
“shareholder”

The following terms used in this section are defined in 15 Pa.C.S. § 102:
§ 1784. Proceeds and expenses.

(a) Proceeds. – Except as provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise or settlement, belong to the business corporation and not to the plaintiff; and

(2) if the plaintiff or its counsel receives any proceeds, the proceeds shall be remitted immediately to the corporation.

(b) Expenses. – If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the business corporation, but in no event shall the attorney fees awarded exceed a reasonable proportion of the value of the relief, including nonpecuniary relief, obtained by the plaintiff for the corporation.

(c) Certain provisions of articles ineffective. – This section may not be relaxed by any provision of the articles.

Committee Comment (2016):

Subsections (a) and (b) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 805(a) and (b), except the last clause of subsection (b) which is patterned after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) § 7.17.

Subsection (c) of the Uniform Act, which provides that “a derivative action ... may not be voluntarily dismissed or settled without the court’s approval” has been omitted because Pa.R.Civ.Pro. 1506(d) provides the same result.

Chapter 19
Fundamental Changes

Subchapter F
Voluntary Dissolution and Winding Up

§ 1971. Voluntary dissolution by shareholders or incorporators.

(a) General rule. – The shareholders or incorporators of a business corporation that has never transacted business or held assets other than money received from subscriptions for shares may effect the dissolution of the corporation by filing articles of
dissolution in the Department of State. The articles of dissolution shall be executed in the name
of the corporation by a majority of the incorporators or a majority in interest of the shareholders
and shall set forth:

(1) The name of the corporation and, subject to section 109 (relating to name of
commercial registered office provider in lieu of registered address), the address, including
street and number, if any, of its registered office.

(2) The statute under which the corporation was incorporated and the date of
incorporation.

(3) That the corporation has [not commenced business] never transacted business
or held assets other than money received from subscriptions for shares.

(4) That the amount, if any, actually paid in on subscriptions for its shares, less any
part thereof disbursed for necessary expenses, has been returned to those entitled thereto.

(5) That all liabilities of the corporation have been discharged or that adequate
provision has been made therefor.

(6) That a majority of the incorporators or a majority in interest of the shareholders
 elect that the corporation be dissolved.

(b) Filing. – The articles of dissolution shall be filed in the Department of State. See
section 134 (relating to docketing statement).

(c) Effect. – Upon the filing of the articles of dissolution, the existence of the corporation
shall cease.

[No change to Committee Comment (1988).]

Chapter 33
Benefit Corporations

Subchapter A
Preliminary Provisions

§ 3301. Application and effect of chapter.

(a) General rule. – This chapter shall apply to all benefit corporations.

(b) Application of business corporation law generally. – The existence of a provision of
this chapter shall not of itself create any implication that a contrary or different rule of law is or
would be applicable to a business corporation that is not a benefit corporation. This chapter shall
not affect any statute or rule of law that is or would be applicable to a business corporation that is not a benefit corporation.

(c) Laws applicable to benefit corporations. – Except as otherwise provided in this chapter, Part I (relating to preliminary provisions) and this subpart shall apply generally to benefit corporations. The provisions of this chapter shall control over inconsistent provisions of this title. A benefit corporation may be simultaneously subject to this chapter and one or more other chapters of this article.

(d) Organic [records] rules may not be inconsistent. – A provision of the articles or bylaws of a benefit corporation may not relax, be inconsistent with or supersede any provision of this chapter.

Amended Committee Comment (2016):

This chapter authorizes the organization of a form of business corporation that offers entrepreneurs and investors the option to build, and invest in, businesses that operate in a socially and environmentally responsible manner. Enforcement of those responsibilities comes not from governmental oversight, but rather from new provisions on transparency and accountability included in this chapter.

Because subsection (c) provides that the provisions of this chapter control over the provisions of Part I, this chapter will control over the provisions of Chapter 3 regarding entity transactions. For example, the requirement of approval of certain actions by a “minimum status vote” will control over the provisions in 15 Pa.C.S. Subch. 3B for approving transactions under Chapter 3.

The last sentence of subsection (c) makes clear that a corporation subject to one or more other chapters of Article C, such as a statutory close corporation subject to Chapter 23, a registered (or publicly traded) corporation subject to Chapter 25, and an insurance corporation subject to Chapter 31 may also be a benefit corporation. In the case of a professional corporation subject to Chapter 29, 15 Pa.C.S. § 3311(e) provides a special rule that eliminates any conflict between this chapter and 15 Pa.C.S. § 2922(a) regarding the purposes of a professional corporation.

As a result of subsection (d), a corporation that elects to be subject to this chapter will be subject to all of the provisions of the chapter and will not be able to vary their application to the corporation.

The Committee Comments to Chapter 33 are intended to form part of the legislative history of Chapter 33 and to be citable as such under 1 Pa.C.S. § 1939.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”
“business corporation”
“bylaws”
“relax”

The term “benefit corporation” used in this section is defined in 15 Pa.C.S. § 3302.

§ 3302. Definitions.
The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Benefit corporation." A business corporation that has elected to become subject to this chapter and whose status as a benefit corporation has not been terminated.

"Benefit director." [Either:

(1) the] The director designated as the benefit director of a benefit corporation as provided in section 3322 (relating to benefit director); or

(2) a person with one or more of the powers, duties or rights of a benefit director to the extent provided in the bylaws under section 3322].

"Benefit enforcement proceeding." A claim or action for:

(1) failure to pursue or create the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles; or

(2) violation of any obligation, duty or standard of conduct under this chapter.

"Benefit officer." The individual, if any, designated as the benefit officer of a benefit corporation as provided in section 3324 (relating to benefit officer).

"General public benefit." A material positive impact on society and the environment, taken as a whole and assessed against a third-party standard, from the business and operations of a benefit corporation.

"Independent." When a person has no material relationship with a benefit corporation or any of its subsidiaries, other than the relationship of serving as the benefit director or benefit officer. A material relationship between an individual and a benefit corporation or any of its subsidiaries will be conclusively presumed to exist if:

(1) the person is or has been within the last three years an employee of the benefit corporation or any of its subsidiaries, other than as a benefit officer;

(2) an immediate family member of the person is or has been within the last three years an executive officer, other than a benefit officer, of the benefit corporation or any of its subsidiaries; or

(3) the person, or an association of which the person is a [director, officer or other manager] governor or officer or in which the person owns beneficially or of record 5% or more of the outstanding [equity] interests, owns beneficially or of record 5% or more of the outstanding shares of the benefit corporation. The percentage of ownership in an
association shall be calculated as if all outstanding rights to acquire [equity] interests in the association had been exercised.

"Minimum status vote." As follows:

(1) In the case of a business corporation, in addition to any other required approval or vote, the satisfaction of the following conditions:

(i) The shareholders of every class or series must be entitled, as a class, to vote on the corporate action regardless of a limitation stated in the articles of incorporation or bylaws on the voting rights of any class or series.

(ii) The corporate action must be approved by a vote of the shareholders of each class or series entitled to cast at least two-thirds of the votes that all shareholders of the class or series are entitled to cast on the action.

(2) In the case of a domestic association other than a business corporation, in addition to any other required approval, vote or consent, the satisfaction of the following conditions:

(i) The holders of every class or series of [equity] interest in the association that are entitled to receive a distribution of any kind from the association must be entitled as a class to vote on or consent to the action regardless of any otherwise applicable limitation on the voting or consent rights of any class or series.

(ii) The action must be approved by vote or consent of the holders described in subparagraph (i) entitled to cast at least two-thirds of the votes or consents that all of those holders are entitled to cast on the action.

"Specific public benefit." Includes:

(1) providing low-income or underserved individuals or communities with beneficial products or services;

(2) promoting economic opportunity for individuals or communities beyond the creation of jobs in the normal course of business;

(3) preserving the environment;

(4) improving human health;

(5) promoting the arts, sciences or advancement of knowledge;

(6) promoting economic development through support of initiatives that increase access to capital for emerging and growing technology enterprises, facilitate the transfer and commercial adoption of new technologies, provide technical and business support to
emerging and growing technology enterprises or form support partnerships that support those objectives;

(7) increasing the flow of capital to entities with a public benefit purpose; and

(8) the accomplishment of any other particular benefit for society or the environment.

"Subsidiary." An association in which a person owns beneficially or of record 50% or more of the outstanding [equity] interests. The percentage of ownership in an association shall be calculated as if all outstanding rights to acquire [equity] interests in the association had been exercised.

"Third-party standard." A standard for defining, reporting and assessing overall corporate social and environmental performance which is:

(1) Comprehensive in that it assesses the effect of the business and its operations upon the interests listed in section 3321(a)(1)(ii), (iii), (iv) and (v) (relating to standard of conduct for directors).

(2) Developed by an organization that is independent of the benefit corporation and satisfies the following requirements:

(i) Not more than one-third of the members of the governing body of the organization are representatives of any of the following:

(A) An association of businesses operating in a specific industry the performance of whose members is measured by the standard.

(B) Businesses from a specific industry or an association of businesses in that industry.

(C) Businesses whose performance is assessed against the standard.

(ii) The organization is not materially financed by an association or business described in subparagraph (i).

(3) Credible because the standard is developed by a person that both:

(i) Has access to necessary expertise to assess overall corporate social and environmental performance.

(ii) Uses a balanced multistakeholder approach, including a public comment period of at least 30 days to develop the standard.

(4) Transparent because the following information is publicly available:
(i) About the standard:

(A) The criteria considered when measuring the overall social and
environmental performance of a business.

(B) The relative weightings, if any, of those criteria.

(ii) About the development and revision of the standard:

(A) The identity of the directors, officers, material owners and the
governing body of the organization that developed and controls revisions to the
standard.

(B) The process by which revisions to the standard and changes to the
membership of the governing body are made.

(C) An accounting of the sources of financial support for the
organization, with sufficient detail to disclose any relationships that could
reasonably be considered to present a potential conflict of interest.

Committee Comment (2012):

"Benefit corporation." The provisions of this chapter apply to a business corporation while it has
the status of a benefit corporation because its articles contain a statement that it is a benefit corporation.
If that statement is deleted under 15 Pa.C.S. § 3305, the corporation will cease to be a benefit corporation
immediately upon the effectiveness of the deletion.

"Benefit director." The second part of this definition recognizes that a corporation may provide
that the functions of the board of directors will be discharged by persons other than directors pursuant to
either 15 Pa.C.S. § 1721 with respect to business corporations generally or 15 Pa.C.S. §§ 2331 and 2332
with respect to statutory close corporations.

"Benefit enforcement proceeding." This definition not only describes the action that may be
brought under 15 Pa.C.S. § 3325, but it also has the effect of excluding other actions against a benefit
corporation and its directors and officers because 15 Pa.C.S. § 3325(a)(1) provides that “no person may
bring an action or assert a claim against a benefit corporation or its directors or officers” with respect to
violation of the provisions of this chapter except in a benefit enforcement proceeding.

The obligations that may be enforced through a benefit enforcement proceeding include the
obligations of a benefit corporation under 15 Pa.C.S. § 3331 to post its benefit reports on its Internet
website and to supply copies of its benefit report if it does not have an Internet website. In the case of a
failure to provide a copy of a benefit report, a benefit enforcement proceeding to enforce that obligation
may only be brought by the persons listed in 15 Pa.C.S. § 3325(b) and not by the person requesting the
copy of the report.

"General public benefit." By requiring that the impact of a business on society and the
environment be looked at “as a whole,” the concept of general public benefit requires consideration of all
of the effects of the business on society and the environment. What is involved in creating general public
benefit is informed by 15 Pa.C.S. § 3321(a)(1) which lists the specific interests that the directors of a benefit corporation are required to consider.

“Minimum status vote.” An amendment of the articles or a fundamental change that has the effect of changing the status of a corporation so that it either becomes a benefit corporation or ceases to be a benefit corporation must be approved by the minimum status vote. 15 Pa.C.S. §§ 3304 and 3305. This definition is patterned generally after the definition of “minimum vote” in 15 Pa.C.S. § 2302. The purpose of requiring a two-thirds vote under this chapter and Chapter 23 is to ensure that there is broader shareholder support for an action than the usual rule in Title 15 that action by the shareholders requires approval of a majority of the votes cast.

The second paragraph of the definition extends the policy of requiring a supermajority vote to other forms of entities so that, for example, a merger of a limited liability company into a benefit corporation must be approved by the members of the limited liability company by at least a two-thirds vote.

The two-thirds vote required by the definition is in addition to any other vote required in the case of any particular corporation or other form of association. If the articles of a corporation were to require, for example, an 80% supermajority vote to approve a merger, a 70% vote to approve a merger of the corporation into a benefit corporation would be sufficient to satisfy the requirement that the merger be approved by the minimum status vote but would not be sufficient for valid approval of the merger.

“Specific public benefit.” Every benefit corporation has the purpose under 15 Pa.C.S. § 3311(a) of creating general public benefit. A benefit corporation may also elect to pursue one or more specific public benefit purposes. Since the creation of specific public benefit is optional, paragraph (8) of this definition permits a benefit corporation to identify a specific public benefit that is different from those listed in paragraphs (1) through (7).

“Third-party standard.” The requirement in 15 Pa.C.S. § 3331 that a benefit corporation prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection against the abuse of benefit corporation status. The performance of a regular business corporation is measured by the financial statements that the corporation prepares. 15 Pa.C.S. §§ 1554 and 2511. But the performance of a benefit corporation in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the shareholders can judge how the directors have discharged their responsibility to manage the corporation and thus whether they should be retained in office. The annual benefit report is also intended to reduce “greenwashing” (the phenomenon of businesses seeking the cachet of being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit corporation.

Subchapter C
Accountability

§ 3321. Standard of conduct for directors.

(a) Consideration of interests. - Without regard to whether the benefit corporation is subject to section 1715 (relating to exercise of powers generally) or 1716 (relating to alternative standard), in discharging the duties of their respective positions, the board of directors,
committees of the board and individual directors of a benefit corporation, in considering the best interest of the benefit corporation:

(1) shall consider the effects of any action upon:

(i) the shareholders of the benefit corporation;

(ii) the employees and work force of the benefit corporation and its subsidiaries and suppliers;

(iii) the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit corporation;

(iv) community and societal considerations, including those of any community in which offices or facilities of the benefit corporation or its subsidiaries or suppliers are located;

(v) the local and global environment;

(vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and

(vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose; and

(2) may consider:

(i) matters listed in section 1715(a); and

(ii) any other pertinent factors or the interests of any other group that they deem appropriate; but

(3) shall not be required to give priority to the interests of any person or group referred to in paragraph (1) or (2) over the interests of any other person or group unless the benefit corporation has stated in its articles its intention to give priority to certain interests related to its accomplishment of its general public benefit purpose or of a specific public benefit purpose identified in its articles.

(b) Coordination with other provisions of law. – The consideration of interests and factors in the manner required under subsection (a):

(1) shall not constitute a violation of section 1712 (relating to standard of care and justifiable reliance); and
(2) is in addition to the ability of directors to consider interests and factors as provided in section 1715 or 1716.

(c) Exoneration from personal liability. -

(1) A director shall not be personally liable, as such, for monetary damages for any action taken as a director if the director performed the duties of his or her office in compliance with section 1712 and this section in the course of performing the duties specified in subsection (a) unless the action constitutes self-dealing, willful misconduct or a knowing violation of law.

(2) A director shall not be personally liable for monetary damages for failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

(d) Limitation on standing. – A director does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

[No change to Committee Comment (2012).]

§ 3322. Benefit director.

(a) General rule. -

(1) The board of directors of a benefit corporation which is a registered corporation shall include a director who:

(i) shall be designated as the benefit director; and

(ii) shall have, in addition to all of the powers, duties, rights and immunities of the other directors of the benefit corporation, the powers, duties, rights and immunities provided in this subchapter.

(2) The board of directors of a benefit corporation which is not a registered corporation may include a director who:

(i) shall be designated as the benefit director; and

(ii) shall have, in addition to all of the powers, duties, rights and immunities of the other directors of the benefit corporation, the powers, duties, rights and immunities provided in this subchapter.

(b) Election, removal and qualifications. – The benefit director shall be elected and may be removed in the manner provided under Subchapter C of Chapter 17 (relating to directors and officers). Except as set forth in subsection (e)(2)(i) or (g), the benefit director shall be an individual who is independent. The benefit director may serve as the benefit officer at the same
time as serving as the benefit director. The articles or bylaws of a benefit corporation may prescribe additional qualifications of the benefit director not inconsistent with this subsection.

(c) Annual compliance statement. – The benefit director shall prepare, and the benefit corporation shall include in the annual benefit report to shareholders required under section 3331 (relating to annual benefit report), a statement whether, in the opinion of the benefit director, the benefit corporation acted in accordance with its general and any specific public benefit purpose in all material respects during the period covered by the report and whether the directors and officers complied with sections 3321(a) (relating to standard of conduct for directors) and 3323(a) (relating to standard of conduct for officers), respectively. If, in the opinion of the benefit director, the benefit corporation or its directors or officers failed so to act, then the statement of the benefit director shall include a description of the ways in which the benefit corporation or its directors or officers failed so to act.

(d) Status of actions. – The acts of an individual in the capacity of a benefit director shall constitute for all purposes acts of that individual in the capacity of a director of the benefit corporation.

([e]) Alternative governance arrangements. —

(1) The bylaws of a benefit corporation must provide that the persons or shareholders who perform the duties of the board of directors include a person with the powers, duties, rights and immunities of a benefit director if any of the following apply:

   (i) The bylaws of a benefit corporation provide that the powers and duties conferred or imposed upon the board of directors shall be exercised or performed by a person other than the directors under section 1721(a) (relating to board of directors).

   (ii) The bylaws of a statutory close corporation that is a benefit corporation provide that the business and affairs of the corporation shall be managed by or under the direction of the shareholders.

(2) A person that exercises one or more of the powers, duties or rights of a benefit director under this subsection:

   (i) does not need to be independent of the benefit corporation;

   (ii) shall have the immunities of a benefit director;

   (iii) may share the powers, duties and rights of a benefit director with one or more other persons; and

   (iv) shall not be subject to the procedures for election or removal of directors in Subchapter C of Chapter 17 unless:
(A) the person is also a director of the benefit corporation; or

(B) the bylaws make those procedures applicable.] (Repealed.)

(f) Exoneration from personal liability. – Regardless of whether the bylaws of a benefit corporation include a provision eliminating or limiting the personal liability of directors authorized under section 1713 (relating to personal liability of directors), a benefit director shall not be personally liable for any act or omission in the capacity of a benefit director unless the act or omission constitutes self-dealing, willful misconduct or a knowing violation of law.

(g) Professional corporations. – The benefit director of a professional corporation does not need to be independent.

Amended Committee Comment (2016):

The statement of the benefit director required by subsection (c) is an important part of the transparency required under this chapter. The perspective of the benefit director on whether the corporation has been successful in creating general or specific public benefit will be an important source of information for the shareholders as to whether the directors have adequately discharged their stewardship of the benefit corporation and its resources.

Subsection (d) makes clear that the actions of a benefit director are actions of a director of the benefit corporation and are subject to the same standards as actions of directors generally.

Subsection (f) is patterned after 15 Pa.C.S. § 1713, but unlike that section it does not require the benefit corporation to adopt an implementing bylaw. Instead the liability shield provided by subsection (f) automatically applies to all benefit directors.

The GAA Amendments Act of 2013 made the requirement of a benefit director optional for all corporations except registered corporations because of a concern that in smaller, privately-owned businesses finding a person to serve as the benefit director could be disruptive to the governance of the corporation and potentially burdensome. The GAA Amendments Act of 2013 also added subsection (g) to remove an impediment to professional corporations becoming benefit corporations since all of the directors of professional corporations practicing certain professions are required to be licensed individuals and finding an independent director in such a situation is effectively impossible. PA Rule of Professional Conduct 5.4(d)(2).

The term “act” used in this section is defined in 15 Pa.C.S. § 102 to include failure to act.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“articles”
“board of directors”
“bylaws”
“director”
“officers”
“professional corporation”
“registered corporation”
“shareholders”
“statutory close corporation”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

“benefit corporation”
“benefit director”
“benefit enforcement proceeding”
“benefit officer”
“general public benefit”
“independent”
“specific public benefit”

§ 3323. Standard of conduct for officers.

(a) General rule. - Each officer of a benefit corporation shall consider the interests and factors described in section 3321(a) (relating to standard of conduct for directors) in the manner provided in that subsection when:

(1) the officer has discretion to act with respect to a matter; and

(2) it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit corporation of general public benefit or a specific public benefit identified in the articles of the benefit corporation.

(b) Coordination with other provisions of law. - The consideration of interests and factors in the manner described in subsection (a) shall not constitute a violation of section 1712(c) (relating to standard of care and justifiable reliance).

(c) Exoneration from personal liability. -

(1) An officer shall not be personally liable, as such, for monetary damages for any action taken as an officer [if the officer performed the duties of the position in compliance with section 1712(c) and this section] in the course of performing the duties specified in subsection (a) unless the action constitutes self-dealing, willful misconduct or a knowing violation of law.

(2) An officer shall not be personally liable for monetary damages for failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

(d) Limitation on standing. - An officer does not have a duty to a person that is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a benefit corporation arising from the status of the person as a beneficiary.

[No change to Committee Comment (2012).]

§ 3325. Right of action.
(a) Limitations. –

(1) Except in a benefit enforcement proceeding, no person may bring an action or assert a claim against a benefit corporation or its directors or officers with respect to:

(i) failure to pursue or create general public benefit or a specific public benefit set forth in its articles; or

(ii) violation of a duty or standard of conduct under this chapter.

(2) A benefit corporation shall not be liable for monetary damages under this chapter for any failure of the benefit corporation to pursue or create general public benefit or a specific public benefit.

(b) Parties with standing. – A benefit enforcement proceeding may be commenced or maintained only:

(1) directly by the benefit corporation; or

(2) derivatively by:

(i) a shareholder that owned at least 2% of the total number of shares of a class or series outstanding at the time of the act complained of;

(ii) a director;

(iii) a person or group of persons that owns beneficially or of record 5% or more of the [equity] interests in an association of which the benefit corporation is a subsidiary at the time of the act complained of; or

(iv) such other persons as may be specified in the articles or bylaws of the benefit corporation.

(c) Cross reference. – The provisions of Subchapter F of Chapter 17 (relating to derivative actions) shall apply to derivative actions under this section.

Amended Committee Comment (2016):

Standing in actions against directors and officers of a business corporation that is not a benefit corporation for breach of duty is limited by 15 Pa.C.S. § 1717 just to the corporation or shareholders bringing a derivative suit. This section provides a similar limitation on standing in actions to enforce this chapter, except that the requirement that a shareholder own at least 2% of a class or series and the grants of standing to a director or 5% shareholder of a parent association are new. The limitation on standing in 15 Pa.C.S. § 1717 will continue to apply to actions against the directors and officers of a benefit corporation to the extent the action is not seeking to enforce this chapter.
This section only applies to actions or claims relating to the duties of directors and officers under this chapter, and the general and specific public benefit purposes of a benefit corporation. Lawsuits for breach of contract by directors, officers, or the benefit corporation, as well as lawsuits for breach of duties not arising under this chapter, are not subject to this section.

The GAA Amendments Act of 2013 added the contemporaneous ownership requirement in subsection (b)(2)(i) and (iii).

The cross reference in subsection (c) is a reminder that the provisions on derivative actions in 15 Pa.C.S. Subch. 17F will apply to a derivative action under this section. 15 Pa.C.S. § 3301(c).

The following terms used in this section are defined in 15 Pa.C.S. § 102:

"act"
"association"
"interest"

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

"articles"
"bylaws"
"directors"
"officers"
"shareholder"

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

"benefit corporation"
"benefit enforcement proceeding"
"general public benefit"
"specific public benefit"
"subsidiary"

§ 3331. Annual benefit report.

(a) Contents. – A benefit corporation must deliver to each shareholder an annual benefit report including:

(1) A narrative description of:

(i) the ways in which the benefit corporation pursued general public benefit during the year and the extent to which general public benefit was created;

(ii) the ways in which the benefit corporation pursued any specific public benefit that the articles state is the purpose of the benefit corporation to create and the extent to which that specific public benefit was created;

(iii) any circumstances that have hindered the creation by the benefit corporation of general or specific public benefit; and
(iv) the process and rationale for selecting or changing the third-party standard used to prepare the benefit report.

(2) An assessment of the overall social and environmental performance of the benefit corporation against a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application. The assessment does not need to be audited or certified by a third-party standards provider.

(3) The name of the benefit director and the benefit officer, if any, and the address to which correspondence to each of them may be directed.

(4) The compensation paid by the benefit corporation during the year to each director in that capacity.

(5) (Deleted by amendment).

(6) The statement of the benefit director described in section 3322(c) (relating to benefit director).

(7) A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of 5% or more of the governance interests in the organization, and the benefit corporation or its directors, officers or any holder of 5% or more of the outstanding shares of the benefit corporation, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.

[(8) If the benefit corporation has dispensed with, or restricted the discretion or powers of, the board of directors, a description of:

(i) the persons that exercise the powers, duties and rights and who have the immunities of the board of directors; and

(ii) the benefit director, as required by section 3322(e).]

(b) Timing of report.--A benefit corporation shall annually send a benefit report to each share holder either:

(1) within 120 days following the end of the fiscal year of the benefit corporation; or

(2) at the same time that the benefit corporation delivers any other annual report to its shareholders.

(c) Internet website posting.--A benefit corporation must post all of its benefit reports on the public portion of its Internet website, if any, except that the compensation paid to directors
and any financial or proprietary information included in the benefit report may be omitted from
the benefit report as posted.

(d) Availability of copies.--If a benefit corporation does not have an Internet website, the
benefit corporation shall provide a copy of its most recent benefit report, without charge, to any
person that requests a copy, but the compensation paid to directors and financial or proprietary
information included in the benefit report may be omitted from the copy of the benefit report
provided.

(e) Filing of report.--Concurrently with the delivery of the benefit report to shareholders
pursuant to subsection (b), the benefit corporation must deliver a copy of the benefit report to the
department for filing, except that the compensation paid to directors and any financial or
proprietary information included in the benefit report may be omitted from the benefit report as
filed under this section. The department shall charge a fee of $70 for filing a benefit report.

[No change to Committee Comment (2013).]

Chapter 41
Foreign Business Corporations

Subchapter C
Powers, Duties and Liabilities

§ 4146. Provisions applicable to all foreign corporations.

The following provisions of this subpart shall, except as otherwise provided in this section,
be applicable to every foreign corporation for profit, whether or not required to [procure a
certificate of authority under this chapter] register under Chapter 4 (relating to foreign
associations):

Section 1503 (relating to defense of ultra vires), as to contracts and conveyances governed
by the laws of this Commonwealth and conveyances affecting real property situated in this
Commonwealth.

Section 1506 (relating to form of execution of instruments), as to instruments or other
documents governed by the laws of this Commonwealth or affecting real property situated in this
Commonwealth.

Section 1510 (relating to certain specifically authorized debt terms), as to obligations (as
defined in the section) governed by the laws of this Commonwealth or affecting real property
situated in this Commonwealth.

Section 1782 (relating to [actions against directors and officers] eligible shareholder
plaintiffs and security for costs), as to any derivative action [or proceeding] brought in a court
of this Commonwealth.
Subchapter F of Chapter 25 (relating to business combinations), to the extent provided in
section 2551(c) (relating to continuing applicability).

[No change to Committee Comment (2001).]

Subpart C
Nonprofit Corporations

Chapter 51
General Provisions

§ 5103. Definitions.

(a) General definitions. – Subject to additional definitions contained in subsequent
provisions of this subpart that are applicable to specific provisions of this subpart, the following
words and phrases when used in this subpart shall have the meanings given to them in this
section unless the context clearly indicates otherwise:

**

[“Charitable purposes.” The relief of poverty, the advancement and provision of
education, including postsecondary education, the advancement of religion, the prevention
and treatment of disease or injury, including mental retardation and mental disorders,
governmental or municipal purposes, and any other purpose the accomplishment of which
is recognized as important and beneficial to the public.]

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Chapter 57
Officers, Directors and Shareholders

Subchapter F
Derivative Actions

§ 5781. Derivative action.

(a) General rule. – Subject to section 5782 (relating to eligible member plaintiffs and
security for costs) and subsection (b), a plaintiff may maintain a derivative action to enforce a
right of a nonprofit corporation only if:

(1) the plaintiff first makes a demand on the corporation or the board of directors
requesting that it cause the corporation to bring an action to enforce the right, and:

   (i) if a special litigation committee is not appointed under section 5783 (relating to special litigation committee), the corporation does not bring the action within a reasonable time; or

   (ii) if a special litigation committee is appointed under section 5783, a determination is made:

      (A) under section 5783(e)(1) that the corporation not object to the action; or

      (B) under section 5783(e)(5)(i) that the plaintiff continue the action;

(2) demand is excused under subsection (b);

(3) the action is maintained for the limited purpose of seeking court review under section 5783(f); or

(4) the court has allowed the action to continue under the control of the plaintiff under subsection 5783(f)(3)(ii).

(b) Prior demand excused. –

  (1) A demand under subsection (a)(1) is excused only if the plaintiff makes a specific showing that immediate and irreparable harm to the nonprofit corporation would otherwise result.

  (2) If demand is excused under paragraph (1), demand shall be made promptly after commencement of the action.

(c) Contents of demand. – A demand under this section must be in record form and give notice with reasonable specificity of the essential facts relied upon to support each of the claims made in the demand.

(d) Additional claims. – If a derivative action is commenced after a demand has been made under this section and includes a claim that was not fairly subsumed under the demand, a new demand must be made with respect to that claim. The new demand shall not relate back to the date of the original demand for purposes of subsection (e).

(e) Statute of limitations. – The making of a demand tolls any applicable statute of limitations with respect to a claim asserted in the demand until the earlier of the date:

  (1) the plaintiff making the demand is notified either:

     (i) that the board of directors has decided not to bring an action and not to
appoint a special litigation committee; or

(ii) of a determination under section 5783(e) after the appointment of a special litigation committee under section 5783; or

(2) the plaintiff commences an action asserting the claim.

Committee Comment (2016):

This section is patterned in part after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) (the “ALI Principles”) § 7.03. In , 692 A.2d 1042 (Pa. 1997), the Pennsylvania Supreme Court adopted Sections 7.02 – 7.10 and 7.13 of the ALI Principles and thus filled a void in Pennsylvania statutory law at the time. Although the Court in did not specifically address the application of the ALI Principles to nonprofit corporations, as opposed to business corporations, this subchapter generally follows the sections of the ALI Principles adopted in , while elaborating and revising certain portions of those sections of the ALI Principles as they apply to nonprofit corporations.

Subsections (a) and (b) follow Section 7.03 of the ALI Principles in adopting a “universal demand” requirement subject to an exception for irreparable injury. Except in the limited situation described in subsection (b)(1), a plaintiff must always demand that the board of directors bring an action and allow the corporation to respond as provided in this subchapter before the plaintiff may commence a derivative action. This section thus rejects the law as it has developed in Delaware and other states that excuse pre-suit demand in circumstances where it is alleged that demand would be futile.

Section 7.02(c) of the ALI Principles provides that a director has standing to bring a derivative action unless the court finds that the director is unable to represent fairly and adequately the interests of the shareholders; and Section 7.03(a) of the ALI Principles requires a director to make demand in the same manner as a shareholder. Consistent with those sections of the ALI Principles, it is intended that the plaintiffs who are subject to this section will include a director plaintiff.

The rights that may be enforced in a derivative action include the right to seek redress for a wrong to the corporation.

If “immediate and irreparable injury” is shown as required by subsection (b), that will not excuse the plaintiff altogether from making demand; judicial review will begin with the response of the board. If “immediate and irreparable injury” justifies the commencement of the action without demand and the court grants an injunction to preserve the status quo, subsection (b) contemplates that the board would still be given an appropriate time to respond and that further inquiry by the court will focus on the response of the board, or a special litigation committee if one is appointed as provided in 15 Pa.C.S. § 5783.

If a derivative action is commenced before demand has been made and the failure to make demand is not excused under subsection (b), under the ALI Principles the appropriate sanction will not be dismissal of the action, but rather an award of costs against the responsible attorney under Section 7.04(d) of the ALI Principles.

Subsection (c) requires that a demand be in record form, but this section does not prescribe the manner in which the demand must be delivered to the board of directors. The plaintiff should verify that the demand was received to avoid a challenge that demand was not made.
If the board of directors does not appoint a special litigation committee in response to a demand, further action by the board and demanding plaintiff will be subject to ALI Principles §§ 7.04 – 7.10 and 7.13, as modified by 15 Pa.C.S. §§ 5782 and 5784. If the board does appoint a special litigation committee, further action by the board, committee and plaintiff will be subject to those sections of the ALI Principles, as modified by this subchapter including specifically 15 Pa.C.S. § 5783 with respect to special litigation committees.

If a derivative action is commenced after a demand has been made and the action includes a claim that was not fairly subsumed under the original demand, subsection (d) requires that a new demand must be made with respect to that claim. With respect to the new claim, the tolling of the statute of limitations under subsection (e) will begin with the date of the new demand and not the date of the original demand.

Under 15 Pa.C.S. § 5734, the functions of the board of directors under this section may be exercised by an other body.

The following terms used in this section are defined in 15 Pa.C.S. § 5103:

“board of directors”
“nonprofit corporation”
“record form”

§ 5782. **[Actions against directors, members of an other body and officers.] Eligible member plaintiffs and security for costs.**

(a) General rule. – Except as provided in subsection (b), in any action or proceeding brought to enforce a secondary right on the part of one or more members of a nonprofit corporation against any present or former officer, director or member of an other body of the corporation because the corporation refuses to enforce rights that may properly be asserted by it, each plaintiff must aver and it must be made to appear that each plaintiff was a member of the corporation at the time of the transaction of which he complains.

(b) Exception. – Any member who, except for the provisions of subsection (a), would be entitled to maintain the action or proceeding and who does not meet such requirements may, nevertheless in the discretion of the court, be allowed to maintain the action or proceeding on preliminary showing to the court, by application and upon such verified statements and depositions as may be required by the court, that there is a strong prima facie case in favor of the claim asserted on behalf of the corporation and that without the action serious injustice will result.

(c) Security for costs. – In any action or proceeding instituted or maintained by less than the smaller of 50 members of any class or 5% of the members of any class of the corporation, the corporation in whose right the action or proceeding is brought shall be entitled at any stage of the proceedings to require the plaintiffs to give security for the reasonable expenses, including attorney fees, that may be incurred by the corporation in connection therewith or for which it may become liable pursuant to section 5743 (relating to mandatory indemnification), but only insofar as relates to actions by or in the right of the corporation, to which security the corporation
shall have recourse in such amount as the court determines upon the termination of the action or proceeding. The amount of security may from time to time be increased or decreased in the discretion of the court upon showing that the security provided has or [may] is likely to become inadequate or excessive. The security may be denied or limited [in the discretion of] by the court [upon preliminary showing to the court, by application and upon such verified statements and depositions as may be required by the court, establishing prima facie that the requirement of full or partial security would impose] if the court finds after an evidentiary hearing that undue hardship on plaintiffs and serious injustice would result.

(d) Cross reference. – See section 6146 (relating to provisions applicable to all foreign corporations).

Committee Comment (2016):
This section tracks the language of 15 Pa.C.S. § 1782, which is the analogous provision of the Business Corporation Law. Subsections (a) and (b) of section 1782 were suspended by Pennsylvania Rule of Civil Procedure 1506(e), amended April 12, 1999, insofar as inconsistent with Rule 1506 relating to stockholder's derivative action. Rule 1506(e) further provided that subsections (c) and (d) of section 1782 shall not be deemed suspended or affected by Rule 1506.

It is unclear how Rule 1506 relates to this section. On the one hand, Rule 1506 speaks of “one or more stockholders or members of a corporation or similar entity” that bring a derivative action; and the reference to “members of a corporation” could encompass members of a nonprofit corporation. On the other hand, Rule 1506 did not suspend subsections (a) and (b) of this section even though this section was in effect in 1999 and closely followed the text of section 1782 at the time.

The policy underlying both Rule 1506 and subsections (a) and (b) of this section is to impose a requirement that a plaintiff have been a member of the corporation at the time of the events complained of, subject to an exception for cases where serious injustice would result. Accordingly, if subsections (a) and (b) were to be suspended by court rule, that action would not substantially change the law on the standing of a member to bring a derivative action.

Subsection (c) was amended in 2015 to track amendments made to section 1782. The practice under this section generally with respect to nonprofit corporations thus tracks the practice under section 1782 and Rule 1506 with respect to business corporations.

In , 692 A.2d 1042 (Pa. 1997), the Pennsylvania Supreme Court adopted Sections 7.02 – 7.10 and 7.13 of the American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) (the “ALI Principles”). The corporation involved in the case was a business corporation and Section 1.12 of the ALI Principles defines a “corporation” for purposes of the ALI Principles as a business corporation. As with the question of the application of Rule 1506 to nonprofit corporations, it is not clear that the adoption of the ALI Principles in applies to nonprofit corporations. However, in the final footnote to its opinion in , the Pennsylvania Supreme Court encouraged Pennsylvania courts to consider the application of the ALI Principles more broadly than the actual holding of the Supreme Court in . Given the long-established policy in Title 15 of conforming the law with respect to nonprofit corporations to the law governing business corporations except where policy concerns dictate a different result, this Subchapter (15 Pa.C.S. §§ 5781 – 5784) follows the analogous provisions of the Business Corporation Law.

Under 15 Pa.C.S. § 5734, the functions of the board of directors under this section may be exercised
This section is applicable to every derivative action brought in a Pennsylvania court against a foreign corporation not-for-profit, whether or not the corporation is required to register to do business in Pennsylvania under 15 Pa.C.S. Ch. 4. 15 Pa.C.S. § 6146.

The term “verified” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 5103:

“director”
“member”
“nonprofit corporation”
“officer”
“other body”

The reference in this section to “court” implies any court of competent jurisdiction and not merely the court as defined in 15 Pa.C.S. § 102.

§ 5783. Special litigation committee.

(a) General rule. – If a nonprofit corporation or the board of directors receives a demand to bring an action to enforce a right of the corporation, or if a derivative action is commenced before demand has been made on the corporation or the board, the board may appoint a special litigation committee to investigate the claims asserted in the demand or action and to determine on behalf of the corporation or recommend to the board whether pursuing any of the claims asserted is in the best interests of the corporation. The corporation shall send a notice in record form to the plaintiff promptly after the appointment of a committee under this section notifying the plaintiff that a committee has been appointed and identifying by name the members of the committee.

(b) Discovery stay. – If the board of directors appoints a special litigation committee and an action is commenced before a determination has been made under subsection (e):

(1) On motion by the committee made in the name of the nonprofit corporation, the court shall stay discovery for the time reasonably necessary to permit the committee to complete its investigation, except for good cause shown.

(2) The time for the defendants to plead shall be tolled until the process provided for under subsection (f) has been completed.

(c) Composition of committee. – A special litigation committee shall be composed of two or more individuals who:

(1) are not interested in the claims asserted in the demand or action;

(2) are capable as a group of objective judgment in the circumstances; and
(3) may, but need not, be members, directors or members of an other body.

(d) Appointment of committee. – A special litigation committee may be appointed:

(1) by a majority of the directors not named as actual or potential parties in the demand or action; or

(2) if all the directors are named as actual or potential parties in the demand or action, by a majority of:

   (i) the members of an other body not named as parties in the proceeding if the other body has the authority to appoint a special litigation committee; or

   (ii) the directors so named.

(e) Determination. – After appropriate investigation by a special litigation committee, the committee or the board of directors may determine that it is in the best interests of the nonprofit corporation that:

(1) an action based on some or all of the claims asserted in the demand not be brought by the corporation but that the corporation not object to an action being brought by the party that made the demand;

(2) an action based on some or all of the claims asserted in the demand be brought by the corporation;

(3) some or all of the claims asserted in the demand be settled on terms approved by the committee;

(4) an action not be brought based on any of the claims asserted in the demand;

(5) an action already commenced continue under the control of:

   (i) the plaintiff;

   (ii) the corporation; or

   (ii) the committee;

(6) some or all the claims asserted in an action already commenced be settled on terms approved by the committee; or

(7) an action already commenced be dismissed.

(f) Court review and action. – If a special litigation committee is appointed and a
derivative action is commenced before or after a determination is made under subsection (e):

(1) The nonprofit corporation shall file with the court after a determination is made under subsection (e) a statement of the determination and a report supporting the determination. The corporation shall serve each party with a copy of the determination and report. If the corporation moves to file the report under seal, the report shall be served on the parties subject to an appropriate stipulation agreed to by the parties or a protective order issued by the court.

(2) The corporation shall file with the court a motion, pleading or notice consistent with the determination under subsection (e).

(3) If the determination is one described in subsection (e)(2), (3), (4), (5)(ii), (6) or (7), the court shall determine whether the members of the committee met the qualifications required under subsection (c)(1) and (2) and whether the committee conducted its investigation and made its recommendation in good faith, independently and with reasonable care. If the court finds that the members of the committee met the qualifications required under subsection (c)(1) and (2) and that the committee acted in good faith, independently and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall:

   (i) dissolve any stay of discovery entered under subsection (b);
   (ii) allow the action to continue under the control of the plaintiff; and
   (iii) permit the defendants to file preliminary objections, other appropriate pleadings and motions.

(g) Attorney General. – Nothing in this section limited the rights, powers and duties of the Attorney General under other applicable law with respect to a nonprofit corporation.

Committee Comment (2016):

This section is patterned in part after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 805.

This section is intended to supersede those provisions of American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) §§ 7.03 – 7.10 and 7.13 that deal with the same subjects as this section.

Subsection (a) - The statement in subsection (a) that a special litigation committee is may “determine ... whether pursuing any of the claims asserted is in the best interests of the corporation” means that a committee appointed under this section may be given the authority to act on behalf of the corporation without further action by the full board of directors.

Subsection (f) - Subsection (f) provides for review of the determination of a special committee in two scenarios: (i) where the plaintiff commences a derivative action before the committee has made a determination, or (ii) where the committee makes its determination before an action is commenced. If an
action is commenced before the committee makes its determination, judicial review of the committee’s
determination will occur in the context of that action. In the second scenario, where an action has not
been commenced before the committee makes its determination, the plaintiff may seek review of the
determination under this subsection by filing a derivative action.

The standard stated for judicial review of the determination of a special litigation committee
follows , 393 N.E.2d 994 (N.Y. 1979) rather than , 430
A.2d 779 (Del. 1981), because the latter’s reference to a court’s business judgment has generally not been
followed in other states. In essence, a special litigation committee is intended to function as a surrogate
decision-maker, allowing the corporation to make what is fundamentally a business decision. If a court
determines that the members of the committee met the qualifications required under subsection (c)(1) and
(2) and that the committee conducted its investigation and made its recommendation in good faith,
individually and with reasonable care, it makes no sense to substitute the court’s legal judgment for the
business judgment of the committee.

, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court’s role
in reviewing a decision of a special litigation committee:

The value of a special litigation committee is coextensive with the extent to which that committee
truly exercises business judgment. In order to ensure that special litigation committees do act for
the [entity]’s best interest, a good deal of judicial oversight is necessary in each case. At the same
time, however, courts must be careful not to usurp the committee’s valuable role in exercising
business judgment. ... [A ] special litigation committee must be independent, unbiased, and act in
good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding
the plaintiff’s derivative suit. ... The burden of proving that these procedural requirements have been
met must rest, in all fairness, on the party capable of making that proof – the [entity].

For an extensive discussion of how a court should approach the question of independence,
, 612 N.W.2d 78, 91 (Wis. 2000).

Under 15 Pa.C.S. § 5734, the functions of the board of directors under this section may be exercised
by an other body.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“director”
“member”
“nonprofit corporation”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“court”
“record form”

§ 5784. Proceeds and expenses.

(a) Proceeds. – Except as provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment,
compromise or settlement, belong to the nonprofit corporation and not to the plaintiff; and

(2) if the plaintiff or its counsel receives any proceeds, the proceeds shall be remitted immediately to the corporation.

(b) Expenses. – If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the nonprofit corporation, but in no event shall the attorney fees awarded exceed a reasonable proportion of the value of the relief, including nonpecuniary relief, obtained by the plaintiff for the corporation.

Committee Comment (2016):

Subsections (a) and (b) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 805(a) and (b), except the last clause of subsection (b) which is patterned after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) § 7.17.

Subsection (c) of the Uniform Act, which provides that “a derivative action ... may not be voluntarily dismissed or settled without the court’s approval” has been omitted because Pa.R.Civ.Pro. 1506(d) provides the same result.

Chapter 61
Foreign Nonprofit Corporations

Subchapter C
Powers, Duties and Liabilities

§ 6146. Provisions applicable to all foreign corporations.

The following provisions of this subpart shall, except as otherwise provided in this section, be applicable to every foreign corporation not-for-profit, whether or not required to [procure a certificate of authority under this chapter] register under Chapter 4 (relating to foreign associations):

Section 5503 (relating to defense of ultra vires) as to contracts and conveyances governed by the laws of this Commonwealth and conveyances affecting real property situated in this Commonwealth.

Section 5506 (relating to form of execution of instruments) as to instruments or other documents governed by the laws of this Commonwealth or affecting real property situated in this Commonwealth.

Section 5510 (relating to certain specifically authorized debt terms) as to obligations (as defined in the section) governed by the laws of this Commonwealth or affecting real property
situated in this Commonwealth.

Section 5782 (relating to actions against directors, members of an other body and officers eligible member plaintiffs and security for costs) as to any derivative action [or proceeding] brought in a court of this Commonwealth.

[There is no Committee Comment to 15 Pa.C.S. § 6146.]

Part III
Partnerships and Limited Liability Companies

Chapter 81
General Provisions

§ 8102. Interchangeability of partnership, limited liability company and corporate forms of organization.

(a) General rule. – Subject to any restrictions on a specific line of business made applicable by section 103 (relating to subordination of title to regulatory laws):

(1) Any business that may be conducted in a corporate form may also be conducted as a partnership or a limited liability company.

(2) A domestic or foreign partnership or limited liability company may exercise any right, power, franchise or privilege that a domestic or foreign corporation engaged in the same line of business might exercise under the laws of this Commonwealth, including powers conferred by section 1511 (relating to additional powers of certain public utility corporations) or other provisions of law granting the right to a duly authorized corporation to take or occupy property and make compensation therefor.

(b) Exceptions. – Subsection (a) shall not:

(1) Affect any law relating to the taxation of partnerships, limited liability companies or corporations.

(2) [Apply to a banking institution, credit union, insurance corporation or savings association.] A authorize acting as a banking institution, credit union or insurer unless the laws relating thereto or this part expressly [contemplate] permit the conduct of the regulated business in partnership or limited liability company form. See [section 8911 (relating to purposes).] sections 8620(b) (relating to characteristics of limited partnership) and 8818(b) (relating to characteristics of limited liability company).

(3) Except as otherwise provided by law, permit a partnership to provide full limited liability for all of the investors therein or otherwise fail to preserve the intrinsic
differences between the partnership and corporate forms.

Amended Committee Comment (2016):

15 Pa.C.S. § 1501 and the Committee Comment thereto regarding the legal capacity of corporations to act and the effect of 15 Pa.C.S. § 103.

15 Pa.C.S. § 8620(b) sets forth the permissible purposes of a limited partnership which include any lawful purpose, other than acting as a banking institution or insurer, regardless of whether the purpose is for profit. 15 Pa.C.S. § 8818(b) sets forth the permissible purposes of a limited liability company which include any lawful purpose, other than acting as an insurer, regardless of whether the purpose is for profit.

§ 8105. Ownership of certain professional partnerships and limited liability companies.

(a) General rule. – Except as otherwise provided by statute, rule or regulation applicable to a particular profession, all of the ultimate beneficial owners of the partnership interests in a partnership that renders one or more restricted professional services shall be licensed persons. As used in this section, the term "restricted professional services" shall have the meaning specified in section 8903 (relating to definitions and index of definitions). In the profession the entity practices if the entity renders any of the following professional services:

(1) chiropractic;
(2) dentistry;
(3) law;
(4) medicine and surgery;
(5) optometry;
(6) osteopathic medicine and surgery;
(7) podiatric medicine;
(8) public accounting;
(9) psychology; or
(10) veterinary medicine.

(b) Transitional provision. – Subsection (a) shall not apply to a person that holds only a transferable interest that was acquired before the Legislative Reference Bureau shall insert here
the effective date of this act].

Amended Committee Comment (2016):

The type of ownership structure this section is intended to permit includes, for example, a partnership of professional corporations. 15 Pa.C.S. § 2922(b).

A law firm organized as a type of entity that is subject to this section is also subject to the Pennsylvania Rules of Professional Conduct that apply to entities.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“electing partnership”
“general partnership”
“governor”
“interest”
“licensed person”
“limited liability company”
“limited partnership”

§ 8106. Failure to observe formalities.

The failure of a limited liability partnership, limited partnership, limited liability limited partnership, electing partnership or limited liability company to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a partner, member or manager of the entity for a debt, obligation or other liability of the entity.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §§ 303(b) and 404(d), and Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 304(b).

This section pertains to the equitable doctrine of “piercing the veil” — conflating an entity and its owners to hold one liable for the obligations of the other. The doctrine of “piercing the corporate veil” is well-established, and courts regularly (and sometimes almost reflexively) apply that doctrine to limited liability companies and other unincorporated entities. In the corporate realm, “disregard of corporate formalities” is a key factor in the piercing analysis. In the realm of limited liability companies, that factor is inappropriate, because informality of organization and operation is both common and desired.

84 So. 3d 32, 42 (Miss. Ct. App. 2012) (recognizing that “an LLC imposes much less formalities on its members than a corporation” and stating that “[t]he traditional lack of formalities—failure to conduct regular meetings, failure to appoint officers and directors, etc.— does not necessarily signal LLC abuse”).

Similar considerations apply in the case of limited partnerships. Corporate formalities reflect statutory mandates. Formalities in the governance of limited partnerships, in contrast, derive for the most part from the agreement among the partners. From a policy perspective, disregarding formalities adopted by agreement differs substantially from disregarding formalities imposed by law. Under this section,
disregard of formalities will never be a factor in piercing the veil of an unincorporated entity even if there are other factors that support piercing the veil of the entity.

The formalities at issue are the process formalities of governance - both those few created by this title and however few or many might be created by the organic rules.

EXAMPLE: The operating agreement of a three-member, member-managed limited liability company requires formal monthly meetings of the members. Each of the members works in the company’s business, and they consult each other regularly. They have forgotten or ignore the requirement of monthly meetings. Under subsection (b), the failure to hold the monthly meetings is irrelevant to a piercing claim.

In contrast, this section has no relevance to another key piercing factor - disregard by an entity’s owners of the formal economic separateness between entity and owner.

EXAMPLE: The sole owner of a limited liability company uses a car titled in the company’s name for personal purposes and writes checks on the company’s account to pay for personal expenses. These facts are relevant to a piercing claim; they pertain to economic separateness, not governance formalities.

This section also has no relevance to an interest holder’s claim of oppression. In some circumstances, disregard of agreed-upon formalities can be a “freeze out” mechanism. Likewise, this section has no relevance to an interest holder’s claim that the disregard of agreed-upon formalities is a breach of the organic rules.

Chapter 82
[Registered] Limited Liability Partnerships and Limited Liability Limited Partnerships

Subchapter A
Domestic [Registered] Limited Liability Partnerships and Limited Liability Limited Partnerships

§ 8201. Scope.

(a) Application of subchapter. - This subchapter applies to a general or limited partnership whose internal affairs are governed by or that is formed under the laws of this Commonwealth and that registers under this section. Any partnership that desires to register under this subchapter or to amend or terminate its registration shall [file in] deliver to the Department of State for filing a statement of registration, amendment or termination, as the case may be, which shall be signed by a general partner and shall set forth:

(1) The name of the partnership.

(2) Either:
(i) the address of the principal place of business of the partnership, in the case of a general partnership; or

(ii) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the registered office of the partnership, in the case of a limited partnership.

(3) A statement that the partnership registers under this subchapter or that the registration of the partnership under this subchapter shall be amended or terminated, as the case may be. If the statement relates to an amendment, the amendment shall restate in full the statement of registration.

(4) A statement that:

(i) the registration, amendment or termination has been authorized by at least a majority in interest of the partners; and

(ii) in the case of a termination, the termination has also been authorized by all of the general partners.

(b) Effect of filing. – Upon the filing of the statement of registration, amendment or termination in the department, the registration under this subchapter shall be effective, amended or terminated, as the case may be. The effectiveness, amendment or termination of the registration of a partnership under this subchapter shall not be deemed to cause a dissolution of the partnership.

(c) Effect of registration. – As long as the registration under this subchapter is in effect, the partnership shall be governed by the provisions of this subchapter and, to the extent not inconsistent with this subchapter, Chapter 84 (relating to general partnerships) and, if a limited partnership, in addition, Chapter 85 or 86 (relating to limited partnerships). Without limiting the generality of the foregoing, a domestic or foreign registered limited liability partnership or limited liability limited partnership shall be treated the same as if it were not registered under this subchapter for purposes of:

(1) determining whether it is a permissible form of entity in which to conduct the practice of a profession; or

(2) the imposition by the Commonwealth or any political subdivision of any tax or license fee on or with respect to any income, property, privilege, transaction, subject or occupation.

(d) Continuation of registration. – If a registered limited liability partnership or limited liability limited partnership is dissolved and its business is continued without liquidation of the partnership affairs, the registration under this subchapter of the dissolved partnership shall continue to be applicable to the partnership continuing the business, and it shall not be necessary to make a new filing under this section until such time, if any, as the registration is to be
amended or terminated.

(e) Prohibited termination. – A registration under this subchapter may not be terminated while the partnership is a [bankrupt as that term is defined in section 8903 (relating to definitions and index of definitions)] debtor in bankruptcy. See section 8221(f) (relating to annual registration).

(f) Alternative procedure. – In lieu of filing a statement of registration as provided in subsection (a), a limited partnership may register as a [registered] limited liability limited partnership by including in its certificate of limited partnership, either originally or by amendment, the statements required by subsection (a)(3) and (4). To terminate its registration, a limited partnership that uses the procedure authorized by this subsection shall amend its certificate of limited partnership to delete the statements required by this subsection.

(g) Constructive notice. – [Filing] Registration under this section shall constitute constructive notice that the partnership is a [registered] limited liability partnership or limited liability limited partnership and that the partners are entitled to the protections from liability provided by this subchapter.

(h) Approval of termination. – In addition to any required approvals under the partnership agreement, the termination of a statement of registration must be approved by the affirmative vote or consent of all the general partners.

Amended Committee Comment (2016):

Subsection (a) makes clear that the status of being a limited liability partnership is available for either general partnerships or limited partnerships. In the case of a limited partnership, the limited partners already enjoy limited liability, but registering under this chapter will provide limited liability for the general partners. This chapter has not been made available to electing partnerships subject to Chapter 87 because the liability of a partner in an electing partnership is already limited by the provisions of Chapter 87.

Whether the internal affairs of a general partnership are governed by the laws of Pennsylvania is determined under the rules set forth in 15 Pa.C.S. § 8414.

A statement filed under this section may include a delayed effective date or time under 15 Pa.C.S. § 136(c).

Subsection (c) makes clear that registration under this subchapter does not change the basic form of organization of the registering partnership as either a general or limited partnership. Except for the provisions of this subchapter, which supersede the otherwise applicable provisions of Title 15 on the same subjects, a limited liability partnership or limited liability limited partnership is intended to be treated as a partnership under Pennsylvania law in the same manner as if it had not registered under this subchapter. Subsection (c)(1) applies that general principle in the context of professional licensing and taxation statutes. If a professional practice may be conducted as a partnership, it will be permissible for
that type of practice to be conducted by a limited liability partnership or limited liability limited
partnership; and, except for the application of the special rules of this subchapter to the extent they are not
superseded under 15 Pa.C.S. § 103, the provisions of the licensing statute should be applied to the
partnership in the same manner as if it had not registered under this subchapter. In the same way,
subsection (c)(2) provides that registration under this subchapter will not affect the tax treatment of a
partnership under Pennsylvania law.

Subsection (d) makes clear that if a partnership dissolves but its business is continued without
liquidation, the partnership's registration under this subchapter carries over to the successor partnership
continuing the business.

Subsections (e) through (g) were added by the GAA Amendments Act of 2001. Subsection (g) was
added to avoid any possibility that 15 Pa.C.S. § 106 might be construed as producing the contrary
conclusion. As to subsection (g), 15 Pa.C.S. § 8613(c).

The cross references to 15 Pa.C.S. §§ 134 and 135 in subsection (i) reflects a change in style by the
Committee. Similar cross references will be added throughout Title 15 as the opportunity arises. In the
meantime, no contrary implication is intended with respect to sections lacking those cross references and
15 Pa.C.S. §§ 134 and 135 will continue to be applicable to all filings under Title 15.

The fee for filing a statement of registration by a limited liability partnership or limited liability
limited partnership is set forth in 15 Pa.C.S. § 153(a)(3)(ii). The fee for filing a statement of amendment

The Committee Comments to Chapter 82 are intended to form part of the legislative history of
Chapter 82 and to be citable as such under 1 Pa.C.S. § 1939.

The term “partner” used in this section is defined in 15 Pa.C.S. § 8202.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

department
limited liability limited partnership
limited liability partnership
profession

§ 8202. Definitions.

The following words and phrases when used in this chapter shall have the meanings given
to them in this section unless the context clearly indicates otherwise:

“Distribution.” A direct or indirect transfer of money or other property or incurrence of
indebtedness by a limited liability partnership to a person on account of a transferable interest or
in a person’s capacity as a partner. The term:

(1) includes:

(i) a redemption or other purchase by a partnership of a transferable interest;
and

(ii) a transfer to a partner in return for the partner’s relinquishment of any right to participate as a partner in the management or conduct of the partnership’s business or have access to records or other information concerning the partnership’s business; and

(2) does not include:

(i) amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program;

(ii) the making of, or payment or performance on, a guaranty or similar arrangement by a partnership for the benefit of any or all of its partners;

(iii) a direct or indirect allocation or transfer effected under Chapter 3 (relating to entity transactions) with the approval of the partners; or

(iv) a direct or indirect transfer of:

(A) a governance or transferable interest; or

(B) options, rights or warrants to acquire a governance or transferable interest.

[“Foreign registered limited liability partnership.” A partnership that has registered under a law of any jurisdiction other than this Commonwealth similar to this subchapter, whether or not the partnership is required to register under section 8211 (relating to foreign registered limited liability partnerships).]

“Partner.” Includes a person who is or was a partner in a [registered] limited liability partnership or a general partner in a limited liability limited partnership at any time while the registration of the partnership under this subchapter is or was in effect.

[“Registered limited liability partnership” or “domestic registered limited liability partnership.” A partnership as to which a registration under section 8201(a) (relating to scope) is in effect.]

Amended Committee Comment (2016):

“Distribution.” This definition is the same as in 15 Pa.C.S. § 8412. It has been repeated here to avoid any question whether it applies to the use of the term in 15 Pa.C.S. §§ 8231 and 8232.

“Partner.” This definition was added by the GAA Amendments Act of 2001 to make clear that the protections of this chapter against personal liability for debts and obligations arising while the registration of a partnership under this chapter is in effect are not lost because a person ceases to be a partner or the
§ 8203. Name. (Repealed.) [By M ETA legislation.]

§ 8204. Limitation on liability of partners.

(a) General rule. – Except as provided in subsection (b), a partner in a [registered] limited liability partnership or limited liability limited partnership shall not be [individually] liable directly or indirectly, whether by way of indemnification, contribution or otherwise, under an order of court or in any other manner for any debts [and], obligations or other liabilities of, or chargeable to, the partnership, whether sounding in contract or tort or otherwise, that arise [from any negligent or wrongful acts or misconduct committed by another partner or other representative of the partnership] while the registration of the partnership under this subchapter is in effect.

(b) Exceptions. –

(1) (Repealed).

(2) Subsection (a) shall not affect the liability of a partner:

(i) Individually for any negligent or wrongful acts or misconduct committed by [him or by any person under his direct supervision and control] the partner.

(ii) For any debts [or], obligations or other liabilities of the partnership:

(A) [arising from any cause other than those specified in subsection (a); or] (Repealed.)

(B) as to which the partner has agreed in [writing] record form to be liable[.]; or

(C) that:

(I) arose before [the Legislative Reference Bureau shall insert here the effective date of this clause]; and

(II) did not arise from any negligent or wrongful acts or misconduct committed by a partner or other representative of the partnership.

(iii) To the extent expressly undertaken in the partnership agreement or the certificate of limited partnership.
(3) Subsection (a) shall not affect in any way:

(i) the liability of the partnership itself for all its debts [and], obligations and other liabilities;

(ii) the availability of the entire assets of the partnership to satisfy its debts [and], obligations and other liabilities; or

(iii) any obligation undertaken by a partner in [writing] record form to individually indemnify another partner of the partnership or to individually contribute toward a liability of another partner.

(c) Continuation of limited liability. – Neither the termination of the registration of a partnership under this subchapter nor the dissolution, winding up or termination of the partnership shall affect the limitation on the liability of a partner in the partnership under this section with respect to [negligent or wrongful acts or misconduct occurring] debts, obligations and other liabilities that arose while the registration under this subchapter was in effect.

(d) Proper parties. – A partner in a limited liability partnership or limited liability limited partnership is not a proper party to an action or proceeding by or against the partnership, the object of which is to recover damages or enforce debts, obligations or other liabilities for which the partner is not liable.

[(d)] (e) Cross reference. – See section 103 (relating to subordination of title to regulatory laws).

Amended Committee Comment (2016):

This section is at the heart of what it means to be a limited liability partnership ("LLP") or limited liability limited partnership ("LLLP"). By electing that status and registering under this subchapter, the partnership may protect its general partners from liability for partnership liabilities including liability for the misconduct of other partners or representatives of the partnership.

Subsection (a) - This section protects general partners against debts, obligations, and other liabilities chargeable to the partnership whether or not the act of the wrongdoer was unauthorized or outside the course of the partnership business. If a person would otherwise be vicariously liable because of being a general partner, this section intends to protect the person from liability to the extent provided.

This section is intended to deal only with nonconsensual liabilities of a partner, and subsection (b)(2)(ii)(B), (b)(2)(iii) and (b)(3)(iii) make clear that a partner will continue to be free to agree voluntarily to assume liability, either directly or indirectly, for debts, obligations, and other liabilities against which the partner would otherwise be protected from liability under this section.

This section also deals only with liabilities of the partnership, and not individual liabilities of a partner.

EXAMPLE: A general partner purports to bind an LLLP to a contract with a third party while
lacking any power under agency law to do so. The LLLP is not bound, but the partner is liable to
the third party for having breached the “warranty of authority” (an agency law doctrine).
Subsection (a) does not apply. The liability is not a debt, obligation, or other liability of the
LLLP, but is rather the partner’s own, direct liability. Indeed, the liability exists because the LLLP
is indebted, obligated or liable. Restatement (Third) of Agency § 6.10 (2006).

Example: A general partner of an LLLP defames a third party in circumstances that render the
LLLP vicariously liable. Under subsection (a), the third party cannot hold the partner accountable
for the liability, but that protection is immaterial. The partner is the tortfeasor and in
that role is directly liable to the third party.

Example: An LLP provides professional services, and one of its partners commits malpractice.
The liability shield is irrelevant under subsection (b)(2)(i) to the partner’s direct liability in tort.
However, if the partner’s malpractice liability is attributed to the partnership, the liability shield
will protect the other partners against a claim that they must make good on the LLP’s liability.

Subsection (b)(2)(i) – Subsection (b)(2)(i) was amended in 2016 to remove an implication in the
former language of the provision that a partner could be liable for any act of a person under the
supervision and control of the partner even if the partner had no responsibility to supervise or control the
act giving rise to liability.

Subsection (b)(2)(ii)(B) – The liability shield provided by this section is not intended to override
an agreement by a partner undertaking a liability.

Example: A general partner personally guarantees a debt of an LLP. The liability shield does
not apply to the general partner’s liability as guarantor.

Subsection (b)(3) – Subsection (b)(3)(i) makes clear that this section will not have any effect on
the liability of the partnership itself, which will continue to be liable for the conduct of its partners and
other representatives. Subsection (b)(3)(ii) is intended to make clear that an innocent partner cannot
argue that his or her proportionate interest in the partnership (and thus indirectly a similar proportion of
the partnership’s assets) should be exempt from being available to satisfy a debt, obligation, or other
liability of the partnership for which the innocent partner is not liable. As subsection (b)(2)(i) confirms, this section also does not affect the liability of a partner for his or her own acts which may create a partnership obligation.

The reference in subsection (a) to liabilities arising “directly or indirectly, whether by way of
indemnification, contribution, assessment or otherwise” is intended to make clear that the policy of this
section should not be evaded by seeking to hold partners liable indirectly by a demand for
indemnification, contribution, etc. Nonetheless, subsection (b)(3)(iii) makes clear that this section does
not affect an indemnification obligation that a partner undertakes contractually. However, such an
indemnification obligation must be one undertaken “individually” and an indemnification obligation of
the partnership generally should not be construed as making the partners personally liable. The reference
in subsection (a) to debts and obligations “chargeable to” the partnership is intended to make clear that
the limited liability provided by this section may also not be circumvented by a plaintiff in a direct action
against uninvolved partners seeking to hold them vicariously liable for the actions of a wrongdoing
partner or other representative.

Subsection (c) – Subsection (c) is patterned after 15 Pa.C.S. § 1979(b) which provides that
dissolution of a business corporation does not affect the limited liability of shareholders of the
corporation. It is intended to make clear that if partners are entitled to the benefit of the limited liability
conferred by this section, the termination of the registration of the partnership or its dissolution will not
take away the previously existing limitation of liability. 15 Pa.C.S. § 8201(d).

Former provisions - Former subsection (b)(1) conditioned the limitation on personal liability
provided by subsection (a) on the availability of a certain minimum amount of insurance. Subsection (b)
was repealed at the same time the insurance requirement was repealed. The reasons for the repeal of the
insurance requirement by the GAA Amendments Act of 2000 are discussed in the Amended Committee

Former 15 Pa.C.S. § 8205 permitted a partner to file a statement of withdrawal which had the effect
of cutting off any liability of the partner for debts, obligations, and other liabilities of the partnership,
whether incurred by the partnership before or after withdrawal. Because this section previously provided
only a partial liability shield and only limited the liability of general partners for liabilities arising from
negligent or wrongful acts or misconduct committed by other partners or other representatives of the
partnership, the ability to cut off liability more broadly under former section 8205 was an important
protection for general partners. The reason for former section 8205 ceased to exist with the change in this
section to a full liability shield and former section 8205 was accordingly repealed in 2016.

The term “partner” used in this section is defined in 15 Pa.C.S. § 8202.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“limited liability limited partnership”
“limited liability partnership”
“obligation”
“record form”
“representative”

§ 8205. Liability of withdrawing partner.

(a) General rule. - Except as provided in subsection (b), if the business of a
registered limited liability partnership is continued without liquidation of the partnership
affairs following the dissolution of the partnership as a result of the withdrawal for any
reason of a partner, the withdrawing partner shall not be individually liable directly or
indirectly, whether by way of indemnification, contribution or otherwise, for the debts and
obligations of either the dissolved partnership or any partnership continuing the business if
a statement of withdrawal is filed as provided in this section.

(b) Exceptions. - Subsection (a) shall not affect the liability of a partner:

(1) Individually for any negligent or wrongful acts or misconduct committed
by him or by any person under his direct supervision and control.

(2) For any debts or obligations of the partnership as to which the
withdrawing partner has agreed in writing to be liable.

(3) To the partnership for damages if the partnership agreement prohibits the
withdrawal of the partner or the withdrawal otherwise violates the partnership
agreement.

(4) Under section 8334 (relating to partner accountable as fiduciary).

(5) To the extent a debt or obligation of the partnership has been expressly undertaken by the partner in the partnership agreement or the certificate of limited partnership.

(6) If the partnership subsequently dissolves within one year after the date of withdrawal of the partner and the business of the partnership is not continued following such subsequent dissolution. This paragraph shall not be applicable in the case of a withdrawal caused by:

(i) the death of the partner; or

(ii) the retirement of the partner pursuant to a retirement policy of the dissolved partnership that has been in effect prior to the retirement of the partner for the shorter of one year or the period that the partnership has been in existence.

(7) For any obligation undertaken by a partner in writing to individually indemnify another partner of the partnership or to individually contribute toward a liability of another partner.

(c) Statement of withdrawal. - A statement of withdrawal shall be executed by the withdrawing partner or his personal representative and shall set forth:

(1) The name of the registered limited liability partnership.

(2) The name of the withdrawing partner.

(d) Filing and effectiveness. - The statement of withdrawal shall be filed in the Department of State and shall be effective upon filing. The withdrawing partner shall send a copy of the filed statement of withdrawal to the registered limited liability partnership.

(e) Permissive filing. - Filing under this section is permissive, and failure to make a filing under this section by a partner entitled to do so shall not affect the right of that partner to the limitation on liability provided by section 8204 (relating to limitation on liability of partners).

(f) Constructive notice. - Filing under this section shall constitute constructive notice that the partner has withdrawn from the partnership and is entitled to the protection from liability provided by this section.

(g) Variation of section. - A written provision of the partnership agreement may restrict or condition the application of this section to some or all of the partners of the
partnership.

(h) Application of section. - A partner in a foreign registered limited liability partnership, regardless of whether or not it has registered to do business in this Commonwealth under section 8211 (relating to foreign registered limited liability partnerships), shall not be entitled to make a filing under this section with regard to that partnership.

(i) Cross references. - See sections 134 (relating to docketing statement) and 135 (relating to requirements to be met by filed documents).

§ 8207. Extraterritorial application of subchapter.

(a) Legislative intent. - It is the intent of the General Assembly in enacting this subchapter that the legal existence of registered limited liability partnerships organized in this Commonwealth be recognized outside the boundaries of this Commonwealth and that, subject to any reasonable requirement of registration, a domestic registered limited liability partnership transacting business outside this Commonwealth be granted protection of full faith and credit under the Constitution of the United States. [Repealed.]

(b) Basis for determining liability of partners. - The liability of partners in a domestic limited liability partnership or domestic limited liability limited partnership shall at all times be determined under Chapters 83 and 84 (relating to general partnerships) and 86 (relating to limited partnerships) as modified by the provisions of this subchapter.

(c) Conflict of laws. - The personal liability of a partner of a domestic limited liability partnership or domestic limited liability limited partnership to any person or in any action or proceeding for the debts, obligations or other liabilities of the partnership or for the acts or omissions of other partners or representatives of the partnership shall be governed solely and exclusively by the laws of this Commonwealth. Whenever a conflict arises between the laws of this Commonwealth and the laws of any other state with regard to the liability of partners of a domestic limited liability partnership [registered under this subchapter] or domestic limited liability limited partnership for the debts, obligations and other liabilities of the partnership or for the acts or omissions of the other partners or representatives of the partnership, the laws of this Commonwealth shall govern in determining such liability.

Amended Committee Comment (2016):

The term “partner” used in this section is defined in 15 Pa.C.S. § 8202.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“limited liability limited partnership”
“limited liability partnership”
“obligation”
“representative”
[Subchapter B
Foreign Registered Limited Liability Partnerships]

§ 8211. Foreign registered limited liability partnerships.

(a) Governing law. – Subject to the Constitution of Pennsylvania:

(1) The laws of the jurisdiction under which a foreign registered limited liability partnership is organized govern its organization and internal affairs and the liability of its partners except as provided in subsection (c).

(2) A foreign registered limited liability partnership may not be denied registration by reason of any difference between those laws and the laws of this Commonwealth.

(b) (Repealed 2014).

(c) Exception. – The liability of the partners in a foreign registered limited liability partnership shall be governed by the laws of the jurisdiction under which it is organized, except that the partners shall not be entitled to greater protection from liability than is available to the partners in a domestic registered limited liability partnership.]

Subchapter C
Annual Registration

§ 8221. Annual registration.

(a) General rule. – Every domestic [registered] limited liability partnership or limited liability limited partnership in existence on December 31 of any year and every foreign [registered] limited liability partnership or limited liability limited partnership that is registered to do business in this Commonwealth on December 31 of any year shall [file in] deliver to the Department of State for filing with respect to that year, and on or before April 15 of the following year, a certificate of annual registration on a form provided by the department, signed by a general partner and accompanied by the annual registration fee prescribed by subsection (b). The department shall not charge a fee other than the annual registration fee for filing the certificate of annual registration.

(b) Annual registration fee. –

(1) The annual registration fee to be paid when filing a certificate of annual registration shall be equal to a base fee of $200 times the number of persons who were general partners of the partnership on December 31 of the year with respect to which the
certificate of annual registration is being filed and who:

(i) in the case of a natural person, had his principal residence on that date in this Commonwealth; or

(ii) in the case of any other person, was incorporated or otherwise organized or existing on that date under the laws of this Commonwealth.

(2) The base fee of $200 shall be increased on December 31, 1997, and December 31 of every third year thereafter by the percentage increase in the Consumer Price Index for Urban Workers during the most recent three calendar years for which that index is available on the date of adjustment. Each adjustment under this paragraph shall be rounded up to the nearest $10.

(c) Notice of annual registration. – Not later than February 1 of each year, the department shall give notice to every partnership required to file a certificate of annual registration with respect to the preceding year of the requirement to file the certificate. The notice shall state the amount of the base fee payable under subsection (b)(1), as adjusted pursuant to subsection (b)(2), if applicable, and shall be accompanied by the form of certificate of annual registration to be filed. Failure by the department to give notice to any party, or failure by any party to receive notice, of the annual registration requirement shall not relieve the party of the obligation to file the certificate of annual registration.

(d) Credit to Corporation Bureau Restricted Account. – The annual registration fee shall not be deemed to be an amount received by the department under Subchapter C of Chapter 1 for purposes of section 155 (relating to disposition of funds), except that $25 of the fee shall be credited to the Corporation Bureau Restricted Account.

(e) Failure to file or pay annual fee. –

(1) Failure to file the certificate of annual registration required by this section for five consecutive years shall result in the automatic termination of:

(i) the status of the [registered] limited liability partnership or limited liability limited partnership as such, if it is a domestic partnership; or

(ii) the registration of the limited liability partnership or limited liability limited partnership, if it is a foreign partnership.

(1.1) [In addition, any] Any annual registration fee that is not paid when due shall be a lien in the manner provided in this subsection from the time the annual registration fee is due and payable. If a certificate of annual registration is not filed within 30 days after the date on which it is due, the department shall assess a penalty of $500 against the partnership, which shall also be a lien in the manner provided in this subsection. The imposition of that penalty shall not be construed to relieve the partnership from liability for any other penalty or interest provided for under other applicable law.
(2) If the annual registration fee paid by a [registered limited liability] partnership is subsequently determined to be less than should have been paid because it was based on an incorrect number of general partners or was otherwise incorrectly computed, that fact shall not affect the existence [or], status or foreign registration of the [registered limited liability] partnership [as such], but the amount of the additional annual registration fee that should have been paid shall be a lien in the manner provided in this subsection from the time the incorrect payment is discovered by the department.

(3) The annual registration fee shall bear simple interest from the date that it becomes due and payable until paid. The interest rate shall be that provided for in section 806 of the act of April 9, 1929 (P.L. 343, No. 176), known as The Fiscal Code, with respect to unpaid taxes. The penalty provided for in paragraph (1) shall not bear interest. The payment of interest shall not relieve the [registered limited liability] partnership from liability for any other penalty or interest provided for under other applicable law.

(4) The lien created by this subsection shall attach to all of the property and proceeds thereof of the [registered limited liability] partnership in which a security interest can be perfected in whole or in part by filing in the department under 13 Pa.C.S. Div. 9 (relating to secured transactions; sales of accounts, contract rights and chattel paper), whether the property and proceeds are owned by the partnership at the time the annual registration fee or any penalty or interest becomes due and payable or whether the property and proceeds are acquired thereafter. Except as otherwise provided by statute, the lien created by this subsection shall have priority over all other liens, security interests or other charges, except liens for taxes or other charges due the Commonwealth. The lien created by this subsection shall be entered on the records of the department and indexed in the same manner as a financing statement filed under 13 Pa.C.S. Div. 9. At the time an annual registration fee, penalty or interest that has resulted in the creation of a lien under this subsection is paid, the department shall terminate the lien with respect to that annual registration fee, penalty or interest without requiring a separate filing by the partnership for that purpose.

(5) If the annual registration fee paid by a [registered limited liability] partnership is subsequently determined to be more than should have been paid for any reason, no refund of the additional fee shall be made.

(6) Termination of the status or foreign registration of a [registered limited liability] partnership [as such] under this section, whether voluntarily or involuntarily, shall not release it from the obligation to pay any accrued fees, penalties and interest and shall not release the lien created by this subsection.

(f) Exception for bankrupt partnerships. – A partnership that would otherwise be required to pay the annual registration fee set forth in subsection (b) shall not be required to pay that fee with respect to any year during any part of which the partnership is a [bankrupt as defined in section 8903 (relating to definitions and index of definitions)] debtor in bankruptcy. The partnership shall, instead, indicate on its certificate of annual registration for...
that year that it is exempt from payment of the annual registration fee pursuant to this subsection.  
If the partnership fails to file timely a certificate of annual registration, a lien shall be entered on 
the records of the department pursuant to subsection (e) which shall not be removed until the 
partnership files a certificate of annual registration indicating its entitlement to an exemption 
from payment of the annual registration fee as provided in this subsection.  See section 8201(e) 
(relating to scope).

Amended Committee Comment (2016):

This section imposes an annual fee on all domestic limited liability partnerships and limited liability 
limited partnerships and foreign registered limited liability limited partnerships based on the number of 
general partners in the partnership resident in Pennsylvania or existing under Pennsylvania law.  Of the 
total fee, $25 is deposited in the Corporation Bureau Restricted Account, with the remainder being 
deposited in the General Fund.

As a means of enforcing payment of the annual registration fee, subsection (e) provides that 
nonpayment will create a lien on certain personal property of the partnership.  Failure to pay the annual 
registration fee for a period of five years will also terminate the status of a limited liability partnership or 
limited liability limited partnership as such.  The reference to property in which a security interest can be 
perfected “in whole or in part” recognizes that fully perfecting a security interest in some types of 
property requires filing in locations other than just the Department of State.  Subsection (e) is intended to 
be an exception to those requirements of multiple filing, and notation of the lien on the records of the 
Department of State is intended to be sufficient for the lien to be valid and fully perfected.

The provisions of subsection (e) on penalties and interest were added by the GAA Amendments Act 
of 2001 and were patterned after sections 1703 and 806, respectively, of the act of April 9, 1929 (P.L.343, 
No.176), known as The Fiscal Code.

The term “partner” used in this section is defined in 15 Pa.C.S. § 8202.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“limited liability limited partnership”
“limited liability partnership”

Subchapter D
Distributions

Section
8231. Limitations on distributions by limited liability partnership.
8232. Liability for improper distributions by limited liability partnership.

§ 8231. Limitations on distributions by limited liability partnership.

(a) General rule. – A domestic limited liability partnership may not make a distribution, 
including a distribution under section 8486 (relating to disposition of assets in winding up and
required contributions), if after the distribution:

(1) the partnership would not be able to pay its debts as they become due in the
ordinary course of the partnership’s business; or

(2) the partnership’s total assets would be less than the sum of its total liabilities
plus the amount that would be needed, if the partnership were to be dissolved and wound
up at the time of the distribution, to satisfy the preferential rights upon dissolution and
winding up of partners and transferees whose preferential rights are superior to the rights of
persons receiving the distribution.

(b) Valuation. – A domestic limited liability partnership may base a determination that a
distribution is not prohibited under subsection (a)(2) on:

(1) the book values of the assets and liabilities of the partnership, as reflected on its
books and records;

(2) a valuation that takes into consideration unrealized appreciation and
depreciation or other changes in value of the assets and liabilities of the partnership;

(3) the current value of the assets and liabilities of the partnership, either valued
separately or valued in segments or as an entirety as a going concern; or

(4) any other method that is reasonable in the circumstances.

(c) Excluded liabilities. – In determining whether a distribution is prohibited under
subsection (a)(2), the partnership need not consider obligations and liabilities unless they are
required to be reflected on a balance sheet, not including the notes to the balance sheet, prepared
on the basis of generally accepted accounting principles, or such other accounting practices and
principles as are used generally by the partnership in the maintenance of its books and records
and as are reasonable in the circumstances.

(d) Measuring date of distribution. – Except as provided in subsection (e), the effect of a
distribution under subsection (a) is measured:

(1) as of the date specified by the partnership when it authorizes the distribution if
the distribution occurs within 125 days of the earlier of the date so specified or the date of
authorization; or

(2) as of the date of distribution in all other cases.

(e) Date of redemption. – In the case of a distribution as described in paragraph (1) of the
definition of “distribution” in section 8202 (relating to definitions), the distribution is deemed to
occur as of the earlier of the date money or other property is transferred or debt is incurred by the
partnership, or the date the person entitled to the distribution ceases to own the interest or right
being acquired by the partnership in return for the distribution.
(f) Status of distribution debt. – The indebtedness of a domestic limited liability partnership to a partner or transferee incurred by reason of a distribution made in accordance with this section shall be at least on a parity with the partnership’s indebtedness to its general, unsecured creditors, except to the extent subordinated by agreement.

(g) Certain subordinated debt. – The indebtedness of a domestic limited liability partnership, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that a payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(h) Distributions in winding up. – In measuring the effect of a distribution under section 8486, the liabilities of a dissolved domestic limited liability partnership do not include any claim that has been barred under section 8241 (relating to known claims against dissolved limited liability partnership) or 8242 (relating to other claims against dissolved limited liability partnership) or for which security has been provided under section 8243 (relating to court proceedings).

(i) Cross references. – See sections 8415(d)(1) (relating to contents of partnership agreement) and 8447 (relating to standards of conduct for partners).

Committee Comment (2016):

This section is patterned after 15 Pa.C.S. § 1551.

This section does not apply to limited liability limited partnerships because the tests for the legality of distributions by limited partnerships in 15 Pa.C.S. § 8654 also apply to distributions by limited liability limited partnerships.

In most cases involving a limited liability partnership (“LLP”) operating as a going concern in the normal course, information generally available will make it quite apparent that no particular inquiry concerning the application of the equity insolvency test in subsection (a)(1) is needed. While neither a balance sheet nor an income statement can be conclusive as to this test, the existence of significant equity and normal operating conditions are of themselves a strong indication that no issue should arise under this test. Indeed, in the case of an LLP having regularly audited financial statements, the absence of any qualification in the most recent auditor’s opinion as to the status of the LLP as a “going concern,” coupled with a lack of subsequent material adverse events that would cause such a qualification, should normally be decisive.

It is only when circumstances indicate that the LLP is encountering difficulties or is in an uncertain position concerning its liquidity and operations that the partners may need to address the issue. Because of the overall judgment required in evaluating the equity insolvency test, no one or more “bright line” tests can be employed. However, in determining whether the equity insolvency test has been met, certain judgments or assumptions as to the future course of the LLP’s business are customarily justified, absent clear evidence to the contrary. These include the likelihood that (a) based on existing and contemplated
demand for the LLP’s products or services, it will be able to generate funds over the next several years sufficient to satisfy its existing and reasonably anticipated obligations as they mature during that period of time, and (b) indebtedness which matures in the near-term will be refinanced where, on the basis of the LLP’s financial condition and future prospects and the general availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may be accomplished. There may be occasions when it would be useful to consider a cash flow analysis, based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that known obligations of the LLP can reasonably be expected to be satisfied over the period of time that they will mature.

It is not necessary for the partners to know of the details of the various analyses or market or economic projections that may be relevant. Judgments, further, must of necessity be made on the basis of information in the hands of the partners when a distribution is authorized. See “Time of Measurement of Distributions,” below. The partners should not, of course, be held responsible as a matter of hindsight for unforeseen developments. This is particularly true with respect to assumptions as to the ability of the LLP to refinance or repay long-term obligations that do not mature for several years, since the primary focus of the partners’ decision to make a distribution should normally be on the LLP’s prospects and obligations in the shorter term, unless special factors concerning the LLP’s prospects require the taking of a longer term perspective.

This section establishes the validity of distributions from the state entity law standpoint and 15 Pa.C.S. § 8232 determines the potential liability of partners for improper distributions. The federal Bankruptcy Code and fraudulent transfer or voidable transaction laws, on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds transferred to others in cases of actual or constructive fraud. In light of these diverse purposes, it was not thought necessary to make the tests of this section identical with the tests for insolvency under those statutes.

a. Accounting Principles.

This section does not incorporate technical accounting terminology or specific accounting concepts. Accounting terminology and concepts are constantly under review and subject to revision by the Public Company Accounting Oversight Board, Financial Accounting Standards Board, American Institute of Certified Public Accountants, Securities and Exchange Commission, and others. In making determinations under this section, the partners may make judgments about accounting matters, subject to compliance with their generally applicable duties.

In an LLP with subsidiaries, it is intended that the partners may rely on unconsolidated statements prepared on the basis of the equity method of accounting as to the LLP’s subsidiaries, including joint ventures, although other evidence may be relevant in the total determination.

The partners may use reasonably current financial statements prepared on the basis of generally accepted accounting principles in determining whether or not the balance sheet test of subsection (a)(2) has been met, unless the partners are aware at the time that it would be unreasonable to use those financial statements because of newly-discovered or subsequently arising facts or circumstances. Subsection (b), however, does not mandate the use of generally accepted accounting principles, and the partners may base their determination that a distribution satisfies the test of subsection (a)(2) on other factors, including any method that is reasonable in the circumstances. Some LLPs maintain records solely on a tax accounting basis and their financial statements are of necessity prepared on that basis. Others prepare financial statements that substantially reflect generally accepted accounting principles but may depart from them in some respects ( , footnote disclosure). These facts of life indicate that a statutory standard of
reasonableness, rather than stipulating generally accepted accounting principles as the normative standard, is appropriate in order to achieve a reasonable degree of flexibility and to accommodate the needs of the many different types of businesses which might be subject to these provisions. Subsection (b)(4) contemplates that generally accepted accounting principles are always “reasonable in the circumstances” and that other accounting principles may be perfectly acceptable, under a general standard of reasonableness.

b. Other Valuation Principles.

Subsection (b) permits the validity of a distribution to be tested on the basis of various forms of valuations other than under accounting principles, including any other method that is reasonable in the circumstances. The intent of paragraphs (2), (3), and (4) of subsection (b) is to prohibit a distribution only when the value of the LLP's total assets is less than its liabilities; and it is commonly recognized that asset values on a balance sheet prepared in accordance with GAAP, being normally based on historical costs, do not purport to represent current values. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal and current value methods to determine the amount available for distribution. Decisions as to whether to use a basis other than historical cost accounting and the choice of a particular alternative basis that may be appropriate are left to the judgment of the partners. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a “quick-sale liquidation” method to value an ongoing enterprise, particularly with respect to the payment of normal distributions. On the other hand, a “quick-sale liquidation” valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily an LLP should not selectively revalue assets. It should consider the value of all of its material assets, whether or not reflected in the financial statements (e.g., a valuable executory contract). Likewise, all of the LLP’s material obligations should be considered and revalued to the extent appropriate and possible. However, as subsection (c) makes clear, contingent liabilities need be considered in applying the test of subsection (a)(2) only where they are required to be reflected on the LLP’s balance sheet (other than the notes thereto).

Subsection (b)(4) also refers to “any other method that is reasonable in the circumstances.” This phrase is intended to comprehend within subsection (b) the wide variety of possibilities that might not be considered to fall under a “fair valuation” or “current value” method but might be reasonable in the circumstances of a particular case.

c. Preferential Dissolution Rights.

Subsection (a)(2) provides that a distribution may not be made unless the total assets of the LLP exceed its liabilities plus the amount that would be needed to satisfy any superior preferential rights upon dissolution of a partner or transferee if the LLP were to be dissolved on the date as of which the distribution is measured. This requirement means that the distribution rights of classes or series of partnership interests for distribution purposes as equivalent to liabilities rather than as equity interests. In making the calculation of the amount that must be added to the liabilities of the LLP to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be determined pursuant to the partnership agreement as of the date the distribution or proposed distribution is to be measured. The amount so determined must include arrearages in preferential distributions if the partnership agreement requires that they be paid upon the dissolution of
the LLP. In the case of partnership interests having both a preferential right upon dissolution and additional nonpreferential rights, only the preferential portion of the rights should be taken into account. The treatment of preferential dissolution rights set forth in subsection (a)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of subsection (a)(1). The treatment of preferential rights mandated by subsection (a)(2) may be eliminated by an appropriate provision in the partnership agreement. 15 Pa.C.S. § 8415(c)(4) and (d)(1)(ii).

The definition of “distribution” in 15 Pa.C.S. § 8202 controls the scope of this section. In addition to transfers or money or property from an LLP on account of a transferable interest or in a person’s capacity as a partner, a distribution also includes the purchase by the LLP of a transferable interest or a transfer to a partner in return for relinquishment of some or all of the partner’s governance rights. 15 Pa.C.S. § 8202 excludes from the definition of a “distribution,” and thus from the scope of this section, certain transactions as to which it was considered inappropriate to apply the restrictions in this section.

Subsection (d) specifies how to determine the date as of which the legality of a distribution is measured. It permits the partnership to designate the date as of which the legality of any distribution is to be tested if the distribution is subsequently made within 125 days of the earlier of the date specified or the date of authorization. Because the preparation of financial statements necessarily lags the date as of which they are prepared, subsection (d) permits the partnership to align the date for measuring the legality of a dividend with respect to the most recent quarterly financial statements of the partnership.

If the partnership fails to specify the measuring date when it authorizes a distribution, the measuring date will be the date the distribution is made. The date of distribution will also be the measuring date if the distribution is not made within 125 days of the earlier of the measuring date specified by the partnership or the date of authorization.

The liability of partners under 15 Pa.C.S. § 8232 for a violation of this section would ordinarily arise upon payment of a distribution and the statute of limitations would then begin to run. It is not intended that the validity of the action be judged by hindsight, but as the facts appeared to the partners at the time of authorization, or at any later date when the partners possessed and failed to use the capacity to rescind or appropriately modify the terms of the distribution.

In an acquisition or redemption of a transferable or governance interest, an LLP may transfer property or incur debt to the former holder of the interest. Agreements involving payment for interests over a period of time are of special importance in smaller, non-public enterprises. Subsection (e) provides a clear rule for this situation: the distribution is deemed to occur at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid, except as provided in subsection (g). Of course, this does not preclude a later challenge of a payment on account of redemption-related debt by a bankruptcy trustee on grounds of equitable subordination.

Subsection (f) provides that indebtedness created to acquire interests in the LLP shares or issued as a distribution (if permitted under subsection (a)), is at least on a parity with the indebtedness of the LLP to its general, unsecured creditors, except to the extent subordinated by agreement. General creditors are better off in these situations than they would have been if cash or other property had been paid out for the
interests or distributed (which is proper under the statute), and no worse off than if cash had been paid or
distributed and then lent back to the LLP, making the current or former partners (or transferees) creditors.
The reference to redemption related debt being “at least” on a parity with debts owed to general creditors
makes clear that security may be given for the repayment of redemption related debt.

Subsection (g) provides that indebtedness, including indebtedness issued as a distribution, need not
be taken into account as a liability in determining whether the tests of subsection (a) have been met if the
terms of the indebtedness provide that payments of principal and interest can be made only if and to the
extent that payment of a distribution could then be made under this section. This has the effect of making
the holder of the indebtedness junior to all other creditors but senior to the holders of all classes of
interests, not only during the time the LLP is operating but also upon dissolution and liquidation. It
should be noted that the creation of such indebtedness, and the related limitation on payments of principal
and interest, may create tax problems or raise other legal questions.

Although subsection (g) is applicable to all indebtedness meeting its tests, regardless of the
circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the
reacquisition of interests in the LLP at a time when the deferred purchase price exceeds the net worth of
the LLP. This type of reacquisition will often be necessary in the case of businesses in early stages of
development or service businesses whose value derives principally from existing or prospective net
income or cash flow rather than from net asset value. In such situations, it is anticipated that net worth
will grow over time from operations so that when payments in respect of the indebtedness are to be made
the two tests of subsection (a) will be satisfied. In the meantime, the fact that the indebtedness is
outstanding will not prevent distributions that could be made under subsection (a) if the indebtedness
were not counted in making the determination.

The provisions cited in subsection (h) provide methods for cutting off or securing the debts of an
LLP that is winding up its affairs and activities, and thus those debts do not need to be considered when
determining under subsection (a) if a distribution can be paid during winding up.

The following terms used in this section are defined in 15 Pa.C.S. § 8202:
“distribution”
“partner”

The following terms used in this section are defined in 15 Pa.C.S. § 8202:
“limited liability partnership”
“obligation”
“transfer”

§ 8232. Liability for improper distributions by limited liability partnership.
(a) General rule. – If a partner of a limited liability partnership consents to a distribution made in violation of section 8231 (relating to limitations on distributions by limited liability partnership) and in consenting to the distribution fails to comply with section 8447 (relating to standards of conduct for partners), the partner is personally liable to the partnership for the amount of the distribution which exceeds the amount that could have been distributed without the violation of section 8231.

(b) Recipients. – A person that receives a distribution knowing that the distribution violated section 8231 is personally liable to the limited liability partnership, but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under Section 8231.

(c) Contribution. – A person against which an action is commenced because the person is liable under subsection (a) may:

(1) join any other person that is liable under subsection (a) and seek to enforce a right of contribution from the person; and

(2) join any person that received a distribution in violation of subsection (b) and seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (b).

(d) Statute of repose. – An action under this section is barred unless commenced within two years after the distribution.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 407(a), (c), (d), and (e).

Under 15 Pa.C.S. § 8415(c)(4), the provisions of this section cannot be varied by the partnership agreement.

This section contemplates two categories of liability: (i) liability of those who have consented to improper distributions (subsection (a)) and (ii) liability of those who have received improper distributions (subsection (b)). Liability that has accrued under this section is not affected by a person subsequently ceasing to be a partner or transferee.

This section does not preclude or interfere with claims for fraudulent or voidable transfer.

Subsection (a) – Liability under subsection (a) is not strict liability but rather attaches only to the extent a partner has failed to comply with the duties stated in 15 Pa.C.S. § 8447. To the extent those duties have been permissibly revised by the partnership agreement, the revised standards apply to this subsection. 15 Pa.C.S. § 8231(b)(4) (permitting reasonable reliance on financial information). Merely accepting a distribution that other partners have decided to pay is not the type of active consent that might involve a breach of duty by the accepting partner and is not a basis for liability under subsection (a).
**Subsection (b)** – Actual knowledge is necessary to impose liability under subsection (b). Reason to know does not suffice. 15 Pa.C.S. § 8413(a), § 8413(b).

**Subsections (b) and (c)(2)** – Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a general partner.

**Subsection (d)** – When a distribution is in the form of indebtedness, the distribution may occur on several different dates. 15 Pa.C.S. § 8231(e). The statute of repose in subsection (d) applies only to actions “under this section” and does not affect claims under other applicable law, which most often is fraudulent or voidable transfer law. For a different approach, 6 Del. Code § 17-607(c) (applying a three year statute of limitations to claims “under this chapter or other applicable law”).

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**Subchapter E**

**Dissolution**

**Section 8241.** Known claims against dissolved limited liability partnership.

**8242.** Other claims against dissolved limited liability partnership.

**8243.** Court proceedings.

**8244.** Liability of partner when claim against partnership barred.

**§ 8241. Known claims against dissolved limited liability partnership.**

(a) General rule. – Except as provided in subsection (d), a dissolved limited liability partnership may give notice of a known claim under subsection (b), which has the effect provided in subsection (c).

(b) Notice. – A dissolved limited liability partnership may notify in record form its known claimants of the dissolution. The notice must:

1. Specify the information required to be included in a claim;
2. State that a claim must be in writing and provide a mailing address to which the claim is to be sent;
3. State the deadline for receipt of a claim, which may not be less than 120 days after the date the notice is received by the claimant;
4. State that the claim will be barred if not received by the deadline; and
5. Unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on section 8436 (relating to partner’s liability).

(c) Claims barred. – A claim against a dissolved limited liability partnership is barred if
the requirements of subsection (b) are met and:

(1) the claim is not received by the specified deadline; or

(2) if the claim is timely received but rejected by the partnership:

   (i) the partnership causes the claimant to receive a notice in record form
   stating that the claim is rejected and will be barred unless the claimant commences an
   action against the partnership to enforce the claim within 90 days after the claimant
   receives the notice; and

   (ii) the claimant does not commence the required action within 90 days after
   the claimant receives the notice.

(d) Later arising claims. – This section shall not apply to a claim based on an event
occurring after the date of dissolution or a liability that on that date is contingent.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 807.
The provisions of this subchapter provide rules under which a dissolved limited liability partnership
may achieve finality with regard to claims.

1 Pa.C.S. § 1098 provides that when a period of time is referred to in a statute, the period “shall be
so computed as to exclude the first and include the last day of such period.” That section also provides
that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a
legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from
the computation.”
The term “partner” used in this section is defined in 15 Pa.C.S. § 8202.
The following terms used in this section are defined in 15 Pa.C.S. § 102:
“limited liability partnership”
“record form”

§ 8242. Other claims against dissolved limited liability partnership.

(a) Permissive notice. – A dissolved limited liability partnership may publish notice of its
dissolution and request persons having claims against the partnership to present them in
accordance with the notice.

(b) Notice procedure. – A notice under subsection (a) must:

(1) be officially published one time;
(2) describe the information required to be contained in a claim, state that the claim must be in writing and provide a mailing address to which the claim is to be sent;

(3) state that a claim against the partnership is barred unless an action to enforce the claim is commenced within two years after publication of the notice; and

(4) unless the partnership has been throughout its existence a limited liability partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any partner or person dissociated as a partner which is based on section 8436 (relating to partner’s liability).

(c) Claims barred. – If a dissolved limited liability partnership publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership within two years after the publication date of the notice:

(1) a claimant that did not receive notice in record form under section 8241 (relating to known claims against dissolved limited liability partnership);

(2) a claimant whose claim was timely sent to the partnership but not acted on; and

(3) a claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) Claims not barred. – A claim not barred under this section or section 8241 may be enforced:

(1) against a dissolved limited liability partnership, to the extent of its undistributed assets;

(2) except as provided in section 8243 (relating to court proceedings), if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person’s proportionate share of the claim or of the partnership’s assets distributed to the partner or transferee after dissolution, whichever is less, except that a person’s total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution; and

(3) against any person liable on the claim under sections 8436, 8473 (relating to liability of person dissociated as partner to other persons) and 8485 (relating to liability after dissolution).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 808.

Use of the procedure in this section is optional.
Subsection (d)(2) - Liability under this paragraph extends to those who have received distributions under a charging order because the beneficiary of a charging order is a transferee. 15 Pa.C.S. § 8454. Unlike 15 Pa.C.S. § 8232(c) regarding recapture of improper interim distributions, subsection (d)(2) does not contain a “knowledge” element.

The term “partner” used in this section is defined in 15 Pa.C.S. § 8202.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

1. “limited liability partnership”
2. “officially publish”
3. “record form”

§ 8243. Court proceedings.

(a) Determination of security. – A dissolved limited liability partnership that has published a notice under section 8242 (relating to other claims against dissolved limited liability partnership) may file an application with the court of common pleas embracing the county where the partnership’s principal office is located or, if the principal office is not located in this Commonwealth, where its registered office is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the partnership and:

(1) at the time of the application:

   (i) are contingent; or

   (ii) have not been made known to the partnership; or

(2) are based on an event occurring after the date of dissolution.

(b) When security not required. – Security is not required for any claim that is or is reasonably anticipated to be barred under section 8241 (relating to known claims against dissolved limited liability partnership).

(c) Notice. – Not later than 10 days after the filing of an application under subsection (a), the dissolved limited liability partnership shall give notice of the proceeding to each claimant holding a contingent claim known to the partnership.

(d) Guardian ad litem. – In any proceeding under this section, the court may appoint a guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must be paid by the dissolved limited liability partnership.

(e) Effect on contingent claims. – A dissolved limited liability partnership that provides security in the amount and form ordered by the court under subsection (a) satisfies the
partnership’s obligations with respect to claims that are contingent, have not been made known
to the partnership or are based on an event occurring after the date of dissolution. The claims
may not be enforced against a partner or transferee on account of assets received in liquidation.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 809.

Use of the procedure in this section is optional.

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be
so computed as to exclude the first and include the last day of such period.” That section also provides
that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a
legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from
the computation.”

The term “limited liability partnership” used in this section is defined in 15 Pa.C.S. § 102.

§ 8244. Liability of partner when claim against partnership barred.

If a claim against a dissolved limited liability partnership is barred under this subchapter,
any corresponding claim under sections 8436 (relating to partner’s liability), 8473 (relating to
liability of person dissociated as partner to other persons) and 8485 (relating to liability after
dissolution) is also barred.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 810.

A general partner’s liability under 15 Pa.C.S. §§ 8436, 8473, and 8485 is vicarious liability based
solely on status and solely for debts, obligations, and other liabilities of the partnership. To the extent a
claim pertaining to the underlying debt, obligation, or other liability is barred, a claim pertaining to the
corresponding vicarious liability should likewise be barred.

The term “limited liability partnership” used in this section is defined in 15 Pa.C.S. § 102.

Chapter 83
General Partnerships

(Repealed.)

Chapter 84
General Partnerships

Subchapter
A. General Provisions
B. Nature of Partnership
C. Relations of Partners to Persons Dealing with Partnership
D. Relations of Partners to Each Other and to Partnership
E. Transferable Interests and Rights of Transferees and Creditors
F. Dissociation
G. Dissociation as Partner if Business Not Wound Up
H. Dissolution and Winding Up

### Subchapter A
#### General Provisions

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### § 8411. Short title and application of chapter.

(a) Short title. – This chapter shall be known and may be cited as the Pennsylvania Uniform Partnership Act of 2016.

(b) Initial application. – Before April 1, 2017, this chapter governs only:

1. a partnership formed on or after [the Legislative Reference Bureau shall insert here the effective date of this chapter]; and

2. except as provided in subsection (d), a partnership formed before [the Legislative Reference Bureau shall insert here the effective date of this chapter] which elects, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be subject to this chapter.

(c) Full effective date. – Except as provided in subsection (d), on and after April 1, 2017, this chapter governs all partnerships.

(d) Liabilities to third parties. – With respect to a partnership that elects under subsection (b)(2) to be subject to this chapter, after the election takes effect the provisions of this chapter relating to the liability of the partnership’s partners to third parties apply:
(1) before April 1, 2017, to:

   (i) a third party that had not done business with the partnership in the year before the election took effect; and

   (ii) a third party that had done business with the partnership in the year before the election took effect only if the third party knows or has been notified of the election; and

(2) on and after April 1, 2017, to all third parties, except that those provisions remain inapplicable to any obligation incurred while those provisions were inapplicable under paragraph (1)(ii).

e) Cross reference. – See section 8415(c)(5) (relating to contents of partnership agreement).

Committee Comment (2016):

Subsection (a) is patterned after Uniform Partnership Act (1997) (Last Amended 2013) (“UPA”) § 101. Subsections (b) through (d) are patterned after UPA § 110.

The Committee Comments to this chapter are intended to form part of the legislative history of the chapter and to be citable as such under 1 Pa.C.S. § 1939. The Committee Comments have been adapted from the commentary to the UPA and are intended to supersede that commentary.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”
(1) includes:

(i) a redemption or other purchase by a partnership of a transferable interest; and

(ii) a transfer to a partner in return for the partner’s relinquishment of any right to participate as a partner in the management or conduct of the partnership’s business or have access to records or other information concerning the partnership’s business; and

(2) does not include:

(i) amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program;

(ii) the making of, or payment or performance on, a guaranty or similar arrangement by a partnership for the benefit of any or all of its partners;

(iii) a direct or indirect allocation or transfer effected under Chapter 3 (relating to entity transactions) with the approval of the partners; or

(iv) a direct or indirect transfer of:

   (A) a governance or transferable interest; or

   (B) options, rights or warrants to acquire a governance or transferable interest.

“Partner.” A person that:

(1) has become a partner in a partnership under section 8442 (relating to becoming partner) or was a partner in a partnership when the partnership became subject to this chapter under section 8411 (relating to short title and application of chapter); and

(2) has not dissociated as a partner under section 8461 (relating to events causing dissociation).

“Partnership.” An association of two or more persons to carry on as co-owners a business for profit formed under this chapter or that becomes subject to this chapter under Chapter 3 (relating to entity transactions) or section 8411. The term includes a limited liability partnership or an electing partnership that is not also a limited partnership.

“Partnership agreement.” The agreement, whether or not referred to as a partnership agreement and whether oral, implied, in record form or in any combination thereof, of all the
partners of a partnership concerning the matters described in section 8415(a) (relating to contents of partnership agreement). The term includes the agreement as amended or restated.

“Partnership at will.” A partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

“Transferable interest.” The right, as initially owned by a person in the person’s capacity as a partner, to receive distributions from a partnership, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

“Transferee.” A person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner.

(b) Index of definitions. – The following is a nonexclusive list of definitions in section 102 (relating to definitions) that apply to this chapter:

“Act” or “action.”
“Court.”
“Debtor in bankruptcy.”
“Department.”
“Jurisdiction.”
“Jurisdiction of formation.”
“Obligation.”
“Principal office.”
“Professional services.”
“Property.”
“Record form.”
“Sign.”
“Transfer.”

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 102.

This Section contains definitions for terms used throughout Chapter 84. Additional definitions that apply to Chapter 84 are found in 15 Pa.C.S. § 102.

“Business.” This definition is fundamentally important because a general partnership must have a business purpose. The definition of “partnership” and 15 Pa.C.S. § 8422(a). 15 Pa.C.S. §§ 8620(b) (a limited partnership may have any lawful purpose “regardless of whether the purpose is for profit”) and § 8818(b) (same as to a limited liability company).

“Contribution.” This definition serves to distinguish capital contributions from other circumstances under which a partner or would-be partner might provide benefits to a general partnership (i.e., providing services to the partnership as an employee or independent contractor, or leasing property to the partnership).
This definition does not encompass capital raised from transferees. In contrast, partnership agreements sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. 15 Pa.C.S. § 8486(b)(1) (referring to distributions to be made “to each owner of a transferable interest that reflects made and not previously returned” (emphasis added)).

“Distribution.” Paragraph (1) specifically refers to transactions between a general partnership and one of its partners, which in the corporate context would be labeled a “redemption.” The paragraph has subparagraphs because ownership interests in a partnership are conceptually bifurcated into economic rights (“transferable interests”) and governance and information rights.

Under 15 Pa.C.S. § 8445(a), “[a]ny distribution made by a partnership before its dissolution and winding up must be in equal shares among partners … except as provided in section 8453(b) … or to the extent necessary to comply with a charging order in effect under section 8454.” Because a redemption is a distribution, absent authorization in the partnership agreement a partnership may not redeem the interest of one partner or transferee without redeeming (or at least offering to redeem) the interests of all other partners and transferees. The law of close corporations has flirted with a similar notion.

A partnership agreement can override the equal treatment requirement in 15 Pa.C.S. § 8445(a) without specifically mentioning redemptions.

EXAMPLE: Ryan Company is a general partnership whose partnership agreement: (i) includes a list (the “protected list”) of decisions or actions that may be taken only with the consent of all partners; and (ii) provides that all other decisions and acts may be taken as the Management Committee determines. The protected list does not include redemptions. The partnership agreement overrides the equal treatment requirement in section 8445(a).

Paragraph (2) affects the reach of: (i) the charging order remedy under 15 Pa.C.S. § 8454; and (ii) the clawback provisions in 15 Pa.C.S. § 8232 applicable to distributions made by a limited liability partnership.

“Partner.” Under 15 Pa.C.S. § 8422(a), any “person” can be a partner. At common law, “[t]he general rule … [was] that every person of sound mind, , and not otherwise restrained by law, may enter into a contract of partnership.” Joseph Story, Commentaries on the Law on Partnership (2nd ed. 1850) § 7 at 10. The phrase “sound mind” and the term “” suggest that at common law a partner was necessarily an individual. Black’s Law Dictionary (9th ed. 2009), sui juris (“Of full age and capacity”). Under the Pennsylvania Statutory Construction Act, 1 Pa.C.S. § 1991, the term “person” is defined to include “a corporation, partnership, limited liability company, business trust, other association … “.

After a person has been dissociated as a partner as provided in 15 Pa.C.S. § 8462, the term
“partner” continues to apply to the person’s conduct while a partner. 15 Pa.C.S. § 8463(b).

“Partnership.” This definition makes clear that a general partnership is a business organization. 15 Pa.C.S. § 8422(a).

“Partnership agreement.” This definition must be read in conjunction with 15 Pa.C.S. §§ 8415 through 8417, which further describe the partnership agreement. A partnership agreement is a contract, and therefore all statutory language pertaining to the partnership agreement must be understood in the context of the law of contracts.

The definition of “partnership agreement” is very broad and recognizes a wide scope of authority for the partnership agreement, namely “the matters described in section 8415(a).” Those matters include not only all relations the partners and the partnership but also “the business of the partnership and the conduct of that business.” 15 Pa.C.S. § 8415(a)(3). Moreover, this definition puts no limits on the form of the partnership agreement. To the contrary, the definition contains the phrase “whether oral, implied, in record form or in any combination thereof.”

Unless the partnership agreement itself provides otherwise:

a partnership agreement may comprise a number of separate documents, however denominated; and

subject to 15 Pa.C.S. § 8416(b) (deeming new partners to assent to the then-existing partnership agreement), a document, understanding, etc. can be part of the partnership agreement only with the assent of all persons then partners.

An agreement among less than all partners might well be enforceable among those partners as parties, but would not be part of the partnership agreement. An amendment to a partnership agreement, however, can be made with less than unanimous consent if the partnership agreement itself so provides. 15 Pa.C.S. §§ 8415(a)(4) and 8441(j).

An agreement to form a partnership is not itself a partnership agreement. The term “partnership agreement” presupposes “partners,” and a person cannot be a partner in a partnership before the partnership exists. As soon as a partnership comes into existence, however, it perforce has a partnership agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in a manner that satisfies 15 Pa.C.S. § 8422 (formation of partnership); (ii) the partnership is thus formed; and (iii) without further ado or agreement, the persons become the partnership’s initial partners. Under those circumstances, a partnership agreement exists. In the words of this definition, “all the partners” have agreed who the partners are and that, as “all the partners,” they will conduct a business. That agreement - no matter how informal or rudimentary – is an agreement “concerning the matters described in section 8415(a).” To the extent the agreement does not provide the “rules of the game,” this chapter “fills in the gaps.” 15 Pa.C.S. § 8415(b).

“Partnership at will.” Any partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking is a “partnership at will.” The distinction between an “at-will” partnership and a partnership for “a definite term or the completion of a particular undertaking” is important in determining the rights of dissociating and continuing partners following the dissociation of a partner. 15 Pa.C.S. §§ 8461, 8462, and 8481(a).

It is sometimes difficult to determine whether a partnership is at will or is for a definite term or the completion of a particular undertaking. Presumptively, every partnership is an at-will partnership. To constitute a partnership for a term or a particular undertaking, the partners must agree (i) that the
partnership will continue for a definite term or until a particular undertaking is completed; and (ii) that
they will remain partners until the expiration of the term or the completion of the undertaking. Both are
necessary for a term partnership; if the partners have the unrestricted right, as distinguished from the
power, to withdraw from a partnership formed for a term or particular undertaking, the partnership is one
at will, rather than a term partnership.

To find that the partnership is formed for a definite term or a particular undertaking, there must be
clear evidence of an agreement among the partners that the partnership (i) has a minimum or maximum
duration, or (ii) terminates at the conclusion of a particular venture whose time is indefinite but certain to
occur. , , , 637 F. Supp. 1051 (E.D. Pa. 1986) (partnership to dissolve no later than December 30, 2020);
, , , 838 F.2d 691 (3d Cir. 1988) (partnership purpose to market an art book). A partnership to conduct a business which may last indefinitely,
however, is an at-will partnership, even though there may be an obligation of the partnership, such as a
mortgage, which must be repaid by a certain date, absent a specific agreement that no partner can
rightfully withdraw until the obligation is repaid. , , , 332 A.2d 443 (Pa. 1975) (partnership purpose to maintain and lease buildings).

“Transferable interest.” Absent a contrary provision in the partnership agreement or the consent
of the partners, a “transferable interest” is the only interest in a partnership which can be transferred to a
non-partner. 15 Pa.C.S. § 8452. This chapter does not have a defined term for the entirety of a
partner’s rights in a partnership, including governance and information rights as well as economic rights.

This chapter defines a “transferable interest” as an interest “initially owned by a person in the
person’s capacity as a partner,” because this chapter does not contemplate a partnership directly creating
interests that comprise only economic rights. 15 Pa.C.S. §§ 8442 (addressing how a person becomes a partner) and 8453 (addressing how a person becomes a transferee).

§ 8413. Knowledge and notice.

(a) Knowledge. – A person knows a fact if the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under subsection (d)(1) or law other than this chapter.

(b) Notice. – A person has notice of a fact if the person:

(1) has reason to know the fact from all the facts known to the person at the time in question; or

(2) is deemed to have notice of the fact under subsection (d)(2).

(c) Notification. – Except as provided under section 113(b) (relating to delivery of document), a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to know the fact.
(d) Constructive knowledge or notice. - A person not a partner is deemed:

(1) to know of a limitation on authority to transfer real property as provided in section 8433(g) (relating to certificate of partnership authority); and

(2) to have notice of:

(i) a person's dissociation as a partner 90 days after a certificate of dissociation under section 8474 (relating to certificate of dissociation) becomes effective;

(ii) the dissolution of the partnership 90 days after a certificate of dissolution under section 8482(b)(2)(i) (relating to winding up and filing of certificates) is effective;

(iii) the termination of the partnership 90 days after a certificate of termination under section 8482(b)(2)(vi) is effective; and

(iv) participation in a merger, interest exchange, conversion, division or domestication, 90 days after a statement of merger, interest exchange, conversion, division or domestication under Chapter 3 (relating to entity transactions) is effective.

(e) Effect of partner's knowledge or notice. - A partner's knowledge or notice of a fact relating to the partnership is effective immediately as knowledge of or notice to the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 103. This chapter does not contain generally applicable provisions for determining when an organization other than a partnership is charged with knowledge or notice. Rules on imputation of knowledge and notice are core topics within the law of agency and do not need to be different under this chapter than in other circumstances. Subsection (e), however, does provide a rule for attributing to a partnership knowledge or notice possessed by a general partner.

This section does not define “notice” to include “knowledge.” Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This chapter follows ordinary usage and therefore contains some references to “knowledge or notice.”

Subsection (a)(2) - In this context, the most important source of “law other than this chapter” is the common law of agency.

Subsection (b)(1) - The “facts known to the person at the time in question” include facts the person is deemed to know under subsection (a)(2).

Subsection (c) - If a person “notifies” another person of a fact, the other person has “reason to
know" the fact and therefore has notice under subsection (b)(1). However, a person can have “notice” of a fact without having been “notifie[d]” of the fact.

**Subsection (d)** - This subsection provides what is commonly called constructive notice for various filed documents, and works in conjunction with other sections of this chapter to curtail the power to bind and personal liability of general partners and persons dissociated as general partners. 15 Pa.C.S. §§ 8472, 8473, 8484, and 8485. Under subsection (d)(2), the constructive notice begins 90 days after the effective date of the filed record. 15 Pa.C.S. § 136(c) with respect to delayed effective dates. Constructive notice with respect to certificates of authority is provided for in 15 Pa.C.S. § 8433.

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

- “partner”
- “partnership”

§ 8414. Governing law.

(a) General rule. - The internal affairs of a partnership and the liability of a partner as a partner for the debts, obligations or other liabilities of the partnership are governed by:

(1) in the case of a limited liability partnership, the laws of this Commonwealth;

and

(2) in the case of a partnership that is not a limited liability partnership, the laws of:

(i) the jurisdiction chosen by a provision of the partnership agreement in record form; or

(ii) the jurisdiction in which the partnership has its principal office if there is no choice of law pursuant to subparagraph (i).

(b) Enforceability of chosen law. - A choice of law under subsection (a)(2)(i) is enforceable even though:

(1) The chosen jurisdiction has no substantial relationship to the partners or the partnership and there is no other reasonable basis for the parties’ choice.

(2) Application of the chosen law would be contrary to a fundamental policy of a jurisdiction that has a materially greater interest in the determination of the particular issue than does the jurisdiction whose law has been chosen.
(c) Cross reference. - See section 8415(c)(6) (relating to contents of partnership agreement).

**Committee Comment (2016):**

**Subsection (a) -** Subsection (a) is patterned in part after Uniform Partnership Act (1997) (Last Amended 2013) ("UPA") § 104.

Subsection (a) states two choice-of-law rules: an invariable rule for limited liability partnerships in paragraph 1, and a default rule for other partnerships in paragraph 2. Both rules address "internal affairs" and "the liability of a partner as a partner for the debts, obligations or other liabilities of the partnership."

Like any other legal concept, "internal affairs" may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the partnership agreement, relations among the partners as partners, and relations between the partnership and a partner as a partner.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (1971), cmt. a (defining "internal affairs" with reference to a corporation as "the relations inter se of the corporation, its shareholders, directors, officers or agents").

The concept of "internal affairs" does not include whether a person has power to bind a partnership. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 292(2) (1971) ("The principal will be held bound by the agent's action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority." ) and 295(1) ("Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state selected by application of the rule of § 292."); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 345 (1934) (Law Governing Effect of Act of Agent or Partner), cmt. c ("If... the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for unauthorized conduct of the agent or partner in accordance with the law of that state.").

"Internal affairs" and the "liability of a partner as a partner" are mentioned separately, because it can be argued that the liability of partners to third parties is not an internal affair. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971) (treating shareholders' liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not.

In any event, neither "internal affairs" nor the "liability of a partner as a partner" encompass a claim that a partner is liable to a third party for: (i) having purported inaccurately to have the actual authority to bind a partnership to the third party; or (ii) having committed a tort against the third party while acting on the partnership's behalf or in the course of the partnership's business. That liability is not by status (, not "as a partner") but rather results from function or conduct.

**Subsection (a)(1) -** The partnership agreement cannot alter this paragraph. 15 Pa.C.S. § 8415(c)(6). In essence, when a partnership chooses where to file a statement of registration as a limited liability partnership, the partnership chooses its governing law. This approach comports with the law of other businesses entities whose formation or legal status depends at least in part on a publicly-filed record.

**Subsection (b) -** The Comment to UPA § 104 suggests that the enforceability of a choice of
The following terms used in this section are defined in 15 Pa.C.S. § 8412:

- “partner”
- “partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “jurisdiction”
- “obligation”
- “principal office”

§ 8415. Contents of partnership agreement.

(a) Scope of partnership agreement. – Except as provided in subsections (c) and (d), the partnership agreement governs:

1. relations among the partners as partners and between the partners and the partnership;
2. the rights and duties under this title of a person in the capacity of a partner;
3. the business of the partnership and the conduct of that business;
4. the means and conditions for amending the partnership agreement; and
5. the means and conditions for approving a transaction under Chapter 3 (relating to entity transactions).

(b) Title applies generally. – To the extent the partnership agreement does not provide for a matter described in subsection (a), this title governs the matter.

(c) Limitations. – A partnership agreement may not do any of the following:

1. Vary a provision of Chapter 1 (relating to general provisions) or Subchapter A of Chapter 2 (relating to names).
2. Vary the right of a partner to approve a merger, interest exchange, conversion, division or domestication under section 333(a)(2) (relating to approval of merger),
(3) Vary the required contents of a plan of merger under section 332(a) (relating to plan of merger), plan of interest exchange under section 342(a) (relating to plan of interest exchange), plan of conversion under section 352(a) (relating to plan of conversion), plan of division under section 362(a) (relating to plan of division) or plan of domestication under section 372(a) (relating to plan of domestication).

(4) Vary a provision of Chapter 81 (relating to general provisions) or 82 (relating to limited liability partnerships and limited liability limited partnerships), except as provided in subsection (d).

(5) Vary the provisions of section 8411(b), (c) and (d) (relating to short title and application of chapter).

(6) Vary the law applicable under section 8414(a)(1) (relating to governing law).

(7) Vary any requirement, procedure or other provision of this title pertaining to:

   (i) registered offices; or

   (ii) the department, including provisions pertaining to documents authorized or required to be delivered to the department for filing under this title.

(8) Vary the provisions of section 8437 (relating to actions by and against partnership and partners).

(9) Unreasonably restrict the duties and rights under section 8446 (relating to rights to information), except as provided in subsection (d).

(10) Eliminate the duty of loyalty provided for under section 8447(b)(1)(i) or (ii) or (2) (relating to standards of conduct for partners) or the duty of care, except as provided in subsection (d).

(11) Vary the contractual obligation of good faith and fair dealing under section 8447(d), except as provided in subsection (d).

(12) Unreasonably restrict the right of a person to maintain an action under section 8448(b) (relating to actions by partnership and partners).

(13) Provide indemnification or exoneration in violation of the limitations in sections 8441(m) (relating to partner’s rights and duties) and 8447(i).

(14) Vary the power of a person to dissociate as a partner under section 8462(a)
(relating to power to dissociate as partner and wrongful dissociation), except to require that the notice under section 8461(1) (relating to events causing dissociation) be in record form.

(15) Vary the causes of dissolution specified in section 8481(a)(4) or (5) (relating to events causing dissolution).

(16) Vary the requirement to wind up the partnership’s business as specified in section 8482(a), (b)(1) and (d) (relating to winding up and filing of certificates).

(17) Except as provided in section 8417(b) (relating to amendment and effect of partnership agreement), restrict the rights under this title of a person other than a partner.

(d) Permitted terms. – Subject to subsection (c)(13), the following rules apply:

(1) The partnership agreement may:

   (i) specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts;

   (ii) alter the prohibition in section 8231(a)(2) (relating to limitations on distributions by limited liability partnership) so that the prohibition requires only that the partnership’s total assets not be less than the sum of its total liabilities; and

   (iii) impose reasonable restrictions on the availability and use of information obtained under section 8446 and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

(2) To the extent the partnership agreement expressly relieves a partner of a responsibility that the partner would otherwise have under this title and imposes the responsibility on one or more other partners, the agreement also may eliminate or limit any fiduciary duty of the partner relieved of the responsibility which would have pertained to the responsibility.

(3) If not manifestly unreasonable, the partnership agreement may:

   (i) alter the aspects of the duty of loyalty stated in section 8447(b)(1)(i) or (ii) or (2);

   (ii) prescribe the standards by which the performance of the contractual obligation of good faith and fair dealing under section 8447(d) is to be measured;

   (iii) identify specific types or categories of activities that do not violate the duty of loyalty;

   (iv) alter the duty of care; and
(v) alter or eliminate any other fiduciary duty.

(e) Determination of manifest unreasonableness. – The court shall decide as a matter of law whether a term of a partnership agreement is manifestly unreasonable under subsection (d)(3). The court:

(1) shall make its determination as of the time the challenged term became part of the partnership agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes and business of the partnership, it is readily apparent that:

(i) the objective of the term is unreasonable; or

(ii) the term is an unreasonable means to achieve the term’s objective.

### Committee Comment (2016):

1. This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 105.

2. The partnership agreement is pivotal to a partnership, and this section and 15 Pa.C.S. §§ 8416 and 8417 are pivotal to this chapter. They must be read together, along with the definition of “partnership agreement” in 15 Pa.C.S. § 8412.

This section performs five essential functions:

(i) Subsection (a) establishes the primacy of the partnership agreement in establishing relations among the partners and the partnership.

(ii) Subsection (b) recognizes that Chapter 84 comprises mostly default rules – , gap fillers for issues at to which the partnership agreement provides no rule.

(iii) Subsection (c) lists the mandatory provisions of Chapter 84 that cannot be varied by the partnership agreement.

(iv) Subsection (d) deals with some provisions frequently found in partnership agreements, authorizing some unconditionally and others so long as “not manifestly unreasonable.”

(v) Subsection (e) delineates in detail both the meaning of “not manifestly unreasonable” and the information relevant to determining a claim that a provision of a partnership agreement is manifestly unreasonable.

15 Pa.C.S. § 8416 details the effect of a partnership agreement on the partnership and on persons becoming partners. 15 Pa.C.S. § 8417 concerns the effect of a partnership agreement on third parties.

3. 15 Pa.C.S. § 8412 defines the “partnership agreement” very broadly. As a result, once a partnership
comes into existence, a partnership agreement necessarily exists. Accordingly, this chapter refers to “the” partnership agreement rather than “a” partnership agreement. This phrasing should not, however, be read to require a partnership or its partners to take any formal action to adopt a partnership agreement.

Subsection (b) is intended to make clear that the partnership agreement is the exclusive consensual process for modifying the various default rules in Chapter 84 pertaining to relationships between the partners and between the partners and the partnership. The partnership agreement also has power over “[t]he obligations of a partnership and its partners to a person in the person’s capacity as a transferee or person dissociated as a partner” under 15 Pa.C.S. § 8417(b). For the relationship between the partnership agreement and documents filed in the department, 15 Pa.C.S. § 8417(d).

4.

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the interest holders can affect the fiduciary and other duties of those who have ultimate power to manage the organization (in a general partnership – the partners themselves). As explained in detail in the comment to subsection (d)(3), Chapter 84 rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arm’s length association. Within that limitation, however, this section provides substantial power to the partnership agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

5.

Subsection (a) - Subsection (a) describes the very broad scope of the partnership agreement, which includes all matters constituting “internal affairs.” 15 Pa.C.S. § 8414 (using the phrase “internal affairs” in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in subsection (c), including the broad restriction stated in paragraph (c)(17) (concerning the rights under this title of third parties).

Subsection (a)(1) - This subsection encompasses all the rights and duties of each partner, including rights and duties pertaining to transactions under Chapter 3.

Subsection (a)(4) - Under this provision, the partnership agreement can control both the quantum of consent required (majority of partners) and the means by which the consent is manifested (prohibiting modifications except when consented to in writing). Under subsection (b), if the partnership agreement does not address the issue, 15 Pa.C.S. 8441(j) applies and requires the affirmative vote or consent of all the partners.

Under 15 Pa.C.S. §110 (supplementary general principles of law applicable), the parol evidence rule will apply to a written partnership agreement when appropriate under contract law.

Subsection (b) - The partnership agreement may vary any provision of this chapter pertaining to internal matters, except as provided in subsections (c) and (d).

The Committee Comments sometimes - but not always - refer to a variable provision of Chapter 84 as a “default rule” and a nonwaivable provision as “mandatory.” These references are merely to draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this chapter whose comments lack such a reference.

Subsection (c) - This subsection lists provisions of Title 15 that cannot be varied or may be varied
subject to a stated limitation.

**Subsection (c)(2)** - The default rule for approval of a merger or other fundamental transaction is the consent or affirmative vote of all partners. The partnership agreement may modify these requirements. In contrast, under the sections cited in this subsection:

(i) each partner is protected from being merged, exchanged, converted, divided, or domesticated “into” the status of a partner in a general partnership that is not a limited liability partnership (or a comparable “unshielded” position in some other organization) without the partner having consented to either:

- the merger, interest exchange, conversion, division, or domestication; or
- a partnership agreement provision that permits such transactions to occur with less than unanimous consent of the partners; and

(ii) merely consenting to a partnership agreement provision that permits amendment of the partnership agreement with less than unanimous consent of the partners does not qualify as the requisite direct consent.

**Subsection (c)(3)** - Because these plans are the basic “deal documents” for each of the organic transactions contemplated in Chapter 3, the partnership agreement may not vary the contents of these plans.

**Subsection (c)(6)** - “[T]he law applicable under section 8414(a)(1)” establishes the governing law for the internal affairs of a limited liability partnership. The organizers of a limited liability partnership make this choice of law by choosing to register as a limited liability partnership under Chapter 82. Domestication to another jurisdiction will re-set the choice of law, but the partnership agreement cannot.

**Subsection (c)(8)** - The cited section pertains to actions by and against the partnership and the partners. In many instances, an action arguably will also come within subsection (c)(17) (prohibiting the partnership agreement from “restrict[ing] the rights under this title of a person other than a partner”).

**Subsection (c)(9)** - Although phrased as a restriction, this provision grants substantial power to the partnership agreement.

**EXAMPLE:** A law firm operates as a partnership, and the partnership agreement provides that a “Compensation Committee” periodically decides each partner’s compensation. The agreement also states that only partners who are on the Compensation Committee may have access to the Committee’s compensation decisions pertaining to other partners. This restriction is reasonable.

This chapter also empowers the partnership “as a matter within the ordinary course of its business [to] impose reasonable restrictions and conditions on access to and use of information” obtained under 15 Pa.C.S. § 8446. 15 Pa.C.S. § 8446(j).

**Subsection (c)(10)** - This limitation is less far-reaching than might first appear, because subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties.

**Subsection (c)(11)** - 15 Pa.C.S. § 8447(d) refers to the “contractual obligation of good faith and fair dealing,” which contract law implies in every contract. A partnership agreement that seeks to “prescribe the standards … by which the performance of [that] obligation is to be measured” should expressly refer to the obligation. , 67 A.3d 400, 418 (Del. 2013) (distinguishing between the implied contractual covenant and an express contractual obligation of
“good faith” as stated in a limited partnership agreement).

EXAMPLE: A partnership agreement designates a managing partner, provides that partner almost total control of the partnership’s operations, and grants the partner the discretion to cause the partnership to enter into contracts with affiliates of the partner (so-called “Conflict Transactions”). The agreement further provides: “When causing the Company to enter into a Conflict Transaction, the Managing Partner complies with 15 Pa.C.S. § 8447(d) if a disinterested person, knowledgeable in the subject matter, states in writing that the terms and conditions of the Conflict Transaction are equivalent to the terms and conditions that would be agreed to by persons at arm’s length in comparable circumstances.” This provision “prescribes[s] the standards by which the performance of the [section 8447(d)] obligation is to be measured.”

EXAMPLE: Same facts as the previous example, except that, during the performance of a Conflict Transaction, the managing partner causes the partnership to waive material protections under the applicable contract. The standard stated in the previous example does not apply to this conduct. 15 Pa.C.S. § 8447(d) therefore applies to the conduct without any direct contractual delineation. (However, other terms of the agreement may be relevant to determining whether the conduct violates section 8447(d).)

EXAMPLE: A partnership agreement designates a managing partner and gives that partner “sole discretion” to make various decisions. The agreement further provides: “Whenever this agreement requires or permits the Managing Partner to make a decision that has the potential to benefit one class of partners to the detriment of another class, the Managing Partner complies with 15 Pa.C.S. § 8447(d) if the Managing Partner makes the decision with:

a. the honest, subjective belief that the decision:

i. serves the best interests of the Partnership; or

ii. at least does not injure or otherwise disserve those interests; and

b. the reasonable belief that the decision breaches no partner’s rights under this agreement.”

This provision “prescribes[s] the standards by which the performance of the [section 8447(d)] obligation is to be measured.”, 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the right to call preferred stock and deciding by a 3-2 vote that exercising the call did not breach the implied covenant of good faith and fair dealing).

Subsection (c)(12) – 15 Pa.C.S. § 8448(b) delineates a partner’s rights to “maintain an action against the partnership or another partner.” It would be unreasonable to frustrate these rights but not unreasonable to channel their exercise. For example, the partnership agreement might select a forum, require pre-suit mediation, provide for arbitration, or require a pre-suit demand on a management committee before a partner files suit against the partnership. Similarly, it is not unreasonable to provide for liquidated damages consonant with the law of contracts. In contrast, it would be unreasonable for a partnership agreement to both: (i) require a would-be plaintiff to make demand on a management committee before filing suit against the partnership; and (ii) bar taking the claim to court no matter how long the management committee ponders the demand.

Subsection (c)(13) – The standards in 15 Pa.C.S. §§ 8441(m) and 8447(i) follow the standards used in other chapters of Title 15., 15 Pa.C.S. § 1746(b).

This paragraph limits direct efforts to exonerate a person from liability and also limits how far a partnership agreement can go in providing for indemnification. 15 Pa.C.S. § 8441(c) with respect to indemnification.

Although this paragraph does not expressly address contracts between a partnership and a partner,
the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

EXAMPLE: A general partnership enters into a management contract with its sole managing partner, and the contract provides the manager exoneration for liability to the partnership even for willful misconduct. Most likely, contract law will treat the provision as against public policy and therefore unenforceable. Restatement (Second) of Contracts § 195(1) (1981) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”) If not, a court should hold the provision unenforceable to avoid evisceration of subsection (c)(13).

Subsection (c)(14) – As a result of this restriction, a partner always has the power to dissociate; the partnership agreement can only negate the right. This approach is consistent with the notions that:

(i) a partnership is a voluntary association;
(ii) the partnership relationship is essentially contractual; and
(iii) only in exceptional circumstances does a party to a contract lack the power to breach, and courts will not enjoin a person to remain in an ongoing contractual relationship that involves trust and confidence. E. Allan Farnsworth, Contracts (3rd ed., 2003) § 12.7 at 781 (“A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal ... is based [in part] on the undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.”) (footnote omitted).

Subsection (c)(15) – The partnership agreement may not change the stated grounds for dissolution but may determine the forum in which a claim for dissolution under 15 Pa.C.S. § 8481(a)(4) or (5) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in partnership agreements in particular.

Subsection (c)(16) – The cited provisions comprise the non-waivable aspects of winding up a dissolved partnership. The other provisions of 15 Pa.C.S. § 8482 are permissive.

Subsection (c)(17) – This limitation pertains only to “the rights under this title of a person other than a partner.” The limitation is, however, itself substantially limited by 15 Pa.C.S. §§ 8416 (pertaining to the partnership agreement’s relationship to the partnership itself and to persons becoming partners) and 8417(b) (pertaining to the partnership agreement’s power over the rights of transferees).

Subsection (d) – The partnership agreement has broad power over the matters described in subsection (a), except as specifically limited by subsections (c) and (d)(3). However, for the convenience of practitioners and the courts, paragraphs (d)(1) and (2) list various arrangements often found in partnership agreements. Paragraph (d)(3) lists various ways that the partnership agreement may modify the duties of partners subject to the “not manifestly unreasonable” standard. Subsection (e) delineates that standard.

Subsection (d)(1)(i) – An arrangement involving “one or more disinterested and independent persons” acting “after full disclosure of all material facts” would “alter ... the aspects of the duty of loyalty stated in section 8447(b)(1)(i) or (ii) or (2)” and would therefore be subject to the “not manifestly unreasonable standard” of subsection (d)(3)(i).

Subsection (d)(1)(ii) – 15 Pa.C.S. 8231(a)(2) prohibits distributions:
when, after the distribution, “the partnership’s total assets would be less than the
sum of its total liabilities,“
when, after the distribution, the assets would less than the total liabilities “plus the
amount that would be needed, if the partnership were to be dissolved and wound up at the time
of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners
and transferees whose preferential rights are superior to the rights of persons receiving the
distribution.”

The second part of that balance sheet test pertains to preferential rights to distributions, is thus a matter
the partners and any transferees, and is therefore subject to change in the partnership agreement.

In contrast, the first part of the test protects third parties – creditors of the partnership – and
therefore cannot be changed by the partnership agreement. 

Subsection (d)(2) – The “not manifestly unreasonable” standard does not apply to partnership
agreement provisions within this paragraph.

EXAMPLE: ABC Company (“ABC”) has three partners. ABC has two entirely separate lines of
business, the Alpha business and the Beta business. Under ABC’s partnership agreement:
i. Partner 1’s responsibilities pertain exclusively to the Alpha business, while responsibility for:
the Beta business is allocated exclusively to Partner 2; and
ABC’s overall operations is allocated exclusively to Partner 3.
ii. Partner 2’s responsibilities pertain exclusively to the Beta business, while responsibility for:
the Alpha business is allocated exclusively to Partner 1, while
ABC’s overall operations is allocated exclusively to Partner 3.
iii. Partner 1 has no fiduciary duties pertaining to the Beta business.
iv. Partner 2 has no fiduciary duties pertaining to the Alpha business.
The elimination of Partner 1’s fiduciary duties with regard to the Beta business and Partner 2’s
fiduciary duties with regard to the Alpha business are enforceable, without regard to the “manifestly
unreasonable” standard of Subsection (d)(3).

Section (d)(3) – This chapter rejects the ultra-contractarian notion that fiduciary duty within a
business organization is merely a set of default rules and seeks instead to balance the virtues of “freedom
of contract” against the dangers that inescapably exist when some have power over the interests of others.

Nonetheless, a properly drafted partnership agreement may substantially alter and even eliminate
fiduciary duties. Two important limitations exist. First, arrangements subject to this subsection may not
be “manifestly unreasonable.” subsection (e) (delineating and strictly fencing in this standard).

Second, the partnership agreement may not transform the relationship among the partners and the
partnership into an entirely arm’s length arrangement. For example, displacement of fiduciary duties is
effective only to the extent that the displacement is stated clearly and with particularity. This rule is
fundamental in the jurisprudence of fiduciary duty.

Civ. A. No. 5502–CS, 2011 WL 3505355 at *31 (Del.Ch. Aug. 8, 2011) (stating that, even
under a statute that “permits the waiver of fiduciary duties … such waivers must be set forth clearly”). It
would therefore be manifestly unreasonable for a partnership agreement to negate this rule.
EXAMPLE: A general partnership enters into a management contract with its sole managing partner, and the contract provides that the duties of loyalty stated in 15 Pa.C.S. § 8447(b) are entirely eliminated. If the partnership agreement were to so provide, the provision would be subject to the “manifestly unreasonable standard.”

Subsection (d)(3)(i) - Subject to the “not manifestly unreasonable” standard, this paragraph empowers the partnership agreement to alter the aspects of the duty of loyalty listed in 15 Pa.C.S. § 8447(b)(1)(i) or (ii) or (2). The obligation of good faith and fair dealing would remain. Subsection (c)(6). As to any uncodified aspects of the duty of loyalty, as well as the aspects of the duty of loyalty stated in section 8447(b)(1)(iii) or (3), subsection (d)(3)(v) (empowering the partnership agreement to “alter or eliminate any other fiduciary duty”).

EXAMPLE: Joint Venture Company (“JV”) is a general partnership, with two partners, Kappa, Inc. (“Kappa”) and Lambda, LLC (“Lambda”). The partnership agreement provides that:

i. JV is managed by a “board” consisting of one person appointed by Kappa and one person appointed by Lambda;

ii. each appointee:
   - owes fiduciary and any other duties exclusively to the partner that made the appointment;
   - owes no duties to the other partner and the partnership.

The “not manifestly unreasonable” standard applies to these provisions under subsection (d)(3)(i) and (iv), and the provisions are not manifestly unreasonable. Note that the provisions do not affect the duties of Kappa and Lambda to each other.

Subsection (d)(3)(iii) - Under this paragraph, a partnership agreement might provide that an affiliate of a partner will provide compensated services to the partnership at a price not exceeding market price, or that the partner may pursue opportunities that otherwise would be partnership opportunities. Such arrangements are commonplace.

Subsection (d)(3)(iv) - Subject to the “not manifestly unreasonable” standard and the bedrock requirements stated here and in subsection (c)(13), the partnership agreement can reduce the duty of care almost to nil. In particular, the partnership agreement can eliminate the aspects of the duty of care pertaining to gross negligence and recklessness.

Subsection (e) - This subsection provides rules for applying the concept of varying the statutory default rules in a manner that is not manifestly unreasonable, specifying:

who decides the issue of “manifestly unreasonable”

“the court ... as a matter of law,” subsection (e);

the framework for determining the issue
determination to be made “in light of the purposes and business of the partnership,” subsection (e)(2);

the temporal setting for determining the issue
determination [to be made] as of the time the challenged term became part of the partnership agreement,” subsection (e)(1); and

what information is admissible for determining the issue
“only circumstances existing” when “the challenged term became part of the partnership agreement,” subsection (e)(1).
Subsection (e) also provides a very demanding standard for persons claiming that a term of a partnership agreement is “manifestly unreasonable.” “The court ... may invalidate the term only if, in light of the purposes, activities, and affairs of the partnership, it is that: (i) the objective of the term is unreasonable; or (ii) the term is an unreasonable means to achieve the term’s objective.” (emphasis added).

Subsection (e) is fundamental to Chapter 84 because of the deference Chapter 84 shows to the agreement among the partners. Subsection (e) safeguards the partnership agreement in at least four ways:

(i) Determining manifest unreasonableness with respect to the relationship among the owners of an organization is a different task than doing so in a commercial context, where concepts like “usages of trade” are available to inform the analysis. Each business organization must be understood in its own terms and context.

(ii) If loosely applied, the concept of “manifestly unreasonable” would permit a court to rewrite the partners’ agreement, which would destroy the balance Chapter 84 seeks to establish between freedom of contract and fiduciary duty.

(iii) Case law has not adequately delineated the concept.

, 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) (“RUPA does not define what is ‘manifestly unreasonable’ and the parties have not cited, nor can the court locate, a decision that defines the term. Absent case law or even a dictionary definition, the court must rely on its common sense to recognize something as manifestly unreasonable.”).

(iv) In the context of statutes permitting stock transfer restrictions unless “manifestly unreasonable,” courts have often ignored the meaning or role of “manifestly unreasonable,” courts have often ignored the meaning or role of “manifestly

, 692 N.W. 2d 144, 152 (N.D. 2005) (stating that “in close corporations, a majority of courts have sustained restrictions that are determined to be reasonable in light of the relevant circumstances”);

, 638 N.W. 2d 782, 786 (Minn. Ct. App. 2002) (stating that “the restrictions [on share transfer] are not ‘manifestly unreasonable’ because they are reasonable means to ensure that the management and control of the business remains in the group of investors or with people well known to them”);

, 633 A.2d 1024, 1027-28 (N.J. Super. Ct. App. Div. 1993) (“We are obliged to apply the statute in a manner consonant with its essential purpose to permit reasonable restrictions upon alienation.”).

Subsection (e)(1) – The significance of the phrase “as of the time the challenged term became part of the partnership agreement” is best shown by example.

EXAM PLE: When partnership P comes into existence, its business plan is quite unusual and its success depends on the willingness of Lisa to serve as its sole managing partner. Lisa has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the partnership’s start-up. In order to induce Lisa to accept the position of sole managing partner, the other partners are willing to have the partnership agreement significantly limit the managing partner’s fiduciary duties. Several years later, when the partnership’s operations have turned prosaic and the managing partner’s talents and background are not nearly so crucial, a partner challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under subsection (e)(1) is when the partnership began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

EXAM PLE: As initially adopted, a partnership agreement identifies a category of decisions ordinarily subject to the duty of loyalty and provides that “the managing partner’s sole, reasonable discretion” satisfies the duty. A year later, the agreement is amended to delete the word “reasonable.” Later, a partner claims that, without the word “reasonable,” the provision is manifestly unreasonable. The relevant time under subsection (e)(1) is when the agreement was
amended, not when the agreement was initially adopted.

6.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”

“partner”

“partnership”
The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“partnership”
(2) the document prevails as to other persons to the extent they reasonably rely on the document.

(e) Prohibition of oral amendments. – If a provision of a partnership agreement in record form provides that the partnership agreement cannot be amended, modified or rescinded except in record form, an oral agreement, amendment, modification or rescission shall not be enforceable.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 107.

Subsection (a) - This subsection permits a non-partner to have veto rights over amendments to the partnership agreement. An amendment made in derogation of such a veto right is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-partner managers.

Example: A non-partner manager enters into a management contract with a partnership, and that agreement provides in part that the partnership may remove the manager without cause only with the consent of partners holding 2/3 of the profits interests. The partnership agreement contains a parallel provision (the “quantum provision”), but the non-partner manager is not a party to the partnership agreement. Later, the partners amend the quantum provision to reduce the quantum to a simple majority of profits interests and thereafter purport to remove the manager without cause. Although the partnership has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the partnership has the under 15 Pa.C.S. § 8415(a)(2) to effect the removal – unless the partnership agreement provides the manager a veto right over changes in the partnership agreement’s quantum provision.

This subsection does not refer to partner veto rights because, unless otherwise provided in the partnership agreement, the consent of each partner is necessary to effect an amendment. 15 Pa.C.S. 8441(j).

Because “[a] partnership agreement may specify that its amendment requires … the satisfaction of a condition,” a partnership agreement can require that any amendment be made through a writing or a record signed by each partner. 15 Pa.C.S. § 8415(a)(4) (empowering the partnership agreement to determine “the means and conditions for amending the partnership agreement”).

Subsection (b) - The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization’s owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization’s economic interests. If, as is often the situation, the partnership agreement overrides 15 Pa.C.S. § 8471 (purchase of interest of person dissociated as partner), transferees can include the heirs of the partnership’s founders as well as former partners who, by agreement, are “locked in” as transferees of their own interests.

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that spectacle can “freeze the deal” as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

There is little case law in this area, and almost all of it pertains to limited liability companies rather
than partnerships. The case law clearly favors the remaining owners over former owners and other 
transferees. , , 849 P.2d 1365, 1367 n.2 (Alaska 1993) (holding that a mere assignee “was not entitled to complain about a decision made with the consent 
of all the partners” and stating “[w]e are unwilling to hold that partners owe a duty of good faith and fair 
dealing to assignees of a partner’s interest”).

This subsection follows and other cases by expressly subjecting transferees (including 
dissociated partners) to partnership agreement amendments made after the transfer or dissociation, except 
amendments that increase obligations on transferees. For example, an amendment might extend the 
duration of a partnership but may not institute a new capital call obligation on transferees.

The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to 
claim some type of duty or obligation to protect against expropriation, is a question for other law.

Moreover, the wording of the partnership agreement may be critical. For example, in 
, 440 S.W.3d 798, 813 (Tex. Ct. App. 2013), the court: (i) noted that a limited liability company’s 
“Regulations provide[] for the distribution of ‘available cash’ to members quarterly provided that the 
available cash is not needed for a reasonable working capital reserve;” (ii) also noted that “[c]how [the 
defendant member] paid himself $100,000 for management services that were not performed and failed 
to make any profit distributions to M ike [former member and ex-spouse of the plaintiff Parvaneh] or 
Parvaneh [ex-spouse of M ike, who became M ike’s transferee as part of their divorce proceeding] even 
though more than $250,000 in undistributed profit had accumulated in the company’s accounts since the 
mortgage on the property had been paid off in February 2007;” and (iii) concluded that “more than a 
scintilla of evidence supports the trial court’s finding that Jacob failed to make profit distributions to 
Parvaneh.” In essence, the court upheld a finding that Jacob had breached (or caused the partnership to 
breach) a contractual obligation to make distributions. But the court went further: “We also agree with 
the trial court’s conclusion that the established facts demonstrated Jacob engaged in wrongful conduct and 
exhibited a lack of fair dealing in the company’s affairs to the prejudice of Parvaneh.”

For the very limited rights in general of transferees, 15 Pa.C.S. § 8453.

Subsection (c) – This provision precludes using a filed document ( , a certificate of authority) to 
make an end run around the strictures of 15 Pa.C.S. § 8415(c) and (d)(3).

Subsection (d) – It will be possible, albeit improvident, for a partnership agreement to be 
inconsistent with a public filing pertaining to the partnership. For those circumstances, this subsection 
provides rules for determining which source of information prevails.

For partners and transferees, the partnership agreement is paramount. Third parties may invoke the 
public record upon a showing of reasonable reliance, which of course presupposes knowledge. Thus, a 
third party may not invoke deemed knowledge under 15 Pa.C.S. § 8413(d)(1) or deemed notice under 
section 8413(d)(2).

The mere fact that a term is present in a publicly-filed document and not in the partnership 
agreement, or , does not automatically establish a conflict. Subsection (d) does not expressly 
cover a situation in which: (i) one of the specified filed documents contains information in addition to, but 
not inconsistent with, the partnership agreement, and (ii) a person, other than a partner or transferee, 
reasonably relies on the additional information. However, the policy reflected in this subsection seems 
equally applicable to that situation. Moreover, to argue that the partnership agreement prevails over the 
filed record is to argue that the additional term does conflict with the partnership agreement, at least in 
effect.
15 Pa.C.S. § 8415(a)(4) might also be relevant to the subject matter of this subsection. Absent a contrary provision in the partnership agreement, language in a document delivered to the department for filing on behalf of the partnership may be evidence of the partners’ agreement and might thereby constitute or at least imply a term of the partnership agreement.

Subsection (d) does not apply to documents delivered to the department for filing on behalf of persons other than a partnership.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“partnership”
“Sign” is defined very broadly in 15 Pa.C.S. § 102 to include any manual, facsimile, conformed, or electronic signature.

From the perspective of the department, it is not necessary that a document delivered for filing on behalf of a partnership be delivered by a partner. The partnership agreement can impose such a requirement as an matter, but the requirement would not affect this provision. 15 Pa.C.S. § 8415(c)(7)(ii) (stating that the partnership agreement may not “vary any requirement, procedure, or other provision of this title pertaining to ... the department, including provisions pertaining to documents authorized or required to be delivered to the department for filing under this title”).

The department will not check whether a person who purports to be authorized to sign a document on behalf of a partnership actually has that authority, even if a certificate of authority pertaining to the matter is in effect. Indeed, even if the department somehow “knows” of a certificate limiting authority, the department lacks the authority to reject a document on that basis.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”
(A) filed a petition under section 144 (relating to signing and filing pursuant to judicial order); or

(B) delivered to the department for filing a statement of correction under section 138 (relating to statement of correction) or a statement of abandonment under section 141 (relating to abandonment of filing before effectiveness).

(b) Partner relieved of responsibility. – To the extent the partnership agreement expressly relieves a partner of responsibility for maintaining the accuracy of information contained in records delivered on behalf of the partnership to the department for filing under this title and imposes that responsibility on one or more other partners, the liability stated in subsection (a)(2) applies to those other partners and not to the partner that the partnership agreement relieves of the responsibility.

(c) Cross reference. – See section 143 (relating to liability for inaccurate information in filing).

Committee Comment (2016):

This section is patterned in part after Uniform Partnership Act (1997) (Last Amended 2013) § 109(a) and (b).

Subsection (a) – This subsection relates to liability to third parties for inaccurate information in a filed document. Paragraph 1 requires actual knowledge because the paragraph applies to non-partners as well as partners. Under paragraph 2(i), notice suffices, because: (i) the provision applies only to partners; (ii) by status partners have overall management authority; and (iii) therefore it is reasonable to impose liability when a partner either knows or “has reason to know ... from all the facts known to the person at the time in question.” 15 Pa.C.S. § 8413(b)(1) (defining notice). For the same reason, paragraph 1 applies only when a person knows there is false or misleading information in the document at the time the document is signed, while paragraph 2 applies whenever a “partner knew or had notice there was false or misleading information for a reasonably sufficient time before the document was relied upon so that, before the reliance, the partner reasonably could have [taken corrective action].”

Subsection (b) – 15 Pa.C.S. § 8415(d)(2) authorizes the partnership agreement to establish an analogous rule for the partners. This subsection goes where the partnership agreement cannot reach and affects the rights of third parties.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“partnership”
§ 8421. Partnership as entity.

(a) General rule. – A partnership is an entity distinct from its partners.

(b) Limited liability partnership. – A partnership is the same entity regardless of whether the partnership has a statement of registration in effect under section 8201 (relating to scope).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 201.

Subsection (a) - The law of general partnerships long struggled with the question of whether a partnership is merely an aggregate of its partners or an entity distinct from its partners.

The common law took the aggregate approach. , 111 A.2d 753, 759 (N.J. 1955) (stating that “the common law did not recognize the separate existence of partnerships”); , 691 P.2d 417, 418 (Nev. 1984) (referring to the “common law or aggregate theory of partnership”); , 324 S.W.2d 773, 776 (M.o. Ct. A pp. 1959) (referring to “the aggregate or common-law theory as to partnerships”).

Under the Uniform Partnership Act (1914), former 15 Pa.C.S. Ch. 83, a general partnership had both entity and aggregate characteristics, in part because that act’s first reporter, who died during the lengthy drafting process, strongly favored the entity approach, while his replacement just as strongly favored the aggregate construct. , 521 A.2d 693, 697 (M e. 1987) (“The draftsmen of the uniform act were divided over what effect it should have on the common law [aggregate] rule…. The result is the Act contains language that supports application of either [the entity or aggregate] theory.”)

This section embraces the entity theory of the partnership. Under this section there is no “new” partnership just because of partner changes. Chapter 84, however, retains several aspects of the aggregate construct: (i) under 15 Pa.C.S. § 8436(a), there is joint and several liability of the partners for the obligations of a partnership that is not a limited liability partnership; (ii) 15 Pa.C.S. § 8481(a)(1) continues the concept of a partnership at-will, under which dissociation of any partner by “express will” dissolves the partnership; and (iii) a partnership for a term or undertaking is susceptible to dissolution following the dissociation of a partner.

Subsection (b) - Neither becoming nor ceasing to be a limited liability partnership affects a partnership’s entity status. These changes merely add or subtract a characteristic.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
§ 8422. Formation of partnership.

(a) General rule. – Except as provided in subsection (b), the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.

(b) Excluded associations. – An association formed under a statute other than this chapter, a predecessor statute or a comparable statute of another jurisdiction is not a partnership under this chapter.

(c) Rules for determining formation of partnership. – In determining whether a partnership is formed, the following rules apply:

(1) Joint tenancy, tenancy in common, tenancy by the entirety, joint property, common property or part ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.

(2) The sharing of gross returns does not by itself establish a partnership, even if the persons sharing them have a joint or common right or interest in property from which the returns are derived.

(3) A person who receives a share of the profits of a business is presumed to be a partner in the business, unless the profits were received in payment:

   (i) of a debt by installments or otherwise;

   (ii) for services as an independent contractor or of wages or other compensation to an employee;

   (iii) of rent;

   (iv) of an annuity or other retirement or health benefit to a deceased or retired partner or a beneficiary, representative or designee of a deceased or retired partner;

   (v) of interest or other charge on a loan, even if the amount of payment varies with the profits of the business, including a direct or indirect present or future ownership of the collateral, or rights to income, proceeds or increase in value derived from the collateral; or

   (vi) for the sale of the goodwill of a business or other property by installments or otherwise.

(d) Cross reference. – See section 8416(c) (relating to application of partnership
Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 202.

This section combines former 15 Pa.C.S. §§ 8311 and 8312. The language of former 15 Pa.C.S. § 8311(a), which was a definition of a partnership, is recast as an operative rule of law. No substantive change in the law is intended. The former “definition” has always been understood as an operative rule, as well as a definition. The addition in subsection (a) of the phrase, “whether or not the persons intend to form a partnership,” merely codifies the universal construction of the prior law that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be “partners.” Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so. The language of subsection (a) alerts readers to this possibility.

Subsection (a) – Consistent with the common law and prior Pennsylvania statutory law, under Chapter 84 the attribute of co-ownership distinguishes a partnership from a mere agency relationship. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control (albeit a power that can be substantially diminished by agreement) and a right to share in the profits of the co-owned business. As subsection (c)(1) makes clear, however, passive co-ownership of property by itself, as distinguished from the carrying on of a business, does not establish a partnership, nor, as stated in subsection (c)(2), does the sharing of gross returns.

Subsection (b) – This subsection provides that business associations organized under other statutes are not partnerships. Those statutory associations include corporations, limited partnerships, and limited liability companies. This subsection thus continues the concept under the prior law that the general partnership is the residual form of for profit business association, existing only if another form does not.

One effect of subsection (b) is that a limited partnership is not a partnership for purposes of Chapter 84.

Relationships that are called “joint ventures” are partnerships if they otherwise fit the definition of a partnership. However, a relationship will not constitute a partnership simply because it is called a “joint venture.”

An unincorporated nonprofit association is not a partnership for purposes of Chapter 84, even if it qualifies as a business, because it is not a “for profit” organization.

Subsection (c) – This subsection provides three rules of construction that apply in determining whether a partnership has been formed under subsection (a). These rules are largely derived from former 15 Pa.C.S. § 8312, and to that extent no substantive change is intended. However, the sharing of profits is recast as a rebuttable presumption of the existence of a partnership, rather than as evidence, and that change is substantive. “ ” means that the party with the burden of proof has adduced sufficient evidence to carry that burden, subject to the finder of fact’s view of any contrary evidence. The burden of persuasion is unchanged. In contrast, “rebuttable presumption” switches the burden of persuasion.

Subsection (c)(3) – The protected categories, in which receipt of a share of the profits is not presumed to create a partnership, apply whether the profit share is a single flat percentage or a ratio which varies, for example, after reaching a dollar floor or different levels of profits. Subsection (c) makes no
attempt to answer in every case whether a partnership is formed. Whether a relationship is more properly
categorized as that of borrower and lender, employer and employee, or landlord and tenant is left to the
trier of fact. As under the prior law, a person may function in both partner and nonpartner capacities.

Subsection (c)(3)(v) – This protected category is new and excepts from the rebuttable presumption
a share of the profits received in payment of interest or other charges on a loan, “including a direct or
indirect present or future ownership of the collateral, or rights to income, proceeds or increase in value
derived from the collateral.” The quoted language was taken from Section 211 of the Uniform Land
Security Interest Act and is intended to protect shared-appreciation mortgages, contingent or other
variable or performance-related mortgages, and other equity participation arrangements by clarifying that
contingent payments do not presumptively convert lending arrangements into partnerships.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

§ 8423. Partnership property.

Property owned by a partnership is partnership property and is not owned by the partners
individually.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 203.

Although phrased differently, this section produces the same substantive result as did former 15
Pa.C.S. §§ 8313(a) and 8342. All property acquired by a partnership, by whatever manner acquired,
becomes partnership property and belongs to the partnership as an entity, rather than to the individual
partners.

15 Pa.C.S. § 8424 provides guidance concerning when property is acquired by the partnership.

Former 15 Pa.C.S. § 8342(b) also provided that partnership property is not subject to exemptions,
allowances, or rights of a partner’s spouse, heirs, or next of kin. Those provisions have been omitted as
unnecessary, because the exemptions and rights inure to the property of the partners, and not to
partnership property. No substantive change is intended.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”

The term “property” used in this section is defined in 15 Pa.C.S. § 102.
§ 8424. When property is partnership property.

(a) General rule. — Property is owned by a partnership and not by the partners individually if the property is acquired in the name of:

(1) the partnership by a transfer to:

   (i) the partnership in its name; or

   (ii) one or more partners in their capacity as partners in the partnership, if the name of the partnership is indicated in the instrument transferring title to the property; or

(2) one or more partners with an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership but without an indication of the name of the partnership.

(b) Property purchased with partnership assets. — Property is presumed to be partnership property if purchased with partnership assets, even if not acquired in the name of the partnership or of one or more partners with an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership.

(c) Property acquired in name of partner. — Property acquired in the name of one or more of the partners is presumed to be separate property owned by the individual partner or partners, even if used for partnership purposes, if the property is acquired without:

(1) an indication in the instrument transferring title to the property of the person’s capacity as a partner or of the existence of a partnership; and

(2) use of partnership assets.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 204.

This section states the rules for determining when property is acquired by the partnership and, hence, becomes partnership property. These rules apply to all property, regardless of whether the property is titled.

The rules in this section provide three separate approaches — according to:

1. the name or names used in acquiring the property;

2. when a partner’s name appears as a transferee, the capacity in which the partner is acting; and

3. for property acquired by purchase, whether the partnership provided the consideration for the property.

These approaches are complementary, not mutually exclusive.
This section omits any provision corresponding to former 15 Pa.C.S. § 8313(d), which provided “A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.” That provision has been omitted as unnecessary because modern conveyancing law deems all transfers to pass the entire estate of the grantor unless a contrary intent appears.

**Subsection (a)** - Subsection (a) provides the first two of the approaches listed above.

Under this subsection, property becomes partnership property if acquired (1) in the name of the partnership; or (2) in the name of one or more of the partners with an indication in the instrument transferring title of either (i) their capacity as partners, or (ii) of the existence of a partnership, even if the name of the partnership is not indicated. Property acquired “in the name of the partnership” includes property acquired in the name of one or more partners in their capacity as partners, but only if the name of the partnership is indicated in the instrument transferring title.

Property transferred to a partner is partnership property, even though the name of the partnership is not indicated, if the instrument transferring title indicates either (i) the partner’s capacity as a partner, or (ii) the existence of a partnership. This approach is consonant with the entity theory of partnership and resolves the troublesome issue of a conveyance to fewer than all the partners but which nevertheless indicates their partner status.

**Subsections (b) and (c)** - Ultimately, it is the intention of the partners that controls whether property belongs to the partnership or to one or more of the partners in their individual capacities, at least the partners and partnership. Each of these subsections contains rebuttable presumptions which, when applicable, establish the burden of persuasion as to the partners’ intent.

These presumptions are subject to an important caveat. Under 15 Pa.C.S. § 8432(a)(3), partnership property held in the name of individual partners, without an indication of their capacity as partners or of the existence of a partnership, that is transferred by the partners in whose name title is held to a purchaser without knowledge that it is partnership property is free of any claims of the partnership.

**Subsection (b)** - Under this subsection, property purchased with partnership property is presumed to be partnership property, notwithstanding the name in which title is held or any other indicia of ownership. In this context, a promise made by a partnership in exchange for property triggers the presumption, including a promise to perform services or to guarantee another person’s obligation with regard to the purchase of the property.

The presumption is entirely ineffective against third parties with regard to property with record title.

**Example**: Using partnership funds, a partner purchases realty in the partner’s own name and so records the purchase in the appropriate land records. The partner later transfers title to the realty to a third party that has neither knowledge nor notice of any rights the partnership may have in the property. The relevant real estate statute is the applicable law; this subsection is entirely inapposite.

Generally, partners and third parties dealing with partnerships will be able to rely on the record to determine whether property is owned by the partnership. The exception is property purchased with partnership funds without any reference to the partnership in the title documents. The inference concerning the partners’ intent from the use of partnership funds outweighs any inference from the state of the title, subject to the overriding reliance interest in the case of a purchaser without notice of the partnership’s interest. This allocation of risk should encourage the partnership to eliminate doubt about ownership by putting title in the partnership.
Subsection (c) - Under this subsection, property acquired in the name of one or more of the partners, without an indication of their capacity as partners and without use of partnership funds or credit, is presumed to be the partners' separate property, even if used for partnership purposes. In effect, it is presumed that only the use of the property is contributed to the partnership.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“property”
“transfer”

Subchapter C
Relations of Partners to Persons Dealing with Partnership

Section
8431. Partner agent of partnership.
8432. Transfer of partnership property.
8433. Certificate of partnership authority.
8434. Certificate of denial.
8435. Partnership liable for partner’s actionable conduct.
8436. Partner’s liability.
8437. Actions by and against partnership and partners.
8438. Liability of purported partner.

§ 8431. Partner agent of partnership.

Subsection (c)

Subject to the effect of a certificate of partnership authority under section 8433 (relating to certificate of partnership authority), the following rules apply:

(1) Each partner is an agent of the partnership for the purpose of its business. An act of a partner, including the signing of an instrument in the partnership name, for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership, unless the partner did not have authority to act for the partnership in the particular matter and the person with which the partner was dealing knew or had notice that the partner lacked authority.

(2) An act of a partner which is not apparently for carrying on in the ordinary course the partnership’s business or business of the kind carried on by the partnership binds the partnership only if the partner had actual authority to take the action.

Committee Comment (2016):
This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 301.

At common law, a general partner was considered a general agent of the partnership. Joseph Story, Commentaries on the Law on Partnership (2nd ed. 1850) § 101 at 153; Restatement (Second) of Agency § 14A, cmt. a (1958), and the mere status of a general partner “clothes” a person with apparent authority to carry on the partnership business. 80 U.S. 531, 567 (1871); 56 M.o.App. 160 (M.o.App. 1894); N.E.2d 731, 733, 740 (Mass. 1996). In 1914, the Uniform Partnership Act (1914) § 9 codified this principle and “statutory apparent authority” has been part of uniform partnership acts ever since.

This section delineates a partner’s statutory apparent authority. The rights of the partners among themselves, including the right to restrict a partner’s authority, are governed by the partnership agreement and by 15 Pa.C.S. § 841.

The agency rules stated in this section are subject to an important qualification. They may be affected by the filing or recording of a certificate of partnership authority under 15 Pa.C.S. § 8433, which establishes the mechanics for and the legal effect of filing or recording a certificate of partnership authority.

**Paragraph (1)** - This paragraph retains the basic principles reflected in former 15 Pa.C.S. § 8321(a). The paragraph declares that each partner is an agent of the partnership and that, by virtue of partnership status, each partner has apparent authority to bind the partnership in ordinary course transactions. The effect of paragraph (1) is to characterize a partner as a general managerial agent having both actual and apparent authority. This section delineates the extent of the apparent authority.

The agency law origins of statutory apparent authority inform the authority. For example, although the statutory language does not appear to require that the appearance of authority be reasonable, the case law routinely does. 101 B.R. 1007, 1019 (Bankr. W.D. Mo. 1989) (stating a third-party lender in possession of a copy of a limited partnership's partnership agreement was on notice of the general partner's lack of authority and therefore should have inquired as to the partner's authority), 926 F.2d 752 (8th Cir. 1991); S.E.2d 786, 789 (N.C. 1987) (stating that “in order to hold the [partnership] liable, [a third party] must show that in the exercise of reasonable care under the circumstances, it was justified in believing that the principal had conferred ... authority to [act] on behalf of the partnership”); 723 P.2d 1005, 1010 (Or. Ct. App. 1986) (stating that bank in possession of management agreement was on notice of general partner’s restricted authority and could not rely on a theory of apparent authority).

Likewise, per the law of apparent authority, a partner can bind a partnership under this provision even if the partner intends to and does take the resulting benefits for the partner’s own benefit. 360 S.E.2d 786 at 788 (stating that the mere fact that the partner’s act was for personal gain was not enough to justify summary judgment for the partnership on the subject of the partnership’s liability for the act); 413 S.W.2d 204, 216 (M.o. 1967) (stating that partnership is liable for partner’s acts “even if the predominant motive of the partner was to benefit himself or third persons”); 18 A.2d 5, 7 (N.J. Eq. 1941) (“All the partners are responsible for the act of one of their number as agent, even though he acts for some secret purpose of his own, and not really for the benefit of the [partnership].”); 21 A.2d 801 (1941).

This section makes three changes from former 15 Pa.C.S. § 8321(a). First, paragraph (1) clarifies
that a partner’s apparent authority includes acts for carrying on in the ordinary course “business of the kind carried on by the partnership,” not just the business of the particular partnership in question. The former law was ambiguous on this point, but there is some authority for an expanded construction in accordance with the so-called English rule., 439 S.W.2d 128, 131 (Tex.Civ. App. 1969) (dictum); , 254 S.W. 521 (Tex. App. 1923).

Second, paragraph (1) uses “carrying on in the ordinary course” in lieu of the phrase “in the usual way” in the former law. The change in language also has the benefit of aligning paragraph (1) with 15 Pa.C.S. § 8435 (establishing attribution rules for a partner’s wrongful conduct and referring to “ordinary course of business of the partnership” and “in the course of the partnership’s business”).

The third change from the prior law concerns the allocation of risk of a partner’s lack of authority. Under former 15 Pa.C.S. § 8321(a) and (d), only a person with knowledge of a restriction on a partner’s authority was bound by that restriction. Under paragraph (1), a person who knows or has reason to know of a partner’s lack of authority is bound and thus, to some extent, the risk of lack of authority is shifted from the partners and partnership to those dealing with partners. A third party who has reason to know of a partner’s lack of authority will be hard pressed to demonstrate a reasonable belief that the partner had authority.

With one exception, the rules stated in paragraph (1) are not affected even if the partnership files a certificate of partnership authority containing a limitation on a partner’s authority. 15 Pa.C.S. § 8433(e) makes clear that a person dealing with a partner is not deemed to know of such a limitation merely because it is contained in a filed certificate of authority. Under 15 Pa.C.S. § 8433(f), however, all persons are deemed to know of a limitation on the authority of a partner to transfer real property contained in a recorded certificate. Thus, a recorded limitation on authority concerning real property constitutes constructive knowledge of the limitation to the whole world.

Paragraph (2) - This paragraph is drawn directly from former 15 Pa.C.S. § 8321(b), with conforming changes to mirror the new language of paragraph (1), and makes clear that the partnership is bound by a partner’s actual authority, even if the partner has no apparent authority. 15 Pa.C.S. § 8441(j) requires the unanimous consent of the partners for a grant of authority outside the ordinary course of business, unless the partnership agreement provides otherwise. Under general agency principles, the partners can subsequently ratify a partner’s unauthorized act. 15 Pa.C.S. § 110.

The list in former 15 Pa.C.S. § 8321(c) of five extraordinary acts requiring unanimous consent of the partners before the partnership is bound has been omitted. Most of the acts in that list probably remain outside the apparent authority of a partner under this chapter, such as disposing of the goodwill of the business, but elimination of a statutory rule and leaving the decision to the courts affords more flexibility in some of the formerly specified situations. In particular, it seems archaic that the submission of a partnership claim to arbitration always requires unanimous consent.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“act”
“sign”
§ 8432. Transfer of partnership property.

(a) General rule. - Partnership property may be transferred as follows:

(1) Subject to the effect of a certificate of partnership authority under section 8433 (relating to certificate of partnership authority), partnership property held in the name of the partnership may be transferred by an instrument of transfer signed by a partner in the partnership name.

(2) Partnership property held in the name of one or more partners with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer signed by the persons in whose name the property is held.

(3) Partnership property held in the name of one or more persons other than the partnership, without an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, may be transferred by an instrument of transfer signed by the persons in whose name the property is held.

(b) Recovery of property by partnership. - A partnership may recover partnership property from a transferee only if it proves that the signing of the instrument of initial transfer did not bind the partnership under section 8431 (relating to partner agent of partnership) and:

(1) as to a subsequent transferee who gave value for property transferred under subsection (a)(1) or (2), proves that the subsequent transferee knew or had notice that the person who signed the instrument of initial transfer lacked authority to bind the partnership; or

(2) as to a transferee who gave value for property transferred under subsection (a)(3), proves that the transferee knew or had notice that the property was partnership property and that the person who signed the instrument of initial transfer lacked authority to bind the partnership.

(c) Subsequent transferees. - A partnership may not recover partnership property from a subsequent transferee if the partnership would not have been entitled to recover the property under subsection (b) from any earlier transferee of the property.

(d) Sole partner. - If one person holds all the interests in a partnership, all the partnership property vests in that person. The person may sign a document in the name of the partnership to evidence vesting of the property in that person and may file or record the document.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 302.
This section replaces former 15 Pa.C.S. § 8322 and provides rules for the transfer and recovery of partnership property. The former provision covered only real property. This section, however, also governs the transfer of partnership personal property acquired by instrument and held in the name of the partnership or one or more of the partners. The rules stated in this section necessarily parallel the rules stated in 15 Pa.C.S. § 8424.

**Subsection (a)** - Subsection (a)(1) deals with the transfer of partnership property held in the name of the partnership and subsection (a)(2) with property held in the name of one or more of the partners with an indication either of their capacity as partners or of the existence of a partnership. Subsection (a)(3) deals with partnership property held in the name of one or more persons without an indication of their capacity as partners or of the existence of a partnership. Like the general agency rules in 15 Pa.C.S. § 8431, the power of a partner to transfer partnership property under subsection (a)(1) is subject to the effect under 15 Pa.C.S. § 8433 of the filing or recording of a certificate of partnership authority. These rules are intended to foster reliance on record title.

**Subsection (b)** - This subsection deals with the right of the partnership to recover partnership property transferred by a partner without actual authority.

**Subsection (b)(1)** - This paragraph deals with the recovery of property held in either the name of the partnership or the name of one or more of the partners with an indication of their capacity as partners or of the existence of a partnership, while subsection (b)(2) deals with the recovery of property held in the name of one or more persons without an indication of their capacity as partners or of the existence of a partnership. In either case, a transfer of partnership property may be avoided only if the partnership proves that it was not bound under 15 Pa.C.S. § 8431 by the execution of the instrument of initial transfer. The burden of persuasion is on the partnership to prove the partner’s lack of actual or apparent authority and, in the case of a subsequent transferee, the transferee’s knowledge or notification thereof. Thus, even if the transfer to the initial transferee could be avoided, the partnership may not recover the property from a subsequent purchaser or other transferee for value unless it also proves that the subsequent transferee knew or had received a notification of the partner’s lack of authority with respect to the initial transfer. Since knowledge is required, rather than notice, a remote purchaser has no duty to inquire as to the authority for the initial transfer, even if he knows it was partnership property.

The burden of persuasion is on the transferee to show that value was given. Value, as used in this context, is synonymous with valuable consideration and means any consideration sufficient to support a simple contract.

The burden of persuasion on all other issues is allocated to the partnership consistent with the general proposition that a party has the burden of proving the elements of the parties claim and because a partnership is generally in a better position than the transferee to produce the evidence (at least as to actual authority). Moreover, the partnership may protect itself against unauthorized transfers by ensuring that partnership real property is held in the name of the partnership and that a certificate of partnership authority is recorded specifying any limitations on the partners’ authority to convey real property. Under 15 Pa.C.S. § 8433(f), transferees of real property held in the partnership name are conclusively bound by those limitations. On the other hand, transferees can protect themselves by insisting that the partnership record a certificate specifying who is authorized to transfer partnership property. Under 15 Pa.C.S. § 8433(e), transferees for value, without actual knowledge to the contrary, may rely on that grant of authority.

**Subsection (b)(2)** - This paragraph replaces former 15 Pa.C.S. § 8322(c) and provides that partners
who hold partnership property in their own names, without an indication in the record of their capacity as
partners or of the existence of a partnership, may transfer good title to a transferee for value without
knowledge or a notification that it was partnership property. To recover the property under this
subsection, the partnership has the burden of proving that the transferee knew or had notice of the
partnership’s interest in the property, as well as of the partner’s lack of authority for the initial transfer.

Subsection (c) – This subsection is new and provides that property may not be recovered by the
partnership from a remote transferee if any intermediate transferee of the property would have prevailed
against the partnership. . 12 Pa.C.S. §§ 5108(a) (subsequent transferee from bona fide purchaser
protected), 5108(b)(2) (same).

Subsection (d) – This subsection is also new. The prior law did not have a provision dealing with
the situation in which all of the partners’ interests in the partnership are held by one person, such as a
surviving partner or a purchaser of all the other partners’ interests. This subsection allows for clear record
title, even though the partnership no longer exists as a technical matter. When a partnership becomes a
sole proprietorship by reason of the dissociation of all but one of the partners, title vests in the remaining
“partner,” although there is no “transfer” of the property. The remaining “partner” may execute a deed or
other transfer of record in the name of the non-existent partnership to evidence vesting of the property in
that person’s individual capacity.

15 Pa.C.S. § 8481(a)(6) states that a cause of dissolution is “the passage of 90 consecutive days
during which the partnership does not have at least two partners.” That statement implies that: (i) for at
least 89 consecutive days a partnership remains undissolved although having only one partner; and (ii)
even at 90 days the partnership remains a partnership, albeit dissolved and compelled to wind up its
business. Subsection (d) is useful because it permits transfer of partnership property even before the
passage of the full 90 day period.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”

The term “transferee” is used in this section with a different meaning than is given to it in 15
Pa.C.S. § 8412.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“property”
“transfer”

§ 8433. Certificate of partnership authority.

(a) General rule. – A partnership may deliver to the department for filing a certificate of
partnership authority. The certificate:

(1) must include the name of the partnership and:

(i) if the partnership is not a registered foreign limited liability partnership,
the street and mailing addresses of its principal office; or
(ii) if the partnership is a registered foreign limited liability partnership, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office;

(2) with respect to any position that exists in or with respect to the partnership, may state the authority, or limitations on the authority, of all persons holding the position to:

(i) sign an instrument transferring real property held in the name of the partnership; or

(ii) enter into other transactions on behalf of, or otherwise act for or bind, the partnership; and

(3) may state the authority, or limitations on the authority, of a specific person to:

(i) sign an instrument transferring real property held in the name of the partnership; or

(ii) enter into other transactions on behalf of, or otherwise act for or bind, the partnership.

(b) Amendment or cancellation. – To amend or cancel a certificate of authority filed by the department, a partnership must deliver to the department for filing an amendment or cancellation stating:

(1) the name of the partnership;

(2) if the partnership is not a registered foreign limited liability partnership, the street and mailing addresses of the partnership’s principal office;

(3) if the partnership is a registered foreign limited liability partnership, subject to section 109, the address, including street and number, if any, of its registered office;

(4) the date the certificate being affected became effective; and

(5) the contents of the amendment or a statement that the certificate is canceled.

(c) Effect of certificate. – A certificate of authority:

(1) affects only the power of a person to bind a partnership to persons that are not partners; and

(2) is not binding on the department for purposes of the administration of this title or any other provision of law.
(d) Effect of limitation on authority. – Subject to subsection (c) and section 8413(d)(1) (relating to knowledge and notice), and except as provided in subsections (f), (g) and (h), a limitation on the authority of a person or a position contained in an effective certificate of authority is not by itself evidence of any person’s knowledge or notice of the limitation.

(e) Authority not relating to real property. – A grant of authority not pertaining to transfers of real property and contained in an effective certificate of authority is conclusive in favor of a person that gives value in reliance on the grant, unless when the person gives value:

(1) the person has knowledge to the contrary;

(2) the certificate has been canceled or restrictively amended under subsection (b); or

(3) a limitation on the grant is contained in another certificate of authority that became effective after the certificate containing the grant became effective.

(f) Authority relating to real property. – An effective certificate of authority that grants authority to transfer real property held in the name of the partnership, a certified copy of which certificate is recorded in the office of the recorder of deeds for the county in which the real property is located, is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, unless when the person gives value:

(1) the certificate has been canceled or restrictively amended under subsection (b), and a certified copy of the cancellation or restrictive amendment has been recorded in the office of the recorder of deeds for the county in which the real property is located; or

(2) a limitation on the grant is contained in another certificate of authority that became effective after the certificate containing the grant became effective and a certified copy of the later-effective certificate is recorded in the office of the recorder of deeds for the county in which the real property is located.

(g) Constructive knowledge of limitation. – Subject to subsection (c), if a certified copy of an effective certificate containing a limitation on the authority to transfer real property held in the name of a partnership is recorded in the office of the recorder of deeds for the county in which real property is located, all persons are deemed to know of the limitation.

(h) Effect of certificate of dissolution. – Subject to subsection (i), an effective certificate of dissolution is a cancellation of any filed certificate of authority for the purposes of subsection (f) and is a limitation on authority for purposes of subsection (g).

(i) Post-dissolution certificate of authority. – After a certificate of dissolution becomes effective, a partnership may deliver to the department for filing and, if appropriate, may record a certificate of authority that is designated as a post-dissolution certificate of authority. The certificate operates as provided in subsections (f) and (g).
(j) Cancellation by operation of law. – Unless canceled earlier, an effective certificate of
authority is canceled by operation of law five years after the date on which the certificate, or its
most recent amendment, becomes effective. The cancellation is effective without recording
under subsection (f) or (g).

(k) Effect of certificate of denial. – An effective certificate of denial under section 8434
(relating to certificate of denial):

(1) operates as a restrictive amendment under this section and a certified copy may
be recorded as provided in subsection (f)(1) by the partnership or the person that delivered
the certificate of denial to the department for filing; and

(2) affects only the authority of a person to bind a partnership with respect to
persons that are not partners.

(l) Foreign partnerships. – A foreign partnership, regardless of whether it is registered to
do business in this Commonwealth, may deliver a certificate of authority to the department for
filing and may record a copy as provided in this section in the same manner and with the same
effect is if it were a domestic partnership.

(m) Cross references. - See:
Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8418 (relating to signing of filed documents).
Section 8482 (relating to winding up and filing of certificates).

Committee Comment (2016):
This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 303.

This section is conceptually divided into two realms: certificates pertaining to the power to transfer
interests in the partnership’s real property and certificates pertaining to other matters. In the latter realm,
certificates are filed only in the records of the department and operate only to the extent the certificates
are actually known and relied on by a third party. subsections (d) and (e).

As to interests in real property, in contrast, this section: (i) requires double-filing – with the
department and the recorder of deeds; and (ii) provides for constructive knowledge of certificates limiting
authority. Thus, a properly filed and recorded certificate can protect the partnership under subsection (g),
and, in order for a certificate pertaining to real property to be a sword in the hands of a third party, the
certificate must have been both filed and properly recorded under subsection (f). It is expected that
certificates of authority will most often be used in connection with transactions in real property.

Subsection (a)(2) - This paragraph permits a certificate to designate authority by position (or
office) rather than by specific person, thus avoiding the need to file anew whenever a new person assumes
the position or the office. This type of a certificate will enable partnerships to provide evidence of
ongoing power to enter into transactions without having to disclose to third parties the entirety of the partnership agreement.

Here and elsewhere in the section, the phrase “real property” includes all types of interests in real property, such as mortgages, easements, etc.

Subsection (a)(2)(i) and (a)(3)(i) - The authority to “sign” an instrument includes the authority to commit the partnership to the transfer reflected in the agreement. Subsection (f) (referring not merely to signing but rather to “an effective statement of authority that grants authority to transfer real property”).

Subsection (c) - This subsection expresses a very important limitation - that this section’s rules do not operate vis-à-vis partners. For partners, the partnership agreement is controlling under 15 Pa.C.S. § 8417(d). However, like any other document delivered for filing on behalf of a partnership, a certificate of authority might be some evidence of the contents of the partnership agreement.

Another important limitation exists. Under subsection (c)(2), the department is not affected by a certificate of authority that purports to delineate the authority of persons to sign documents to be delivered for filing of behalf of a partnership. Moreover, even if an employee of the department happened to see that a certificate of authority purported to delineate the authority of persons to sign records to be delivered on behalf of a partnership, that information would not be binding on the department.

Subsection (d) - The phrase “by itself” in subsection (d) is important because the existence of a limitation of authority could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

Subsections (f) through (h) - These subsections pertain to transactions in real property and provide a mechanism by which authority to transfer a partnership’s real property can be made to appear in the real estate records.

Subsection (f) - This subsection provides a sword for a vendee of real property. If the vendee has “give[n] value in reliance on the grant without knowledge to the contrary,” the certificate of authority protects the vendee against claims that contradict the grant.

Subsection (g) - This subsection provides a shield for the partnership as alleged vendor. If a vendee’s claim contradicts the stated limitation, constructive knowledge (“deemed to know”) defeats the claim even if the vendee gave value and lacked actual knowledge.

Subsection (h) - This subsection integrates certificates of dissolution and termination into the operation of this section.

The effect of a certificate of dissolution depends on the circumstances.

EXAMPLE: ABC Company, a general partnership, has in effect a properly filed and recorded certificate of authority authorizing ABC’s CEO to transfer real property owned by the partnership. The proper filing and recording by ABC of a certificate of dissolution cancels the certificate of authority. Subsequently, Buyer gives value in return for a deed signed by the CEO on behalf of ABC. Due to subsections (h) and (f)(1), subsection (f) does not protect Buyer. Moreover, under subsections (g) and (h), Buyer is “deemed to know” of the dissolution. Whether that deemed knowledge functions to deprive the CEO of authority to bind ABC depends on agency law and
additional facts. For example, the CEO might have had actual or apparent authority to transfer the real property despite the dissolution of the partnership.

In contrast, the effect of a certificate of termination under 15 Pa.C.S. § 8482(b)(2)(vi), is categorical. If properly filed with the department and properly recorded in the office of the recorder of deeds, the statement eliminates the power of any person to transfer real property owned in the name of the partnership. No one can have the authority to act for a non-existent entity. Restatement (Third) of Agency § 4.04(1)(a) (2006) (precluding ratification by a principal that did not exist at the time of the unauthorized act).

Subsection (i) - This provision permits a partnership to use certificates of authority during winding up. As an additional protection for third parties, a certificate must be "designated as a post-dissolution certificate of authority" to be effective under this provision.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

"partner"
"partnership"

The following terms used in this section are defined in 15 Pa.C.S. § 102:

"department"
"principal office"
"sign"
"transfer"

§ 8434. Certificate of denial.

(a) General rule. - A person named in a filed certificate of authority granting that person authority may deliver to the department for filing a certificate of denial that:

(1) provides the name of the partnership and:

(i) if the partnership is not a registered foreign limited liability partnership, the street and mailing addresses of its principal office; or

(ii) if the partnership is a registered foreign limited liability partnership, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office;

(2) states the caption of the certificate of authority to which the certificate of denial pertains; and

(3) denies the grant of authority.

(b) Cross references. - See:
Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8418 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 304.

A person whose powers are delineated in the public record by another person should have the right to dissent from that delineation. For the effect of a certificate of denial, 15 Pa.C.S. § 8433(k).

15 Pa.C.S. § 8438(c) makes clear that a person does not become a partner solely because the person is named as a partner in a certificate of partnership authority filed by another person.

The term “partnership” used in this section is defined in 15 Pa.C.S. § 8412.

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8435. Partnership liable for partner’s actionable conduct.

(a) General rule. – A partnership is liable for loss or injury caused to a person, or for a penalty incurred, as a result of a wrongful act or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with the actual or apparent authority of the partnership.

(b) Misapplication of property. – If, in the course of the partnership’s business or while acting with actual or apparent authority of the partnership, a partner receives or causes the partnership to receive money or property of a person not a partner and the money or property is misapplied by a partner, the partnership is liable for the loss.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 305.

Subsection (a) – This provision is derived from former 15 Pa.C.S. § 8325 and for the most part parallels the agency law doctrine of . RESTATEMENT (SECOND) OF AGENCY § 14A, cmt. a (1958) (“When one of the partners is in active management of the business or is otherwise regularly employed in the business, he is a servant of the partnership.”). The liability is vicarious and without regard to the fault of those managing the partnership.

The rights provided by subsection (a) are not limited to persons who are not partners in the partnership. This permits a partner to sue the partnership under this subsection during the term of the partnership, rather than being limited to the remedies of dissolution and an accounting.

The phrase “or other actionable conduct” means subsection (a) covers no-fault torts.
To invoke successfully subsection (a), a plaintiff must show: (i) "a wrongful act or other actionable conduct" by a general partner; (ii) that caused "loss or injury;" and (iii) that at the relevant moment, the general partner was acting with actual authority, apparent authority (if relevant), or within "the ordinary course of business of the partnership."

Extrapolating from agency law, apparent authority is relevant only when the appearance of authority augments the impact of the wrongful act or omission. RESTATEMENT (THIRD) OF AGENCY § 7.08 (2006) ("A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.")

An act or omission may be "in the ordinary course of business of the partnership" even though the act is wrongful. Any other interpretation would vitiate the "ordinary course" element. "The proper question ... is not whether the specific wrongful act is 'ordinary course' ..., but rather whether that type of act, if done rightfully, would be." Daniel S. Kleinberger, AGENCY, PARTNERSHIP AND LLCs: EXAMPLES AND EXPLANATIONS (4th ed.; Wolters Kluwer; 2012) § 10.5.1 at 350 (emphasis omitted). Moreover, the proper question is whether the conduct is in the ordinary course for the partnership and not whether the particular partner ordinarily plays a role in that part of the partnership's business.

Subsection (b) – This provision is derived from former 15 Pa.C.S. § 8326. It is not necessary that the general partner "receive[ing] or caus[ing] the partnership to receive money or property" do so wrongfully. Culpability is necessary at the second phase — when "the money or property is misapplied by a partner."

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“act”
“property”

§ 8436. Partner’s liability.

(a) General rule. – Except as provided in subsection (b) or section 8204 (relating to limitation on liability of partners), all partners are jointly and severally liable for all debts,
obligations and other liabilities of the partnership unless otherwise agreed by the claimant or provided by law.

(b) Preexisting liabilities. A person that becomes a partner is not personally liable for a debt, obligation or other liability of the partnership incurred before the person became a partner.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 306(a) and (b).

Subsection (a) - Under former 15 Pa.C.S. § 8327, the nature of the general partners’ liability depended on the claim giving rise to the partnership’s liability. If the partnership’s liability sounded in tort, the general partners’ liability was joint and several. If the partnership’s liability sounded in contract, the general partners’ liability was only joint. Subsection (a) dispenses with that distinction.

Nonetheless, in one respect joint and several liability under Chapter 84 differs from the classic model, which permits a judgment creditor to proceed immediately against any of the joint and several judgment debtors. Generally, 15 Pa.C.S. § 8437(d) requires a judgment creditor to exhaust the partnership’s assets before enforcing a judgment against the separate assets of a partner.

Subsection (b) - Chapter 84 continues the approach of the prior law in former 15 Pa.C.S. §§ 8329 and 8363(g), but states the rule more clearly and simply. Under subsection (a), a person becoming a partner in a partnership that is not a limited liability partnership becomes jointly and severally liable as a partner for all partnership obligations, except as otherwise provided in subsection (b). That subsection excludes from an incoming partner’s personal liability all partnership obligations incurred before the person became a partner. In effect, a new partner has no personal liability to pre-existing creditors of the partnership, and only the person’s investment in the firm is at risk for the satisfaction of existing partnership debts. This subsection leaves to other law the question of when a partnership incurs a debt, obligation, or other liability.

With regard to when a partnership incurs a debt, obligation, or other liability, the case law is scant and concerns only contractual and similar obligations. The leading case is 658 A.2d 1257 (N.J. 1995), which holds that: (i) obligations on a loan, whether for interest or principal, are incurred when the loan is made, not when each particular payment is due; and (ii) obligations for lease payments are incurred when each rental payment is due, not when the lease is made.

Concerned a loan obligation entered into before a partner joined the partnership but for the most part payable afterwards. The court held that “interest is part of the contractual debt, and the obligation to pay interest on a loan if at all, at the time that the parties execute the note or other debt instrument. 658 A.2d at 1261 (emphasis in original). The court indicated that the same analysis applies to the obligation to repay principal. at 1263 (stating that “the decisive issue before this court ... [is that] [p]ayment of interest, like repayment of advances, is an obligation that arises at the time the debt instrument is executed”).

Discussed the lease issue in response to the creditor’s argument that “just as a rent obligation arises for current use of property, an interest obligation arises for current use of principal.” at 1261. Rejecting that argument, the court: (i) noted “the common-law obligation to pay rent based on current tenancy [which]... arises with each period of tenancy, and ... arises even in the absence of a lease;” (ii) described “the common-law obligation to pay rent [as] entirely independent of the contractual
obligation under the lease;" and (iii) held that, for purposes of partnership law, the rule for “incurring” a
lease obligation rests on the common law duty in tenancy and not on the lease as a contract. (citing
104 P.2d 507, 508 (Cal. 1940)).

As to when a partnership incurs a tort liability, the answer might be found by analogy to statute of
limitation rules, another area of law concerned with when claims arise. “Although the courts have not
been consistent ..., the interpretation of [when a ... statute [of limitations begins to run] as applied to
torts has been such that the statute does not usually begin to run until the tort is complete.... A tort is
ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff.”
RESTATEMENT (SECOND) OF TORTS § 899 (1979), cmt. c.
Cal. App. 3d 1071 (Ct. App. 1983). By analogy, a partnership would incur liability for a tort when the
harm occurs. , 828 P.2d 218, 224 (Colo. 1992) (“A cause of action has commonly
been understood to 'accrue' when a suit may be maintained thereon.) (quoting BLACK’S LAW DICTIONARY
1983).

However, a policy argument exists to the contrary. Vicarious liability for a partnership's torts
should be confined to persons who are partners when the wrongful conduct occurs. It is the conduct, not
the consequences, that is wrongful; therefore, the occurrence of the wrongful conduct should determine
which set of owners are liable for the conduct's consequences.

The analysis set forth above of when a partnership incurs a liability is also applicable to the
question of the effect of the liability shield in 15 Pa.C.S. § 8204 on liabilities existing before a partnership
becomes a limited liability partnership.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8437. Actions by and against partnership and partners.

(a) Partnership as party. – A partnership may sue and be sued in the name of the
partnership.

(b) Partner as party. – To the extent not inconsistent with section 8436 (relating to
partner’s liability), a partner may be joined in an action against the partnership or named in a
separate action.

(c) Judgment against partnership only. – A judgment against a partnership:

1. is not by itself a judgment against a partner; and

2. except as provided in subsection (d), may not be satisfied from a partner’s
assets.
(d) Judgment against partnership and partner. – If there is a judgment against a partnership and a partner on the same claim, the judgment creditor may levy execution against the assets of the partner if both of the following apply:

1. The partner is personally liable for the claim under section 8436.
2. One of the following subparagraphs applies:
   
   (i) A writ of execution on the judgment against the partnership has been returned unsatisfied in whole or in part.
   
   (ii) The partnership is a debtor in bankruptcy.
   
   (iii) The partner has agreed that the creditor need not exhaust partnership assets.
   
   (iv) A court grants permission to levy execution based on a finding that:
       
       (A) partnership assets subject to execution are clearly insufficient to satisfy the judgment;
       
       (B) exhaustion of partnership assets is excessively burdensome; or
       
       (C) the grant of permission is an appropriate exercise of the court’s equitable powers.
   
   (v) Liability is imposed on the partner by law or contract independent of the existence of the partnership.

(e) Liability for representations. – This section also applies to any debt, liability or other obligation of a partnership which results from a representation by a partner or purported partner under section 8438 (relating to liability of purported partner).

(f) Cross reference. – See section 8415(c)(8) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 307. 15 Pa.C.S. § 8415(c)(8) prohibits the partnership agreement from changing any part of this section.

Subsection (a) – This subsection provides that a partnership may sue and be sued in the partnership name. That rule reflects the entity approach and is designed to simplify suits by and against a partnership.

If a debt, obligation, or other liability is incurred by a limited liability partnership, joining a partner would be improper. Likewise, if a debt, obligation, or other liability is incurred by an ordinary
partnership before a person becomes a partner, it would be improper to join that person.

**Subsection (b)** - This subsection provides that suit generally may be brought against the partnership and any or all of the partners in the same action or in separate actions. In particular, in an action against a partnership, it is not necessary to name a partner individually in addition to the partnership.

Note, however, that to levy against a partner for a partnership debt, subsection (c) requires that the creditor must have a judgment against the partner as well as against the partnership. If a creditor doubts that the partnership’s assets will be sufficient to satisfy the creditor’s claim, it will simplify matters and save costs to include both the partnership and the partners in one suit.

The reference to “not inconsistent with section 8436” is the procedural analog to the substantive protections of 15 Pa.C.S. § 8436(b) (incoming partner not liable for pre-existing partnership obligations).

This provision reflects the “separate entity” characteristic of partnerships. Whether collateral estoppel might apply is a matter for other law.

**Subsection (c)** - This subsection provides that a judgment against the partnership is not, standing alone, a judgment against the partners, and it cannot be satisfied from a partner’s personal assets unless there is a judgment against the partner. Thus, a partner must be individually named and served, either in the action against the partnership or in a later suit, before the partner’s personal assets may be subject to levy for a claim against the partnership.

Chapter 84 leaves it to the law of judgments to determine the collateral effects to be accorded a prior judgment for or against the partnership in a subsequent action against a partner individually. RESTATEMENT (SECOND) OF JUDGMENTS § 60 (1982) and comments.

**Subsection (d)** - This subsection requires partnership creditors to exhaust the partnership’s assets before levying on a judgment debtor partner’s individual property where the partner is personally liable for the partnership obligation under 15 Pa.C.S. § 8436 which sets forth the general rule on the liability of a partner as such for the debts, obligations, and other liabilities of the partnership. The rule in subsection (d) respects the concept of the partnership as an entity and makes partners more in the nature of guarantors than principal debtors on every partnership debt. The judgment that must have been obtained against the partner must be with respect to the partner’s liability under 15 Pa.C.S. § 8436 with respect to the liability for which there is also a judgment against the partnership. A judgment against the partner only on a basis other than the partner’s liability as a partner, for example as a guarantor or joint tortfeasor, does not satisfy the requirements of subsection (d).

Although subsection (d) is silent with respect to pre-judgment remedies, it may help to guide courts as they apply the law of pre-judgment remedies.

**Subsection (e)** - The effect of this subsection depends on whether 15 Pa.C.S. § 8438 applies to produce a partnership obligation or a joint and several obligation.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

- “partner”
- “partnership”
The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “debtor in bankruptcy”
- “obligation”

§ 8438. Liability of purported partner.

(a) General rule. – If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner’s consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is jointly and severally liable, with any other person consenting to the representation, with respect to that liability.

(b) Authority of purported partner. – If a person is represented in the manner described in subsection (a) to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner with respect to persons who enter into transactions in reliance upon the representation. If all the partners of the existing partnership consent to the representation, a partnership act or obligation results. If fewer than all the partners of the existing partnership consent to the representation, the person acting and the partners consenting to the representation are jointly and severally liable.

(c) Effect of certificate of partnership authority. – A person is not liable as a partner merely because the person is named by another as a partner in a certificate of partnership authority.

(d) No effect of failure to disclaim authority. – A person does not continue to be liable as a partner merely because of a failure to file a certificate of dissociation or to amend a certificate of partnership authority to indicate the person’s dissociation as a partner.

(e) Nonliability of persons not partners. – Except as provided in subsections (a) and (b), persons who are not partners as to each other are not liable as partners to other persons.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 308. This section continues the basic principles of partnership by estoppel from former 15 Pa.C.S. § 8328, under this chapter more accurately entitled “liability of purported partner.”
Subsections (a) and (b) – Even though these subsections refer to “reliance” without expressly imposing a reasonableness requirement, the requirement exists in the case law. 319 P.3d 625, 633 (Nev. 2014) (adopting the requirement and stating that, although the requirement “is not explicitly stated in [the statute,] [g]enerally, jurisdictions provide that the partnership-by-estoppel doctrine conditions liability on the plaintiff having reasonably relied on the representation of partnership, which often involves an exercise of due diligence to ascertain the facts”).

Subsection (a) – This subsection continues the distinction between representations made to specific persons and those made in a public manner. It is the exclusive basis for imposing liability as a partner on persons who are not partners in fact. This section does not impose a duty of denial. A person held out by another as a partner is not liable unless the person consents to the representation. subsection (c) (no duty to file certificate of denial) and subsection (d) (no duty to file certificate of dissociation or to amend certificate of partnership authority).

This subsection makes clear that the persons being protected by this section are those who enter into transactions in reliance upon a representation. If all of the partners of an existing partnership consent to the representation, a partnership obligation results. A part from this section, a partnership may be bound in other situations under general principles of apparent authority or ratification.

If a partnership liability results under this section, the creditor must exhaust the partnership’s assets before seeking to satisfy the claim from the partners. 15 Pa.C.S. § 8437.

Subsections (c) and (d) – These subsections are new and deal with potential negative inferences to be drawn from a failure to correct inaccurate or outdated filed certificates.

Subsection (c) – This subsection makes clear that a person otherwise not liable as a partner does not become so for failing to deny his partnership status as asserted by a third person in a certificate of partnership authority.

Subsection (d) – Analogously to subsection (c), this subsection provides that a partner’s liability as a partner does not continue after dissociation solely because of a failure to file a statement of dissociation.

Subsection (e) – This subsection means that only those persons who are partners as among themselves are liable as partners to third parties for the obligations of the partnership, except for liabilities incurred by purported partners under subsections (a) and (b).

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter D

Relations of Partners to Each Other and to Partnership

Section 8441. Partner’s rights and duties.

8442. Becoming a partner.
§ 8441. Partner's rights and duties.

(a) Distributions. – Each partner is entitled to share in distributions as provided in section 8445 (relating to sharing of and right to distribution before dissolution).

(b) Reimbursement. – A partnership shall reimburse a partner for:

(1) Any payment made by the partner in the course of the partner's activities on behalf of the partnership, if the partner complied with this section and section 8447 (relating to standards of conduct for partners) in making the payment.

(2) An advance to the partnership beyond the amount of capital the partner agreed to contribute.

(c) Indemnification. – A partnership shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation or other liability incurred by the person by reason of the person's former or present capacity as partner, if the claim, demand, debt, obligation or other liability does not arise from the person's breach of this section or section 8233 (relating to liability for improper distributions by limited liability partnership) or 8447.

(d) Advances. – In the ordinary course of its business, a partnership may advance expenses, including attorney fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person's former or present capacity as a partner, if the person promises to repay the partnership if the person ultimately is determined not to be entitled to be indemnified under subsection (c).

(e) Insurance. – A partnership may purchase and maintain insurance on behalf of a partner against liability asserted against or incurred by the partner in that capacity or arising from that status even if, under subsection (m), the partnership agreement could not eliminate or limit the person's liability to the partnership for the conduct giving rise to the liability.

(f) Loan to partnership. – A payment or advance made by a partner which gives rise to a partnership obligation under subsection (b) constitutes a loan to the partnership which accurses interest from the date of the payment or advance.

(g) Management rights. – Each partner has equal rights in the management and conduct of the partnership's business.
(h) Rights to property. - A partner may use or possess partnership property only on behalf of the partnership.

(i) Compensation for services. - A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.

(j) Required approvals by partners. - A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners. An act outside the ordinary course of business of a partnership and an amendment to the partnership agreement may be undertaken only with the affirmative vote or consent of all the partners.

(k) Nonexclusivity. - The rights provided by subsections (b), (c), (d) and (e) shall not be deemed exclusive of any other rights to which a person seeking reimbursement, indemnification, advancement of expenses or insurance may be entitled under the partnership agreement, vote of partners, contract or otherwise, both as to action in his official capacity and as to action in another capacity while holding that position. Section 8447(f) shall be applicable to a vote, contract or other action under this subsection. A partnership may create a fund of any nature, which may, but need not be, under the control of a trustee, or otherwise secure or insure in any manner its indemnification obligations, whether arising under this section or otherwise.

(l) Grounds. - Indemnification pursuant to subsection (k) may be granted for any action taken and may be made whether or not the partnership would have the power to indemnify the person under any other provision of law except as provided in this section and whether or not the indemnified liability arises or arose from any threatened, pending or completed action by or in the right of the partnership. Indemnification under subsection (k) is declared to be consistent with the public policy of this Commonwealth.

(m) Limitation. - Indemnification under this section shall not be made in any case where the act giving rise to the claim for indemnification is determined by a court to constitute recklessness, willful misconduct or a knowing violation of law.

Committee Comment (2016):

Subsections (b) – (j) are patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 401(b) – (k). Subsections (k) – (m) are patterned after 15 Pa.C.S. § 1746.

This section is derived substantially from former 15 Pa.C.S. § 8331 and establishes many of the default rules that govern the relations among partners. All of these rules are, however, subject to contrary agreement of the partners as provided in 15 Pa.C.S. §§ 8415 through 8417.

Subsection (b) - This subsection is derived from former 15 Pa.C.S. § 8331(2), with two changes: (i) deleting “for the preservation of its business or property” as a separate category for reimbursement, because that category is a subset of the category of “payment[s] made ... in the course of the partner’s activities on behalf of the partnership”; and (ii) conditioning reimbursement on the partner’s having complied with the duties stated in 15 Pa.C.S. § 8447. Subject only to 15 Pa.C.S. § 8415(c)(13), the partnership agreement can relax this precondition substantially. The agreement can also impose a stricter
Subsection (c) - This subsection provides a default rule requiring indemnification of partners who meet the stated preconditions. Subject only to 15 Pa.C.S. § 8415(c)(13), the partnership agreement can relax these preconditions substantially. The agreement can also impose stricter preconditions.

Subsection (d) - This subsection authorizes but does not require a partnership to provide advances to cover expenses. (Because rights to indemnification and advancement differ in important ways, our courts have refused to recognize claims for advancement not granted in specific language clearly suggesting such rights.). The phrase “hold harmless” likewise does not encompass advances. The authorization applies only to those persons eligible for indemnification under subsection (c), but the partnership agreement certainly can authorize a broader scope and also make advances obligatory.

The reference to “ordinary course” pertains to subsection (j) (stating that any “difference arising ... in the ordinary course of business of the partnership may be decided by a majority of the partners”).

Subsection (e) - The language of this subsection is very broad and authorizes a partnership to purchase insurance to cover, , a partner’s intentional misconduct. It is unlikely that such insurance would be available. This authorization comes from the statute, not the partnership agreement, and therefore is not subject to 15 Pa.C.S. § 8415(c)(13).

Subsection (f) - This provision is derived from former 15 Pa.C.S. § 8331(3).

Subsection (g) - This subsection is derived from former 15 Pa.C.S. § 8331(5). The provision of the prior law has been interpreted broadly to mean that, absent contrary agreement, each partner has a continuing right to participate in the management of the partnership and to be informed about the partnership business, even if, per the partnership agreement, the partner’s assent to partnership business decisions is not required.

Note also that for some decisions Chapter 84 requires the affirmative vote or consent of all partners. subsection (j) ("an act outside the ordinary course of business of a partnership and an amendment to the partnership agreement"); 15 Pa.C.S. § 8442(b)(3) (becoming a partner after formation of the partnership).

Subsection (g) has implications for a partner’s actual authority to act on behalf of the partnership. The actual authority of a partner is a question of agency law and depends fundamentally on the contents of the partnership agreement. If, however, the partnership agreement is silent on the issue, this subsection helps delineate that actual authority. Acting individually:

1. a partner has no actual authority to commit the partnership to any matter for which this chapter requires the affirmative vote or consent of all partners;
2. a partner has the actual authority to commit the partnership to usual and customary matters, unless the partner has reason to know that: (i) other partners might disagree; or (ii) for some other reason consultation with fellow partners is appropriate; and
3. the more serious the matter, the less likely it is that a partner has actual authority to act unilaterally.

The first point follows self-evidently from the language of this chapter. Where this chapter requires unanimity, no partner could reasonably believe to the contrary (unless the partnership agreement provided otherwise).
The second point follows because:

Subsection (g) serves as the gap-filler manifestation from the partnership to its partners, and does not require partners to act only in concert or after consultation. To the contrary, subject to the partnership agreement, paragraph (g) expressly provides that “each partner has equal rights in the management and conduct of the partnership’s business.”

It would be impractical to require collective action on even the smallest of decisions. However, to the extent a partner has reason to know of a possible difference of opinion among the partners, subsection (j) a requires decision by at least “a majority of the partners” and by unanimous consent if the matter is “outside the ordinary course of the business.”

The third point is a matter of common sense. RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an individual has “an unusual degree of unilateral authority over a matter fraught with enduring consequences for the institution” and stating that “[t]he gravity of the matter from the standpoint of the organization is relevant to whether a third party could reasonably believe that the manager has authority to proceed unilaterally”).

Finally, the authority granted by this subsection includes the authority to delegate. Delegation does not relieve the delegating partner or partners of their duties under 15 Pa.C.S. § 8447. However, the fact of delegation is a fact relevant to any breach of duty analysis.

EXAMPLE: A partner personally handles all important paperwork for a partnership. The partner neglects to renew the fire insurance coverage on a building owned by the partnership, despite having received and read a warning notice from the insurance company. The building subsequently burns to the ground and is a total loss. The partner might be liable for breach of the duty of care under 15 Pa.C.S. § 8447(c) (gross negligence).

EXAMPLE: A partner delegates responsibility for insurance renewals to the partnership’s office manager, and that manager neglects to renew the fire insurance coverage on the building. Even assuming that the office manager has been grossly negligent, the partner is not necessarily liable under 15 Pa.C.S. § 8447 (c). The office manager’s gross negligence is not automatically attributed to the partner. Under 15 Pa.C.S. § 8447(c), the question is whether the partner was grossly negligent (or worse) in selecting the general manager, delegating insurance renewal matters to the general manager, and supervising the general manager after the delegation.

The partnership agreement may also provide for delegation and, subject to 15 Pa.C.S. § 8415, may modify a partner’s duties under 15 Pa.C.S. § 8447 accordingly.

Subsection (i) - This subsection continues the rule in former 15 Pa.C.S. § 8331(6) that a partner is not entitled to remuneration for services performed, except in winding up the partnership; while expanding the exception to apply to any partner who undertakes winding up. The exception is not intended to apply in the hypothetical winding up that takes place if there is a buyout under Subchapter G.

Subsection (j) - This subsection continues with one important clarification the rule in former 15 Pa.C.S. § 8331(8) regarding allocation of management authority among the partners. The prior law required majority consent for ordinary matters and unanimous consent for amending the partnership agreement, but was silent regarding extraordinary matters. This subsection requires unanimous consent for extraordinary matters.

Subsections (k) - (m) - These subsections apply to partnerships the basic policies on
The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8442. Becoming a partner.

(a) Upon formation. – Upon formation of a partnership, a person becomes a partner under section 8422(a) (relating to formation of partnership).

(b) After formation. – After formation of a partnership, a person becomes a partner:

(1) as provided in the partnership agreement;

(2) as a result of a transaction effective under Chapter 3 (relating to entity transactions); or

(3) with the affirmative vote or consent of all the partners.

(c) Noneconomic partners. – A person may become a partner without:

(1) acquiring a transferable interest; or

(2) making or being obligated to make a contribution to the partnership.

(d) Nature of interest. – The interest of a partner in a partnership is personal property.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 402.

Subsection (c)(1) - This paragraph reflects a modern view that a person may be a general partner while having only a governance interest.

Subsection (c)(2) - The prior law did not contain language to this effect. Given the broad scope of the rules in 15 Pa.C.S. § 8443 on the permissible forms of contributions, this paragraph is likely to have few applications.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“contribution”
“partner”
“partnership”
perform personally.

(b) Substitute payment. – If a person does not fulfill an obligation to make a contribution other than money, the person is obligated, at the option of the partnership, to contribute money equal to the value, as stated in the records of the partnership, of the part of the contribution which has not been made.

(c) Compromise of obligation. – The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the partners. If a creditor of a limited liability partnership extends credit or otherwise acts in reliance on an obligation described in subsection (a) without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 404. Subsection (a) - Under common law principles of impracticability, an individual's death or incapacity will sometimes discharge a duty to render performance. RESTATEMENT (SECOND) OF CONTRACTS §§ 261 (Discharge by Supervening Impracticability) and 262 (1981) (Death or Incapacity of Person Necessary For Performance). This subsection overrides those principles. Moreover, the reference to “perform personally” is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

Subsection (b) – This subsection is a statutory liquidated damage provision, exercisable at the option of the partnership, with the damage amount set according to the value of the promised, non-monetary contribution.

EXAMPLE: In order to become a partner, a person promises to contribute to the partnership various assets which the partnership agreement values at $150,000. In return for the person's promise, and in light of the agreed value, the partnership admits the person as a partnership with a right to receive 25% of the partnership’s distributions.

The promised assets are subject to a security agreement, but the person promises to contribute them “free and clear.” Before the partner can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the actual fair market value of the assets, under this subsection the partnership has a claim against the partner for “money equal to the value ... of the part of the contribution which has not been made” - $150,000.

EXAMPLE: Same facts as the previous example, except that the public sale brings $225,000. The partnership is not obliged to invoke this subsection and may instead sue for breach of the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss suffered as a result of the breach.

Subsection (c) – The unanimity requirement expressed in the first sentence might indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may be varied in the partnership agreement. The right of each partner to consent is not a “right[] under this title of a person other than a partner.” 15 Pa.C.S. § 8415(c)(17) (preventing the partnership agreement from affecting such rights). In contrast, the right stated in the second sentence fits squarely within section 8415(c)(17) and therefore may not be varied by the partnership agreement.
The following terms used in this section are defined in 15 Pa.C.S. § 8412:
“contribution”
“partner”
“partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:
“act”
“obligation”

§ 8445. Sharing of and right to distribution before dissolution.

(a) Distributions before dissolution. – Any distribution made by a partnership before its dissolution and winding up shall be in equal shares among partners and persons dissociated as partners whose interests in the partnership have not been purchased under section 8471 (relating to purchase of interest of person dissociated as partner), except as provided in section 8453(b) (relating to transfer of transferable interest) or to the extent necessary to comply with a charging order in effect under section 8454 (relating to charging order).

(b) No right to distribution. – Subject to section 8471, a person has a right to a distribution before the dissolution and winding up of a partnership only if the partnership decides to make an interim distribution.

(c) Form of distribution. – A person does not have a right to demand or receive a distribution from a partnership in any form other than money. Except as provided in section 8486 (relating to disposition of assets in winding up and required contributions), a partnership may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person’s share of distributions.

(d) Status as creditor. – If a partner or transferee becomes entitled to receive a distribution, the partner or transferee has the status of, and is entitled to all remedies available to, a creditor of the partnership with respect to the distribution. The partnership’s obligation to make a distribution is subject to offset for any amount owed to the partnership by the partner or a person dissociated as partner on whose account the distribution is made.

Committee Comment (2016):
This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 405.

Subsection (a) – The rule stated applies to redemptions as well as operating distributions but is a default rule in both contexts.

Subsection (b) – 15 Pa.C.S. § 8471 provides a default rule for buying out a dissociated partner when the dissociation does not lead to dissolution of the partnership.
Subsection (d) – 15 Pa.C.S. § 8231(f) with respect to the rights of partners and transferees that receive a distribution from a limited liability partnership in the form of indebtedness.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“transferee”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8446. Rights to information.

(a) Location of records. – A partnership shall keep its books and records, if any, at its principal office.

(b) Right to inspection. – On reasonable notice, a partner may inspect and copy during regular business hours, at a reasonable location specified by the partnership, any record maintained by the partnership regarding the partnership’s business, financial condition and other circumstances.

(c) Material information. – The partnership shall furnish to each partner without demand, any information concerning the partnership’s business, financial condition and other circumstances which the partnership knows and is material to the proper exercise of the partner’s rights and duties under the partnership agreement or this title, except to the extent the partnership can establish that it reasonably believes the partner already knows the information.

(d) Duty of partners. – The duty to furnish information under subsection (c) also applies to each partner to the extent the partner knows any of the information described in subsection (c).

(e) Rights after dissociation. – Subject to subsection (j), within 10 days after receipt by a partnership of a demand made in record form, a person dissociated as a partner may have access to information to which the person was entitled while a partner if:

1. the information pertains to the period during which the person was a partner;

2. the person seeks the information in good faith; and

3. the information is material to the person’s rights and duties under the partnership agreement or this title.

(f) Partnership response to demand. – Within 10 days after receiving a demand under subsection (e), the partnership shall, in record form, inform the person that made the demand of:
(1) the information that the partnership will provide in response to the demand and when and where the partnership will provide the information; and

(2) the partnership’s reasons for declining, if the partnership declines to provide any demanded information.

(g) Costs of copying. – A partnership may charge a person that makes a demand under this section the reasonable costs of copying.

(h) Exercise of rights. – A partner or person dissociated as a partner may exercise the rights under this section through an agent or, in the case of an incapacitated person, a guardian. Any restriction or condition imposed by the partnership agreement or under subsection (j) applies both to the agent or guardian and to the partner or person dissociated as a partner.

(i) No rights of transferee. – Subject to section 8455 (relating to power of personal representative of deceased partner), the rights under this section do not extend to a person as transferee.

(j) Reasonable restrictions permitted. – In addition to any restriction or condition stated in its partnership agreement, a partnership, as a matter within the ordinary course of its business, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

(k) Cross reference. – See section 8415 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned in part after Uniform Partnership Act (1997) (Last Amended 2013) § 408.

The rules stated in this section are what might be termed “quasi-default rules” – subject to some change by the partnership agreement. 15 Pa.C.S. § 8415(c)(9) (prohibiting unreasonable restrictions on the information rights stated in this section).

Subsection (a) – A general partnership is often a very informal organization. Accordingly, this subsection states a default required location for any books and records a partnership may have but does not require that books and records be kept. Other law may so require, however, including particularly tax law. This subsection applies to any books and records kept to satisfy other law.

Subsection (b) – This subsection states the rule pertaining to information memorialized in “any record maintained by the partnership.”

Subsection (c) – The scope of this subsection includes information not maintained in the records of the partnership.

Subsections (c) and (d) – In appropriate circumstances, violation of either or both of these
provisions might cause a court to enjoin or even rescind action taken by the partnership, especially when the violation has interfered with an approval or veto mechanism involving partnership consent.

Subsection (c) – This subsection imposes a duty on the partnership, not the partners. However, a partner could be liable in damages if the partner were: (i) to breach a duty under 15 Pa.C.S. § 8447 or the partnership agreement; and (ii) in doing so to cause or suffer the partnership to breach the duty stated in this paragraph.

Subsection (d) – This paragraph imposes a duty directly on each partner. Therefore, a partner’s violation of this subsection is actionable in damages without need to show a violation of a duty stated in 15 Pa.C.S. § 8447.

Subsection (e) – When a partner dies, 15 Pa.C.S. § 8455 provides additional information rights to the legal representative of the deceased partner.

Subsection (e)(1) – A person dissociated as a partner has information rights only as to the period during which the person was a partner, extent to the extent that further information is accessible under 15 Pa.C.S. § 8455.

Subsection (j) – This provision is a fall-back protection against gaps in the partnership agreement and, for example, allows the partners to protect the partnership from disclosure or other misuses of confidential information even if the partnership agreement has neglected to address this issue.

The reference to “ordinary course” pertains to 15 Pa.C.S. § 8441(j) (stating that any “matter in the ordinary course of business of a partnership may be decided by a majority of the partners”). This approach is necessary, lest a requesting partner have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the partnership.

The burden of persuasion under this subsection contrasts with the burden of persuasion under 15 Pa.C.S. § 8415(c)(9) (prohibiting unreasonable limitations on the information rights provided by this section). Under that paragraph, as a matter of ordinary procedural law the burden is on the person making the claim.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”
loyalty and care stated in subsections (b) and (c).

(b) Duty of loyalty. – The fiduciary duty of loyalty of a partner includes the duties:

(1) to account to the partnership and hold as trustee for it any property, profit or benefit derived by the partner:

(i) in the conduct or winding up of the partnership’s business;

(ii) from a use by the partner of the partnership’s property; or

(iii) from 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 person having an interest adverse to the partnership; and

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

(c) Duty of care. – The duty of care of a partner in the conduct or winding up of the partnership business is to refrain from engaging in gross negligence, recklessness, willful misconduct or a knowing violation of law.

(d) Good faith and fair dealing. – A partner shall discharge the duties and obligations under this title or under the partnership agreement and exercise any rights consistent with the contractual obligation of good faith and fair dealing.

(e) Self-serving conduct. – A partner does not violate a duty or obligation under this title or under the partnership agreement solely because the partner’s conduct furthers the partner’s own interest.

(f) Authorization or ratification. – All the partners may authorize or ratify, after disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty of a partner.

(g) Fairness as a defense. – It is a defense to a claim under subsection (b)(2) and any comparable claim in equity or at common law that the transaction was fair to the partnership at the time it was authorized or ratified under subsection (f).

(h) Rights and obligations in approved transaction. – If a partner enters into a transaction with the partnership which otherwise would be prohibited under subsection (b)(2), but the transaction is authorized or ratified as provided under subsection (f) or the partnership agreement, the partner’s rights and obligations arising from the transaction are the same as those of a person that is not a partner.
(i) Exoneration. – The partnership agreement may provide that a partner shall not be personally liable for monetary damages to the partnership or the other partners for a breach of subsection (c), except that a partner may not be exonerated for an act that constitutes recklessness, willful misconduct or a knowing violation of law.

(j) Cross reference. – See section 8415 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 409. Subsection (i) is patterned in part after 15 Pa.C.S. § 1713.

This section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section are subject to the partnership agreement, but 15 Pa.C.S. § 8415(c) and (d) contain important limitations on the power of the partnership agreement to affect fiduciary duties and the obligation of good faith and fair dealing.

For the effect of dissociation on a person’s duties under this section, see 15 Pa.C.S. § 8463(b)(2).

Subsection (a) – This subsection recognizes two core managerial duties, but does not purport to state all managerial duties.

Subsection (b) – This subsection states three core aspects of the fiduciary duty of loyalty: (i) not “appropriating” partnership opportunities or otherwise wrongly benefiting from the partnership’s operations or property; (ii) avoiding conflict of interests in dealing with the partnership (whether directly or on behalf of another); and (iii) refraining from competing with the partnership. Essentially the same duties exist in agency law and under the law of all types of business organizations.

The subsection applies beginning with “the conduct … of the partnership’s business.” Thus the stated duties do not apply to pre-formation activities.

The stated duties comprise a default rule and are subject to variation to the extent provided in 15 Pa.C.S. § 8415(d)(3)(i).

Subsection (b)(1) – The phrase “hold as trustee” dates back to the Uniform Partnership Act (1914) § 21 (former 15 Pa.C.S. § 8334) and reflects the availability of disgorgement remedies, such as a constructive trust.

Subsection (b)(1)(i) – This provision is consistent with a basic principle of agency law – namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. Restatement (Third) of Agency § 8.06, cmt. c. (2006). Typically, however, the partnership agreement will legitimize particular benefits – , a management fee paid to a managing partner in addition to that partner’s share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(ii) – For the expansive meaning of “property,” see 15 Pa.C.S. § 102. The term includes confidential information.

Subsection (b)(1)(iii) – Chapter 84 does not specify what constitutes “a partnership opportunity,”
but ample case law exists. 404 F.3d 1088, 1096 (8th Cir. 2005) (“A
opportunity that is closely related to the entity’s existing or prospective line of business,
would competitively advantage the partnership, and is one that the partnership has the financial ability,
knowledge and experience to pursue is a partnership opportunity.”); 831 N.W.2d 763,
767 (N.D. 2013) (explaining why conducting farming operations on land owned by others was a
partnership opportunity while purchasing farmland was not).

This duty continues through winding up, although in that context the scope of partnership
opportunities inevitably narrows.

In most, if not all, situations, usurping a partnership opportunity also breaches the duty not to
compete under paragraph (b)(3), but not

Subsection (b)(2) – In this context, the phrase “adverse interest” is a term of art, meaning “to be on
the other side of the table” in some dealing with the partnership. Absent informed consent by the
partnership, this duty is breached by the mere existence of the conflict of interest and the partnership need
not prove that the outcome of the dealing was adverse to the partnership. But see subsection (g)
(permitting the defense of fairness). This duty continues through winding up.

Subsection (b)(3) – Although competition is often thought of in terms of potential customers, this
duty applies equally to competition for resources, including employees. This duty ends when the
partnership dissolves.

Subsection (c) – Chapter 84 no longer refers to the duty of care as a fiduciary duty, because: (i) the
duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable in
damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement,
constructive trust, and rescission. The change in label is consistent with the RESTATEMENT (THIRD) OF
AGENCY § 8.02 (2006), which refers to the agent’s fiduciary duty to act loyally, but eschews the word
“fiduciary” when stating the agent’s duties of “care, competence, and diligence.” § 8.08. However,
the change in label to no longer refer to the duty of care as “fiduciary” is merely semantics; no change in
the law is intended.

The partnership agreement can raise the standard of care, or subject to 15 Pa.C.S. § 8415(c)(10) and
(d)(3), lower it. A person’s practical exposure for breaching the duty of care involves not only the
standard of care but also any partnership agreement provision that: (i) exonerates the person from liability
for breach of the duty of care; or (ii) entitles the person to indemnification despite such a breach.

A partner may rely on information, opinions, reports or statements, including financial statements
and other financial data prepared or presented by other persons, subject to compliance with the standard
of care in subsection (c). Thus a partner is able to rely on others to an even greater extent than a director
of a corporation because reliance by a director is limited in some respects by a standard of reasonableness.

15 Pa.C.S. § 1712.

Subsection (d) – This subsection refers to the “obligation of good faith and fair
dealing” (emphasis added) and thereby invokes the implied obligation that exists in every contract.
RESTATEMENT (SECOND) CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of
good faith and fair dealing in its performance and its enforcement.”) The adjective (“contractual”) should
help avoid decisions like 170 P.3d 474, 483 (M ont. 2007) (holding that Montana’s
version of UPA (1997) creates a statutory obligation of good faith and fair dealing separate from the
implied contractual covenant).
At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights - duties and rights “under this title.” However, for the most part those duties and rights apply to relationships the partners and the partnership and function only to the extent not displaced by the partnership agreement. In the contract-based organization that is a partnership, those statutory default rules are intended to function like a contract. Therefore, applying the contractual notion of good faith and fair dealing makes sense.

The contractual obligation of “good faith” has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware’s famous corporate law exoneration provision; and (ii) that provision’s exception “for acts or omissions not in good faith.” 8 Del. Code § 102(b)(7). In that context, good faith is an aspect of the duty of loyalty.

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the “utmost good faith” sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other.

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner’s own self-interest:

“Fair dealing” is not akin to the fair process component of entire fairness, , whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care. It is rather a commitment to deal “fairly” in the sense of consistently with the terms of the parties' agreement and its purpose. Likewise “good faith” does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties' contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.

Courts should not use the contractual obligation to change the allocation of risk and power by the parties or this chapter. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The partnership agreement or this title may grant discretion to a partner, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a partner may properly exercise discretion even though another partner suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.
The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties' agreed-upon arrangements:

An implied covenant claim ... looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but


In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the partnership agreement to affect the contractual obligation of good faith and fair dealing, 15 Pa.C.S. § 8415(c)(11) (prohibiting elimination but allowing the agreement to “prescribe standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured”).

Subsection (e) – A partner in a general partnership has at least two different roles: (i) as a party to the partnership agreement, with rights and obligations under that agreement; and (ii) as co-manager of the enterprise. This provision pertains to the first role. A partner's exercise of rights under the partnership agreement is subject to the obligation of good faith and fair dealing under subsection (d), but a partner does not breach that contractual obligation “solely because the partner's conduct furthers the partner's own interest.” In contrast, this provision is ineffective with regard to a partner's duties as co-manager. For example, a partner's liability under subsection (b)(3) (prohibiting competition) is not “solely because the partner's conduct furthers the partner's own interest.” Rather, the liability results from the breach of a specific obligation – , the codified aspect of the duty of loyalty that prohibits competition.

Subsection (f) – Here and elsewhere in Chapter 84, information is “material” if there is a substantial likelihood that a reasonable [decision maker] would consider it important in deciding how to vote” or take other action under this act or the partnership agreements.

, 426 U.S. 438, 449 (1976). The partnership agreement can provide additional or different methods of authorization or ratification, subject to the strictures of 15 Pa.C.S. § 8415.

Subsection (g) – This subsection codifies judge-made law applicable to all business entities.

Subsection (h) – This subsection is the modern, reformulated version of language that sought to overturn the now-defunct notion that debts to partners were categorically inferior to debts to non-partner creditors. The reformulation makes clear that this provision does not override the obligation to avoid conflict of interests.

, 89 Cal. Rptr. 2d 811 (Cal. Ct. A pp. 1999) (examining the prior formulation, explaining its history and stating “[w]e cannot discern anything in the purpose of [the prior formulation] that suggests an intent to affect a general partner's fiduciary duty to limited partners”).
This subsection states a default rule. The partnership agreement may provide that debt to a partner (or partners generally) is subordinate to other partnership obligations. The agreement that creates the debt may do likewise.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”
circumstances in which an accounting action is available without requiring a partner to dissolve the partnership. This subsection goes far beyond that rule, providing that, during the term of the partnership, partners may maintain a variety of legal or equitable actions, without having to sue for dissolution and an accounting. Reflecting a growing trend in the case law, the change eliminated the so-called “exclusivity rule.” 198 P. 178, 180 (Kan. 1921) (“[F]or all practical purposes a partnership may be considered as a business entity.”); 382 N.Y. S.2d 897, 901 (1976) (“No purpose of justice is served by delaying the resolution here on empty procedural grounds.”).

Actions brought by partners under this subsection are direct. Since general partners are not passive investors like limited partners, this chapter does not authorize derivative actions.

This subsection also encompasses actions by a dissociated partner under 15 Pa.C.S. § 8471(i).

Subsection (c) – The rule stated in this subsection inevitably implies that other law governs the accrual of a claim under subsection (b) as well as the statute of limitations applicable to those claims. As a result, partners must take care not to “to sit on their claims,” 719 N.E.2d 574, 576 (Ohio Ct. App. 1998), until the partnership dissolves.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“partnership”
particular, this subsection creates a presumption that by their conduct the partners have agreed to continue the business. The presumption shifts the burden of persuasion to the person claiming that the partnership is dissolved.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”
“partnership at will”

Subchapter E
Transferable Interests and Rights of Transferees and Creditors

Section

8451. Partner not co-owner of partnership property.
8452. Nature of transferable interest.
8453. Transfer of transferable interest.
8454. Charging order.
8455. Power of personal representative of deceased partner.

§ 8451. Partner not co-owner of partnership property.

A partner is not a co-owner of partnership property and has no interest in partnership property which can be transferred, either voluntarily or involuntarily.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 501.

This section follows ineluctably from the concept of a partnership as an entity. The construct of “tenancy in partnership” in former 15 Pa.C.S. § 8342 has been eliminated. 15 Pa.C.S. § 8423 which provides that property transferred to, or otherwise acquired by, the partnership is property of the partnership and not of the partners individually.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

§ 8452. Nature of transferable interest.

(a) Personal property. - A transferable interest is personal property.
(b) Only right that may be transferred. – A person may not transfer to a person not a
partner any rights in a partnership other than a transferable interest.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 502.

Absent a contrary provision in the partnership agreement or the consent of the partners, a
“transferable interest” is the only interest in a partnership that can be transferred. As to whether a partner
may transfer governance rights to a fellow partner, the question is moot absent a provision in the
partnership agreement changing the default rule allocating governance rights . In the default
mode, a partner’s transfer of governance rights to another partner: (i) does not increase the transferee’s
governance rights; (ii) eliminates the transferor’s governance rights; and (iii) thereby changes the
denominator but not the numerator in calculating governance rights.

EXAMPLE: LCN Company is a general partnership with three partners, Laura, Charles, and Nora. The partnership agreement does not displace this chapter’s default rule on the allocation of governance rights among general partners. Thus, each partner has 1/3 of those rights. Laura transfers her entire ownership interest to Charles. The transfer does not increase Charles’s governance rights but does eliminate Laura’s. After the transfer, Laura has no governance rights (regardless of whether Charles and Nora agree to expel Laura under 15 Pa.C.S. § 8462(b)(2)). As a result, Charles and Nora each have 1/2 of the governance rights.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in those Articles.

The term “transferable interest” used in this section is defined in 15 Pa.C.S. § 8412.

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

§ 8453. Transfer of transferable interest.

(a) General rule. – A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause the dissociation of the transferor as a partner or a dissolution and winding up of the partnership’s business; and

(3) subject to section 8455 (relating to power of personal representative of deceased partner), does not entitle the transferee to:

(i) participate in the management or conduct of the partnership’s business; or

(ii) except as provided in subsection (c), have access to records or other information concerning the partnership’s business.
(b) Rights of transferee. - A transferee has the right to:

(1) receive, in accordance with the terms of the transfer:

(i) distributions to which the transferor would otherwise be entitled; and

(ii) allocations of income, gain, loss, deduction or credit or similar item which would otherwise be made to the transferor; and

(2) seek under section 8481(a)(5) (relating to events causing dissolution) a judicial determination that it is equitable to wind up the partnership business.

(c) Right to account on dissolution. - In a dissolution and winding up of a partnership, a transferee is entitled to an account of the partnership’s transactions only from the date of dissolution.

(d) Recognition of transferee’s rights. - A partnership need not give effect to a transferee’s rights under this section until the partnership knows or has notice of the transfer.

(e) Transfer restrictions. - A transfer of a transferable interest in violation of a restriction on transfer contained in the partnership agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

(f) Rights retained by transferor. - Except as provided in section 8461(4)(ii) (relating to events causing dissociation), if a partner transfers a transferable interest, the transferor retains the rights of a partner other than the transferable interest transferred and retains all the duties and obligations of a partner.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 503.

One of the most fundamental characteristics of partnership law is its fidelity to the “pick your partner” principle. 311 P.2d 972, 975 (Nev. 1957) (stating that (i) “the assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners”; and (ii) absent consent by the remaining partners “[t]he stranger remains a stranger” with no rights to management or even information). This section is the core of the provisions of this chapter reflecting and protecting that principle. A partner’s rights in a partnership are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, and rights to seek judicial intervention). Unless the partnership agreement otherwise provides, a partner acting without the consent of all the other partners lacks both the power and the right to: (i) bestow partnership on a non-partner, 15 Pa.C.S. § 8442(b)(3); or (ii) transfer to a non-partner anything other than some or all of the partner’s transferable interest, subsection (a)(3). The rights of a mere transferee are quite limited, to receive distributions as provided in subsection (b), and, if the partnership dissolves and winds up, to receive specified information pertaining to the partnership from the date of dissolution as provided in subsection (c).

This section applies regardless of whether the transferor is a partner, a transferee of a partner, a
transferee of a transferee, etc.) the definition of “transferable interest” in 15 Pa.C.S. § 8412 (defining “transferable interest” in terms of a right “initially owned by a person in the person’s capacity as a partner” regardless of “whether or not the person remains a partner or continues to own any part of the right”).

This section does not directly consider whether a partner may transfer governance rights to another partner without obtaining consent from all the other partners. As noted in the Committee Comment to 15 Pa.C.S. § 8452, the question is moot under this chapter’s default rule for allocating governance rights.

However, the question can be pivotal when the partnership agreement displaces the default rule on governance rights but does not determine whether transfer restrictions (whether contractual, statutory, or both) apply to transfers of governance rights from one partner to another. Case law is scant and pertains to limited liability companies. Nonetheless, the cases suggest that this chapter does not protect partners from control shifts that result from transfers among partners.

Other law may affect the applicability of this section. 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate regardless of restrictions on transfer); U.C.C. §§ 9-406, 9-408 (overriding specified restrictions on assignment in specified circumstances, regardless of whether state law or a contract imposes the restrictions). In any event, this section does not apply to the transfer of ownership interests in a partner that is an entity.

EXAMPLE: ABC, Company (“ABC”) has three partners: Ralph (an individual), Alice, Inc. (“Alice”), and Norton, LLC (“Norton”). 15 Pa.C.S. § 8452 applies to any attempt by Ralph, Alice, or Norton to transfer their respective partnership interest in ABC. Section 8452 is inapplicable, however, to a change in control of Alice or Norton or even a complete change in their respective ownership.

Subsection (a) - The definition of “transfer” in 15 Pa.C.S. § 102 and this subsection’s reference to “in whole or in part” combine to mean that this section encompasses not only unconditional, permanent, and complete transfers, but also temporary, contingent, and partial ones. Thus, for example, a charging order under 15 Pa.C.S. § 8454 effects a transfer of part of the judgment debtor’s transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a partner’s rights to distributions.

Subsection (a)(2) - The phrase “by itself” contemplates 15 Pa.C.S. § 8462(b)(2), which creates a risk of dissociation via expulsion when a partner transfers all of the partner’s transferable interest.

Subsection (a)(3) - Mere transferees have no right to intrude as the partners carry on the business
of the partnership and their activities as partners.

Because 15 Pa.C.S. § 102 defines “transfer” to include “a transfer by operation of law,” this section affects the power of other law to effect transfers of a partner’s ownership interest. For example, a divorce court lacks the power to award a partner’s spouse anything beyond the partner’s transferable interest. Nor does the partner have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the partner’s complete ownership interest (the transferable interest as enhanced by the management and information rights and the standing to sue) and: (i) if possible, award the partner’s spouse marital property of equal value; or (ii) if not possible, award the partner’s spouse a money judgment and a charging order to enforce the judgment.

Granting the non-partner of the partner’s transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the partner’s ex-spouse the transferable interest is rarely a viable alternative. If the partner is an active member of the partnership, the approach is impossible. The partner’s transferable interest will typically constitute much or all of the partner’s remuneration for the partner’s activity. Even if the partner is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a “bare naked assignee.” (ii) “Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike’s transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company’s accounts since the mortgage on the property had been paid off in February 2007”).

When a partner dies, subject to the partnership agreement other law may effect a transfer of the partner’s transferable interest to the partner’s estate or personal representative. However, for the reasons just stated, other law lacks the power to transfer anything more than a transferable interest. 15 Pa.C.S. § 8455 does provide extra information rights for the purposes of settling the estate of the deceased partner.)

Subsection (a)(3)(i) - 15 Pa.C.S. § 8446(i) which provides that this section’s information rights do not apply to transferees.

Subsection (b) - Amounts due under this subsection are subject to offset for any amount owed to the partnership by the partner or dissociated partner on whose account the distribution is made. As to whether a partnership may properly offset for claims against a transferor that was never a partner is matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c) - This very limited grant of information rights encompasses only transactions occurring at or after the date of the partnership’s dissolution. The transferee has only the right to information as to the allocation of net assets among the partnership’s creditors, partners, and transferees - and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a partner-transferor to require the partner-transferor to disclose further information to the transferee. Whether such an agreement would breach the partnership agreement, the implied contractual obligation of good faith and fair dealing, or a fiduciary duty depends on the circumstances.
Subsection (e) - The term “notice” includes “reason to know” under 15 Pa.C.S. § 8413(b)(1), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the partnership agreement.

Subsection (e) is consistent with U.C.C. § 9-406(a) which states that “an account debtor … may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification, authenticated by the assignor or the assignee, that the amount due or to become due has been assigned and that payment is to be made to the assignee.”

Subsection (f) - Under this subsection, a partner remains a partner (with all attendant rights and obligations) even after permanently transferring the entirety of the transferable interest, unless: (i) the other partners opt for expulsion under 15 Pa.C.S. § 8461(4)(ii); or (ii) as otherwise provided in the partnership agreement.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”
the transferable interest. The purchaser at the foreclosure sale obtains only the transferable
interest, does not thereby become a partner and is subject to section 8453 (relating to transfer of
transferable interest).

(d) Satisfaction of judgment. – At any time before foreclosure under subsection (c), the
partner or transferee whose transferable interest is subject to a charging order under subsection
(a) may extinguish the charging order by satisfying the judgment and filing a certified copy of
the satisfaction with the court that issued the charging order.

(e) Purchase of rights. – At any time before foreclosure under subsection (c), a
partnership or one or more partners whose transferable interests are not subject to the charging
order may pay to the judgment creditor the full amount due under the judgment and thereby
succeed to the rights of the judgment creditor, including the charging order.

(f) Exemption laws preserved. – This chapter shall not deprive any partner or transferee
of the benefit of any exemption law applicable to the transferable interest of the partner or
transferee.

(g) Exclusive remedy. – This section provides the exclusive remedy by which a person
seeking, in the capacity of a judgment creditor, to enforce a judgment against a partner or
transferee may satisfy the judgment from the judgment debtor’s transferable interest.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 504.

The charging order concept dates back to the English Partnership Act of 1890 and in the United
States has been a fundamental part of partnership law since 1914. Charging orders were authorized in
former 15 Pa.C.S. § 8345. As much a remedy limitation as a remedy, the charging order is the sole
method by which a judgment creditor of a partner or transferee can extract any value from the partner’s or
transferee’s ownership interest in a partnership.

Under this section, the judgment creditor of a partner or transferee is entitled to a charging order
against the relevant transferable interest. While in effect, that order entitles the judgment creditor to
whatever distributions would otherwise be due to the partner or transferee whose interest is subject to the
order. However, the judgment creditor has no say in the timing or amount of those distributions. The
charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise
interfere with the management and activities of the partnership.

The partnership agreement has no power to alter the provisions of this section to the prejudice of
third parties. 15 Pa.C.S. § 8415(c)(17).

Subsection (a) – The phrase “judgment debtor” encompasses both partners and transferees. The
lien pertains only to a distribution, which is defined in 15 Pa.C.S. § 8412 to exclude “amounts
constituting reasonable compensation for present or past service or payments made in the ordinary course
of business under a bona fide retirement plan or other bona fide benefits program.” A judgment creditor
that wishes to levy on such amounts should use the appropriate creditor’s remedy, such as garnishment.

Whether an application for a charging order must be served on the partnership, the judgment debtor,
or both is a matter for other law, principally the law of remedies and civil procedure. The order itself
must be served on the partnership. Whether the order must also be served on the judgment debtor is a
matter for other law.

Subsection (b) - Paragraph (2) refers to “other orders” rather than “additional orders”. Therefore,
given appropriate circumstances, a court may invoke either paragraph (1) or (2) or both.

Subsection (b)(1) - The receiver contemplated here is emphatically not a receiver for the
partnership, but rather a receiver for the distributions subject to the charging order. The principal
advantage provided by this paragraph is an expanded right to information. However, that right goes no
further than “the extent necessary to effectuate the collection of distributions pursuant to a charging
order.” For a correctly narrow reading of this provision,


Subsection (b)(2) - This paragraph must be understood in the context of: (i) the very limited nature
of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not
a judgment creditor of the partnership, has no claim on the partnership’s assets, and has no right to
interfere in the activities, affairs, and management of the partnership. In particular, the court’s power to
make orders is limited to “giv[ing] effect to the charging order.”

EXAMPLE: A judgment creditor with a charging order believes that the partnership should invest
less of its surplus in operations, leaving more funds for distributions. The creditor moves the court
for an order directing the partnership to restrict re-investment. Subsection (b)(2) does not authorize
the court to grant the motion.

EXAMPLE: A judgment creditor with a judgment for $10,000 against a partner obtains a charging
order against the partner’s transferable interest. Having been properly served with the order, the
partnership nonetheless fails to comply and makes a $3000 distribution to the partner. The court
has the power to order the partnership to pay $3000 to the judgment creditor to “give effect to the
charging order.”

Under subsection (b)(2), the court has the power to decide whether a particular payment is a
distribution because that decision determines whether the payment is part of a transferable interest subject
to a charging order.

EXAMPLE: Partner A of ABC, a general partnership has for some years received distributions
from the partnership. However, when a judgment creditor of A obtains a charging order against
A’s transferable interest, the partnership ceases to make distributions to A and instead provides a
salary to A equivalent to former distributions. A court might deem this salary a disguised
distribution. (In any event, however, the salary will be subject to garnishment.)

This chapter has no specific rules for determining the fate or effect of a charging order when the
partnership undergoes a merger, interest exchange, conversion, division, or domestication under Chapter
3. In the proper circumstances, such an organic change might trigger an order under subsection (b)(2).

Subsection (c) - The phrase “that distributions under a charging order will not pay the judgment
debt within a reasonable period of time” comes from case law.

A pp. 2003) (“Judicial sale may be appropriate where ... it is apparent that distributions under the charging
order will not pay the judgment debt within a reasonable amount of time.”). A purchaser at a foreclosure
sale obtains only the very limited rights of a transferee under 15 Pa.C.S. § 8452 and is in some ways more
vulnerable and less powerful than the holder of a charging order. After foreclosure and sale, subsection (b) no longer applies. More generally, the court is no longer involved in the matter.

Subsection (d) - This provision allows the judgment debtor to end the charging order without need for a hearing.

Subsection (e) - Traditionally, charging order provisions referred to the possibility of “redeeming” an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This chapter substitutes an approach that more closely parallels the practical possibility of the partnership or its partners buying the underlying judgment (and thereby dispensing with any interference the judgment creditor might seek to inflict on the partnership).

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the partnership or the other partners might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor’s consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the partnership.

Whether a partnership’s decision to invoke this subsection is “ordinary course” or “outside the ordinary course” for purposes of 15 Pa.C.S. § 8441(j), depends on the circumstances. However, the involvement of this subsection does not by itself make the decision “outside the ordinary course.”

Subsection (f) - This subsection preserves otherwise applicable exemptions but does not create any. , 405 B.R. 604, 609 (Bankr. N. D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating that “it is clear that [the provision] does not create an exemption”).

Subsection (g) - This subsection does not override Uniform Commercial Code, Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a “reverse pierce” where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. , 799 A.2d 298, 312 (Conn. App. Ct. 2002) (approving a reverse pierce where a judgment debtor had established a partnership in a patent attempt to frustrate the judgment creditor), overruled on other grounds by , 830 A.2d 1114 (Conn. 2003). Likewise, this subsection does not supplant fraudulent transfer law.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

Èglwùèxùřqù
“partner”
“partnership”
“transferable interest”
“transferee”

The term “court” is not used in this section in the sense defined in 15 Pa.C.S. § 102.
§ 8455. Power of personal representative of deceased partner.

If a partner dies, the deceased partner’s personal representative may exercise:

(1) the rights of a transferee provided in section 8453(c) (relating to transfer of transferable interest); and

(2) for purposes of settling the estate, the rights the deceased partner had under section 8446 (relating to rights to information).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 505.

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the personal representative of the estate.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“transferee”

Subchapter F
Dissociation

Section
8461. Events causing dissociation.
8462. Power to dissociate as partner and wrongful dissociation.
8463. Effects of dissociation.

§ 8461. Events causing dissociation.

A person is dissociated as a partner when any of the following occurs:

(1) The partnership knows or has notice of the person’s express will to withdraw as a partner, except that, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date.

(2) An event stated in the partnership agreement as causing the person’s
dissociation occurs.

(3) The person is expelled as a partner pursuant to the partnership agreement.

(4) The person is expelled as a partner by the affirmative vote or consent of all the other partners if:

(i) it is unlawful to carry on the partnership business with the person as a partner;

(ii) there has been a transfer of all of the person’s transferable interest in the partnership, other than:

(A) a transfer for security purposes; or

(B) a charging order in effect under section 8454 (relating to charging order) which has not been foreclosed;

(iii) the person is an association and:

(A) the partnership notifies the person that the person will be expelled as a partner because:

(I) the person has filed a certificate of dissolution or the equivalent;

(II) the person has been administratively dissolved;

(III) the person’s charter or the equivalent has been revoked; or

(IV) the person’s right to conduct business has been suspended by the person’s jurisdiction of formation; and

(B) within 90 days after the notification:

(I) the certificate of dissolution or the equivalent has not been withdrawn, rescinded or revoked;

(II) the person has not been reinstated;

(III) the person’s charter or the equivalent has not been reinstated; or

(IV) the person’s right to conduct business has not been reinstated; or
(iv) the person is an unincorporated association that has been dissolved and whose activities and affairs are being wound up;

(5) On application by the partnership or another partner, the person is expelled as a partner by judicial order because the person:

(i) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership’s business;

(ii) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or a duty or obligation under section 8447 (relating to standards of conduct for partners); or

(iii) has engaged or is engaging in conduct relating to the partnership’s business which makes it not reasonably practicable to carry on the business with the person as a partner.

(6) The person:

(i) becomes a debtor in bankruptcy;

(ii) makes an assignment for the benefit of creditors; or

(iii) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the person or of all or substantially all the person’s property.

(7) In the case of an individual:

(i) the individual dies;

(ii) a guardian for the individual is appointed; or

(iii) a court orders that the individual has otherwise become incapable of performing the individual’s duties as a partner under this title or the partnership agreement.

(8) In the case of a person that is a testamentary or inter vivos trust or is acting as a partner by virtue of being a trustee of such a trust, the trust’s entire transferable interest in the partnership is distributed.

(9) In the case of a person that is an estate or is acting as a partner by virtue of being a personal representative of an estate, the estate’s entire transferable interest in the partnership is distributed.

(10) In the case of a person that is not an individual, the existence of the person
(11) The partnership participates in a merger under Chapter 3 (relating to entity transactions) and:

(i) the partnership is not the surviving entity; or
(ii) otherwise as a result of the merger, the person ceases to be a partner.

(12) The partnership participates in an interest exchange under Chapter 3 and, as a result of the interest exchange, the person ceases to be a partner.

(13) The partnership participates in a conversion under Chapter 3.

(14) The partnership participates in a division under Chapter 3 and:

(i) the partnership is not a resulting association; or
(ii) as a result of the division, the person ceases to be a partner.

(15) The partnership participates in a domestication under Chapter 3 and, as a result of the domestication, the person ceases to be a partner.

(16) The partnership dissolves and completes winding up.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 601. This section states default rules that may be varied by the partnership agreement. However, it would be nonsensical to vary some of the rules – , to provide that death does not cause an individual’s dissociation as provided in paragraph (7)(i), or that a person (other than an individual) remains a partner even after the existence of the person has terminated as provided in paragraph (10).

Paragraph (1) – Partnership agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation. The partnership cannot eliminate the power of a partner to dissociate by express will, but can make the dissociation wrongful. 15 Pa.C.S. § 8415(c)(14).

Paragraph (3) – General partnership agreements often provide for “no cause” expulsion, and courts differ somewhat in how they approach such provisions. 363 N.E.2d 573, 576 (N.Y. 1977), 664 N.E.2d 239, 245 (Ill. App. Ct. 1996). the Committee Comment to 15 Pa.C.S. § 8447(d) (explaining the implied contractual covenant of good faith and fair dealing).

Paragraph (4)(ii) – This paragraph permits expulsion when a partner no longer has any “skin in the game.” Under this paragraph (unless the partnership agreement provides otherwise), a partner’s transferee can protect itself from the vulnerability of “bare transferee” status by obligating the partner/transferor to retain a small interest and exercise the partner’s governance rights to protect the
Paragraph (4)(iii)(B) - 1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

Paragraph (5) - Although the partnership agreement can revise or eliminate this rule, doing so requires careful planning. 15 Pa.C.S. § 8481(a)(4), which contains some analogous grounds for dissolution by court order. The partnership agreement cannot vary those grounds. 15 Pa.C.S. § 8415(c)(15).

Paragraph (5)(iii) - This provision has an analog among the grounds for dissolution. 15 Pa.C.S. § 8481(a)(4)(iii) and (iv).

Paragraph (6)(i) - This provision is subject to bankruptcy law. 11 U.S.C. § 365(e) (invalidating “ipso facto” clauses, subject to some exceptions).

Paragraphs (8) and (9) - A change in trustee or personal representative does not cause dissociation.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

Paragraph (11)(i) - If the separate existence of a partnership ceases as a result of a merger, no person can continue as a partner of the partnership. When the merger takes effect, the partners of the disappearing partnership are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving partnership. In those circumstances, the merger will have dissociated them from one partnership and admitted them into partnership in the surviving partnership.

Paragraph (11)(ii) - It is possible for a plan of merger to “shuffle the equity” of the surviving entity, even to the extent of “taking out” some of the owners of the surviving entity.

Paragraph (13) - By definition, a partnership that converts to another type of entity ceases to be a partnership. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will be owners of the converted entity. In some cases, the conversion will “shuffle the equity” and “take out” some of the partners of the converting partnership.

Paragraph (15) - Domestication does not by itself dissociate a partner, because the domesticated entity remains both a partnership and the same entity without interruption as the domesticating company. However, an “equity shuffle” could dissociate a partner.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
"partnership"
Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 602.

Subsection (a) - A general partnership is a voluntary association. Necessarily therefore, a general partner always has the power to dissociate by express will. Accordingly, the partnership agreement cannot vary this subsection except to the extent of requiring the notice of dissociation to be in writing. 15 Pa.C.S. § 8415(c)(14).

The phrase “rightfully or wrongfully” reflects the distinction between a partner’s right to withdraw in contravention of the partnership agreement and a partner’s right to do so. Thus, although a partner cannot be enjoined from exercising the power to dissociate, the dissociation may be wrongful under subsection (b).

Subsection (b) - This subsection lists exhaustively (“only if”) the dissociations that are “wrongful.” The label has three consequences:

1. liability for resulting damages under subsection (c), which may be offset under 15 Pa.C.S. § 8471(c) against the amount of the buyout price due to the partner under section 8471(a);
2. postponement of payment of the buyout price under section 8471(h) until the term expires or the undertaking is completed; and
3. exclusion from the winding up process under 15 Pa.C.S. § 8484, if the dissociation results in dissolution of the partnership.

This subsection states a default rule. The partnership agreement can expand the list; , by making wrongful a dissociation that breaches the implied contractual covenant of good faith and fair dealing. In theory, the partnership agreement can also contract or even eliminate the list.

Subsection (b)(2)(i) - This paragraph protects a partner’s reactive withdrawal from a term partnership after the premature departure of another partner, such as the partnership’s rainmaker or main supplier of capital, under the same circumstances that may result in the dissolution of the partnership under 15 Pa.C.S. § 8481(a)(2)(i). Under that provision, a term partnership is dissolved 90 days after the bankruptcy, incapacity, death (or similar dissociation of a partner that is an entity), or wrongful dissociation of any partner, unless a majority in interest of the remaining partners agree to continue the partnership. Under this provision, a partner’s exercise of the right of withdrawal by express will under those circumstances is rendered “rightful,” even if the partnership is continued by others, and does not expose the withdrawing partner to damages for wrongful dissociation under subsection (c).

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

Subsection (c) - A partner who prematurely dissociates from a partnership for an agreed term or undertaking risks liability for any resulting damages. For example, the partnership might incur substantial expenses in replacing the partner’s expertise or reputation or in obtaining new financing.

In effect, this subsection equates wrongful dissociation with breach of contract. Accordingly, courts should look to contract law to determine what consequential damages are recoverable.
The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”

“partnership”
Subsection (b)(2) – Unless a partner’s dissociation results in dissolution and the dissociated partner participates in winding up under 15 Pa.C.S. § 8482, dissociation ends a partner’s fiduciary duties “with regard to matters arising and events occurring after the person’s dissociation.” The dividing line requires special attention with regard to a partner’s duties not to compete and not to take partnership opportunities. For example, a partner who leaves a brokerage firm may immediately compete with the firm for new clients, but must exercise care in completing on-going client transactions and must account to the firm for any fees received from the old clients on account of those transactions.

Disputes involving law firms have generated much of the relevant case law. , 535 N.E.2d 1255, 1257 (M ass. 1989); , 203 Cal. Rptr. 13, 15 (Cal. Dist. Ct. App. 1984). To a large extent a well-drawn partnership agreement can avoid problems. However, if the partnership becomes insolvent, the bankruptcy court may well scrutinize the partners’ arrangements. , 476 B.R. 732, 743 (S.D.N.Y. 2012) (considering whether a law firm had “fraudulently transferred … assets when its partners adopted the Jewel Waiver [releasing rights recognized by ] on the eve of dissolution without consideration”).

This provision does not determine the effect of a person’s dissociation as a partner on the person’s future obligations under the partnership agreement. Some contractual obligations typically extend beyond dissociation – , non-competition agreements.

Subsection (c) – A partner’s obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the partner learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation.

This subsection is subject to change by the partnership agreement. For example, many partnership agreements contain non-competition provisions that extend beyond a partner’s dissociation.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

Subchapter G
Dissociation as Partner if Business Not Wound Up

Section

8471. Purchase of interest of person dissociated as partner.
8472. Power to bind and liability of person dissociated as partner.
8473. Liability of person dissociated as partner to other persons.
8474. Certificate of dissociation.
8475. Continued use of partnership name.

§ 8471. Purchase of interest of person dissociated as partner.

(a) Right to buyout. – If a person is dissociated as a partner without the dissociation winding up as if still a partner, unless the dissociation was wrongful.”).
resulting in a dissolution and winding up of the partnership business under section 8481 (relating to events causing dissolution), the partnership shall cause the person’s interest in the partnership to be purchased for a buyout price determined under subsection (b).

(b) Buyout price. - The buyout price of the interest of a person dissociated as a partner is the amount that would have been distributable to the person under section 8486(b) (relating to disposition of assets in winding up and required contributions) if, on the date of dissociation, the assets of the partnership were sold and the partnership were wound up, with the sale price equal to the greater of:

(1) the liquidation value; or

(2) the value based on a sale of the entire business as a going concern without the person.

(c) Interest and offsets. - Interest accrues on the buyout price from the date of dissociation to the date of payment, except that damages for wrongful dissociation under section 8462(b) (relating to power to dissociate as partner and wrongful dissociation) and all other amounts owing, whether or not presently due, from the person dissociated as a partner to the partnership must be offset against the buyout price.

(d) Indemnification. - A partnership shall defend, indemnify and hold harmless a person dissociated as a partner whose interest is being purchased against all partnership liabilities, whether incurred before or after the dissociation, except liabilities incurred by an act of the person under section 8472 (relating to power to bind and liability of person dissociated as partner).

(e) Payment of partnership’s estimate. - If an agreement for the purchase of the interest of a person dissociated as a partner is not reached within 120 days after a demand in record form for payment, the partnership shall pay, or cause to be paid, in money to the person the amount the partnership estimates to be the buyout price and accrued interest, reduced by any offsets and accrued interest under subsection (c).

(f) Buyout of deferred payment. - If a deferred payment is authorized under subsection (h), the partnership may tender an offer in record form to pay the amount it estimates to be the buyout price and accrued interest, reduced by any offsets under subsection (c), stating the time of payment, the amount and type of security for payment and the other terms and conditions of the obligation.

(g) Information accompanying payment. - The payment or tender required by subsection (e) or (f) must be accompanied by the following:

(1) a statement of partnership assets and liabilities as of the date of dissociation;

(2) the latest available partnership balance sheet and income statement, if any;
(3) an explanation of how the estimated amount of the payment was calculated; and
(4) notice in record form that the payment is in full satisfaction of the obligation to purchase unless, within 120 days after the notice, the person dissociated as a partner commences an action to determine the buyout price, any offsets under subsection (c) or other terms of the obligation to purchase.

(h) Deferred payment on wrongful dissociation. – A person that wrongfully dissociates as a partner before the expiration of a definite term or the completion of a particular undertaking is not entitled to payment of any part of the buyout price until the expiration of the term or completion of the undertaking, unless the person establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership. A deferred payment must be adequately secured and bear interest.

(i) Right to bring action. – A person dissociated as a partner may maintain an action against the partnership, under section 8448(b) (relating to actions by partnership and partners), to determine the buyout price of that person’s interest, any offsets under subsection (c) or other terms of the obligation to purchase. The action must be commenced within 120 days after the partnership has tendered payment or an offer to pay or within one year after demand in record form for payment if no payment or offer to pay is tendered. The court shall determine the buyout price of the person’s interest, any offset due under subsection (c), and accrued interest, and enter judgment for any additional payment or refund. If deferred payment is authorized under subsection (h), the court shall also determine the security for payment and other terms of the obligation to purchase. The court may assess reasonable attorney fees and the fees and expenses of appraisers or other experts for a party to the action, in amounts the court finds equitable, against a party that the court finds acted arbitrarily, vexatiously or not in good faith. The finding may be based on the partnership’s failure to tender payment or an offer to pay or to comply with subsection (g).

Committee Comment (2016):
This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 701.
This subchapter provides for the buyout of a dissociated partner’s interest in the partnership when the partner’s dissociation does not result in a dissolution and winding up of its business under Subchapter H. If there is no dissolution, the remaining partners have a right to continue the business and the dissociated partner has a right to be paid the value of his partnership interest. These rights can, of course, be varied in the partnership agreement. A dissociated partner has a continuing relationship with the partnership and third parties as provided in 15 Pa.C.S. §§ 8463(b), 8472, and 8473. 15 Pa.C.S. § 8446(e) (former partner’s access to information).

The rules in this section are merely default rules. The partners may, in the partnership agreement, fix the method or formula for determining the buyout price and all of the other terms and conditions of the buyout right. Indeed, the very right to a buyout itself may be modified, although a provision providing for a complete forfeiture would probably not be enforceable. 15 Pa.C.S. 110 (supplementary principles of law).

Subsection (a) – This subsection provides that, if a partner’s dissociation does not result in a
windup of the business, the partnership shall cause the interest of the dissociating partner to be purchased for a buyout price determined pursuant to subsection (b). The buyout is mandatory, unless the partnership provides otherwise. The “cause to be purchased” language is intended to accommodate a purchase by the partnership, one or more of the remaining partners, or a third party.

Subsection (b) - This subsection provides how the “buyout price” is to be determined. The terms “fair market value” or “fair value” were not used because they are often considered terms of art having a special meaning depending on the context, such as in tax or corporate law. Under subsection (b), the buyout price is the amount that would have been distributable to the dissociating partner under 15 Pa.C.S. § 8486(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of liquidation value or going concern value without the departing partner. Liquidation value is not intended to mean distress sale value. Under general principles of valuation, the hypothetical selling price in either case should be the price that a willing and informed buyer would pay a willing and informed seller, with neither being under any compulsion to deal. The notion of a minority discount in determining the buyout price is negated by valuing the business as a going concern. Other discounts, such as for a lack of marketability or the loss of a key partner, may be appropriate, however. For a case applying the concept, , 427 B.R. 798, 803-05 (N.D. Cal. 2010).

Since the buyout price is based on the value of the business at the time of dissociation, the partnership must pay interest on the amount due from the date of dissociation until payment to compensate the dissociating partner for the use of his interest in the firm. Under former 15 Pa.C.S. § 8364, the dissociated partner could elect a share of the profits in lieu of interest.

Former 15 Pa.C.S. § 8360(b)(3)(ii) provided that the good will of the business would not be considered in valuing a wrongfully dissociating partner’s interest. Under this section, unless the partnership’s goodwill is damaged by the wrongful dissociation, the value of the wrongfully dissociating partner’s interest will include any goodwill value of the partnership. If the firm’s goodwill is damaged, the amount of the damages suffered by the partnership and the remaining partners will be offset against the buyout price.

Subsection (c) - This subsection provides that the partnership may offset against the buyout price all amounts owing by the dissociated partner to the partnership, whether or not presently due, including any damages for wrongful dissociation under 15 Pa.C.S. § 8463(c). This rule has the effect of accelerating payment of amounts not yet due from the departing partner to the partnership, including a long-term loan by the partnership to the dissociated partner. Where appropriate, the amounts not yet due should be discounted to present value. A dissociating partner, on the other hand, is not entitled to an add-on for amounts owing to him by the partnership. Thus, a departing partner who has made a long-term loan to the partnership must wait for repayment, unless the terms of the loan agreement provide for acceleration upon dissociation.

The partnership’s right of setoff does not limit the amount of the damages for the partner’s wrongful dissociation and any other amounts owing to the partnership to the value of the dissociated partner’s interest. Those amounts may result in a net sum due to the partnership from the dissociated partner.

Subsection (d) - This section requires the partnership to indemnify a dissociated partner against all partnership liabilities, whether incurred before or after the dissociation, except those incurred by the dissociated partner under 15 Pa.C.S. § 8472. The rationale for covering post-dissociation liabilities is the fact of dissociation; the dissociated partner is no longer a co-owner of the enterprise. As for pre-existing liabilities, the determination of the buyout price necessarily assumes that these liabilities will be paid. Thus, in effect the dissociate partner’s share of these liabilities has already been paid through the...
Subsection (e) – Under this subsection, if no agreement for the purchase of the dissociated partner’s interest is reached within 120 days after the dissociated partner’s demand for payment, the partnership must pay, or cause to be paid, in cash the amount it estimates to be the buyout price, adjusted for any offsets allowed and accrued interest. Thus, the dissociating partner will receive in cash within 120 days of dissociation the undisputed minimum value of the partner’s partnership interest. If the dissociated partner claims that the buyout price should be higher, suit may thereafter be brought as provided in subsection (i) to have the amount of the buyout price determined by the court.

The “cause to be paid” language of subsection (a) is repeated here to permit either the partnership, one or more of the continuing partners, or a third-party purchaser to tender payment of the estimated amount due.

Subsection (f) – Under this subsection, when deferred payment is authorized in the case of a wrongfully dissociating partner, a written offer stating the amount the partnership estimates to be the purchase price should be tendered within the 120-day period, even though actual payment of the amount may be deferred, possibly for many years. The dissociated partner is entitled to know at the time of dissociation what amount the remaining partners think is due, including the estimated amount of any damages allegedly caused by the partner’s wrongful dissociation that may be offset against the buyout price.

Subsection (g) – The disclosures required by this subsection should serve to identify and narrow substantially the items of dispute between the dissociated partner and the partnership over the valuation of the partnership interest. The disclosures will also serve to pin down the parties as to their claims of partnership assets and values and as to the existence and amount of all known liabilities. Lastly, the disclosures will force the remaining partners to consider thoughtfully the difficult and important questions as to the appropriate method of valuation under the circumstances, and in particular, whether they should use going concern or liquidation value. Simply getting that information on the record in a timely fashion should increase the likelihood of a negotiated resolution of the parties’ differences during the 120-day period within which the dissociated partner must bring suit.

Subsection (h) – Former 15 Pa.C.S. § 8360 contemplated a buyout in the context of the partnership business being continued after a partner’s wrongful dissociation had (inevitably) caused dissolution. Former section 8360(b)(3) entitled the wrongfully dissociating partner to have the buyout price “paid to him in cash, or the payment secured by bond approved by the court.” This subsection takes a different approach. Under this subsection, a wrongfully dissociating partner is not entitled to receive any portion of the buyout price before the expiration of the term or completion of the undertaking, unless the dissociated partner establishes to the satisfaction of the court that earlier payment will not cause undue hardship to the business of the partnership.

Subsection (i) – This subsection provides that a dissociated partner may maintain an action against the partnership to determine the buyout price, any offsets, or other terms of the purchase obligation. The action must be commenced within 120 days after the partnership tenders payment of the amount it estimates to be due or, if deferred payment is authorized, its offer. This provision creates a 120-day “cooling off” period. It also allows the parties an opportunity to negotiate their differences after disclosure by the partnership of its financial statements and other required information.

If the partnership fails to tender payment of the estimated amount due (or an offer, if deferred payment is authorized), the dissociated partner has one year after demand for payment in which to commence suit.
The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“court”
“obligation”
“record form”

§ 8472. Power to bind and liability of person dissociated as partner.

(a) When partnership bound. – After a person is dissociated as a partner without the dissociation resulting in a dissolution and winding up of the partnership business and before the partnership is merged or divided out of existence, converted or domesticated under Chapter 3 (relating to entity transactions), or dissolved, the partnership is bound by an act of the person only if:

(1) the act would have bound the partnership under section 8431 (relating to partner agent of partnership) before dissociation; and

(2) at the time the other party enters into the transaction:

   (i) less than two years has passed since the dissociation; and

   (ii) the other party does not know or have notice of the dissociation and reasonably believes that the person is a partner.

(b) Liability of person dissociated as partner. – If a partnership is bound under subsection (a), the person dissociated as a partner which caused the partnership to be bound is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation incurred under subsection (a); and

(2) if a partner or another person dissociated as a partner is liable for the obligation, to the partner or other person for any damage caused to the partner or other person arising from the liability.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 702.

A partner’s dissociation ends immediately the partner’s actual authority to act for the partnership, unless the dissociation results in a dissolution and winding up of the business of the partnership.
§ 8473. Liability of person dissociated as partner to other persons.

(a) General rule. – Except as provided in subsection (b), a person dissociated as a partner is not liable for a partnership obligation incurred after dissociation.

(b) Exception. – A person that is dissociated as a partner is liable on a transaction entered into by the partnership after the dissociation only if:

(1) a partner would be liable on the transaction; and
(2) at the time the other party enters into the transaction:

   (i) less than two years have passed since the dissociation; and

   (ii) the other party does not have knowledge or notice of the dissociation and reasonably believes that the person is a partner.

(c) Constructive release by creditor. – A person dissociated as a partner is released from liability for a debt, obligation or other liability of the partnership if the partnership’s creditor, with knowledge or notice of the person’s dissociation but without the person’s consent, agrees to a material alteration in the nature or time of payment of the debt, obligation or other liability. The release from liability under this subsection applies whether the liability arises directly or indirectly, by way of contribution or otherwise, but only if the liability arises solely by reason of having been a partner.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 703.

To the extent a partnership has been a limited liability partnership throughout its existence, the liability rules stated in this section are moot.

Subsection (a) – Other law determines when a partnership obligation is “incurred.”

Subsection (b) – The rule stated here for the “lingering liability” of a dissociated partner parallels the rule stated in 15 Pa.C.S. § 8472 for a dissociated partner’s lingering apparent authority. Lingering liability can be reduced or cut off if the partnership is a limited liability partnership under 15 Pa.C.S. Ch. 82

Subsection (b)(2)(i) – In any event, a dissociated partner’s lingering liability ends two years after the dissociation.

Subsection (b)(2)(ii) – A person might have notice under 15 Pa.C.S. § 8413(d)(2)(ii) (certificate of dissolution) as well as under section 8413(b)(1) (person “ha[ving] reason to know the fact from all the facts known to the person at the time in question”).

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“partner”
“partnership”

The term “obligation: used in this section is defined in 15 Pa.C.S. § 102.

§ 8474. Certificate of dissociation.

(a) Right to file certificate. – A person dissociated as a partner or the partnership may deliver to the department for filing a certificate of dissociation stating:
(1) the name of the partnership;

(2) if the partnership is a limited liability partnership, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office; and

(3) the name of the person and that the person has dissociated from the partnership.

(b) Effect of certificate. – A certificate of dissociation is a limitation on the authority of a person dissociated as a partner for the purposes of section 8433 (relating to certificate of partnership authority).

(c) Cross references. – See:

- Section 134 (relating to docketing statement).
- Section 135 (relating to requirements to be met by filed documents).
- Section 136(c) (relating to processing of documents by Department of State).
- Section 8413(d)(2) (relating to knowledge and notice).
- Section 8418 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 704.

Both a person dissociated as a partner and the partnership are entitled (but not required) to deliver to the department a certificate of dissociation. For the person dissociated as a partner, the incentive is to limit the lingering liability stated in 15 Pa.C.S. § 8473. For the partnership, the incentive is to limit the lingering apparent authority stated in 15 Pa.C.S. § 8472 and to permit the filing of a copy of the certificate in any relevant land records. 15 Pa.C.S. § 8433(g).

Subsection (a) – 15 Pa.C.S. § 8413(d)(2)(i) provides that “A person not a partner is deemed ... to have notice of ... a person's dissociation as a partner 90 days after a certificate of dissociation under section 8474 ... becomes effective.” This constructive notice ends both the lingering apparent authority and lingering liability exposure of the dissociated partner. 15 Pa.C.S. §§ 8472(a)(2)(ii) and 8473(b)(2)(ii). Because the 90 day period begins when the certificate of dissociation becomes effective, rather than on the earlier date of dissociation, it is important that the person dissociated as a partner file the certificate promptly after dissociation.

Subsection (b) – This subsection interrelates a certificate of dissociation with the intricate provisions in Chapter 84 on certificates of authority.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

- “partner”
- “partnership”
- The term “department” used in this section is defined in 15 Pa.C.S. § 102.
§ 8475. Continued use of partnership name.

Continued use of a partnership name, or the name of a person dissociated as a partner as part of the partnership name, by partners continuing the business does not of itself make the person dissociated as a partner liable for an obligation of the partners or the partnership continuing the business.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 705.

The section merely protects a person dissociated as a partner from liability in case the partnership continues to use the person’s name. Whether a partnership has a right to the continued use is a matter for the partnership agreement; this chapter does not state a rule on the subject.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter H
Dissolution and Winding Up

§ 8481. Events causing dissolution.

(a) General rule. – A partnership is dissolved, and its business shall be wound up, upon the occurrence of any of the following:

(1) In a partnership at will, the partnership knows or has notice of a person’s express will to withdraw as a partner, other than a partner that has dissociated under section 8461(2), (3), (4), (5), (6), (7), (8), (9) or (10) (relating to events causing dissociation), except that, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on the later date.
(2) In a partnership for a definite term or particular undertaking:

   (i) within 90 days after a person’s dissociation by death or otherwise under section 8461(6), (7), (8), (9) or (10) or wrongful dissociation under section 8462(b) (relating to power to dissociate as partner and wrongful dissociation), the affirmative vote or consent of at least half of the remaining partners to wind up the partnership business, for which purpose a person’s rightful dissociation under section 8462(b)(2)(i) constitutes that partner’s consent to wind up the partnership business;

   (ii) the affirmative vote or consent of all the partners to wind up the partnership business; or

   (iii) the expiration of the term or the completion of the undertaking.

(3) An event or circumstance that the partnership agreement states causes dissolution.

(4) On application by a partner, the entry by the court of an order dissolving the partnership on the grounds that:

   (i) the conduct of all or substantially all the partnership’s business is unlawful;

   (ii) the economic purpose of the partnership is likely to be unreasonably frustrated;

   (iii) another partner has engaged in conduct relating to the partnership business which makes it not reasonably practicable to carry on the business in partnership with that partner; or

   (iv) it is otherwise not reasonably practicable to carry on the partnership business in conformity with the partnership agreement.

(5) On application by a transferee, the entry by the court of an order dissolving the partnership on the grounds that it is equitable to wind up the partnership business:

   (i) after the expiration of the term or completion of the undertaking, if the partnership was for a definite term or particular undertaking at the time of the transfer or entry of the charging order that gave rise to the transfer; or

   (ii) at any time, if the partnership was a partnership at will at the time of the transfer or entry of the charging order that gave rise to the transfer.

(6) The passage of 90 consecutive days during which the partnership does not have at least two partners.
(b) Cross reference. – See section 8415(c)(15) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 801.

Except for subsection (a)(4) and (5), this section comprises default rules. Paragraphs 4 and 5 are mandatory only with regard to the stated grounds for dissolution. Section 8415(c)(15), comment.

In some circumstances, an amendment to the partnership agreement might avert dissolution, by revising an agreed-upon deadline for selling the partnership assets and winding up the business. A retroactive amendment may also be possible.

CV 082220PSG(P)Wx, 2009 WL 279080 at *5-6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 802(b) permitted a partnership to rescind dissolution).

Subsection (a)(1) – This paragraph: (i) recognizes the power of any partner in a partnership at will to dissolve the partnership at any time “by express will”; and (ii) provides that a partner who has already been dissociated under some other provision of this section lacks the power to dissolve the partnership.

The latter proposition seems self-evident; a person dissociated as a partner is no longer a partner.

Subsection (a)(2) – This paragraph provides three ways in which a term partnership may be dissolved before the expiration of the term.

Subsection (a)(2)(i) – A person’s dissociation as a partner by death or otherwise under 15 Pa.C.S. § 8461(6) through (10) or wrongful dissociation under 15 Pa.C.S. § 8462(b), makes a term partnership to dissolution. If within 90 days after the dissociation at least half of the remaining partners express their will to dissolve the partnership, the partnership dissolves. 15 Pa.C.S. § 8461(6) through (10) pertain respectively to a partner’s bankruptcy or similar financial impairment [6]; a partner’s death or incapacity [7]; the distribution by a trust-partner of its entire transferable interest [8]; the distribution by an estate-partner of its entire transferable interest; and the termination of an entity-partner [10].

During the same 90-day window, 15 Pa.C.S. § 8462(b)(2)(i) permits each remaining partner to withdraw rightfully by express will. A partner does not express a desire to withdraw solely by reason of voting for or consenting to the winding up of the partnership business. However, the converse is true: “a person’s rightful dissociation under section 8462(b)(2)(i) constitutes that partner's consent to wind up the partnership business.”

Example: A term partnership has seven partners, and one of the partners dissociates by dying before the end of the term. The partnership will dissolve if within 90 days after the dissociation three of the remaining six partners affirmatively vote or consent to dissolution.

Example: Same facts, except the partner dissociates in breach of the partnership agreement. Same result.

Example: Same facts, except that the partner is “a person that … is acting as a partner by virtue of being a trustee of … a trust, [and] the trust’s entire transferable interest in the partnership [has been] distributed.” Same result.
1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

**Subsection (a)(2)(ii)** - This provision states that a term partnership may be dissolved and wound up at any time by the express will of all the partners. The provision merely reflects the general rule that the partnership agreement may override the statutory default rules and that the partnership agreement, like any contract, can be amended at any time by unanimous consent.

**Subsection (a)(2)(iii)** - This rule is inherent in the concept of a partnership for a specified term or undertaking. This provision must be read in conjunction with 15 Pa.C.S. § 8449. Under 15 Pa.C.S. § 8449(a), if the partners continue the business after the expiration of the term or the completion of the undertaking, the partnership will be treated as a partnership at will and the rights and duties of the partners will remain the same, so far as is consistent with a partnership at will. Moreover, if the partners continue the business without any settlement or liquidation of the partnership, under 15 Pa.C.S. § 8449(b) they are presumed to have agreed that the partnership will continue, despite the lack of a formal agreement.

**Subsection (a)(3)** - The partners can avoid the effects of this paragraph by amending the partnership agreement before dissolution occurs. A retroactive amendment may also be possible. , CV082220PSG(PJWx), 2009 WL 279080 at *5-6 (C.D. Cal. Feb. 3, 2009) (giving effect to an amendment that retroactively eliminated an event of dissolution; noting that UPA (1997) § 8482(b) permitted a partnership to rescind dissolution).

**Subsection (a)(4)** - The partnership agreement cannot vary the stated grounds for dissolution.

**Subsection (a)(4)(i)** - The “all or substantially all” proviso is intended to avoid dissolution for insubstantial or innocent regulatory violations.

**Subsection (a)(4)(ii)-(iv)** - The Virginia Supreme Court has referred to “these statutory bases for judicial dissolution as the economic purpose test, the partner conduct test, and the business operations test, respectively.” , 724 S.E.2d 690, 693 (Va. 2012). These tests somewhat overlap and are often pled together. , 375 F. Supp. 2d 942, 948 (N.D. Cal. 2005).

Some courts have held that, if the trial court finds grounds for dissolution under one or more of these provisions, that court has no power to order a lesser remedy, such as a buyout. , 95 P.3d 671, 679-680 (Mont. 2004) (so holding even though: (i) “judicial dissolution of the Partnership would trigger significant adverse tax consequences to all the parties involved, including M arvin [who commenced the action seeking dissolution];” and (ii) “M arvin [had] requested monetary damages as an alternative to dissolution”); , 19 Cal. Rptr. 3d 198, 201 (Cal. Dist. Ct. App. 2004) (“W here the court determines it is not reasonably practical to carry on the partnership, the court has no discretion to deny a partner's application to dissolve it.”).

**Subsection (a)(4)(ii)** - Poor financial performance is neither sufficient nor necessary to satisfy this provision. , 724 S.E.2d 690, 694 (Va. 2012). The provision’s history substantiates the first point (not by itself sufficient). UPA (1997) § 801, cmt. 8 (“RUPA deletes UPA Section 32(1)(e) which provides for dissolution when the business can only be carried on at a loss. That
provision might result in a dissolution contrary to the partners’ expectations in a start-up or tax shelter situation, in which case “book” or “tax” losses do not signify business failure.

As for the second point (not always necessary), 724 S.E.2d at 694-955 (noting that the partnership’s purpose was “to acquire, hold, invest in, and lease and sell investment properties;” stating with regard to the Virginia analog to paragraph 4(ii) that “[t]he partners’ expectations for realizing these purposes included not only expectations of economic success, but also the ability to undertake these activities in an efficient and productive manner to maximize return to the partnership;” and listing numerous ways in which the relationship between the partners frustrated the economic purpose of the partnership).

**Subsection (a)(4)(iii)** – A partner can trigger this provision without necessarily breaching the partnership agreement. , 830 N.W.2d 191, 202 (Neb. 2013) (stating that “the somewhat autocratic manner in which Ardith conducted the affairs of the partnership in recent years, even if not in violation of the partnership agreement, would constitute grounds for dissolution under [the UPA (1997) version of this provision”).

**Subsection (a)(4)(iv)** – The specific terms of the partnership agreement are the frame of reference for applying this provision. , 22 F.3d 498, 502 (2d Cir. 1994):

The issue is not whether the partnerships can effectively carry out the general purpose of the Agreements after considerable modification of their terms. Rather, the query is: whether the purpose of the Agreements can be carried out “in conformity with the partnership agreement,” that is, in conformity with the terms and conditions of the Agreements to which the limited partners ascribed and on which they relied when choosing to part with their capital. (applying the provision of RULPA (1976/1985) that is analogous to paragraph (4)(iii)).

**Subsection (a)(5)** – This paragraph gives a transferee rights comparable to a partner who seeks dissolution because the other partners are continuing the business in derogation of the partner’s rights to obtain dissolution. The paragraph is based on UPA (1914) § 32(2) but UPA (1997) added the requirement that the court determine that it is equitable to wind up the business. The rights of a transferee under this section cannot be varied in the partnership agreement. Section 8415(c)(15). Neither the Uniform Limited Partnership Act (2001) (Last Amended 2013) nor the Uniform Limited Liability Company Act (2006) (Last Amended 2013) have comparable provisions, because both those acts provide for perpetual existence. 15 Pa.C.S. §§ 8620(c) (limited partnerships) and 8818(c) (limited liability companies).

**Subsection (a)(6)** – This provision is consistent with 15 Pa.C.S. § 8422(a) (stating that “the association of two or more persons to carry on as co-owners a business for profit forms a partnership”).

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”

“partner”
“partnership”
certificate of termination stating:

(A) the name of the partnership;

(B) if the partnership is a limited liability partnership, subject to section 109, the address, including street and number, if any, of its registered office; and

(C) that the partnership is terminated; and

(vii) perform other acts necessary or appropriate to the winding up.

(c) Participation after dissociation. – A person whose dissociation as a partner resulted in dissolution may participate in winding up as if still a partner, unless the dissociation was wrongful.

(d) Conduct of winding up when no partner. – If a dissolved partnership does not have a partner and no person has the right to participate in winding up under subsection (c), the personal representative or guardian of the last person to have been a partner may wind up the partnership’s business. If the personal representative or guardian does not exercise that right, a person to wind up the partnership’s business may be appointed by the affirmative vote or consent of transferees owning a majority of the rights to receive distributions at the time the consent is to be effective. A person appointed under this subsection has the powers of a partner under section 8484 (relating to power to bind partnership after dissolution) but is not liable for the debts, obligations and other liabilities of the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the partnership’s business.

(e) Judicial supervision. – On the application of any partner or person entitled under subsection (c) to participate in winding up, a court may order judicial supervision of the winding up of a dissolved partnership, including the appointment of a person to wind up the partnership’s business, if:

(1) the partnership does not have a partner and within a reasonable time following the dissolution no person has been appointed under subsection (d); or

(2) the applicant establishes other good cause.

(f) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8415(c)(16) (relating to contents of partnership agreement).
Section 8418 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 802.
Under the default rules of this chapter, dissolution does not change governance arrangements. However, dissolution does change the context for determining whether a matter is in or outside “the ordinary course of business of [the] partnership” under 15 Pa.C.S. § 8441(j). In addition, dissolution triggers a default rule entitling each partner to “reasonable compensation for services rendered in winding up the business of the partnership” under 15 Pa.C.S. § 8441(i).

15 Pa.C.S. § 8484 governs the post-dissolution power of a partner to bind the partnership, and 15 Pa.C.S. § 8485 governs the liability after dissolution of a partner and a person dissociated as general partner.

**Subsection (b)** - The particular circumstances determine how long winding up may continue without giving “good cause” for court intervention under subsection (e). There is no “hard and fast” rule. Partnership Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time…. (quoting, 497 S.W.2d 860, 867 (M.o. Ct. A pp. 1973)); 574 P.2d 447, 450 (Alaska 1978) (stating “we are aware of [no authority] requiring that deadlines be set in the winding up of a partnership”).

“Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners.”, 270 N.W.2d 632, 635 (Iowa 1978). “Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible.”, 856 P.2d 536, 540 (M ont. 1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary.

1 If the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the value of such asset can continue to inure to the benefit of the partners through the continuation of the partnership after dissolution.

**Subsection (b)(2)(i) and (vi)** - For the constructive notice effect of a certificate of dissolution or termination, 15 Pa.C.S. §§ 8413(d)(2)(i) and (ii) and 8433.

**Subsection (c)** - This provision applies only to a partner whose rightful dissociation resulted in dissolution.

**EXAMPLE**: Partner A dissociates from the Killarney Company (“Killarney”), a general partnership. A’s dissociation does not result in dissolution, and, per the Killarney partnership agreement, A’s transferable interest is being redeemed over five years. A year after A’s dissociation, Partner B dissociates rightfully, and dissolution results. B may participate in Killarney’s winding up; A may not.

**EXAMPLE**: Partner A wrongfully dissociates from Killarney, and the dissociation results in the dissolution of Killarney. Partner A may not participate in winding up.

A partner’s duties and obligations under 15 Pa.C.S. § 8447 extend to winding up under 15 Pa.C.S. § 8463(b)(2). However, under 15 Pa.C.S. § 8447(b)(3) each partner’s duty not to compete ends when the
partnership dissolves.

**Subsection (d)** - A person appointed under this section will normally be an agent of the dissolved partnership, acting pursuant to a contract. Agency and contract law will determine the person’s duties; by its terms 15 Pa.C.S. § 8447 does not apply.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”

“partner”

“partnership”
(ii) the other party does not know or have notice of the dissociation and
reasonably believes that the person is a partner; and

(2) the act:

(i) is appropriate for winding up the partnership’s business; or

(ii) would have bound the partnership under section 8431 before dissolution
and the other party does not know or have notice of the dissolution at the time the
other party enters into the transaction.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 804.

This section provides the “power to bind” rules applicable once dissolution occurs. In general, this
section parallels 15 Pa.C.S. § 8472 (power to bind of a person dissociated as a partner when dissolution
does not result from the dissociation). However, one significant difference exists. 15 Pa.C.S. §
8472(a)(2)(i) contains a provision analogous to a statute of repose. A person’s power to bind the
partnership terminates two years after the date of dissociation. Subsection (b) contains a comparable
provision, but subsection (a) does not.

Subsections (a) and (b) – Subsection (a) states the power-to-bind rules for persons still partners
when dissolution occurs. Subsection (b) pertains to persons dissociated before dissolution, including a
partner whose dissociation results in dissolution. Compare 15 Pa.C.S. § 8482(c) (stating as an
matter that a person whose rightful dissociation results in dissolution may participate in winding up “as if
still a partner”).

Subsection (a)(1) – This paragraph states a rule of inherent agency power. Restatement (Second) of Agency § 8A (defining “inherent agency power” as “the power of an agent which is
derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists
for the protection of persons harmed by or dealing with a servant or other agent”). Thus, a partner might
act without actual or apparent authority and still bind the partnership. The partnership agreement cannot
change the stated rule, because the rule pertains to the rights under this act of third parties. 15 Pa.C.S.
§ 8415(c)(17).

If a partner’s words or conduct trigger this paragraph, thereby binding the partnership, and the
partner lacks the actual authority to do so, the partner breaches an agent’s duty to act within authority, and
is liable to the partnership for any resulting damages. Restatement (Third) of Agency § 8.09(1) (“An
agent has a duty to take action only within the scope of the agent’s actual authority”). The partner might
also be liable for breach of the partnership agreement.

Subsection (a)(2) – A person might have notice under 15 Pa.C.S. § 8413(d)(2)(ii) (statement of
dissolution) or 8413(b)(1) (reason to know).

Subsection (b) – This subsection deals with the post-dissolution power to bind of a person
dissociated as a partner. For the most part: (i) paragraph 1 replicates 15 Pa.C.S. § 8472, pertaining to the
pre-dissolution power to bind of a person dissociated as a partner; and (ii) paragraph 2 replicates
subsection (a) of this section, which states the post-dissolution power to bind of a person that is still a
For a person dissociated as a partner to bind a dissolved partnership:
the person’s dissociation must have:
been rightful; and
resulted in dissolution; and
the person’s act must satisfy both paragraphs 1 and 2.

Subsection (b)(1)(ii) - A person might have notice under 15 Pa.C.S. § 8413(d)(2)(ii) (statement of
dissolution) or 8413(b)(1) (reason to know).

Subsection (b)(2)(ii) - A person might have notice under 15 Pa.C.S. § 8413(d)(2)(ii) (statement of
dissolution) or 8413(b)(1) (reason to know).

The following terms used in this section are defined in 15 Pa.C.S. § 8412:
“business”
“partner”
“partnership”

The term “act” used in this section is defined in 15 Pa.C.S. § 102.

§ 8485. Liability after dissolution.

(a) Liability of partner. – If a partner having knowledge of the dissolution causes a partnership to incur an obligation under section 8484(a)(2) (relating to power to bind partnership after dissolution) by an act that is not appropriate for winding up the partnership business, the partner is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation; and
(2) if another partner or person dissociated as a partner is liable for the obligation, to that other partner or person for any damage caused to that other partner or person arising from the liability.

(b) Liability of person dissociated as partner. – Except as provided under subsection (c), if a person dissociated as a partner causes a partnership to incur an obligation under section 8484(b), the person is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation; and
(2) if a partner or another person dissociated as a partner is liable for the obligation, to the partner or other person for any damage caused to the partner or other person arising from the obligation.
(c) Exception in winding up. – A person dissociated as a partner is not liable under subsection (b) if:

1. section 8482(c) (relating to winding up and filing of certificates) permits the person to participate in winding up; and

2. the act that causes the partnership to be bound under section 8484(b) is appropriate for winding up the partnership’s business.

Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 805.

This section parallels 15 Pa.C.S. § 8472(b). It is possible for more than one person to be liable under this section on account of the same partnership obligation. This chapter does not provide any rule for apportioning liability in that circumstance.

Subsection (a)(2) – If the partnership is not a limited liability partnership, the liability created by this paragraph includes liability under 15 Pa.C.S. §§ 8436(a) and 8473(b). The paragraph also applies when a partner or person dissociated as a general partner suffers damage due to a contract of guaranty.

Other law determines liability (if any) to a person that is neither a partner nor dissociated as a partner.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

“business”
“partner”
“partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“act”
“obligation”

§ 8486. Disposition of assets in winding up and required contributions.

(a) Creditors. – In winding up its business, a partnership shall apply its assets, including the contributions required by this section, to discharge the partnership’s obligations to creditors, including partners that are creditors.

(b) Surplus. – After a partnership complies with subsection (a), any surplus shall be distributed in the following order, subject to any charging order in effect under section 8454 (relating to charging order):

1. to each owner of a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and
(2) among owners of transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership.

(c) Insufficient assets. – If a partnership’s assets are insufficient to satisfy all its obligations under subsection (a), with respect to each unsatisfied obligation incurred when the partnership was not a limited liability partnership, the following rules apply:

(1) Each person that was a partner when the obligation was incurred and that has not been released from the obligation under section 8473(c) (relating to liability of person dissociated as partner to other persons) shall contribute to the partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions when the obligation was incurred.

(2) If a person does not contribute the full amount required under paragraph (1) with respect to an unsatisfied obligation of the partnership, the other persons required to contribute under paragraph (1) on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions when the obligation was incurred.

(3) If a person does not make the additional contribution required under paragraph (2), further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) Recovery of additional contributions. – A person that makes an additional contribution under subsection (c)(2) or (3) may recover from any person whose failure to contribute under subsection (c)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person’s liability under this subsection shall not exceed the amount the person failed to contribute.

(e) Distributions when surplus insufficient. – If a partnership does not have sufficient surplus to comply with subsection (b)(1), the following shall apply:

(1) If the partnership has been a limited liability partnership at any time during its existence, any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

(2) If the partnership has never been a limited liability partnership, the partners and any person whose dissociation resulted in dissolution shall contribute to the partnership funds sufficient to cause the insufficiency under subsection (b)(1) to be allocated consistently with section 8441(a) (relating to partner’s rights and duties).

(f) Form of payment. – All distributions made under subsections (b) and (c) must be paid in money.
Committee Comment (2016):

This section is patterned after Uniform Partnership Act (1997) (Last Amended 2013) § 806.

Subsection (a) - This subsection is non-waivable as to creditors who are not partners. Section 8415(c)(17) (stating that the partnership agreement may not "restrict the rights under this title of a person other than a partner "). However, if a creditor is willing, a dissolved partnership may certainly make agreements with the creditor specifying the terms under which the partnership will "discharge its obligations" to the creditor.

If under 15 Pa.C.S. § 8436(a) one or more partners are also liable on a partnership obligation, any agreement between the partnership and the creditor should take into account 15 Pa.C.S. § 8473(c).

Subsection (b) - For the most part, this subsection states default rules. For example, partnership agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under this subsection (or otherwise under the partnership agreement) are subject to 15 Pa.C.S. § 8454 (charging orders). As to the extent the partnership agreement can be amended to affect the distribution rights of persons already transferees, 15 Pa.C.S. § 8417(b).

Subsection (c) - This section applies obligation by obligation, because a person – partner or person dissociated as a partner – is required to contribute to the partnership to satisfy a partnership obligation only if, when the obligation was incurred: (i) the person was a partner; and (ii) the partnership was not an LLP. 15 Pa.C.S. § 8436.

The partnership agreement can change the allocation of liability partners and persons dissociated as partners, but cannot prejudice the rights of non-partner creditors.

EXAMPLE: The A-B Partnership (the "Partnership") owes Creditor $150, an obligation incurred when Partners A and B were the only partners, sharing distributions equally, and the Partnership was not an LLP. The Partnership has no funds to pay Creditor. Although subsection (c)(1) would require Partners A and B each to contribute equally (i.e., $75), the A-B Partnership Agreement provides that Partner A has the entire contribution obligation and Partner B has none. As between Partner A and B, Partner A is obligated to contribute $150 and Partner B nothing. However, as to Creditor, Partner B still has a contribution obligation of $75.

This formal distinction will have practical consequences only if Partner A does not contribute the full $150. Also, Creditor may have problems establishing standing.

Subsection (c)(2) and (3) - These provisions adopt an approach analogous to buy-sell provisions that: (i) provide that an owner’s effort to sell the ownership interest triggers an option to purchase allocated among all the other owners; (ii) make the option conditional on the entire interest being purchased; and (iii) provide for successive allocations to take up any previous allocations that were not exercised.

The following terms used in this section are defined in 15 Pa.C.S. § 8412:

"business"
"contribution"
Chapter 85
Limited Partnerships

(Repealed.)

Chapter 86
Limited Partnerships

Subchapter A
General Provisions

§ 8611. Short title and application of chapter.
(a) Short title. – This chapter may be cited as the Pennsylvania Uniform Limited Partnership Act of 2016.

(b) Initial application. – Before April 1, 2017, this chapter governs only:

(1) a limited partnership formed on or after [the Legislative Reference Bureau shall insert here the effective date of this chapter]; and

(2) except as provided in subsections (d) and (e), a limited partnership formed before [the Legislative Reference Bureau shall insert here the effective date of this chapter] which elects, in the manner provided in its partnership agreement or by law for amending the partnership agreement, to be subject to this chapter.

(c) Full effective date. – Except as provided in subsections (d) and (e), on and after April 1, 2017, this chapter governs all limited partnerships.

(d) Transitional provisions. – With respect to a limited partnership formed before [the Legislative Reference Bureau shall insert here the effective date of this chapter], the following rules apply except as the partners otherwise elect in the manner provided in the partnership agreement or by law for amending the partnership agreement:

(1) Section 8620(c) (relating to characteristics of limited partnership) does not apply and the limited partnership has whatever duration it had under the law applicable immediately before [the Legislative Reference Bureau shall insert here the effective date of this chapter].

(2) Sections 8661 (relating to dissociation as limited partner) and 8662 (relating to effect of dissociation as limited partner) do not apply and a limited partner has the same right and power to dissociate from the limited partnership, with the same consequences, as existed immediately before [the Legislative Reference Bureau shall insert here the effective date of this chapter].

(3) Section 8663(a)(4) (relating to dissociation as general partner) shall not apply.

(4) Section 8663(a)(5) shall not apply and the court has the same power to expel a general partner as the court had immediately before [the Legislative Reference Bureau shall insert here the effective date of this chapter].

(5) Section 8681(a)(3) (relating to events causing dissolution) shall not apply and the connection between a person’s dissociation as a general partner and the dissolution of the limited partnership is the same as existed immediately before [the Legislative Reference Bureau shall insert here the effective date of this chapter].

(e) Liabilities to third parties. – With respect to a limited partnership that elects under subsection (b)(2) to be subject to this chapter, after the election takes effect, the provisions of this
chapter relating to the liability of the limited partnership’s general partners to third parties apply:

(1) before April 1, 2017, to:

(i) a third party that had not done business with the limited partnership in the year before the election took effect; and

(ii) a third party that had done business with the limited partnership in the year before the election took effect only if the third party knows or has been notified of the election; and

(2) on and after April 1, 2017, to all third parties, except that those provisions remain inapplicable to any obligation incurred while those provisions were inapplicable under paragraph (1)(ii).

(f) Cross reference. – See section 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

Subsection (a) is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) (“ULPA”) § 101. Subsections (b) through (e) are patterned after ULPA § 112.

The Committee Comments to this chapter are intended to form part of the legislative history of the chapter and to be citable as such under 1 Pa.C.S. § 1939. The Committee Comments have been adapted from the commentary to the ULPA and are intended to supersede that commentary.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partner”
“partnership agreement”

The term “court” used in this section is defined in 15 Pa.C.S. § 102.

§ 8612. Definitions.

(a) General definitions. – The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Certificate of limited partnership.” The certificate required by section 8621 (relating to formation of limited partnership and certificate of limited partnership). The term includes the certificate as amended or restated.

“Contribution.” Property or a benefit described in section 8651 (relating to form of contribution) which is provided by a person to a limited partnership to become a partner or in the
person’s capacity as a partner.

“Distribution.” A direct or indirect transfer of money or other property or incurrence of indebtedness by a limited partnership to a person on account of a transferable interest or in the person’s capacity as a partner. The term:

(1) Includes:

(i) a redemption or other purchase by a limited partnership of a transferable interest; and

(ii) a transfer to a partner in return for the partner’s relinquishment of any right to participate as a partner in the management or conduct of the partnership’s activities and affairs or to have access to records or other information concerning the partnership’s activities and affairs.

(2) Does not include:

(i) amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program;

(ii) the making of, or payment or performance on, a guaranty or similar arrangement by a partnership for the benefit of any or all of its partners;

(iii) a direct or indirect allocation or transfer effected under Chapter 3 (relating to entity transactions) with the approval of the members; or

(iv) a direct or indirect transfer of:

(A) a governance or transferable interest; or

(B) options, rights or warrants to acquire a governance or transferable interest.

“General partner.” A person that:

(1) has become a general partner under section 8641 (relating to becoming a general partner) or was a general partner in a partnership when the partnership became subject to this chapter under section 8611 (relating to short title and application of chapter); and

(2) has not dissociated as a general partner under section 8663 (relating to dissociation as general partner).

“Limited partner.” A person that:
(1) has become a limited partner under section 8631 (relating to becoming a limited partner) or was a limited partner in a limited partnership when the partnership became subject to this chapter under section 8611; and

(2) has not dissociated as a limited partner under section 8661 (relating to dissociation as limited partner).

“Limited partnership.” A n association formed under this chapter or which becomes subject to this chapter under Chapter 3 or section 8611. The term includes a limited liability limited partnership or an electing partnership that is also a limited partnership.

“Partner.” A limited partner or general partner.

“Partnership agreement.” The agreement, whether or not referred to as a partnership agreement and whether oral, implied, in record form or in any combination thereof, of all the partners of a limited partnership concerning the matters described under section 8615(a) (relating to contents of partnership agreement). The term includes the agreement as amended or restated.

“Required information.” The information that a limited partnership is required to maintain under section 8618 (relating to required information).

“Transferable interest.” The right, as initially owned by a person in the person’s capacity as a partner, to receive distributions from a limited partnership, whether or not the person remains a partner or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

“Transferee.” A person to which all or part of a transferable interest has been transferred, whether or not the transferor is a partner. The term includes a person that owns a transferable interest under section 8662(a)(3) (relating to effects of dissociation as limited partner) or 8665(a)(4) (relating to effects of dissociation as general partner).

(b) Index of definitions. – Following is a nonexclusive list of definitions in section 102 (relating to definitions) that apply to this chapter:

“A ct” or “action.”

“Court.”

“Debtor in bankruptcy.”

“Department.”

“Jurisdiction.”

“Jurisdiction of formation.”

“Obligation.”

“Professional services.”

“Property.”

“Record form.”

“Sign.”

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“Transfer.”

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 102.

“Certificate of limited partnership.” Until the 1985 amendments to the Revised Uniform Limited Partnership Act (1976), the certificate of limited partnership contained significant information about the limited partnership and the relationship among the partners. Under this chapter the certificate: (i) merely reflects the existence of a limited partnership (rather than being the locus for important governance rules); and (ii) is significantly different from articles of incorporation, which typically have a substantially greater role in setting rules for the corporate entity and its owners. For the relationship between the certificate of limited partnership and the partnership agreement, see 15 Pa.C.S. § 8617(d).

“Contribution.” This definition serves to distinguish capital contributions from other circumstances under which a partner or would-be partner might provide benefits to a limited partnership (providing services to the partnership as an employee or independent contractor, leasing property to the partnership).

This definition does not encompass capital raised from transferees. In contrast, partnership agreements sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. 15 Pa.C.S. § 8690(b)(1) (referring to distributions to be made “to each owner of a transferable interest that reflects made and not previously returned”) (emphasis added).

“Distribution.” This provision specifically refers to transactions between a limited partnership and one of its partners, which in the corporate context would be labeled a “redemption.” This paragraph has subparts because partnership ownership interests are conceptually bifurcated into economic rights (“transferable interests”) and governance and information rights.

Under 15 Pa.C.S. § 8653(a), “[a]ny distribution made by a limited partnership before its dissolution and winding up must be shared among the partners and persons dissociated as partners on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner ....” Because a redemption is a distribution, absent authorization in the partnership agreement a limited partnership may not redeem the interest of one partner or transferee without redeeming (or at least offering to redeem) the interests of all other partners and transferees to a comparable extent.

The law of close corporations has flirted with a similar notion.

, 328 N.E.2d 505, 518 (M ass. 1975) (stating, with regard to closely held corporations, “if the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price”);

, 498 A.2d 642, 650 (M d. 1985) (rejecting the “per se breach of duty” approach);

, 353 N.E.2d 657, 663 (M ass. 1976) (stating that “untempered application of the strict good faith standard enunciated in ... will result in the imposition of limitations on legitimate action by the controlling group in a close corporation which will unduly hamper its effectiveness in managing the corporation in the best interests of all concerned”).
A partnership agreement can override the proportional treatment requirement in 15 Pa.C.S. § 8653(a) without specifically mentioning redemptions.

EXAMPLE: A limited partnership agreement: (i) includes a list (the “protected list”) of decisions or actions that may be taken only with the consent of all the general partners and 2/3 of the interests owned by the limited partners; and (ii) provides that all other decisions and acts may be taken as the general partners determine. The protected list does not include redemptions. The partnership agreement overrides the proportional treatment requirement.

This exclusion affects the reach of the clawback provisions in 15 Pa.C.S. § 8645 and also the charging order remedy under 15 Pa.C.S. § 8673. The effect on the clawback provision reflects the law in several states, Del. Code Ann., tit. 6, § 17-607(a) (2012) and V A. Code § 153.21(b) (2012), and makes sense conceptually and as a matter of policy. (8th Cir. B A P 2005), aff’d 452 F.3d 756 (8th Cir. 2006) (“We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.”)

Affecting the charging order remedy is novel and is further explained in the Committee Comment to 15 Pa.C.S. § 8673(a).

“General partner.” A partnership agreement may vary 15 Pa.C.S. § 8641 and provide a process or mechanism for becoming a general partner that is different from or additional to the rules stated in that section. For the purposes of this definition, a person who becomes a general partner pursuant to a provision of the partnership agreement “become[s] a general partner under section 8641.” After a person has been dissociated as a general partner under 15 Pa.C.S. § 8663, the term “general partner” continues to apply to the person’s conduct while a general partner. 15 Pa.C.S. § 8665(b).

“Limited partnership.” This definition makes no reference to a limited partnership having partners upon formation, but 15 Pa.C.S. § 8621(d) does.

“Partnership agreement.” This definition must be read in conjunction with 15 Pa.C.S. §§ 8615 through 8617, which further describe the partnership agreement. In particular, although this definition refers to “the agreement ... of all the partners,” the limited partnership itself is bound by and may enforce the agreement under 15 Pa.C.S. § 8616(a).

A partnership agreement is a contract, and therefore all statutory language pertaining to the partnership agreement must be understood in the context of the law of contracts.

The definition of “partnership agreement” is very broad and recognizes a wide scope of authority for the partnership agreement: “the matters described under 15 Pa.C.S. § 8615(a).” Those matters include not only all relations the partners and the partnership but also “the activities and affairs of the partnership and the conduct of those activities and affairs” as provided in 15 Pa.C.S. § 8615(a)(3). Moreover, the definition puts no limits on the form of the partnership agreement. To the contrary, the definition contains the phrase “whether oral, implied, in record form or in any combination thereof”

Unless the partnership agreement itself provides otherwise:

a partnership agreement may comprise a number of separate documents (or records), however denominated; and

subject to 15 Pa.C.S. § 8616(b) (deeming new partners to assent to the then-existing partnership agreement), a document, understanding, etc. can be part of the partnership agreement only with
the assent of all persons then partners.

An agreement among less than all partners might well be enforceable among those partners as parties, but would not be part of the partnership agreement. However, under 15 Pa.C.S. § 8615(a)(4), an amendment to a partnership agreement can be made with less than unanimous consent if the partnership agreement itself so provides.

An agreement to form a limited partnership is not itself a partnership agreement. The term “partnership agreement” presupposes “partners,” and a person cannot be a partner in a partnership before the partnership exists. However, as soon as a limited partnership comes into existence, it perforce has a partnership agreement. For example, suppose: (i) two persons, Gamma and Lambda, orally and informally agree to join their business activities through a limited partnership, in which Gamma will be the general partner and Lambda the limited partner; (ii) an appropriate certificate of limited partnership is delivered to the department, which files the certificate; (iii) Gamma and Lambda become respectively the general and limiter partner; and (iv) the limited partnership is thus formed under 15 Pa.C.S. § 8621(d). A partnership agreement exists. In the words of the definition of “partnership agreement,” the partners have agreed (i) who the partners are, (ii) that, as the partners, they will conduct a business, (iii) that Gamma will be the general partner, and (iv) that Lambda will be the limited partner and will be more or less passive. That agreement - no matter how informal or rudimentary - is an agreement “concerning the matters described in section 8615(a).” To the extent the agreement does not provide the “rules of the game,” the default rules of this chapter fill in the gaps as provided in 15 Pa.C.S. § 8615(b).

Partnership agreements, like other contracts, are subject to the Statute of Frauds. The land provision of the statute of frauds applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock. In contrast, the land provision does not apply to a partner’s interest in a partnership, no matter how much the partnership owns or deals in real property. Interests in a partnership are personal property and reflect no direct interest in the entity’s assets. Thus, the real property issues pertaining to a partnership ownership of land do not “flow through” to the partners and partnership interests.

“Transferable interest.” Absent a contrary provision in the partnership agreement or the consent of the partners, a “transferable interest” is the only interest in a limited partnership which can be transferred. 15 Pa.C.S. § 8672. “Transferable interest” is defined “as [an interest] initially owned by a person in the person’s capacity as a partner,” because this chapter does not contemplate a limited partnership directly creating interests that comprise only economic rights. 15 Pa.C.S. §§ 8631 and 8641 (addressing how a person becomes a limited and general partner) and 8672 (addressing how a person becomes a transferee).

“Transferee.” Under 15 Pa.C.S. §§ 8662(a)(3) and 8665(a)(5), subject to limited exceptions, “any transferable interest owned by [a general or limited partner] in the person’s capacity as a [general or limited] partner immediately before dissociation is owned by the person solely as a transferee” following dissociation.

The following terms used in this section are defined in 15 Pa.C.S. § 102:

association
“electing partnership”
“governance interest”
“limited liability limited partnership”
§ 8613. Knowledge and notice.

(a) Knowledge. – A person knows a fact if the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under law other than this chapter.

(b) Notice. – A person has notice of a fact if the person:

(1) has reason to know the fact from all the facts known to the person at the time in question; or

(2) is deemed to have notice of the fact under subsection (c) or (d).

(c) Effect of certificate. – A certificate of limited partnership on file in the department is notice that the partnership is a limited partnership and the persons designated in the certificate as general partners are general partners. Except as provided under subsection (d) and section 8201(g) (relating to scope), the certificate is not notice of any other fact.

(d) Constructive notice. – A person not a partner is deemed to have notice of:

(1) another person’s dissociation as a general partner 90 days after an amendment to the certificate of limited partnership which states that the other person has dissociated becomes effective or 90 days after a certificate of dissociation pertaining to the other person becomes effective, whichever occurs first;

(2) a limited partnership’s:

(i) dissolution 90 days after an amendment to the certificate of limited partnership stating that the limited partnership is dissolved is effective;

(ii) termination 90 days after a certificate of termination under section 8682(e) (relating to winding up and filing of certificates) is effective; and

(iii) participation in a merger, interest exchange, conversion, division or domestication, 90 days after a statement of merger, interest exchange, conversion, division or domestication under Chapter 3 (relating to entity transactions) is effective.

(e) Notification. – Except as provided in section 113(b) (relating to delivery of document), a person notifies another person of a fact by taking steps reasonably required to inform the other person in ordinary course, whether or not those steps cause the other person to
(f) Effect of partner’s knowledge or notice. – A general partner’s knowledge or notice of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership, except in the case of a fraud on the partnership committed by or with the consent of the general partner. A limited partner’s knowledge or notice of a fact relating to the partnership is not effective as knowledge of or notice to the partnership.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 103.

This section contains no generally applicable provisions determining when an organization is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the law of agency; (ii) are very complicated; (iii) should not have any different content under this chapter than in other circumstances; and (iv) are the subject of considerable attention in the Restatement (Third) of Agency (2006).

This section does not define “notice” to include “knowledge.” Although conceptualizing the latter as giving the former makes logical sense and has a long pedigree, that conceptualization is counter-intuitive for the uninitiated. In ordinary usage, notice has a meaning separate from knowledge. This chapter follows ordinary usage and therefore contains some references to “knowledge or notice.”

Subsection (a)(2) – In this context, the most important source of “law other than this chapter” is the common law of agency.

Subsection (b)(1) – The “facts known to the person at the time in question” include facts the person is deemed to know under subsection (a)(2).

Subsection (c) – 15 Pa.C.S. § 8621(b)(3) requires the initial certificate of limited partnership to name each general partner, and 15 Pa.C.S. § 8622(d) requires a limited partnership to promptly amend its certificate of limited partnership to reflect any change in the identity of its general partners. Nonetheless, it will be possible, albeit improper, for a person to be designated in the certificate of limited partnership as a general partner without having become a general partner as contemplated by 15 Pa.C.S. § 8641. Likewise, it will be possible for a person to have become a general partner without being designated as a general partner in the certificate of limited partnership. According to the last clause of subsection (c), the fact that a person is not listed in the certificate as a general partner is not notice that the person is not a general partner.

If the partnership agreement and the certificate of limited partnership are inconsistent, the certificate prevails under 15 Pa.C.S. § 8617(d)(1). If the partnership agreement and a document in the public record other than the certificate are inconsistent, the partnership agreement prevails as to internal matters and the record prevails as to third parties who have reasonably relied on it under 15 Pa.C.S. § 8617(d)(2)(ii). 15 Pa.C.S. §§ 8622(d) (requiring the limited partnership to amend its certificate of limited partnership to keep accurate the listing of general partners), 8622(e) (requiring a general partner to take corrective action when the general partner knows that the certificate of limited partnership contains false information), and 8624 (imposing liability for false information in, , the certificate of limited partnership).
Subsection (d) - This subsection provides constructive notice of facts stated in specified filed public records. The subsection works in conjunction with other sections of this chapter to curtail the power to bind and personal liability of general partners and persons dissociated as general partners. 15 Pa.C.S. §§ 8642, 8666, 8667, 8684, and 8685. The constructive notice begins 90 days after the effective date of the filed record. For the rules on delayed effective dates in documents filed by the department, see 15 Pa.C.S. § 136(c).

The 90-day delay under this subsection applies only to the constructive notice and not to the event described in the filed record.

EXAMPLE: On March 15, X dissociates as a general partner from XYZ Limited Partnership by giving notice to XYZ. 15 Pa.C.S. § 8663(a)(1). On March 20, XYZ amends its certificate of limited partnership to remove X's name from the list of general partners.

X's dissociation is effective March 15. If on March 16 X purports to be a general partner of XYZ and under 15 Pa.C.S. § 8666(a) binds XYZ to some obligation, X will be liable under section 8666(b) as a “person dissociated as a general partner” unless the other party has actual knowledge that X is not a general partner.

On June 13 (90 days after March 15), the world has constructive notice of X's dissociation as a general partner. Beginning on that date, X will lack the power to bind XYZ. 15 Pa.C.S. § 8666(a)(2)(ii) (providing that a person dissociated as a general partner can bind the limited partnership only if, “at the time the other party enters into the transaction ... the other party does not know or have notice of the dissociation”).

Constructive notice under this subsection applies to partners and transferees as well as other persons.

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

Subsection (f) - Under this subsection and 15 Pa.C.S. § 8632, information possessed by a person that is only a limited partner is not attributable to the limited partnership. However, information possessed by a person that is both a general partner and a limited partner is attributable to the limited partnership. 15 Pa.C.S. § 8619 (dual capacity). For a discussion of agency law principles analogous to “fraud on the partnership,” RESTATEMENT (THIRD) OF AGENCY § 5.04, cmt. b (2006).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“general partner”
“limited partnership”
“partner”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8614. Governing law.
(a) General rule. – The laws of this Commonwealth govern:

(1) the internal affairs of a limited partnership; and

(2) the liability of a partner as partner for the debts, obligations or other liabilities of a limited partnership.

(b) Cross reference. – See section 8615(c)(6) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 104.

Subsection (a)(1) – Like any other legal concept, “internal affairs” may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the partnership agreement, relations among the partners as partners, and relations between the limited partnership and its partners. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, cmt. a (1971) (defining “internal affairs” with reference to a corporation as “the relations inter se of the corporation, its shareholders, directors, officers or agents”). The concept of “internal affairs” does not include whether a person has power to bind a limited partnership.

Subsection (a)(2) – This paragraph obviously encompasses 15 Pa.C.S. §§ 8204 (the shield for general partners in a limited liability limited partnership) and 8633 (the liability shield for limited partners), but does not necessarily encompass a claim that a partner is liable to a third party for: (i) having purported to bind a limited partnership to the third party; or (ii) having committed a tort against the third party while acting on a limited partnership’s behalf or in the course of the partnership’s business. That liability is not by status (not partner as a partner) but rather results from function or conduct. 15 Pa.C.S. § 8632(b) (stating that, although Chapter 86 does not make a limited partner as limited partner the agent of a limited partnership, other law may make a limited partnership liable for the conduct of a limited partner).

This paragraph is stated separately from paragraph (1), because it can be argued that the liability of partners to third parties is not an internal affair. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 307 (1971) (treating shareholders’ liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. 8 F.3d 130, 132 (2nd Cir. 1993). In any event, the rule stated in this paragraph is correct. All sensible authorities agree that, except in extraordinary circumstances, “shield-related” issues should be determined according to the law of the state of organization.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partnership”

“partner”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.
§ 8615. Contents of partnership agreement.

(a) Scope of partnership agreement. - Except as provided in subsections (c) and (d), the partnership agreement governs:

1. relations among the partners as partners and between the partners and the limited partnership;
2. the rights and duties under this title of a person in the capacity of a partner;
3. the activities and affairs of the partnership and the conduct of those activities and affairs;
4. the means and conditions for amending the partnership agreement; and
5. the means and conditions for approving a transaction under Chapter 3 (relating to entity transactions).

(b) Title applies generally. - To the extent the partnership agreement does not provide for a matter described in subsection (a), this title governs the matter.

(c) Limitations - A partnership agreement may not do any of the following:

1. Vary a provision of Chapter 1 (relating to general provisions) or Subchapter A of Chapter 2 (relating to names).
2. Vary the right of a partner to approve a merger, interest exchange, conversion, division or domestication under section 333(a)(2) (relating to approval of merger), 343(a)(2) (relating to approval of interest exchange), 353(a)(3) (relating to approval of conversion), 363(a)(2) (relating to approval of division) or 373(a)(2) (relating to approval of domestication).
3. Vary the required contents of a plan of merger under section 332(a) (relating to plan of merger), plan of interest exchange under section 342(a) (relating to plan of interest exchange), plan of conversion under section 352(a) (relating to plan of conversion), plan of division under section 362(a) (relating to plan of division) or plan of domestication under section 372(a) (relating to plan of domestication).
4. Vary a provision of Chapter 81 (relating to general provisions) or 82 (relating to limited liability partnerships and limited liability limited partnerships).
5. Vary the provisions of section 8611(b), (c), (d) and (e) (relating to short title and application of chapter).
6. Vary the law applicable under section 8614 (relating to governing law).
(7) Vary any requirement, procedure or other provision of this title pertaining to:

(i) registered offices; or

(ii) the department, including provisions pertaining to documents authorized
or required to be delivered to the department for filing under this title.

(8) Vary a limited partnership’s capacity under section 8620(d) (relating to
characteristics of limited partnership) to sue and be sued in its own name.

(9) Vary a provision of section 8620(e).

(10) Eliminate the duty of loyalty provided for in section 8649(b)(1)(i) or (ii) or (2)
(relating to standards of conduct for general partners) or the duty of care, except as
provided in subsection (d).

(11) Vary the contractual obligation of good faith and fair dealing under sections
8635(a) (relating to limited duties of limited partners) and 8649(d), except as provided in
subsection (d).

(12) Provide indemnification or exoneration in violation of the limitations in sections
8648(g) (relating to reimbursement, indemnification, advancement and insurance) and
8649(i).

(13) Vary the information required under section 8618 (relating to required
information) or unreasonably restrict the duties and rights under section 8634 (relating to
limited partner rights to information) or 8647 (relating to general partner rights to
information), except as provided under subsection (d).

(14) Vary the power of a person to dissociate as a general partner under section
8664(a) (relating to power to dissociate as general partner and wrongful dissociation),
except to require that the notice under section 8663(a)(1) (relating to dissociation as general
partner) be in record form.

(15) Vary the causes of dissolution specified in section 8681(a)(6) (relating to events
causing dissolution).

(16) Vary the requirements to wind up the partnership’s activities and affairs
specified in section 8682(a), (b)(1), (d) and (e) (relating to winding up and filing of
certificates).

(17) Unreasonably restrict the right of a partner to maintain an action under
Subchapter I (relating to actions by partners).

(18) Vary the provisions of section 8694 (relating to special litigation committee),
but the partnership agreement may provide that the partnership may not have a special
litigation committee.

(19) Except as provided in section 8617(b) (relating to amendment and effect of partnership agreement), restrict the rights under this title of a person other than a partner.

(d) Rules. - Subject to subsection (c)(12), the following rules apply:

(1) The partnership agreement may:

   (i) specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts;

   (ii) alter the prohibition in section 8654(a)(2) (relating to limitations on distributions) so that the prohibition requires only that the partnership’s total assets not be less than the sum of its total liabilities; and

   (iii) impose reasonable restrictions on the availability and use of information obtained under section 8618, 8634 or 8647 and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

(2) To the extent the partnership agreement expressly relieves a partner of a responsibility that the partner would otherwise have under this title and imposes the responsibility on one or more other partners, the agreement also may eliminate or limit any fiduciary duty of the partner relieved of the responsibility which would have pertained to the responsibility.

(3) If not manifestly unreasonable, the partnership agreement may:

   (i) alter the aspects of the duty of loyalty stated in section 8649(b)(1)(i) or (ii) or (2);

   (ii) identify specific types or categories of activities that do not violate the duty of loyalty;

   (iii) alter the duty of care;

   (iv) alter or eliminate any other fiduciary duty; and

   (v) prescribe the standards by which the performance of the contractual obligation of good faith and fair dealing is to be measured.

(e) Determination of manifest unreasonableness. - A court shall decide as a matter of law whether a term of a partnership agreement is manifestly unreasonable under subsection (d)(3).

The court:
(1) shall make its determination as of the time the challenged term became part of the partnership agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes, activities and affairs of the limited partnership, it is readily apparent that:

(i) the objective of the term is unreasonable; or

(ii) the term is an unreasonable means to achieve the term’s objective.

Committee Comment (2016):

1.

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 105.

2.

The partnership agreement is pivotal to a limited partnership, and 15 Pa.C.S. §§ 8615 through 8617 are pivotal to this chapter. They must be read together, along with the definition of “partnership agreement” in 15 Pa.C.S. § 8612.

This section performs five essential functions:

(i) Subsection (a) establishes the primacy of the partnership agreement in establishing relations the limited partnership and its partners.

(ii) Subsection (b) recognizes this chapter as comprising mostly default rules — gap fillers for issues at to which the partnership agreement provides no rule.

(iii) Subsection (c) lists the few mandatory provisions of this title.

(iv) Subsection (d) lists some provisions frequently found in partnership agreements, authorizing some provisions unconditionally and other provisions so long as “not manifestly unreasonable.”

(v) Subsection (e) delineates in detail both the meaning of “not manifestly unreasonable” and the information relevant to determining a claim that a provision of a partnership agreement is manifestly unreasonable.

15 Pa.C.S. § 8616 details the effect of a partnership agreement on the limited partnership and on persons becoming partners. 15 Pa.C.S. § 8617 concerns the effect of a partnership agreement on third parties.

3.

“A limited partnership is a creature of both statute and contract.”

CIV.A. 18101, 2001 WL 1456494 at *5 (Del. Ch. Nov. 5, 2001). 15 Pa.C.S. § 8612 delineates a very broad scope for the “partnership agreement.” Once a limited partnership comes into existence and has at least one general partner and one limited partner, the limited partnership necessarily has a partnership agreement. Accordingly, this chapter refers to “the partnership agreement” rather than “a partnership agreement.” This phrasing should not, however, be read to require a limited partnership or its partners to take any formal action to adopt a partnership agreement.
Subject only to subsections (c) and (d), the partnership agreement has plenary power to structure and regulate the relations of the partners. For the relationship between the partnership agreement and certificate of limited partnership, see 15 Pa.C.S. § 8617(d).

One of the most complex questions in the law of unincorporated business organizations is the extent to which an agreement among the organization’s owners can affect the fiduciary and other duties of those who manage the organization – in the case of a limited partnership, the general partner (or partners). As explained in detail below with respect to subsection (d)(3), Chapter 86 rejects the notion that a contract can completely transform an inherently fiduciary relationship into a merely arm’s length association. Within that limitation, however, this section provides substantial power to the partnership agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

Subsection (a) recognizes that the partnership agreement is the map to the parties’ deal and that any claim by a partner of managerial misconduct must be assessed first under the relevant terms of the partnership agreement. Subsection (d) specifically validates arrangements commonly used to reshape managerial duties and limit the consequences of breaching those duties. Subsection (c) contains relevant limitations, but those limitations: (i) must be read together with subsection (d); and (ii) do not preclude the partnership agreement fundamentally redesigning the duties applicable to the general partners.

Subsection (a) – This subsection describes the very broad scope of the partnership agreement, which includes all matters constituting “internal affairs.” Compare 15 Pa.C.S. § 8414(a)(1) (using the phrase “internal affairs” in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in subsection (c), including the broad restriction stated in subsection (c)(19) concerning the rights under this title of third parties.

Subsection (a)(1) – This paragraph encompasses all the rights and duties of each partner, including rights and duties pertaining to transactions under Chapter 3.

Subsection (a)(4) – Under this provision, the partnership agreement can control both the quantum of consent required (majority of partners) and the means by which the consent is manifested (prohibiting modifications except when consented to in record form).

Subsection (b) – To the extent the partnership agreement does not determine an internal matter, this title determines the matter. The partnership agreement may vary any provision of this title pertaining to internal matters, except as provided in subsections (c) and (d).

Sometimes – but not always – the Committee Comments to this chapter refer to a variable provision as a “default rule” and a non-waivable provision as “mandatory.” These references are merely to draw attention to the default/mandatory distinction in particular contexts and have neither the intent nor the power to affect the default/mandatory status of provisions of this chapter whose comments lack a comparable reference.

Subsection (c) – This subsection lists provisions of this title whose respective effects cannot be varied or may be varied subject to a stated limitation. If a person claims that a term of the partnership agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.
Subsection (c)(2) – 15 Pa.C.S. § 324 specifies the vote required for a limited partnership to approve transactions under Chapter 3. The partnership agreement may modify section 324. In contrast, under the sections stated in this subsection:

- each partner is protected from being merged, exchanged, converted, divided, or domesticated “into” the status of a partner in a general partnership that is not a limited liability partnership (or a comparable “unshielded” position in some other organization) without the partner having consented to either:
  - the merger, interest exchange, conversion, division, or domestication; or
  - a partnership agreement provision that permits those transactions to occur with less than unanimous consent of the partners; and
  - merely consenting to a partnership agreement provision that permits amendment of the partnership agreement with less than unanimous consent of the partners does not qualify as the requisite direct consent.

Subsection (c)(3) – Because these plans are the basic “deal documents” for each of the organic transactions contemplated in Chapter 3, the partnership agreement may not vary the contents of these plans.

Subsection (c)(6) – 15 P.C.S. § 8614 states that this chapter provides the law applicable to: (i) the internal affairs of a limited partnership subject to Chapter 86; and (ii) the liability of partners for debts, obligations, and other liabilities of the limited partnership. The organizers of a limited partnership make this choice of law by choosing to form a limited partnership under this chapter. Domestication to another jurisdiction will re-set the choice of law.

Subsection (c)(7) – This prohibition is arguably implicit in subsection (c)(19) (affecting rights under this act of third parties) but is stated expressly to avoid any doubt.

Subsection (c)(8) – Under Chapter 86, a limited partnership is emphatically an entity, and the partners lack the power to alter that characteristic.

Subsection (c)(10) – This limitation is less powerful than might first appear, because subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties.

Subsection (c)(11) – 15 Pa.C.S. §§ 8635(a) and 8649(d) refer to the “contractual obligation of good faith and fair dealing,” which contract law implies in every contract. The partnership agreement cannot eliminate this obligation, neither in whole (generally) nor in part (as applicable to specified situations).

However, subsection (d)(3)(v) permits a partnership agreement to “prescribe the standards ... by which the performance of the contractual obligation of good faith and fair dealing is to be measured.”

EXAMPLE: The partnership agreement of a limited partnership gives the general partner the discretion to cause the limited partnership to enter into contracts with affiliates of the general partner (so-called “Conflict Transactions”). The agreement further provides: “When causing the Limited Partnership to enter into a Conflict Transaction, the general partner complies with 15 Pa.C.S. § 8649(d) if a disinterested person, knowledgeable in the subject matter, states in writing that the terms and conditions of the Conflict Transaction are equivalent to the terms and conditions that would be agreed to by persons in an arm’s length transaction under comparable circumstances.” This provision prescribes the standards by which the performance of the
The contractual obligation of good faith and fair dealing is to be measured and thus is valid.

**Example:** Same facts as the previous example, except that, during the performance of a Conflict Transaction, the general partner causes the limited partnership to waive material protections under the applicable contract. The standard stated in the previous example is inapposite to this conduct. The contractual obligation of good faith and fair dealing therefore applies to the conduct without any direct contractual delineation. (However, other terms of the agreement may be relevant to determining whether the conduct violates 15 Pa.C.S. § 8649(d)).

**Example:** The partnership agreement of a limited partnership gives the general partner “sole discretion” to make various decisions. The agreement further provides: “Whenever this agreement requires or permits a general partner to make a decision that has the potential to benefit one class of partners to the detriment of another class, the general partner complies with 15 P.C.S. § 8649(d) if the general partner makes the decision with:

a. the honest belief that the decision:
   i. serves the best interests of the Limited Partnership; or
   ii. at least does not injure or otherwise disserve those interests; and
b. the reasonable belief that the decision breaches no partner’s rights under this agreement.”

This provision prescribes the standards by which the performance of the contractual obligation of good faith and fair dealing is to be measured and is valid. , 991 A.2d 1120 (Del. 2010) (considering such a situation in the context of the right to call preferred stock and deciding by a 3-2 vote that exercising the call did not breach the implied covenant of good faith and fair dealing).

A partnership agreement that seeks to prescribe standards for measuring the contractual obligation of good faith and fair dealing under 15 Pa.C.S. § 8649(d) should expressly refer to the obligation either by citing the statutory provision or referring expressly to the contractual obligation. , 67 A.3d 400, 418 (Del. 2013) (distinguishing between the implied contractual covenant and an express contractual obligation of “good faith” as stated in a limited partnership agreement).

**Subsection (c)(12)** – The prohibition of indemnification and exoneration against recklessness or willful misconduct follows the standard applicable to business corporations. 15 P.C.S. §§ 1713 (exoneration) and 1746(b) (indemnification).

Although subsection (c)(12) does not expressly address contracts between a limited partnership and a general partner, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

**Example:** A limited partnership enters into a management contract with its general partner, and the contract provides the general partner exoneration for liability to the limited partnership even for willful and intentional misconduct. Most likely, contract law will treat the provision as against public policy and therefore unenforceable. Restatement (Second) of Contracts § 195(1) (1981) (“A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.”) If not, a court should hold the provision unenforceable to avoid evisceration of subsection (c)(12); or, alternatively, the court could invoke the policy expressed in subsection (c)(12) as grounds for holding the provision unenforceable under contract law.

**Subsection (c)(13)** – Although phrased as a restriction, this provision grants substantial power to the partnership agreement.
EXAMPLE: The partnership agreement of a limited partnership states “No limited partner may have access to information constituting a trade secret of the Partnership.” This restriction is reasonable.

The information required under 15 Pa.C.S. § 8618 is skeletal, and the partnership agreement can impose reasonable limitations on access to and use of other information.

Chapter 86 also empowers the limited partnership “as a matter within the ordinary course of its activities and affairs [to] impose reasonable restrictions and conditions on access to and use of information” obtained under 15 Pa.C.S. § 8634 (by limited partners) or 8647 (by general partners).

In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored. Under this chapter, general and limited partners have sharply different roles. A restriction that is reasonable as to a limited partner is not necessarily reasonable as to a general partner. Restricting a limited partner’s access to or use of the names and addresses of other limited partners is not per se unreasonable.

Subsection (c)(14) – A partnership agreement certainly may make a person’s dissociation as a general partner a breach of contract, but eliminating even the power to dissociate would contradict the essence of the limited partnership. General partners in a limited partnership are analogous to partners in a general partnership, and the relationship among general partners is at its core an association.

Moreover, general partners in a limited partnership provide services not only as fiduciaries but also pursuant to a contract. Only in exceptional circumstances does a party to a contract lack the power to breach, and such circumstances do not exist as to general partners of a limited partnership. Indeed, courts will not enjoin a person to remain in an ongoing contractual relationship that involves trust and confidence. E. Allan Farnsworth, CONTRACTS (3rd ed. 2003) § 12.7 at 781 (“A court will not grant specific performance of a contract to provide a service that is personal in nature. This refusal … is based [in part] on the undesirability of compelling the continuance of personal relations after disputes have arisen and confidence and loyalty have been shaken and the undesirability, in some instances, of imposing what might seem like involuntary servitude.”) (footnote omitted).

For two reasons Chapter 86 treats limited partners quite differently. First, to make possible the use of Chapter 86 as a suitable vehicle for family limited partnerships, “[a] person does not have a right to dissociate as a limited partner before the completion of the winding up of the limited partnership.” 15 Pa.C.S. § 8661(a).

Second, the partnership agreement may eliminate a limited partner’s power to dissociate, because limited partners do not resemble contract obligors. Limited partners provide no services to the limited partnership, and moreover limited partners have no fiduciary duties.

Subsection (c)(15) – The partnership agreement may not change the stated grounds for judicial dissolution but may determine the forum in which a claim for dissolution under 15 Pa.C.S. § 8681(a)(6) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in partnership agreements in particular.

Subsection (c)(16) – The cited provisions comprise the nonwaivable aspects of winding up a dissolved limited partnership. The other provisions of 15 Pa.C.S. § 8682 are default rules.
Subsection (c)(17) – Subchapter I delineates a partner’s rights to bring direct and derivative actions. It would be unreasonable to frustrate these rights, but not unreasonable to channel their exercise. For example, the partnership agreement might select a forum or provide for arbitration of both direct and derivative claims. Similarly, it is not unreasonable to provide for liquidated damages consonant with the law of contracts.

Subsection (c)(18) – A partnership agreement may not alter the rules in 15 Pa.C.S. § 8694 for a special litigation committee, but may preclude entirely the use of such a committee.

Subsection (c)(19) – This limitation pertains only to “the rights under this title of” third parties other than partners. Moreover, the limitation is subject to two substantial exceptions: 15 Pa.C.S. §§ 8616 (pertaining to the partnership agreement’s relationship to the limited partnership itself and to persons becoming partners) and 8617(b) (pertaining to the partnership agreement’s power over the rights of transferees).

Subsection (d) – The partnership agreement has full power over the matters described in subsection (a), except as specifically limited by subsection (c). Subsection (d) qualifies what would otherwise be absolute restrictions in subsection (c) on varying certain provisions of Chapter 86. Some of the arrangements listed in subsection (d) are subject to a “not manifestly unreasonable standard.” Subsection (e) delineates that standard.

Subsection (d)(1)(i) – An arrangement involving “one or more disinterested and independent persons” acting “after full disclosure of all material facts” would “alter the aspects of the duty of loyalty stated in section 8649(b)(1)(i) or (ii) or (2)” and would therefore be subject to the “not manifestly unreasonable standard” of Subsection (d)(3)(i).

Subsection (d)(1)(ii) – 15 Pa.C.S. § 8654(a)(2) prohibits distributions when, after the distribution, the assets would less than the total liabilities “plus the amount that would be needed, if the partnership were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of partners and transferees whose preferential rights are superior to the rights of persons receiving the distribution.” A preferential right to distributions is a matter of the partners, and subsection (d)(1)(ii) therefore permits it to be changed in the partnership agreement.

In contrast, the requirement that assets not be less than liabilities protects third parties – creditors of the limited partnership – and therefore cannot be changed by the partnership agreement. Likewise, the partnership agreement cannot change the equity insolvency test stated in 15 Pa.C.S. § 8654(a)(1) (“the partnership would not be able to pay its debts as they become due in the ordinary course of the partnership’s activities and affairs”).

Section (d)(3) – Chapter 86 rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of “freedom of contract” against the dangers that inescapably exist when some have power over the interests of others.

Nonetheless, a properly drafted partnership agreement may substantially alter and even eliminate fiduciary duties. Two important limitations exist. First, arrangements subject to subsection (d)(3) may not be “manifestly unreasonable,” which is delineated in subsection (e).

Second, the partnership agreement may not transform the relationship between the general partners, on the one hand, and the limited partnership and limited partners, on the other hand, into an entirely arm’s length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the
displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty. Civ. A. No. 5502-CS, 2011 WL 3505355 at *31 (Del.Ch. Aug. 8 2011) (stating that, even under a statute that “permits the waiver of fiduciary duties ... such waivers must be set forth clearly”); Civ. A. No. 4516-VCP, 2010 WL 629850, at *10 n.70 (Del. Ch. Feb. 24, 2010) (“Having been granted great contractual freedom by the LLC Act, drafters of or parties to an LLC agreement should be expected to provide ... clear and unambiguous provisions when they desire to expand, restrict or eliminate the operation of traditional fiduciary duties”). It would therefore be manifestly unreasonable for a partnership agreement to negate this rule.

Although Subsection (d)(3) does not expressly address contracts between a limited partnership and general partners, the stated constraints must also apply to such contracts. If not, those constraints are effectively meaningless.

Example: A limited partnership enters into a management contract with its sole general partner, and the contract provides that the duties of loyalty stated in 15 Pa.C.S. § 8649(b) are entirely eliminated. If the partnership agreement were to so provide, the provision would be subject to the “not manifestly unreasonable” standard under subsection (d)(3)(i). Absent the authorization provided by subsection (d)(3)(i), the management contract’s attempt to waive fiduciary duties would be unenforceable as a matter of public policy and contract law.

Subsection (d)(3)(i) – Subject to the “not manifestly unreasonable” standard, this paragraph empowers the partnership agreement to eliminate those aspects of the duty of loyalty set forth in the listed provisions of 15 Pa.C.S. § 8649(b). As to any other, uncodified aspects of the duty of loyalty, see subsection (d)(3)(iv).

Example: Joint Venture Limited Partnership (“JV”) is a limited partnership, with two general partners, Kappa, Inc. (“Kappa”) and Lambda, LLC (“Lambda”). The partnership agreement provides that:

- each general partner will appoint an individual to act for the partner with regard to JV;
- each appointee:
  - owes fiduciary and any other duties exclusively to the general partner that made the appointment; and
  - owes no duties to:
    - the other general partner;
    - the limited partners; and
    - the limited partnership itself.

The “not manifestly unreasonable” standard applies to these provisions under Subsection (d)(3)(i) and (iv), and the provisions are not manifestly unreasonable. Note that the provisions do not affect the duties of Kappa and Lambda as general partners.

Example: ABC Limited Partnership (“ABC”) is a limited partnership with three general partners and two entirely separate lines of business, the Alpha business and the Beta business. Under ABC’s partnership agreement:

- General Partner 1’s responsibilities pertain exclusively to the Alpha business; and responsibility for:
- the Beta business is allocated exclusively to General Partner 2; and
- ABC’s overall operations are allocated exclusively to General Partner 3.
- General Partner 2’s responsibilities pertain exclusively to the Beta business; and responsibility for:
the Alpha business is allocated exclusively to General Partner 1; and
ABC’s overall operations are allocated exclusively to General Partner 3.
General Partner 1 has no fiduciary duties pertaining to the Beta business.
General Partner 2 has no fiduciary duties pertaining to the Alpha business.
The "not manifestly unreasonable" standard applies to these provisions under subsection (d)(3)(i) and (iv), and the provisions are not manifestly unreasonable.

Subsection (d)(3)(ii) - Under this paragraph, a partnership agreement might provide that an affiliate of a general partner will provide compensated services to the limited partnership at a price not exceeding market price, or that a general partner may pursue opportunities that otherwise would be partnership opportunities. Such arrangements are commonplace and permissible.

Subsection (d)(3)(iii) - Subject to the "not manifestly unreasonable" standard and the bedrock requirements stated here and in subsection (c)(12), the partnership agreement can reduce the duty of care substantially. In particular, the partnership agreement can eliminate the aspects of the duty of care pertaining to gross negligence. This provision replicates in a particular context the general rule stated in subsection (c)(12).

Subsection (e) - The "not manifestly unreasonable" concept became part of uniform business entity statutes when the Uniform Partnership Act (1997) imported the concept from the Uniform Commercial Code. This subsection provides rules for applying the concept, specifying:

who decides the issue of "manifestly unreasonable"
"the court ... as a matter of law," lead-in language to subsection (e);
the framework for determining the issue
the determination is to be made "in light of the purposes, activities, and affairs of the limited partnership," subsection (e)(2);
the temporal setting for determining the issue
the determination is to be made "as of the time the challenged term became part of the partnership agreement," subsection (e)(1); and
what information is admissible for determining the issue
"only circumstances existing" when "the challenged term became part of the partnership agreement," subsection (e)(1).

Subsection (e) also provides a very demanding standard for persons claiming that a term of a partnership agreement is "manifestly unreasonable" because the court may invalidate the term only if, "in light of the purposes, activities, and affairs of the limited partnership it is that: (i) the objective of the term is unreasonable; or (ii) the term is an unreasonable means to achieve the term's objective." Subsection (e)(2) (emphasis added).

Subsection (e) is fundamental to Chapter 86, because: (i) Chapter 86 generally defers to the agreement among the partners; and (ii) subsection (e) safeguards the partnership agreement in at least four ways:

1. Determining manifest unreasonableness partners of an organization is a different task than doing so in a commercial context, where concepts like "usages of trade" are available to inform the analysis. Each business organization must be understood in its own terms and context.

2. If loosely applied, the concept of “manifestly unreasonable” would permit a court to rewrite the
partners’ agreement, which would destroy the balance Chapter 86 seeks to establish between freedom of contract and fiduciary duty.

3. Case law has not adequately delineated the concept. 

   408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) (“RUPA does not define what is ‘manifestly unreasonable’ and the parties have not cited, nor can the court locate, a decision that defines the term. Absent case law or even a dictionary definition, the court must rely on its common sense to recognize something as manifestly unreasonable.”).

4. In the context of statutes permitting stock transfer restrictions unless “manifestly unreasonable,” courts have often ignored the word “manifestly.”

   692 N.W.2d 144, 152 (N.D. 2005) (stating that “in close corporations, a majority of courts have sustained restrictions that are determined to be reasonable in light of the relevant circumstances”);
   638 N.W.2d 782, 786 (Minn. Ct. A pp. 2002) (stating that “the restrictions [on share transfer] are not ‘manifestly unreasonable’ because they are reasonable means to ensure that the management and control of the business remains in the group of investors or with people well known to them”);
   633 A.2d 1024, 1027-28 (N.J. Super. Ct. A pp. Div. 1993) (“We are obliged to apply the statute in a manner consonant with its essential purpose to permit reasonable restrictions upon alienation.”).

Subsection (e)(1) – The significance of the phrase “as of the time the challenged term became part of the partnership agreement” is best shown by example.

EXA M P L E: When a particular limited partnership comes into existence, its business plan is quite unusual and its success depends on the willingness of a particular individual to serve as the limited partnership’s sole general partner. This individual has a rare combination of skills, experiences, and contacts, which are particularly appropriate for the partnership start-up. In order to induce the individual to accept the position of sole general partner, the partners are willing to have the partnership agreement significantly limit the general partner’s fiduciary duties. Several years later, when the limited partnership’s operations have turned prosaic and the general partner’s talents and background are not nearly so crucial, a limited partner challenges the fiduciary duty limitations as manifestly unreasonable. The relevant time under subsection (e)(1) is when the limited partnership began. Subsequent developments are not relevant, except as they might inferentially bear on the circumstances in existence at the relevant time.

EXA M P L E: As initially adopted, a partnership agreement identifies a category of decisions ordinarily subject to the duty of loyalty and provides that “the general partner’s sole, reasonable discretion” satisfies the duty. A year later, the agreement is amended to delete the word “reasonable.” Later, a partner claims that, without the word “reasonable,” the provision is manifestly unreasonable. The relevant time under subsection (e)(1) is when the agreement was amended, not when the agreement was initially adopted.

6. The following terms used in this section are defined in 15 Pa.C.S. § 8612:

   “general partner”
   “limited partnership”
   “partner”
   “partnership agreement”
The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“record form”

The term “court” used in this section is intended to include any court with jurisdiction, and not just the “court” as defined in 15 Pa.C.S. § 102.

§ 8616. Application of partnership agreement.

(a) Partnership bound. – A limited partnership is bound by and may enforce the partnership agreement, whether or not the partnership has itself manifested assent to the agreement.

(b) Deemed assent. – A person that becomes a partner is deemed to assent to the partnership agreement.

(c) Preformation agreement. – Two or more persons intending to become the initial partners of a limited partnership may make an agreement providing that upon the formation of the partnership the agreement will become the partnership agreement.

(d) Cross reference. – See section 8621 (relating to formation of limited partnership and certificate of limited partnership).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 106.

Subsection (a) – This subsection resolves twin issues that have troubled some courts, particularly in the context of unincorporated entities and agreements to arbitrate.

, 8 F.Supp.3d 845, 852 (N.D. Tex. 2014) (concluding that a limited liability partnership “is a party to the Partnership Agreement,” even though the partnership itself never signed or otherwise assented to the agreement; enforcing arbitration provision to the benefit of the LLP).

, 921 N.E.2d 1249, 1255 (Ill. App. Ct. 2010) (finding that “neither FODG [an LLC] nor the Golf Club [a related LLC] was a party to the operating agreements and that they are therefore not bound by the arbitration clauses therein”).

This subsection does not consider whether a limited partnership is an indispensable party to a suit concerning the partnership agreement. That is a question of procedural law and the answer can be determinative of whether federal diversity jurisdiction exists.

Subsection (b) – Given the possibility of oral and implied-in-fact terms in the partnership agreement, a person becoming a partner of an existing limited partnership should take precautions to ascertain fully the contents of the partnership agreement.

Subsection (c) – A preformation agreement is not a partnership agreement. A partnership agreement is among “partners,” and, under 15 Pa.C.S. § 8641, the earliest a person can become a partner
is upon the formation of the limited partnership.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partnership”
“partner”
“partnership agreement”

§ 8617. Amendment and effect of partnership agreement.

(a) Approval of amendments. - A partnership agreement may specify that its amendment requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition.

(b) Obligations to nonpartners. - The obligations of a limited partnership and its partners to a person in the person’s capacity as a transferee or person dissociated as a partner are governed by the partnership agreement. Except as provided in section 8653(d) (relating to sharing of and right to distributions before dissolution) or in a court order issued under section 8673(b)(2) (relating to charging order) to effectuate a charging order, an amendment to the partnership agreement made after a person becomes a transferee or is dissociated as a partner:

(1) is effective with regard to any debt, obligation or other liability of the partnership or its partners to the person in the person’s capacity as a transferee or person dissociated as a partner; and

(2) is not effective to the extent the amendment imposes a new debt, obligation or other liability on the transferee or person dissociated as a partner.

(c) Provisions in filed documents. - If a document delivered by a limited partnership to the department for filing becomes effective and contains a provision that would be ineffective under section 8615(c) or (d)(3) (relating to contents of partnership agreement) if contained in the partnership agreement, the provision is ineffective in the document.

(d) Conflicts with partnership agreement. - Subject to subsection (c):

(1) If a provision of the certificate of limited partnership conflicts with a provision of the partnership agreement, the provision of the certificate prevails.

(2) If a document other than its certificate of limited partnership that has been delivered by a limited partnership to the department for filing becomes effective and conflicts with a provision of the partnership agreement:

(i) the agreement prevails as to partners, persons dissociated as partners and transferees; and
(ii) the document prevails as to other persons to the extent they reasonably rely on the document.

(e) Prohibition of oral amendments. - If a provision of a partnership agreement in record form provides that the partnership agreement cannot be amended, modified or rescinded except in record form, an oral agreement, amendment, modification or rescission shall not be enforceable.

(f) Voting requirements. - A partnership agreement may provide in record form that, whenever a provision of this title requires the vote or consent of a specified number or percentage of partners or of a class of partners for the taking of any action, a higher number or percentage of votes or consents shall be required for the action. Except as otherwise provided in the partnership agreement, whenever the partnership agreement requires for the taking of any action by the partners or a class of partners a specific number or percentage of votes or consents, the provision of the partnership agreement setting forth that requirement shall not be amended or repealed by any lesser number or percentage of votes or consents of the partners or the class of partners.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 107. Subsection (f) is a reenactment of former 15 Pa.C.S. § 8520(c).

Subsection (a) - This subsection, derived from Del. Code Ann. tit. 6, § 18-302(e), permits the partnership agreement to: (i) accord a non-partner veto rights over amendments to the agreement; and (ii) establish other preconditions for amendments. A n amendment made in derogation of a veto right or precondition is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-partner executives or consultants.

EXAMPLE: A non-partner manager enters into a management contract with a limited partnership, and that agreement provides in part that the limited partnership may remove the manager without cause only with the consent of partners holding 2/3 of the economic interests. The partnership agreement contains a parallel provision (the “partnership agreement’s quantum provision”), but the non-partner manager is not a party to the partnership agreement. Later, the partners amend the partnership agreement’s quantum provision to reduce the quantum to a simple majority of economic interests and thereafter purport to remove the manager without cause. Although the limited partnership has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the limited partnership has the power to effect the removal – unless the partnership agreement provides the manager a veto right over changes in the partnership agreement’s quantum provision.

This subsection does not refer to partner veto rights because, unless otherwise provided in the partnership agreement, the consent of each partner is necessary to effect an amendment. 15 Pa.C.S. 8646(b)(1).

Because “[a] partnership agreement may specify that its amendment requires ... the satisfaction of a condition,” a partnership agreement can require that any amendment be made through a writing or a
Subsection (b) - The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization’s owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization’s economic interests. Such transferees can include the heirs of business founders as well as former owners who are “locked in” as transferees of their own interests.

If the law categorically favors the owners, there is a serious risk of expropriation and other abuse. On the other hand, if the law grants former owners and other transferees the right to seek judicial protection, that specter can “freeze the deal” as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

The scant case law in this area pertains mostly to and clearly favors the remaining partners over former partners and other transferees.

This subsection follows and other cases by expressly subjecting transferees (including a person dissociated as a partner) to partnership agreement amendments made after the transfer or dissociation, except amendments that increase obligations on transferees. For example, an amendment might extend the duration of a limited partnership but may not institute a new capital call obligation on transferees.

The question of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation awaits development in the case law. A unreported LLC case suggests the answer might be yes, but the decision rests primarily on the wording of the LLC’s operating agreement. In , 08-11-00155-CV, 2013 WL 3943078 at *10-11 (Tex. App. July 24, 2013), the court: (i) noted an LLC’s “Regulations provide[] for the distribution of ‘available cash’ to members quarterly provided that the available cash is not needed for a reasonable working capital reserve;” (ii) also noted that “Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike’s transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company’s accounts since the mortgage on the property had been paid off in February 2007;” and (iii) concluded that “more than a scintilla of evidence supports the trial court’s finding that Jacob failed to make profit distributions to Parvaneh.” In essence, the court upheld a finding that Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the company’s affairs to the prejudice of Parvaneh.

For the very limited rights in general for transferees, see 15 Pa.C.S. § 8672.

Subsection (b)(1) - This provision is inapposite when “a partner or transferee becomes entitled to receive a distribution.” 15 Pa.C.S. § 8653(d). In that circumstance:

“the partner or transferee has the status of ... a creditor of the limited partnership with respect
Subsection (c) - This provision precludes using the certificate of limited partnership to make an end run around the strictures of 15 Pa.C.S. § 8615(c) and (d)(3).

Subsection (d) - It will be possible, albeit improvident, for a limited partnership agreement to be inconsistent with the certificate of limited partnership or other public filings pertaining to the partnership. For those circumstances, this subsection provides rules for determining which source of information prevails:

The certificate of limited partnership controls over the partnership agreement as to all persons.

When there is a conflict between the partnership agreement and a filed document other than the certificate of limited partnership:
- The partnership agreement is paramount for partners, persons dissociated as partners, and transferees.
- Third parties may invoke the public record upon a showing of reasonable reliance.
- Reliance of course presupposes knowledge and thus, in this context, deemed knowledge under 15 Pa.C.S. § 8613(d) is inapposite.

The mere fact that a term is present in a publicly-filed document and not in the partnership agreement, or , does not automatically establish a conflict. This subsection does not expressly cover a situation in which: (i) a filed document contains information in addition to, but not inconsistent with, the partnership agreement, and (ii) a person, other than a partner or transferee, reasonably relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation. Moreover, to argue that the partnership agreement prevails over the filed document is to argue that the additional term does conflict with the partnership agreement, at least in effect.

This subsection does not apply to records delivered to the filing office for filing on behalf of a person other than a limited partnership.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- "certificate of limited partnership"
- "limited partnership"
- "partner"
- "partnership agreement"
- "transferee"

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- "department"
- "obligation"
- "record form"

§ 8618. Required information.
(a) General rule. - A limited partnership shall maintain at its principal office the following information:

(1) A current list showing the full name and last known street and mailing address of each partner, separately identifying the general partners, in alphabetical order, and the limited partners, in alphabetical order.

(2) A copy of the initial certificate of limited partnership and all amendments to and restatements of the certificate, together with signed copies of any powers of attorney under which any certificate, amendment or restatement has been signed.

(3) A copy of any filed certificate or statement of merger, interest exchange, conversion, division or domestication.

(4) A copy of the partnership’s Federal, State and local income tax returns and reports, if any, for the three most recent years.

(5) A copy of any provisions of the partnership agreement in record form and any amendment made in record form to any partnership agreement.

(6) A copy of any financial statement of the partnership for the three most recent years.

(7) A copy of any record made by the partnership during the past three years of any consent given by or vote taken of any partner under this title or the partnership agreement.

(8) Unless contained in a provision of the partnership agreement in record form, a record stating:

   (i) a description and statement of the agreed value of contributions other than money made and agreed to be made by each partner;

   (ii) the times at which, or events on the happening of which, any additional contributions agreed to be made by each partner are to be made;

   (iii) for any person that is both a general partner and a limited partner, a specification of what transferable interest the person owns in each capacity; and

   (iv) any events upon the happening of which the partnership is to be dissolved and its activities and affairs wound up.

(b) Cross reference. - See section 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 108.
The partnership agreement cannot vary this section. However, subject to 15 Pa.C.S. § 8615(c)(13), the agreement can vary 15 Pa.C.S. §§ 8634 and 8647, which govern access to and use of the information required by this section.

**Subsection (a)(5)** - This requirement applies to superseded as well as current agreements and amendments. An agreement or amendment is “made in record form” to the extent the agreement is integrated into a document in record form and consented to in that memorialized form. It is possible for a partnership agreement to be made in part in record form and in part otherwise. the definition of “partnership agreement” in 15 Pa.C.S. § 8612. An oral agreement that is subsequently inscribed in record form (but not consented to as such) was not “made in record form” and is not covered by this paragraph. However, if the limited partnership happens to have such a document in record form, 15 Pa.C.S. § 8634(b) might, and 15 Pa.C.S. § 8647(c) will, provide a right of access.

**Subsection (a)(7)** - This subsection does not require a limited partnership to make a record of consents given and votes taken. However, if the limited partnership has made such a record, this subsection requires that the limited partnership maintain the record for three years. The requirement applies to any record made by the limited partnership, not just to records made contemporaneously with the giving of consent or voting. The three-year period runs from when the record was made and not from when the consent was given or vote taken.

**Subsection (a)(8)** - Information is “contained in a provision of the partnership agreement in record form” only to the extent that the information is integrated into a document in record form and, in that memorialized form, has been consented to as part of the partnership agreement.

This subsection is not a statute of frauds provision. For example, failure to comply with paragraph (8)(i) or (ii) does not render unenforceable an oral promise to make a contribution. Likewise, failure to comply with paragraph (8)(iv) does not invalidate an oral term of the partnership specifying events upon the happening of which the limited partnership is to be dissolved and its activities wound up.

Conversely, the mere fact that a limited partnership maintains a record in purported compliance with paragraph (8)(i) or (ii) does not prove that a person has actually promised to make a contribution. Likewise, the mere fact that a limited partnership maintains a record in purported compliance with paragraph (8)(iv) does not prove that the partnership agreement actually includes the specified events as causes of dissolution.

Consistent with the partnership agreement’s plenary power to structure and regulate the relations of the partners, a partnership agreement can impose “made in record form” requirements which render unenforceable oral promises to make contributions or oral understandings as to “events upon the happening of which the limited partnership is to be dissolved.”

**Subsection (a)(8)(i) and (ii)** - Often a partnership agreement will state in record form the value of contributions made and promised to be made. If not, these provisions require that the value be stated in a record maintained as part of the limited partnership’s required information. This chapter does not authorize the limited partnership or the general partners to set the value of a contribution without the concurrence of the person who has made or promised the contribution, although the partnership agreement itself can grant that authority.

**Subsection (a)(8)(iii)** - The information required by this provision is essential for determining what happens to the transferable interests of a person that is both a general partner and a limited partner and that dissociates in one of those capacities but not the other.
The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- “certificate of limited partnership”
- “contribution”
- “general partner”
- “limited partner”
- “limited partnership”
- “partner”
- “partnership agreement”
- “transferable interest”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “principal office”
- “record form”

§ 8619. Dual capacity.

A person may be both a general partner and a limited partner. A person that is both a general and limited partner has the rights, powers, duties and obligations provided by this title and the partnership agreement in each of those capacities. When the person acts as a general partner, the person is subject to the obligations, duties and restrictions under this title and the partnership agreement for general partners. When the person acts as a limited partner, the person is subject to the obligations, duties and restrictions under this title and the partnership agreement for limited partners.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 109.

It may be to the advantage of a general partner to own some of its interests as a limited partner, especially interests connected to voting rights. 15 Pa.C.S. § 8635(b) (providing that, except for the implied contractual covenant of good faith and fair dealing, “a limited partner does not have any duty to the limited partnership or to any other partner solely by reason of acting as a limited partner”).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- “general partner”
- “limited partner”
- “partnership agreement”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8620. Characteristics of limited partnership.

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(a) Separate entity. – A limited partnership is an entity distinct from its partners. A limited partnership is the same entity regardless of whether:

(1) its certificate of limited partnership states that the limited partnership is a limited liability limited partnership; or

(2) it has a statement of registration in effect under section 8201 (relating to scope).

(b) Purpose. – A limited partnership may have any lawful purpose other, than acting as a banking institution, credit union or insurer, regardless of whether the purpose is for profit. See section 8102 (relating to interchangeability of partnership, limited liability company and corporate forms of organization).

(c) Duration. – A limited partnership has perpetual duration.

(d) Powers. – A limited partnership has the capacity to sue and be sued in its own name and the power to do all things necessary or convenient to carry on its activities and affairs.

(e) Restrictions on nonprofit limited partnerships. – If a limited partnership has a purpose that is not for profit:

(1) Its purpose must be stated in the certificate of limited partnership.

(2) The partnership shall not distribute any part of its income or profits to its partners, but it may pay compensation in a reasonable amount to those persons for services rendered.

(3) The partnership may confer benefits on partners or nonpartners in conformity with its purposes, may repay capital contributions and may redeem evidences of indebtedness, except when the partnership is currently insolvent or would thereby be made insolvent or rendered unable to carry on its purposes, or when the fair value of the assets of the partnership remaining after the conferring of benefits, payment or redemption would be insufficient to meet its liabilities. The partnership may make distributions of money or property to partners upon dissolution or final liquidation as permitted by this chapter.

(4) If the partnership is organized for a charitable purpose, it may take, receive and hold such real and personal property as may be given, devised to, or otherwise vested in the partnership, in trust, for the purpose or purposes set forth in its certificate of limited partnership. The general partners shall, as trustees of the property, be held to the same degree of responsibility and accountability as other trustees, unless:

(i) a lesser degree or a particular degree of responsibility and accountability is prescribed in the trust instrument; or

(ii) the general partners are under the control of the limited partners or third persons who retain the right to direct, and do direct, the actions of the general partners
as to the use of the trust property from time to time.

(5) Property of the partnership committed to charitable purposes shall not, by any proceeding under Chapter 3 (relating to entity transactions) or otherwise, be diverted from the objects to which it was donated, granted or devised, unless and until the partnership obtains from the court an order under 20 Pa.C.S. Ch. 77 (relating to trusts) specifying the disposition of the property.

(f) Cross references. – See sections 8611(d) (relating to short title and application of chapter) and 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

Subsections (a) through (c) are patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) (“ULPA”) § 110. Subsection (d) is patterned after ULPA § 111. Subsection (e) is patterned after 15 Pa.C.S. § 5551(a) and (b) (paragraph (2)), 5551(c) (paragraph (3)), 5547(a) (paragraph (4)), and 5547(b) (paragraph (5)).

Subsection (a) - The “separate entity” characteristic is fundamental to a limited partnership and is inextricably connected to both the liability shields in 15 Pa.C.S. §§ 8633 and 8644, and the inability of creditors of a partner or transferee to reach the assets of the limited partnership, absent a “reverse pierce” or a claim of fraudulent transfer or voidable transaction.

Acquiring or relinquishing an LLLP shield changes only the rules governing a general partner’s liability for subsequently incurred obligations of the limited partnership. The underlying entity is unaffected.

Subsection (b) – Although some limited partnership statutes continue to require a business purpose, Chapter 86 follows the current trend and takes a more expansive approach. The phrase “any lawful purpose … regardless of whether the purpose is for profit” encompasses even charitable activities.

Subsection (c) – The word “perpetual” is a misnomer, albeit one commonplace in limited partnership and limited liability company statutes. In this context, “perpetual” means merely that Chapter 86: (i) does not require a definite term; and (ii) creates no immediate nexus between the dissociation of a partner and the dissolution of the entity.

The public record will not reveal when (or even whether) a limited partnership has come into existence. 15 Pa.C.S. § 8621(d) (providing that the formation of a limited partnership requires both that the certificate of limited partnership become effective and that at least two separate persons become partners, with at least one being a general partner and one being a limited partner).

Subsection (d) – Chapter 86 omits as unnecessary any detailed list of specific powers.

The partnership agreement cannot vary a limited partnership’s capacity to sue and be sued. 15 Pa.C.S. § 8615(c)(8). A limited partnership’s standing to enforce the partnership agreement is a separate matter, which is covered by 15 Pa.C.S. § 8616(a) (stating, as a default rule, that the limited partnership “may enforce the partnership agreement”).

Subchapter (e) – Because a limited partnership may have a nonprofit or charitable purpose under subsection (b), this subsection imposes certain restrictions patterned after those applicable to nonprofit
corporations designed to protect the nonprofit or charitable nature of such a partnership. 15 Pa.C.S. §§ 5547 and 5551.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- “certificate of limited partnership”
- “distribution”
- “general partner”
- “limited partner”
- “limited partnership”
- “partner”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “charitable purposes”
- “entity”
- “limited liability limited partnership”
- “property”

Subchapter B
Formation and Filings

Section
8621. Formation of limited partnership and certificate of limited partnership.
8622. Amendment or restatement of certificate of limited partnership.
8623. Signing of filed documents.
8624. Liability of general partner for false or missing information in filed document.
8625. Registered office.

§ 8621. Formation of limited partnership and certificate of limited partnership.

(a) Formation. – To form a limited partnership, a person must deliver a certificate of limited partnership to the department for filing.

(b) Required contents of certificate. – A certificate of limited partnership must state:

(1) the name of the limited partnership, which must comply with Subchapter A of Chapter 2 (relating to names);

(2) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the partnership’s registered office; and

(3) the name and address of each general partner.
(c) Optional contents of certificate. – A certificate of limited partnership may contain statements as to matters other than those required under subsection (b), but may not vary or otherwise affect the provisions specified in section 8615(c) and (d) (relating to contents of partnership agreement) in a manner inconsistent with that section.

(d) Time of formation. – A limited partnership is formed when:

(1) the certificate of limited partnership becomes effective:
(2) at least two persons have become partners;
(3) at least one person has become a general partner; and
(4) at least one person has become a limited partner.

(e) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8620 (relating to characteristics of limited partnership).
Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 201.

For a limited partnership to be formed ( , to come into existence), four conditions must be met: (i) a certificate of limited partnership must become effective; (ii) at least two persons must become partners; (iii) at least one person must become a general partner; and (iv) at least one person must become a limited partner.

By definition, the earliest a person can become a limited partner is when the certificate of limited partnership takes effect. The definition of “limited partner” in 15 Pa.C.S. § 8612, which defines a “limited partner” as a person that “has become a limited partner under section 8631.” However, a certificate of limited partnership can take effect well before any person becomes a limited partner, and Chapter 86 does not require any public filing to indicate that a person has become a limited partner. Therefore, the public record will not reflect when (and even whether) a limited partnership has come into existence.

Subsection (c) - This provision permits the certificate of limited partnership to contain information beyond that required in subsection (b). A limited partnership should have good reason, however, before choosing to include additional information. Such information: (i) is available to the public (including competitors); (ii) increases the chances of a conflict between the certificate of limited partnership and the partnership agreement; and (iii) can be confusing to the extent the information appears to delineate the power of persons to act for the limited partnership. In any event, placing additional information in the certificate of limited partnership does not enable a limited partnership to avoid the restrictions in 15 Pa.C.S. § 8615(c) and (d) which limit the ability of the partnership agreement to vary specified provisions.
of this chapter.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“general partner”
“limited partner”
“limited partnership”
“partner”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8622. Amendment or restatement of certificate of limited partnership.

(a) General rule. – A certificate of limited partnership may be amended or restated at any
time.

(b) Required contents of certificate of amendment. – To amend its certificate of limited
partnership, a limited partnership must deliver to the department for filing a certificate of
amendment that states:

(1) the name of the partnership;
(2) the date of filing of its initial certificate;
(3) subject to section 109 (relating to name of commercial registered office provider
in lieu of registered address), the address, including street and number, if any, of its
registered office; and
(4) the amendment.

(c) Restatement. – To restate its certificate of limited partnership, a limited partnership
must deliver to the department for filing a certificate of amendment that:

(1) is designated as a restatement; and
(2) includes a statement that the restated certificate supersedes the original
certificate and all amendments.

(d) Required amendments. – A limited partnership shall promptly deliver to the
department for filing an amendment to its certificate of limited partnership to reflect:

(1) the admission of a new general partner;
(2) the dissociation of a person as a general partner; or
(3) the appointment of a person to wind up the partnership’s activities and affairs under section 8682(c) or (d) (relating to winding up and filing of certificates).

(e) Obligation to correct. – If a general partner knows that any information in a filed certificate of limited partnership is inaccurate, the general partner shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the department for filing:

   (i) a certificate of change of registered office under section 8625 (relating to registered office);

   (ii) a statement of correction under section 138 (relating to statement of correction); or

   (iii) a statement of abandonment under section 141 (relating to abandonment of filing before effectiveness).

(f) Amendment of voting provisions. – Except as provided in the certificate of limited partnership, whenever the certificate requires for the taking of any action by the partners or a class of partners a specific number or percentage of votes or consents, the provision of the certificate setting forth that requirement shall not be amended or repealed by any lesser number or percentage of votes or consents of the partners or of the class of partners.

(g) Cross references. – See:

   Section 134 (relating to docketing statement).

   Section 135 (relating to requirements to be met by filed documents).

   Section 136(c) (relating to processing of documents by Department of State).

   Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 202. Subsection (f) is a reenactment of former 15 Pa.C.S. § 8512(f).

Subsection (d) - This subsection states an obligation of the limited partnership. However, so long as the limited partnership has at least one general partner, the general partner or partners are responsible for managing the limited partnership’s activities. That management responsibility includes maintaining the accuracy of the limited partnership’s public record. Moreover, subsection (e) imposes direct responsibility on any general partner that knows that the filed certificate of limited partnership contains inaccurate information.

Subsection (e) - This subsection imposes an obligation directly on the general partners rather than on the limited partnership. A general partner’s failure to meet the obligation can expose the general partner to liability to third parties under 15 Pa.C.S. § 8624(a)(2) and might constitute a breach of the general partner’s duties under 15 Pa.C.S. § 8649. In addition, an aggrieved person may seek a remedy
under 15 Pa.C.S. §§ 143 (liability for inaccurate information in filing) and 144 (signing and filing pursuant to judicial order).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- "certificate of limited partnership"
- "general partner"
- "limited partnership"

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8623. Signing of filed documents.

(a) Required signatures. – Except as provided in this title, a document delivered to the department for filing under this title relating to a limited partnership must be signed as follows:

1. An initial certificate of limited partnership must be signed by all general partners listed in the certificate.

2. An amendment to the certificate of limited partnership deleting a statement that the limited partnership is a limited liability limited partnership must be signed by all general partners listed in the certificate.

3. An amendment to the certificate of limited partnership designating as general partner a person admitted under section 8681(a)(3)(ii) (relating to events causing dissolution) following the dissociation of a limited partnership’s last general partner must be signed by that person.

4. An amendment to the certificate of limited partnership required by section 8682(c) (relating to winding up and filing of certificates) following the appointment of a person to wind up the dissolved limited partnership’s activities and affairs must be signed by that person.

5. Any other amendment to the certificate of limited partnership must be signed by:

   i. at least one general partner listed in the certificate;

   ii. each person designated in the amendment as a new general partner; and

   iii. each person that the amendment indicates has dissociated as a general partner, unless:

       A. the person is deceased or a guardian has been appointed for the person and the amendment so states; or
(B) the person has previously delivered to the department for filing a certificate of dissociation.

(6) A restated certificate of limited partnership must be signed by at least one general partner listed in the certificate, and, to the extent the restated certificate effects a change under any other paragraph of this subsection, the certificate must be signed in a manner that satisfies that paragraph.

(7) A certificate of termination must be signed by all general partners listed in the certificate of limited partnership or, if the certificate of a dissolved limited partnership lists no general partners, by the person appointed under section 8682(c) or (d) to wind up the dissolved limited partnership’s activities and affairs.

(8) Any other document delivered by a limited partnership to the department for filing must be signed by at least one general partner listed in the certificate of limited partnership.

(9) A statement by a person under section 8665(a)(3) (relating to effects of dissociation as general partner) stating that the person has dissociated as a general partner must be signed by that person.

(10) A certificate of negation by a person under section 8636 (relating to person erroneously believing self to be limited partner) must be signed by that person.

(11) Any other document delivered on behalf of a person to the department for filing must be signed by that person.

(b) Cross reference. – See section 142 (relating to effect of signing filings).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 204.

The department will not check the bona fides of a person purporting to have signed a record in a representative capacity.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“general partner”
“limited partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“limited liability limited partnership”
“sign”
§ 8624. Liability of general partner for false or missing information in filed document.

(a) General rule. – If a document delivered to the department for filing under this title and filed by the department contains a materially false statement or fails to state a material fact required to be stated, a person that suffers loss by reasonable reliance on the statement or failure to state a material fact may recover damages for the loss from a general partner if:

1. the document was delivered for filing on behalf of the limited partnership; and
2. the general partner knew or had notice there was false or missing information in the document for a reasonably sufficient time before the document was relied upon so that, before the reliance, the general partner reasonably could have:
   (1) effected an amendment under section 8622 (relating to amendment or restatement of certificate of limited partnership);
   (2) filed a petition under section 144 (relating to signing and filing pursuant to judicial order); or
   (3) delivered to the department for filing:
      (A) a certificate of change of registered office under section 8625 (relating to registered office);
      (B) a statement of correction under section 138 (relating to statement of correction); or
      (C) a statement of abandonment under section 141 (relating to abandonment of filing before effectiveness).

(b) Cross references. – See sections 142 (relating to effect of signing filings) and 143 (relating to liability for inaccurate information in filing).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 205.

Subsection (a)(2) – Although Chapter 86 establishes the avoidance of gross negligence as the standard of care for general partners with respect to the limited partnership, this provision encompasses liability to third parties. Accordingly, the standard here is more demanding. The phrases “reasonably sufficient time” and “reasonably could have” indicate a standard of ordinary care.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:
§ 8625. Registered office.

(a) General rule. - Every limited partnership shall have and continuously maintain in this Commonwealth a registered office which may, but need not, be the same as its place of business.

(b) Change of registered office. - After formation, a change in the location of the registered office may be effected at any time by the limited partnership. Before the change becomes effective, the limited partnership shall amend its certificate of limited partnership under the provisions of this chapter to reflect the change in location, or shall deliver to the department for filing a certificate of change of registered office setting forth:

1. The name of the limited partnership.

2. The address, including street and number, if any, of its then registered office.

3. The address, including street and number, if any, to which the registered office is to be changed.

(c) Alternative procedure. - A limited partnership may satisfy the requirements of this chapter concerning the maintenance of a registered office in this Commonwealth by setting forth in any document filed by the department under any provision of this title that permits or requires the statement of the address of its then registered office, in lieu of that address, the statement authorized by section 109(a) (relating to name of commercial registered office provider in lieu of registered address).

(d) Cross references. - See:

Section 108 (relating to change in location or status of registered office provided by agent).

Section 134 (relating to docketing statement).

Section 135 (relating to requirements to be met by filed documents).

Section 136(c) (relating to processing of documents by Department of State).

Section 8615(c)(6) (relating to contents of partnership agreement).

Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is substantially a reenactment of former 15 Pa.C.S. § 8506.

Under 15 Pa.C.S. § 135(c), only an actual street address or rural route box number, and not a post
office box number, is acceptable as a registered office address.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“limited partnership”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter C
Limited Partners

Section
8631. Becoming a limited partner.
8632. No agency power of limited partner as limited partner.
8633. No liability as limited partner for limited partnership obligations.
8634. Limited partner rights to information.
8635. Limited duties of limited partner.
8636. Person erroneously believing self to be limited partner.

§ 8631. Becoming a limited partner.

(a) Upon formation. – Upon formation of a limited partnership, a person becomes a limited partner as agreed among the persons that are to be the initial partners.

(b) After formation. – After formation, a person becomes a limited partner:

(1) as provided in the partnership agreement;

(2) as the result of a transaction effective under Chapter 3 (relating to entity transactions);

(3) with the affirmative vote or consent of all the partners; or

(4) as provided in section 8681(a)(4) or (5) (relating to events causing dissolution).

(c) Noneconomic limited partners. – A person may become a limited partner without:

(1) acquiring a transferable interest; or

(2) making or being obligated to make a contribution to the limited partnership.

(d) Nature of interest. – The interest of a limited partner in a limited partnership is personal property.

Committee Comment (2016):
This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 301.

**Subsection (b)(3)** - A limited partnership being in part a creature of contract, consent is determined on an objective basis (contract law’s “reasonable person” standard). Depending on the terms of a limited partnership agreement, the partners’ manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the partnership agreement might reduce the quantum of consent necessary or shift the consent right to the general partners.

A limited partnership being a voluntary association, a person cannot become a partner without manifesting consent to do so. That consent also is judged objectively.

Under 15 Pa.C.S. § 8616(b), “[a] person that becomes a partner is deemed to assent to the partnership agreement,” and the agreement binds the partner regardless of whether the partner has actually indicated assent in any way.

**Subsection (c)** - To accommodate business practices and also because a limited partnership need not have a business purpose, this subsection permits so-called “non-economic partners.”

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- “contribution”
- “limited partner”
- “limited partnership”
- “partner”
- “partnership agreement”
- “transferable interest”

§ 8632. **No agency power of limited partner as limited partner.**

(a) General rule. - A limited partner is not an agent of a limited partnership solely by reason of being a limited partner.

(b) Creation of partnership liability. - A person’s status as a limited partner does not prevent or restrict law other than this chapter from imposing liability on a limited partnership because of the person’s conduct.

**Committee Comment (2016):**

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 302.

A limited partner is analogous to a shareholder in a corporation in that, in each case, status as an owner provides neither the right to manage nor a reasonable appearance of that right.

The fact that a limited partner in the capacity of a limited partner has no power to bind the limited partnership means that, subject to 15 Pa.C.S. § 8619 (dual capacity), information possessed by a limited partner is not attributed to the limited partnership. 15 Pa.C.S. § 8613(f).
The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partner”

“limited partnership”

§ 8633. No liability as limited partner for limited partnership obligations.

A debt, obligation or other liability of a limited partnership is not the debt, obligation or other liability of a limited partner. A limited partner is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the partnership solely by reason of being or acting as a limited partner, even if the limited partner participates in the management and control of the partnership. This subsection applies regardless of the dissolution, winding up or termination of the partnership.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 303.

This section provides a corporate-like liability shield for limited partners, protecting them against the debts, obligations and liabilities of the limited partnership —, against vicarious liability for the obligations of the entity. Because a dissolved limited partnership is nonetheless an entity formed under this chapter, dissolution has no effect on the liability shield.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“contribution”

“limited partner”

“limited partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8634. Limited partner rights to information.

(a) Right to required information. – Within ten days after receipt by a limited partnership of a demand made in record form, a limited partner may inspect and copy required information during regular business hours in the partnership’s principal office. The limited partner need not have any particular purpose for seeking the information.

(b) Right to other information. – During regular business hours and at a reasonable location specified by the limited partnership, a limited partner may inspect and copy information, other than the required information, regarding the activities, affairs, financial condition and other circumstances of the partnership if:

(1) the limited partner seeks the information for a purpose reasonably related to the
partner’s interest as a limited partner;

(2) the limited partner makes a demand in record form received by the partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(3) the information sought is directly connected to the limited partner’s purpose.

(c) Rights of person dissociated as limited partner. – Subject to subsection (h), on demand made in record form received by a limited partnership, a person dissociated as a limited partner may have access to information to which the person was entitled while a limited partner if:

(1) the information pertains to the period during which the person was a limited partner;

(2) in seeking the information the person complies with section 8635(a) (relating to limited duties of limited partner) as if still a limited partner; and

(3) the person satisfies the requirements imposed on a limited partner by subsection (b).

(d) Required response to demand. – Within 10 days after receiving a demand under subsection (b) or (c), the limited partnership shall inform in record form the person that made the demand of:

(1) what information the partnership will provide in response to the demand and when and where the partnership will provide the information; and

(2) the partnership’s reasons for declining, if the partnership declines to provide any demanded information.

(e) Copying costs. – A limited partnership may charge a person that makes a demand under this section reasonable costs of copying.

(f) Rights of agent or guardian. – A limited partner or person dissociated as a limited partner may exercise the rights under this section through an agent or, in the case of an individual under legal disability, a guardian. Any restriction or condition imposed by the partnership agreement or under subsection (h) applies both to the agent or guardian and to the limited partner or person dissociated as a limited partner.

(g) No rights of transferee. – Subject to section 8674 (relating to power of personal representative of deceased partner), the rights under this section do not extend to a person as transferee.

(h) Limitations on access. – In addition to any restriction or condition stated in its
partnership agreement, a limited partnership, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the partnership has the burden of proving reasonableness.

(i) Cross reference. – See section 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 304.

This section balances two countervailing concerns relating to information: the need of limited partners and former limited partners for access versus the limited partnership’s need to protect confidential business data and other intellectual property. The balance must be understood in the context of fiduciary duties. The general partners are obliged through their duties of care and loyalty under 15 Pa.C.S. § 8649 to protect information whose confidentiality is important to the limited partnership or otherwise inappropriate for dissemination. Under 15 Pa.C.S. § 8635(b), in contrast, a limited partner “does not have any [fiduciary] duty to the limited partnership or to any other partner solely by reason of acting as a limited partner.”

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. The statement of fiduciary duties in 15 Pa.C.S. § 8649 is not exhaustive, and some cases characterize owners’ information rights as reflecting a fiduciary duty of those with management power.

Subsection (a) – The phrase “required information” is a defined term in 15 Pa.C.S. § 8612. This subsection’s broad right of access is subject not only to reasonable limitations in the partnership agreement, as provided in 15 Pa.C.S. § 8615(c)(13), but also to the power of the limited partnership to impose reasonable limitations on use under subsection (h). Unless the partnership agreement provides otherwise, it will be the general partners that have the authority to use that power.

Subsection (b) – This subsection does not itself impose a requirement of good faith on a limited partner seeking information because 15 Pa.C.S. § 8635(a) contains a generally applicable obligation of good faith and fair dealing for limited partners.
**Subsection (c) -** Access under this section is limited and subject to conditions.

**EXAMPLE:** A person dissociated as a limited partner seeks access to information pertaining to the period during which the person was a limited partner and to which the person would have had access while a limited partner. The person makes a bald demand, merely stating a desire to review the information at the limited partnership’s principal office. In particular, the demand does not describe “with reasonable particularity the information sought and the purpose for seeking the information,” as is required under subsection (b)(2). The limited partnership is not obliged to allow access. The person must first comply with subsection (c), which incorporates by reference the requirements of subsection (b).

**Subsection (c)(2) -** The duty of good faith imposed here by the requirement that the person comply with 15 Pa.C.S. § 8635(a) is needed because a person claiming access under this subsection is no longer a limited partner and thus no longer subject directly to section 8635(a). 15 Pa.C.S. § 8662(a)(2) (dissociation as a limited partner terminates duty of good faith as to subsequent events).

**Subsection (f) -** The rule in the second sentence of this subsection would be the result in any case under the law of agency. It has been stated here to avoid any argument that a limited partnership may exclude an agent or guardian from exercising rights under this section. No negative implication should be drawn from the failure to state in other contexts that agents and guardians are bound by applicable restrictions or conditions.

**Subsection (g) -** This section provides no information rights to a person as transferee. Transferee status brings only the very limited information rights stated in 15 Pa.C.S. § 8672(c). However, a transferee that is a person dissociated as a limited partner has rights in the latter capacity under subsection (c).

**Subsection (h) -** This subsection permits the limited partnership – as distinguished from the partnership agreement - to impose use limitations. 15 Pa.C.S. § 8615(c)(13) (providing that the partnership agreement may impose reasonable restrictions). Under 15 Pa.C.S. § 8646(a), it will be the general partners that decide whether the limited partnership will impose use restrictions. The limited partnership bears the burden of proving the reasonableness of any restriction imposed under this subsection. In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored. Restricting use of the names and addresses of limited partners is not per se unreasonable.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partner”
“limited partnership”
“partnership agreement”
“required information”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“principal office”
“receipt”
“record form”
§ 8635. Limited duties of limited partner.

(a) Good faith and fair dealing. – A limited partner shall discharge any duties to the limited partnership and the other partners under the partnership agreement and exercise any rights under this title or the partnership agreement consistently with the contractual obligation of good faith and fair dealing.

(b) No other duties. – Except as provided under subsection (a), a limited partner does not have any duty to the limited partnership or to any other partner solely by reason of acting as a limited partner.

(c) Transactions with limited partnership. – If a limited partner enters into a transaction with a limited partnership, the limited partner’s rights and obligations arising from the transaction are the same as those of a person that is not a partner.

(d) Cross reference. – See section 8615(c)(11) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 305.

Subsection (a) – Fiduciary duty typically attaches to a person whose status or role creates significant power for that person over the interests of another person. Under this chapter, limited partners have very limited power of any sort in the regular activities of the limited partnership and no power whatsoever justifying the imposition of fiduciary duties either to the limited partnership or fellow partners. , 223 N.E.2d 869, 873 (N.Y. 1966) (“the limited partner is in a position analogous to that of a corporate shareholder, an investor who likewise has limited liability and no voice in the operation of an enterprise”) (internal quotation omitted).

It is possible for a partnership agreement to allocate significant managerial authority and power to a limited partner, but in that case the power exists not as a matter of status or role but rather as a matter of contract. The proper limit on such contract-based power is the contract itself (including the implied obligation of good faith and fair dealing), not fiduciary duty, unless the partnership agreement itself: (i) expressly imposes a fiduciary duty; or (ii) creates a role for a limited partner which, as a matter of other law, gives rise to a fiduciary duty. For example, if the partnership agreement makes a limited partner an agent for the limited partnership as to particular matters, the law of agency will impose fiduciary duties on the limited partner with respect to the limited partner’s role as agent.

This subsection refers to the “contractual obligation of good faith and fair dealing” to emphasize that the obligation is not an invitation to re-write agreements among the partners. At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – , duties and rights “under this title.” However, for the most part those duties and rights apply to relationships the partners and the limited partnership and function only to the extent not displaced by the partnership agreement. Those statutory default rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.
For a detailed discussion of the implied contractual obligation of good faith and fair dealing, see the Committee Comment to 15 Pa.C.S. § 8649(d). As to the power of the partnership agreement to affect the obligation, 15 Pa.C.S. § 8615(d)(3)(v) (prohibiting elimination but allowing the agreement to “prescribe the standards by which the performance of the contractual obligation of good faith and fair dealing is to be measured”).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partner”
“limited partnership”
“partner”
“partnership agreement”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8636. Person erroneously believing self to be limited partner.

(a) Right to correct. – Except as provided in subsection (b), a person that makes an investment in a business enterprise and erroneously but in good faith believes that the person has become a limited partner in the enterprise is not liable for the enterprise’s obligations by reason of making the investment, receiving distributions from the enterprise or exercising any rights of or appropriate to a limited partner, if, on ascertaining the mistake, the person:

1. causes an appropriate certificate of limited partnership, amendment or statement of correction to be signed and delivered to the department for filing;

2. if a certificate of limited partnership is on file in the department, withdraws from future participation as an owner in the enterprise by delivering to the department for filing a certificate of negation under this section stating:

   (i) the name of the limited partnership;

   (ii) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the partnership’s registered office;

   (iii) the name of the person delivering the certificate to the department for filing; and

   (iv) that the person is not a general partner; or

3. files a certificate of denial under section 8434 (relating to certificate of denial) as if the enterprise were a general partnership.

(b) Liability before correction. – A person that makes an investment described in subsection (a) is liable to the same extent as a general partner to any third party that enters into a
transaction with the enterprise, believing in good faith that the person is a general partner, before the department files a certificate of negation, certificate of limited partnership, amendment or statement of correction to show that the person is not a general partner.

(c) Right to withdraw. - If a person makes a diligent effort in good faith to comply with subsection (a)(1) and is unable to cause the appropriate certificate of limited partnership, amendment or statement of correction to be signed and delivered to the department for filing, the person has the right to withdraw from the enterprise under subsection (a)(2) even if the withdrawal would otherwise breach an agreement with others that are or have agreed to become co-owners of the enterprise.

(d) Cross references. - See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 306.

This section deals with the somewhat rare situation in which a person intending in good faith to be a limited partner invests in an enterprise, but:

- the enterprise is not a limited partnership (i.e., no certificate of limited partnership has become effective); or
- the certificate of limited partnership has become effective but lists the person as a general partner.

Subsection (a) - In this subsection, “good faith” does not refer to the implied contractual covenant under 15 Pa.C.S. § 8649(d) because a person invoking this section is not a partner under this chapter. The good faith standard in this subsection is entirely subjective and relates to the person’s actual state of mind regardless of whether that state of mind is objectively reasonable.

Subsection (a)(2) - The requirement that a person “[withdraw] from future participation as an owner in the enterprise” means, in part, that the person refrain from taking any further profit from the enterprise. However, the person is not required to return previously obtained profits or forfeit the investment.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“distribution”
“general partner”
“limited partner”
“limited partnership”
The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“obligation”

Subchapter D
General Partners

Section

§ 8641. Becoming a general partner.
(a) Admission on formation. – On formation of a limited partnership, a person becomes a general partner as agreed among the persons that are to be the initial partners.
(b) Admission after formation. – After formation of a limited partnership, a person becomes a general partner:
   (1) as provided in the partnership agreement;
   (2) as the result of a transaction effective under Chapter 3 (relating to entity transactions);
   (3) with the affirmative vote or consent of all the partners; or
   (4) under section 8681(a)(3)(ii) or (5) (relating to events causing dissolution) following the dissociation of a limited partnership’s last general partner.
(c) Noneconomic general partners. – A person may become a general partner without:
   (1) acquiring a transferable interest; or
   (2) making or being obligated to make a contribution to the partnership.
(d) Nature of interest. – The interest of a general partner in a limited partnership is personal property.
Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 401.

A person’s status as a general partner is not dependent on the person being so designated in the certificate of limited partnership. If a person does become a general partner under this section without being so designated:

The limited partnership is obligated to amend promptly and appropriately the certificate of limited partnership under 15 Pa.C.S. § 8622(d)(1).

Each general partner that knows of the anomaly is personally obligated under 15 Pa.C.S. § 8622(e)(1) to cause the certificate to be promptly and appropriately amended, and is subject to liability for failing to do so under 15 Pa.C.S. § 8624(a)(2).

The “non-designated” general partner has no right to sign records which are to be filed on behalf of the limited partnership under this chapter, except the right to sign an amendment to the certificate of limited partnership in the capacity of a person newly designated as a general partner as required by 15 Pa.C.S. § 8623(a)(5)(ii).

The “non-designated” general partner has nonetheless:

- the powers of a general partner to bind the limited partnership under 15 Pa.C.S. §§ 8642 and 8643; and
- the rights and duties of a general partner with respect to the limited partnership and the other partners.

A limited partnership’s liability under 15 Pa.C.S. § 8642 does not depend on the “act of a general partner” being the act of a general partner designated in the certificate of limited partnership. Moreover, the notice provided by 15 Pa.C.S. § 8613(c) does not undercut any appearance of authority. According to the second sentence of 15 Pa.C.S. § 8613(c), the fact that a person is not listed in the certificate as a general partner is not notice that the person is not a general partner.

EXAMPLE: By consent of the partners of XYZ Limited Partnership, G is admitted as a general partner. However, XYZ’s certificate of limited partnership is not amended accordingly. Later, G – acting without actual authority – purports to bind XYZ to a transaction with Third Party. Third Party does not review the filed certificate of limited partnership before entering into the transaction. XYZ will be bound under 15 Pa.C.S. § 8642, assuming that G’s action is “for apparently carrying on in the ordinary course the partnership’s activities and affairs, or activities and affairs of the kind carried on by the partnership.”

EXAMPLE: Same facts, except that Third Party does review the certificate of limited partnership before entering into the transaction. The result might still be the same. The omission of a person’s name from the certificate’s list of general partners is not notice that the person is not a general partner. Therefore, Third Party’s review of the certificate does not mean that Third Party knew, had received a notification, or had notice that G lacked authority. At most, XYZ could argue that, because Third Party knew that G was not listed in the certificate, a transaction entered into by G could not reasonably appear to Third Party to be for apparently carrying on the limited partnership’s activities in the ordinary course.

Subsection (b)(3) – A limited partnership being in part a creature of contract, consent is determined on an objective basis ( , contract law’s “reasonable person” standard). Depending on the
terms of a partnership agreement, the partners’ manifestation of consent might involve detailed
formalities, entirely informal activities, or anything in between. Moreover, the partnership agreement
might reduce the quantum of consent necessary or shift the consent right to a manager.

A partnership being a voluntary association, a person cannot become a partner without manifesting
consent to do so. That consent also is judged objectively.

Under 15 Pa.C.S. § 8616(b), “[a] person that becomes a partner is deemed to assent to the
partnership agreement,” and the agreement binds the partner regardless of whether the partner has
actually indicated assent in any way.

**Subsection (c)** - To accommodate business practices and also because a limited partnership need
not have a business purpose, this subsection permits so-called “non-economic partners.”

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“contribution”
“general partner”
“limited partnership”
“partner”
“partnership agreement”
“transferable interest”

The term “interest” used in this section is defined in 15 Pa.C.S. § 102.

§ 8642. *General partner agent of limited partnership.*

(a) General rule. - Each general partner is an agent of the limited partnership for the
purposes of its activities and affairs. An act of a general partner, including the signing of a
document in record form in the partnership’s name, for apparently carrying on in the ordinary
course the partnership’s activities and affairs, or activities and affairs of the kind carried on by
the partnership, binds the partnership, unless the general partner did not have authority to act for
the partnership in the particular matter and the person with which the general partner was dealing
knew or had notice that the general partner lacked authority.

(b) Act outside of ordinary course. - An act of a general partner which is not apparently
for carrying on in the ordinary course the limited partnership’s activities and affairs, or activities
and affairs of the kind carried on by the partnership, binds the partnership only if the partner had
actual authority to take the action.

**Committee Comment (2016):**

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
402.

**Subsection (a)** - At common law, a general partner was considered a general agent of the
partnership. Joseph Story, Commentaries on the Law of Partnership (2nd ed. 1850) § 101 at 153;
Restatement (Second) of Agency § 14A, cmt. a (1958), and the mere status of a general partner
“clothes” a person with apparent authority to carry on the partnership business. 80 U.S. 359 (1871); 56 Mo.App. 160, 1894; 659 N.E.2d 731, 733, 740 (Mass. 1996). In 1914, the original Uniform Partnership Act codified this principle, and “statutory apparent authority” has been part of uniform partnerships acts ever since.

These agency law origins inform the application of statutory apparent authority. For example, although the statutory language does not appear to require that the appearance of authority be reasonable, the case law routinely does.

Likewise, in keeping with the law of apparent authority, a general partner can bind a limited partnership under this provision even if the partner intends to and does take the resulting benefits for the partner’s own benefits.

The fact that a person is not listed in the certificate of limited partnership as a general partner is not notice that the person is not a partner and is not notice that the person lacks authority to act for the limited partnership.

EXAMPLE: For the past ten years, X has been a general partner of XYZ Limited Partnership and has regularly conducted the limited partnership’s business with Third Party. However, 100 days ago the limited partnership expelled X as a general partner and the next day delivered for filing an amendment to XYZ’s certificate of limited partnership which stated that X was no longer a general partner. On that same day, the filing officer filed the amendment.

Today X approaches Third Party, purports still to be a general partner of XYZ and purports to enter into a transaction with Third Party on XYZ’s behalf. Third Party is unaware that X has been expelled and has no reason to doubt X’s bona fides. Nonetheless, XYZ is not liable on the transaction. Under 15 Pa.C.S. § 8613(d)(1), Third Party has notice that X is dissociated and perforce has notice that X is not a general partner authorized to bind XYZ because Third Party is deemed to have notice 90 days after the amendment became effective.

The reference to “signing of a document in record form in the partnership’s name” encompasses documents that purport to convey title to realty.

Subsection (b) – Under this provision, a general partner that lacks both actual and statutory apparent authority entirely lacks the power to bind the entity. Restatement (Third) of Agency Ch. 2, Introductory Note (2006) (stating that “this Restatement... does not use the concept of inherent agency power”).
The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”

The term “record form” used in this section is defined in 15 Pa.C.S. § 102.

§ 8643. Limited partnership liable for general partner’s actionable conduct.

(a) General rule. – A limited partnership is liable for loss or injury caused to a person or for a penalty incurred as a result of a wrongful act, or other actionable conduct, of a general partner acting in the ordinary course of activities and affairs of the partnership or with the actual or apparent authority of the partnership.

(b) Misapplication of property. – If, in the course of a limited partnership’s activities and affairs or while acting with actual or apparent authority of the partnership, a general partner receives or causes the partnership to receive money or property of a person not a partner, and the money or property is misapplied by a general partner, the partnership is liable for the loss.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 403.

Subsection (a) – This provision is derived from former 15 Pa.C.S. § 8325 and for the most part parallels the agency law doctrine of . Restatement (Second) of Agency § 14A, cmt. a (1958) (“When one of the partners is in active management of the business or is otherwise regularly employed in the business, he is a servant of the partnership.”). The liability is vicarious and without regard to the fault of those managing the partnership.

To invoke successfully this provision, a plaintiff must show: (i) a wrongful act or omission, or other actionable conduct by a general partner; (ii) that caused loss or injury; and (iii) that at the relevant moment, the general partner was acting with actual authority, apparent authority (if relevant), or within the ordinary course of activities and affairs of the partnership.

Extrapolating from agency law, apparent authority is relevant only when the appearance of authority augments the impact of the wrongful act. Restatement (Third) of Agency § 7.08 (2006) (“A principal is subject to vicarious liability for a tort committed by an agent in dealing or communicating with a third party on or purportedly on behalf of the principal when actions taken by the agent with apparent authority constitute the tort or enable the agent to conceal its commission.”).

An act or omission may be “in the ordinary course of activities and affairs of the partnership” even though the act or omission is wrongful. Any other interpretation would vitiate the “ordinary course” element. “The proper question ... is not whether the specific wrongful act is ‘ordinary course’ ... , but rather whether that type of act, if done rightfully, would be.” Daniel S. Kleinberger, Agency, Partnership and LLCs: Examples and Explanations (4th ed.; Wolters Kluwer; 2012) § 10.5.1 at 350 (emphasis omitted).
Moreover, subsection (a) refers to “the ordinary course of business of the” (emphasis added); thus the proper question is whether the conduct is in the ordinary course for the partnership and not whether the particular partner ordinarily plays a role in that part of the partnership’s business. 679 N.W.2d 165, 167-168 (Minn. Ct. App. 2004) (stating, as part of its analysis, that “[i]t is undisputed that one of the cooks scheduled to work that evening [at the partnership’s restaurant] did not come in, and that [one] partner asked [another partner] to help in the kitchen … [and that] [the other partner] was making pizzas for the partnership when” her negligence injured the plaintiff); 86 F. Supp. 2d 42, 51 (D. Conn. 1998), 208 F.3d 204 (2d Cir. 2000) (stating that “Kennedy [a partner] committed his misdeeds, which led directly to plaintiff’s injuries, within the ordinary course of the business of E & K [the partnership]”); 697 A.2d 1162, 1166 (Conn. App. Ct. 1997) (stating that to be considered “in ordinary course of the business,” a partner’s action must be “the kind of thing … partner would do”) (emphasis added).

Subsection (b) - This provision is derived from former 15 Pa.C.S. § 8326. It is not necessary that the general partner receiving or causing the partnership to receive money or property do so wrongfully. Culpability is necessary at the second phase - when “the money or property is misapplied by a general partner.”

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partner”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“act”
“property”

§ 8644. General partner’s liability.

(a) General rule. - Except as provided under subsection (b) or section 8204 (relating to limitation on liability of partners), all general partners are liable jointly and severally for all debts, obligations and other liabilities of the limited partnership unless otherwise agreed by the claimant or provided by law.

(b) Pre-existing obligations. - A person that becomes a general partner is not personally liable for a debt, obligation or other liability of the limited partnership incurred before the person became a general partner.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 404(a) and (b).

Subsection (a) - Until the advent of limited liability partnerships and limited liability limited partnerships, one hallmark of general partner status was strict, vicarious liability for the debts, obligations, and other liabilities of the partnership. This subsection states a modern version of that venerable rule.
Subsection (b) - With regard to when a limited partnership incurs a debt, obligation, or other liability, the case law is scant and concerns contractual and similar obligations. The leading case is 658 A.2d 1257 (N.J. 1995), which holds that: (i) obligations on a loan, whether for interest or principal, are incurred when the loan is made, not when each particular payment is due; and (ii) obligations for lease payments are incurred when each rental payment is due, not when the lease is made.

Concerned a loan obligation entered into before a partner joined the partnership but for the most part payable afterwards. The court held that "interest is part of the contractual debt, and the obligation to pay interest on a loan if at all, at the time that the parties execute the note or other debt instrument. 658 A.2d at 1261 (emphasis in original). The court indicated that the same analysis applies to the obligation to repay principal. 658 A.2d at 1263 (stating that "the decisive issue before this court ... [is that] [p]ayment of interest, like repayment of advances, is an obligation that arises at the time the debt instrument is executed").

Discussed the lease issue in response to the creditor's argument that "just as a rent obligation arises for current use of property, an interest obligation arises for current use of principal." 658 A.2d at 1261. Rejecting that argument, the court: (i) noted "the obligation to pay rent based on current tenancy [which]... arises with each period of tenancy, and ... arises even in the absence of a lease;" (ii) described "the common-law obligation to pay rent [as] entirely independent of the contractual obligation under the lease;" and (iii) held that, for purposes of partnership law, the rule for "incurring" a lease obligation rests on the common law duty in tenancy and not on the lease as a contract. 658 A.2d at 1262 (citing 104 P.2d 507, 508 (Cal. 1940)).

Involved a general partnership but, in this context, that difference is immaterial.

As to when a partnership incurs a tort liability, the answer might be found by analogy to statute of limitation rules, another area of law concerned with when claims arise. But a policy argument exists to the contrary. Vicarious liability for a limited partnership's torts should be confined to persons who are general partners when the wrongful conduct occurs. It is the conduct, not the consequences, that is wrongful; therefore, the occurrence of the wrongful conduct should determine which set of general partners are liable for the conduct's consequences.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

"general partner"
"limited partnership"

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8645. Actions by and against partnership and partners.

(a) General partner as party. - To the extent not inconsistent with section 8644 (relating to general partner’s liability), a general partner may be joined in an action against the limited partnership or named in a separate action.

(b) Judgment against partnership only. - A judgment against a partnership:

(1) is not by itself a judgment against a partner; and
(2) except as set forth in subsection (c), may not be satisfied from a partner’s assets.

(c) Judgment against partnership and partner. - If there is a judgment against a partnership and a partner on the same claim, the judgment creditor may levy execution against the assets of the partner if both of the following paragraphs apply:

(1) The partner is personally liable for the claim under section 8644.

(2) One of the following subparagraphs applies:

(i) A writ of execution on the judgment against the partnership has been returned unsatisfied in whole or in part.

(ii) The partnership is a debtor in bankruptcy.

(iii) The partner has agreed that the creditor need not exhaust partnership assets.

(iv) A court grants permission to levy execution based on a finding that:

(A) partnership assets subject to execution are clearly insufficient to satisfy the judgment;

(B) exhaustion of partnership assets is excessively burdensome; or

(C) the grant of permission is an appropriate exercise of the court’s equitable powers.

(v) Liability is imposed on the partner by law or contract independent of the existence of the partnership.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 405.

Subsection (a) – If a debt, obligation, or other liability is incurred against a limited liability limited partnership, joining a general partner would be improper. Likewise, if a debt, obligation, or other liability against an ordinary limited partnership is incurred before a person becomes a general partner, it would be improper to join that person.

When a general partner has personally guaranteed a limited partnership obligation, naming that general partner in a suit against the limited partnership is “not inconsistent with section 8644.” , 595 A.2d 872, 875 (Conn. 1991) (upholding pre-judgment attachment of a partner’s assets, where the partner had personally guaranteed the partnership’s obligations).
Subsection (b) – Reflecting the entity construct, this subsection provides that a judgment against the limited partnership: (i) is not, standing alone, a judgment against the general partners; and (ii) cannot be satisfied from a general partner’s personal assets absent a judgment against the general partner.

This chapter leaves to the law of judgments to determine the collateral effects to be accorded a prior judgment for or against the limited partnership in a subsequent action against a general partner individually. RESTATEMENT (SECOND) OF JUDGMENTS § 60 (1982) and comments, 264 F.2d 658 (5th Cir. 1959); 414 N.W.2d 547 (Minn. App. 1987) (Lansing, J.).

, 602 F.3d 610, 618 (5th Cir. 2010) (disregarding the separateness of partner and partnership, overlooking therefore the issue of collateral estoppel, discussing with approval a bankruptcy case in which “the trustee sought to enforce the partnership judgment against [partners] simply by virtue of their status as partner;” and quoting with approval that case’s holding that “[o]nce the liability of the partnership became fixed, the only issue remaining was whether the Defendants are partners of [the partnership]”) (quoting , 161 B.R. 180, 183-184 (Bankr. N.D. Tex. 1993)) (second brackets in original).

This subsection and subsection (c) combine to create a trap for the unwary. For statute of limitations purposes, a creditor’s claim against the general partners accrues simultaneously with the claim against the limited partnership. If a creditor chooses not to sue the general partners in its suit against the limited partnership, the statute of limitations may run before the creditor commences suit against the general partners.

, 405 S.W.3d 905, 907 (Tex. App. 2013) (holding that the partnership creditor “was obligated to sue the partners of S & J ... within the same limitations period it had to sue S & J, the partnership” and that “[b]ecause, [the creditor] did not, the trial court correctly held that limitations ran”), 457 S.W. 3d 427 (Tex. 2015);

, 487 F. Supp. 2d 905, 908 (E.D. Mich. 2007) aff’d, 286 F. App’x 930 (6th Cir. 2008) (“While the plaintiff may use collateral estoppel to prevent the partner from relitigating the issue of liability, the plaintiff must still bring suit within the applicable limitations period for the underlying wrong.”)

Subsection (c) – Subject to the five listed exceptions, this subsection prevents a general partner’s assets from being the first recourse for a judgment creditor of the limited partnership, even if the partner is liable for the judgment debt under 5 Pa.C.S. § 8644.

Although this subsection is silent with respect to pre-judgment remedies, as a matter of policy the subsection should guide courts as they apply the law of pre-judgment remedies.

223 Cal. Rptr. 288, 292 (Cal. Ct. A pp. 1985) (granting a pre-judgment remedy against a partner because there is “no distinction between those sued individually as partners and those sued as sole proprietors”), 595 A.2d 872, 875 (Conn. 1991) (upholding pre-judgment attachment of a partner’s assets, because the partner had personally guaranteed the partnership’s obligations).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partner”

The term “debtor in bankruptcy” used in this section is defined in 15 Pa.C.S. § 102.
(a) General rule. – Each general partner has equal rights in the management and conduct of the limited partnership’s activities and affairs. Except as provided in this title, any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners.

(b) Actions requiring unanimous approval. – The affirmative vote or consent of all the partners is required to:

1. Amend the partnership agreement; and
2. Amend the certificate of limited partnership to delete a statement that the limited partnership is a limited liability limited partnership.

(c) Reimbursement of advance. – A limited partnership shall reimburse a general partner for an advance to the partnership beyond the amount of capital the general partner agreed to contribute.

(d) Status of advance. – A payment or advance made by a general partner which gives rise to an obligation of the limited partnership under subsection (c) or section 8648(a) (relating to reimbursement, indemnification, advancement and insurance) constitutes a loan to the partnership which accrues interest from the date of the payment or advance.

(e) No right to remuneration. – A general partner is not entitled to remuneration for services performed for the limited partnership.

(f) Sale of assets. – A sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a limited partnership that is not made in the usual and regular course of the business of the partnership must be approved by:

1. All the general partners; and
2. Limited partners owning the rights to receive a majority of the distributions as limited partners.

(g) Cross reference. – See section 324 (relating to approval by limited partnership).

Committee Comment (2016):

Subsections (a) – (d) are patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 406.

Subsection (a) – This chapter assumes that, more often than not, people utilizing this chapter will want: (i) strong centralized management, strongly entrenched, and (ii) passive investors with little control over the entity. 15 Pa.C.S. § 8632 essentially excludes limited partners from the ordinary management of a limited partnership’s activities, unless the partnership agreement provides otherwise.
This subsection states affirmatively the general partners’ commanding role. Only the partnership agreement and the express provisions of this title can limit that role.

The authority granted by this subsection includes the authority to delegate. Delegation does not relieve the delegating general partner or partners of their duties under 15 Pa.C.S. § 8649. However, the fact of delegation is a fact relevant to any breach of duty analysis.

EXAMPLE: A sole general partner personally handles all important paperwork for a limited partnership. The general partner neglects to renew the fire insurance coverage on a building owned by the limited partnership, despite having received and read a warning notice from the insurance company. The building subsequently burns to the ground and is a total loss. The general partner might be liable for breach of the duty of care under 15 Pa.C.S. § 8649(c) which establishes a standard of gross negligence.

EXAMPLE: A sole general partner delegates responsibility for insurance renewals to the limited partnership’s office manager, and that manager neglects to renew the fire insurance coverage on the building. Even assuming that the office manager has been grossly negligent, the general partner is not necessarily liable under 15 Pa.C.S. § 8649(c). The office manager’s gross negligence is not automatically attributed to the general partner. Under 15 Pa.C.S. § 8649(c), the question is whether the general partner was grossly negligent (or worse) in selecting the general manager, delegating insurance renewal matters to the general manager, and supervising the general manager after the delegation.

The partnership agreement may also provide for delegation and, subject to 15 Pa.C.S. § 8615(c)(10) and (11) and (d)(3), may modify a general partner’s duties under 15 Pa.C.S. § 8649.

For limited partnerships that have more than one general partner, this chapter provides that in most circumstances a “matter relating to the activities and affairs of the partnership is decided … by a majority of the general partners.” However, unlike corporate statutes, this chapter does not provide a rule for the quantum of participation necessary to constitute “a majority.” If a limited partnership has more than one general partner, the partnership agreement should consider what “a majority” means in the event a general partner position is vacant.

Subsection (b) – Other provisions of this chapter also contain default rules providing for unanimous consent, 15 Pa.C.S. §§ 8631(b)(3) (for a person to become a limited partner after formation of the limited partnership); 8641(b)(3) (same as to becoming a general partner); and 8652(c) (for compromising a person’s obligation to make a contribution).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“contribution”
“general partner”
“limited partnership”
“partner”
“partnership agreement”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“limited liability limited partnership”
“obligation”
§ 8647. General partner rights to information.

(a) Right to required information. – A general partner may inspect and copy required information during regular business hours in the limited partnership’s principal office.

(b) Right to other information. – On reasonable notice, a general partner may inspect and copy during regular business hours, at a reasonable location specified by the limited partnership, any other records maintained by the partnership in addition to the required information regarding the partnership’s activities, affairs, financial condition and other circumstances.

(c) Obligation of limited partnership. – A limited partnership shall furnish to each general partner, without demand, any information concerning the partnership’s activities, affairs, financial condition and other circumstances which the partnership knows and is material to the proper exercise of the general partner’s rights and duties under the partnership agreement or this title, except to the extent the partnership can establish that it reasonably believes the general partner already knows the information.

(d) Obligation of general partner. – The duty to furnish information under subsection (c) also applies to each general partner to the extent the general partner knows any of the information described in subsection (b).

(e) Rights of person dissociated as general partner. – Subject to subsection (j), within ten days after receipt by a limited partnership of a demand made in record form, a person dissociated as a general partner may have access to the information and records described in subsections (a) and (b) at the locations specified in subsections (a) and (b) if:

(1) the information or record pertains to the period during which the person was a general partner;

(2) in seeking the information or record the person complies with section 8649(d) (relating to standards of conduct for general partners) as if still a general partner; and

(3) all of the following apply:

(i) the person seeks the information for a purpose reasonably related to the partner’s interest as a former general partner;

(ii) the person makes a demand in record form received by the partnership, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(iii) the information sought is directly connected to the person’s purpose.

(f) Required response to demand. – Within 10 days after receiving a demand under
subsection (e), the limited partnership shall, in record form, inform the person that made the
demand of:

(1) what information the partnership will provide in response to the demand and
when and where the partnership will provide the information; and

(2) the partnership’s reasons for declining, if the partnership declines to provide any
demanded information.

(g) Copying costs. – A limited partnership may charge a person that makes a demand
under this section the reasonable costs of copying.

(h) Rights of agent or guardian. – A general partner or person dissociated as a general
partner may exercise the rights under this section through an agent or, in the case of an individual
under legal disability, a guardian. Any restriction or condition imposed by the partnership
agreement or under subsection (j) applies both to the agent or guardian and to the general partner
or person dissociated as a general partner.

(i) No rights of transferee. – The rights under this section do not extend to a person as
transferee, except that if:

(1) a general partner dies, section 8674 (relating to power of personal representative
of deceased partner) applies; and

(2) an individual dissociates as a general partner under section 8663(a)(7)(ii) or (iii)
(relating to dissociation as general partner), the personal representative of the individual
may exercise the rights under subsection (d) of a person dissociated as a general partner.

(j) Limitations on access. – In addition to any restriction or condition stated in its
partnership agreement, a limited partnership, as a matter within the ordinary course of its
activities and affairs, may impose reasonable restrictions and conditions on access to and use of
information to be furnished under this section, including designating information confidential
and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute
concerning the reasonableness of a restriction under this subsection, the partnership has the
burden of proving reasonableness.

(k) Cross reference. – See section 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
407.

Subsection (a) – The phrase “required information” is a defined term in 15 Pa.C.S. § 8612. 15
Pa.C.S. § 8618. This subsection’s broad right of access is subject both to reasonable limitations in the
partnership agreement, as permitted by 15 Pa.C.S. § 8615(c)(13), and also the power of the limited
partnership to impose reasonable limitations on use under subsection (j). However, limiting a general
partner’s access to this information or any other information would be quite unusual.

**Subsection (c)** – Because a limited partnership is an entity, this provision obligates the partnership. However, the general partners are typically responsible for seeing that the limited partnership fulfills this obligation. For the limited partnership, breaching this obligation is a matter of strict liability (analogous to breaching a contract). In contrast, 15 Pa.C.S. § 8649 provides the standard for evaluating a general partner’s conduct in this context. Subsection (d) establishes a separate duty for the general partners.

A general partner’s right to information under this subsection is personal to the general partner and enforceable under 15 Pa.C.S. § 8691(a). These rights are in addition to whatever discovery rights a party has in a civil suit.

Subsection (c) imposes an affirmative duty to volunteer information. However, given the assumption that each general partner will be active in management, the obligation ceases “to the extent the partnership can establish that it reasonably believes the general partner already knows the information.”

**EXAMPLE:** A limited partnership has two general partners: each of which is regularly engaged in conducting the limited partnership’s activities; both of which are aware of and have regular access to all significant limited partnership records; and neither of which has special responsibility for or knowledge of any particular aspect of those activities or the relevant partnership records. Most likely, neither general partner is obliged to draw the other general partner’s attention to information apparent in the limited partnership’s records.

**EXAMPLE:** Although a limited partnership has three general partners, one is the managing partner with day-to-day responsibility for running the limited partnership’s activities. The other two meet periodically with the managing general partner, and together with that partner function in a manner analogous to a corporate board of directors. Most likely, the managing general partner has a duty to draw the attention of the other general partners to important information, even if that information would be apparent from a review of the limited partnership’s records.

In any event, the obligation is limited to information which is both material and known by the limited partnership. “Knowledge” is viewed subjectively – i.e., actual knowledge. Materiality is viewed objectively. Thus, the duty applies to known, material information, even if the limited partnership does not know that the information is material.

A limited partnership will “know” what its general partners know. Under 15 Pa.C.S. § 8613(f), a general partner’s knowledge of a fact relating to the limited partnership is effective immediately as knowledge of or notice to the partnership. As to others acting or reasonably appearing to act on behalf of the limited partnership, common law agency rules will apply. **Restatement (Third) of Agency § 5.03 (2006)** (“Imputation of Notice of Fact to Principal”).

Typically a general partner’s duties are continuous, and therefore a general partner’s right to information is not just transaction-specific. Ongoing managerial responsibilities require ongoing information – both periodically and when a situation warrants.

**Subsection (d)** – This provision imposes a direct duty on each general partner. The duty is both narrower and more demanding than the duty placed on general partners as the typically responsible parties under subsection (c). The duty is narrower because the relevant information is confined to “the information [pertaining to records] described in subsection (b),” rather than the wide scope of “any information” delineated by subsection (c). The duty is more demanding because it applies directly to the
general partners, is therefore in the nature of a contractual obligation, and its breach is a matter of strict 13479
liability. For example, it is no defense for a general partner under this section to assert that, although the 13480
partner failed to furnish required information, the failure did not amount to gross negligence under 15 13481
Pa.C.S. § 8649(c).

As with subsection (c), a general partner’s right to information under this subsection is personal to 13484
the general partner and enforceable under 15 Pa.C.S. § 8691(a). These rights are in addition to whatever 13485
discovery rights a party has in a civil suit.

Subsection (e)(2) – A duty of good faith is needed here, because a person claiming access under 13488
this subsection is no longer a general partner and no longer subject to a general partner’s obligation of 13489
good faith and fair dealing under 15 Pa.C.S. § 8649(d). 15 Pa.C.S. § 8665(a)(2) (stating that a 13490
person’s dissociation as a general partner terminates as to subsequent events the person’s duties under 15 13491
Pa.C.S. § 8649, including the contractual obligation of good faith).

Subsection (i) - This section provides no information rights to a person as transferee. Transferee 13493
status brings only the very limited information rights stated in 15 Pa.C.S. § 8672(c). However, a 13494
transferee that is a person dissociated as a general partner has rights in the latter capacity under subsection 13496
(e).

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a 13498
decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its 13499
provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A 13500
fiduciary appointed under authority of law by a register of wills or court to administer the estate of a 13501
decedent.”

Subsection (j) – This subsection permits the limited partnership – as distinguished from the 13503
partnership agreement – to impose use limitations. 15 Pa.C.S. § 8615(d)(1)(iii) (providing that the 13505
partnership agreement may “impose reasonable restrictions on the availability and use of information 13506
under section … 86 47.” Under 15 Pa.C.S. § 8646(a), it will be the general partners that decide whether 13507
the limited partnership will impose use restrictions.

The limited partnership bears the burden of proving the reasonableness of any restriction imposed 13509
under this subsection. In determining whether a restriction is reasonable, a court might consider: (i) the 13510
danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is 13511
sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably 13512	ailed.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partnership agreement”
“required information”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“principal office”
“receipt”
“record form”
§ 8648. Reimbursement, indemnification, advancement and insurance.

(a) Reimbursement. – A limited partnership shall reimburse a general partner for any payment made by the general partner in the course of the general partner’s activities on behalf of the partnership, if the general partner complied with sections 8646 (relating to management rights), 8649 (relating to standards of conduct for general partners) and 8654 (relating to limitations on distributions) in making the payment.

(b) Indemnification. – A limited partnership shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation or other liability incurred by the person by reason of the person’s former or present capacity as a general partner, if the claim, demand, debt, obligation or other liability does not arise from the person’s breach of section 8646, 8649 or 8654.

(c) Advancement. – In the ordinary course of its activities and affairs, a limited partnership may advance expenses, including attorney fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person’s former or present capacity as a general partner, if the person promises to repay the partnership if the person ultimately is determined not to be entitled to be indemnified.

(d) Insurance. – A limited partnership may purchase and maintain insurance on behalf of a general partner against liability asserted against or incurred by the general partner in that capacity or arising from that status even if, under subsection (g), the partnership agreement could not eliminate or limit the person’s liability to the partnership for the conduct giving rise to the liability.

(e) Non-exclusivity. – The rights provided under subsections (a), (b), (c) and (d) shall not be deemed exclusive of any other rights to which a person seeking reimbursement, indemnification, advancement of expenses or insurance may be entitled under the partnership agreement, vote of partners, contract or otherwise, both as to action in his official capacity and as to action in another capacity while holding that position. Section 8649(f) shall be applicable to a vote, contract or other action under this subsection. A limited partnership may create a fund of any nature, which may, but need not be, under the control of a trustee, or otherwise secure or insure in any manner its indemnification obligations, whether arising under this section or otherwise.

(f) Grounds. – Indemnification under subsection (e) may be granted for any action taken and may be made whether or not the limited partnership would have the power to indemnify the person under any other provision of law except as provided in this section and whether or not the indemnified liability arises or arose from any threatened, pending or completed action by or in the right of the partnership. Indemnification under subsection (e) is declared to be consistent with the public policy of the Commonwealth.

(g) Limitation. – Indemnification under this section shall not be made in any case where
the act giving rise to the claim for indemnification is determined by a court to constitute recklessness, willful misconduct or a knowing violation of law.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 408, except subsections (e) – (g) which are patterned after 15 Pa.C.S. § 1746.

Subsections (a) and (b) – These subsections apply only to general partners. A limited partnership’s obligation, if any, to reimburse or indemnify others ( , employees, independent contractors, other agents, independent contractors) is a question for other law, including the law of agency, contract, and restitution. The fact a person has dissociated as a partner does not affect any obligations incurred by the partnership under these subsections for conduct occurring before the dissociation.

Subsection (a) - The reimbursement obligation stated here is a default rule and roughly parallels a rule of agency law. Restatement (Third) of Agency § 8.14(2)(a) (2006) (stating that “[a] principal has a duty to indemnify an agent …when the agent makes a payment (i) within the scope of the agent’s actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously in making the payment”).

Subsection (b) - This subsection provides for indemnification but only as a default rule.

Although referring broadly to any “person,” this subsection is actually limited to present and former general partners. The indemnification obligation applies only to a “debt, obligation, or other liability incurred by the person by reason of the person’s former or present capacity as a general partner.” Thus, by its terms this subsection does not apply to a person in the capacity of an officer, manager, CEO, etc.

Of course, the partnership agreement may mandate indemnification of officers, managers, employees, and other persons providing services to or acting for the limited partnership. Within the limitations stated in 15 Pa.C.S. § 8615(c)(12), a limited partnership agreement may obligate a limited partnership to indemnify a person even when the person has breached a managerial duty or the partnership agreement itself.

Subsection (c) - This subsection authorizes but does not require a limited partnership to provide advances to cover expenses. The authorization applies only to those persons eligible for indemnification under subsection (b), but the partnership agreement certainly can authorize a broader scope and even make advances obligatory.

The reference to “ordinary course” places the decision squarely within 15 Pa.C.S. § 8646(a), under which, with exceptions not relevant here, any matter relating to the activities and affairs of the partnership is decided exclusively by the general partner or, if there is more than one general partner, by a majority of the general partners.

Subsection (d) - This subsection’s language is very broad and authorizes a limited partnership to purchase insurance to cover, , a general partner’s intentional misconduct. It is unlikely that such insurance would be available. This authorization comes from the statute, not the partnership agreement, and therefore is not subject to the restrictions stated in 15 Pa.C.S. § 8615(c)(12).

Subsections (e) – (g) - These subsections apply to limited partnerships the basic policies on indemnification by business corporations.
The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partner”
“partnership agreement”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8649. Standards of conduct for general partners.

(a) General rule. – A general partner owes to the limited partnership and, subject to
section 8691 (relating to direct action by partner), the other partners the duties of loyalty and care
stated in subsections (b) and (c).

(b) Duty of loyalty. – The fiduciary duty of loyalty of a general partner includes the
duties:

(1) to account to the limited partnership and hold as trustee for it any property,
profit or benefit derived by the general partner:

(i) in the conduct or winding up of the partnership’s activities and affairs;

(ii) from a use by the general partner of the partnership’s property; or

(iii) from the appropriation of a partnership opportunity;

(2) to refrain from dealing with the partnership in the conduct or winding up of the
partnership’s activities and affairs as or on behalf of a person having an interest adverse to
the partnership; and

(3) to refrain from competing with the partnership in the conduct or winding up of
the partnership’s activities and affairs.

(c) Duty of care. – The duty of care of a general partner in the conduct or winding up of
the limited partnership’s activities and affairs is to refrain from engaging in grossly negligent or
reckless conduct, willful or intentional misconduct, or knowing violation of law.

(d) Good faith and fair dealing. – A general partner shall discharge the duties and
obligations under this title or under the partnership agreement and exercise any rights consistent
with the contractual obligation of good faith and fair dealing.

(e) Self-serving conduct. – A general partner does not violate a duty or obligation under
this title or under the partnership agreement solely because the general partner’s conduct furthers
the general partner’s own interest.
(f) Authorization or ratification. – All the partners of a limited partnership may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that otherwise would violate the duty of loyalty of a general partner.

(g) Fairness as a defense. – It is a defense to a claim under subsection (b)(2) and any comparable claim in equity or at common law that the transaction was fair to the limited partnership at the time it is authorized or ratified under subsection (f).

(h) Rights and obligations in approved transactions. – If a general partner enters into a transaction with the limited partnership which otherwise would be prohibited by subsection (b)(2) and the transaction is authorized or ratified as provided in subsection (f) or the partnership agreement, the general partner’s rights and obligations arising from the transaction are the same as those of a person that is not a general partner.

(i) Exoneration. – The partnership agreement may provide that a general partner shall not be personally liable for monetary damages to the partnership or the other partners for a breach of subsection (c), except that a general partner may not be exonerated for an act that constitutes recklessness, willful misconduct or a knowing violation of law.

(j) Cross reference. – See section 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 409. Subsection (i) is patterned in part after 15 Pa.C.S. § 1713.

This section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section are subject to the limited partnership agreement, but 15 Pa.C.S. § 8615(c) and (d) contain important limitations on the power of the partnership agreement to affect fiduciary and other duties and the obligation of good faith and fair dealing.

For the effect of dissociation on a person’s duties under this section, see 15 Pa.C.S. §§ 8662(a)(2) (limited partners) and 8665(a)(2) (general partners).

Subsection (a) - This subsection recognizes two core managerial duties, but does not purport to be exhaustive. For example, many cases characterize a manager’s duty to disclose as a fiduciary duty.

Subsection (b) - This subsection states three core aspects of the fiduciary duty of loyalty: (i) not usurping partnership opportunities or otherwise wrongly benefiting from the limited partnership’s operations or property; (ii) avoiding conflict of interests in dealing with the limited partnership (whether directly or on behalf of another); and (iii) refraining from competing with the limited partnership.
Essentially the same duties exist in agency law and under the law of all types of business organizations. The duties stated in this subsection apply beginning with “the conduct ... of the partnership's activities and affairs” and thus do not apply to pre-formation activities.

**Subsection (b)(1)** - The phrase “hold as trustee” was used in former 15 Pa.C.S. § 8334 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information.

**Subsection (b)(1)(i)** - This provision is consistent with a basic principle of agency law - namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. Restatement (Third) of Agency § 8.06, cmt. c. (2006). Typically, however, the limited partnership agreement legitimizes particular benefits - , a management fee..

**Subsection (b)(1)(iii)** - This chapter does not specify what constitutes “a partnership opportunity,” but ample case law exists. , , 159 B.R. 964 (M.D. Fla. 1990) (discussing the usurpation of a limited partnership opportunity”) 2 F.3d 1098 (11th Cir. 1993); , 223 N.E.2d 869, 873 (N.Y. 1966) (“There is no basis or warrant for distinguishing the fiduciary relationship of corporate director and shareholder from that of general partner and limited partner.”)

The duty stated here continues through winding up, although in that context the scope of partnership opportunities inevitably narrows.

**Subsection (b)(2)** - In this context, the phrase “adverse interest” is a term of art, meaning “to be on the other side of the table” in some dealing with the limited partnership. Absent informed consent by the limited partnership, this duty is breached by the mere existence of the conflict of interest; the limited partnership need not prove that the outcome of the dealing was adverse to the partnership.

**Subsection (b)(3)** - Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees.

**Subsection (c)** - This chapter does not refer to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable only in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission.

The change in label is consistent with the Restatement (Third) of Agency § 8.02 (2006), which refers to the agent’s “fiduciary duty” to act loyally, but eschews the word “fiduciary” when stating the agent’s duties of “care, competence, and diligence.” § 8.08. However, the label change is merely semantics; no change is the law is intended.

The partnership agreement can raise the standard of care, or subject to 15 Pa.C.S. § 8615(c)(10) and (d)(3)(iii), lower it. A person’s practical exposure for breaching the duty of care involves not only the standard of care but also any partnership agreement provision that: (i) exonerates the person from liability for breach of the duty of care; or (ii) entitles the person to indemnification despite such breach.

**Subsection (d)** - This subsection refers to the “obligation of good faith and fair dealing” (emphasis added) and thereby invokes the implied obligation that exists in every contract.
At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – duties and rights “under this title.” However, for the most part those duties and rights apply to relationships the partners and the limited partnership and function only to the extent not displaced by the limited partnership agreement. Those statutory default rules are thus intended to function like a contract; applying the contractual notion of good faith and fair dealing therefore makes sense.

The contractual obligation of “good faith” has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware’s famous corporate law exoneration provision; and (ii) that provision’s exception “for acts or omissions not in good faith.” Del. Code Ann. tit. 8, § 102(b)(7). In that context, good faith is an aspect of the duty of loyalty. , 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the “utmost good faith” sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. , 164 N.E. 545, 551 (N.Y. 1928) (“[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship.”); 328 N.E.2d 505, 515 (Mass. 1975) (“[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty.” (footnotes, citations, and internal quotations omitted)).

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a general partner from acting in the general partner’s own self-interest:

“Fair dealing” is not akin to the fair process component of entire fairness, i.e., whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care ... It is rather a commitment to deal “fairly” in the sense of consistently with the terms of the parties’ agreement and its purpose. Likewise “good faith” does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties’ contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.


Courts should not use the contractual obligation to change the parties’ or this chapter’s allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.
The partnership agreement or this chapter may grant discretion to a general partner, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a general partner may properly exercise discretion even though another partner (whether general or limited) suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.

The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties’ agreed-upon arrangements:

An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but

In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the general partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the partnership agreement to affect the contractual obligation of good faith and fair dealing, see 15 Pa.C.S. § 8615(c)(11) (prohibiting elimination but allowing the agreement to prescribe the standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured).

**Subsection (e)** - A general partner in a limited partnership has at least two different roles: (i) as a party to the limited partnership agreement, with rights and obligations under that agreement; and (ii) as manager or co-manager of the enterprise. This provision pertains to the first role. A general partner’s exercise of rights under the partnership agreement is subject to the obligation of good faith and fair dealing, but a general partner does not breach that contractual obligation solely because the general partner’s conduct furthers the general partner’s own interest. In contrast, this provision is ineffective with regard to a general partner’s duties as manager or co-manager. For example, a general partner’s liability under subsection (b)(3) (prohibiting competition) is not solely because the general partner’s conduct furthers the general partner’s own interest. Rather, the liability results from the breach of a specific obligation - , the codified aspect of the duty of loyalty that prohibits competition.

**Subsection (f)** - Here and elsewhere in this title, information is material if there is a substantial likelihood that a reasonable decision maker would consider it important in deciding how to vote or take other action under this title or the partnership agreement.

**Subsection (g)** - This subsection codifies judge-made law applicable to all business entities.
Subsection (h) – This subsection overturns the now-defunct notion that debts to partners were categorically inferior to debts to non-partner creditors. This provision has nothing to do with the fiduciary duty pertaining to conflict of interests.

This subsection states a default rule. The partnership agreement may provide that debt to a general partner (or general partners generally) is subordinate to other partnership obligations. The agreement that creates the debt may do likewise.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partner”
“partnership agreement”

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter E
Contributions and Distributions

§ 8651. Form of contribution.

A contribution may consist of:

(1) property transferred to, services performed for or another benefit provided to the limited partnership;

(2) an agreement to transfer property to, perform services for or provide another benefit to the partnership; or

(3) any combination of items listed in paragraphs (1) and (2).
Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 501.

This section is intentionally quite broad, encompassing past, present, and promised benefits. Case law recognizes the intended breadth of this approach.

, 732 P.2d 1233, 1234 (Colo. Ct. App. 1986) (letter of credit as contribution);


Chapter 86 does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to the limited partnership is subject to the statute of frauds pertaining to land transfers.

707 N.E.2d 557, 564 (Ohio Ct. App. 1997) (holding that where terms of oral partnership agreement required limited partner to contribute real property, statute of frauds barred enforceability of the agreement).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“contribution”

“limited partnership”

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

§ 8652. Liability for contribution.

(a) Obligation not excused. – A person’s obligation to make a contribution to a limited partnership is not excused by the person’s death, disability, termination or other inability to perform personally.

(b) Substitute payment. – If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited partnership to contribute money equal to the value, as stated in the required information, of the part of the contribution which has not been made.

(c) Compromise of obligation. – The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the partners. If a creditor of a limited partnership extends credit or otherwise acts in reliance on an obligation described in subsection (a) without knowledge or notice of a compromise under this subsection, the creditor may enforce the obligation.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 502.
**Subsection (a)** – Under common law principles of impracticability, an individual's death or incapacity will sometimes discharge a duty to render performance. *Restatement (Second) of Contracts* §§ 261 and 262 (1981). This subsection overrides those principles. Moreover, the reference to “perform personally” is not limited to individuals but rather may refer to any legal person (including an entity) that has a non-delegable duty.

**Subsection (b)** – This subsection is a statutory liquidated damages provision, exercisable at the option of the limited partnership, with the damage amount set according to the value of the promised, non-monetary contribution.

Example: In order to become a partner, Dan promises to contribute to the limited partnership various assets which the partnership agreement values at $150,000. In return for Dan's promise, and in light of the agreed value, the limited partnership admits Dan as a partner with a right to receive 25% of the limited partnership's distributions.

The promised assets are subject to a security agreement, but Dan promises to contribute them “free and clear.” Before Dan can contribute the assets, the secured party forecloses on the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the actual fair market value of the assets, under this subsection the limited partnership has a claim against Dan for “money equal to the value ... of the part of the contribution which has not been made” – $150,000.

Example: Same facts as the previous example, except that the public sale brings $225,000. The limited partnership is not obliged to invoke this subsection and is not limited to the $150,000 valuation. The limited partnership may sue for breach of the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss suffered as a result of the breach.

**Subsection (c)** – The unanimity requirement expressed in the first sentence might indirectly benefit creditors, but the requirement is only a default rule. The right of each partner to consent is not one of the “rights under this title of a person other than a partner” within the meaning of that phrase in 15 Pa.C.S. § 8615(c)(19) (preventing the partnership agreement from affecting such rights). In contrast, the creditor right stated in the second sentence fits squarely within 15 Pa.C.S. § 8615(c)(19).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“contribution”

“limited partnership”

“partner”

“required information”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8653. Sharing of and right to distributions before dissolution.

(a) General rule. – Any distribution made by a limited partnership before its dissolution and winding up must be shared among the partners and persons dissociated as partners on the basis of the value, as stated in the required information when the limited partnership decides to make the distribution, of the contributions the limited partnership has received from each partner, except as provided in section 8672(b) (relating to transfer of transferable interest) or to the extent
necessary to comply with a charging order in effect under section 8673 (relating to charging
order).

(b) No entitlement to distribution. – A person has a right to a distribution before the
dissolution and winding up of a limited partnership only if the partnership decides to make an
interim distribution. A person's dissociation does not entitle the person to a distribution.

(c) Distribution in kind. – A person does not have a right to demand or receive a
distribution from a limited partnership in any form other than money. Except as provided under
section 8690(f) (relating to disposition of assets in winding up and required contributions), a
partnership may distribute an asset in kind only if each part of the asset is fungible with each
other part and each person receives a percentage of the asset equal in value to the person's share
of distributions.

(d) Status as creditor. – If a partner or transferee becomes entitled to receive a
distribution, the partner or transferee has the status of, and is entitled to all remedies available to,
a creditor of the limited partnership with respect to the distribution, except that the partnership's
obligation to make a distribution is subject to offset for any amount owed to the partnership by
the partner or a person dissociated as a partner on whose account the distribution is made.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
503.

Subsection (a) - The rule stated applies to redemptions as well as operating distributions but is a
default rule in both contexts.

Subsection (b) - The second sentence of this subsection accords with 15 Pa.C.S. § 8662(a)(3)
because upon dissociation a partner is treated as a mere transferee of the partner's own transferable
interest. Like most rules in this chapter, this one is subject to the limited partnership agreement.

Subsection (d) - 15 Pa.C.S. § 8654(f) (pertaining to the rights of partners and transferees
that receive a distribution in the form of indebtedness).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“contribution”
“distribution”
“limited partnership”
“partner”
“required information”
“transferee”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8654. Limitations on distributions.
(a) General rule. – A limited partnership may not make a distribution, including a
distribution under section 8690 (relating to disposition of assets in winding up and required
contributions), if after the distribution:

(1) the partnership would not be able to pay its debts as they become due in the
ordinary course of the partnership’s activities and affairs; or

(2) the partnership’s total assets would be less than the sum of its total liabilities
plus the amount that would be needed, if the partnership were to be dissolved and wound
up at the time of the distribution, to satisfy the preferential rights upon dissolution and
winding up of partners and transferees whose preferential rights are superior to the rights of
persons receiving the distribution.

(b) Valuation. – A limited partnership may base a determination that a distribution is not
prohibited under subsection (a)(2) on:

(1) the book values of the assets and liabilities of the partnership, as reflected on its
books and records;

(2) a valuation that takes into consideration unrealized appreciation and
depreciation or other changes in value of the assets and liabilities of the partnership;

(3) the current value of the assets and liabilities of the partnership, either valued
separately or valued in segments or as an entirety as a going concern; or

(4) any other method that is reasonable in the circumstances.

(c) Excluded liabilities. – In determining whether a distribution is prohibited by
subsection (a)(2), the limited partnership need not consider obligations and liabilities unless they
are required to be reflected on a balance sheet, not including the notes to the balance sheet,
prepared on the basis of generally accepted accounting principles or such other accounting
practices and principles as are used generally by the partnership in the maintenance of its books
and records and as are reasonable in the circumstances.

(d) Measuring date of distribution. – Except as provided in subsection (e), the effect of a
distribution under subsection (a) is measured:

(1) as of the date specified by the limited partnership when it authorizes the
distribution if the distribution occurs within 125 days of the earlier of the date so specified
or the date of authorization; or

(2) as of the date of distribution in all other cases.

(e) Date of redemption. – In the case of a distribution described in paragraph (1) of the
definition of “distribution” in section 8612 (relating to definitions), the distribution is deemed to
occur as of the earlier of the date money or other property is transferred or debt is incurred by the
limited partnership or the date the person entitled to the distribution ceases to own the interest or
right being acquired by the partnership in return for the distribution.

(f) Status of distribution debt. – The indebtedness of a limited partnership to a partner or
transferee incurred by reason of a distribution made in accordance with this section shall be at
least on a parity with the partnership’s indebtedness to its general, unsecured creditors, except to
the extent subordinated by agreement.

(g) Certain subordinated debt. – The indebtedness of a limited partnership, including
indebtedness issued as a distribution, is not a liability for purposes of subsection (a) if the terms
of the indebtedness provide that payment of principal and interest is made only if and to the
extent that payment of a distribution could then be made under this section. If the indebtedness
is issued as a distribution, each payment of principal or interest is treated as a distribution, the
effect of which is measured on the date the payment is made.

(h) Distributions in winding up. – In measuring the effect of a distribution under section
8690, the liabilities of a dissolved limited partnership do not include any claim that has been
barred under section 8686 (relating to known claims against dissolved limited partnership) or
8687 (relating to other claims against dissolved limited partnership), or for which security has
been provided under section 8688 (relating to court proceedings).

(i) Cross references. – See sections 8615(d)(1)(ii) (relating to contents of partnership
agreement) and 8649 (relating to standards of conduct for general partners).

Committee Comment (2016):

This section is patterned after 15 Pa.C.S. § 1551. It is similar in part to Uniform Limited

Former 15 Pa.C.S. Ch. 85 did not have a test for measuring the legality of distributions and relied
instead on the law of fraudulent conveyances. The ULPA, in contrast, contains distribution tests based on
the Model Business Corporation Act. The Committee concluded that Pennsylvania should follow the
approach of the ULPA because distribution tests provide useful guidance and certainty. However,
because the Model Act provisions have been refined in 15 Pa.C.S. § 1551, the Committee concluded that
the distribution tests for limited partnerships should follow the established Pennsylvania pattern.

Subsection (a) provides two tests for measuring a distribution, which are disjunctive. A distribution
violates this section if after the dissolution the limited partnership fails either of the tests. The tests apply
both to interim distributions and liquidating distributions.

One test of the legality of a distribution is whether, after giving effect thereto, the limited
partnership would be insolvent in the equity sense, unable to pay its obligations as they become due in
the ordinary course of business. The Committee believes that this is the fundamentally important test.

In most cases involving a limited partnership operating as a going concern in the normal course,
information generally available will make it quite apparent that no particular inquiry concerning the
equity insolvency test is needed. While neither a balance sheet nor an income statement can be
conclusive as to this test, the existence of significant equity and normal operating conditions are of
themselves a strong indication that no issue should arise under this test. Indeed, in the case of a
partnership having regularly audited financial statements, the absence of any qualification in the most
recent auditor's opinion as to the partnership's status as a “going concern,” coupled with a lack of
subsequent material adverse events that would cause such a qualification, should normally be decisive.

It is only when circumstances indicate that the limited partnership is encountering difficulties or is
in an uncertain position concerning its liquidity and operations that the partnership may need to address
the issue. Because of the overall judgment required in evaluating the equity insolvency test, no one or
more "bright line" tests can be employed. However, in determining whether the equity insolvency test
has been met, certain judgments or assumptions as to the future course of the partnership's business are
customarily justified, absent clear evidence to the contrary. These include the likelihood that (a) based on
existing and contemplated demand for the partnership's products or services, it will be able to generate
funds over the next several years sufficient to satisfy its existing and reasonably anticipated obligations as
they mature during that period of time, and (b) indebtedness which matures in the near-term will be
refinanced where, on the basis of the partnership's financial condition and future prospects and the general
availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may
be accomplished. There may be occasions when it would be useful to consider a cash flow analysis,
based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that
known obligations of the partnership can reasonably be expected to be satisfied over the period of time
that they will mature.

In determining whether a limited partnership is insolvent, or as a result of a proposed distribution
would be rendered insolvent, the general partners may rely on information supplied by officers of the
partnership and others. 15 Pa.C.S. § 8649. It is not necessary for the general partners to know of the
details of the various analyses or market or economic projections that may be relevant. Judgments,
further, must of necessity be made on the basis of information in the hands of the general partners when a
distribution is authorized. “Time of Measurement of Distributions,” below. The general partners
should not, of course, be held responsible as a matter of hindsight for unforeseen developments. This is
particularly true with respect to assumptions as to the ability of the partnership to refinance or repay long-
term obligations that do not mature for several years, since the primary focus of the decision by the
general partners to make a distribution should normally be on the partnership's prospects and obligations
in the shorter term, unless special factors concerning the partnership's prospects require the taking of a
longer term perspective.

This section establishes the validity of distributions from the entity law standpoint and 15 Pa.C.S. §
8655 determines the potential liability of general and limited partners for improper distributions. The
federal Bankruptcy Code and the Uniform Fraudulent Transfer Act (12 Pa.C.S. § 5101, ), on the
other hand, are designed to enable the trustee or other representative to recapture for the benefit of
creditors funds transferred to others in cases of actual or constructive fraud. In light of these diverse
purposes, it was not thought necessary to make the tests of this section identical with the tests for
insolvency under those statutes.

The balance sheet test permits unrealized appreciation and depreciation of assets to be considered
during measuring the legality of a dividend.

a. Accounting Principles.
To avoid the problem that would be encountered as the statutory provisions diverged from developing accounting principles, this section does not incorporate technical accounting terminology or specific accounting concepts. Accounting terminology and concepts are constantly under review and subject to revision by the Public Company Accounting Oversight Board, Financial Accounting Standards Board, American Institute of Certified Public Accountants, Securities and Exchange Commission, and others. In making determinations under this section, the general partners may make judgments about accounting matters, giving full effect to their right to rely upon professional or expert opinion.

In a limited partnership with subsidiaries, it is intended that the general partners may rely on unconsolidated statements prepared on the basis of the equity method of accounting as to the partnership's investee subsidiaries, although other evidence may be relevant in the total determination.

The general partners are entitled to rely upon reasonably current financial statements prepared on the basis of generally accepted accounting principles in determining whether or not the balance sheet test of subsection (a)(2) has been met, unless the general partners are aware at the time that it would be unreasonable to rely on the financial statements because of newly discovered or subsequently arising facts or circumstances. Subsection (b), however, does not mandate the use of generally accepted accounting principles, and the general partners may base a determination that a distribution satisfies the test of subsection (a)(2) on other factors, including any method that is reasonable in the circumstances. Subsection (b) contemplates that generally accepted accounting principles are always “reasonable in the circumstances” and that other accounting principles may be perfectly acceptable, under a general standard of reasonableness.

b. Other Valuation Principles.

Subsection (b) permits the validity of a distribution to be tested on the basis of various forms of valuations other than under accounting principles, including any other method that is reasonable in the circumstances. The intent of paragraphs (2), (3) and (4) of subsection (b) is to prohibit a distribution only when the value of the partnership's total assets is less than its liabilities; and it is commonly recognized that asset values on a balance sheet prepared in accordance with GAAP, being normally based on historical costs, do not purport to represent current values. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal and current value methods to determine the amount available for distribution. Decisions as to whether to use a basis other than historical cost accounting and the choice of a particular alternative basis that may be appropriate are left to the judgment of the general partners. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a “quick-sale liquidation” method to value an ongoing enterprise, particularly with respect to the payment of normal dividends. On the other hand, a “quick-sale liquidation” valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily a limited partnership should not selectively revalue assets. It should consider the value of all of its material assets, whether or not reflected in the financial statements (, a valuable executory contract). Likewise, all of the partnership's material obligations should be considered and revalued to the extent appropriate and possible. Subsection (c) makes clear, however, that contingent liabilities need be considered in applying the test of subsection (a)(2) only where they are required to be reflected on the partnership's balance sheet (other than the notes thereto).
Subsection (b)(4) also refers to “any other method that is reasonable in the circumstances.” This phrase is intended to comprehend within subsection (b) the wide variety of possibilities that might not be considered to fall under a “fair valuation” or “current value” method but might be reasonable in the circumstances of a particular case.

c. Preferential Dissolution Rights.

Subsection (a)(2) provides that a distribution may not be made unless the total assets of the limited partnership exceed its liabilities plus the amount that would be needed to satisfy any partner's superior preferential rights upon dissolution if the partnership were to be dissolved on the date as of which the distribution is measured. This requirement in effect treats preferential dissolution rights of classes or series of partnership interests for distribution purposes as equivalent to liabilities rather than as equity interests. In making the calculation of the amount that must be added to the liabilities of the partnership to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be determined pursuant to the certificate of limited partnership or partnership agreement as of the date the distribution or proposed distribution is to be measured. The amount so determined must include arrearages in preferential dividends if the certificate or limited partnership or partnership agreement require that they be paid upon the dissolution of the partnership. In the case of partners having both a preferential right upon dissolution and additional nonpreferential rights, only the preferential portion of the partnership interest should be taken into account. The treatment of preferential dissolution rights of classes of partners set forth in subsection (a)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of subsection (a)(1). The treatment of preferential rights mandated by this section may be eliminated by an appropriate provision in the certificate of limited partnership or partnership agreement. 15 Pa.C.S. § 8615(d)(1)(ii).

The definition of “distribution” in 15 Pa.C.S. § 8612 deals specifically with the following:

(a) a purchase of the interest of a partner in a parent limited partnership by a subsidiary of any type whose actions are controlled by the parent. These are “distributions” by the parent and are covered by the general term “indirect.”

(b) . If a limited partnership distributes its own promissory obligations and receives nothing in return, the transaction is a distribution.

Subsection (d), which specifies how to determine the date as of which the legality of a distribution is measured permits the general partners to designate the date as of which the legality of any distribution is to be tested if the distribution is subsequently made within 125 days of the earlier of the date specified or the date of authorization. Under 15 Pa.C.S. §§ 8649(c) general partners may rely on the financial statements of the limited partnership so long as their behavior meets the standard of that subsection which is simply that their conduct not amount to gross negligence or worse. The second cross reference in subsection (i) is intended to emphasize, among other things, that 15 Pa.C.S. § 8649 will be applicable to the declaration of a distribution under this section. Because the preparation of financial statements necessarily lags the date as of which they are prepared, the protection of 15 Pa.C.S. § 8649 would almost never be available if the date for measuring the legality of a distribution were the same as the date on which the general partners take action.

If the general partners fail to specify the measuring date when a distribution is authorized, the
measuring date will be the date the distribution is made. The date of distribution will also be the
measuring date if the distribution is not made within 125 days of the earlier of the measuring date
specified or the date of authorization.

Liability under 15 Pa.C.S. § 8655 for a violation of this section would ordinarily arise upon
payment of a distribution and the statute of limitations would then begin to run. The Committee
Comment to 15 Pa.C.S. § 8655. It is not intended that the validity of the action be judged by hindsight,
but as the facts appeared at the time of authorization, or at any later date when the general partners
possessed and failed to use the capacity to rescind or appropriately modify the terms of the distribution.

In an acquisition or redemption of a partnership interest, a limited partnership may transfer property
or incur debt to the former partner. Purchase agreements involving payment for a partnership interest
over a period of time are of special importance in smaller, non-public enterprises. Subsection (e) provides
a clear rule for this situation: the distribution is deemed to occur at the time of the issuance or incurrence
of the debt, not at a later date when the debt is actually paid, except as provided in subsection (g) (  
Comment 7, below). Of course, this does not preclude a later challenge of a payment on account of
redemption-related debt by a bankruptcy trustee on the ground that it constitutes a preferential payment to
a creditor under the bankruptcy laws.

Subsection (f) provides that indebtedness created to acquire a partnership interest in the limited
partnership or issued as a distribution (if permitted under subsection (a)), is at least on a parity with the
indebtedness of the partnership to its general, unsecured creditors, except to the extent subordinated by
agreement. General creditors are better off in these situations than they would have been if cash or other
property had been paid out for the partnership interest or distributed (which is proper under the statute),
and no worse off than if cash had been paid or distributed and then lent back to the partnership, making
the partners (or former partners) creditors. The reference to redemption related debt being “at least” on a
parity with debts owed to general creditors makes clear that security may be given for the repayment of
redemption related debt.

Subsection (g) provides that indebtedness, including indebtedness issued as a distribution, need not
be taken into account as a liability in determining whether the tests of subsection (a) have been met if the
terms of the indebtedness provide that payments of principal and interest can be made only if and to the
extent that payment of a distribution could then be made under this section. This has the effect of making
the holder of the indebtedness junior to all other creditors but senior to the partners, not only during the
time the limited partnership is operating but also upon dissolution and liquidation. It should be noted that
the creation of such indebtedness, and the related limitation on payments of principal and interest, may
create tax problems or raise other legal questions.

Although subsection (g) is applicable to all indebtedness meeting its tests, regardless of the
circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the
reacquisition of partnership interests at a time when the deferred purchase price exceeds the net worth of
the limited partnership. This type of reacquisition will often be necessary in the case of businesses in
early stages of development or service businesses whose value derives principally from existing or
prospective net income or cash flow rather than from net asset value. In such situations, it is anticipated
that net worth will grow over time from operations so that when payments in respect of the indebtedness
are to be made the two tests of subsection (a) will be satisfied. In the meantime, the fact that the
indebtedness is outstanding will not prevent distributions that could be made under subsection (a) if the
The sections cited in subsection (h) provide methods for cutting off or securing the debts of a limited partnership that is winding up its affairs and activities, and thus those debts do not need to be considered when determining under subsection (a) if a distribution can be paid during winding up.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“distribution”
“limited partnership”
“partner”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“interest”
“obligation”
“property”

§ 8655. Liability for improper distributions.

(a) General rule. – If a general partner consents to a distribution made in violation of section 8654 (relating to limitations on distributions) and in consenting to the distribution fails to comply with section 8649 (relating to standards of conduct for general partners), the general partner is personally liable to the limited partnership for the amount of the distribution which exceeds the amount that could have been distributed without the violation of section 8654.

(b) Recipients. – A person that receives a distribution knowing that the distribution violated section 8654 is personally liable to the limited partnership but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under section 8654.

(c) Contribution. – A general partner against which an action is commenced because the general partner is liable under subsection (a) may:

(1) join any other person that is liable under subsection (a) or otherwise seek to enforce a right of contribution from the person; and

(2) join any person that received a distribution in violation of subsection (b) or otherwise seek to enforce a right of contribution from the person in the amount the person received in violation of subsection (b).

(d) Statute of repose. – An action under this section is barred unless commenced within
two years after the distribution.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 505.

This section contemplates two categories of liability: liability of those who have authorized improper distributions (subsection (a)) and the liability of those who have received improper distributions (subsection (b)). Liability that has accrued under this section is not affected by a person subsequently ceasing to be a partner or transferee.

The provisions of this section are non-waivable under 15 Pa.C.S. § 8615(c)(19) to the extent they involve the rights of persons who are not partners.

Subsection (a) - The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in 15 Pa.C.S. § 8649. To the extent those duties have been permissibly revised by the partnership agreement, the revised standards apply to this subsection.

Subsection (b) - Actual knowledge is necessary to impose liability. Reason to know does not suffice.

Subsections (b) and (c)(2) - Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a general partner.

Subsection (d) - When the distribution is in the form of indebtedness, the distribution may occur on several different dates.

This section does not preclude or interfere with claims for fraudulent transfer. The statute of repose in subsection (d) applies only to actions “under this section” and does not affect claims under other applicable law, which most often is fraudulent transfer law.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

Subchapter F
Dissociation

Section
8661. Dissociation as limited partner.
8662. Effects of dissociation as limited partner.
8663. Dissociation as general partner.
8664. Power to dissociate as general partner and wrongful dissociation.
8665. Effects of dissociation as general partner.
§ 8661. Dissociation as limited partner.

(a) No right to dissociate. – A person does not have a right to dissociate as a limited partner before the completion of the winding up of the limited partnership.

(b) Events causing dissociation. – A person is dissociated as a limited partner when any of the following apply:

(1) The limited partnership knows or has notice of the person’s express will to withdraw as a limited partner rightfully or wrongfully, except that, if the person has specified a withdrawal date later than the date the partnership knew or had notice, on that later date.

(2) An event stated in the partnership agreement as causing the person’s dissociation as a limited partner occurs.

(3) The person is expelled as a limited partner pursuant to the partnership agreement.

(4) The person is expelled as a limited partner by the affirmative vote or consent of all the other partners if:

   (i) it is unlawful to carry on the partnership’s activities and affairs with the person as a limited partner;

   (ii) there has been a transfer of all the person’s transferable interest in the partnership, other than:

      (A) a transfer for security purposes; or

      (B) a charging order in effect under section 8673 (relating to charging order) which has not been foreclosed;

   (iii) the person is an entity and:

      (A) the partnership notifies the person that it will be expelled as a limited partner because:

         (I) the person has filed a certificate of dissolution or the equivalent;

         (II) the person has been administratively dissolved;
(III) the person’s charter or the equivalent has been revoked; or

(IV) the person’s right to conduct business has been suspended by the person’s jurisdiction of formation; and

(B) within 90 days after the notification:

(I) the certificate of dissolution or the equivalent has not been withdrawn, rescinded or revoked;

(II) the person has not been reinstated;

(III) the person’s charter or the equivalent has not been reinstated; or

(IV) the person’s right to conduct business has not been reinstated;

or

(iv) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up.

(5) On application by the partnership or a partner in a direct action under section 8691 (relating to direct action by partner), the person is expelled as a limited partner by judicial order because the person:

(i) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership’s activities and affairs;

(ii) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or the contractual obligation of good faith and fair dealing under section 8635(a) (relating to limited duties of limited partner); or

(iii) has engaged or is engaging in conduct relating to the partnership’s activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a limited partner.

(6) In the case of an individual, the individual dies.

(7) In the case of a person that is a testamentary or inter vivos trust or is acting as a limited partner by virtue of being a trustee of such a trust, the trust’s entire transferable interest in the limited partnership is distributed.

(8) In the case of a person that is an estate or is acting as a limited partner by virtue of being a personal representative of an estate, the estate’s entire transferable interest in the
limited partnership is distributed.

(9) In the case of a person that is not an individual, the existence of the person terminates.

(10) The partnership participates in a merger under Chapter 3 (relating to entity transactions) and:

(i) the partnership is not the surviving entity; or

(ii) otherwise as a result of the merger, the person ceases to be a limited partner.

(11) The partnership participates in an interest exchange under Chapter 3 and, as a result of the interest exchange, the person ceases to be a limited partner.

(12) The partnership participates in a conversion under Chapter 3.

(13) The partnership participates in a division under Chapter 3 and:

(i) the partnership is not a resulting association; or

(ii) as a result of the division, the person ceases to be a partner.

(14) The partnership participates in a domestication under Chapter 3 and, as a result of the domestication, the person ceases to be a limited partner.

(15) The partnership dissolves and completes winding up.

(c) Cross reference. – See section 8611(d) (relating to short title and application of chapter).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 601.

Subsection (a) - This provision states a default rule.

Subsection (b) - This subsection states default rules. However, it would be nonsensical to vary some of the rules - , to provide that the death of a partner who is an individual does not cause the partner’s dissociation, or that an entity remains a partner even after the existence of the entity has terminated.

Subsection (b)(1) - The partnership agreement may vary this provision, even to the extent of eliminating a person’s power to dissociate as a limited partner. 15 Pa.C.S. § 8615(c)(14) prohibits the limited partnership agreement from eliminating the power to dissociate of a person as a partner, but 15 Pa.C.S. § 8615(c) and (d) do not preserve as mandatory the power of a person to dissociate as a
partner.

Subsection (b)(4)(ii) – This provision permits expulsion when a limited partner no longer has any “skin in the game.” Under this subparagraph (unless the limited partnership agreement provides otherwise), a limited partner’s transferee can protect itself from the vulnerability of “bare transferee” status by obligating the partner/transferor to retain a 1% interest and exercise the partner’s contract and governance rights (including the right to bring a derivative suit) to protect the transferee’s interests.

Subsection (b)(4)(iii) – 1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

Subsection (b)(5) – Although the limited partnership agreement can revise or eliminate this rule, doing so requires careful planning. 15 Pa.C.S. § 8681(a)(6), which contains analogous provisions stating grounds for dissolution by court order. The partnership agreement cannot vary those grounds under 15 Pa.C.S. § 8615(c)(15), although the agreement can vary the forum.

Subsection (b)(7) and (8) – A change in trustee or personal representative does not cause dissociation.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

Subsection (b)(9) – This provision is the entity analog to subsection (b)(6) (death of an individual).

Subsection (b)(10)(i) – If a limited partnership disappears as part of a merger, no person can continue as a partner of the limited partnership. When the merger takes effect, the partners of the disappearing entity are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving limited partnership. In those circumstances, the merger will have dissociated them from one limited partnership and admitted them into partnership in another.

Subsection (b)(10)(ii) – It is possible for a plan of merger to “shuffle the equity” of the surviving entity, even to the extent of dissociating some or all of the owners of the merging entity. A reverse triangular merger involving a limited partnership as the surviving entity typically dissociates all the pre-merger partners of the partnership.

Subsection (b)(12) – By definition, a limited partnership that converts ceases to be a limited partnership. Thus, when the plan of conversion takes effect, all the partners of the converted entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will “shuffle the equity” and dissociate some of the partners of the converting limited partnership.

Subsection (b)(14) – Domestication does not by itself dissociate a partner, because the domesticated entity remains both a limited partnership and the same entity without interruption as the domesticating limited partnership. However, an “equity shuffle” could dissociate a partner.
The following terms used in this section are defined in 15 Pa.C.S. § 8612:
“limited partner”
“limited partnership”
“partner”
“partnership agreement”
“transferable interest”

The following terms used in this section are defined in 15 Pa.C.S. § 102:
“entity”
“jurisdiction of formation”

§ 8662. Effects of dissociation as limited partner.
(a) General rule. – If a person is dissociated as a limited partner:
(1) subject to section 8674 (relating to power of personal representative of deceased partner), the person does not have further rights as a limited partner;
(2) the person’s contractual obligation of good faith and fair dealing as a limited partner under section 8635(a) (relating to limited duties of limited partners) ends with regard to matters arising and events occurring after the person’s dissociation except as provided in section 8634(c) (relating to limited partner rights to information); and
(3) subject to section 8674 and Chapter 3 (relating to entity transactions), any transferable interest owned by the person in the person’s capacity as a limited partner immediately before dissociation is owned by the person solely as a transferee.

(b) Existing obligations not discharged. – A person’s dissociation as a limited partner does not of itself discharge the person from any debt, obligation or other liability to the limited partnership or the other partners which the person incurred while a limited partner.

(c) Cross reference. – See section 8611(d) (relating to short title and application of chapter).

Committee Comment (2016):
This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 602.

Subsection (a) – This provision makes no reference to power-to-bind matters, because 15 Pa.C.S. § 8632(a) provides that a limited partner as a limited partner has no power to bind the limited partnership.

Subsection (a)(3) – This paragraph accords with 15 Pa.C.S. § 8653(b), which provides that dissociation does not entitle a person to any distribution, even if dissociation takes the form of expulsion. This rule is subject to variation in the partnership agreement. For example, the partnership agreement has
the power to provide for the buy-out of a person’s transferable interest in connection with the person’s
dissociation.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partner”
“limited partnership”
“partner”
“transferable interest”
“transferee”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8663. Dissociation as general partner.

(a) General rule. – A person is dissociated as a general partner when any of the following
occurs:

(1) The limited partnership knows or has notice of the person’s express will to
withdraw as a general partner rightfully or wrongfully, except that, if the person has
specified a withdrawal date later than the date the partnership knew or had notice, on that
later date.

(2) An event stated in the partnership agreement as causing the person’s
dissociation as a general partner occurs.

(3) The person is expelled as a general partner pursuant to the partnership
agreement.

(4) The person is expelled as a general partner by the affirmative vote or consent of
all the other partners if:

(i) it is unlawful to carry on the partnership’s activities and affairs with the
person as a general partner;

(ii) there has been a transfer of all the person’s transferable interest in the
partnership, other than:

(A) a transfer for security purposes; or

(B) a charging order in effect under section 8673 (relating to charging
order) which has not been foreclosed;

(iii) the person is an entity and:

(A) the partnership notifies the person that it will be expelled as a
general partner because:

(I) the person has filed a certificate of dissolution or the equivalent;

(II) the person has been administratively dissolved;

(III) the person’s charter or the equivalent has been revoked; or

(IV) the person’s right to conduct business has been suspended by the person’s jurisdiction of formation; and

(B) within 90 days after the notification:

(I) the certificate of dissolution or the equivalent has not been withdrawn, rescinded or revoked;

(II) the person has not been reinstated;

(III) the person’s charter or the equivalent has not been reinstated; or

(iv) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up.

(5) On application by the partnership or a partner in a direct action under section 8691 (relating to direct action by partner), the person is expelled as a general partner by judicial order because the person:

(i) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the partnership’s activities and affairs;

(ii) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the partnership agreement or a duty or obligation under section 8649 (relating to standards of conduct for general partners); or

(iii) has engaged or is engaging in conduct relating to the partnership’s activities and affairs which makes it not reasonably practicable to carry on the activities and affairs of the partnership with the person as a general partner.

(6) The person:
(i) becomes a debtor in bankruptcy;

(ii) executes an assignment for the benefit of creditors; or

(iii) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the person or of all or substantially all the person’s property.

(7) In the case of an individual:

(i) the individual dies;

(ii) a guardian for the individual is appointed; or

(iii) a court orders that the individual has otherwise become incapable of performing the individual’s duties as a general partner under this title or the partnership agreement.

(8) In the case of a person that is a testamentary or inter vivos trust or is acting as a general partner by virtue of being a trustee of the trust, the trust’s entire transferable interest in the limited partnership is distributed.

(9) In the case of a person that is an estate or is acting as a general partner by virtue of being a personal representative of an estate, the estate’s entire transferable interest in the limited partnership is distributed.

(10) In the case of a person that is not an individual, the existence of the person terminates.

(11) The partnership participates in a merger under Chapter 3 (relating to entity transactions) and:

(i) the partnership is not the surviving entity; or

(ii) otherwise as a result of the merger, the person ceases to be a general partner.

(12) The partnership participates in an interest exchange under Chapter 3 and, as a result of the interest exchange, the person ceases to be a general partner.

(13) The partnership participates in a conversion under Chapter 3.

(14) The partnership participates in a division under Chapter 3 and:

(i) the partnership is not a resulting association; or

(ii) as a result of the division, the person ceases to be a partner.
(15) The partnership participates in a domestication under Chapter 3 and, as a result of the domestication, the person ceases to be a general partner.

(16) The partnership dissolves and completes winding up.

(b) Cross reference. - See section 8611(d) (relating to short title and application of chapter).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 603.

This section states default rules, which the limited partnership agreement may vary. However, it would make no sense to vary some of the rules - , to provide that death does not cause an individual’s dissociation, or that a person (other than an individual) remains a general partner even though the existence of the person terminates.

Subsection (a)(1) - Limited partnership agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation. Under 15 Pa.C.S. § 8615(c)(14) the agreement cannot eliminate the power of a general partner to dissociate by express will, but can eliminate the right and thereby make the dissociation wrongful.

Subsection (a)(4)(ii) - This paragraph permits expulsion when a general partner no longer has any "skin in the game." Under this paragraph (unless the partnership agreement provides otherwise), a general partner’s transferee can protect itself from the vulnerability of “bare transferee” status by obligating the general partner/transferor to retain a 1% interest and exercise the partner’s governance rights (including the right to bring a derivative suit) to protect the transferee’s interests.

Subsection (a)(4)(iii) - 1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

Subsection (a)(5) - The reference to “a direct action under section 8691” reflects the “separate entity” nature of a limited partnership. Section 8691 limits a partner’s standing to bring a direct action to circumstances in which the partner can “plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership.”

EXAMPLE: General Partner Alpha breaches the limited partnership agreement by purporting to oust General Partner Beta from Beta’s role in managing the limited partnership. Beta has a direct claim against Alpha, not only for breach of contract, but also for expulsion under subsection (a)(5).

EXAMPLE: General Partner Alpha breaches the limited partnership agreement (and also 15 Pa.C.S. § 8649(c)) through grossly negligent conduct which harms the profitability of the limited partnership. Depending on the terms of the limited partnership agreement and the allocation of power among the partners, General Partner Beta may be able to cause the limited partnership to invoke subsection (a)(5) and seek Alpha’s expulsion. But Beta has no standing individually to seek
Alpha’s expulsion, except through a derivative claim.

Subsection (a)(5)(iii) – This provision has an analog among the causes for dissolution in 15 Pa.C.S. § 8681(a)(6)(i). For examples of conduct warranting an expulsion order, see A.2d 629, 642 (M d. Ct. Spec. A pp. 2008), 996 A.2d 382 (M d. 2010) (noting that “[t]he trial court expressly found that [two major capital] calls ‘were issued in bad faith’... [and] the court also found that, ‘by another improper accounting movement’ in [the partnership], $580,000 was taken ‘for executive office expenses which was improper’” (third bracket in original); 977 A.2d 107, 117-18 (Conn. 2009) (referring to the expelled partner’s “moral turpitude and criminal fraud, and failure to be honest in court as to the extent of his criminal wrongdoing” and “his baseless claims of fraud” against a fellow partner; stating “he has rung the bell and it cannot be unrung”).


Where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. 830 N.W.2d 191, 201-02 (Neb. 2013) (“[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution.” 977 A.2d 107, 121 (Conn. 2009) (general partnership).

Subsection (a)(6)(i) – This provision is subject to bankruptcy law. 11 U.S.C.A. § 365(e) (invalidating “ipso facto” clauses, subject to some exceptions).

Subsection (a)(7)(ii) and (iii) – No comparable provisions appear in 15 Pa.C.S. § 8661 dealing with the dissociation of a limited partner because, given the limited rights and duties of limited partners, the stated occurrences do not necessarily justify dissociation.

Subsection (a)(8) and (9) – A change in trustee or personal representative does not cause dissociation.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

Subsection (a)(10) – This provision is the entity analog to subsection (a)(7)(i) (death of an individual). Although in theory the partnership agreement could change this rule, doing so would be nonsensical.

Subsection (a)(11)(i) – If a limited partnership disappears as part of a merger, no person can continue as a partner of the company. When the merger takes effect, the partners of the disappearing partnership are perforce dissociated. Depending on the plan of merger, those persons may become partners of a surviving limited partnership. In those circumstances, the merger will have dissociated them from one limited partnership and admitted them into partnership in the surviving limited partnership.

Subsection (a)(11)(ii) – It is possible for a plan of merger to “shuffle the equity” of the surviving entity, even to the extent of dissociating some or all of the partners of the merging entity. A reverse
triangular merger involving a limited partnership as the surviving entity typically dissociates all the pre-
merger partners of the limited partnership.

**Subsection (a)(13)** – By definition, a limited partnership that converts ceases to be a limited
partnership. Thus, when the plan of conversion takes effect, all the partners of the converted entity are
dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In
some cases, the conversion will “shuffle the equity” and dissociate some of the partners of the converting
partnership.

**Subsection (a)(15)** – Domestication does not by itself dissociate a partner, because the
domesticated entity remains both a limited partnership and the same entity without interruption as the
domesticating partnership. However, an “equity shuffle” could dissociate a general partner.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- “general partner”
- “limited partnership”
- “partner”
- “partnership agreement”
- “transferable interest”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “debtor in bankruptcy”
- “entity”
- “jurisdiction of formation”
- “property”

§ 8664. Power to dissociate as general partner and wrongful dissociation.

(a) Power to dissociate. – A person has the power to dissociate as a general partner at any
time, rightfully or wrongfully, by withdrawing as a general partner by express will under section
8663(a)(1) (relating to dissociation as general partner).

(b) Wrongful dissociation. – A person’s dissociation as a general partner is wrongful only if the dissociation:

1. is in breach of an express provision of the partnership agreement; or
2. occurs before the completion of the winding up of the limited partnership, and:
   (i) the person withdraws as a general partner by express will;
   (ii) the person is expelled as a general partner by judicial order under section
        8663(a)(5);
   (iii) the person is dissociated as a general partner under section 8663(a)(6); or
(iv) the person is expelled or otherwise dissociated as a general partner because its existence terminated, except that this subparagraph does not apply to a person that is:

(A) a trust that is not a business or statutory trust;

(B) an estate; or

(C) an individual.

(c) Damages for wrongful dissociation. – A person that wrongfully dissociates as a general partner is liable to the limited partnership and, subject to section 8691 (relating to direct action by partner), to the other partners for damages caused by the dissociation. The liability is in addition to any debt, obligation or other liability of the general partner to the partnership or the other partners.

(d) Cross reference. – See section 8615 (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 604.

Subsection (a) – The limited partnership agreement may not eliminate this power under 15 Pa.C.S. § 8615(c)(14). In this respect, a general partner in a limited partnership is analogous to a general partner in general partnership.

Subsection (b) – Although this subsection would appear to list exhaustively the dissociations that are “wrongful,” the list is a default rule in that the limited partnership agreement can expand the list; by making wrongful a dissociation that breaches the implied contractual covenant of good faith and fair dealing. In theory, the partnership agreement can provide for liquidated damages (subject to the requirements of contract law) and, in theory, can also contract or even eliminate the list of wrongful dissociations.

Subsection (b)(1) – The reference to “an express provision of the partnership agreement” means that a person’s dissociation as a general partner in breach of the obligation of good faith and fair dealing is not wrongful dissociation for the purposes of this section (unless the partnership agreement expressly provides for that). The breach might be actionable on other grounds.

Subsection (b)(2) – The reference to “before the completion of the winding up of the limited partnership” reflects the expectation that each general partner will shepherd the limited partnership through winding up. A person’s obligation to remain as general partner through winding up continues even if another general partner dissociates and even if that dissociation leads to the limited partnership’s premature dissolution under 15 Pa.C.S. § 8681(a)(3)(i).

Subsection (b)(2)(iii) – This subsection refers to 15 Pa.C.S. § 8663(a)(6), which involves dissociation on account of bankruptcy, which in turn is subject to bankruptcy law. 11 U.S.C. § 365(e) (invalidating “ipso facto” clauses, subject to some exceptions).
Subsection (c) – The language “subject to section 8691” is intended to preserve the distinction between direct and derivative claims.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”
“partner”
“partnership agreement”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8665. Effects of dissociation as general partner.

(a) General rule. – If a person is dissociated as a general partner:

(1) The person’s right to participate as a general partner in the management and conduct of the limited partnership’s activities and affairs terminates.

(2) The person’s duties and obligations as a general partner under section 8649 (relating to standards of conduct for general partners) end with regard to matters arising and events occurring after the person’s dissociation except as provided in section 8647(e)(2) (relating to general partner rights to information).

(3) The person may deliver to the department for filing a certificate of dissociation stating:

(i) the name of the partnership;

(ii) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the registered office of the partnership; and

(iii) the name of the person and that the person has dissociated as a general partner.

(4) At the request of the limited partnership, the person shall sign an amendment to the certificate of limited partnership which states that the person has dissociated as a general partner.

(5) Subject to section 8674 (relating to power of personal representative of deceased partner) and Chapter 3 (relating to entity transactions), any transferable interest owned by the person in the person’s capacity as a general partner immediately before dissociation is owned by the person solely as a transferee.

(b) Existing obligations not discharged. – A person’s dissociation as a general partner
does not of itself discharge the person from any debt, obligation or other liability to the limited partnership or the other partners which the person incurred while a general partner.

(c) Cross references. - See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 605.

Subsection (a)(1) - Once a person dissociates as a general partner, the person loses all management rights as a general partner regardless of what happens to the limited partnership. This rule contrasts with 15 Pa.C.S. § 8463(b)(1), which permits a dissociated partner of a general partnership to participate in winding up if circumstances.

Subsection (a)(2) - This provision establishes a dividing line, separating matters in process at the time of dissociation from “matters arising and events occurring after the person’s dissociation.” If the limited partnership has continuing projects with clients, ongoing relationships with clients, or both, the dividing line requires special attention with regard to duties relating to non-competition and partnership opportunities.

Disputes involving law firms have generated much of the relevant case law.  
, 535 N.E.2d 1255, 1257 (M ass. 1989); , 203 Cal. Rptr. 13, 15 (Cal. Ct. A pp. 1984). To a large extent, a well-drawn partnership agreement can delineate the parties’ respective rights and responsibilities and thereby avoid problems. However, if the partnership becomes insolvent, the bankruptcy court may well scrutinize the partners’ arrangements.

, 476 B.R. 732, 743 (S.D.N.Y. 2012) (considering whether a law firm had “fraudulently transferred ... assets when its partners adopted the Jewel Waiver [releasing rights recognized by on the eve of dissolution without consideration”), , 762 F.3d 157 (2d Cir. 2014).

This provision does not determine the effect of a person’s dissociation as a general partner on the person’s future obligations under the partnership agreement. Some contractual obligations typically extend beyond dissociation – , non-competition provisions.

Subsections (a)(3) and (4) - The filing permitted by paragraph (3) has the same effect as a filing under paragraph (4). Both give constructive notice under 15 P.C.S. § 8613(d) that the person has dissociated as a general partner. The notice benefits the person by curtailing any further personal liability under 15 P.a.C.S. §§ 8667 and 8685. The notice benefits the limited partnership by curtailing any lingering power to bind under 15 P.C.S. § 8666 and 8684.

The limited partnership is in any event obligated under 15 P.a.C.S. § 8622(d)(2) to amend its certificate of limited partnership to reflect the dissociation of a person as general partner. In most circumstances, the amendment requires the signature of the person that has dissociated under 15 P.a.C.S. § 8623(a)(5)(iii). If that signature is required and the person refuses or fails to sign, the limited partnership
may invoke 15 Pa.C.S. § 144 (signing and filing pursuant to judicial order).

Subsection (a)(5) - As provided in 15 Pa.C.S. § 8653(b), dissociation does not result in a distribution. In general, when a person dissociates as a general partner, the person’s rights as a general partner disappear and, subject to 15 Pa.C.S. § 8619 (dual capacity), the person’s status degrades to that of a mere transferee - even when the dissociation comes in the form of expulsion. A-2628-09T1, 2012 WL 6652510 at *12 (N.J. Super. Ct. App. Div. Dec. 24, 2012).

This rule is subject to the partnership agreement. For example, the partnership agreement might provide for the buyout of a person’s transferable interest in connection with the person’s dissociation.

Subsection (b) - A general partner’s obligation to safeguard trade secrets and other confidential or proprietary information is incurred when the partner learns or otherwise obtains the information. This subsection preserves the obligation post-dissociation.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“general partner”
“limited partnership”
“transferable interest”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“department”
“obligation”

§ 8666. Power to bind and liability of person dissociated as general partner.

(a) Power to bind. - After a person is dissociated as a general partner and before the limited partnership is merged or divided out of existence, converted or domesticated under Chapter 3 (relating to entity transactions) or dissolved, the partnership is bound by an act of the person only if:

(1) the act would have bound the partnership under section 8642 (relating to general partner agent of limited partnership) before the dissociation; and

(2) at the time the other party enters into the transaction:

(i) less than two years has passed since the dissociation; and

(ii) the other party does not know or have notice of the dissociation and reasonably believes that the person is a general partner.

(b) Liability. - If a limited partnership is bound under subsection (a), the person dissociated as a general partner which caused the partnership to be bound is liable:
(1) to the partnership for any damage caused to the partnership arising from the obligation incurred under subsection (a); and

(2) if a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the liability.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 606.

A person’s dissociation as a partner ends immediately the person’s actual authority to act for the partnership, unless the dissociation results in a dissolution and winding up of the business of the partnership. However, the person’s apparent authority may linger.

This section does not affect a person’s power to bind a partnership in another capacity – , as an employee with actual authority.

Subsection (a) - This subsection codifies and constrains the lingering apparent authority of a person dissociated as a general partner. The constraint is in the phrase “only if.”

The provision applies until the limited partnership dissolves or in a transaction under 15 Pa.C.S. Ch. 3 ceases to be governed by this chapter. Once a limited partnership dissolves, 15 Pa.C.S. § 8684 applies.

It is the statutory apparent authority from 15 Pa.C.S. § 8642 that lingers. In any event, any lingering apparent authority ends two years after the dissociation.

Subsection (a)(2)(ii) - A person might have notice under 15 Pa.C.S. § 8613(d)(1) as a result of a certificate of dissociation as well as under 15 Pa.C.S. § 8613(b)(1) as result of the person having reason to know the fact from all the facts known to the person at the time in question.

Subsection (b) - The liability stated in this subsection is not exhaustive. For example, if a person dissociated as a general partner causes a limited partnership to be bound under subsection (a) and, due to a guaranty, some other person – not a general partner nor dissociated as a general partner – is liable on the resulting obligation, that other person may have a claim under other law against the person dissociated as a general partner.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”

“limited partnership”

§ 8667. Liability of person dissociated as general partner to other persons.

(a) General rule. – A person’s dissociation as a general partner does not of itself discharge the person’s liability as a general partner for a debt, obligation or other liability of the limited partnership incurred before dissociation. Except as provided in subsections (b) and (c),
the person is not liable for a partnership obligation incurred after dissociation.

(b) Obligations incurred after dissolution. – A person whose dissociation as a general partner results in a dissolution and winding up of the limited partnership’s activities and affairs is liable on an obligation incurred by the partnership under section 8685 (relating to general partner liability after dissolution) to the same extent as a general partner under section 8644 (relating to general partner’s liability).

(c) When partnership not dissolved. – A person that is dissociated as a general partner without the dissociation resulting in a dissolution and winding up of the limited partnership’s activities and affairs is liable on a transaction entered into by the partnership after the dissociation only if a general partner would be liable on the transaction, but at the time the other party enters into the transaction:

1. less than two years have passed since the dissociation; and
2. the other party does not have knowledge or notice of the dissociation and reasonably believes that the person is a general partner.

(d) Constructive release by creditor. – A person dissociated as a general partner is released from liability for a debt, obligation or other liability of the limited partnership if the partnership’s creditor, with knowledge or notice of the person’s dissociation as a general partner and without the person’s consent, agrees to a material alteration in the nature or time of payment of the debt, obligation or other liability. The release from liability under this subsection applies whether the liability arises directly or indirectly, by way of contribution or otherwise, but only if the liability arises solely by reason of having been a general partner.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 607.

To the extent a limited partnership has been a limited liability limited partnership throughout its existence, the liability rules stated in this section are moot.

Subsection (a) – A person’s dissociation as a general partner does not categorically preclude the person being liable as a general partner for subsequently incurred obligations of the limited partnership. If the dissociation results in dissolution, subsection (b) applies and the person will be liable as a general partner on any partnership obligation incurred under 15 Pa.C.S. § 8685. If the dissociation does not result in dissolution, subsection (c) applies.

The phrase “liability as a general partner” refers to liability under 15 Pa.C.S. § 8644.

Subsection (b) – In these circumstances, a person’s dissociation as a general partner has no effect on the person’s liability exposure, even if any or all of the following occur:

The certificate of limited partnership is amended to state that the person has dissociated as a general partner.
The person has filed a certificate of dissociation, as permitted by 15 Pa.C.S. § 8665(a)(3). The person was the sole general partner, and the limited partnership is wound up by someone else.

However, amending the certificate of limited partnership to indicate dissolution would protect the person to the same extent as the amendment would protect the remaining general partners. 15 Pa.C.S. § 8684.

Subsection (c) – The rule stated here for the lingering liability to third parties of a person dissociated as a general partner parallels the rule stated in 15 Pa.C.S. § 8666 for the lingering apparent authority of a person dissociated as a general partner that can create a liability of the partnership.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter G
Transferable Interests and Rights of Transferees and Creditors

Section
8671. Nature of transferable interest.
8672. Transfer of transferable interest.
8673. Charging order.
8674. Power of personal representative of deceased partner.

§ 8671. Nature of transferable interest.

(a) Personal property. – A transferable interest is personal property.

(b) Only right that may be transferred. – A person may not transfer to a person not a partner any rights in a limited partnership other than a transferable interest.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 701.

Absent a contrary provision in the partnership agreement or the consent of the partners, a “transferable interest” is the only interest in a limited partnership that can be transferred. 15 Pa.C.S. § 8672.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in those Articles.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:
“limited partnership”
“partner”
“transferable interest”

The term “transfer” used in this section are defined in 15 Pa.C.S. § 102.

§ 8672. Transfer of transferable interest.

(a) General rule. – A transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause the dissociation of the transferor as a partner or a dissolution and winding up of the limited partnership’s activities and affairs; and

(3) subject to section 8674 (relating to power of personal representative of deceased partner), does not entitle the transferee to:

(i) participate in the management or conduct of the partnership’s activities and affairs; or

(ii) except as provided under subsection (c), have access to required information, records or other information concerning the partnership’s activities and affairs.

(b) Right to distributions. – A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) Right to account on dissolution. – In a dissolution and winding up of a limited partnership, a transferee is entitled to an account of the partnership’s transactions only from the date of dissolution.

(d) Certificate of interest. – A transferable interest may be evidenced by a certificate of the interest issued by a limited partnership in record form, and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) Recognition of transferee’s rights. – A limited partnership need not give effect to a transferee’s rights under this section until the partnership knows or has notice of the transfer.

(f) Transfer restrictions. – A transfer of a transferable interest in violation of a restriction on transfer contained in the partnership agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

(g) Rights retained by transferor. – Except as provided under sections 8661(b)(4)(ii) (relating to dissociation as limited partner) and 8663(a)(4)(ii) (relating to dissociation as general
partner), if a general or limited partner transfers a transferable interest, the transferor retains the rights of a general or limited partner other than the transferable interest transferred and retains all the duties and obligations of a general or limited partner.

**Committee Comment (2016):**

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 702.

One of the most fundamental characteristics of limited partnership law is its fidelity to the “pick your partner” principle. This section is the core of this chapter’s provisions reflecting and protecting that principle. The provisions of this section apply regardless of whether the interest pertains to a general partner or a limited partner.

A partner’s rights in a limited partnership are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, rights to seek judicial intervention). Unless the partnership agreement otherwise provides, a partner acting without the consent of all other partners lacks both the power and the right to: (i) bestow partnership on a non-partner because of the restrictions in 15 Pa.C.S. §§ 8631(b)(3) and 8641(b)(3); or (ii) transfer to a non-partner anything other than some or all of the partner’s transferable interest as provided in subsection (a)(3). The rights of a mere transferee are quite limited – , to receive distributions as provided in subsection (b); and, if the limited partnership dissolves and winds up, to receive specified information pertaining to the limited partnership from the date of dissolution as provided in subsection (c).

This section applies regardless of whether the transferor is a partner, a transferee of a partner, a transferee of a transferee, etc. 15 Pa.C.S. § 8612 which defines “transferable interest” in terms of a right “initially owned by a person in the person’s capacity as a partner” regardless of “whether or not the person remains a partner or continues to own any part of the right”.

Other law may affect the applicability of this section. 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate regardless of restrictions on transfer).

In any event, this section does not apply to the transfer of ownership interests in a partner that is an entity.

**Example:** ABC, LP has three partners: one general partner – Ralph (an individual); and two limited partners – Alice, Inc. (“Alice”), and Norton, LLC (“Norton”). This section applies to any attempt by Ralph, Alice, or Norton to transfer their respective partnership interest in ABC. This section is inapplicable, however, to a change in control of Alice or Norton.

**Subsection (a)** – The definition of “transfer” in 15 Pa.C.S. § 102 and this subsection’s reference to “in whole or in part” combine to mean that this section encompasses not only unconditional, permanent, and complete transfers, but also temporary, contingent, and partial ones. Thus, for example, a charging order under 15 Pa.C.S. § 8673 effects a transfer of part of the judgment debtor’s transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a partner’s rights to distribution.

**Subsection (a)(2)** – The phrase “by itself” has in view 15 Pa.C.S. §§ 8661(b)(4)(ii) and 8663(a)(4)(ii), each of which creates a risk of dissociation via expulsion when a partner transfers all of the...
partner’s transferable interest.

Subsection (a)(3) – Mere transferees have no right to participate in management or otherwise intrude as the partners carry on the affairs of the limited partnership and their activities as partners.

Because 15 Pa.C.S. § 102 defines “transfer” to include “a transfer by operation of law,” this section affects the power of other law to effect transfers of a partner’s ownership interest. For example, a divorce court lacks the power to award a partner’s spouse anything beyond the partner’s transferable interest. Nor does the partner have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the partner’s complete ownership interest (the transferable interest as enhanced by the management and information rights and the standing to sue) and: (i) if possible, award the partner’s spouse marital property of equal value; or (ii) if not possible, award the partner’s spouse a money judgment and a charging order to enforce the judgment.

Granting the non-partner any part of a partner’s transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the partner’s ex-spouse the entire transferable interest is rarely a viable alternative. If the partner is an active participant in the limited partnership, the approach is impossible. The partner’s transferable interest will typically constitute much or all of the partner’s remuneration for the partner’s activity. Even if the partner is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a “bare transferee.”

When a partner dies, subject to the limited partnership agreement other law may effect a transfer of the partner’s transferable interest to the partner’s estate or personal representative. However, for the reasons just stated, other law lacks the power to transfer anything more than a transferable interest.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

Subsection (b) – Amounts due under this subsection are subject to offset under 15 Pa.C.S. § 8653(d) for any amount owed to the limited partnership by the partner or dissociated partner on whose account the distribution is made. As to whether a limited partnership may properly offset for claims against a transferor that was never a partner is a matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c) – This very limited grant of information rights encompasses only transactions occurring at or after the date of the limited partnership’s dissolution. The transferee has only the right to information as to the allocation of net assets among the limited partnership’s creditors, partners, and transferees – and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a partner-transferor to require the partner-transferor to disclose further information to the transferee. Whether such an agreement would breach the limited partnership agreement, the implied contractual obligation of good faith and fair dealing, or a fiduciary duty depends on the circumstances.

Subsection (d) – The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform
Commercial Code.

Subsection (f) - The term “notice” includes “reason to know” under 15 Pa.C.S. § 8613(b)(1), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the limited partnership agreement.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“distribution”
“general partner”
“limited partner”
“limited partnership”
“partner”
“partnership agreement”
“required information”
“transferable interest”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“record form”
“transfer”

§ 8673. Charging order.

(a) General rule. – On application by a judgment creditor of a partner or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. A charging order constitutes a lien on a judgment debtor's transferable interest and requires the limited partnership to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

(b) Available relief. – To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:

(1) appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(2) make all other orders necessary to give effect to the charging order.

(c) Foreclosure. – Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. The purchaser at the foreclosure sale obtains only the transferable interest, does not thereby become a partner and is subject to section 8672 (relating to transfer of transferable interest).

(d) Satisfaction of judgment. – At any time before foreclosure under subsection (c), the partner or transferee whose transferable interest is subject to a charging order under subsection
(a) may extinguish the charging order by satisfying the judgment and filing a certified copy of
the satisfaction with the court that issued the charging order.

(e) Purchase of rights. – At any time before foreclosure under subsection (c), a limited
partnership or one or more partners whose transferable interests are not subject to the charging
order may pay to the judgment creditor the full amount due under the judgment and thereby
succeed to the rights of the judgment creditor, including the charging order.

(f) Exemption laws preserved. – This chapter shall not deprive any partner or transferee
of the benefit of any exemption law applicable to the transferable interest of the partner or
transferee.

(g) Exclusive remedy. – This section provides the exclusive remedy by which a person
seeking, in the capacity of a judgment creditor, to enforce a judgment against a partner or
transferee may satisfy the judgment from the judgment debtor’s transferable interest.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
703.

The charging order concept dates back to the English Partnership Act of 1890 and in the United
States has been a fundamental part of law of unincorporated business organizations since 1914. As much
a remedy limitation as a remedy, the charging order is the sole method by which a person acting as
judgment creditor of a partner or transferee can extract value from the partner’s or transferee’s ownership
interest in a limited partnership.

Under this section, the judgment creditor of a partner or transferee is entitled to a charging order
against the relevant transferable interest. While in effect, that order entitles the judgment creditor to
whatever distributions would otherwise be due to the partner or transferee whose interest is subject to the
order. However, the judgment creditor has no say in the timing or amount of those distributions. The
charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise
interfere with the management and activities of the limited partnership.

This section applies regardless of whether the transferable interest at issue is owned by a person in
the capacity of a general partner, limited partner, or transferee. The partnership agreement has no power
to alter the provisions of this section to the prejudice of third parties. See 15 Pa.C.S. § 8615(c)(19).

Subsection (a) – The phrase “judgment debtor” encompasses both partners and transferees. The
lien pertains only to a distribution, which is defined in 15 Pa.C.S. § 8612 to exclude “amounts
constituting reasonable compensation for present or past service or payments made in the ordinary course
of business under a bona fide retirement plan or other bona fide benefits program.” A judgment creditor
that wishes to levy on such amounts should use the appropriate creditor’s remedy, such as garnishment
(which may be subject to exemptions or exclusions not relevant to a charging order).

, 719 A.2d 73, 76 (Conn. 1998) (rejecting the contention of an LLC’s two members
that “payments of $28,000 to each of them” should be treated “as expenses for wages” rather than as
distributions).

Whether an application for a charging order must be served on the limited partnership, the
judgment debtor, or both is a matter for other law, principally the law of remedies and civil procedure. The order itself must be served on the limited partnership. Whether the order must also be served on the judgment debtor is a matter for other law.

If a distribution consists of rights to acquire interests in a limited partnership, the charging order applies only to those rights within the definition in 15 Pa.C.S. § 8612 of “transferable interest.”

Subsection (b) – Paragraph (2) refers to “other orders” rather than “additional orders.” Therefore, given appropriate circumstances, a court may invoke paragraph (1), paragraph (2), or both.

Subsection (b)(1) – The receiver contemplated here is not a receiver for the limited partnership, but rather a receiver for the distributions subject to the charging order. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than “the extent necessary to effectuate the collection of distributions pursuant to a charging order.” For a correctly narrow reading of this provision, see No. 11–1285, 2012 WL 3195759 (Iowa A pp. Aug. 8, 2012).

Subsection (b)(2) – This paragraph must be understood in the context of: (i) the very limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not a judgment creditor of the limited partnership, has no claim on the limited partnership’s assets, and has no right to interfere in the activities, affairs, and management of the limited partnership. In particular, the court’s power to make “all other orders” is limited to “orders necessary to give effect to the charging order.”

EXAMPLE: A judgment creditor with a charging order believes that the limited partnership should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited partnership to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

EXAMPLE: A judgment creditor with a judgment for $10,000 against a partner obtains a charging order against the partner’s transferable interest. Having been properly served with the order, the limited partnership nonetheless fails to comply and makes a $3000 distribution to the partner. The court has the power to order the limited partnership to pay $3000 to the judgment creditor to “give effect to the charging order.”

Under subsection (b)(2), the court has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order.

This chapter has no specific rules for determining the fate or effect of a charging order when the limited partnership undergoes a merger, conversion, interest exchange, division, or domestication under 15 Pa.C.S. Ch. 3. In the proper circumstances, such an organic change might trigger an order under subsection (b)(2).

Subsection (c) – The phrase “that distributions under the charging order will not pay the judgment debt within a reasonable period of time” comes from case law. 453 S.E.2d 780, 783 (Ga. Ct. A pp. 1995). 578 S.E.2d 572, 574 (Ga. Ct. A pp. 2003) ("Judicial sale may be appropriate where ... it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable amount of time."). A purchaser at a foreclosure sale obtains only the very limited rights of a mere transferee and is in some ways more vulnerable and less powerful than the holder of a charging order. After foreclosure and sale, subsection (b) no longer
applies. More generally, the court is no longer involved in the matter.

Subsection (d) - This provision allows the judgment debtor to end the charging order without need for a hearing.

Subsection (e) - Traditionally, charging order provisions referred to the possibility of “redeeming” an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This section substitutes an approach that more closely parallels the modern, real-world possibility of the limited partnership or its partners buying the underlying judgment (and thereby dispensing with any interference the judgment creditor might seek to inflict on the limited partnership).

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection, because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the limited partnership or the other partners might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor’s consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the limited partnership.

Whether a limited partnership should invoke this provision is a question for the general partners. If the charging order pertains to the transferable interest of a general partner, subject to the partnership agreement that partner should not be involved in deciding the question.

Subsection (f) - This subsection preserves otherwise applicable exemptions but does not create any. 405 B.R. 604, 609 (Bankr. N. D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating that “it is clear that [the provision] does not create an exemption”).

Subsection (g) - This subsection does not override Uniform Commercial Code, Article 9, which may provide different remedies for a secured creditor acting in that capacity.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“distribution”
“limited partnership”
“partner”
“transferable interest”
“transferee”

The term “court” as used in this section means any court with jurisdiction and not just the “court” as defined in 15 Pa.C.S. § 102.

§ 8674. Power of personal representative of deceased partner.

If a partner dies, the personal representative of the deceased partner may exercise:

(1) the rights of a transferee provided in section 8672(c) (relating to transfer of transferable interest); and

(2) for the purposes of settling the estate, the rights of a current limited partner under section 8634 (relating to limited partner rights of information).
Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 704.

The estate and those claiming through the estate are transferees, and as such they have very limited rights to information. This section provides temporary, additional information rights to the legal representative of the estate.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partner”  
“partner”  
“transferee”

Subchapter H  
Dissolution and Winding Up

Section  
8681. Events causing dissolution.  
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§ 8681. Events causing dissolution.

(a) General rule. – A limited partnership is dissolved, and its activities and affairs must be wound up, upon the occurrence of any of the following:

(1) an event or circumstance that the partnership agreement states causes dissolution;

(2) the affirmative vote or consent of:
(i) all general partners; and

(ii) limited partners owning the rights to receive a majority of the distributions as limited partners at the time the vote or consent is to be effective;

(3) after the dissociation of a person as a general partner:

(i) if the partnership has at least one remaining general partner, the affirmative vote or consent to dissolve the partnership within 90 days after the dissociation by partners owning a majority of the rights to receive distributions as partners at the time the vote or consent is to be effective; or

(ii) if the partnership does not have a remaining general partner, the passage of 180 days after the dissociation, unless before the end of the period:

(A) consent to continue the activities and affairs of the partnership and admit at least one general partner is given by limited partners owning a majority of the rights to receive distributions as limited partners at the time the consent is to be effective; and

(B) at least one person is admitted as a general partner in accordance with the consent;

(4) the passage of 180 consecutive days after the dissociation of the partnership’s last limited partner, unless before the end of the period the partnership admits at least one limited partner;

(5) the passage of 180 consecutive days during which the partnership has only one partner, unless before the end of the period:

(i) the partnership admits at least one person as a partner;

(ii) if the previously sole remaining partner is only a general partner, the partnership admits a person as a limited partner; and

(iii) if the previously sole remaining partner is only a limited partner, the partnership admits a person as a general partner; or

(6) on application by a partner, the entry by the court of an order dissolving the partnership on the grounds that:

(i) the conduct of all or substantially all the partnership’s activities and affairs is unlawful;

(ii) it is not reasonably practicable to carry on the partnership’s activities and affairs in conformity with the certificate of limited partnership and partnership
agreement; or

(iii) the general partners have acted, are acting or will act in a manner that is illegal or fraudulent.

(b) Multiple deadlines. – If an event occurs that imposes a deadline on a limited partnership under subsection (a) and before the partnership has met the requirements of the deadline, another event occurs that imposes a different deadline on the partnership under subsection (a):

(1) the occurrence of the second event does not affect the deadline caused by the first event; and

(2) the partnership’s meeting of the requirements of the first deadline does not extend the second deadline.

(c) Cross references. – See sections 8611(d) (relating to short title and application of chapter) and 8615(c)(15) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 801.

“Dissolution” has been a term of art in the law of unincorporated business organizations since at least the time of Roman law. Joseph Story, Commentaries on the Law of Partnership (2nd ed. 1850) § 266 at 408 (“The Roman law ... declared, that partnership might be dissolved in various ways ...”). Dissolution does not end a limited partnership’s existence but rather changes the purpose of that existence. Under 15 Pa.C.S. § 8682(a): “the partnership continues after dissolution only for the purpose of winding up.” The partnership may, but need not, amend its certificate of limited partnership to state that dissolution has occurred. The limited partnership terminates when winding up is complete and a certificate of termination has been filed under 15 Pa.C.S. § 8682(e).

Except for subsection (a)(6), this section compromises default rules. Moreover, a partnership agreement can provide additional causes of dissolution as stated in subsection (a)(1). Variations to the statutory causes of dissolution are commonplace.

In some circumstances, an amendment to the limited partnership agreement might avert dissolution by revising an agreed-upon deadline for selling the partnership assets and winding up the business. A retroactive amendment may also be possible.

Subsection (a)(2) – Although most actions involving limited partner consent require unanimous consent, this provision requires only the specified majority consent. Rights to receive distributions owned by a person that is both a general and a limited partner figure into the limited partner determination only to the extent those rights are owned in the person’s capacity as a limited partner.

Example: XYZ is a limited partnership with three general partners, each of whom is also a
limited partner, and 5 other limited partners. Rights to receive distributions are allocated as follows:

Partner #1 as general partner – 3%
Partner #2 as general partner – 2%
Partner #3 as general partner – 1%
Partner #1 as limited partner – 7%
Partner #2 as limited partner – 3%
Partner #3 as limited partner – 4%
Partner #4 as limited partner – 5%
Partner #5 as limited partner – 5%
Partner #6 as limited partner – 5%
Partner #7 as limited partner – 5%
Partner #8 as limited partner – 5%
Several non-partner transferees, in the aggregate – 55%

Distribution rights owned by persons as limited partners amount to 39% of total distribution rights. A majority of that 39% is therefore anything greater than 19.5%. If only Partners 1, 2, 3 and 4 consent to dissolve, the limited partnership is not dissolved. Together these partners own as limited partners 19% of the distribution rights owned by persons as limited partners – just short of the necessary majority. For purposes of this calculation, distribution rights owned by non-partner transferees are irrelevant. So, too, are distribution rights owned by persons as general partners. (However, dissolution under this provision requires “the consent of all general partners.”)

Subsection (a)(3) - Historically, the dissociation of any general partner from a limited partnership could lead to dissolution (subject of course to the partnership agreement). This provision continues that concept.

Subsection (a)(3)(i) - Unlike subsection (a)(2), this provision makes no distinction between distribution rights owned by persons as general partners and distribution rights owned by persons as limited partners. Distribution rights owned by non-partner transferees are irrelevant.

Subsection (a)(4) and (5) - These provisions reflect the number and type of partners required for a limited partnership to come into existence under 15 Pa.C.S. § 8621(d).

Subsection (a)(6) - The partnership agreement cannot vary the causes of dissolution stated in this provision. However, the partnership agreement may contain a forum selection clause or change the forum from “the appropriate court” to binding arbitration.

A court of another jurisdiction should decline to order dissolution of a limited partnership formed under this chapter.

Subsection (a)(6)(ii) - For an analytic framework for applying this provision, see CIV. A. 5566-V CN, 2011 WL 808953 at *3(Del. Ch. Feb. 25, 2011).

407 N.E.2d 821, 829 (Ill. App. Ct. 1980) (upholding a decree dissolving a limited partnership “[b]ecause the partnership had a negative cash flow during 15 months of the 17 months prior to filing this suit” and “find[ing] that the trial court properly decreed dissolution ... on the ground that [the limited partnership] could only be carried on at a loss”).

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides
that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“certificate of limited partnership”
“distribution”
“general partner”
“limited partner”
“limited partnership”
“partner”
“partnership agreement”

The term “court” used in this section is defined in 15 Pa.C.S. § 102.

§ 8681.1 Voluntary termination by partners.

(a) General rule. – The general partners of a limited partnership that has never transacted business or held assets other than money received as capital contributions may effect the termination of the partnership by delivering to the department for filing a certificate of termination stating:

(1) the name of the partnership;
(2) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the registered office of the partnership;
(3) that the partnership has never transacted business or held assets other than money received as capital contributions;
(4) that the amounts, if any, actually paid in as contributions, less any part disbursed for necessary expenses, have been returned to those entitled to the return of the amounts;
(5) that all liabilities of the partnership have been discharged or that adequate provision has been made for those liabilities; and
(6) that a majority of the general partners elect that the partnership be terminated.

(b) Effect. – Upon the filing of the certificate of termination, the existence of the limited partnership shall cease.

(c) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after 15 Pa.C.S. § 1971.

Tax clearance certificates are not required to be delivered to the department in connection with the filing of a certificate of termination under this section.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“contribution”
“general partner”
“limited partnership”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8682. Winding up and filing of certificates.

(a) General rule. – A dissolved limited partnership shall wind up its activities and affairs and the partnership continues after dissolution only for the purpose of winding up.

(b) Conduct of winding up. – In winding up its activities and affairs, the limited partnership:

(1) shall discharge the partnership’s debts, obligations and other liabilities, settle and close the partnership’s activities and affairs, and marshal and distribute the assets of the partnership; and

(2) may:

(i) amend its certificate of limited partnership to state that the partnership is dissolved;

(ii) preserve the partnership activities, affairs and property as a going concern for a reasonable time;

(iii) prosecute, defend and settle actions and proceedings, whether civil, criminal or administrative;

(iv) transfer the partnership’s property;

(v) participate in, agree to participate in and settle disputes by mediation, arbitration or alternative dispute resolution proceedings; and
(vi) perform other acts necessary or appropriate to the winding up.

(c) Conduct of winding up when no general partner. – If a dissolved limited partnership does not have a general partner, a person to wind up the dissolved partnership’s activities and affairs may be appointed by the affirmative vote or consent of limited partners owning the rights to receive a majority of the distributions as limited partners at the time the vote or consent is to be effective. A person appointed under this subsection:

(1) has the powers of a general partner under section 8684 (relating to power to bind partnership after dissolution) but is not liable for the debts, obligations and other liabilities of the partnership solely by reason of having or exercising those powers or otherwise acting to wind up the dissolved partnership’s activities and affairs; and

(2) shall deliver promptly to the department for filing an amendment to the partnership’s certificate of limited partnership stating:

   (i) that the partnership does not have a general partner;

   (ii) the name and address of the person; and

   (iii) that the person has been appointed under this subsection to wind up the partnership.

(d) Judicial supervision. – On the application of a partner or person entitled under subsection (c) to participate in winding up, the court may order judicial supervision of the winding up of a dissolved limited partnership, including the appointment of a person to wind up the partnership’s activities and affairs, if:

(1) the partnership does not have a general partner and within a reasonable time following the dissolution no person has been appointed under subsection (c); or

(2) the applicant establishes other good cause.

(e) Certificate of termination. – When all debts, obligations and other liabilities of the limited partnership have been paid and discharged or adequate provision has been made therefor and all of the remaining property and assets of the partnership have been distributed to the partners, a certificate of termination shall be delivered to the department for filing along with the certificates required by section 139 (relating to tax clearance of certain fundamental transactions). The certificate of termination shall set forth:

(1) The name of the limited partnership.

(2) Subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the registered office of the partnership.
(3) That all debts, obligations and other liabilities of the partnership have been paid and discharged or that adequate provision has been made therefor.

(4) That all the remaining property and assets of the partnership have been distributed among its partners in accordance with their respective rights and interests.

(5) That there are no actions pending against the partnership in any court or that adequate provision has been made for the satisfaction of any judgment that may be entered against it in any pending action.

(6) That the partnership is terminated.

(f) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8615(c)(16) (relating to contents of partnership agreement).
Section 8623 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 802.

Under the default rules of this chapter, dissolution does not change governance arrangements. However, dissolution does change the context for determining for the purposes of the voting requirement in 15 Pa.C.S. § 8646(f) whether a sale, lease, exchange, or other disposition of all, or substantially all, of the limited partnership’s property, with or without the good will is “not made in the usual and regular course of the activities and affairs of the limited partnership.”

Subsection (b) – The particular circumstances determine how long winding up may continue without giving “good cause” for court intervention under subsection (d).

Law contemplates that dissolved partnerships may continue in business for a short, long or indefinite period of time...”) (quoting 497 S.W.2d 860, 867 (Mo. Ct. App. 1973)); 574 P.2d 447, 450 (Alaska 1978) (stating, “[W]e are aware of [no authority] requiring that deadlines be set in the winding up of a partnership”).

“Winding up usually entails the time necessary for the partners to finish old business, collect and pay debts, and finally distribute remaining assets to the partners.”, 270 N.W.2d 632, 635 (Iowa 1978). “Generally the best interests of the partnership will be served by winding up the partnership affairs as quickly as possible.”, 856 P.2d 536, 540 (Mont. 1993). However, in some circumstances, a long period of winding up is not only appropriate but necessary.

, 306 N.E.2d 769, 772 (Ohio Ct. A pp. 1972) (“[I]f the only means of availing the partners of the benefit of the value of the lease would be to continue to operate under such lease until its expiration, then such operation may continue as part of the winding up of the partnership affairs after dissolution. It is not necessary that a partnership, in the absence of the consent of all the partners, abandon a valuable asset upon dissolution merely because it may have no ready market value, but the value of such asset can...
continue to inure to the benefit of the partners through the continuation of the partnership after
dissolution.”).

**Subsection (b)(2)(i) and (e)** - For the constructive notice effect of the specified amendment and a
certificate of termination, see 15 Pa.C.S. § 8613(d)(2)(i) and (ii).

**Subsection (c)** - The duties stated in 15 Pa.C.S. § 8649 do not apply to a person appointed under
this subsection. Such a person will inevitably be an agent of the dissolved limited partnership, acting
pursuant to a contract. Thus, agency and contract law will determine the person’s duties.

**Subsection (d)** - The duties stated in 15 Pa.C.S. § 8649 do not apply to a person appointed under
this subsection. The applicable standards of conduct might come from a variety of sources, such as the
court order, the law pertaining to receiverships, agency law, and contract law.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

- “certificate of limited partnership”
- “distribution”
- “general partner”
- “limited partner”
- “limited partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “court”
- “department”
- “obligation”
- “property”

§ 8683. (Reserved.)

§ 8684. Power to bind partnership after dissolution.

(a) Power of general partner. - A limited partnership is bound by a general partner’s act
after dissolution which:

(1) is appropriate for winding up the partnership’s activities and affairs; or

(2) would have bound the partnership under section 8642 (relating to general
partner agent of limited partnership) before dissolution if, at the time the other party enters
into the transaction, the other party does not know or have notice of the dissolution.

(b) Power of person dissociated as general partner. - A person dissociated as a general
partner binds a limited partnership through an act occurring after dissolution if:

(1) at the time the other party enters into the transaction:
(i) less than two years has passed since the dissociation; and

(ii) the other party does not know or have notice of the dissociation and reasonably believes that the person is a general partner; and

(2) the act:

(i) is appropriate for winding up the partnership’s activities and affairs; or

(ii) would have bound the partnership under section 8642 before dissolution and at the time the other party enters into the transaction, the other party does not know or have notice of the dissolution.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 804.

This section provides the “power to bind” rules applicable once dissolution occurs; and, in general, parallels 15 Pa.C.S. § 8666 (power to bind of a person dissociated as general partner when dissolution does not result from the dissociation). However, one significant difference exists. 15 Pa.C.S. § 8666(a)(2)(i) contains a provision analogous to a statute of repose. A person’s power to bind the partnership under that section terminates two years after the date of dissociation. Subsection (b) of this section contains a comparable provision, but subsection (a) does not.

Subsections (a) and (b) – Subsection (a) states the power-to-bind rules for persons who are still general partners when dissolution occurs. Subsection (b) pertains to a person dissociated as a general partner before dissolution, including a general partner whose dissociation results in dissolution.

Subsection (a)(1) – This paragraph states a rule of inherent agency power. RESTATEMENT (SECOND) OF AGENCY § 8A (defining “inherent agency power” as “the power of an agent which is derived not from authority, apparent authority or estoppel, but solely from the agency relation and exists for the protection of persons harmed by or dealing with a servant or other agent”). Thus, a general partner might act without actual or apparent authority and still bind the limited partnership. The partnership agreement cannot change the stated rule, because the rule pertains to the rights under this title of third parties.

If a general partner’s words or conduct trigger this paragraph, thereby binding the limited partnership, and the general partner lacks the actual authority to do so, the general partner breaches an agent’s duty to act within authority, and is liable to the partnership for any resulting damages. RESTATEMENT (THIRD) OF AGENCY § 8.09(1) (“An agent has a duty to take action only within the scope of the agent’s actual authority”). The general partner might also be liable for breach of the partnership agreement.

Subsection (a)(2) – A person might have notice of the dissolution under 15 Pa.C.S. § 8613(d)(2)(i) (amendment of certificate of limited partnership to indicate dissolution), as well as under section 8613(b)(1)(reason to know).

Subsection (b) – This subsection deals with the post-dissolution power to bind of a person dissociated as a general partner. For the most part: (i) paragraph 1 replicates 15 Pa.C.S. § 8666 pertaining
§ 8685.  General partner liability after dissolution.

(a) Liability of general partner. – If a general partner having knowledge of the dissolution causes a limited partnership to incur an obligation under section 8684(a) (relating to power to bind partnership after dissolution) by an act that is not appropriate for winding up the partnership’s activities and affairs, the general partner is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation; and

(2) if another general partner or a person dissociated as a general partner is liable for the obligation, to that other general partner or person for any damage caused to that other general partner or person arising from the liability.

(b) Liability of person dissociated as general partner. – If a person dissociated as a general partner causes a limited partnership to incur an obligation under section 8684(b), the person is liable:

(1) to the partnership for any damage caused to the partnership arising from the obligation; and

(2) if a general partner or another person dissociated as a general partner is liable for the obligation, to the general partner or other person for any damage caused to the general partner or other person arising from the obligation.
Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 805.

This section parallels 15 Pa.C.S. § 8666(b). It is possible for more than one person to be liable under this section on account of the same limited partnership obligation. This chapter does not provide any rule for apportioning liability in that circumstance.

Subsection (a)(2) – If the limited partnership is not a limited liability limited partnership, the liability created by this paragraph includes liability under 15 Pa.C.S. §§ 8644(a), 8667(b), and 8667(c). The paragraph also applies when a partner or person dissociated as a general partner suffers damage due to a contract of guaranty.

Other law determines liability (if any) to a person that is neither a general partner nor dissociated as a general partner.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”
“limited partnership”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8686. Known claims against dissolved limited partnership.

(a) General rule. – Except as provided in subsection (d), a dissolved limited partnership may give notice of a known claim under subsection (b), which has the effect provided in subsection (c).

(b) Required notice. – A dissolved limited partnership may notify in record form its known claimants of the dissolution. The notice must:

(1) specify the information required to be included in a claim;
(2) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;
(3) state the deadline for receipt of a claim, which may not be less than 120 days after the date the notice is received by the claimant;
(4) state that the claim will be barred if not received by the deadline; and
(5) unless the partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner.
which is based on section 8644 (relating to general partner’s liability).

(c) Claims barred. – A claim against a dissolved limited partnership is barred if the requirements of subsection (b) are met and:

(1) the claim is not received by the specified deadline; or

(2) if the claim is timely received but rejected by the partnership:

   (i) the partnership causes the claimant to receive a notice in record form stating that the claim is rejected and will be barred unless the claimant commences an action against the partnership to enforce the claim within 90 days after the claimant receives the notice; and

   (ii) the claimant fails to commence the required action no later than 90 days after the claimant receives the notice.

(d) Later arising claims. – This section does not apply to a claim based on an event occurring after the date of dissolution or a liability that on that date is contingent.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 806.

This section together with 15 Pa.C.S. §§ 8687 and 8688 provide rules under which a dissolved limited partnership may achieve finality with regard to claims.

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“general partner”

“limited partnership”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“limited liability limited partnership”

“receipt”

“record form”

§ 8687. Other claims against dissolved limited partnership.
(a) Permissive notice. – A dissolved limited partnership may publish notice of its dissolution and request persons having claims against the partnership to present them in accordance with the notice.

(b) Notice procedure. – A notice under subsection (a) must:

(1) be officially published one time;
(2) describe the information required to be contained in a claim, state that the claim must be in writing and provide a mailing address to which the claim is to be sent;
(3) state that a claim against the partnership is barred unless an action to enforce the claim is commenced within two years after publication of the notice; and
(4) unless the partnership has been throughout its existence a limited liability limited partnership, state that the barring of a claim against the partnership will also bar any corresponding claim against any general partner or person dissociated as a general partner which is based on section 8644 (relating to general partner’s liability).

(c) Claims barred. – If a dissolved limited partnership publishes a notice in accordance with subsection (b), the claim of each of the following claimants is barred unless the claimant commences an action to enforce the claim against the partnership within two years after the publication date of the notice:

(1) a claimant that did not receive notice in record form under section 8686 (relating to known claims against dissolved limited partnership);
(2) a claimant whose claim was timely sent to the partnership but not acted on; and
(3) a claimant whose claim is contingent at, or based on an event occurring after, the date of dissolution.

(d) Claims not barred. – A claim not barred under this section or section 8686 may be enforced:

(1) against the dissolved limited partnership, to the extent of its undistributed assets;
(2) except as provided under section 8688 (relating to court proceedings), if assets of the partnership have been distributed after dissolution, against a partner or transferee to the extent of that person’s proportionate share of the claim or of the partnership’s assets distributed to the partner or transferee after dissolution, whichever is less, except that a person’s total liability for all claims under this paragraph may not exceed the total amount of assets distributed to the person after dissolution; and
(3) against any person liable on the claim under sections 8644 and 8667 (relating to
liability of person dissociated as general partner to other persons).

Committee Comment (2016):
This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
807.

Subsection (d)(2) - Liability under this paragraph extends to those who have received distributions under a charging order. Unlike 15 Pa.C.S. § 8655(b) (recapture of improper interim distributions), this paragraph contains no “knowledge” element.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“distribution”
“general partner”
“limited partnership”
“partner”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“limited liability limited partnership”
“officially publish”
“receive”

§ 8688. Court proceedings.

(a) Determination of security. – A dissolved limited partnership that has officially published a notice under section 8687 (relating to other claims against dissolved limited partnership) may file an application with the court of common pleas embracing the county where the partnership’s principal office is located or, if the principal office is not located in this Commonwealth, where its registered office is or was last located, for a determination of the amount and form of security to be provided for payment of claims that are reasonably expected to arise after the date of dissolution based on facts known to the partnership and:

(1) at the time of the application:

(i) are contingent; or

(ii) have not been made known to the partnership; or

(2) are based on an event occurring after the date of dissolution.

(b) When security not required. – Security is not required for any claim that is or is reasonably anticipated to be barred under section 8687.

(c) Notice. – Within ten days after the filing of an application under subsection (a), the
dissolved limited partnership shall give notice of the proceeding to each claimant holding a
contingent claim known to the partnership.

d) Guardian ad litem. – In a proceeding brought under this section, the court may
appoint a guardian ad litem to represent all claimants whose identities are unknown. The
reasonable fees and expenses of the guardian, including all reasonable expert witness fees, must
be paid by the dissolved limited partnership.

e) Effect on contingent claims. – A dissolved limited partnership that provides security
in the amount and form ordered by the court under subsection (a) satisfies the partnership’s
obligations with respect to claims that are contingent, have not been made known to the
partnership or are based on an event occurring after the date of dissolution. The claims may not
be enforced against a partner or transferee on account of assets received in liquidation.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
808.

The term “limited partnership” used in this section is defined in 15 Pa.C.S. § 8612.

The following terms used in this section are defined in 15 Pa.C.S. § 102:
“court”
“officially publish”

§ 8689. General partner liability when claim against limited partnership
barred.

If a claim against a dissolved limited partnership is barred under section 8686 (relating to
known claims against dissolved limited partnership), 8687 (relating to other claims against
dissolved limited partnership) or 8688 (relating to court proceedings), any corresponding claim
under section 8644 (relating to general partner’s liability) or 8667 (relating to liability of person
dissociated as general partner to other persons) is also barred.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §
809.

A general partner’s liability under 15 Pa.C.S. §§ 8644 and 8667 is vicarious liability – liability
solely by status and solely for the “debts, obligations, and other liabilities of the limited partnership.” To
the extent a claim pertaining to the underlying debt, obligation, or other liability is barred, a claim
pertaining to the corresponding vicarious liability should likewise be barred.

The term “limited partnership” used in this section is defined in 15 Pa.C.S. § 8612.
§ 8690. Disposition of assets in winding up and required contributions.

(a) Creditors. – In winding up its activities and affairs, a limited partnership shall apply its assets, including the contributions required by this section, to discharge the partnership’s obligations to creditors, including partners that are creditors.

(b) Surplus. – After a limited partnership complies with subsection (a), any surplus shall be distributed in the following order, subject to any charging order in effect under section 8673 (relating to charging order):

1. to each owner of a transferable interest that reflects contributions made and not previously returned, an amount equal to the value of the unreturned contributions; and

2. among owners of transferable interests in proportion to their respective rights to share in distributions immediately before the dissolution of the partnership.

(c) Insufficient assets. – If a limited partnership’s assets are insufficient to satisfy all of its obligations under subsection (a), with respect to each unsatisfied obligation incurred when the partnership was not a limited liability limited partnership, the following rules apply:

1. Each person that was a general partner when the obligation was incurred and that has not been released from the obligation under section 8667 (relating to liability of person dissociated as general partner to other persons) shall contribute to the partnership for the purpose of enabling the partnership to satisfy the obligation. The contribution due from each of those persons is in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those persons when the obligation was incurred.

2. If a person does not contribute the full amount required under paragraph (1) with respect to an unsatisfied obligation of the partnership, the other persons required to contribute by paragraph (1) on account of the obligation shall contribute the additional amount necessary to discharge the obligation. The additional contribution due from each of those other persons is in proportion to the right to receive distributions in the capacity of a general partner in effect for each of those other persons when the obligation was incurred.

3. If a person does not make the additional contribution required by paragraph (2), further additional contributions are determined and due in the same manner as provided in that paragraph.

(d) Recovery of additional contributions. – A person that makes an additional contribution under subsection (c)(2) or (3) may recover from any person whose failure to contribute under subsection (c)(1) or (2) necessitated the additional contribution. A person may not recover under this subsection more than the amount additionally contributed. A person’s liability under this subsection may not exceed the amount the person failed to contribute.
(e) Distribution when surplus insufficient. - If a limited partnership does not have sufficient surplus to comply with subsection (b)(1), any surplus must be distributed among the owners of transferable interests in proportion to the value of the respective unreturned contributions.

(f) Form of payment. - All distributions made under subsections (b) and (c) must be paid in money.

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 810.

In some circumstances, this chapter requires a partner to make payments to the limited partnership, 15 Pa.C.S. §§ 8652(b), 8655(a), 8655(b), and subsection (c) of this section. In other circumstances, this chapter requires a partner to make payments to other partners, 15 Pa.C.S. § 8655(c), and subsection (d) of this section. In no circumstances does this chapter require a partner to make a payment for the purpose of equalizing or otherwise reallocating capital losses incurred by partners.

EXAMPLE: XYZ Limited Partnership (“XYZ”) has one general partner and four limited partners. XYZ is not a limited liability limited partnership. According to XYZ’s required information, the values of each partner’s contribution to XYZ are:

- General partner – $5,000
- Limited partner #1 – $10,000
- Limited partner #2 – $15,000
- Limited partner #3 – $20,000
- Limited partner #4 – $25,000

XYZ is unsuccessful and eventually dissolves without ever having made a distribution to its partners. XYZ lacks any assets with which to return to the partners the value of their respective contributions. No partner is obliged to make any payment either to the limited partnership or to fellow partners to adjust these capital losses. These losses are not part of “the partnership’s obligations to creditors” for purposes of subsection (a).

EXAMPLE: Same facts, except that Limited Partner #4 loaned $25,000 to XYZ, and XYZ lacks the assets to repay the loan. The general partner must contribute to the limited partnership whatever funds are necessary to enable XYZ to satisfy the obligation owed to Limited Partner #4 on account of the loan.

Subsection (a) - As to non-partner creditors, this subsection is not a default rule. 15 Pa.C.S. § 8615(c)(19) (stating that the partnership agreement may not “restrict the rights under this title of a person other than a partner”). However, if a creditor is willing, a dissolved limited partnership may certainly make agreements with the creditor specifying the terms under which the limited partnership will “discharge the partnership’s obligations to” the creditor.

Subsection (b) - For the most part, the provisions in this subsection state default rules. For example, partnership agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under this subsection (or otherwise under the partnership
agreement) are subject to rights of transferees. As to the extent the partnership agreement can be amended to affect the distribution rights of persons already transferees,  15 Pa.C.S. 8617(b).

Subsection (c) – This section applies obligation by obligation, because a person – as a general partner or person dissociated as a general partner – is required to contribute to the limited partnership to satisfy a partnership obligation only if, when the obligation was incurred: (i) the person was a general partner; and (ii) the limited partnership was not an LLLP.

The partnership agreement can change the allocation among general partners and persons dissociated as general partners but cannot prejudice the rights of non-partner creditors.

EX A M P L E: The A-B Limited Partnership (the “Partnership”) owes Creditor $150, an obligation incurred when General Partners A and B were the only general partners, sharing distributions equally, and the Limited Partnership was not an LLLP. The Partnership has no funds to pay Creditor. Although subsection (c)(1) would require Partners A and B each to contribute equally ( , $75), the A-B Partnership Agreement provides that General Partner A has the entire contribution obligation and General Partner B has none. As between General Partners A and B, General Partner A is obligated to contribute $150 and General Partner B nothing. However, as to Creditor, General Partner B still has a contribution obligation of $75.

This formal distinction will have practical consequences only if General Partner A does not contribute the full $150. Also, Creditor may have problems establishing standing.

Subsection (c)(2) and (3) – These provisions are analogous to buy-sell provisions that: (i) provide that an owner’s effort to sell the ownership interest triggers an option to purchase allocated among all the other owners; (ii) make the option conditional on the entire interest being purchased; and (iii) provide for successive allocations to take up any previous allocations that were not unexercised.

Subsection (e) – If a limited partnership has been a limited liability limited partnership throughout the partnership’s existence, this subsection is consistent with this chapter’s approach to loss sharing. If a partnership has been a limited liability limited partnership during only part of the partnership’s existence, the issue of loss sharing upon dissolution: (i) can be exceedingly complicated, varying radically depending on the circumstances; (ii) is therefore not amenable to a statutory “gap filler;” and (iii) thus should always be addressed in the partnership agreement.

However, in case the partnership agreement does not address the issue, this chapter must provide a default rule. This subsection applies to fill the gap. This approach has the virtues of simplicity and certainty but in no way resembles what “typical” partners might agree if they were to consider the matter, especially if the partnership was never a LLLP. Robert W. Hillman, Private Ordering Within Partnerships, 41 U. MIAMI L. REV. 425, 448 (1987) (“[T]he various norms established by the Act, applicable in the absence of agreements to the contrary, represent the supposed understandings partners most likely reach if they choose to bargain on the various issues.”).

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“contribution”
“distribution”
“general partner”
“limited partnership”
“partner”
“transferable interest”
The following terms used in this section are defined in 15 Pa.C.S. § 102:

“limited liability limited partnership”

“obligation”

Subchapter I
Actions by Partners

Section

8691. Direct action by partner.
8692. Derivative action.
8693. Security for costs.
8694. Special litigation committee.
8695. Proceeds and expenses.

§ 8691. Direct action by partner.

(a) General rule. – Subject to subsection (b), a partner may maintain a direct action against another partner or the limited partnership, with or without an accounting as to the partnership’s activities and affairs, to enforce the partner’s rights and protect the partner’s interests, including rights and interests under the partnership agreement or this title or arising independently of the partnership relationship.

(b) Required injury. – A partner maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited partnership.

(c) Claims not revived. – A right to an accounting on a dissolution and winding up does not revive a claim barred by law.

(d) Cross reference. – See section 8615(c)(17) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 901.

Subsection (a) – A partner’s rights under this subsection are subject to the rule of standing stated in subsection (b). The phrase “protect the partner’s interests” pertains to remedies and creates no additional causes of action.

The last phrase of this subsection (“or arising independently ...”) does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person being a partner in a limited partnership does not preclude the person from enforcing rights existing “independently of the partnership relationship” – , as a creditor.
Subsection (b) – The distinction between a direct claim under this section and a derivative claim under 15 Pa.C.S. § 8692 protects the partnership agreement. If any partner can sue directly over any management issue, the mere threat of suit can interfere with the partners’ agreed-upon arrangements.

Although in ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract, within a limited partnership different circumstances typically exist. A partner does not have a direct claim against a general partner merely because the general partner has breached the partnership agreement. Likewise a general partner’s violation of this chapter does not automatically create a direct claim for every other partner. To have standing in his, her, or its own right, a partner plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the limited partnership.

EXAMPLE: Through grossly negligent conduct, in violation of 15 Pa.C.S. § 8649(c), the general partner of a limited partnership reduces the net assets of the limited partnership by 50%, which in turns decreases the value of Limited Partner A’s investment by $3,000,000. Limited Partner A has no standing to bring a direct claim. A’s damage is merely derivative of the damage directly suffered by the limited partnership.

EXAMPLE: Same facts, except in addition to violating 15 Pa.C.S. § 8649(c), the general partner’s conduct breaches an express provision of the partnership agreement to which Limited Partner A is a signatory. The analysis and the result are the same as in the prior example.

EXAMPLE: A partnership agreement defines “distributable cash” and requires the limited partnership to periodically distribute that cash among all partners. The limited partnership’s general partner fails to distribute the cash. Each partner has a direct claim against the general partner and the limited partnership.

The reference to “threatened injury” is to encompass potential claims for preventative relief, such as a temporary restraining order or preliminary injunction.

This section’s standing rule is subject to reasonable alterations by the partnership agreement.

Subsection (c) – This subsection reverses the rule in former 15 Pa.C.S. § 8365. This subsection inevitably implies that other law governs the accrual of a claim under subsection (b) as well as the statute of limitations applicable to those claims. As a result, partners must take care not to “to sit on their claims” waiting for the partnership to dissolve.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partnership”
“partner”
“partnership agreement”

§ 8692. Derivative action.

(a) General rule. – Subject to subsection (b), a partner may maintain a derivative action to enforce a right of a limited partnership only if:
(1) the partner first makes a demand on the general partners requesting that they cause the partnership to bring an action to enforce the right, and:

   (i) if a special litigation committee is not appointed under section 8694 (relating to special litigation committee), the partnership does not bring the action within a reasonable time; or

   (ii) if a special litigation committee is appointed under section 8694, a determination is made:

         (A) under section 8694(e)(1) that the partnership not object to the action; or

         (B) under section 8694(e)(5)(i) that the plaintiff continue the action;

(2) demand is excused under subsection (b);

(3) the action is maintained for the limited purpose of seeking court review under section 8694(f); or

(4) the court has allowed the action to continue under the control of the plaintiff under section 8694(f)(3)(ii).

(b) Prior demand excused. –

   (1) A demand under subsection (a)(1) is excused only if the partner makes a specific showing that immediate and irreparable harm to the limited partnership would otherwise result.

   (2) If demand is excused under paragraph (1), demand shall be made promptly after commencement of the action.

(c) Contents of demand. – A demand under this section must be in record form and give notice with reasonable specificity of the essential facts relied upon to support each of the claims made in the demand.

(d) Additional claims. – If a derivative action is commenced after a demand has been made under this section and includes a claim that was not fairly subsumed under the demand, a new demand must be made with respect to that claim. The new demand shall not relate back to the date of the original demand for purposes of subsection (e).

(e) Statute of limitations. – The making of a demand tolls any applicable statute of limitations with respect to a claim asserted in the demand until the earlier of the date: 

   (1) the partner making the demand is notified either:
(i) that the general partners have decided not to bring an action and not to appoint a special litigation committee; or

(ii) of the determination under section 8694(e) after the appointment of a special litigation committee under section 8694; or

(2) the plaintiff commences an action asserting the claim.

(f) Cross reference. – See section 8615(c)(17) (relating to contents of partnership agreement).

Committee Comment (2016):

This section is patterned in part after Uniform Limited Partnership Act (2001) (Last Amended 2013) (“ULPA”) § 902; and in part after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) (the “ALI Principles”) § 7.03. In 1042 (Pa. 1997), the Pennsylvania Supreme Court adopted Sections 7.02 – 7.10 and 7.13 of the ALI Principles with respect to derivative actions involving business corporations. In the final footnote to its opinion in, the Pennsylvania Supreme Court encouraged Pennsylvania courts to consider the application of the ALI Principles more broadly than the actual holding of the Supreme Court in . This subchapter is patterned generally after provisions of the ULPA with modifications based on the ALI Principles.

The rights that may be enforced in a derivative action include the right to seek redress for a wrong to the limited partnership.

Subsections (a) and (b) follow Section 7.03 of the ALI Principles in adopting a “universal demand” requirement subject to an exception for irreparable injury. Except in the limited situation described in subsection (b)(1), a partner must always demand that the general partners bring an action and allow the limited partnership to respond as provided in this subchapter before the partner may commence a derivative action. This section thus rejects the law as it has developed in Delaware and other states that excuse pre-suit demand in circumstances where it is alleged that demand would be futile.

By its terms, this section permits a general partner as well as a limited partner to bring a derivative action.

If “immediate and irreparable injury” is shown as required by subsection (b), that will not excuse the partner altogether from making demand; judicial review will begin with the response of the general partners. If “immediate and irreparable injury” justifies the commencement of the action without demand and the court grants an injunction to preserve the status quo, subsection (b) contemplates that the general partners would still be given an appropriate time to respond and that further inquiry by the court will focus on the response of the general partners, or a special litigation committee if one is appointed as provided in 15 Pa.C.S. § 8694.

If a derivative action is commenced before demand has been made and the failure to make demand is not excused under subsection (b), under the ALI Principles the appropriate sanction will not be dismissal of the action, but rather an award of costs against the responsible attorney under Section 7.04(d) of the ALI Principles. This approach is consistent with the general policy expressed in Section 7.04(d) in favor of sanctions directed at the attorney (or, when appropriate, the individual client) instead of a
dismissal affecting the interests of all partners.

Subsection (c) requires that a demand be in record form, but this section does not prescribe the manner in which the demand must be delivered to the general partners. The plaintiff should verify that the demand was received to avoid a challenge that demand was not made.

If the general partners do not appoint a special litigation committee in response to a demand, further action by the general partners and demanding partner should be governed by ALI Principles §§ 7.04 - 7.10 and 7.13, as modified by 15 Pa.C.S. §§ 8693 and 8695. If the general partners do appoint a special litigation committee, further action by the general partners, committee and demanding partner should be subject to those sections of the ALI Principles, as modified by this subchapter including specifically 15 Pa.C.S. § 8694 with respect to special litigation committees.

If a derivative action is commenced after a demand has been made and the action includes a claim that was not fairly subsumed under the original demand, subsection (d) requires that a new demand must be made with respect to that claim. With respect to the new claim, the tolling of the statute of limitations under subsection (e) will begin with the date of the new demand and not the date of the original demand.

Section 904 of the ULP A requires that the complaint in a derivative action state that demand was made and the response to the demand, or that demand should be excused. Section 904 has been omitted from Chapter 86 because Pa.R.Civ.Pro 1506 imposes a similar requirement.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“general partner”
“limited partnership”
“partner”
“record form”

§ 8693. Security for costs.

In any action or proceeding instituted or maintained by partners holding transferable interests entitled to receive less than 5% of any distribution by a limited partnership, unless the transferable interests held by the partners have an aggregate fair market value in excess of $200,000, the partnership in whose right the action or proceeding is brought shall be entitled at any stage of the proceedings to require the plaintiffs to give security for the reasonable expenses, including attorneys' fees, that may be incurred by the partnership in connection therewith or for which it may become liable pursuant to section 8468(b) (relating to reimbursement, indemnification, advancement and insurance) to which security the partnership shall have recourse in such amount as the court determines upon the termination of the action or proceeding. The amount of security may, from time to time, be increased or decreased in the discretion of the court upon showing that the security provided has or is likely to become inadequate or excessive. The security may be denied or limited by the court if the court finds after an evidentiary hearing that undue hardship on plaintiffs and serious injustice would result.

Committee Comment (2016):

This section is patterned after 15 Pa.C.S. § 1782(c).
Section 903 of the Uniform Limited Partnership Act (2001) (Last Amended 2013) specifies that a plaintiff partner must be a partner at the time a derivative suit is commenced and also must have been a partner when the conduct underlying the suit occurred or whose status as a partner devolved on the plaintiff from a person who was a partner at the time the conduct occurred. That section has been omitted from Chapter 86 because Pa.R.Civ.Pro. 1506(a) imposes a similar requirement.

The term “verified” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 8612:

“limited partnership”
“partner”
“transferable interest”

The reference in this section to “court” implies any court of competent jurisdiction and not merely the court as defined in 15 Pa.C.S. § 102.

§ 8694. Special litigation committee.

(a) General rule. – If a limited partnership or the general partners receive a demand to bring an action to enforce a right of the partnership, or if a derivative action is commenced before demand has been made on the partnership or the general partners, the general partners may appoint a special litigation committee to investigate the claims asserted in the demand or action and to determine on behalf of the limited partnership or recommend to the general partners whether pursuing any of the claims asserted is in the best interests of the partnership. The partnership shall send a notice in record form to the plaintiff promptly after the appointment of the committee under this section notifying the plaintiff that a committee has been appointed and identifying by name the members of the committee.

(b) Discovery stay. – If the general partners appoint a special litigation committee and an action is commenced before a determination has been made under subsection (e):

(1) On motion by the committee made in the name of the limited partnership, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation, except for good cause shown.

(2) The time for the defendants to plead shall be tolled until the process provided for under subsection (f) has been completed.

(c) Composition of committee. – A special litigation committee shall be composed of two or more individuals who:

(1) are not interested in the claims asserted in the demand or action;

(2) are capable as a group of objective judgment in the circumstances; and
(3) may, but need not, be general or limited partners.

(d) Appointment of committee. – A special litigation committee may be appointed:

(1) by a majority of the general partners not named as actual or potential parties in the demand or action; or

(2) if all general partners are named as actual or potential parties in the demand or action, by a majority of the general partners so named.

(e) Determination. – After appropriate investigation by a special litigation committee, the committee or the general partners may determine that it is in the best interests of the limited partnership that:

(1) an action based on some or all of the claims asserted in the demand not be brought by the partnership but that the partnership not object to an action being brought by the party that made the demand:

(2) an action based on some or all of the claims asserted in the demand be brought by the partnership;

(3) some or all of the claims asserted in the demand be settled on terms approved by the committee;

(4) an action not be brought based on any of the claims asserted in the demand;

(5) an action already commenced continue under the control of:

(i) the plaintiff;

(ii) the limited partnership; or

(iii) the committee;

(6) some or all of the claims asserted in an action already commenced be settled on terms approved by the committee; or

(7) an action already commenced be dismissed.

(f) Court review and action. – If a special litigation committee is appointed and an action is commenced before a determination is made under subsection (e):

(1) The limited partnership shall file with the court after a determination is made under subsection (e) a statement of the determination and a report of the committee. The partnership shall serve each party with a copy of the determination and report. If the partnership moves to file the report under seal, the report shall be served on the parties
subject to an appropriate stipulation agreed to by the parties or a protective order issued by the court.

(2) The partnership shall file with the court a motion, pleading or notice consistent with the determination of the committee under subsection (e).

(3) If the committee makes a determination described in subsection (e)(2), (3), (4), (5)(ii), (6) or (7), the court shall determine whether the members of the committee met the qualifications required under subsection (c)(1) and (2) and whether the committee conducted its investigation and made its recommendation in good faith, independently and with reasonable care. If the court finds that the members of the committee met the qualifications required under subsection (c)(1) and (2) and that the committee acted in good faith, independently and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall:

(i) dissolve any stay of discovery entered under subsection (b);

(ii) allow the action to continue under the control of the plaintiff; and

(iii) permit the defendants to file preliminary objections and other appropriate motions and pleadings.

(g) Attorney General – Nothing in this section shall limit the rights, powers and duties of the Attorney General under other applicable law with respect to a limited partnership organized for a charitable purpose.

(h) Cross reference. – See section 8615(c)(18) (relating to contents of partnership agreement).

Committee Comment (2016):

Subsections (a) – (f) are patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 905.

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. A “SLC” can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of partners who are neither plaintiffs nor defendants (if any), and bring the benefits of a specially tailored business judgment to any judicial decision.

This section’s approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited partnership. Use of a special litigation committee is optional. A partnership agreement can preclude the use of a special litigation committee, rendering this section inapplicable, but cannot otherwise vary this section. 15 Pa.C.S. § 8615(c)(18).

Subsection (a) – The statement in subsection (a) that a special litigation committee may “determine ... whether pursuing any of the claims asserted is in the best interests of the partnership” means that a committee appointed under this section may be given the authority to act
on behalf of the partnership without further action by the general partners.

**Subsection (f)** - Subsection (f) provides for review of the determination of a special committee in two scenarios: (i) where the plaintiff commences a derivative action before the committee has made a determination, or (ii) where the committee makes its determination before an action is commenced. If an action is commenced before the committee makes its determination, judicial review of the committee’s determination will occur in the context of that action. In the second scenario, where an action has not been commenced before the committee makes its determination, the plaintiff may seek review of the determination under this subsection by filing a derivative action.

The standard stated for judicial review of the determination of a special litigation committee follows, 393 N.E. 2d 994 (N.Y. 1979) rather than, 430 A.2d 779 (Del. 1981), because the latter’s reference to a court’s business judgment has generally not been followed in other states. In essence, a special litigation committee is intended to function as a surrogate decision-maker, allowing the limited partnership to make what is fundamentally a business decision. If a court determines that the members of the committee were disinterested and independent and that the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, it makes no sense to substitute the court’s legal judgment for the business judgment of the committee.

556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court’s role in reviewing an SLC decision:

The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]’s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee’s valuable role in exercising business judgment... [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff’s derivative suit... The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof—the [entity].

For an extensive discussion of how a court should approach the question of independence, see 612 N.W.2d 78, 91 (Wisc. 2000).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“general partner”
“limited partnership”
“shareholder”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“court”
“record form”

§ 8695. **Proceeds and expenses.**
(a) **Proceeds.** – Except as provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise or settlement, belong to the limited partnership and not to the plaintiff; and

(2) if the plaintiff or its counsel receives any proceeds, the proceeds shall be remitted immediately to the partnership.

(b) **Expenses.** – If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the limited partnership, but in no event shall the attorney fees awarded exceed a reasonable proportion of the value of the relief, including nonpecuniary relief, obtained by the plaintiff for the limited partnership.

(c) **Cross reference.** – See section 8615(c)(17) (relating to contents of partnership agreement).

**Committee Comment (2016):**

This section is patterned in part after Uniform Limited Partnership Act (2001) (Last Amended 2013) § 906(a) and (b), except the last clause of subsection (b) which is patterned after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) § 7.17.

Subsection (c) of the Uniform Act, which provides that “a derivative action ... may not be voluntarily dismissed or settled without the court’s approval” has been omitted because Pa.R.Civ.Pro. 1506(d) provides the same result.

**Chapter 87**

**Electing Partnerships**

**§ 8701. Scope and definition.**

(a) **Application of chapter.** – This chapter applies to a general or limited partnership formed under the laws of this Commonwealth that elects to be governed by this chapter. Any partnership that desires to elect to be governed by this chapter, or to amend or terminate the election, shall [file in] deliver to the Department of State for filing a statement of election, amendment or termination, as the case may be, which shall be signed by a general partner and shall set forth:

(1) The name of the partnership.

(2) The location of the principal place of business.

(3) The name of each general partner of the partnership as of the date of the statement.
§ 8702. Centralized management.

The business and affairs of every electing partnership shall be managed by one-third or less, but not less than one, of the partners selected for that purpose in the manner provided by any agreement between the partners, and no other partner shall have a right to participate in the management of the partnership. A partner of an electing partnership shall be an agent of the partnership only to the extent that an employee of the partnership would be under like circumstances. In making such a determination, the court may consider among other things whether a person dealing with the partnership has knowledge, as defined in section [8303(a)(relating to knowledge)] 8413(a) (relating to knowledge and notice), that this section is applicable to the partnership.

[There is no Committee Comment to 15 Pa.C.S. § 8702.]

§ 8705. Limited liability in certain cases.

(a) General rule. – The liability of a partner of an electing partnership for the debts and obligations of the partnership shall be satisfied out of partnership assets alone if[]:

(1) the debt or obligation arises from a transaction or occurrence in which the person
dealing with the partnership has notice, as defined in section [8303(b) (relating to notice)]
8413(b) (relating to knowledge and notice), that this section is applicable to the
partnership[; or

(2) the fact that this section is applicable to the partnership has been advertised
in the manner provided by section 8357(a)(2)(ii) (relating to power of partner to bind
partnership to third persons)].

(b) Exceptions. – Subsection (a) does not apply:

(1) Unless otherwise agreed by the obligee, to a debt or obligation arising prior to
the time a partnership becomes an electing partnership[ and complies with subsection
(a)(1) or (2)].

(2) To a transaction or occurrence involving the furnishing or sale of any goods or
services by the partnership.

(c) Professional relationship unaffected. – Subsection (a) shall not afford the partners of
an electing partnership providing professional services with greater immunity than is available to
the officers, shareholders, employees or agents of a professional corporation. See section 2925
(relating to professional relationship retained).

[There is no Committee Comment to 15 Pa.C.S. § 8701.]

Chapter 88

Limited Liability Companies

Subchapter A

General Provisions

Section
8811. Short title and application of chapter.
8812. Definitions.
8813. Knowledge and notice.
§ 8811. Short title and application of chapter.

(a) Short title. — This chapter may be cited as the Pennsylvania Uniform Limited Liability Company Act of 2016.

(b) Initial Application. — Before April 1, 2017, this chapter governs only:

(1) a limited liability company formed on or after [the Legislative Reference Bureau shall insert here the effective date of this chapter]; and

(2) except as provided in subsection (c), a limited liability company formed before [the Legislative Reference Bureau shall insert here the effective date of this chapter] which elects, in the manner provided in its operating agreement or by law for amending the operating agreement, to be subject to this chapter.

(c) Full effective date. — Except as provided in subsection (d), on and after April 1, 2017, this chapter governs all limited liability companies.

(d) Certificates of membership interest. — For purposes of applying this chapter to a limited liability company formed before [the Legislative Reference Bureau shall insert here the effective date of this chapter], language in the company’s certificate of organization authorizing the issuance of certificates of membership interest operates as if that language were in the operating agreement.

(e) Cross reference. — See section 8815(c)(5) (relating to contents of operating agreement).

Committee Comment (2016):

Subsection (a) is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) (“ULLCA”) § 101. Subsections (b) and (c) are patterned after ULLCA § 110.

The Committee Comments to this chapter are intended to form part of the legislative history of the chapter and to be citable as such under 1 Pa.C.S. § 1939. The Committee Comments have been adapted from the commentary to the ULLCA and are intended to supersede that commentary.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”

“limited liability company”
§ 8812. Definitions.

(a) General definitions. – The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

“Certificate of organization.” The certificate required by section 8821 (relating to formation of limited liability company and certificate of organization). The term includes the certificate as amended or restated.

“Contribution.” Property or a benefit described under section 8842 (relating to form of contribution) which is provided by a person to a limited liability company to become a member or in the capacity of a person as a member.

“Distribution.” A direct or indirect transfer of money or other property or incurrence of indebtedness by a limited liability company to a person on account of a transferable interest or in the person’s capacity as a member. The term:

(1) includes:

(i) a redemption or other purchase by a limited liability company of a transferable interest; and

(ii) a transfer to a member in return for the member’s relinquishment of any right to participate as a member in the management or conduct of the company’s activities and affairs or to have access to records or other information concerning the company’s activities and affairs; and

(2) does not include:

(i) amounts constituting reasonable compensation for present or past service or payments made in the ordinary course of business under a bona fide retirement plan or other bona fide benefits program;

(ii) the making of, or payment or performance on, a guaranty or similar arrangement by a company for the benefit of any or all of its members;

(iii) a direct or indirect allocation or transfer effected under Chapter 3 (relating to entity transactions) with the approval of the members; or

(iv) a direct or indirect transfer of:

(A) a governance or transferable interest; or
options, rights or warrants to acquire a governance or transferable interest.

“Limited liability company.” An association formed under this chapter or which becomes subject to this chapter under Chapter 3 or section 8811 (relating to short title and application of chapter).

“Manager.” A person that under the operating agreement of a manager-managed limited liability company is responsible, alone or in concert with others, for performing the management functions stated under section 8847(c) (relating to management of limited liability company).

“Manager-managed limited liability company.” A limited liability company that qualifies as such under section 8847(a).

“Member.” A person that:

(1) has become a member of a limited liability company under section 8841 (relating to becoming a member) or was a member in a company when the company became subject to this chapter under section 8811(b); and

(2) has not dissociated as a member under section 8861 (relating to events causing dissociation).

“Member-managed limited liability company.” A limited liability company that is not a manager-managed limited liability company.

“Operating agreement.” The agreement, whether or not referred to as an operating agreement and whether oral, implied, in record form or in any combination thereof, of all the members of a limited liability company, including a sole member, concerning matters described in section 8815(a) (relating to contents of operating agreement). The term includes the agreement as amended or restated.

“Organizer.” A person that acts under section 8821 to form a limited liability company.

“Professional company.” A limited liability company that renders one or more professional services.

“Transferable interest.” The right, as initially owned by a person in the person’s capacity as a member, to receive distributions from a limited liability company, whether or not the person remains a member or continues to own any part of the right. The term applies to any fraction of the interest, by whomever owned.

“Transferee.” A person to which all or part of a transferable interest has been transferred, whether or not the transferor is a member. The term includes a person that owns a transferable interest under section 8863(a)(3) (relating to effect of dissociation).
(b) Index of other definitions. -- Following is a nonexclusive list of definitions in section 102 (relating to definitions) that apply to this chapter:

"Act" or "action."
"Debtor in bankruptcy."
"Department."
"Jurisdiction of formation."
"Principal office."
"Professional services."
"Property."
"Record form."
"Sign."
"Transfer."

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 102. The definition of "distribution" is patterned in part after 15 Pa.C.S. § 1103 ("distribution").

"Certificate of organization." For the relationship between the certificate of organization and the operating agreement, see 15 Pa.C.S. § 8817(d). This definition is different from the definition in the prior law which included as part of the certificate other documents filed in the department under the prior law.

"Contribution." This definition serves to distinguish capital contributions from other circumstances under which a member or would-be member might provide benefits to a limited liability company ( , providing services to the company as an employee or independent contractor, leasing property to the company).

This definition does not encompass capital raised from transferees. Operating agreements, however, sometimes provide for contributions from transferees. In such circumstances, the default rules for liquidating distributions should be altered accordingly. 15 Pa.C.S. § 8877(b)(1) (referring to distributions to be made “to each owner of a transferable interest that reflects made and not previously returned.”) (emphasis added).

"Distribution." Paragraph (1) of this definition refers to transactions between a limited liability company and one of its members that in the corporate context would be labeled a “redemption.” Paragraph (1) is divided into subparagraphs because ownership interests in a company are conceptually bifurcated into economic rights (or “transferable interests”), which are covered by subparagraph (i), and governance and information rights, which are covered by subparagraph (ii). A redemption, of course, may also involve an entire ownership interest in a company.

The exclusions in paragraph (2) of the definition of “distribution” affect the reach of the clawback provisions in 15 Pa.C.S. § 8846 and also the charging order remedy under 15 Pa.C.S. § 8853. The effect on the clawback provision makes sense conceptually and as a matter of policy.

329 B.R. 252, 266 (8th Cir. BAP 2005), . 452 F.3d 756 (8th Cir. 2006) (“We know of no principle of law which suggests that a manager of a company is required to give up agreed upon salary to pay creditors when business turns bad.”)
“Manager.” Chapter 88 uses “manager” as a term of art that only applies in the context of manager-managed limited liability companies. The phrase “manager-managed” is itself a term of art, referring only to a company whose operating agreement refers to the company as manager-managed. Thus, for purposes of this chapter, if the members of a manager-managed LLC delegate full management authority to one person (whether or not a member), the references in this chapter to “manager” do not apply to that person, even if the members or their operating agreement refers to the person as a “manager.”

This approach has the potential for confusion, but confusion around the term “manager” is common to all limited liability company statutes. The confusion stems from the choice to use “manager” as a term of art in a way that can be at odds with other common usages of the word. For example, a member-managed company might well have an “office manager” or a “property manager.” Moreover, in a manager-managed company, the “property manager” is not likely to be a manager as the term is used in this chapter. The best solution to this nomenclature problem is to have the operating agreement carefully delineate who is and is not a manager as this chapter uses that label.

A manager does not need to be a natural person. For example, one limited liability company can serve as the manager of another limited liability company.

After a person ceases to be a manager, the term “manager” continues to apply to the person’s conduct while a manager. 15 Pa.C.S. § 8847(c)(6).

“Manager-managed limited liability company.” Chapter 88 authorizes the operating agreement rather than the certificate of organization to establish the status of a limited liability company as manager-managed. This is a change from the prior law which required a provision in the certificate if a company were to be manager-managed. The choice of whether to designate a company as manager-managed in its certificate will determine whether the managers will have statutory power to bind the entity. 15 P.C.S. § 8831 which eliminates statutory apparent authority for members and provides statutory apparent authority for managers only if the certificate provides that the company is manager-managed.

A limited liability company that is “manager-managed” under this definition does not change its management structure simply because the members fail to designate anyone to act as a manager. In that situation, absent additional facts, the company is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

“Member.” After a person has been dissociated as a member, the term “member” continues to apply to the person’s conduct while a member. 15 Pa.C.S. § 8863(b).

“Member-managed limited liability company.” Under Chapter 88, member-management is the default mode. 15 Pa.C.S. § 8847(a).

Some member-managed limited liability companies give important managerial responsibilities to one or more members. Because “manager” is a term of art under this chapter and applies only to manager-managed limited liability companies, referring to such members as “managers” risks confusion. In contrast, “managing member” or some other designation such as President or Chief Executive Officer avoids the defined term of “manager” and thereby avoids confusion.

“Operating Agreement.” This definition must be read in conjunction with 15 Pa.C.S. §§ 8815 through 8817, which further describe the operating agreement. An operating agreement is a contract, and therefore all statutory language pertaining to the operating agreement must be understood in the context...
of the law of contracts.

This definition is very broad and recognizes a wide scope of authority for the operating agreement, namely “the matters described in section 8815(a).” Those matters include not only all relations the members and the limited liability company, but also all “activities and affairs of the company and the conduct of those activities and affairs.” 15 Pa.C.S. § 8815(a)(3). Moreover, the definition puts no limits on the form of the operating agreement. To the contrary, the definition contains the phrase “whether oral, implied, in record form or in any combination thereof.”

Unless the operating agreement itself provides otherwise:

An operating agreement may comprise a number of separate documents (or records), however denominated; and subject to 15 Pa.C.S. § 8816(b) (deeming new members to assent to the then-existing operating agreement), a document, understanding etc. can be part of the operating agreement only with the assent of all persons then members.

An agreement among less than all the members might well be enforceable among those members as parties, but would not be part of the operating agreement. However, under 15 Pa.C.S. § 8815(a)(4), an amendment to an operating agreement can be made with less than unanimous consent if the operating agreement itself so provides.

An agreement to form a limited liability company is not itself an operating agreement. The term “operating agreement” presupposes at least one “member,” and a person cannot be a member of a company before the company exists. However, as soon as a company has any members, the company perforce has an operating agreement. For example, suppose: (i) two persons orally and informally agree to join their activities in some way through the mechanism of a limited liability company; (ii) they form the company or cause it to be formed; and (iii) without further ado or agreement, they become the company’s initial members. The company has an operating agreement. In the words of this definition, “all the members” have agreed on who the members are, and that agreement – no matter how informal or rudimentary – is an agreement “concerning the matters described in section 8815(a).” To the extent the agreement does not provide the “rules of the game,” this title “fills in the gaps.” 15 Pa.C.S. § 8815(b).

The result is the same when a person becomes the sole initial member of a limited liability company, so long as the person has any understanding or intention with regard to the company. Any such understanding or intention constitutes an agreement “of all the members of [the] limited liability company, including a sole member.”

Chapter 88 does not state a rule as to whether the statute of frauds applies to an oral term of an operating agreement. Case law suggests that the answer is yes., 986 A.2d 1150, 1161 (Del. 2009) (“The legislative history of the LLC Act does not demonstrate the General Assembly’s intent to place LLC agreements outside of the statute of frauds.”) (applying the Delaware one-year provision to an alleged oral buy-out agreement), negated by 2010 Del Laws, ch. 287 (H.B. 372), §§ 1 and 31 (pertaining to statutes of fraud generally).

The Delaware court decision is consistent with partnership cases. “Partnership agreements, like other contracts, are subject to the Statute of Frauds. A contract of partnership for a term exceeding one year is within the Statute of Frauds and is void unless it is in writing [and signed by the party to be bound]; however, a contract establishing a partnership terminable at the will of any partner is generally held to be capable of performance by its terms within one year of its making and, therefore, to be outside
Likewise, the land provision of the statute of frauds “applies to an oral contract to transfer or convey partnership real property, and the interest of the other partners therein, to one partner as an individual, as well as to a parol contract by one of the parties to convey certain land owned by him individually to the partnership, or to another partner, or to put it into the partnership stock.”) , 287 P. 55, 56 (Wash. 1930) (quoting 27 CORPUS JURIS 220).

Pennsylvania law on the statute of frauds does not include a one-year provision similar to what was at issue in the and cases, but other aspects of the statute of frauds may apply. , 13 Pa.C.S. § 2201 and 33 P.S. §§ 1 through 5.

15 Pa.C.S. § 8817(e) with respect to prohibiting oral operating agreements and oral amendments or modifications of operating agreements.

“Organizer.” – An organizer does not need to be a prospective member of the limited liability company. Unless the organizer will be the sole initial member of the company, as a matter of agency law and 15 Pa.C.S. § 8841(a) and (b), the organizer is acting on behalf of the person or persons who have agreed to become the initial member or members of the company. The organizer does not act on behalf of the company, because a person cannot be an agent of an organization that does not yet exist. RESTATEMENT (THIRD) OF AGENCY (2006) § 4.04, cmt. c (“Nonexistent principals”).

“Transferable interest.” - A dissenting or dissenting provision in the operating agreement or the consent of the members, a “transferable interest” is the only interest in a limited liability company that can be transferred to a non-member. 15 Pa.C.S. § 8852.

“Transferable interest” is defined “as initially owned by a person in the person’s capacity as a member,” because this chapter does not contemplate a limited liability company directly creating interests that comprise only economic rights. 15 Pa.C.S. §§ 8841 (addressing how a person becomes a member) and 8852 (addressing how a person becomes a transferee).

“Transferee.” – Under 15 Pa.C.S. § 8863(a)(3), subject to limited exceptions, “any transferable interest owned by the person in the person’s capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee” following dissociation.

§ 8813. Knowledge and notice.

(a) Knowledge. – A person knows a fact if the person:

(1) has actual knowledge of it; or

(2) is deemed to know it under subsection (d) or law other than this chapter.

(b) Notice. – A person has notice of a fact if the person has reason to know the fact from all the facts known to the person at the time in question.

(c) Constructive notice. – A person not a member or manager is deemed to have notice of:
(1) the dissolution of a limited liability company 90 days after a certificate of
dissolution under section 8872(b)(2)(i) (relating to winding up and filing of certificates) is
effective;

(2) the termination of a company 90 days after a certificate of termination under
section 8872(f) is effective; and

(3) the participation of a company in a merger, interest exchange, conversion,
division or domestication, 90 days after a statement of merger, interest exchange,
conversion, division or domestication under Chapter 3 (relating to entity transactions)
becomes effective.

(d) Notification. – Except as provided under section 113(b) (relating to delivery of
document), a person notifies another person of a fact by taking steps reasonably required to
inform the other person in ordinary course, whether or not those steps cause the other person to
know the fact.

(e) Transfer of real property. – A person not a member or manager is deemed to know of
a limitation on authority to transfer real property as provided under section 8832(g) (relating to
certificate of authority).

(f) Effect of manager’s knowledge or notice. – If the certificate of organization of a
limited liability company provides that it is manager-managed, a manager’s knowledge or notice
of a fact relating to the company is effective immediately as knowledge of or notice to the
company, except in the case of a fraud on the company committed by or with the consent of the
manager.

Committee Comment (2016):
This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 103.

This section does not contain any generally applicable provisions determining when an organization
is charged with knowledge or notice, because those imputation rules: (i) comprise core topics within the
law of agency; (ii) are very complicated; (iii) should not have any different content under this chapter
than in other circumstances; and (iv) are the subject of considerable attention in the RESTATEMENT

“Notice” is not defined to include “knowledge.” Although conceptualizing the latter as giving the
former makes logical sense and has a long pedigree, that conceptualization is at odds with ordinary usage.
In ordinary usage, notice has a meaning separate from knowledge. Chapter 88 follows ordinary usage and
therefore contains some references to “knowledge or notice.”

Subsection (a)(2) – In this context, the most important source of “law other than this chapter” is the
common law of agency.

Subsection (b) – The “facts known to the person at the time in question” include facts the person is
Subsection (d) – If a person notifies another person of a fact, the other person has reason to know the fact and therefore has notice under subsection (b). However, a person can have notice of a fact without having been notified of the fact.

Subsection (f) – Under the prior law, if a limited liability company was to be managed by managers with statutory apparent authority to bind the company, the certificate of organization was required to include a statement that the company was manager-managed. If the certificate did not state that the company was manager-managed, then the members had apparent authority to bind the company. This chapter provides for apparent authority only in the case of a company whose certificate provides that it is manager-managed. Subsection (f) contains a special rule for attributing to a company information possessed by or communicated to a manager if the certificate provides that the company is manager-managed. A manager to which notice may be given under subsection (f) is a “manager” as defined in 15 Pa.C.S. § 8812, and notice to a person with a title of “manager,” such as a property manager, will not be effective unless the person is also a manager as so defined.

Subsection (f) will not apply in the case of notice, etc. to a manager if the certificate of organization does not provide that the company is manager-managed. Whether the knowledge of, notice to, or receipt of a notification by a member or manager of a limited liability company whose certificate of organization does not provide that it is manager-managed will be effective with respect to the company will depend on the actual authority the member or manager has with respect to the affairs of the company.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- “certificate of organization”
- “limited liability company”
- “manager”
- “member”

§ 8814. Governing law.

(a) General rule. – The law of this Commonwealth governs:

(1) the internal affairs of a limited liability company; and

(2) the liability of a member as member and of a manager as manager for the debts, obligations or other liabilities of a limited liability company.

(b) Cross reference. – See section 8815(c)(6) (relating to contents of operating agreement).
Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 104.

Subsection (a)(1) – Like any other legal concept, “internal affairs” may be indeterminate at its edges. However, the concept certainly includes interpretation and enforcement of the operating agreement, relations among the members, relations between the limited liability company and a member, relations between a manager-managed limited liability company and a manager, and relations between a manager of a manager-managed limited liability company and the members. Compare Restatement (Second) of Conflict of Laws (1971) § 302, cmt. a (defining “internal affairs” with reference to a corporation as “the relations inter se of the corporation, its shareholders, directors, officers or agents”).

The concept of “internal affairs” does not include whether a person has power to bind a limited liability company. Restatement (Second) of Conflict of Laws § 292(2) (1971) (“The principal will be held bound by the agent’s action if he would so be bound under the local law of the state where the agent dealt with the third person, provided at least that the principal had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent had such authority.”); § 295(1) (“Whether a partnership is bound by action taken on its behalf by an agent in dealing with a third person is determined by the local law of the state selected by application of the rule of § 292.”); Restatement (First) of Conflict of Laws § 345, cmt. c (1934) (Law Governing Effect of Act of Agent or Partner) (“If... the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for unauthorized conduct of the agent or partner in accordance with the law of that state.”).

The operating agreement cannot alter this section. 15 Pa.C.S. § 8815(c)(6). This approach comports with the law of other businesses entities whose formation or legal status depends at least in part on a publicly-filed record.

Subsection (a)(2) – This paragraph obviously encompasses 15 Pa.C.S. § 8834 (the liability shield) but does not necessarily encompass a claim that a member or manager is liable to a third party for: (i) having purported to bind a limited liability company to the third party; or (ii) having committed a tort against the third party while acting on the limited liability company’s behalf or in the course of the company’s business. That liability is not by status (, not “as member ... [or] as manager”) but rather results from function or conduct. Compare 15 Pa.C.S. § 8831(c) (stating that, although this chapter does not make a member as member the agent of a limited liability company, other law may make a limited liability company liable for the conduct of a member).

“Internal affairs” and the “liability of a member as member” are mentioned separately because it can be argued that the liability of members and managers to third parties is not an internal affair. Restatement (Second) of Conflict of Laws (1971), § 307 (treating shareholders’ liability separately from the internal affairs doctrine). A few cases subsume owner/manager liability into internal affairs, but many do not. 8 F.3d 130, 132 (2nd Cir. 1993) (holding that the corporation’s “primary purpose is to insulate shareholders from legal liability” and therefore “the state of incorporation has the greater interest in determining when and if that insulation is to be stripped away”) (quoting 756 F. Supp. 126, 131 (S.D.N.Y. 1991) (internal quotation marks omitted). In any event, most (if not all) limited liability company statutes follow the rule stated in this paragraph.

Moreover, in the case law, “The general rule is that a plaintiff’s alter ego theory is governed by the law of the state in which the business at issue is organized.” 549 F.
The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- "limited liability company"
- "manager"
- "member"

The term "obligation" used in this section is defined in 15 Pa.C.S. § 102.

§ 8815. Contents of operating agreement.

(a) Scope of operating agreement. - Except as provided under subsections (c) and (d), the operating agreement governs:

1. relations among the members as members and between the members and the limited liability company;
2. the rights and duties under this title of a person in the capacity of a member or manager;
3. the activities and affairs of the company and the conduct of those activities and affairs;
4. the means and conditions for amending the operating agreement; and
5. the means and conditions for approving a transaction under Chapter 3 (relating to entity transactions).

(b) Title applies generally. - To the extent the operating agreement does not provide for a matter described in subsection (a), this title governs the matter.

(c) Limitations. - An operating agreement may not do any of the following:

1. Vary a provision of Chapter 1 (relating to general provisions) or Subchapter A of Chapter 2 (relating to names);
2. Vary the right of a member to approve a merger, interest exchange, conversion, division or domestication under section 333(a)(2) (relating to approval of merger), 343(a)(2) (relating to approval of interest exchange), 353(a)(3) (relating to approval of conversion), 363(a)(2) (relating to approval of division) or 373(a)(2) (relating to approval of domestication).
(3) Vary the required contents of a plan of merger under section 332(a) (relating to plan of merger), plan of interest exchange under section 342(a) (relating to plan of interest exchange), plan of conversion under section 352(a) (relating to plan of conversion), plan of division under section 362(a) (relating to plan of division) or plan of domestication under section 372(a) (relating to plan of domestication).

(4) Vary a provision of Chapter 81 (relating to general provisions).

(5) Vary the provisions of section 8811(b), (c) and (d) (relating to short title and application of chapter).

(6) Vary the law applicable under section 8814 (relating to governing law).

(7) Vary a provision of section 8818(d) (relating to characteristics of limited liability company).

(8) Vary a provision of section 8819 (relating to powers).

(9) Vary any requirement, procedure or other provision of this title pertaining to:

(i) registered offices; or

(ii) the department, including provisions pertaining to documents authorized or required to be delivered to the department for filing under this title.

(10) Provide indemnification or exoneration in violation of the limitations in sections 8848(g) (relating to reimbursement, indemnification, advancement and insurance), 8849.1(j) (relating to standards of conduct for members) and 8849.2(h) (relating to standards of conduct for managers).

(11) Eliminate the duty of loyalty provided for in section 8849.1(b)(1)(i) or (ii) or (2) or the duty of care of a member in a member-managed company, except as provided in subsection (d).

(12) Eliminate the duty of loyalty provided for in section 8849.2(b)(1)(i) or (ii) or (2) or the duty of care of a manager, except as provided in subsection (d).

(13) Vary the contractual obligation of good faith and fair dealing under section 8849.1(d) or 8849.2(d), except as provided in subsection (d).

(14) Restrict the duties and rights under section 8850 (relating to rights to information), except as provided in subsection (d).

(15) Vary the causes of dissolution specified in section 8871(a)(4) (relating to events causing dissolution).
(16) Vary the requirements to wind up the company’s activities and affairs specified in section 8872(a), (b)(1), (e) and (f) (relating to winding up and filing of certificates).

(17) Unreasonably restrict the right of a member to maintain an action under Subchapter H (relating to actions by members).

(18) Vary the provisions of section 8884 (relating to special litigation committee), except that the operating agreement may provide that the company may not have a special litigation committee.

(19) Vary a provision of Subchapter I (relating to benefit companies).

(20) Except as provided in section 8817(b) (relating to amendment and effect of operating agreement), restrict the rights under this title of a person other than a member or manager.

(d) Permitted terms. – Subject to subsection (c)(10), the following rules apply:

(1) The operating agreement may:

(i) specify the method by which a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by one or more disinterested and independent persons after full disclosure of all material facts;

(ii) alter the prohibition stated in section 8845(a)(2) (relating to limitations on distributions) so that the prohibition requires only that the company’s total assets not be less than the sum of its total liabilities; and

(iii) impose reasonable restrictions on the availability and use of information obtained under section 8850 and may define appropriate remedies, including liquidated damages, for a breach of any reasonable restriction on use.

(2) To the extent the operating agreement of a member-managed limited liability company expressly relieves a member of a responsibility that the member would otherwise have under this title and imposes the responsibility on one or more other members, the operating agreement also may eliminate or limit any fiduciary duty of the member relieved of the responsibility that would have pertained to the responsibility.

(3) If not manifestly unreasonable, the operating agreement may:

(i) alter the aspects of the duty of loyalty stated under section 8849.1(b)(1)(i) or (ii) or (2) or 8849.2(b)(1)(i) or (ii) or (2);

(ii) prescribe the standards, if not manifestly unreasonable, by which the performance of the contractual obligation of good faith and fair dealing under section 8849.1(d) or 8849.2(d) is to be measured;
(iii) identify specific types or categories of activities that do not violate the
duty of loyalty;
(iv) alter the duty of care; and
(v) alter or eliminate any other fiduciary duty.

(e) Determination of manifest unreasonableness. – The court shall decide as a matter of
law whether a term of an operating agreement is manifestly unreasonable under subsection
(d)(3). The court:

(1) shall make its determination as of the time the challenged term became part of
the operating agreement and by considering only circumstances existing at that time; and

(2) may invalidate the term only if, in light of the purposes, activities and affairs of
the limited liability company, it is readily apparent that:

(i) the objective of the term is unreasonable; or

(ii) the term is an unreasonable means to achieve the term’s objective.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 105.

A limited liability company is as much a creature of contract as of statute. Once a company comes
into existence and has a member, the company necessarily has an operating agreement. the
Committee Comment to 15 Pa.C.S. § 8812 (“operating agreement”). Accordingly, Chapter 88 refers to
“the operating agreement” rather than “an operating agreement.” This phrasing should not, however, be
read to require a limited liability company or its members to take any formal action to adopt an operating
agreement.

The operating agreement and certificate of organization are the exclusive consensual process for
modifying the various default rules in Chapter 88 pertaining to relationships the members and
between the members and the limited liability company. The operating agreement and certificate of
organization also have power over “the rights and duties under this title of a person in the capacity of a
member or manager” pursuant to subsection (a)(2), and “the obligations of a limited liability company
and its members to a person in the person’s capacity as a transferee or person dissociated as a member”
pursuant to 15 Pa.C.S. § 8817(b). For the relationship between the operating agreement and certificate of
organization, 15 Pa.C.S. § 8817(d).

One of the most complex questions in the law of unincorporated business organizations is the extent
to which an agreement among the organization’s owners can affect the fiduciary and other duties of those
who manage the organization (members in a member-managed LLC; managers in a manager-
managed LLC). As explained in detail in the comment to subsection (d)(3), Chapter 88 rejects the notion
that a contract can completely transform an inherently fiduciary relationship into a merely arm’s length
association. Within that limitation, however, this section provides substantial power to the operating
agreement to reshape, limit, and eliminate fiduciary and other managerial duties.

**Subsection (a)** - This section describes the very broad scope of a limited liability company’s operating agreement, which includes all matters constituting “internal affairs.” Compare 15 Pa.C.S. § 8814(a)(1) (using the phrase “internal affairs” in stating a choice of law rule). This broad grant of authority is subject to the restrictions stated in subsection (c), including the broad restriction stated in subsection (c)(20) (concerning the rights under this chapter of third parties).

**Subsection (a)(2)** - Under this paragraph, the operating agreement has the power to affect the rights and duties of managers (including non-member managers). Because the term “operating agreement” is defined in 15 Pa.C.S. § 8812 to include “the agreement as amended or restated,” this paragraph gives the members the ongoing power to define the role of a company’s managers. Power is not the same as right, however, and exercising the power provided by this paragraph might constitute a breach of a separate contract between the company and the manager. A non-member manager might also have rights under 15 Pa.C.S. § 8817(a) to approve amendments to the operating agreement.

**Subsection (a)(4)** - Under this paragraph, the operating agreement can control both the quantum of consent required (majority of members) and the means by which the consent is manifested (prohibiting modifications except when consented to in writing). Under subsection (b), if the operating agreement does not address the issue, this chapter provides the rule. 15 Pa.C.S. § 8847(b)(6) and (c)(3)(iii) each require the affirmative vote or consent of all the members.

Under 15 Pa.C.S. § 110 (supplemental principles of law) the parol evidence rule will apply to a written operating agreement when appropriate under contract law.

**Subsection (b)** - To the extent the operating agreement does not determine an matter, this title determines the matter. The provisions of this title outside of this chapter that apply to limited liability companies are Chapters 1, 2, 3, and 81. The operating agreement may vary any rule pertaining to these matters, except as provided in subsections (c) and (d).

**Subsection (c)** - This subsection lists the provisions of this title that cannot be varied or may be varied subject to a stated limitation. If a person claims that a term of the operating agreement violates this subsection, as a matter of ordinary procedural law the burden of proof is on the person making the claim.

**Subsection (c)(1)** - One of the provisions of Chapter 1 that cannot be varied under this paragraph is 15 Pa.C.S. § 144 which provides a right to seek a court order to compel the signing and filing of a document with the department when “a person required by this title to sign a document or deliver a document to the department for filing under this title does not do so.”

**Subsection (c)(2)** - The operating agreement may modify the requirements for approval of fundamental transactions such as mergers, conversions, etc. In contrast, the operating agreement may not vary the approval requirements listed in this paragraph because they protect members from having personal liability imposed on them without their express consent.

**Subsection (c)(3)** - Because these plans are the basic “deal documents” for each of the organic transactions contemplated in Chapter 3, the operating agreement may not vary the contents of these plans.

**Subsection (c)(6)** - 15 Pa.C.S. § 8814 states that Chapter 88 provides the law applicable to: (i) the internal affairs of a limited liability company formed under this chapter; and (ii) the liability of members and managers for obligations of the company. The organizers of a company make this choice of law by choosing to form a company under this chapter. Domestication to another jurisdiction under 15 Pa.C.S.
Subch. 3G will re-set the choice of law, but the operating agreement cannot.

**Subsection (c)(8)** - Under 15 Pa.C.S. § 8818(a), a limited liability company is an entity distinct from its members, and the members lack the power to alter the characteristics stated in 15 Pa.C.S. § 8819 that flow from the status of the company as a separate entity.

**Subsection (c)(9)** - This prohibition is arguably implicit in subsection (c)(20) (affecting rights under this act of third parties) but is stated expressly to avoid any doubt.

**Subsection (c)(10)** - These restrictions are ubiquitous in the law of business entities and, in conjunction with other provisions of this section, control the otherwise very broad power of an operating agreement to affect fiduciary and other duties.

This paragraph pertains to indirect as well as direct efforts to provide indemnification or exoneration and thus limits how far an operating agreement can go in providing for indemnification. 15 Pa.C.S. § 8848(b) (stating a default rule for indemnification). Also, in accordance with this paragraph, an exculpatory provision cannot shield against a member’s claim of oppression. 15 Pa.C.S. § 8871(a)(4)(iii).

**Subsection (c)(11) and (12)** - These limitations are less far-reaching than might first appear because subsection (d) specifically authorizes substantial alterations to the duties of loyalty and care, including restricting and substantially eliminating those duties under certain circumstances.

**Subsection (c)(13)** - 15 Pa.C.S. §§ 8849.1(d) and 8849.2(d) refer to the “contractual obligation of good faith and fair dealing,” which contract law implies in every contract. An operating agreement that seeks to “prescribe the standards ... by which the performance of [that] obligation ... is to be measured” should expressly refer to the obligation.

**EXAMPLE:** The operating agreement of a manager-managed limited liability company gives the manager the discretion to cause the company to enter into contracts with affiliates of the manager (so-called “Conflict Transactions”). The agreement further provides: “When causing the Company to enter into a Conflict Transaction, the manager complies with 15 Pa.C.S. § 8849.2(d) if a disinterested person, knowledgeable in the subject matter, states in writing that the terms and conditions of the Conflict Transaction are equivalent to the terms and conditions that would be agreed to by persons at arm’s length in comparable circumstances.” This provision “prescribe[s] the standards ... by which the performance of the obligation is to be measured” in a manner that is not manifestly unreasonable.

**EXAMPLE:** Same facts as the previous example, except that, during the performance of a Conflict Transaction, the manager causes the limited liability company to waive material protections under the applicable contract. The standard stated in the previous example does not apply to this conduct. 15 Pa.C.S. § 8849.2(d) therefore applies to the conduct without any direct contractual delineation. However, other terms of the agreement may be relevant to determining whether the conduct violates 15 Pa.C.S. § 8849.2(d).

**EXAMPLE:** The operating agreement of a manager-managed limited liability company gives the manager “sole discretion” to make various decisions. The agreement further provides: “Whenever this agreement requires or permits a manager to make a decision that has the potential to benefit one class of members to the detriment of another class, the manager complies with 15 Pa.C.S. §
8849.2(d) if the manager makes the decision with:

a. the honest, subjective belief that the decision:
   i. serves the best interests of the Company; or
   ii. at least does not injure or otherwise disserve those interests; and

b. the reasonable belief that the decision breaches no member’s rights under this agreement."

This provision prescribes the standards by which the performance of the obligation is to be measured in a manner that is not manifestly unreasonable.

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Subsection (c)(14) – Although phrased as a restriction, this provision grants substantial power to the operating agreement because of the application of the rules in subsection (d).

Example: A law firm operates as a limited liability company, and the operating agreement provides that a “Compensation Committee” periodically decides each partner’s compensation. The agreement also states that only members who are on the Compensation Committee may have access to the Committee’s compensation decisions pertaining to other members. This restriction is reasonable.

15 Pa.C.S. § 8850(h) also empowers a limited liability company “as a matter within the ordinary course of its activities and affairs [to] impose reasonable restrictions and conditions on access to and use of information” obtained under section 8850.

In determining whether a restriction is reasonable, a court might consider: (i) the danger or other problem the restriction seeks to avoid; (ii) the purpose for which the information is sought; and (iii) whether, in light of both the problem and the purpose, the restriction is reasonably tailored. In addition, a restriction that is reasonable when applied to a non-managing member in a manager-managed limited liability company might be unreasonable when applied to a managing member or in the context of a member-managed company.

Subsection (c)(15) – The operating agreement may not change the stated grounds for judicial dissolution but may determine the forum in which a claim for dissolution under 15 Pa.C.S. § 8871(a)(4) is determined. For example, arbitration and forum selection clauses are commonplace in business relationships in general and in operating agreements in particular.

Subsection (c)(16) – The cited provisions comprise the nonwaivable aspects of winding up a dissolved limited liability company. The other provisions of 15 Pa.C.S. § 8872 are permissive.

Subsection (c)(17) – The default rule under Subchapter H is that both members and managers have standing to maintain a derivative suit. Because this subsection only relates to restrictions imposed by an operating agreement on the right of members to maintain a derivative action, the operating agreement is free to restrict in any way – or even eliminate – the right of a manager to maintain a derivative action.

In , 692 A.2d 1042 (Pa. 1997), the Pennsylvania Supreme Court adopted Sections 7.02 – 7.10 and 7.13 of the American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) (the “ALI Principles”) in a case involving a business corporation. The ALI Principles themselves limit their scope to business corporations because Section 1.12 of the ALI Principles defines a “corporation” for purposes of the ALI Principles as a business corporation. In the final footnote to its opinion in , however, the Pennsylvania Supreme Court encouraged
Pennsylvania courts to consider the application of the ALI Principles more broadly than the actual holding of the Supreme Court in Subchapter H regarding actions by members generally follows the ALI Principles, but with changes that recognize the differences between business corporations and limited liability companies. Section 7.02 of the ALI Principles gives directors standing to maintain a derivative action. 15 Pa.C.S. § 8882 provides as a default rule that managers will have standing to maintain a derivative action. In some companies, managers occupy a position analogous to corporate directors, but in other companies the position of manager is more akin to that of a corporate officer. Thus, subsection (c)(17) takes a more permissive approach to managers than to members.

Subchapter H governs a member’s rights to bring direct and derivative actions. Subsection (c)(17) adopts the position that it would be unreasonable to frustrate these rights but not unreasonable to channel their exercise. For example, the operating agreement might select a forum or provide for arbitration of both direct and derivative claims.

**Subsection (c)(18)** - An operating agreement may not alter the rules for a special litigation committee but may preclude entirely the use of such a committee.

**Subsection (c)(20)** - This limitation pertains only to “the rights under this title of a person other than a member or manager.” The limitation is, however, itself substantially limited by 15 Pa.C.S. § 8816 (pertaining to the operating agreement’s relationship to the limited liability company itself and to persons becoming members) and 15 Pa.C.S. § 8817(b) (pertaining to the operating agreement’s power over the rights of transferees).

**Subsection (d)** - The operating agreement has complete power over the matters described in subsection (a), except as specifically limited by subsections (c) and (d)(3). However, for the convenience of practitioners and the courts, subsection (d)(1) and (2) list various arrangements often found in operating agreements. Subsection (d)(3) lists arrangements subject to the “not manifestly unreasonable” standard. Subsection (e) delineates the manifestly unreasonable standard.

**Subsection (d)(1)(i)** - An arrangement involving “one or more disinterested and independent persons [acting] after full disclosure of all material facts” would “alter ... the aspects of the duty of loyalty stated in 15 Pa.C.S. § 8849.1(b)(1) or (ii) or (2) or 8849.2(b)(1)(i) or (ii) or (2)” and would therefore be subject to the “not manifestly unreasonable standard” of subsection (d)(3)(i).

**Subsection (d)(1)(ii)** - 15 Pa.C.S. § 8845(a)(2) prohibits distributions:

- when, after the distribution, “the company’s total assets would be less than the sum of its total liabilities,”
- when, after the distribution, the assets would be less than the total liabilities “plus the amount that would be needed, if the company were to be dissolved and wound up at the time of the distribution, to satisfy the preferential rights upon dissolution and winding up of members and transferees whose preferential rights are superior to those of persons receiving the distribution.”

The second part of the solvency test pertains to preferential rights to distributions, is thus an internal matter involving just members and any transferees, and is therefore subject to change in the operating agreement.

In contrast, the first part of the test protects third parties - creditors of the limited liability company - and therefore cannot be changed by the operating agreement. Likewise, the operating agreement cannot change the solvency test stated in 15 Pa.C.S. § 8845(a)(1) (that “the company would not be able to pay its debts as they become due in the ordinary course of the company’s activities and affairs”).
Subsection (d)(2) - This provision is limited to member-managed limited liability companies on the premise that: (i) managers are collectively responsible; and (ii) managers may properly delegate a duty but the delegation does not discharge the duty. However, in a manager-managed company (as well as in a member-managed company), subject to subsection (d)(3) the operating agreement may alter or even eliminate fiduciary duties.

Subsection (d)(3) - Chapter 88 rejects the ultra-contractarian notion that fiduciary duty within a business organization is merely a set of default rules and seeks instead to balance the virtues of “freedom of contract” against the dangers that inescapably exist when some have power over the interests of others.

Nonetheless, a properly drafted operating agreement may substantially alter and even eliminate fiduciary duties. Two important limitations exist. First, arrangements subject to this subsection may not be “manifestly unreasonable” as that concept is delineated in subsection (e).

Second, the operating agreement may not transform the relationship among the members, managers, and the limited liability company into an entirely arm’s length arrangement. For example, displacement of fiduciary duties is effective only to the extent that the displacement is stated clearly and with particularity. This rule is fundamental in the jurisprudence of fiduciary duty.

EXAMPLE: A B LLC is a manager-managed limited liability company with three managers and two entirely separate lines of business, the Alpha business and the Beta business. Under A B’s operating agreement: (i) Manager 1’s responsibilities pertain exclusively to the Alpha business; (ii) Manager 2’s responsibilities pertain exclusively to the Beta business; (iii) Manager 1 has no fiduciary duties pertaining to the Beta business; and (iv) Manager 2 has no fiduciary duties pertaining to the Alpha business. The elimination of Manager 1’s fiduciary duties with regard to the Beta business and Manager 2’s fiduciary duties with regard to the Alpha business is not manifestly unreasonable.

Subsection (d)(3)(i) - Subject to the “not manifestly unreasonable” standard, this subparagraph empowers the operating agreement to eliminate all aspects of the duty of loyalty listed in 15 Pa.C.S. §§ 8849.1(b)(1)(i) and (ii) and (2) and 8849.2(b)(1)(i) and (ii) and (2). The obligation of good faith and fair dealing in 15 Pa.C.S. § 8849(d) would remain. As to any other uncodified aspects of the duty of loyalty, subsection (d)(3)(v) (empowering the operating agreement to “alter or eliminate any other fiduciary duty”).

EXAMPLE: A B LLC is a manager-managed limited liability company with three managers and two entirely separate lines of business, the Alpha business and the Beta business. Under A B’s operating agreement: (i) Manager 1’s responsibilities pertain exclusively to the Alpha business; (ii) Manager 2’s responsibilities pertain exclusively to the Beta business; (iii) Manager 1 has no fiduciary duties pertaining to the Beta business; and (iv) Manager 2 has no fiduciary duties pertaining to the Alpha business. The elimination of Manager 1’s fiduciary duties with regard to the Beta business and Manager 2’s fiduciary duties with regard to the Alpha business is not manifestly unreasonable.

Subsection (d)(3)(iii) - Under this subparagraph, an operating agreement might provide that an affiliate of a manager of a manager-managed limited liability company will provide compensated services to the company at a price not exceeding market price, or that the manager may pursue opportunities that otherwise would be company opportunities. Such arrangements are commonplace and permissible.

Subsection (d)(3)(iv) - Subject to the “not manifestly unreasonable” standard and the bedrock requirements stated here and in subsections (c)(11) and (12), the operating agreement can reduce the duty of care almost to nil. In particular, the operating agreement can eliminate the aspects of the duty of care pertaining to gross negligence.

Subsection (e) - This subsection provides rules for applying the concept of “not manifestly unreasonable” to the operating agreement. It requires that the arrangement be not manifestly unreasonable and that it not transform the relationship among the members, managers, and the limited liability company into an entirely arm’s length arrangement.
unreasonable” and specifies:

who decides the issue of “manifestly unreasonable”

“the court ... as a matter of law”;

the framework for determining the issue

determination to be made “in light of the purposes, activities and affairs of the limited
liability company,” subsection (e)(2);

the temporal setting for determining the issue

determination [to be made] as of the time the challenged term became part of the
operating agreement,” subsection (e)(1); and

what information is admissible for determining the issue

“only circumstances existing” when “the challenged term became part of the operating
agreement,” subsection (e)(1).

Subsection (e) provides a very demanding standard for persons claiming that a term of an operating
agreement is “manifestly unreasonable” because it provides that the court may invalidate the term only if, in light of the purposes, activities, and affairs of the limited liability company, it is that
the objective of the term is unreasonable or that the term is an unreasonable means to achieve the term’s objective.

Subsection (e) is very important to the operating agreement (and therefore to Chapter 88) for a
number of reasons:

Determining manifest unreasonableness in the context of owners of an organization is a
different task than doing so in a commercial context, where concepts like “usages of trade” are available to inform the analysis. Each business organization must be understood in its own
terms and context and in light of the practices of its owners.

If loosely applied, the concept of “manifestly unreasonable” would permit a court to rewrite the
members’ agreement, which would destroy the balance Chapter 88 seeks to establish between freedom of contract and fiduciary duty.

Case law has not adequately delineated the concept.

, 408 B.R. 318, 335 (Bankr. N.D. Cal. 2009) (“RUPA does not define what is
‘manifestly unreasonable’ and the parties have not cited, nor can the court locate, a decision
that defines the term. A bare case law or even a dictionary definition, the court must rely on its
common sense to recognize something as manifestly unreasonable.”).

In the context of statutes permitting stock transfer restrictions unless “manifestly
unreasonable,” courts have often ignored the meaning or role of “manifestly.”

, 692 N.W. 2d 144, 152 (N.D. 2005) (stating that “in close corporations, a majority
of courts have sustained restrictions that are determined to be reasonable in light of the relevant
circumstances”); , 638 N.W. 2d 782, 786 (Minn. Ct. App. 2002)
(stating that “the restrictions [on share transfer] are not ‘manifestly unreasonable’ because they are reasonable means to ensure that the management and control of the business remains in the
condition of investors or with people well known to them”) , 633 A.2d 1024,
1027-28 (N.J. Sp. Ct. A pp. Div. 1993) (“We are obliged to apply the statute in a manner
consonant with its essential purpose to permit reasonable restrictions upon alienation.”).

Subsection (e)(1) – The significance of the phrase “as of the time the challenged term became part
of the operating agreement” is best shown by example:

EX A M P L E: When a particular manager-managed limited liability company comes into existence,
its business plan is quite unusual and its success depends on the willingness of a particular
individual to serve as the company’s sole manager. This individual has a rare combination of skills,
experiences, and contacts, which are particularly appropriate for the company’s start-up. In order to
induce the individual to accept the position of sole manager, the members are willing to have the
operating agreement significantly limit the manager’s fiduciary duties. Several years later, when
the company’s operations have turned prosaic and the manager’s talents and background are not
nearly so crucial, a member challenges the fiduciary duty limitations as manifestly unreasonable.
The relevant time under subsection (e)(1) is when the company began. Subsequent developments
are not relevant, except as they might inferentially bear on the circumstances in existence at the
relevant time.

EXAM P LE: As initially adopted, an operating agreement identifies a category of decisions
ordinarily subject to the duty of loyalty and provides that “the manager’s sole, reasonable
discretion” satisfies the duty. A year later, the agreement is amended to delete the word
“reasonable.” Later, a member claims that, without the word “reasonable,” the provision is
manifestly unreasonable. The relevant time under subsection (e)(1) is when the agreement was
amended, not when the agreement was initially adopted.

**Subsection (e)(2)** - If a person claims that a term of the operating agreement is manifestly
unreasonable under subsection (d)(3), as a matter of ordinary procedural law the person making the claim
has the burden of proof.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“manager”
“member”
“operating agreement”

§ 8816. **Application of operating agreement.**

(a) Company bound. – A limited liability company is bound by and may enforce the
operating agreement, whether or not the company has itself manifested assent to the agreement.

(b) Deemed assent. – A person that becomes a member of a limited liability company is
deemed to assent to the operating agreement.

(c) Preformation agreement. – Two or more persons intending to become the initial
members of a limited liability company may make an agreement providing that upon the
formation of the company the agreement will become the operating agreement. One person
intending to become the initial member of a limited liability company may assent to terms
providing that upon the formation of the company the terms will become the operating
agreement.

**Committee Comment (2016):**

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 106.
Subsection (a) – This subsection resolves the twin issues of whether a limited liability company is bound by and may enforce an operating agreement that the company has not signed. This subsection does not consider whether a limited liability company is an indispensable party to a suit concerning the operating agreement. That question is one of procedural law, and the answer can determine whether federal diversity jurisdiction exists.

Subsection (b) – As a result of the deemed assent to the operating agreement by a person becoming a member, the person is bound by the operating agreement and also may enforce its provisions. Given the possibility of oral and implied-in-fact terms in the operating agreement, a person becoming a member of an existing limited liability company should take precautions to ascertain fully the contents of the operating agreement.

Subsection (c) – The second sentence refers to “assent to terms” rather than “make an agreement” because, under venerable principles of contract law, an agreement presupposes at least two parties. Although the definition of “operating agreement” in 15 Pa.C.S. § 8812 specifically contemplates an operating agreement in a single member LLC, a preformation arrangement is not an operating agreement. The earliest a person can become a member is upon the formation of the limited liability company.

15 Pa.C.S. § 8841.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”

“member”

“operating agreement”

§ 8817. Amendment and effect of operating agreement.

(a) Approval of amendments. – An operating agreement may specify that its amendment requires the approval of a person that is not a party to the agreement or the satisfaction of a condition. An amendment is ineffective if its adoption does not include the required approval or satisfy the specified condition. See section 8847(b)(6) and (c)(3)(iii) (relating to management of limited liability company).

(b) Obligations to non-members. – The obligations of a limited liability company and its members to a person in the person’s capacity as a transferee or a person dissociated as a member are governed by the operating agreement. Except as provided in section 8844(d) (relating to sharing of and right to distributions before dissolution) or in a court order issued under section 8853(b)(2) (relating to charging order) to effectuate a charging order, an amendment to the operating agreement made after a person becomes a transferee or is dissociated as a member:

(1) is effective with regard to any debt, obligation or other liability of the limited liability company or its members to the person in the person’s capacity as a transferee or person dissociated as a member; and

(2) is not effective to the extent the amendment imposes a new debt, obligation or other liability on the transferee or person dissociated as a member.
(c) Provisions in filed documents. - If a document delivered by a limited liability company to the department for filing contains a provision that would be ineffective under section 8815(c) or (d)(3) (relating to contents of operating agreement) if contained in the operating agreement, the provision is ineffective in the document.

(d) Conflicts with operating agreement. - Subject to subsection (c):

(1) If a provision of the certificate of organization conflicts with a provision of the operating agreement, the provision of the certificate prevails.

(2) If a document other than its certificate of organization has been delivered by the company to the department for filing and conflicts with a provision of the operating agreement:

(i) the operating agreement prevails as to members, dissociated members, transferees and managers; and

(ii) the document prevails as to other persons to the extent they reasonably rely on the document.

(e) Prohibition of oral amendments. - If a provision of an operating agreement in record form provides that the operating agreement cannot be amended, modified or rescinded except in record form, an oral agreement, amendment, modification or rescission shall not be enforceable.

Committee Comment (2016):

This section is patterned generally after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 107. Subsection (e) is substantially a reenactment of former 15 Pa.C.S. § 8916(a) (second sentence).

Subsection (a) - This subsection permits a non-member to have veto rights over amendments to the operating agreement. An amendment made in derogation of such a veto right is ineffective.

Veto rights are likely to be sought by lenders but may also be attractive to non-member managers.

EXAMPLE: A non-member manager enters into a management contract with the limited liability company, and that agreement provides in part that the company may remove the manager without cause only with the consent of members holding 2/3 of the economic interests. The operating agreement contains a parallel provision, but the non-member manager is not a party to the operating agreement. Later the members amend the operating agreement to change the quantum to a simple majority and thereafter purport to remove the manager without cause. Although the company has undoubtedly breached its contract with the manager and subjected itself to a damage claim, the company has the power under 15 Pa.C.S. § 8815(a)(2) to effect the removal - unless the operating agreement provided the non-member manager a veto right over changes in the quantum provision in which case the amendment would not be effective.

This subsection does not refer to member veto rights because, unless otherwise provided in the operating agreement, the consent of each member is necessary to effect an amendment. 15 Pa.C.S. § 8847(b)(6) and (c)(3)(iii).
Subsection (b) - The law of unincorporated business organizations is only beginning to grapple in a modern way with the tension between the rights of an organization’s owners to carry on their activities as they see fit (or have agreed) and the rights of transferees of the organization’s economic interests. Such transferees can include the heirs of business founders as well as former owners who are “locked in” as transferees of their own interests. 15 Pa.C.S. § 8863(a)(3).

If the law were to categorically favor the owners, there would be a serious risk of expropriation and other abuse. On the other hand, if the law were to grant former owners and other transferees the right to seek judicial protection, that specter could “freeze the deal” as of the moment an owner leaves the enterprise or a third party obtains an economic interest.

There is little case law in this area, and almost all of it pertains to partnerships rather than limited liability companies. The case law clearly favors the remaining owners over former owners and other transferees. , , 849 P.2d 1365, 1367 n.2 (Alaska 1993) (holding that a mere assignee “was not entitled to complain about a decision made with the consent of all the partners” and stating “[w]e are unwilling to hold that partners owe a duty of good faith and fair dealing to assignees of a partner's interest”); , 311 P.2d 972, 975 (Nev. 1957) (“[A]n assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners nor require them to resort to dissolution in order to prevent such a relationship from arising. The stranger remains a stranger entitled only to share in the partnership's worth and to demand an accounting upon dissolution.”)

This subsection follows and other cases by expressly subjecting transferees (including dissociated members) to operating agreement amendments made after the transfer or dissociation, except amendments that increase obligations on transferees. For example, an amendment might extend the duration of a limited liability company but may not institute a new capital call obligation on transferees.

The issue of whether, in extreme and sufficiently harsh circumstances, transferees might be able to claim some type of duty or obligation to protect against expropriation, is a question for other law. Moreover, the wording of the operating agreement may be critical. For example, in , 440 S.W. 3d 798, 813 (Tex. App. 2013), the court: (i) noted that the company’s “Regulations provide[] for the distribution of ‘available cash’ to members quarterly provided that the available cash is not needed for a reasonable working capital reserve;” (ii) also noted that “Jacob [the defendant member] paid himself $100,000 for management services that were not performed and failed to make any profit distributions to Mike [former member and ex-spouse of the plaintiff Parvaneh] or Parvaneh [ex-spouse of Mike, who became Mike’s transferee as part of their divorce proceeding] even though more than $250,000 in undistributed profit had accumulated in the company’s accounts since the mortgage on the property had been paid off in February 2007;” and (iii) concluded that “more than a scintilla of evidence supports the trial court's finding that Jacob failed to make profit distributions to Parvaneh.” In essence, the court upheld a finding that Jacob had breached (or caused the LLC to breach) a contractual obligation to make distributions. But the court went further: “We also agree with the trial court's conclusion that the established facts demonstrated Jacob engaged in wrongful conduct and exhibited a lack of fair dealing in the company's affairs to the prejudice of Parvaneh.”

For the very limited rights in general of transferees, 15 Pa.C.S. § 8852.

Subsection (c) - This provision precludes using the certificate of organization to make an end run around the strictures of 15 Pa.C.S. § 8815(c) and (d)(3).

Subsection (d) - It will be possible, albeit improvident, for a limited liability company’s operating
agreement to be inconsistent with the certificate of organization or other public filings pertaining to the company. In such a circumstance, paragraph (1) provides that the certificate of organization is controlling.

Subsection (d)(1) continues the approach of the prior law and is different from the rule in the Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 107(d). The Uniform Act treats the operating agreement as controlling among the members, transferees, and managers, but has the certificate of organization control with respect to third parties reasonably relying on the certificate. The Committee concluded that it was not necessary or appropriate to change the existing Pennsylvania practice in this regard and that to do so might change the expectations of persons who were relying on the prior law. Subsection (d)(2), however, adopts the uniform rule for all filed documents other than the certificate of organization.

The mere fact that a term is present in the certificate of organization and not in the operating agreement, or , does not automatically establish a conflict. Subsection (d) does not expressly cover a situation in which the certificate of organization contains information in addition to, but not inconsistent with, the operating agreement, and a person relies on the additional information. However, the policy reflected in this subsection seems equally applicable to that situation.

This subsection does not apply to records delivered to the filing office for filing on behalf of persons other than a limited liability company.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“member”
“operating agreement”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“obligation”
“record form”

§ 8818. Characteristics of limited liability company.

(a) Separate entity. – A limited liability company is an entity distinct from its member or members.
(b) Purpose. – A limited liability company may have any lawful purpose other than acting as an insurer, regardless of whether the purpose is for profit. Nothing under this section shall prohibit the organization of an insurance agency licensed in this Commonwealth as a limited liability company. See section 8102 (relating to interchangeability of partnership, limited liability company and corporate forms of organization).
(c) Duration. – A limited liability company has perpetual duration.
(d) Restrictions on nonprofit companies. – If a limited liability company has a purpose
that is not for profit:

(1) Its purpose must be stated in the certificate of organization.

(2) The company shall not distribute any part of its income or profits to its members, managers or officers, except that it may pay compensation in a reasonable amount to those persons for services rendered.

(3) The company may confer benefits on members or nonmembers in conformity with its purposes, may repay capital contributions and may redeem evidences of indebtedness, except when the company is currently insolvent or would thereby be made insolvent or rendered unable to carry on its purposes, or when the fair value of the assets of the company remaining after the conferring of benefits, payment or redemption would be insufficient to meet its liabilities. The company may make distributions of money or property to members upon dissolution or final liquidation as permitted by this chapter.

(4) If the company is organized for a charitable purpose, it may take, receive and hold such real and personal property as may be given, devised to or otherwise vested in the company, in trust, for the purpose or purposes set forth in its certificate of organization. The members, if it is member-managed, or the managers, if it is manager-managed, shall, as trustees of the property, be held to the same degree of responsibility and accountability as other trustees, unless:

(i) a lesser degree or a particular degree of responsibility and accountability is prescribed in the trust instrument;

(ii) if the company is member-managed, the members remain under the control of third persons who retain the right to direct, and do direct, the actions of the members as to the use of the trust property from time to time; or

(iii) if the company is manager-managed, the managers remain under the control of the members or third persons who retain the right to direct, and do direct, the actions of the managers as to the use of the trust property from time to time.

(5) Property of the company committed to charitable purposes shall not, by any proceeding under Chapter 3 (relating to entity transactions) or otherwise, be diverted from the objects to which it was donated, granted or devised, unless and until the company obtains from the court an order under 20 Pa.C.S. Ch. 77 (relating to trusts) specifying the disposition of the property.

(e) Cross reference.—See section 8815(c)(7) (relating to contents of operating agreement).

Committee Comment (2016):
Subsections (a), (b), and (c) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 108. Subsection (b) is also patterned after former 15 Pa.C.S. § 8911(a).
Subsection (d) is patterned after 15 Pa.C.S. § 5551(a) and (b) (paragraph (2)), 5551(c) (paragraph (3)), 5547(a) (paragraph (4)), and 5547(b) (paragraph (5)).

Subsection (a) - The “separate entity” characteristic is fundamental to a limited liability company and is inextricably connected to both the liability shield, 15 Pa.C.S. § 8834, and the inability of creditors of a member or transferee to reach the assets of the limited liability company absent a “reverse pierce” or a claim of fraudulent transfer.

Subsection (b) - The prior law required a limited liability company to have a business purpose. Chapter 88 follows the current trend and takes a more expansive approach. The phrase “any lawful purpose, regardless of whether for profit” encompasses even charitable activities. But if a company wishes to be exempt from tax, it will need to include appropriate provisions in its organic documents.

The cross reference to 15 Pa.C.S. § 8102 is intended to make clear that, with the exception of insurance, a limited liability company may engage in any type of business or activity that a corporation may engage in. A further consequence of that provision is that a company may also engage in any type of business or activity that a general or limited partnership may engage in. In particular, it is intended that a limited liability company may be used to conduct a professional practice, such as accounting, law or medicine, if the ethics of the profession permit the use of a limited liability company. 15 Pa.C.S. § 8834(b) which preserves the professional liability of persons practicing in the form of a limited liability company.

Prior to the enactment of the Professional Corporation Law of 1970, Act of July 9, 1970 (P.L. 461, No. 160), a corporation was prohibited from engaging in the practice of medicine. 199 At. 178 (Pa. 1938). That so-called “corporate practice doctrine” was also generally considered to extend to the practice of other professions as well. Rosoff, 17 Cumberland L.Rev. 485, 490 nt. 11 (1987).

Enactment of the Professional Corporation Law of 1970 made clear that the corporate form could be used to organize a professional practice, and Chapter 29 of the 1988 Business Corporation Law continues to permit the practice of a profession that prior to 1970 could not be organized in the corporate form.

The corporate practice doctrine was generally considered not to apply to a general partnership of professionals, which was seen simply as an amalgam of the individual professional practices of the partners. How the doctrine applied, if at all, to forms of organization other than a corporation or general partnership, however, was never entirely clear. In an opinion issued in 1961, the Attorney General concluded that a medical practice could be organized as a partnership association under the act of June 2, 1874 (P.L. 271, No. 153), even though the partnership association had all four of the characteristics used to determine whether it would be taxable as a corporation under Federal law, so long as a majority of the persons managing the practice were licensed physicians. Title 15 follows the result reached by the Attorney General and as a matter of policy does not differentiate among the various forms of organization authorized by Title 15 for purposes of determining what form is appropriate for the conduct of a profession. The broad principle of subsection (b) is subject to 15 Pa.C.S. § 103(a) which provides that Chapter 88 does not give the individuals conducting a business in the form of a limited liability company any immunity from government regulation provided by or pursuant to a statute applicable to the business in which the company is engaged.

As is the case under 15 Pa.C.S. § 1301 with respect to articles of incorporation, if the certificate of
organization does not contain a statement of general purpose, a statement in the certificate of a particular type of business to be conducted by the company (without an express restriction to that line of business) will nonetheless be sufficient to create a restriction on the purpose of the company.

Subsection (c) – The word “perpetual” is something of a misnomer. In this context, “perpetual” means that Chapter 88: (i) does not require a limited liability company to have a definite term; and (ii) creates no nexus between the dissociation of a member and the dissolution of the company.

Chapter 88 provides several consent-based methods to dissolve a limited liability company. For example, a term specified in the operating agreement, an event specified in the operating agreement, and member consent can each cause the dissolution and winding up of a company. See 15 Pa.C.S. §§ 8871 (events causing dissolution) and 8872 (winding up required upon dissolution).

Subsection (d) – Subsection (d) adds provisions patterned after provisions of the Nonprofit Corporation Law of 1988 prohibiting the payment of distributions (15 Pa.C.S. § 5551) and the diversion of charitable property (15 Pa.C.S. § 5547).

Chapter 88 does not authorize the organization of a nonprofit limited liability company without members. But a structure similar to a nonprofit corporation with a self-perpetuating board and no members may be created by providing that the members of the nonprofit company shall not have a financial interest. See 15 Pa.C.S. § 8841(e).

The benefits that a nonprofit limited liability company may confer on its members under subsection (d)(3) include distributing money or other property to the members.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”
“limited liability company”
“manager”
“member”
“operating agreement”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“property”
“representative”
“transfer”

§8819. Powers.

(a) General rule. – A limited liability company has the power to do all things necessary or convenient to carry on its activities and affairs.

(b) Capacity to sue and be sued. – A limited liability company has the capacity to sue and be sued in its own name.

(c) Certain specifically authorized debt terms. – A limited liability company shall be
subject to section 1510 (relating to certain specifically authorized debt terms) to the same extent as if it were a business corporation.

(d) Cross references. – See sections 8102 (relating to interchangeability of partnership, limited liability company and corporate forms of organization) and 8815(c)(8) (relating to contents of operating agreement).

Committee Comment (2016):

Subsections (a) and (b) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 109. Subsection (c) is a reenactment of former 15 Pa.C.S. § 8926.

Subsection (a). – Subsection (a) differs noticeably from 15 Pa.C.S. § 1502 which enumerates the corporate powers of business corporations. The corporate powers and ultra vires provisions of the 1988 Business Corporation Law reflect the evolution of the corporation law out of the old view that corporations were artificial legal entities created by state law with limited powers. That view no longer describes even corporations, and 15 Pa.C.S. §§ 1501, 1502 and 1503 are needed to reflect the modern view that corporations have the same powers and capacity to act as natural persons. This section thus omits as unnecessary any detailed list of specific powers.

Subsection (a) should be read to include the concept in former 15 Pa.C.S. § 8921(a) that “Except as provided in section 103 (relating to subordination of title to regulatory law), a limited liability company shall have the legal capacity of natural persons to act.”

Subsection (b). – The operating agreement cannot vary the capacity of a limited liability company to sue and be sued. 15 Pa.C.S. § 8815(c)(8). A company’s standing to enforce the operating agreement is a separate matter, which is covered by 15 Pa.C.S. § 8816(a) (stating, as a default rule, that the limited liability company “may enforce the operating agreement”).

Subsection (c) – This subsection makes applicable to domestic limited liability companies the rules regarding the elimination of usury as a defense by corporations. The same result obtains with respect to foreign limited liability companies under 15 Pa.C.S. § 402(g).

The term “limited liability company” used in this section is defined in 15 Pa.C.S. § 8812.

Subchapter B
Formation and Filings

Section
8821. Formation of limited liability company and certificate of organization.
8822. Amendment or restatement of certificate of organization.
8823. Signing of filed documents.
8824. Liability of member, manager or other person for false or missing information in filed document.
8825. Registered office.

§ 8821. Formation of limited liability company and certificate of
organization.

(a) Formation. – One or more persons may act as organizers to form a limited liability company by delivering to the department for filing a certificate of organization.

(b) Required contents of certificate. – A certificate of organization must state:

1. the name of the limited liability company, which must comply with Subchapter A of Chapter 2 (relating to names); and

2. subject to section 109 (relating to commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the company's registered office.

(c) Optional contents of certificate. – A certificate of organization may contain statements as to matters other than those required by subsection (b), but may not vary or otherwise affect the provisions specified under section 8815(c) and (d) (relating to contents of operating agreement) in a manner inconsistent with that section.

(d) Substitute certificate of authority. – A statement in a certificate of organization with respect to a matter described in section 8832(a)(2) or (3) (relating to certificate of authority) is effective as a certificate of authority and the statement is subject to the provisions of section 8832 in the same manner as a certificate of authority.

(e) Effect of certificate of organization. – A provision of the certificate of organization shall be deemed to be a provision of the operating agreement for purposes of any provision of this title that refers to a rule as set forth in the operating agreement.

(f) Time of formation. – A limited liability company is formed when its certificate of organization becomes effective.

(g) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8818(d)(1) (relating to characteristics of limited liability company).
Section 8823 (relating to signing of filed documents).

Committee Comment (2016):

Subsections (a) through (c) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) (“ULLCA”) § 201. Subsection (e) is a reenactment of former 15 Pa.C.S. § 8913(8). Subsection (f) is patterned in part after ULLCA § 201(d).

Subsection (b) – Unlike the approach of the prior law, Chapter 88 does not require that the certificate of organization state whether the limited liability company is manager-managed or member-
managed. Consistent with the approach of the prior law, however, if the status of a company as manager-managed is stated in the certificate of organization, the managers will have the same statutory apparent authority as under the prior law.

The required contents of the certificate of organization are limited just to the name of the limited liability company and its registered office. Because of the ease of preparing and delivering the certificate for filing, there is no need for a provision like 15 Pa.C.S. § 504 which validates certain defective corporations that were purportedly incorporated without complying fully with the required procedures in effect at the time.

Subsection (c) - This provision permits the certificate of organization to contain information beyond that required in subsection (b). A limited liability company should have good reason, however, before choosing to include additional information in its certificate of organization because the information will be available to the public and there is an increased chance of a conflict between the certificate of organization and the operating agreement. Placing additional information in the certificate of organization does not enable a company to “end run” the provisions of 15 Pa.C.S. § 8815(c) and (d) limiting the power of the operating agreement.

Subsection (f) - ULLCA § 201(d) provides that a limited liability company is formed when its certificate of organization has become effective and at least one person has become a member. Under that rule, the existence of a company cannot be determined just from the public record. Subsection (f) adopts the more straight-forward approach of treating the company as having come into existence when its certificate of organization has become effective without regard to whether at least one person has become a member. The Committee believes that approach will provide greater certainty for persons dealing with a company and will have other benefits such as simplifying legal opinions as to the status of a company.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”
“limited liability company”
“member”
“operating agreement”
“organizer”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8822. Amendment or restatement of certificate of organization.

(a) General rule. – A certificate of organization may be amended or restated at any time.

(b) Required contents of certificate of amendment. – To amend its certificate of organization, a limited liability company must deliver to the department for filing a certificate of amendment that states:

(1) the name of the company;
(2) the date of filing of its initial certificate of organization;
(3) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office; and

(4) the amendment.

(c) Restatement. – To restate its certificate of organization, a limited liability company must deliver to the department for filing a certificate of amendment that:

(1) is designated as a restatement; and

(2) includes a statement that the restated certificate supersedes the original certificate and all previous amendments.

(d) Obligation to correct. – If a member of a member-managed limited liability company, or a manager of a manager-managed limited liability company, knows that any information in a filed certificate of organization is inaccurate, the member or manager shall promptly:

(1) cause the certificate to be amended; or

(2) if appropriate, deliver to the department for filing a statement of correction under section 138 (relating to statement of correction) or a statement of abandonment under section 141 (relating to abandonment of filing before effectiveness).

(e) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8823 (relating to signing of filed documents).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 202.

Subsection (d) – This subsection imposes an obligation directly on the members and managers rather than on the limited liability company. The failure of a member or manager to meet the obligation exposes the member or manager to liability to third parties under 15 Pa.C.S. § 8824(a)(2) and might constitute a breach of the duties of the member or manager under 15 Pa.C.S. § 8849.1(c) (members) or 8849.2(c) (managers). In addition, an aggrieved person may seek a remedy under 15 Pa.C.S. § 143, 144, and 8824.

Like other provisions of Chapter 88 requiring records to be delivered to the department for filing, this section is not subject to change by the operating agreement. 15 Pa.C.S. § 8815(c)(9).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:
§ 8823. Signing of filed documents.

(a) Required signatures. – Except as provided in this title, a document delivered to the department for filing under this title relating to a limited liability company must be signed as follows:

(1) Except as provided in paragraphs (2) and (3), a document signed on behalf of a limited liability company must be signed by a person authorized by the company.

(2) A company’s initial certificate of organization must be signed by each organizer.

(3) A document delivered on behalf of a dissolved company that has no member must be signed by the person winding up the company’s activities and affairs under section 8872(c) (relating to winding up and filing of certificates) or a person appointed under section 8872(d) to wind up the activities and affairs.

(4) A certificate of denial by a person under section 8833 (relating to certificate of denial) must be signed by that person.

(5) Any other document delivered on behalf of a person to the department for filing must be signed by that person.

(b) Cross reference. – See section 142 (relating to effect of signing filings).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) (“ULLCA”) § 203(a). Subsections (b) and (c) of ULLCA are supplied by 15 Pa.C.S. § 142.

From the perspective of the department, it is not necessary that a document delivered for filing on behalf of a limited liability company be signed or filed by a member or, in the case of a manager-managed limited liability company, a manager. The operating agreement can impose such a requirement as an matter, but the requirement would not affect the operation of this section.

The department should not check whether a person who signs a document on behalf of a limited liability company actually has that authority, even if a certificate of authority pertaining to the matter is in effect. Indeed, even if the department somehow “knows” of a certificate limiting authority, the department lacks the authority to reject a record on that basis. 15 Pa.C.S. § 135 (noting that the
The department’s review is ministerial and limited to information pertaining to the stated requirements.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- "certificate of organization"
- "limited liability company"
- "member"
- "organizer"

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- "department"
- "sign"

§ 8824. Liability of member, manager or other person for false or missing information in filed document.

(a) General rule. – If a document delivered to the department for filing under this title and filed by the department contains a materially false statement or fails to state a material fact required to be stated, a person that suffers loss by reasonable reliance on the statement or failure to state a material fact may recover damages for the loss from:

(1) a person that signed the document or caused another to sign it on the person’s behalf and knew there was false or missing information in the document at the time it was signed; and

(2) subject to subsection (b), a member of a member-managed limited liability company or a manager of a manager-managed limited liability company if:

(i) the document was delivered for filing on behalf of the company; and

(ii) the member or manager knew or had notice there was false or missing information for a reasonably sufficient time before the document was relied upon so that, before the reliance, the member or manager reasonably could have:

(A) effected an amendment under section 8822 (relating to amendment or restatement of certificate of organization);

(B) filed a petition under section 144 (relating to signing and filing pursuant to judicial order); or

(C) delivered to the department for filing a statement of correction under section 138 (relating to statement of correction) or a statement of withdrawal under section 141 (relating to abandonment of filing before effectiveness).

(b) Substitute responsibility. – To the extent the operating agreement of a member-
managed limited liability company expressly relieves a member of responsibility for maintaining
the accuracy of information contained in documents delivered on behalf of the company to the
department for filing under this chapter and imposes that responsibility on one or more other
members, the liability stated in subsection (a)(2) applies to those other members and not to the
member that the operating agreement relieves of the responsibility.

Committee Comment (2016):
This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 205.

Subsection (a) - This subsection provides for liability to third parties for inaccurate information in
a filed document relating to a limited liability company. It supplements the more general rule on the same
subject in 15 Pa.C.S. § 143. Paragraph (1) requires actual knowledge because the paragraph can inculpate
a person who is neither a member of a member-managed company nor a manager of a manager-managed
company. Under paragraph (2)(ii), notice suffices because (i) the provision only applies to members of a
member-managed company and managers of a manager-managed company; (ii) by status these persons
have overall management authority; and (iii) therefore it is reasonable to impose liability when a person
either knows or has reason to know from all the facts known to the person at the time in question.

Subsection (b) - 15 Pa.C.S. § 8815(d)(2) authorizes the operating agreement to establish an
analogous rule the members. This subsection goes where the operating agreement cannot reach
and affects the rights of third parties.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“manager”
“manager-managed limited liability company”
“member”
“member-managed limited liability company”

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“department”
“sign”

§ 8825. Registered office.

(a) General rule. - Every limited liability company shall have and continuously maintain
in this Commonwealth a registered office which may, but need not, be the same as its place of
business.

(b) Change of registered office. - After organization, a change in the location of the
registered office may be effected at any time by the company. Before the change becomes
effective, the company shall amend its certificate of organization under the provisions of this
chapter to reflect the change in location or shall file in the department a certificate of change of
registered office setting forth:
(1) The name of the company.

(2) The address, including street and number, if any, of its then registered office.

(3) The address, including street and number, if any, to which the registered office is to be changed.

(c) Alternative procedure. – A limited liability company may satisfy the requirements of this chapter concerning the maintenance of a registered office in this Commonwealth by setting forth in any document filed in the department under any provision of this chapter that permits or requires the statement of the address of its then registered office, in lieu of that address, the statement authorized under section 109(a) (relating to name of commercial registered office provider in lieu of registered address).

(d) Cross references. – See:

- Section 108 (relating to change in location or status of registered office provided by agent).
- Section 134 (relating to docketing statement).
- Section 135 (relating to requirements to be met by filed documents).
- Section 136(c) (relating to processing of documents by Department of State).
- Section 8815(c)(7) (relating to contents of operating agreement).
- Section 8823 (relating to signing of filed documents).

Committee Comment (2016):


The only purpose of the registered office location of a limited liability company under Chapter 88 is to determine venue in actions involving the company under Pa.R.Civ.Pro. 2179(a)(1) and the definition of “court” in 15 Pa.C.S. 103. For purposes of the Pennsylvania Rules of Civil Procedure, a limited liability company will probably be deemed a “corporation or similar entity” under Pa.R.Civ.Pro. 2176, rather than a “partnership” under Pa.R.C.P. 2126 or an “association” under Pa.R.Civ.Pro. 2151.

It is not intended that a bare registered office necessarily constitutes the type of regular place of business contemplated by Pa.R.Civ.Pro. 424(2) for purposes of service of process. For example, if a company fails to pay the renewal fees of an agent for the provision of registered office service, the agent may file a statement of change of registered office by agent under 15 Pa.C.S. § 108, terminating its status as agent, and thereafter the former agent will “not have any responsibility with respect to matters tendered to the office” in the name of the company. In view of this possibility, it is assumed that a plaintiff will ordinarily make service on the actual principal place of business of the company, wherever situated, in order to minimize the risk of due process defects in the validity of any resulting judgment.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- “certificate of organization”
- “limited liability company”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter C

Relations of Members and Managers to Persons Dealing with Limited Liability Company

Section

8831. Status of member or manager as agent.

8832. Certificate of authority.

8833. Certificate of denial.

8834. Liability of members and managers.

8835. Taxation of limited liability companies.

§ 8831. Status of member or manager as agent.

(a) No agency power of member as member. – A member is not an agent of a limited liability company solely by reason of being a member.

(b) Agency power of manager. – If the certificate of organization states that the company is manager-managed, the act of a manager for apparently carrying on in the usual way the business of the company binds the company unless the manager so acting has in fact no authority to act for the company in the particular matter and the person with whom the manager is dealing has knowledge of the fact that the manager does not have that authority.

(c) Liability of company under other law. – A person’s status as a member or manager does not prevent or restrict law other than this chapter from imposing liability on a limited liability company because of the person’s conduct.

Committee Comment (2016):

This section is patterned in part after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 301.

The prior law provided for what might be termed “statutory apparent authority” for both members in a member-managed limited liability company and managers in a manager-managed limited liability company by reference to the authority of general partners in a general partnership in the case of a member-managed company or in a limited partnership in the case of a manager-managed company.

Chapter 88 rejects the statutory apparent authority approach except in the case of a manager-managed limited liability company whose certificate of organization includes a statement of its status as manager-managed. The prior law required the certificate of organization to include a statement that the
With the exception of manager-managed limited liability companies identified as such in their certificates of organization, other law – most especially the law of agency – will handle power-to-bind questions. Thus, most limited liability companies formed under this chapter and corporations are subject to the same principles for attributing to the entity the conduct of those who act or purport to act on the entity’s behalf. Restatement (Third) Agency §§ 1.03, cmt. c (manifestations of authority by organizations); 2.01, cmt. e (actual authority); 2.03, cmts. (c) – (e) (apparent authority). 15 Pa.C.S. § 8847 provides the default rules on the actual authority of those who manage an LLC.

**Subsection (c)** – As the “flip side” to subsections (a) and (b), this subsection expressly preserves the power of other law to hold a limited liability company directly or vicariously liable on account of conduct by a person who happens to be a member or manager. For example, given the proper set of circumstances: (i) a member or manager might have actual or apparent authority to bind a company to a contract; (ii) the doctrine of might make a company liable for the tortious conduct of a member or manager (in some circumstances a person acts analogously to a “servant” or “employee” of the company); and (iii) a company might be liable for negligently supervising a member or manager who is acting on behalf of the company. A person’s status as a member or manager does not weigh against these or any other relevant theories of law.

Moreover, subsections (a) and (b) do not prevent member or manager status from being relevant to one or more elements of an “other law” theory. The most likely “other law” theory is the agency doctrine of apparent authority. Of course, if a member or manager lacking actual authority binds a limited liability company through conduct within the person’s apparent authority, the company has a claim against the person. Restatement (Third) of Agency § 8.09 (Duty to Act Only Within Scope of Actual Authority and to Comply with Principal’s Lawful Instructions) (2006). In contrast, if the person lacked even the power to bind the company, the person will be liable directly to the vendor as a matter of agency law. Restatement (Third) of Agency § 6.10 (Agent's Implied Warranty of Authority) (2006).

The common law of agency will determine the apparent authority to bind a limited liability company. In that analysis, what the particular third party knows or has reason to know about the management structure and business practices of the particular company will always be relevant. Restatement (Third) of Agency § 3.03, cmt. b (2006) (“A principal may also make a manifestation by placing an agent in a defined position in an organization .... Third parties who interact with the principal through the agent will naturally and reasonably assume that the agent has authority to do acts consistent with the agent's position ... unless they have notice of facts suggesting that this may not be so.”)

Under subsection (a), the mere fact that a person is a member of a member-managed limited liability company cannot establish apparent authority by position. A course of dealing, however, may easily change the analysis.

**Example:** David is a one of two members of DS, LLC, a member-managed LLC. David orders paper clips on behalf of the LLC, signing the purchase agreement, “David, as a member of DS, LLC.” Absent further facts, David has no apparent authority to bind the LLC.

However, the vendor accepts the order, sends an invoice to the LLC’s address, and in due course
receives a check drawn on the LLC’s bank account. When David next places an order with the vendor, the LLC’s payment of the first order is a manifestation that the vendor may use in asserting that David had apparent authority to place the second order. A successful apparent authority claim also presupposes that: (i) the vendor believed that David was authorized; and (ii) the belief was reasonable. Restatement (Third) of Agency § 3.03 (Creation of Apparent Authority) (2006).

In general, a member’s actual authority to act for a limited liability company will depend fundamentally on the operating agreement.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”

“member”

§ 8832. Certificate of authority.

(a) General rule. – A limited liability company may deliver to the department for filing a certificate of authority signed by the company. The certificate:

(1) must include the name of the company and, subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of its registered office;

(2) with respect to any position that exists in or with respect to the company, may state the authority, or limitations on the authority, of all persons holding the position to:

(i) transfer real property held in the name of the company, including signing an instrument of transfer; or

(ii) enter into other transactions on behalf of, or otherwise act for or bind, the company; and

(3) may state the authority, or limitations on the authority, of a specific person to:

(i) transfer real property held in the name of the company, including signing an instrument of transfer; or

(ii) enter into other transactions on behalf of, or otherwise act for or bind, the company.

(b) Amendment or cancellation. – To amend or cancel a certificate of authority filed by the department, a limited liability company must deliver to the department for filing an amendment or cancellation that states:

(1) the name of the company;
(2) subject to section 109, the address, including street and number, if any, of the company’s registered office;

(3) the date the certificate being affected became effective; and

(4) the contents of the amendment or a statement that the certificate is canceled.

(c) Effect. — A certificate of authority:

(1) supersedes any inconsistent provision of the certificate of organization in effect at the time the certificate of authority becomes effective;

(2) affects only the power of a person to bind a limited liability company with respect to persons that are not members; and

(3) is not binding on the department for purposes of the administration of this title or any other provision of law.

(d) Certificate not evidence of knowledge or notice. — Except as provided in subsections (e), (f), (g) and (h), a limitation on the authority of a person or a position contained in an effective certificate of authority is not by itself evidence of knowledge or notice of the limitation by any person.

(e) Authority not pertaining to real property. — A grant of authority not pertaining to transfers of real property and contained in an effective certificate of authority is conclusive in favor of a person that gives value in reliance on the grant, except to the extent that when the person gives value:

(1) the person has knowledge to the contrary;

(2) the certificate has been canceled or restrictively amended under subsection (b); or

(3) a limitation on the grant is contained in another certificate of authority that became effective after the certificate containing the grant became effective.

(f) Authority to transfer real property. — An effective certificate of authority or certificate of organization that grants authority to transfer real property held in the name of a limited liability company, a certified copy of which certificate is recorded in the office of the recorder of deeds for the county in which the property is located, is conclusive in favor of a person that gives value in reliance on the grant without knowledge to the contrary, except to the extent that when the person gives value:

(1) the certificate has been canceled or restrictively amended under subsection (b), and a certified copy of the cancellation or restrictive amendment has been recorded in the office of the recorder of deeds; or
(2) a limitation on the grant is contained in another certificate of authority that became effective after the certificate containing the grant became effective, and a certified copy of the later-effective certificate is recorded in the office of the recorder of deeds.

(g) Effect of recorded certificate. - If a certified copy of an effective certificate containing a limitation on the authority to transfer real property held in the name of a limited liability company is recorded in the office of the recorder of deeds for the county in which the real property is located, all persons are deemed to know of the limitation.

(h) Effect of dissolution or termination of company. - An effective certificate of dissolution does not cancel a filed certificate of authority for the purposes of subsection (f) and is a limitation on authority for the purposes of subsection (g). An effective certificate of termination cancels a filed certificate of authority.

(i) Automatic cancellation. - Unless earlier canceled, an effective certificate of authority that names an individual as having authority is canceled by operation of law five years after the date on which the certificate, or its most recent amendment, becomes effective. The cancellation operates without need for any recording under subsection (f) or (g).

(j) Effect of certificate of denial. - An effective certificate of denial:

(1) operates as a restrictive amendment under this section and a certified copy may be recorded as provided in subsection (f)(1) by the limited liability company or the person that delivered the certificate of denial to the department for filing;

(2) affects only the authority of a person to bind the company with respect to persons that are not members; and

(3) supersedes any inconsistent provision of the certificate of organization in effect at the time the certificate of denial becomes effective.

(k) Foreign companies. - A foreign limited liability company may deliver a certificate of authority to the department for filing and may record a copy as provided in this section in the same manner and with the same effect as if it were a domestic company and regardless of whether the foreign company is registered to do business in this Commonwealth under Chapter 4 (relating to foreign associations).

(l) Cross references. - See:

- Section 134 (relating to docketing statement).
- Section 135 (relating to requirements to be met by filed documents).
- Section 136(c) (relating to processing of documents by Department of State).
- Section 8823 (relating to signing of filed documents).

Committee Comment (2016):
This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 302.

This section is conceptually divided into two realms: certificates pertaining to the power to transfer interests in the real property of a limited liability company and certificates pertaining to other matters. In the latter realm, certificates are filed only in the department and operate only to the extent the certificates are actually known and relied on by a third party.

As to interests in real property, in contrast, this section: (i) requires double-filing – with the department and with the appropriate recorder of deeds; and (ii) provides for constructive knowledge of certificates limiting authority. Thus, a properly filed and recorded certificate can protect the limited liability company and, in order for a certificate pertaining to real property to be a sword in the hands of a third party, the certificate must have been both filed and properly recorded. It is expected that certificates of authority will most often be used in connection with transactions involving real property.

Under 15 Pa.C.S. § 8821(d), the rules in this section, including the mandated automatic cancellation under subsection (i), also apply to a provision of the certificate of organization that operates as a certificate of authority.

Subsection (a)(2) – This paragraph permits a certificate to designate authority by position (or office) rather than by specific person, thus avoiding the need to file anew whenever a new person assumes the position or the office. This type of certificate will enable limited liability companies to provide evidence of ongoing power to enter into transactions without having to disclose to third parties the entirety of the operating agreement.

Here and elsewhere in the section, the phrase “real property” is intended to include all types of interests in real property, such as mortgages, easements, etc. the definition of “property” in 15 Pa.C.S. § 102.

Subsection (c) – Subsection (c)(2) expresses the very important limitation that this section’s rules do not operate with respect to members. For members, the operating agreement is controlling. However, like any other document delivered for filing on behalf of a limited liability company, a certificate of authority might be some evidence of the contents of the operating agreement.

Subsection (c)(3) makes clear that the department is not affected by a certificate of authority that purports to delineate the authority of persons to sign documents to be delivered for filing on behalf of a limited liability company.

Subsection (d) – The phrase “by itself” is important, because the existence of a limitation of authority could be evidence if, for example, the person in question reviewed the public record at a time when the limitation was of record.

Subsections (f) – (h) – These subsections pertain to transactions in real property and provide a mechanism by which authority to transfer the real property of a limited liability company can be made to appear in the real estate records.

Subsection (f) – This subsection provides a sword for a vendee of real property. If the vendee has “give[n] value in reliance on the grant without knowledge to the contrary,” the certificate of authority protects the vendee against claims that contradict the grant.

Subsection (g) – This subsection provides a shield for the limited liability company as alleged
vendor. If a vendee’s claim contradicts the stated limitation, constructive knowledge (“deemed to know”) defeats the claim even if the vendee gave value and lacked actual knowledge.

Subsection (h) - This subsection integrates certificates of dissolution and termination into the operation of this section. If properly filed with the department and properly recorded in the office for land records, a certificate of termination eliminates the power of any person to transfer real property owned in the name of the limited liability company. No one can have the authority to act for a non-existent entity. RESTATEMENT (THIRD) OF AGENCY § 4.04(1)(a) (2006) (precluding ratification by a principal that did not exist at the time of the unauthorized act).

The effect of a certificate of dissolution depends on the circumstances.

EXAMPLE: ABC, LLC has in effect a properly filed and recorded certificate of authority authorizing ABC’s CEO to transfer real property owned by the company. The proper filing and recording by ABC of a certificate of dissolution cancels the certificate of authority. Subsequently, Buyer gives value in return for a deed signed by the CEO on behalf of ABC. Due to subsections (h) and (f)(1), subsection (f) does not protect Buyer. Moreover, under subsections (g) and (h), Buyer is “deemed to know” of the dissolution. Whether that deemed knowledge functions to deprive the CEO of authority to bind ABC depends on agency law and additional facts. For example, the CEO might have had actual or apparent authority to transfer the real property despite the dissolution of the company.

Subsection (i) - The automatic cancellation under this subsection only applies if the certificate of authority names an individual as having authority. Thus, a certificate that confers authority on anyone holding a specified position with the limited liability company or on an entity will remain in force indefinitely.

Subsection (k) - A certificate of authority filed under subsection (k) with respect to a nonregistered foreign limited liability company will not block the use of the company’s name by another association and does not have the effect of registering the foreign company to do business in Pennsylvania.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“member”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8833. Certificate of denial.

(a) General rule. - A person named in a filed certificate of authority granting that person authority may deliver to the department for filing a certificate of denial that:

(1) states:

(i) the name of the limited liability company;
(ii) subject to section 109 (relating to name of commercial registered office
(3) the date the certificate of authority to which the certificate of denial pertains was filed; and

(2) denies the grant of authority.

(b) Cross references. – See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8823 (relating to signing of filed documents).
Section 8832(j) (relating to certificate of authority).

Committee Comment (2016):

This section is patterned in part after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 303.

A person whose powers are delineated in the public record by another person should have the right to dissent from that delineation. For the effect of a certificate of denial, including the effect of recording a certificate of denial in the land records, 15 Pa.C.S. § 8832(j).

A certificate of denial denies the entire grant of authority in the certificate of authority. If a person wishes to deny authority only in part, either the certificate of authority must be amended to reflect the proper scope of the person’s authority or the person may file a certificate of denial and the limited liability company can then file a new, revised certificate of authority.

The term “limited liability company” used in this section is defined in 15 Pa.C.S. § 8812.
The term “department” used in this section is defined in 15 Pa.C.S. § 102.

§ 8834. Liability of members and managers.

(a) General rule. – A debt, obligation or other liability of a limited liability company is solely the debt, obligation or other liability of the company. A member or manager is not personally liable, directly or indirectly, by way of contribution or otherwise, for a debt, obligation or other liability of the company solely by reason of being or acting as a member or manager. This subsection applies regardless of:

(1) whether the company has a single member or multiple members; and

(2) the dissolution, winding up or termination of the company.

(b) Professional relationship unaffected. – Subsection (a) shall not afford members of a
professional company with greater immunity than is available to the officers, shareholders, 
employees or agents of a professional corporation. See section 2925 (relating to professional 
relationship retained).

   (c) Disciplinary jurisdiction unaffected. – A professional company shall be subject to the 
applicable rules and regulations adopted by, and all the disciplinary powers of, the court, 
department, board, commission or other government unit regulating the profession in which the 
company is engaged. The court, department, board or other government unit may require that a 
company include in its certificate of organization or operating agreement provisions that conform 
to any rule or regulation promulgated before, on or after the effective date of this section for the 
purpose of enforcing the ethics of a profession. This chapter shall not affect or impair the 
disciplinary powers of the court, department, board, commission or other government unit over 
licensed persons or any law, rule or regulation pertaining to the standards for professional 
conduct of licensed persons or to the professional relationship between any licensed person 
rendering professional services and the person receiving professional services.

   (d) Rendering professional services. –

   (1) Except as provided by a statute, rule or regulation applicable to a particular 
profession, a professional company may lawfully render professional services only through 
licensed persons. The company may employ persons not so licensed except that those 
persons shall not render any professional services rendered or to be rendered by it.

   (2) Paragraph (1) shall not be interpreted to preclude the use of clerks, secretaries, 
nurses, administrators, bookkeepers, technicians and other assistants or paraprofessionals 
who are not usually and ordinarily considered by law, custom and practice to be rendering 
the professional service or services for which the professional company was organized nor 
to preclude the use of any other person who performs all of the person’s employment under 
the direct supervision and control of a licensed person. A person shall not under the guise 
of employment render professional services unless duly licensed or admitted to practice as 
required by law.

   (3) Notwithstanding any other provision of law, a professional company may 
charge for the professional services rendered by it, may collect those charges and may 
compensate those who render the professional services.

   (e) Medical professional liability. – A professional company shall be deemed to be a 
partnership for purposes of section 744 of the act of March 20, 2002 (P.L. 154, No. 13), known 
as the Medical Care Availability and Reduction of Error (Mcare) Act.

   (f) Cross reference. – See section 8105 (relating to ownership of certain professional 
partnerships).

Committee Comment (2016):

Subsection (a) is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 
2013) ("ULLCA") § 304(a). ULLCA § 304(b) is found at 15 Pa.C.S. § 8106. Paragraph (a)(1) is
patterned after Va. Code § 13.1-1019. Subsections (b), (c), and (e) are a reenactment of former 15
Pa.C.S. § 8922(b), (c), and (f). Subsection (d) is a generalization of former 15 Pa.C.S. § 8996(c).

Subsection (a) - This subsection shields members and managers against only the debts, obligations
and liabilities of the limited liability company — against an owner’s or manager’s alleged vicarious
liability for the obligations of the entity. The shield is therefore irrelevant to claims seeking to hold a
member or manager directly liable on account of the member’s or manager’s own conduct.

EXAMPLE: A manager personally guarantees a debt of a limited liability company. Subsection
(a) is irrelevant to the manager’s liability as guarantor.

EXAMPLE: A member purports to bind a limited liability company while lacking any agency law
power to do so. The limited liability company is not bound, but the member is liable for having
breached the “warranty of authority” (an agency law doctrine). Subsection (a) does not apply. The
liability is not a debt, obligation, or other liability of the limited liability company, but rather is
the member’s direct liability. Indeed, the liability exists because the limited liability company is
indebted, obligated or liable. RESTATEMENT (THIRD) OF AGENCY § 6.10 (2006).

EXAMPLE: A manager of a limited liability company defames a third party in circumstances that
render the limited liability company vicariously liable under agency law. Under subsection (a), the
third party cannot hold the manager accountable for the liability, but that protection is immaterial. The manager is the tortfeasor and in that role is directly liable to the third party.

EXAMPLE: A limited liability company provides professional services, and one of its members
commits malpractice. The “liability shield” is irrelevant to the member’s direct liability in tort.
However, if the member’s malpractice liability is attributed to the LLC under agency law
principles, the liability shield will protect the other members of the LLC against a claim that they
must make good on the LLC’s liability.

Subsection (a) pertains only to claims by third parties and is irrelevant to claims by a limited
liability company against a member or manager and , 15 Pa.C.S. §§ 8848 (pertaining to a
limited liability company’s obligation to indemnify a member or manager), 8849.1 and 8849.2 (pertaining
to management duties), and 8881 (pertaining to a member’s rights to bring a direct claim against a limited
liability company).

Provisions of regulatory law may impose liability on a member or manager due to a role the person
plays in the limited liability company. , 872 F. Supp. 2d 405, 424 (E.D Pa. 2012) (holding several individuals “subject to secondary individual liability under
PACA [Perishable Agricultural Commodities Act]” because their roles within the company enabled them
to control the relevant assets) (citing (3d Cir.2010); Okla. Stat. Ann. tit. 68, § 1361 (West 2013) (“In the case of a limited liability company, all
managers and members under a duty to collect and remit [sales] taxes for the limited liability company
shall be liable for the tax. If no managers or members have been specified to be under the duty of
withholding and remitting taxes, then all managers and members shall be liable for the tax.”); N.Y. Tax
Law §§1131(1) (defining “persons required to collect tax” as including any LLC manager or employee
responsible for collecting the tax as well as “any member of a ... limited liability company”) and 1133(a)
obligating such persons to collect the taxes) (Mckinney 2013) and
, 828 N.Y.S.2d 712, 714 (N.Y.A.D. 3d Dept. 2007) (stating that “Tax Law § 1133(a)
imposes liability on any person who is responsible to collect a tax”). Subsection (a) does not affect this
“role liability.”
The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- "limited liability company"
- "manager"
- "member"
- "professional company"

The term "obligation" used in this section is defined in 15 Pa.C.S. § 102.

§ 8835. Taxation of limited liability companies.

(a) General rule. – For the purposes of the imposition by the Commonwealth of any tax or license fee on or with respect to any income, property, privilege, transaction, subject or occupation, other than the corporate net income tax, capital stock and foreign franchise tax and personal income tax, a domestic or foreign limited liability company shall be deemed to be a corporation organized and existing under Part II (relating to corporations), and a member of the company, as such, shall be deemed to be a shareholder of a corporation.

(b) Financial institutions. – For purposes of the bank shares tax and the mutual thrift institutions tax, a bank, bank and trust company, trust company, savings bank, building and loan association, savings and loan association or savings institution that is a domestic or foreign limited liability company shall be considered an “institution” as defined by Article VII or Article XV of the Tax Reform Code of 1971.

(c) Political subdivisions. – Nothing in this section shall impair or preempt the ability of a political subdivision to levy, assess or collect any applicable taxes or license fees authorized under the act of December 31, 1965 (P.L. 1257, No. 511), known as The Local Tax Enabling Act, on any limited liability company.

Committee Comment (2016):

This section is derived from former 15 Pa.C.S. § 8925(a).

The term “limited liability company” used in this section is defined in 15 Pa.C.S. § 8812.

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter D
Relations of Members to Each Other and to Limited Liability Company

Section

8841. Becoming a member.
8842. Form of contribution.
8843. Liability for contributions.
§ 8841. Becoming a member.

(a) Single initial member. – If a limited liability company is initially to have only one member, the person becomes a member as agreed by that person and the organizer of the company. That person and the organizer may be, but need not be, different persons. If the initial member and the organizer are different persons, the organizer acts on behalf of the initial member.

(b) Multiple initial members. – If a limited liability company is initially to have more than one member, those persons become members as agreed by those persons and the organizer before the formation of the company. The organizer acts on behalf of the persons in forming the company and may be, but need not be, one of the persons.

(c) Powers and authority of organizer. – Until a limited liability company has its first member, the organizer is deemed to be a manager of the company.

(d) Admission after formation. – After formation of a limited liability company, a person becomes a member:

(1) by action of the organizer if the company does not have any members;

(2) as provided in the operating agreement;

(3) as the result of a transaction effective under Chapter 3 (relating to entity transactions);

(4) with the affirmative vote or consent of all the members; or

(5) as provided in section 8871(a)(3) (relating to events causing dissolution).

(e) Noneconomic members. – A person may become a member without:

(1) acquiring a transferable interest; or

(2) making or being obligated to make a contribution to the limited liability company.
(f) Nature of interest. – The interest of a member in a limited liability company is personal property.

Committee Comment (2016):

Subsections (a), (b), (d) and (e) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 401.

Subsections (a) and (b) – These subsections make explicit the agency relationship between the person acting as organizer and the initial member or members.

Subsection (c) – This subsection has been added to the Uniform Act and permits an organizer to take actions to organize the limited liability company until the company has its first member.

Subsection (d)(4) – Because a limited liability company is in part a creature of contract, consent is determined on an objective basis (i.e., contract law’s “reasonable person” standard). Depending on the terms of the company’s operating agreement, the members’ manifestation of consent might involve detailed formalities, entirely informal activities, or anything in between. Moreover, the operating agreement might reduce the quantum of consent necessary or shift the consent right to a manager.

Because a limited liability company is also a voluntary association, a person cannot become a member without manifesting consent to do so. That consent also is judged objectively.

Under 15 Pa.C.S. § 8816(b), a person that becomes a member of a limited liability company is deemed to assent to the operating agreement, and the agreement binds the member regardless of whether the member has actually indicated assent in any way.

Subsection (e) – To accommodate business practices and also because a limited liability company need not have a business purpose, this subsection permits so-called “non-economic members.” Although a limited liability company may be organized for a nonprofit purpose under 15 Pa.C.S. § 8818, it cannot be organized on a non-member basis like a nonprofit corporation with a self-perpetuating board. But organizing a member-managed company where all of the members are without a financial interest can result in a structure that is the functional equivalent of a nonprofit corporation with a self-perpetuating board.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“member”
“operating agreement”
“organizer”

§ 8842. Form of contribution.

A contribution may consist of:

(1) property transferred to, services performed for or another benefit provided to the
limited liability company;

(2) an agreement to transfer property to, perform services for or provide another benefit to the company; or

(3) any combination of items listed in paragraphs (1) and (2).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 402.

This section is intentionally quite broad, encompassing past, present, and promised benefits. Case law recognizes the intended broadness of this approach. So.3d 660, 664 (La.App. 3 Cir. 2012) (stating that “the creation of an obligation to establish a $1.8 million line of credit was valid consideration for the transfer of 24% of the membership interest in M anchac”) and 946 N.Y.S.2d 248, 249 (N.Y.A.D. 2d Dep’t. 2012) (referring to “the petitioner's contributions to the LLC, which overwhelmingly consisted of services rendered to the LLC in the form of preparing and filing start-up documentation and performing activities associated with the renovation of the business's premises”).

The prior law required a promise to contribute to a limited liability company to be in writing. Former 15 Pa.C.S. § 8931(b). Chapter 88 follows the approach of the Uniform Act and does not contain a statute of frauds specifically applicable to promised contributions. Generally applicable statutes of fraud might apply, however. For example, a promise to contribute land to a limited liability company would be subject to the statute of frauds pertaining to land transfers. 33 P.S. § 1.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“contribution”

“limited liability company”

The term “property” used in this section is defined in 15 Pa.C.S. § 102.

§ 8843. Liability for contributions.

(a) Obligation not excused. – A person’s obligation to make a contribution to a limited liability company is not excused by the person’s death, disability, termination or other inability to perform personally.

(b) Substitute payment. – If a person does not fulfill an obligation to make a contribution other than money, the person is obligated at the option of the limited liability company to contribute money equal to the value, as stated in the records of the company, of the part of the contribution which has not been made.

(c) Compromise of obligation. – The obligation of a person to make a contribution may be compromised only by the affirmative vote or consent of all the members. If a creditor of a
limited liability company extends credit or otherwise acts in reliance on an obligation described
under subsection (a) without knowledge or notice of a compromise under this subsection, the
creditor may enforce the obligation.

Committee Comment (2016):

This section is patterned Uniform Limited Liability Company Act (2006) (Last Amended 2013) §
403.

Subsection (a) - Under common law principles of impracticability, an individual’s death or
incapacity will sometimes discharge a duty to render performance. RESTATEMENT (SECOND) OF
CONTRACTS §§ 261 (Discharge by Supervening Impracticability) and 262 (1981) (Death or Incapacity of
Person Necessary For Performance). This subsection overrides those principles. Moreover, the reference
to “perform personally” is not limited to individuals but rather may refer to any legal person (including an
entity) that has a non-delegable duty.

Subsection (b) - This subsection is a statutory liquidated damages provision, exercisable at the
option of the limited liability company, with the damage amount set according to the value of the
promised, non-monetary contribution.

EXAMPLE: In order to become a member, a person promises to contribute to the limited liability
company various assets which the operating agreement values at $150,000 free and clear. In return
for the person’s promise, and in light of the agreed value, the limited liability company admits the
person as a member with a right to receive 25% of the distributions by the company.

The promised assets are subject to a security agreement, but the member promises to contribute
them “free and clear.” Before the member can contribute the assets, the secured party forecloses on
the security interest and sells the assets at a public sale for $75,000. Even if the $75,000 reflects the
actual fair market value of the assets, under this subsection the limited liability company has a
claim against the member for “money equal to the value of the part of the contribution which has
not been made” – $150,000.

EXAMPLE: Same facts as the previous example, except that the public sale brings $225,000. The
limited liability company is not obliged to invoke this subsection and may instead sue for breach of
the promise to make the contribution, asserting the $225,000 figure as evidence of the actual loss
suffered as a result of the breach.

Subsection (c) – The unanimity requirement expressed in the first sentence of subsection (c) might
indirectly benefit creditors, but the requirement is nonetheless a default rule and therefore may be varied
in the operating agreement. The right of each member to consent is not a right under this title of a person
other than a member or manager and thus is not subject to the protective rule in 15 Pa.C.S. § 8815(c)(20).
In contrast, the right stated in the second sentence fits squarely within 15 Pa.C.S. § 8815(c)(20) and
therefore may not be varied by the operating agreement.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“contribution”
“limited liability company”
“member”
§ 8844. Sharing of and right to distributions before dissolution.

(a) General rule. – Any distribution made by a limited liability company before its dissolution and winding up shall be in equal shares among members and persons dissociated as members, except as provided in section 8852(b) (relating to transfer of transferable interest) or to the extent necessary to comply with a charging order in effect under section 8853 (relating to charging order).

(b) No entitlement to distribution. – Except as provided in subsection (e), a person has a right to a distribution before the dissolution and winding up of a limited liability company only if the company decides to make an interim distribution.

(c) Distribution in kind. – A person does not have a right to demand or receive a distribution from a limited liability company in any form other than money. Except as provided in section 8877(d) (relating to disposition of assets in winding up), a limited liability company may distribute an asset in kind only if each part of the asset is fungible with each other part and each person receives a percentage of the asset equal in value to the person’s share of distributions.

(d) Status as creditor. – If a member or transferee becomes entitled to receive a distribution, the member or transferee has the status of, and is entitled to all remedies available to, a creditor of the limited liability company with respect to the distribution, except that the company’s obligation to make a distribution is subject to offset for any amount owed to the company by the member or transferee on whose account the distribution is made.

(e) Distribution upon an event of dissociation. – Upon the effectiveness of a transaction under Chapter 3 (relating to entity transactions) or an amendment of the certificate of organization or operating agreement that results in either case in an event of dissociation but does not result in the dissolution of the limited liability company, the dissociating member may elect in record form to receive in lieu of the property that the person would be entitled to receive pursuant to the terms of the transaction or amendment:

(1) any distribution to which the member is entitled under the operating agreement on the terms provided in the operating agreement; and

(2) within a reasonable time after dissociation, the fair value of the interest of the member in the company as of the date of dissociation based upon the right of the member to share in distributions from the company.

Committee Comment (2016):

Subsections (a) through (d) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 404. Subsection (e) is derived from former 15 Pa.C.S. § 8933.
Chapter 88 provides only a default rule for rights to share in distributions, and does not provide even a default structure for maintaining capital accounts.

**Subsection (a)** - The operating agreement may give the managers or a specified group or percentage of the members the right to make distributions or redeem membership interests. Because “distribution” is defined in 15 Pa.C.S. § 8812 to include a redemption, it will often not be necessary to refer expressly to redemptions in a provision of the operating agreement relating to distributions.

**Subsection (d)** - 15 Pa.C.S. § 8845(f) pertains to the rights of members and transferees that receive a distribution in the form of indebtedness and section 8845(g) pertains to solvency testing for payments on indebtedness issued to redeem an interest.

**Subsection (e)** - This provision is not found in the Uniform Act. It provides, in effect, for a substitute for dissenters rights in connection with a fundamental transaction under Chapter 3 or an amendment of the certificate of organization or operating agreement.

The “fair value” of the interest of the member is to be fixed generally with reference to the right of the member to share in distributions from the company. As such, it should not include discounts for lack of marketability or minority interest and thus is different from “fair market value,” which term has been specifically avoided.

Drafters of provisions under subsection (e) will need to recognize the separate problems raised by the right to current distributions and the right to a distribution upon dissociation. Only infrequently will a dissociation occur at the same time that a current distribution is to be made. When the two do not coincide, the operating agreement should be clear as to whether a pro rata distribution is to be made and, if so, when. Where an operating agreement distinguishes among distributions based upon cash flow, proceeds from refinancing, proceeds from asset sales, etc., particular attention must be given to the distribution upon dissociation since this section merely provides that it will be based upon the right to share in “distributions,” leaving amplification or particularization to the operating agreement. A further complexity will be created where the operating agreement provides that rights to distributions will vary over the term of the limited liability company.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“distribution”
“limited liability company”
“member”
“operating agreement”
“transferable interest”
“transferee”

§ 8845. Limitations on distributions.

(a) General rule. - A limited liability company may not make a distribution, including a distribution under section 8877 (relating to disposition of assets in winding up), if after the distribution:

(1) the company would not be able to pay its debts as they become due in the ordinary course of the company’s activities and affairs; or
the company’s total assets would be less than the sum of its total liabilities plus
the amount that would be needed, if the company were to be dissolved and wound up at the
time of the distribution, to satisfy the preferential rights upon dissolution and winding up of
members and transferees whose preferential rights are superior to the rights of persons
receiving the distribution.

(b) Valuation. – A limited liability company may base a determination that a distribution
is not prohibited under subsection (a)(2) on:

(1) the book values of the assets and liabilities of the company, as reflected on its
books and records;

(2) a valuation that takes into consideration unrealized appreciation and
depreciation or other changes in value of the assets and liabilities of the company;

(3) the current value of the assets and liabilities of the company, either valued
separately or valued in segments or as an entirety as a going concern; or

(4) any other method that is reasonable in the circumstances.

(c) Excluded liabilities. – In determining whether a distribution is prohibited under
subsection (a)(2), the company need not consider obligations and liabilities unless they are
required to be reflected on a balance sheet, not including the notes to the balance sheet, prepared
on the basis of generally accepted accounting principles, or such other accounting practices and
principles as are used generally by the company in the maintenance of its books and records and
as are reasonable in the circumstances.

(d) Measuring date of distribution. – Except as provided in subsection (e), the effect of a
distribution under subsection (a) is measured:

(1) as of the date specified by the company when it authorizes the distribution if the
distribution occurs within 125 days of the earlier of the date so specified or the date of
authorization; or

(2) as of the date of distribution in all other cases.

(e) Date of redemption. – In the case of a distribution described in paragraph (1) of the
definition of “distribution” in section 8812 (relating to definitions), the distribution is deemed to
occur as of the earlier of the date money or other property is transferred or debt is incurred by the
company or the date the person entitled to the distribution ceases to own the interest or right
being acquired by the company in return for the distribution.

(f) Status of distribution debt. – The indebtedness of a limited liability company to a
member or transferee incurred by reason of a distribution made in accordance with this section
shall be at least on a parity with the company’s indebtedness to its general, unsecured creditors,
except to the extent subordinated by agreement.

(g) Certain subordinated debt. – The indebtedness of a limited liability company, including indebtedness issued as a distribution, is not a liability for purposes of subsection (a) if the terms of the indebtedness provide that payment of principal and interest is made only if and to the extent that payment of a distribution could then be made under this section. If the indebtedness is issued as a distribution, each payment of principal or interest is treated as a distribution, the effect of which is measured on the date the payment is made.

(h) Distributions in winding up. – In measuring the effect of a distribution under section 8877, the liabilities of a dissolved limited liability company do not include any claim that has been barred under section 8874 (relating to known claims against dissolved limited liability company) or 8875 (relating to other claims against dissolved limited liability company), or for which security has been provided under section 8876 (relating to court proceedings).

(i) Cross references. – See:

Section 8815(d)(1)(ii) (relating to contents of operating agreement).
Section 8849.1 (relating to standards of conduct for members).
Section 8849.2 (relating to standards of conduct for managers).

Committee Comment (2016):


The prior law did not have a test for measuring the legality of distributions and relied instead on the law of fraudulent conveyances. The ULLCA, in contrast, contains distribution tests based on the Model Business Corporation Act. The Committee concluded that Pennsylvania should follow the ULLCA because distribution tests provide useful guidance and certainty. However, because the Model Act provisions have been refined in 15 Pa.C.S. § 1551, the Committee concluded that the distribution tests for limited liability companies should follow the established Pennsylvania pattern.

Subsection (a) provides two tests for measuring a distribution, which are disjunctive. A distribution violates this section if after the dissolution the limited liability company fails either of the tests. The tests apply both to interim distributions and liquidating distributions.

One test of the legality of a distribution is whether, after giving effect thereto, the limited liability company would be insolvent in the equity sense, unable to pay its obligations as they become due in the ordinary course of business. The Committee believes that this is the fundamentally important test.

In most cases involving a limited liability company operating as a going concern in the normal course, information generally available will make it quite apparent that no particular inquiry concerning the equity insolvency test is needed. While neither a balance sheet nor an income statement can be conclusive as to this test, the existence of significant equity and normal operating conditions are of
themselves a strong indication that no issue should arise under this test. Indeed, in the case of a company having regularly audited financial statements, the absence of any qualification in the most recent auditor's opinion as to the company's status as a “going concern,” coupled with a lack of subsequent material adverse events that would cause such a qualification, should normally be decisive.

It is only when circumstances indicate that the limited liability company is encountering difficulties or is in an uncertain position concerning its liquidity and operations that the company may need to address the issue. Because of the overall judgment required in evaluating the equity insolvency test, no one or more “bright line” tests can be employed. However, in determining whether the equity insolvency test has been met, certain judgments or assumptions as to the future course of the company's business are customarily justified, absent clear evidence to the contrary. These include the likelihood that (a) based on existing and contemplated demand for the company's products or services, it will be able to generate funds over the next several years sufficient to satisfy its existing and reasonably anticipated obligations as they mature during that period of time, and (b) indebtedness which matures in the near-term will be refinanced where, on the basis of the company's financial condition and future prospects and the general availability of credit to businesses similarly situated, it is reasonable to assume that such refinancing may be accomplished. There may be occasions when it would be useful to consider a cash flow analysis, based on a business forecast and budget, covering a sufficient period of time to permit a conclusion that known obligations of the company can reasonably be expected to be satisfied over the period of time that they will mature.

In determining whether a limited liability company is insolvent, or as a result of a proposed distribution would be rendered insolvent, the members or managers may rely on information supplied by the officers of the company and others. 15 Pa.C.S. §§ 8849.1(c) and 8849.2(c). It is not necessary for the members or managers to know of the details of the various analyses or market or economic projections that may be relevant. Judgments, further, must of necessity be made on the basis of information in the hands of the members or managers when a distribution is authorized. “Time of Measurement of Distributions,” below. The members or managers should not, of course, be held responsible as a matter of hindsight for unforeseen developments. This is particularly true with respect to assumptions as to the ability of the company to refinance or repay long-term obligations that do not mature for several years, since the primary focus of the decision by the members or managers to make a distribution should normally be on the company's prospects and obligations in the shorter term, unless special factors concerning the company's prospects require the taking of a longer term perspective.

This section establishes the validity of distributions from the entity law standpoint and 15 Pa.C.S. § 8846 determines the potential liability of managers and members for improper distributions. The federal Bankruptcy Code and the Uniform Fraudulent Transfer Act (12 Pa.C.S. § 5101, ), on the other hand, are designed to enable the trustee or other representative to recapture for the benefit of creditors funds transferred to others in cases of actual or constructive fraud. In light of these diverse purposes, it was not thought necessary to make the tests of this section identical with the tests for insolvency under those statutes.

The balance sheet test permits unrealized appreciation and depreciation of assets to be considered when measuring the legality of a dividend.

a. Accounting Principles.

To avoid the problem that would be encountered as the statutory provisions diverged from developing accounting principles, this section does not incorporate technical accounting terminology or
specific accounting concepts. Accounting terminology and concepts are constantly under review and subject to revision by the Public Company Accounting Oversight Board, Financial Accounting Standards Board, American Institute of Certified Public Accountants, Securities and Exchange Commission, and others. In making determinations under this section, the members or managers may make judgments about accounting matters, giving full effect to their right to rely upon professional or expert opinion.

In a limited liability company with subsidiaries, it is intended that the members or managers may rely on unconsolidated statements prepared on the basis of the equity method of accounting as to the company's investee subsidiaries, although other evidence may be relevant in the total determination.

The members or managers are entitled to rely upon reasonably current financial statements prepared on the basis of generally accepted accounting principles in determining whether or not the balance sheet test of subsection (a)(2) has been met, unless the members or managers are aware at the time that it would be unreasonable to rely on the financial statements because of newly discovered or subsequently arising facts or circumstances. Subsection (b), however, does not mandate the use of generally accepted accounting principles, and the members or managers may base a determination that a distribution satisfies the test of subsection (a)(2) on other factors, including any method that is reasonable in the circumstances. Subsection (b) contemplates that generally accepted accounting principles are always "reasonable in the circumstances" and that other accounting principles may be perfectly acceptable, under a general standard of reasonableness.

b. Other Valuation Principles.

Subsection (b) permits the validity of a distribution to be tested on the basis of various forms of valuations other than under accounting principles, including any other method that is reasonable in the circumstances. The intent of paragraphs (2), (3) and (4) of subsection (b) is to prohibit a distribution only when the value of the company's total assets is less than its liabilities; and it is commonly recognized that asset values on a balance sheet prepared in accordance with GAAP, being normally based on historical costs, do not purport to represent current values. Thus the statute authorizes departures from historical cost accounting and sanctions the use of appraisal and current value methods to determine the amount available for distribution. Decisions as to whether to use a basis other than historical cost accounting and the choice of a particular alternative basis that may be appropriate are left to the judgment of the members or managers. No particular method of valuation is prescribed in the statute, since different methods may have validity depending upon the circumstances, including the type of enterprise and the purpose for which the determination is made. For example, it is inappropriate in most cases to apply a "quick-sale liquidation" method to value an ongoing enterprise, particularly with respect to the payment of normal dividends. On the other hand, a "quick-sale liquidation" valuation method might be appropriate in certain circumstances for an enterprise in the course of reducing its asset or business base by a material degree. In most cases, a fair valuation method or a going-concern basis would be appropriate if it is believed that the enterprise will continue as a going concern.

Ordinarily a limited liability company should not selectively revalue assets. It should consider the value of all of its material assets, whether or not reflected in the financial statements (e.g., a valuable executory contract). Likewise, all of the company's material obligations should be considered and revalued to the extent appropriate and possible. Subsection (d) makes clear, however, that contingent liabilities need be considered in applying the test of subsection (a)(2) only where they are required to be reflected on the company's balance sheet (other than the notes thereto).

Subsection (b)(4) also refers to "any other method that is reasonable in the circumstances." This phrase is intended to comprehend within subsection (b) the wide variety of possibilities that might not be considered to fall under a "fair valuation" or "current value" method but might be reasonable in the
c. Preferential Dissolution Rights.

Subsection (a)(2) provides that a distribution may not be made unless the total assets of the limited liability company exceed its liabilities plus the amount that would be needed to satisfy any member's superior preferential rights upon dissolution if the company were to be dissolved on the date as of which the distribution is measured. This requirement in effect treats preferential dissolution rights of classes or series of memberships for distribution purposes as equivalent to liabilities rather than as equity interests. In making the calculation of the amount that must be added to the liabilities of the company to reflect the preferential dissolution rights, the assumption should be made that the preferential dissolution rights are to be determined pursuant to the certificate of organization or operating agreement as of the date the distribution or proposed distribution is to be measured. The amount so determined must include arrearages in preferential dividends if the certificate or organization or operating agreement require that they be paid upon the dissolution of the company. In the case of memberships having both a preferential right upon dissolution and additional nonpreferential rights, only the preferential portion of the membership should be taken into account. The treatment of preferential dissolution rights of classes of memberships set forth in subsection (a)(2) is applicable only to the balance sheet test and is not applicable to the equity insolvency test of subsection (a)(1). The treatment of preferential rights mandated by this section may always be eliminated by an appropriate provision in the certificate of organization or operating agreement.

The definition of “distribution” in 15 Pa.C.S. § 8812 deals specifically with the following:

(a) a purchase of the interest of a member in a parent limited liability company by a subsidiary of any type whose actions are controlled by the parent. These are “distributions” by the parent and are covered by the general term “indirect.”

(b) If a limited liability company distributes its own promissory obligations and receives nothing in return, the transaction is a distribution.

Subsection (d), which specifies how to determine the date as of which the legality of a distribution is measured permits the members or managers to designate the date as of which the legality of any distribution is to be tested if the distribution is subsequently made within 125 days of the earlier of the date specified or the date of authorization. Under 15 Pa.C.S. §§ 8849.1(c) and 8849.2(c), members or managers may rely on the financial statements of the limited liability company so long as their behavior meets the standard of those subsections which is simply that their conduct not amount to gross negligence or worse. The cross references in subsection (i) to 15 Pa.C.S. §§ 8849.1 and 8849.2 is intended to emphasize, among other things, that those sections will be applicable to the declaration of a distribution under this section. Because the preparation of financial statements necessarily lags the date as of which they are prepared, the protection of 15 Pa.C.S. §§ 8849.1 or 8849.2 would almost never be available if the date for measuring the legality of a distribution were the same as the date on which the members or managers take action.

If the members or managers fail to specify the measuring date when a distribution is authorized, the measuring date will be the date the distribution is made. The date of distribution will also be the measuring date if the distribution is not made within 125 days of the earlier of the measuring date.
specified or the date of authorization.

Liability under 15 Pa.C.S. § 8846 for a violation of this section would ordinarily arise upon payment of a distribution and the statute of limitations would then begin to run. It is not intended that the validity of the action be judged by hindsight, but as the facts appeared at the time of authorization, or at any later date when the members or managers possessed and failed to use the capacity to rescind or appropriately modify the terms of the distribution.

In an acquisition or redemption of a membership, a limited liability company may transfer property or incur debt to the former member. Membership purchase agreements involving payment over a period of time are of special importance in smaller, non-public enterprises. Subsection (e) provides a clear rule for this situation: the distribution is deemed to occur at the time of the issuance or incurrence of the debt, not at a later date when the debt is actually paid, except as provided in subsection (g) (Comment 7 below). Of course, this does not preclude a later challenge of a payment on account of redemption-related debt by a bankruptcy trustee on the ground that it constitutes a preferential payment to a creditor under the bankruptcy laws.

Subsection (f) provides that indebtedness created to acquire a membership in the company or issued as a distribution (if permitted under subsection (a)), is at least on a parity with the indebtedness of the company to its general, unsecured creditors, except to the extent subordinated by agreement. General creditors are better off in these situations than they would have been if cash or other property had been paid out for the membership or distributed (which is proper under the statute), and no worse off than if cash had been paid or distributed and then lent back to the company, making the members (or former members) creditors. The reference to redemption related debt being “at least” on a parity with debts owed to general creditors makes clear that security may be given for the repayment of redemption related debt.

Subsection (g) provides that indebtedness, including indebtedness issued as a distribution, need not be taken into account as a liability in determining whether the tests of subsection (a) have been met if the terms of the indebtedness provide that payments of principal and interest can be made only if and to the extent that payment of a distribution could then be made under this section. This has the effect of making the holder of the indebtedness junior to all other creditors but senior to the members, not only during the time the limited liability company is operating but also upon dissolution and liquidation. It should be noted that the creation of such indebtedness, and the related limitation on payments of principal and interest, may create tax problems or raise other legal questions.

Although subsection (g) is applicable to all indebtedness meeting its tests, regardless of the circumstances of its issuance, it is anticipated that it will be applicable most frequently to permit the reacquisition of memberships at a time when the deferred purchase price exceeds the net worth of the limited liability company. This type of reacquisition will often be necessary in the case of businesses in early stages of development or service businesses whose value derives principally from existing or prospective net income or cash flow rather than from net asset value. In such situations, it is anticipated that net worth will grow over time from operations so that when payments in respect of the indebtedness are to be made the two tests of subsection (a) will be satisfied. In the meantime, the fact that the indebtedness is outstanding will not prevent distributions that could be made under subsection (a) if the indebtedness were not counted in making the determination.
The sections cited in subsection (h) provide methods for cutting off or securing the debts of a limited liability company that is winding up its affairs and activities, and thus those debts do not need to be considered when determining under subsection (a) if a distribution can be paid during winding up.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- "distribution"
- "limited liability company"
- "member"
- "transferee"

§ 8846. Liability for improper distributions.

(a) General rule. – Except as provided in subsection (b), if a member of a member-managed limited liability company or manager of a manager-managed limited liability company consents to a distribution made in violation of section 8845 (relating to limitations on distributions) and in consenting to the distribution fails to comply with section 8849.1 (relating to standards of conduct for members) or 8849.2 (relating to standards of conduct for managers), the member or manager is personally liable to the company for the amount of the distribution which exceeds the amount that could have been distributed without the violation of section 8845.

(b) Members without authority. – To the extent the operating agreement of a member-managed limited liability company relieves a member of the authority and responsibility to consent to distributions and imposes that authority and responsibility on one or more other members, the liability stated in subsection (a) applies to the other members and not the member that the operating agreement relieves of authority and responsibility.

(c) Recipients. – A person that receives a distribution knowing that the distribution violated section 8845 is personally liable to the limited liability company but only to the extent that the distribution received by the person exceeded the amount that could have been properly paid under section 8845.

(d) Contribution. – A person against which an action is commenced because the person is liable under subsection (a) may:

(1) join any other person that is liable under subsection (a) or otherwise seek to enforce a right of contribution from the person; and

(2) join any person that is liable under subsection (c) or otherwise seek to enforce a right of contribution from the person in the amount the person is liable for under subsection (c).

(e) Statute of repose. – An action under this section is barred unless commenced within
two years after the distribution.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 406.

This section contemplates two categories of liability: (i) liability of those who have authorized improper distributions (subsection (a)), and (ii) liability of those who have received improper distributions (subsection (c)). Liability that has accrued under this section is not affected by a person subsequently ceasing to be a member, manager, or transferee. The liability is to the limited liability company, not to the creditors of an insolvent company. 302 P.3d 263, 268 (Colo. 2013); 725 S.E.2d 45, 52 (N.C. Ct. App. 2012).

This section does not preclude or interfere with claims for fraudulent transfer.

Subsection (a) - The liability is not strict liability but rather attaches only to the extent a decision maker has failed to comply with the duties stated in 15 Pa.C.S. § 8849.1 or 8849.2. To the extent those duties have been permissibly revised by the operating agreement, the revised standards apply to this subsection. 15 Pa.C.S. §§ 8849.1(c) and 8849.2(c) (limiting exercise of the duty of care, including relying on others, to avoidance of gross negligence).

Subsection (b) - Although some members of a member-managed limited liability company may be relieved of authority for distributions, the authority to consent to distributions must remain with one or more other members of the company and cannot be given exclusively to one or more persons who are not members.

Subsection (c) - Actual knowledge is necessary to impose liability. Reason to know does not suffice. 15 Pa.C.S. § 8813(a) and (b).

Subsections (c) and (d)(2) - Liability could apply to a person who receives a distribution under a charging order, but only if the person meets the knowledge requirement. That situation is very unlikely unless the person with the charging order is also a member or manager.

Subsection (e) - When the distribution is in the form of indebtedness, the distribution may occur on several different dates.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“distribution”
“limited liability company”
“manager”
“manager-managed limited liability company”
“member”
“member-managed limited liability company”
“operating agreement”

§ 8847. Management of limited liability company.
(a) Determination of management of company. – A limited liability company is a
member-managed limited liability company unless the operating agreement:

1) expressly provides that:
   (i) the company is or will be manager-managed;
   (ii) the company is or will be managed by managers; or
   (iii) management of the company is or will be vested in managers; or

2) includes words of similar import.

(b) Member-managed company. – In a member-managed limited liability company, the
following rules apply:

1) Except as expressly provided in this title, the management and conduct of the
company are vested in the members.

2) Each member has equal rights in the management and conduct of the company’s
activities and affairs.

3) A difference arising among members as to a matter in the ordinary course of the
activities and affairs of the company may be decided by a majority of the members.

4) Except as provided under section 325 (relating to approval by limited liability
company) with respect to a transaction under Chapter 3 (relating to entity transactions), an
act outside the ordinary course of the activities and affairs of the company may be
undertaken only with the affirmative vote or consent of all members.

5) Except as provided in section 8822(d) (relating to amendment or restatement of
certificate or organization), the certificate of organization may be amended only with the
affirmative vote or consent of all members.

6) The operating agreement may be amended only with the affirmative vote or
consent of all members.

(c) Manager-managed company. – In a manager-managed limited liability company, the
following rules apply:

1) Except as expressly provided in this title, any matter relating to the activities
and affairs of the company is decided exclusively by the manager, or, if there is more than
one manager, by a majority of the managers.

2) Each manager has equal rights in the management and conduct of the
company’s activities and affairs.
(3) The affirmative vote or consent of all members is required:

(i) except as provided under section 325 with respect to a transaction under Chapter 3, to undertake any act outside the ordinary course of the company’s activities and affairs;

(ii) except as provided under section 8822(d), to amend the certificate of organization; or

(iii) to amend the operating agreement.

(4) A manager may be chosen at any time by the affirmative vote or consent of a majority of the members and remains a manager until a successor has been chosen, unless the manager at an earlier time resigns, is removed or dies, or, in the case of a manager that is not an individual, terminates. A manager may be removed at any time by the affirmative vote or consent of a majority of the members without notice or cause.

(5) A person need not be a member to be a manager, except that the dissociation of a member that is also a manager removes the person as a manager. If a person that is both a manager and a member ceases to be a manager, that cessation does not by itself dissociate the person as a member.

(6) A person’s ceasing to be a manager does not discharge any debt, obligation or other liability to the limited liability company or members which the person incurred while a manager.

(d) Action by consent or proxy. – An action requiring the vote or consent of members under this title may be taken without a meeting and a member may appoint a proxy or other agent to vote, consent or otherwise act for the member by signing an appointing document in record form, personally or by the member’s agent.

(e) Effect of dissolution. – The dissolution of a limited liability company does not affect the applicability of this section, except that a person that wrongfully causes dissolution of the company loses the right to participate in management as a member and a manager.

(f) Reimbursement of advances. – A limited liability company shall reimburse a member for an advance to the company beyond the amount of capital the member agreed to contribute.

(g) Interest on advance. – A payment or advance made by a member which gives rise to an obligation of the limited liability company under subsection (f) or section 8848(a) (relating to reimbursement, indemnification, advancement and insurance) constitutes a loan to the company which accrues interest from the date of the payment or advance.

(h) No remuneration for services. – A member is not entitled to remuneration for services performed for a member-managed limited liability company, except for reasonable compensation.
for services rendered in winding up the activities of the company.

(i) Increased vote requirements. – Whenever the certificate of organization or operating agreement requires for the taking of any action by the members or a class of members a specific number or percentage of votes or consents, the provision of the certificate or agreement setting forth that requirement shall not be amended or repealed by any lesser number or percentage of votes or consents of the members or the class of members. This subsection does not apply to a provision setting forth the right of members to act by unanimous consent in lieu of a meeting.

(j) Exception. – None of the following shall be considered an amendment of the certificate of organization for purposes of the voting rules in subsections (b)(6) and (c)(3)(iii):

1. a restatement of all the operative provisions of the certificate of organization without change;

2. a change in the name or registered office of the limited liability company; or

3. any combination of the foregoing purposes.

(k) Approval of minor amendments. – Unless otherwise provided in record form in the operating agreement, an amendment described in subsection (j) may be made by the affirmative vote or consent of a majority of the managers or, in the case of a member-managed limited liability company, of a majority of the members.

Committee Comment (2016):

Subsections (a) through (h) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 407. Subsection (i) is patterned after former 15 Pa.C.S. § 8942(d)(2). Subsections (j) and (k) are patterned after former 15 Pa.C.S. § 8942(c).

Subsection (a) – This subsection follows implicitly from the definitions of “manager-managed” and “member-managed” limited liability companies in 15 Pa.C.S. § 8812, but is included here for the sake of clarity.

Subsection (b) – The subsection follows the long-standing default paradigm for management rights of general partners. The stated rules are subject to change by the operating agreement.

In general, a member’s actual authority to act for a limited liability company will depend fundamentally on the operating agreement.

EXAMPLE: Rachael and Sam, who have known each other for years, decide to go into business arranging musical tours. They fill out and electronically sign a one page form available on the website of the department and become the organizers of MMT, LLC. They are the only members of the LLC, and their understanding of who will do what in managing the enterprise is based on several lengthy, late-night conversations that preceded the company’s formation. Sam is to “get the acts,” and Rachael is to manage the tour logistics. There is no written operating agreement.

In the terminology of this act, MMT, LLC is member-managed, and the understanding reached in the late night conversations has become part of the company’s operating agreement. In agency law
terms, the operating agreement constitutes a manifestation by the company to Rachael and Sam concerning the scope of their respective authority to act on behalf of the company. RESTATEMENT (THIRD) OF AGENCY § 2.01, cmt. c (2006) (explaining that a person's actual authority depends first on some manifestation attributable to the principal and stating: “[a]ctual authority is a consequence of a principal's expressive conduct toward an agent, through which the principal manifests assent to be affected by the agent's action, and the agent's reasonable understanding of the principal's manifestation”).

Circumstances outside the operating agreement can also be relevant to determining the scope of a member’s actual authority.

EXAMPLE: Homeworks, LLC is a member-managed limited liability company with three members. The written operating agreement:

specifies in considerable detail the management responsibilities of Margaret, and also states that Margaret is responsible for “the day-to-day operations” of the company;

puts Garrett, a member, in charge of the company’s transportation department; and

specifies no management role for Brooksley, the third member.

When the company’s chief financial officer quits suddenly, Margaret asks Brooksley, a CPA, to “step in until we can hire a replacement.”

Under the operating agreement, Margaret’s request to Brooksley is within Margaret’s actual authority and is a manifestation attributable to the company. If Brooksley manifests assent to Margaret’s request, Brooksley will have the actual authority to act as the company’s CFO.

In the unlikely event that two or more people form a member-managed limited liability company without any understanding of how to allocate management responsibility, agency law, operating in the context as a “gap filler” on management responsibility, will produce the following result:

A single member of a multi-member, member-managed limited liability company:

under subsection (b)(4) has no actual authority to commit the company to any matter “outside the ordinary course of the activities of the company”; and

under subsection (b)(2) has the actual authority to commit the company to any matter “in the management and conduct of the company’s [ordinary course of] activities and affairs,” unless the member has reason to know that other members might disagree or the member has some other reason to know that consultation with fellow members is appropriate.

For an explanation of this result, see the Committee Comment to subsection (c), which provides a detailed analysis in the context of a multi-manager, manager-managed limited liability company whose operating agreement is silent on the analogous question.

For a discussion of the apparent authority of a member to bind an LLC, the Committee Comment to 15 Pa.C.S. § 8831.

The list of approval rights in subsection (b) is not exhaustive. Other approval rights appear in the context of the provisions to which the rights apply, 15 Pa.C.S. §§ 8841(d)(iv) (providing that “[a]fter formation of a limited liability company, a person becomes a member... with the affirmative vote or consent of all the members”).

Subsection (c) – Like subsection (b), this subsection states default rules that, under 15 Pa.C.S. § 8815, are subject to the operating agreement. For example, a limited liability company’s operating agreement might state “This company is manager-managed,” while providing that managers must submit
specified ordinary matters for review by the members.

The actual authority of the manager or managers of a limited liability company is a question of agency law and depends fundamentally on the contents of the operating agreement and any separate management contract between the company and its manager or managers. These agreements are the primary source of the manifestations of the company (as principal) from which a manager (as agent) will form the reasonable beliefs that delimit the scope of the manager's actual authority. Restatement (Third) of Agency § 3.01 (2006). Restatement (Second) of Agency §§ 15, 26 (1958).

Other information may be relevant as well, such as the course of dealing within the limited liability company, unless the operating agreement effectively precludes consideration of that information. 15 Pa.C.S. § 8815(a)(4) (stating that the operating agreement governs “the means and conditions for amending the operating agreement”).

If the operating agreement and a management contract conflict, the reasonable manager will know that the operating agreement controls the extent of the manager’s rightful authority to act for the limited liability company – despite any contract claims the manager might have. 15 Pa.C.S. § 8815(a)(2) (stating that the operating agreement governs “the rights and duties under this title of a person in the capacity of a … manager”) and the Committee Comment to that paragraph. Restatement (Third) of Agency § 8.13, cmt. b (2006) and Restatement (Second) of Agency, § 432, cmt. b (1958) (stating that, when a principal’s instructions to an agent contravene a contract between the principal and agent, the agent may have a breach of contract claim but has no right to act contrary to the principal’s instructions).

If: (i) an operating agreement merely states that the limited liability company is manager-managed and does not further specify the managerial responsibilities; and (ii) the company has only one manager, the actual authority analysis is simple. In that situation, this subsection:

serves as “gap filler” to the operating agreement; and thereby

constitutes the company’s manifestation to the manager as to the scope of the manager’s authority; and thereby

delimits the manager’s actual authority, subject to whatever subsequent manifestations the company may make to the manager ( , by a vote of the members, or an amendment of the operating agreement).

If the operating agreement states only that the limited liability company is manager-managed and the company has more than one manager, the question of actual authority has an additional aspect. It is necessary to determine what actual authority any one manager has to act alone. Paragraphs (c)(1), (2), and (3), combine to provide the answer. A single manager of a multi-manager company:

1. has no actual authority to commit the company to any matter encompassed in paragraph (c)(3) or for which this chapter elsewhere requires unanimity; and

2. has the actual authority to commit the company to usual and customary matters, unless the manager has reason to know that: (i) other managers might disagree; or (ii) for some other reason consultation with fellow managers is appropriate.

The first point follows self-evidently from the language of paragraph (c)(3), which reserves specified matters to the members. Given that language, no manager could reasonably believe to the contrary (unless the operating agreement provided otherwise).

The second point follows because:
Subsection (c) serves as the gap-filler manifestation from the company to its managers, and subsection (c) does not require managers of a multi-manager limited liability company to act only in concert or after consultation. To the contrary, subject to the operating agreement, paragraph (c)(2) expressly provides that “each manager has equal rights in the management and conduct of the activities of the company.”

It would be impractical to require collective action on even the smallest of decisions. However, to the extent a manager has reason to know of a possible difference of opinion among the managers, paragraph (c)(1) requires decision by “a majority of the managers.”

The third point is a matter of common sense. The more serious the matter, the less likely it is that a manager has actual authority to act unilaterally. RESTATEMENT (THIRD) OF AGENCY § 3.03, cmt. c (2006) (noting the unreasonableness of believing, without more facts, that an individual has “an unusual degree of unilateral authority over a matter fraught with enduring consequences for the institution” and stating that “[t]he gravity of the matter from the standpoint of the organization is relevant to whether a third party could reasonably believe that the manager has authority to proceed unilaterally”).

The common law of agency will also determine the apparent authority of a manager or managers, and in that analysis what the particular third party knows or has reason to know about the management structure and business practices of the particular limited liability company will always be relevant. RESTATEMENT (THIRD) OF AGENCY § 3.03 cmt. d (2006) (“The nature of an organization's business or activity is relevant to whether a third party could reasonably believe that a [manager] is authorized to commit the organization to a particular transaction.”).

As a general matter, absent countervailing facts, courts may see the position of manager as clothing its occupants with the apparent authority to take actions that reasonably appear within the ordinary course of the company’s business. The actual authority analysis stated above supports that proposition; absent a reason to believe to the contrary, a third party could reasonably believe that a manager possesses the authority contemplated by the gap-filler of the statute.

Subsection (c)(3) - The default rules in subsection (c)(3)(ii) and (iii) requiring a unanimous vote to amend the certificate of organization or the operating agreement contrast with the default vote under 15 Pa.C.S. § 325(c) that transactions under 15 Pa.C.S. Ch. 3 may be approved by majority vote. The certificate or the agreement may be amended in a transaction under Chapter 3 and thus consideration should be given to whether the same rules should apply to amendments as apply to transactions under Chapter 3.

Subsection (c)(4) - Under the default rule stated in this paragraph, dissolution - in contrast to termination - of an entity that is a manager of a limited liability company does not end the entity’s status as manager. Likewise, dissolution of an entity that is a member does not cause the entity to dissociate. 15 Pa.C.S. § 8861(11) (providing that termination of such an entity causes dissociation).

A limited liability company does not cease to be “manager-managed” simply because no managers are in place. In that situation, absent additional facts, the company is manager-managed and the manager position is vacant. Non-manager members who exercise managerial functions during the vacancy (or at any other time) will have duties as determined by other law, most particularly the law of agency.

Subsection (c)(6) - For example, the obligation to safeguard trade secrets and other confidential or propriety information learned when the person is a manager remains in force after the person ceases to be a manager.
Subsection (e) – The default rules of this chapter do not contemplate a person wrongfully causing dissolution, as distinguished from wrongfully dissociating. Compare 15 Pa.C.S. § 8871 with 15 Pa.C.S. § 8862(b). However, the operating agreement might contemplate wrongful dissolution, and then the exception to the general rule of this subsection would apply unless the operating agreement provided otherwise.

Subsection (h) – Chapter 88 does not provide for remuneration to a manager of a manager-managed limited liability company. That issue is for the operating agreement, or a separate agreement between the company and the manager. A manager may also have a common law right to compensation. RESTATEMENT (THIRD) OF AGENCY § 8.13, cmt d (“Unless an agreement between a principal and an agent indicates otherwise, a principal has a duty to pay compensation to an agent for services that the agent provides.”) (2006).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- “certificate of organization”
- “limited liability company”
- “manager”
- “manager-managed limited liability company”
- “member”
- “member-managed limited liability company”
- “operating agreement”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “obligation”
- “record form”

§ 8848. Reimbursement, indemnification, advancement and insurance.

(a) Reimbursement. – A limited liability company shall reimburse a member of a member-managed company or manager of a manager-managed company for any payment made by the member or in the course of the member’s or manager’s activities on behalf of the company, if the member or manager complied with the applicable provisions of sections 8847 (relating to management of limited liability company), 8849.1 (relating to standards of conduct for members) and 8849.2 (relating to standards of conduct for managers) in making the payment.

(b) Indemnification. – A limited liability company shall indemnify and hold harmless a person with respect to any claim or demand against the person and any debt, obligation or other liability incurred by the person by reason of the person’s former or present capacity as a member or manager, if the claim, demand, debt, obligation or other liability does not arise from the person’s breach of section 8845 (relating to limitations on distributions), 8847, 8849.1 or 8849.2.

(c) Advancement. – In the ordinary course of its activities and affairs, a limited liability company may advance expenses, including attorney fees and costs, incurred by a person in connection with a claim or demand against the person by reason of the person’s former or present capacity as a member or manager, if the person promises to repay the company if the person ultimately is determined not to be entitled to be indemnified.
(d) Insurance. – A limited liability company may purchase and maintain insurance on behalf of a member or manager of the company against liability asserted against or incurred by the member or manager in that capacity or arising from that status even if, under subsection (g), the operating agreement could not provide indemnification against the liability or eliminate or limit the person’s liability to the company for the conduct giving rise to the liability.

(e) Nonexclusivity. – The rights provided by subsections (a), (b), (c) and (d) shall not be deemed exclusive of any other rights to which a person seeking reimbursement, indemnification, advancement of expenses or insurance may be entitled under the operating agreement, vote of members or disinterested managers, contract or otherwise, both as to action in his official capacity and as to action in another capacity while holding that position. Sections 8849.1(f) and 8849.2(e) shall be applicable to a vote, contract or other action under this subsection. A limited liability company may create a fund of any nature, which may, but need not be, under the control of a trustee, or otherwise secure or insure in any manner its indemnification obligations, whether arising under this section or otherwise.

(f) Grounds. – Indemnification pursuant to subsection (e) may be granted for any action taken and may be made whether or not the limited liability company would have the power to indemnify the person under any other provision of law except as provided in this section and whether or not the indemnified liability arises or arose from any threatened, pending or completed action by or in the right of the company. Indemnification under subsection (e) is declared to be consistent with the public policy of this Commonwealth.

(g) Limitation. – Indemnification under this section shall not be made in any case where the act giving rise to the claim for indemnification is determined by a court to constitute recklessness, willful misconduct or a knowing violation of law.

Committee Comment (2016):

Subsections (a) through (d) are patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 408. Subsections (e) – (g) are patterned after 15 Pa.C.S. § 1746.

Subsection (a) – The reimbursement obligation stated here is a default rule and roughly parallels a rule of agency law. Restatement (Third) of Agency § 8.14(2)(a) (2006) (stating that “[a] principal has a duty to indemnify an agent ... when the agent makes a payment (i) within the scope of the agent’s actual authority, or (ii) that is beneficial to the principal, unless the agent acts officiously in making the payment”).

This subsection applies only to managers of manager-managed limited liability companies and members of member-managed limited liability companies. The definite article in the phrase “the member or manager” and “the member’s” refers back to the original phrase: “A limited liability company shall reimburse a member of a member-managed company or the manager of a manager-managed company ...”

A limited liability company’s obligation, if any, to reimburse others (including company employees and non-managing members of a manager-managed company) is a question for other law, including the law of agency. The fact a person has ceased to be a member of a member-managed company or a manager of a manager-managed company does not affect any obligations incurred by the company under
this subsection for payments made before the cessation.

To the extent an operating agreement modifies or displaces the default rules stated in 15 Pa.C.S. §§ 8847, 8849.1 and 8849.2, the agreement should also address this section. For example, if the operating agreement establishes a duty of ordinary care for members (modifying section 8849.1(c)), the agreement should specify which level of care is necessary to satisfy this subsection. It is not necessary that the levels of care be the same, only that the operating agreement make the situation clear and thereby avoid difficult issues of interpretation.

**Subsection (b)** - This subsection provides for indemnification but only as a default rule. The rule’s eligibility requirements correspond to the default rules on management duties, which is appropriate because otherwise the statutory default rule on indemnification could undercut or even vitiate the statutory default rules on duty. To the extent an operating agreement modifies or displaces the default rules stated in 15 Pa.C.S. §§ 8847, 8849.1, or 8849.2, the agreement should also address this section.

Although referring broadly to any “person,” subsection (b) is actually limited to present and former members or managers. The indemnification obligation applies only to a “debt, obligation, or other liability incurred by the person by reason of the person’s former or present capacity as a member or manager.” Thus, by its terms subsection (b) does not apply to a person in the capacity of an “officer,” unless being an officer constitutes being a manager.

Of course, the operating agreement may mandate indemnification of officers, employees, and other persons providing services to or acting for the limited liability company. Within the limitations stated in 15 Pa.C.S. § 8815(c)(10), the operating agreement may obligate a limited liability company to indemnify a person even when the person has breached a managerial duty or the operating agreement itself.

**Subsection (c)** - This subsection authorizes but does not require a limited liability company to provide advances to cover expenses. The authorization applies only to those persons eligible for indemnification under subsection (b), but the operating agreement certainly can authorize a broader scope and also make advances obligatory.

The reference to “ordinary course” pertains to 15 Pa.C.S. § 8847(b)(3) (stating that any “difference arising among members [in a member-managed limited liability company] as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members”). As for a manager-managed limited liability company, 15 Pa.C.S. § 8847(c)(1) (“Except as expressly provided in this chapter, any matter relating to the activities and affairs of the [manager-managed] company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers.”).

**Subsection (d)** - This subsection’s language is very broad and authorizes a limited liability company to purchase insurance to cover, a manager’s intentional misconduct. It is unlikely that such insurance would be available. In contrast to subsection (a), this subsection encompasses all members, not just members in a member-managed limited liability company. This authorization comes from this chapter, not the operating agreement, and therefore is not subject to 15 Pa.C.S. § 8815(c)(10).

**Subsections (e) - (g)** - These subsections apply to limited liability companies the basic policies on indemnification by business corporations.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
§ 8849.  (Reserved).

§ 8849.1. Standards of conduct for members.

(a) General rule. – A member of a member-managed limited liability company owes to
the company and, subject to section 8881(b) (relating to direct action by member), the other
members the duties of loyalty and care stated under subsections (b) and (c).

(b) Duty of loyalty. – The fiduciary duty of loyalty of a member in a member-managed
limited liability company includes the duties:

(1) to account to the company and to hold as trustee for it any property, profit or
benefit derived by the member:

(i) in the conduct or winding up of the company’s activities and affairs;

(ii) from a use by the member of the company’s property; or

(iii) from the appropriation of a company opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the
company’s activities and affairs as or on behalf of a person having an interest adverse to
the company; and

(3) to refrain from competing with the company in the conduct of the company’s
activities and affairs before the dissolution of the company.

(c) Duty of care. – The duty of care of a member of a member-managed limited liability
company in the conduct or winding up of the company’s activities and affairs is to refrain from
engaging in gross negligence, recklessness, willful misconduct or knowing violation of law.

(d) Good faith and fair dealing. – A member shall discharge the duties and obligations
under this title or under the operating agreement and exercise any rights consistent with the
contractual obligation of good faith and fair dealing.

(e) Self-serving conduct. – A member does not violate a duty or obligation under this
title or under the operating agreement solely because the member’s conduct furthers the
member’s own interest.
(f) Authorization or ratification. – All the members of a member-managed limited
liability company may authorize or ratify, after disclosure of all material facts, a specific act or
transaction that otherwise would violate the duty of loyalty of a member.

(g) Fairness as a defense. – It is a defense to a claim under subsection (b)(2) and any
comparable claim in equity or at common law that the transaction was fair to the limited liability
comp company at the time it is authorized or ratified under subsection (f).

(h) Rights and obligations in approved transaction. – If a member enters into a
transaction with the limited liability company which otherwise would be prohibited under
subsection (b)(2), and the transaction is authorized or ratified as provided under subsection (f) or
the operating agreement, the member’s rights and obligations arising from the transaction are the
same as those of a person that is not a member.

(i) Duties of members in manager-managed company. – Subject to subsection (d), a
member does not have any duty to a manager-managed limited liability company or to any other
member of the company solely by reason of being or acting as a member.

(j) Exoneration. – The operating agreement may provide that a member in a member-
managed limited liability company shall not be personally liable for monetary damages to the
company or the other members for a breach of subsection (c), except that a member may not be
exonerated for an act that constitutes recklessness, willful misconduct or a knowing violation of
law.

(k) Cross reference. – See section 8815 (relating to contents of operating agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 409. Subsection (k) is patterned in part after 15 Pa.C.S. § 1713.

This section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care,
and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section
are subject to the operating agreement, but 15 Pa.C.S. § 8815(c) and (d) contain important limitations on
the power of the operating agreement to affect fiduciary duties and the obligation of good faith and fair
dealing.

For the effect of dissociation on a person’s duties under this section, see 15 Pa.C.S. § 8863(a)(2).

Subsection (a) – This subsection recognizes two core managerial duties, but does not purport to
exhaustively state all managerial duties.

Subsection (b) – This subsection states three core aspects of the fiduciary duty of loyalty: (i) not
“usurping” company opportunities or otherwise wrongly benefiting from the company’s operations or
property; (ii) avoiding conflict of interests in dealing with the company (whether directly or on behalf of
another); and (iii) refraining from competing with the company. Essentially the same duties exist in
agency law and under the law of all types of business organizations.
Subsection (b) applies beginning with “the conduct ... of the company’s activities and affairs;” thus the stated duties do not apply to pre-formation activities. In some circumstances, comparable duties might arise from other law, particular the law of agency. , 15 Pa.C.S. § 8841(a) and (b) (stating that the organizer acts “on behalf of” others).

The duties stated in subsection (b) are either partially or fully default rules. 15 Pa.C.S. § 8815(c)(11) provides that the aspects of the duty of loyalty stated in 15 Pa.C.S. § 8849.1(b)(1)(i) or (ii) or (2) may not be eliminated by the operating agreement, but Pa.C.S. § 8815(d)(3)(i) permits those aspects of the duty of loyalty to be altered if the alteration is not manifestly unreasonable. In contrast, there is no restriction on altering or eliminating the aspects of the duty of loyalty stated in 15 Pa.C.S. § 8849.1(b)(1)(iii) or (3).

Subsection (b)(1) - The phrase “hold as trustee” dates back to UPA (1914) § 21 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information.

Subsection (b)(1)(i) - This provision is consistent with a basic principle of agency law – namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. Restatement (Third) of Agency § 8.06, cmt. c. (2006). Typically, however, the operating agreement will legitimize particular benefits, a management fee paid to a managing member in addition to that member’s share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(ii) - In the context of this paragraph, the term “property” includes confidential information.

Subsection (b)(1)(iii) - Chapter 88 does not specify what constitutes “a company opportunity,” but ample case law exists. 45 A.3d 883, 888 (M d.A pp. 2012) (discussing the “interest or reasonable expectancy test”) and 319 B.R. 570, 596 (Bankr.N.D.III. 2005) (discussing the “line of business test”). In most, if not all, situations, usurping a company opportunity also breaches the duty not to compete. Subsection (b)(3), but not .

Subsection (b)(2) - In this context, the phrase “interest adverse” is a term of art, meaning “to be on the other side of the table” in some dealing with the limited liability company. Absent informed consent by the company, this duty is breached by the mere existence of the conflict of interest and the company need not prove that the outcome of the dealing was adverse to the company. subsection (g) (permitting the defense of fairness).

Subsection (b)(3) - Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees. The duty not to compete continues longer in a manager-managed limited liability company. 15 Pa.C.S. § 8849.2(b)(3).

Subsection (c) - Neither this chapter nor Chapter 84 or 86 refer to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission. That change in label is consistent with the Restatement (Third) of Agency § 8.02 (2006), which refers to the agent’s “fiduciary duty to act loyally, but eschews the word “fiduciary” when stating the agent’s duties of “care, competence, and
diligence.” § 8.08. However, the change in label is merely semantics; no change in the law is intended.

The operating agreement can raise the standard of care, or subject to 15 Pa.C.S. § 8815(c)(11) and (d)(3)(iv), lower it. A person’s practical exposure for breaching the duty of care involves not only the standard of care but also any operating agreement provision that: (i) exonerates the person from liability for breach of the duty of care; or (ii) entitles the person to indemnification despite the breach.

In discharging the duties required by this section, a member may rely on other persons if the member’s conduct in so relying satisfies the duty of care required under subsection (c).

Subsection (d) – This subsection refers to the “obligation of good faith and fair dealing” (emphasis added) and thereby invokes the implied obligation that exists in every contract. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”)

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights – duties and rights “under this title.” However, for the most part those duties and rights apply to relationships the members and the limited liability company and function only to the extent not displaced by the operating agreement. In the contract-based organization that is a limited liability company, those statutory default rules are intended to function like a contract. Therefore, applying the contractual notion of good faith and fair dealing makes sense.

The contractual obligation of “good faith” has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware’s famous corporate law exoneration provision; and (ii) that provision’s exception “for acts or omissions not in good faith.” Del. Code Ann. tit. 8, § 102(b)(7) (2012). In that context, good faith is an aspect of the duty of loyalty. 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the “utmost good faith” sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. 164 N.E. 545, 551 (N.Y. 1928) (“[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship.”); 328 N.E.2d 505, 515 (Mass. 1975) (“[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty.” (footnotes, citations, and internal quotations omitted).

To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a partner from acting in the partner’s own self-interest:

“Fair dealing” is not akin to the fair process component of entire fairness, i.e., whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care .... It is rather a commitment to deal “fairly” in the sense of consistently with the terms of the parties’ agreement and its purpose. Likewise “good faith” does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties’ contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining.
originally.

Courts should not use the contractual obligation to change the parties’ or this chapter’s allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The operating agreement or this chapter may grant discretion to a member, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a member may properly exercise discretion even though another member suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.

The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties’ agreed-upon arrangements:

An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but

In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the operating agreement to affect the contractual obligation of good faith and fair dealing, see 15 Pa.C.S. § 8815(c)(13) (prohibiting elimination but allowing the agreement to prescribe standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured). As to whether the obligation stated in this subsection applies to transferees, the Committee Comment to 15 Pa.C.S. § 8817(b).

The contractual obligation of good faith and fair dealing applies to members of a member-managed limited liability company and also to members of a manager-managed company.

Subsection (e) – A member in a member-managed limited liability company has at least two different roles: (i) as a party to the operating agreement, with rights and obligations under that agreement; and (ii) as co-manager of the enterprise. This provision pertains to the first role. A member’s exercise of rights under the operating agreement is subject to the obligation of good faith and fair dealing, subsection (d), but a person does not breach that contractual obligation solely because the person’s exercise of rights
furthers the person’s own interests. In contrast, this provision is ineffective with regard to a member’s
duties as co-manager. For example, a member’s liability under subsection (b)(3) (prohibiting
competition) is not “solely because the member’s conduct furthers the member’s own interest.” Rather,
the liability results from the breach of a specific obligation – , the codified aspect of the duty of loyalty
that prohibits competition.

Subsection (e) also applies to members of a manager-managed limited liability company.

Subsection (f) – The operating agreement can provide additional or different methods of
authorization or ratification, subject to the strictures of 15 Pa.C.S. § 8815(c)(11) and (d).

Subsection (g) – This subsection codifies judge-made law applicable to all business entities.

Subsection (h) – This subsection is the modern, reformulated version of a language that sought to
overturn the now-defunct notion that debts to partners were categorically inferior to debts to non-partner
creditors. The reformulation makes clear that this provision does not override the obligation to avoid
conflict of interests.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“manager”
“manager-managed limited liability company”
“member”
“member-managed limited liability company”
“operating agreement”

The term “acting” used in this section is defined in 15 Pa.C.S. § 102 ("act").

§ 8849.2. Standards of conduct for managers.

(a) General rule. – A manager of a manager-managed limited liability company owes to
the company and, subject to section 8881(b) (relating to direct action by member), the members
the duties of loyalty and care stated under subsections (b) and (c).

(b) Duty of loyalty. – The fiduciary duty of loyalty of a manager in a manager-managed
limited liability company includes the duties:

(1) to account to the company and to hold as trustee for it any property, profit or
benefit derived by the manager:

(i) in the conduct or winding up of the company’s activities and affairs;
(ii) from a use by the manager of the company’s property; or
(iii) from the appropriation of a company opportunity;

(2) to refrain from dealing with the company in the conduct or winding up of the
company’s activities and affairs as or on behalf of a person having an interest adverse to the company; and

(3) to refrain from competing with the company in the conduct of the company’s activities and affairs until completion of the winding up of the company.

(c) Duty of care. - The duty of care of a manager of a manager-managed limited liability company in the conduct or winding up of the company’s activities and affairs is to refrain from engaging in gross negligence, recklessness, willful misconduct or knowing violation of law.

(d) Good faith and fair dealing. - A manager of a manager-managed limited liability company shall discharge the duties and obligations under this title or under the operating agreement and exercise any rights consistent with the contractual obligation of good faith and fair dealing.

(e) Ratification of breach of duty of loyalty. - All the members, or a majority of disinterested managers, of a manager-managed limited liability company may authorize or ratify, after disclosure of all material facts, a specific act or transaction by a manager that otherwise would violate the duty of loyalty.

(f) Fairness as a defense. - It is a defense to a claim under subsection (b)(2) and any comparable claim in equity or at common law that the transaction was fair to the limited liability company.

(g) Manager’s rights in approved transaction. - If a manager enters into a transaction with the limited liability company which otherwise would be prohibited by subsection (b)(2), and the transaction is approved or ratified as provided by subsection (e) or the operating agreement, the manager’s rights and obligations arising from the transaction are the same as those of a person that is not a manager.

(h) Exoneration. - The operating agreement may provide that a manager in a manager-managed limited liability company shall not be personally liable for monetary damages to the company or the members for a breach of subsection (c), except that a manager may not be exonerated for an act that constitutes recklessness, willful misconduct or a knowing violation of law.

(i) Cross reference. - See section 8815 (relating to contents of operating agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 409.

This section states some of the core aspects of the fiduciary duty of loyalty, provides a duty of care, and incorporates the contractual obligation of good faith and fair dealing. The duties stated in this section are subject to the operating agreement, but 15 Pa.C.S. § 8815(c) and (d) contain important limitations on the power of the operating agreement to affect fiduciary duties and the obligation of good faith and fair
Subsection (a) - This subsection recognizes two core managerial duties, but does not purport to exhaustively state all managerial duties. The reference to 15 Pa.C.S. § 8881(b) is needed because a member may bring a direct action against a manager only if the member has standing as provided in that section.

Subsection (b) - This subsection states three core aspects of the fiduciary duty of loyalty: (i) not “usurping” company opportunities or otherwise wrongly benefiting from the company’s operations or property; (ii) avoiding conflict of interests in dealing with the company (whether directly or on behalf of another); and (iii) refraining from competing with the company. Essentially the same duties exist in agency law and under the law of all types of business organizations.

Subsection (b) applies beginning with “the conduct ... of the company’s activities and affairs;” thus the stated duties do not apply to pre-formation activities. In some circumstances, comparable duties might arise from other law, particular the law of agency., 15 Pa.C.S. § 8841(a) and (b) (stating that the organizer acts “on behalf of” others).

The duties stated in subsection (b) are either partially or fully default rules. 15 Pa.C.S. § 8815(c)(12) provides that the aspects of the duty of loyalty stated in 15 Pa.C.S. § 8849.2(b)(1)(i) or (ii) or (2) may not be eliminated by the operating agreement, but Pa.C.S. § 8815(d)(3)(i) permits those aspects of the duty of loyalty to be altered if the alteration is not manifestly unreasonable. In contrast, there is no restriction on altering or eliminating the aspects of the duty of loyalty stated in 15 Pa.C.S. § 8849.2(b)(1)(iii) or (3).

Subsection (b)(1) - The phrase “hold as trustee” dates back to UPA (1914) § 21 and reflects the availability of disgorgement remedies, such as a constructive trust. In contrast to an actual trustee, a person subject to this duty does not: (i) face the special obstacles to consent characteristic of trust law; or (ii) enjoy protection for decisions taken in reliance on the governing instrument and other sources of information.

Subsection (b)(1)(i) - This provision is consistent with a basic principle of agency law – namely, that an agent may not benefit at all from the performance of the agency unless the principal consents. RESTATEMENT (THIRD) OF AGENCY § 8.06, cmt. c. (2006). Typically, however, the operating agreement will legitimize particular benefits, , a management fee paid to a member-manager in addition to that person’s share of distributions. Also, an agreed allocation of distributions takes those benefits outside the reach of this provision.

Subsection (b)(1)(ii) - In the context of this paragraph, the term “property” includes confidential information.

Subsection (b)(1)(iii) - Chapter 88 does not specify what constitutes “a company opportunity,” but ample case law exists. 45 A.3d 883, 887 (M d.A pp. 2012) (discussing the “interest or reasonable expectancy test”) and 319 B.R. 570, 596 (Bankr.N.D.III. 2005) (discussing the “line of business test”). In most, if not all, situations, usurping a company opportunity also breaches the duty not to compete. Subsection (b)(3), but not .

Subsection (b)(2) - In this context, the phrase “interest adverse” is a term of art, meaning “to be on the other side of the table” in some dealing with the limited liability company. A bsent informed consent by the company, this duty is breached by the mere existence of the conflict of interest and the company
need not prove that the outcome of the dealing was adverse to the company. subsection (f)

Subsection (b)(3) – Although competition is often thought of in terms of potential customers, this duty applies equally to competition for resources, including employees.

Subsection (c) – Neither this chapter nor Chapter 84 or 86 refer to the duty of care as a fiduciary duty, because: (i) the duty of care applies in many non-fiduciary situations; and (ii) breach of the duty of care is remediable in damages while breach of a fiduciary duty gives rise also to equitable remedies, including disgorgement, constructive trust, and rescission. That change in label is consistent with the RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006), which refers to the agent’s “fiduciary duty to act loyally, but eschews the word “fiduciary” when stating the agent’s duties of “care, competence, and diligence.” § 8.08. However, the change in label is merely semantics; no change in the law is intended.

The operating agreement can raise the standard of care, or subject to 15 Pa.C.S. § 8815(c)(12) and (d)(3)(iv), lower it. A person’s practical exposure for breaching the duty of care involves not only the standard of care but also any operating agreement provision that: (i) exonerates the person from liability for breach of the duty of care; or (ii) entitles the person to indemnification despite the breach.

In discharging the duties required by this section, a manager may rely on other persons if the manager’s conduct in so relying satisfies the duty of care required under subsection (c).

Subsection (d) – This subsection refers to the “obligation of good faith and fair dealing” (emphasis added) and thereby invokes the implied obligation that exists in every contract, RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”)

At first glance, it may seem strange to apply a contractual obligation to statutory duties and rights –, duties and rights “under this title.” However, for the most part those duties and rights apply to relationships the members, managers, and the limited liability company and function only to the extent not displaced by the operating agreement. In the contract-based organization that is a limited liability company, those statutory default rules are intended to function like a contract. Therefore, applying the contractual notion of good faith and fair dealing makes sense.

The contractual obligation of “good faith” has nothing to do with the corporate concept of good faith that for years bedeviled courts and attorneys trying to understand: (i) Delaware’s famous corporate law exoneration provision; and (ii) that provision’s exception “for acts or omissions not in good faith.” Del. Code Ann. tit. 8, § 102(b)(7) (2012). In that context, good faith is an aspect of the duty of loyalty. 911 A.2d 362, 369-70 (Del. 2006).

Likewise, the contractual obligation of good faith and fair dealing has nothing to do with the “utmost good faith” sometimes used to describe the fiduciary duties that owners of closely held businesses owe each other. 164 N.E. 545, 551 (N.Y. 1928) (“[W]here parties engage in a joint enterprise each owes to the other the duty of the utmost good faith in all that relates to their common venture. Within its scope they stand in a fiduciary relationship.”);

328 N.E.2d 505, 515 (M ass. 1975) (“[S]tockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the utmost good faith and loyalty.” (footnotes, citations, and internal quotations omitted).
To the contrary, the contractual obligation of good faith and fair dealing is not a fiduciary duty, does not command altruism or self-abnegation, and does not prevent a member from acting in the member’s own self-interest:

“Fair dealing” is not akin to the fair process component of entire fairness, i.e., whether the fiduciary acted fairly when engaging in the challenged transaction as measured by duties of loyalty and care. It is rather a commitment to deal “fairly” in the sense of consistently with the terms of the parties’ agreement and its purpose. Likewise “good faith” does not envision loyalty to the contractual counterparty, but rather faithfulness to the scope, purpose, and terms of the parties’ contract. Both necessarily turn on the contract itself and what the parties would have agreed upon had the issue arisen when they were bargaining originally.

Courts should not use the contractual obligation to change the parties’ or this chapter’s allocation of risk and power. To the contrary, the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the arrangements were made.

The operating agreement or this chapter may grant discretion to a manager, and the contractual obligation of good faith and fair dealing is especially salient when discretion is at issue. However, a manager may properly exercise discretion even though a member suffers as a consequence. Conduct does not violate the obligation of good faith and fair dealing merely because that conduct substantially prejudices a party. Indeed, parties allocate risk precisely because prejudice may occur.

The exercise of discretion constitutes a breach of the obligation of good faith and fair dealing only when the party claiming breach shows that the conduct has no honestly-held purpose that legitimately comports with the parties’ agreed-upon arrangements:

An implied covenant claim . . . looks to the past. It is not a free-floating duty unattached to the underlying legal documents. It does not ask what duty the law should impose on the parties given their relationship at the time of the wrong, but

In sum, the purpose of the contractual obligation of good faith and fair dealing is to protect the arrangement the partners have chosen for themselves, not to restructure that arrangement under the guise of safeguarding it.

As to the power of the operating agreement to affect the contractual obligation of good faith and fair dealing, see 15 Pa.C.S. § 8815(c)(13) (prohibiting elimination but allowing the agreement to
“prescribe standards, if not manifestly unreasonable, by which the performance of the obligation is to be measured”). As to whether the obligation stated in this subsection applies to transferees, the Committee Comment to 15 Pa.C.S. § 8817(b).

**Subsection (f)** - The operating agreement can provide additional or different methods of authorization or ratification, subject to the strictures of 15 Pa.C.S. § 8815(c)(12) and (d), and (d).

**Subsection (g)** - This subsection is the modern, reformulated version of a language that sought to overturn the now-defunct notion that debts to partners were categorically inferior to debts to non-partner creditors. The reformulation makes clear that this provision does not override the obligation to avoid conflict of interests.

**Subsection (h)** - This subsection merely negates a claim of fiduciary duty that is exclusively status-based and does not immunize misconduct.

**EXAMPLE:** Although a limited liability company is manager-managed, one member who is not a manager owns a controlling interest and effectively, albeit indirectly, controls the company’s activities. A member owning a minority interest brings an action for dissolution under 15 Pa.C.S. § 8871(a)(4)(iii)(B) (oppression by “the managers or those members in control of the company”). This paragraph does not prevent the court from construing the claim as alleging a breach of fiduciary duty by the controlling member.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- "limited liability company"
- "manager"
- "manager-managed limited liability company"
- "member"
- "operating agreement"

§ 8850. Rights to information.

(a) In member-managed company. - In a member-managed limited liability company, the following rules apply:

(1) On reasonable notice, a member may inspect and copy during regular business hours, at a reasonable location specified by the company, any record maintained by the company regarding the company’s activities, affairs, financial condition and other circumstances.

(2) The company shall furnish to each member without demand, any information concerning the company’s activities, affairs, financial condition and other circumstances which the company knows and is material to the proper exercise of the member’s rights and duties under the operating agreement or this title, except to the extent the company can establish that it reasonably believes the member already knows the information.

(3) The duty to furnish information under paragraph (2) also applies to each member to the extent the member knows any of the information described in paragraph (2).
(b) In manager-managed company. – In a manager-managed limited liability company, the following rules apply:

(1) The informational rights stated in subsection (a) and the duty stated in subsection (a)(3) apply to the managers and not the members.

(2) During regular business hours and at a reasonable location specified by the company, a member may inspect and copy full information regarding the activities, affairs, financial condition and other circumstances of the company as is just and reasonable if:

(i) the member seeks the information for a purpose reasonably related to the member’s interest as a member;

(ii) the member makes a demand in record form received by the company, describing with reasonable particularity the information sought and the purpose for seeking the information; and

(iii) the information sought is directly connected to the member’s purpose.

(3) Within ten days after receiving a demand under paragraph (2)(ii), the company shall, in record form, inform the member that made the demand of:

(i) the information that the company will provide in response to the demand and when and where the company will provide the information; and

(ii) the company’s reasons for declining, if the company declines to provide any demanded information.

(c) Rights of person dissociated as member. – Subject to subsection (h), within 10 days after receipt by a limited liability company of a demand made in record form, a person dissociated as a member may have access to information to which the person was entitled while a member if:

(1) the information pertains to the period during which the person was a member;

(2) the person seeks the information in good faith; and

(3) the person satisfies the requirements imposed on a member under subsection (b)(2).

(d) Response of company. – A limited liability company shall respond to a demand made under subsection (c) in the manner provided in subsection (b)(3).

(e) Copying costs. – A limited liability company may charge a person that makes a demand under this section the reasonable costs of copying.
(f) Rights of agent or guardian. – A member or person dissociated as a member may exercise rights under this section through an agent or, in the case of an individual under legal disability, a guardian. Any restriction or condition imposed by the operating agreement or under subsection (h) applies both to the agent or guardian and the member or person dissociated as a member.

(g) No rights of transferee. – Subject to section 8854 (relating to power of personal representative of deceased member), the rights under this section do not extend to a person as transferee.

(h) Limitations on access. – In addition to any restriction or condition stated in the operating agreement, a limited liability company, as a matter within the ordinary course of its activities and affairs, may impose reasonable restrictions and conditions on access to and use of information to be furnished under this section, including designating information confidential and imposing nondisclosure and safeguarding obligations on the recipient. In a dispute concerning the reasonableness of a restriction under this subsection, the company has the burden of proving reasonableness.

(i) Cross reference. – See section 8815 (relating to contents of operating agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 410.

The rules stated in this section are what might be termed “quasi-default rules” – subject to some change by the operating agreement. 15 Pa.C.S. § 8815(c)(14) (prohibiting unreasonable restrictions on the information rights stated in this section).

Although the rights and duties stated in this section are extensive, they are not necessarily all-inclusive. Some decisions characterize owners’ information rights as reflecting a fiduciary duty of those with management power. , No. Civ.A. 1844-N, 2006 WL 3927242 at *14 (Del.Ch. Oct. 16, 2006) (holding that a manager owed “certain duties to members of the LLC” and stating that “[w]hen fiduciaries communicate with their beneficiaries in the context of asking the beneficiary to make a discretionary decision—such as whether to consent to a sale of substantially all the assets of an LLC—the fiduciary has a duty to disclose all material facts bearing on the decision at issue”) (citing , 700 A.2d 135, 137 (Del.1997)).

Chapter 88’s statements of fiduciary duties is not exhaustive. the Committee Comments to 15 Pa.C.S. §§ 8849.1(a) and 8849.2(a).

Subsection (a) – Paragraph 1 states the rule pertaining to information memorialized in records maintained by the company. Paragraph 2 applies to information not in such a record.

Subsection (a)(2) and (3) – In appropriate circumstances, violation of either or both of these provisions might cause a court to enjoin or even rescind action taken by the limited liability company, especially when the violation has interfered with an approval or veto mechanism involving member consent. , 299 A.D.2d 278, 279-280 (N.Y.A.D. 1st
Subsection (a)(2) – This paragraph imposes a duty on the limited liability company, not the members who manage the company. However, a member could be liable in damages if the member were to: (i) breach a duty under 15 Pa.C.S. § 8849.1 or the operating agreement; and (ii) in doing so cause or suffer the company to breach the duty stated in this paragraph.

Subsection (a)(3) – This paragraph imposes a duty directly on each member. Therefore, a member’s violation of this paragraph is actionable in damages without need to show a violation of a duty stated in 15 Pa.C.S. § 8849.1.

Subsection (b)(1) – This is a switching provision. The comments to paragraph (a)(2) and (3) apply here by analogy.

Subsection (b)(2) – This paragraph refers to “information” rather than “records maintained by the company” – compare subsection (a) – so in some circumstances the company might have an obligation to memorialize information. Such circumstances will likely be rare or at least unusual. This section generally concerns providing existing information, not creating it. In any event, a member does not trigger the company’s obligation under this paragraph merely by satisfying subparagraphs (i) through (iii). The member must also satisfy the “just and reasonable” requirement.

Subsection (c)(1) – A person dissociated as a member has information rights only as to the period during which the person was a member.

Subsection (h) – This provision is a fall-back protection against gaps in the operating agreement. For example, those managing a limited liability company may protect trade secrets from disclosure or prohibit various misuses of confidential information even if the operating agreement has neglected to address this issue.

The reference to “ordinary course” pertains to 15 Pa.C.S. § 8847(b)(3) (stating that any “difference arising among members [in a manager-managed limited liability company] as to a matter in the ordinary course of the activities of the company may be decided by a majority of the members”). As for a manager-managed company, see 15 Pa.C.S. § 8847(c)(1) (“Except as expressly provided in this title, any matter relating to the activities and affairs of the [manager-managed] company is decided exclusively by the manager, or, if there is more than one manager, by a majority of the managers.”). This approach is necessary, lest a requesting member (or manager-member) have the power to block imposition of a reasonable restriction or condition needed to prevent the requestor from abusing the company.

The burden of proof under subsection (h) contrasts with the burden of proof when someone claims that a term of an operating agreement violates 15 Pa.C.S. § 8815(c)(14). Under that subsection, as a matter of ordinary procedural law, the burden is on the person making the claim.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“manager”
“manager-managed limited liability company”
“member”
“member-managed limited liability company”
“operating agreement”
Subchapter E
Transferable Interests and Rights of Transferees and Creditors

Section
8851. Nature of transferable interest.
8852. Transfer of transferable interest.
8853. Charging order.
8854. Power of personal representative of deceased member.

§ 8851. Nature of transferable interest.

(a) Personal property. – A transferable interest is personal property.
(b) Only right that may be transferred. – A person may not transfer to a person not a member any rights in a limited liability company other than a transferable interest.

Committee Comment (2016):
This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 501.

Absent a contrary provision in the operating agreement or the consent of the members, a "transferable interest" is the only interest in a limited liability company that can be transferred to a non-member. 15 Pa.C.S. § 8852. As to whether a member may transfer governance rights to a fellow member, the question is moot absent a provision in the operating agreement changing the default rule, 5 Pa.C.S. § 8847(b)(2), allocating governance rights. In the default mode, a member’s transfer of governance rights to another member: (i) does not increase the transferee’s governance rights; (ii) eliminates the transferor’s governance rights; and (iii) thereby changes the denominator but not the numerator in calculating governance rights.

EXAMPLE: LCN Company, LLC is a member-managed limited liability company with three members, Laura, Charles, and Nora. The operating agreement does not displace this chapter’s default rule on the allocation of governance rights among members. Thus, each member has 1/3 of those rights. Laura transfers her entire ownership interest to Charles. The transfer does not increase Charles’s governance rights but does eliminate Laura’s. After the transfer, Laura has no governance rights (regardless of whether Charles and Nora agree to expel Laura under 15 Pa.C.S. § 8861(5)(ii)). As a result, Charles and Nora each have 1/2 of the governance rights.

Whether a transferable interest pledged as security is governed by Article 8 or 9 of the Uniform Commercial Code depends on the rules stated in those Articles.

The term “transferable interest” used in this section is defined in 15 Pa.C.S. § 8812.

§ 8852. Transfer of transferable interest.
(a) General rule. – Subject to section 8853(f) (relating to charging order), a transfer, in whole or in part, of a transferable interest:

(1) is permissible;

(2) does not by itself cause the dissociation of the transferor as a member or a dissolution and winding up of the limited liability company’s activities and affairs; and

(3) subject to section 8854 (relating to power of personal representative of deceased member), does not entitle the transferee to:

   (i) participate in the management or conduct of the company’s activities and affairs; or

   (ii) except as provided in subsection (c), have access to records or other information concerning the company’s activities and affairs.

(b) Right to distributions. – A transferee has the right to receive, in accordance with the transfer, distributions to which the transferor would otherwise be entitled.

(c) Right to account on dissolution. – In a dissolution and winding up of a limited liability company, a transferee is entitled to an account of the company’s transactions only from the date of dissolution.

(d) Certificate of interest. – A transferable interest may be evidenced by a certificate of the interest issued by the limited liability company in record form and, subject to this section, the interest represented by the certificate may be transferred by a transfer of the certificate.

(e) Recognition of transferee’s rights. – A limited liability company need not give effect to a transferee’s rights under this section until the company knows or has notice of the transfer.

(f) Transfer restrictions. – A transfer of a transferable interest in violation of a restriction on transfer contained in the operating agreement is ineffective if the intended transferee has knowledge or notice of the restriction at the time of transfer.

(g) Rights retained by transferor. – Except as provided in section 8861(5)(ii) (relating to events causing dissociation), if a member transfers a transferable interest, the transferor retains the rights of a member other than the transferable interest transferred and retains all the duties and obligations of a member.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 502.

One of the most fundamental characteristics of limited liability company law is its fidelity to the
“pick your partner” principle. , 311 P.2d 972, 975 (Nev. 1957) (stating that (i) the assignment of a partnership interest from one partner to a stranger does not bring that stranger into fiduciary relationship with the remaining partners and (ii) absent consent by the remaining partners “[t]he stranger remains a stranger” with no rights to management or even information).

This section is the core of this chapter’s provisions reflecting and protecting that principle. A member’s rights in a limited liability company are bifurcated into economic rights (the transferable interest) and governance rights (including management rights, consent rights, rights to information, and rights to seek judicial intervention). Unless the operating agreement otherwise provides, a member acting without the consent of all other members lacks both the power and the right to: (i) bestow membership on a non-member; or (ii) transfer to a non-member anything other than some or all of the member’s transferable interest. The rights of a mere transferee are quite limited –, to receive distributions as provided in subsection (b), and, if the company dissolves and winds up, to receive specified information pertaining to the company from the date of dissolution as provided in subsection (c).

Consistent with current law, a member may transfer governance rights to another member without obtaining consent from the other members. Thus, Chapter 88 does not itself protect members from control shifts that result from transfers among members (as distinguished from transfers to non-members who seek thereby to become members).

This section applies regardless of whether the transferor is a member, a transferee of a member, a transferee of a transferee, etc.

Other law may affect the applicability of this section. 11 U.S.C. § 541(c)(1) (providing that, initially at least, all property of a debtor becomes part of the bankruptcy estate regardless of restrictions on transfer) and Uniform Commercial Code §§ 9-406 and 9-408 (overriding specified restrictions on assignment, regardless of whether state law or a contract impose the restrictions).

In any event, this section does not apply to the transfer of ownership interests in a member that is an entity.

EXAMPLE: ABC, LLC has three members: Ralph (an individual), Alice, Inc. (“Alice”), and Norton, LLC (“Norton”). 15 Pa.C.S. § 8852 applies to any attempt by Ralph, Alice, or Norton to transfer their respective membership interest in ABC. Section 8852 is inapplicable, however, to a change in control of Alice or Norton or even a complete change in their respective membership.

Subsection (a) - The definition of “transfer” in 15 Pa.C.S. § 102 and this subsection’s reference to “in whole or in part” combine to mean that this section encompasses not only unconditional, permanent, and complete transfers but also temporary, contingent, and partial ones. Thus, for example, a charging order under 15 Pa.C.S. 8853 effects a transfer of part of the judgment debtor’s transferable interest, as does the pledge of a transferable interest as collateral for a loan and the gift of a life-interest in a member’s rights to distribution.

Subsection (a)(2) - The phrase “by itself” contemplates 15 Pa.C.S. § 8861(5)(ii), which creates a risk of dissociation via expulsion when a member transfers all of the member’s transferable interest.

Subsection (a)(3) - Mere transferees have no right to participate in management or otherwise intrude as the members carry on the affairs of the limited liability company and their activities as members.
Because 15 Pa.C.S. § 102 defines “transfer” to include “a transfer by operation of law,” this section affects the power of other law to effect transfers of a member’s ownership interest. For example, a divorce court lacks the power to award a member’s spouse anything beyond the member’s transferable interest. Nor does the member have the power to enter into a property settlement purporting to effect any greater transfer.

For the divorce court, the best solution is to value the member’s complete ownership interest (the transferable interest as enhanced by the management and information rights and the standing to sue) and: (i) if possible, award the member’s spouse marital property of equal value; or (ii) if not possible, award the member’s spouse a money judgment and a charging order to enforce the judgment.

Granting the non-member any part of the member’s transferable interest is almost always imprudent; marital discord will almost inevitably carry over into the business relationship. Granting the member’s ex-spouse the entire transferable interest is rarely a viable alternative. If the member is an active participant in the limited liability company, the approach is impossible. The member’s transferable interest will typically constitute much or all of the member’s remuneration for the member’s activity. Even if the member is essentially passive, granting the transferable interest to the ex-spouse puts him or her at great risk as a “bare transferee.”

When a member dies, other law may effect a transfer of the member’s transferable interest to the member’s estate or personal representative. 15 Pa.C.S. § 8854 contains special rules on information rights applicable to that situation.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

Subsection (b) - Amounts due under this subsection are of course subject to offset under 15 Pa.C.S. § 8844(d) for any amount owed to the limited liability company by the member or dissociated member on whose account the distribution is made. As to whether a limited liability company may properly offset for claims against a transferor that was never a member is a matter for other law, specifically the law of contracts dealing with assignments.

Subsection (c) - This very limited grant of information rights encompasses only transactions occurring at or after the date of the dissolution of the limited liability company. The transferee has only the right to information as to the allocation of net assets among the company’s creditors, members, and transferees – and only from the date of dissolution.

This subsection does not prevent a transferee from contracting with a member-transferor to require the member-transferor to disclose further information to the transferee. Whether such an agreement would breach the operating agreement, the implied obligation of good faith and fair dealing under 15 Pa.C.S. § 8849.1(d) or 8849.2(d), or a fiduciary duty depends on the circumstances.

Subsection (d) - The use of certificates can raise issues relating to Articles 8 and 9 of the Uniform Commercial Code.

Subsection (f) - The term “notice” includes “reason to know” under 15 Pa.C.S. § 8813(b), and ordinarily a potential transferee has reason to inquire about transfer restrictions that might be contained in the operating agreement.
The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“distribution”
“limited liability company”
“member”
“operating agreement”
“transferable interest”
“transferee”

The term “record form” used in this section is defined in 15 Pa.C.S. § 102.

§ 8853. Charging order.

(a) General rule. – On application by a judgment creditor of a member or transferee, a court may enter a charging order against the transferable interest of the judgment debtor for the unsatisfied amount of the judgment. Except as provided in subsection (f), a charging order constitutes a lien on a judgment debtor’s transferable interest and requires the limited liability company to pay over to the person to which the charging order was issued any distribution that otherwise would be paid to the judgment debtor.

(b) Available relief. – To the extent necessary to effectuate the collection of distributions pursuant to a charging order in effect under subsection (a), the court may:

(1) appoint a receiver of the distributions subject to the charging order, with the power to make all inquiries the judgment debtor might have made; and

(2) make all other orders necessary to give effect to the charging order.

(c) Foreclosure. – Upon a showing that distributions under a charging order will not pay the judgment debt within a reasonable time, the court may foreclose the lien and order the sale of the transferable interest. Except as provided in subsection (f), the purchaser at the foreclosure sale only obtains the transferable interest, does not thereby become a member, and is subject to section 8852 (relating to transfer of transferable interest).

(d) Satisfaction of judgment. – At any time before foreclosure under subsection (c), the member or transferee whose transferable interest is subject to a charging order under subsection (a) may extinguish the charging order by satisfying the judgment and filing a certified copy of the satisfaction with the court that issued the charging order.

(e) Purchase of rights. – At any time before foreclosure under subsection (c), a limited liability company or one or more members whose transferable interests are not subject to the charging order may pay to the judgment creditor the full amount due under the judgment and thereby succeed to the rights of the judgment creditor, including the charging order.

(f) Foreclosure against sole member. – If a court orders foreclosure of a charging order
lien against the sole member of a limited liability company:

(1) the court shall confirm the sale;

(2) the purchaser at the sale obtains the member’s entire interest, not only the
member’s transferable interest;

(3) the purchaser thereby becomes a member; and

(4) the person whose interest was subject to the foreclosed charging order is
dissociated as a member.

(g) Exemption laws preserved. – This chapter shall not deprive any member or transferee
of the benefit of any exemption laws applicable to the transferable interest of the member or
transferee.

(h) Exclusive remedy. – This section provides the exclusive remedy by which a person
seeking to enforce a judgment against a member or transferee may, in the capacity of judgment
creditor, satisfy the judgment from the judgment debtor’s transferable interest.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 503.

The charging order concept dates back to the English Partnership Act of 1890 and in the United
States has been a fundamental part of law of unincorporated business organizations since 1914. As much
a remedy limitation as a remedy, the charging order is the sole method by which a judgment creditor of a
member or transferee can extract any value from the member’s or transferee’s ownership interest in a
limited liability company.

Under this section, the judgment creditor of a member or transferee is entitled to a charging order
against the relevant transferable interest. While in effect, that order entitles the judgment creditor to
whatever distributions would otherwise be due to the member or transferee whose interest is subject to the
order. However, the judgment creditor has no say in the timing or amount of those distributions. The
charging order does not entitle the judgment creditor to accelerate any distributions or to otherwise
interfere with the management and activities of the limited liability company.

The operating agreement has no power to alter the provisions of this section to the prejudice of third
parties. 15 Pa.C.S. § 8815(c)(20).

Subsection (a) – The phrase “judgment debtor” encompasses both members and transferees. The
lien pertains only to a distribution, which is defined in 15 Pa.C.S. § 8812 to exclude “amounts
constituting reasonable compensation for present or past service or payments made in the ordinary course
of business under a bona fide retirement plan or other bona fide benefits program.” A judgment creditor
that wishes to levy on such amounts should use the appropriate creditor’s remedy, such as garnishment.

Whether an application for a charging order must be served on the limited liability company or the
member or transferee whose transferable interest is to be charged is a matter for other law, principally the
law of remedies and civil procedure.

Subsection (b) – Paragraph (2) refers to “other orders” rather than “additional orders”. Therefore, given appropriate circumstances, a court may invoke either paragraph (1) or (2) or both.

Subsection (b)(1) – The receiver contemplated here is emphatically not a receiver for the limited liability company, but rather a receiver for the distributions subject to the charging order. The principal advantage provided by this paragraph is an expanded right to information. However, that right goes no further than “the extent necessary to effectuate the collections of distributions pursuant to a charging order.” For a correctly narrow reading of this provision, , No. 11–1285, 2012 WL 3195759 (Iowa App. Aug. 8, 2012).

Subsection (b)(2) – This paragraph must be understood in the context of: (i) the very limited nature of the charging order; and (ii) the importance of preventing overreaching on behalf of a person that is not a judgment creditor of the limited liability company, has no claim on the company’s assets, and has no right to interfere in the activities, affairs, and management of the company. In particular, the court’s power to make “all other orders” is limited to “orders necessary to give effect to the charging order.”

EXAMPLE: A judgment creditor with a charging order believes that the limited liability company should invest less of its surplus in operations, leaving more funds for distributions. The creditor moves the court for an order directing the limited liability company to restrict re-investment. Subsection (b)(2) does not authorize the court to grant the motion.

EXAMPLE: A judgment creditor with a judgment for $10,000 against a member obtains a charging order against the member’s transferable interest. Having been properly served with the order, the limited liability company nonetheless fails to comply and makes a $3000 distribution to the member. The court has the power to order the limited liability company to pay $3000 to the judgment creditor to “give effect to the charging order.”

Under subsection (b)(2), the court has the power to decide whether a particular payment is a distribution, because that decision determines whether the payment is part of a transferable interest subject to a charging order.

EXAMPLE: Member A of ABC, LLC has for some years received distributions from the company. However, when a judgment creditor of A obtains a charging order against A’s transferable interest, the company ceases to make distributions to A and instead provides a salary to A equivalent to former distributions. A court might deem this salary a disguised distribution. In any event, however, the salary will be subject to garnishment.

Chapter 88 has no specific rules for determining the fate or effect of a charging order when the limited liability company undergoes a merger, conversion, interest exchange, division, or domestication under Chapter 3. In the proper circumstances, such an organic change might trigger an order under subsection (b)(2).

Subsection (c) – The phrase “that distributions under the charging order will not pay the judgment debt within a reasonable period of time” comes from case law . , 453 S.E.2d 780, 783 (Ga. Ct. A pp. 1995). ); , 578 S.E.2d 572, 574 (Ga. Ct. A pp. 2003) (“Judicial sale may be appropriate where . . . it is apparent that distributions under the charging order will not pay the judgment debt within a reasonable amount of time.”). A purchaser at a foreclosure sale obtains only the very limited rights of a transferee under 15 Pa.C.S. § 8852 and is in some ways more vulnerable and less powerful than the holder of a charging order. After foreclosure and
sale, subsection (b) no longer applies. More generally, the court is no longer involved in the matter.

**Subsection (d)** - This provision allows the judgment debtor to end the charging order without need for a hearing.

**Subsection (e)** - Traditionally, charging order provisions referred to the possibility of “redeeming” an interest subject to a charging order. That usage was confusing, leaving several important questions unanswered. This section substitutes an approach that more closely parallels the practical possibility of the limited liability company or its members buying the underlying judgment (and thereby dispensing with any interference the judgment creditor might seek to inflict on the company).

In many circumstances, buying the judgment is superior to the mechanism provided by this subsection because: (i) this subsection requires full satisfaction of the underlying judgment; and (ii) the limited liability company or other members might be able to buy the judgment for less than face value. On the other hand, this subsection operates without need for the judgment creditor’s consent, so it remains a valuable protection in the event a judgment creditor seeks to do mischief to the company.

Whether a decision of a member-managed limited liability company to invoke this subsection is “ordinary course” or “outside the ordinary course” under 15 Pa.C.S. § 8847(b)(3) and (4) depends on the circumstances. However, the involvement of this subsection does not by itself make the decision “outside the ordinary course.” For a manager-managed company, the distinction is irrelevant. 15 Pa.C.S. § 8847(c)(1).

**Subsection (f)** - The charging order remedy protects the “pick your partner” principle. That principle is inapposite when a limited liability company has only one member. The exclusivity of the charging order remedy was never intended to protect a judgment debtor, rather to protect the interests of the judgment debtor’s co-owners.

Put another way, the charging order remedy was never intended as an “asset protection” device for judgment debtors. , 44 So. 3d 76, 83 (Fla. 2010) (recognizing “the full scope of a judgment creditor’s rights with respect to a judgment debtor’s freely alienable membership interest in a single-member LLC”); , 291 B.R. 538, 540 (Bankr. D. Colo. 2003) (holding that, “because there are no other members in the LLC, … the Debtor’s bankruptcy filing effectively assigned her entire membership interest in the LLC to the bankruptcy estate, and the Trustee obtained all her rights, including the right to control the management of the LLC”). Accordingly, when a charging order against a sole member is foreclosed, the member’s entire ownership interest is sold and the buyer replaces the judgment debtor as the sole member of the limited liability company.

**Subsection (g)** - This subsection preserves otherwise applicable exemptions but does not create any. , 405 B.R. 604, 609 (Bankr. N. D. Ohio 2009) (interpreting the comparable provision in UPA (1997) and stating that “it is clear that [the provision] does not create an exemption”).

**Subsection (h)** - This subsection does not override Uniform Commercial Code, Article 9, which may provide different remedies for a secured creditor acting in that capacity. A secured creditor with a judgment might decide to proceed under Article 9 alone, under this section alone, or under both Article 9 and this section. In the last-mentioned circumstance, the constraints of this section would apply to the charging order but not to the Article 9 remedies.

This subsection is not intended to prevent a court from effecting a “reverse pierce” where appropriate. In a reverse pierce, the court conflates the entity and its owner to hold the entity liable for a debt of the owner. , 799 A.2d 298, 312 (Conn. App. Ct. 2002)
(approving a reverse pierce where a judgment debtor had established a limited liability company in a
patent attempt to frustrate the judgment creditor), overruled on other grounds by
830 A.2d 1114 (Conn. 2003). Likewise, this subsection does not supplant fraudulent transfer law.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“distribution”
“limited liability company”
“member”
“transferable interest”
“transferee”

§ 8854. Power of personal representative of deceased member.

If a member dies, the deceased member’s personal representative may exercise:

(1) the rights of a transferee provided in section 8852(c) (relating to transfer of
transferable interest); and

(2) for the purposes of settling the estate, the rights the deceased member had under
section 8850 (relating to rights to information).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 504.

The estate and those claiming through the estate are transferees, and as such they have very limited
rights to information. This section provides temporary, additional information rights to the legal
representative of the estate.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a
decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its
provisions and administer the estate of the testator.” and “administrator” is defined in 1 Pa.C.S. § 1991 as
“A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a
decedent.”

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“member”
“transferee”

Subchapter F
Dissociation
§ 8861. Events causing dissociation.

A person is dissociated as a member when any of the following occurs:

1. The limited liability company knows or has notice of the person’s express will to withdraw as a member, except that, if the person specified a withdrawal date later than the date the company knew or had notice, on that later date.

2. An event stated in the operating agreement as causing the person’s dissociation occurs.

3. The person’s entire interest is transferred in a foreclosure sale under section 8853(f) (relating to charging order).

4. The person is expelled as a member pursuant to the operating agreement.

5. The person is expelled as a member by the affirmative vote or consent of all the other members if:

   a. it is unlawful to carry on the company’s activities and affairs with the person as a member;

   b. there has been a transfer of all the person’s transferable interest in the company, other than:

      i. a transfer for security purposes; or

      ii. a charging order in effect under section 8853 which has not been foreclosed;

   c. the person is an entity and:

      i. the company notifies the person that it will be expelled as a member because:

         a. the person has filed a certificate of dissolution or the equivalent;

         b. the person has been administratively dissolved;

         c. the person’s charter or its equivalent has been revoked; or
(IV) the person’s right to conduct business has been suspended by the person’s jurisdiction of formation; and

(B) within 90 days after the notification:

(I) the certificate of dissolution or the equivalent has not been withdrawn, rescinded or revoked;

(II) the person has not been reinstated;

(III) the person’s charter or the equivalent has not been reinstated; or

(IV) the person’s right to conduct business has not been reinstated; or

(iv) the person is an unincorporated entity that has been dissolved and whose activities and affairs are being wound up.

(6) On application by the company or a member in a direct action under section 8881 (relating to direct action by member), the person is expelled as a member by judicial order because the person:

(i) has engaged or is engaging in wrongful conduct that has affected adversely and materially, or will affect adversely and materially, the company’s activities and affairs;

(ii) has committed willfully or persistently, or is committing willfully or persistently, a material breach of the operating agreement or a duty or obligation under section 8849.1 (relating to standards of conduct for members); or

(iii) has engaged or is engaging in conduct relating to the company’s activities and affairs which makes it not reasonably practicable to carry on the activities and affairs with the person as a member.

(7) In the case of an individual:

(i) the individual dies; or

(ii) in a member-managed limited liability company:

(A) a guardian for the individual is appointed; or

(B) a court orders that the individual has otherwise become incapable of performing the individual’s duties as a member under this title or the operating agreement.
(8) In a member-managed limited liability company, the person:

(i) becomes a debtor in bankruptcy;

(ii) executes an assignment for the benefit of creditors; or

(iii) seeks, consents to or acquiesces in the appointment of a trustee, receiver, or liquidator of the person or of all or substantially all the person’s property.

(9) In the case of a person that is a testamentary or inter vivos trust or is acting as a member by virtue of being a trustee of such a trust, the trust’s entire transferable interest in the company is distributed.

(10) In the case of a person that is an estate or is acting as a member by virtue of being a personal representative of an estate, the estate’s entire transferable interest in the company is distributed.

(11) In the case of a person that is not an individual, the existence of the person terminates.

(12) The company participates in a merger under Chapter 3 (relating to entity transactions) and:

(i) the company is not the surviving entity; or

(ii) otherwise as a result of the merger, the person ceases to be a member.

(13) The company participates in an interest exchange under Chapter 3 and, as a result of the interest exchange, the person ceases to be a member.

(14) The company participates in a conversion under Chapter 3.

(15) The company participates in a division under Chapter 3 and:

(i) the company is not a resulting association; or

(ii) as a result of the division, the person ceases to be a member.

(16) The company participates in a domestication under Chapter 3 and, as a result of the domestication, the person ceases to be a member.

(17) The company dissolves and completes winding up.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
This section states default rules that may be varied by the operating agreement. However, it would be nonsensical to vary some of the rules — to provide that death does not cause an individual’s dissociation, or that an entity remains a member even after the entity has dissolved and completed winding up.

**Paragraph (1)** — Operating agreements often require notice of dissociation to be in writing and to specify the effective date of the dissociation.

**Paragraph (4)** — Many operating agreements provide for “no cause” expulsion, and courts considering such provisions will likely look to cases addressing the issue in the context of partnerships. In that context, courts have taken somewhat different approaches. 363 N.E.2d 573, 576 (N.Y. 1977), 664 N.E.2d 239, 245 (Ill. App. Ct. 1996). 15 Pa.C.S. §§ 8849.1(d) and 8849.2(d) (stating and explaining the implied contractual covenant of good faith and fair dealing).

**Paragraph (5)(ii)** — This paragraph permits expulsion when a member no longer has any “skin in the game.” Under this paragraph (unless the operating agreement provides otherwise), a member’s transferee can protect itself from the vulnerability of “bare transferee” status by obligating the member/transferor to retain a 1% interest and exercise the member’s governance rights (including the right to bring a derivative suit) to protect the transferee’s interests.

**Paragraph (5)(iii)** — 1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

**Paragraph (6)** — Although the operating agreement can revise or eliminate this rule, doing so requires careful planning. Compare 15 Pa.C.S. § 8871(a)(4), which contains some analogous grounds for dissolution by court order. Under 15 Pa.C.S. § 8815(c)(15), the operating agreement cannot vary those grounds.

15 Pa.C.S. § 8881(b) limits a member’s standing to bring a direct action to circumstances in which the member can “plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.” For example, a member might invoke paragraph (6)(ii) if another member’s breach of the operating agreement harmed the first member directly. If a member has suffered only indirect harm, the paragraph (6)(ii) claim belongs to the limited liability company and not the member. If the company fails to bring suit, the member may assert the claim derivatively. 15 Pa.C.S. §§ 8882 through 8885.

For examples of conduct warranting an expulsion order, 116 P.3d 366, 373 (Utah 2005) (holding that a member’s “misappropriation of trust account funds totaling at least $11,540.06 for his personal use” warranted expulsion, where the member’s “misconduct continued the pattern of behavior that [had previously] resulted in losses to the company of $625,000[,] where the new misconduct ... took place after [the member’s] prior wrongdoing had been discovered and after [the limited liability company] had assented to permit [the member] to atone for his misdeeds by fulfilling the terms of the amended operating agreement”); 323 P.3d 551, 561 (Or. Ct. A pp. 2014) (upholding expulsion of a member who “had stolen a large amount of money from [the limited liability company], had intentionally failed to provide financial information, and had
Paragraph (6)(iii) – This provision has an analog among the causes for dissolution. 15 Pa.C.S. § 8871(a)(4)(ii).

Paragraph (7)(ii) – This provision does not apply to a manager-managed limited liability company because, given the limited rights of non-manager members, the stated occurrences do not necessarily justify dissociation. As for the effect of the stated occurrences on a person’s role as a manager, 15 Pa.C.S. § 8847(c)(4) (permitting the removal of a manager “at any time by the consent of a majority of the members without notice or cause”).

Paragraphs (9) and (10) – A change in trustee or personal representative does not cause dissociation.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” “Administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

Paragraph (11) – This provision is the entity analog to paragraph (7)(i) (death of an individual). Although in theory the operating agreement could change this rule, doing so would be nonsensical.

Paragraph (12)(i) – If a limited liability company disappears as part of a merger, no person can continue as a member of the company. When the merger takes effect, the members of the disappearing company are for purpose dissociated. Depending on the plan of merger, those persons may become members of a surviving limited liability company. In those circumstances, the merger will have dissociated them from one company and admitted them into membership in the surviving company.

Paragraph (12)(ii) – It is possible for a plan of merger to “shuffle the equity” of the surviving entity, even to the extent of taking out some or all of the owners of the surviving entity. A reverse triangular merger involving a limited liability company as the surviving entity typically dissociates all the pre-merger members of the company.

Paragraph (14) – By definition, a limited liability company that converts ceases to be a limited liability company. Thus, when the plan of conversion takes effect, all the members of the converting entity are dissociated from that entity. In many cases, those persons will all be owners of the converted entity. In some cases, the conversion will “shuffle the equity” and take out some of the members of the converting company.
Paragraph (16) - Domestication does not by itself dissociate a member, because the domesticated entity remains both a limited liability company and "the same entity without interruption as the domesticating company." However, an "equity shuffle" could dissociate a member.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- "limited liability company"
- "member"
- "member-managed limited liability company"
- "operating agreement"
- "transferable interest"

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- "debtor in bankruptcy"
- "jurisdiction of formation"

§ 8862. Power to dissociate and wrongful dissociation.

(a) Power to dissociate. - A person has the power to dissociate as a member at any time, rightfully or wrongfully, by withdrawing as a member by express will under section 8861(1) (relating to events causing dissociation).

(b) Wrongful dissociation. - A person's dissociation as a member is wrongful only if the dissociation:

1. is in breach of an express provision of the operating agreement; or
2. occurs before the completion of the winding up of the limited liability company and:
   1. the person withdraws as a member by express will;
   2. the person is expelled as a member by judicial order under section 8861(6);
   3. the person is dissociated under section 8861(8); or
   4. the person is expelled or otherwise dissociated as a member because it willfully dissolved or terminated, except that this subparagraph does not apply to a person that is:
      1. a trust that is not a business or statutory trust;
      2. an estate; or
      3. an individual.
(c) Damages for wrongful dissociation. – A person that wrongfully dissociates as a member is liable to the limited liability company and, subject to section 8881 (relating to direct action by member), to the other members for damages caused by the dissociation. The liability is in addition to any debt, obligation or other liability of the member to the company or the other members.


This subchapter deals with the dissociation of a member. Subchapter G deals with the dissolution of a limited liability company.

Subsection (a) – The operating agreement can vary this provision, even to the extent of negating a member’s power to dissociate.

Subsection (b) – This subsection is also subject to change in the operating agreement. For example, the operating agreement may expand or contract what constitutes wrongful dissociation.

Subsection (c) – In effect, this subsection equates wrongful dissociation with breach of contract. For example, a limited liability company might incur substantial expenses resulting from a member’s wrongful dissociation, such as replacing the member’s expertise or obtaining new financing. The wrongfully dissociating member would be liable to the limited liability company for those and all other damages that are causally related to the wrongful dissociation.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“member”
“operating agreement”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

§ 8863. Effects of dissociation.

(a) General rule. – If a person is dissociated as a member:

(1) the person’s rights as a member terminate;

(2) if the company is member-managed, the person’s duties and obligations under section 8849.1 (relating to standards of conduct for members) as a member end with regard to matters arising and events occurring after the person’s dissociation; and

(3) subject to sections 8844(e) (relating to sharing of and right to distributions before dissolution) and 8854 (relating to power of personal representative of deceased member) and Chapter 3 (relating to entity transactions), any transferable interest owned by
the person in the person’s capacity as a member immediately before dissociation as a member is owned by the person solely as a transferee.

(b) Existing obligations not discharged. – A person’s dissociation as a member does not of itself discharge the person from any debt, obligation or other liability to the company or the other members which the person incurred while a member.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 603.

Subsection (a) – This provision makes no reference to power-to-bind matters, because this chapter provides that a member solely by reason of being a member has no power to bind the limited liability company. 15 Pa.C.S. § 8831.

Subsection (a)(1) – Because the rights of a person as a member terminate upon dissociation, a person dissociated as a member will not have any governance rights following dissociation. If a person that is dissociated as a member continues to hold a transferable interest, the person will hold that interest as a transferee and will have only the rights of a transferee.

Subsection (a)(3) – This paragraph accords with 15 Pa.C.S. § 8844(b) and (e). Under section 8844(b) dissociation generally does not entitle a person to any distribution, but section 8844(e) permits a dissociated member to be bought out instead of continuing as a transferee. Like most rules in this chapter, these rules are subject to the operating agreement.

Subsection (b) – In a member-managed limited liability company, the obligation to safeguard trade secrets and other confidential or proprietary information is incurred when a person is a member. A subsequent dissociation does not entitle the person to usurp the information or use it to the prejudice of the company after the dissociation. (In a manager-managed company, any obligations of a non-manager member with respect to proprietary information would be a matter for the operating agreement, the obligation of good faith and fair dealing, or other law.)

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“member”
“transferable interest”
“transferee”

The term “obligation” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter G
Dissolution and Winding Up

Section
8871. Events causing dissolution.
8872. Winding up and filing of certificates.
§ 8871. Events causing dissolution.

(a) General rule. – A limited liability company is dissolved, and its activities and affairs shall be wound up, upon the occurrence of any of the following:

(1) An event or circumstance that the operating agreement states causes dissolution.

(2) The consent of all the members.

(3) The passage of 180 consecutive days after the company ceases to have any members unless before the end of the period:

   (i) consent to admit at least one specified person as a member is given by transferees owning the rights to receive a majority of distributions as transferees at the time the consent is to be effective; and

   (ii) at least one person becomes a member in accordance with the consent.

(4) On application by a member, the entry by the court of an order dissolving the company on the grounds that:

   (i) the conduct of all or substantially all the company’s activities and affairs is unlawful;

   (ii) it is not reasonably practicable to carry on the company’s activities and affairs in conformity with the certificate of organization and the operating agreement; or

   (iii) the managers or those members in control of the company:

      (A) have acted, are acting, or will act in a manner that is illegal or fraudulent; or

      (B) have acted or are acting in a manner that is oppressive and was, is or will be directly harmful to the applicant.

(b) Other remedies. – In a proceeding brought under subsection (a)(4)(iii)(B), the court may order a remedy other than dissolution.
(c) Cross reference. - See section 8815(c)(15) (relating to contents of operating agreement).

Committee Comment (2016):
This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 701.

“Dissolution” has been a term of art in the law of unincorporated entities since at least the time of Roman law. Joseph Story, Commentaries on the Law on Partnership (2nd ed. 1850) § 266 at 408 (“The Roman law ... declared, that partnership might be dissolved in various ways ...”). The term “dissolution” indicates the beginning of the end for the entity. The end itself is labeled “termination.”


Except for paragraph (a)(4), this section is subject to change by the operating agreement, and operating agreements often address causes of dissolution. For example, an operating agreement might provide for dissolution upon the consent or affirmative vote of fewer than all members.

Subsection (a)(1) - This provision makes clear that an operating agreement may state causes of dissolution in addition to those stated in this section.

Subsection (a)(3) - Because the 180 day period under subsection (a)(3) begins to run when a limited liability company “ceases” to have a member, subsection (a)(3) will not apply to a new company that is awaiting the admission of its first member and such a company will not dissolve even though more than 180 days passes between the effectiveness of its certificate of organization and the admission of its first member.

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

Subsection (a)(4) - The operating agreement cannot vary the causes of dissolution stated in this provision. However, the operating agreement may contain a forum selection clause or change the forum from “the appropriate court” to binding arbitration.

Subsection (a)(4)(ii) - The standard stated here is conventional, deriving originally from the law of limited partnerships.

The court-ordered expulsion of a miscreant member can negate a claim for dissolution.
However, where grounds exist for both dissociation and dissolution, a court has the discretion to choose between the alternatives. [830 N.W.2d 191, 201-02 (Neb. 2013)] “[T]here is no textual basis for imposing a higher burden of proof for dissociation than dissolution.” [977 A.2d 107, 121 (Conn. 2009) (general partnership)].

This provision has an analog among the grounds for dissociation. [15 Pa.C.S. § 8661(6)(iii)].

Subsection (a)(4)(iii) – The provision’s reference to “those members in control of the company” implies that such members have a duty to avoid acting oppressively toward fellow members.

This chapter does not define “oppressively,” but “oppression” is a concept well-grounded in the law of close corporations. [Robert B. Thompson, The Shareholder’s Cause of Action for Oppression, 48 BUS. LAW. 69, 70 (1993) (referring to then “evolving cause of action of shareholder oppression”), and 541 S.E.2d 257, 264 - 266 (S.C. 2001). In many jurisdictions the concept equates to or at least includes the frustration of the plaintiff’s reasonable expectations. This concept of reasonable expectations is entirely separate from the “fruits of the bargain” and “reasonable expectations” language sometimes used in explaining the implied contractual obligation of good faith and fair dealing.

Courts have extrapolated close corporation doctrine to unincorporated organizations. [944 A.2d 1234, 1262 - 1264 (Md. App. 2008) (discussing cases). Indeed many cases simply conflate the two contexts. [440 S.W.3d 798, 812 (Tex. App. 2013) (“A member oppression claim may exist when: (1) a majority shareholder’s conduct substantially defeats the minority’s expectations that objectively viewed, were both reasonable under the circumstances and central to the minority shareholder’s decision to join the venture; or (2) burdensome, harsh, or wrongful conduct, a lack of probity and fair dealing in the company’s affairs to the prejudice of some members, or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.”); 104 S.W.3d 188, 196 (Tex. Ct. App.—Texarkana 2003) (explaining oppression of “members” in terms of shareholder oppression)].

However, applying close corporation law to limited liability companies requires some caution. Close corporation law developed in part because the standard corporate governance structure exalts majority power and does not presuppose contractual relationships among the shareholders.

In contrast, while a limited liability company depends on the sovereign for legal existence and the all-important liability shield, company governance is fundamentally contractual. Therefore, in most situations, the operating agreement should reflect and comprise members’ reasonable expectations. As a result, a court considering a claim of oppression by a member should consider, with regard to each reasonable expectation invoked by the plaintiff, whether the expectation: (i) contradicts any term of the operating agreement or any reasonable implication of any term of that agreement; (ii) was central to the plaintiff’s decision to become a member of the limited liability company or for a substantial time has been centrally important in the member’s continuing membership; (iii) was known to other members, who expressly or impliedly acquiesced in it; (iv) is consistent with the reasonable expectations of all the members, including expectations pertaining to the plaintiff’s conduct; and (v) is otherwise reasonable under the circumstances.

EXAMPLE: From its formation, Work-Here, LLC has had three members, been member-managed, involved all three members in company operations, and allocated distributions in part in reference
After 10 years, two of the members: (i) take a vote; (ii) purport to oust the third member from any continuing role in company operations; and (iii) announce that the third member’s distributions will be substantially reduced. The ousted member has at least three theories of recovery:

1. breach of an implied-in-fact term of the operating agreement, under which each member is entitled to work for the company and be compensated for the work;
2. violation of 15 Pa.C.S. § 8847(b)(4)(i) (requiring the affirmative vote or consent of all the members to undertake an act outside the ordinary course of the activities and affairs of the company); and

On the limited facts stated, these theories are undoubtedly plausible, although not necessarily persuasive.

Subsection (b) – In the close corporation context, many courts have reached this position without express statutory authority, most often with regard to court-ordered buyouts of oppressed shareholders. , 616 N.W. 2d 826, 838 (ND 2000); , 634 A. 2d 1019, 1031 (N.J. 1993); , 507 P. 2d 387, 394-6 (Or. 1973); , 463 S.W. 2d 541, 545 (Mo. A pp. 1971) (per curiam); , 754 S.W. 2d 375, 380 (Tex. A pp. 1988); , 189 S.E. 2d 315, 320 (Va. 1972).

This subsection saves courts and litigants the trouble of re-inventing that wheel in the context of limited liability companies. However, unlike subsection (a)(4), subsection (b) can be overridden by the operating agreement. Thus, the members may agree to restrict or eliminate a court’s power to craft a lesser remedy, even to the extent of confining the court (and themselves) to the all-or-nothing remedy of dissolution.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”
“distribution”
“limited liability company”
“manager”
“member”
“operating agreement”
“transferee”

The term “court” used in this section is defined in 15 Pa.C.S. § 102.

§ 8872. Winding up and filing of certificates.

(a) General rule. – A dissolved limited liability company shall wind up its activities and affairs and the company continues after dissolution only for the purpose of winding up.

(b) Conduct of winding up. – In winding up its activities and affairs, a limited liability company:
(1) shall discharge the company’s debts, obligations and other liabilities, settle and
close the company’s activities and affairs, and marshal and distribute the assets of the
company; and

(2) may:

(i) deliver to the department for filing a certificate of dissolution stating:

(A) the name of the company;

(B) subject to section 109 (relating to name of commercial registered
office provider in lieu of registered address), the address, including street and
number, if any, of the registered office of the company; and

(C) that the company is dissolved;

(ii) preserve the company’s activities, affairs and property as a going concern
for a reasonable time;

(iii) prosecute and defend actions and proceedings, whether civil, criminal or
administrative;

(iv) transfer the company’s property;

(v) settle disputes by mediation or arbitration; and

(vi) perform other acts necessary or appropriate to the winding up.

(c) Conduct of winding up when no members. – If a dissolved limited liability company
has no members, the personal representative, guardian or other person authorized to act on behalf
of the last person to have been a member may wind up the activities and affairs of the company.
If the person does so, the person has the powers of a sole manager under section 8847(c)
(relating to management of limited liability company) and is deemed to be a manager for the
purposes of section 8834(a) (relating to liability of members and managers).

(d) Action by transferees. – If the personal representative, guardian or other person
authorized to act under subsection (c) declines or fails to wind up the company’s activities and
affairs, a person may be appointed to do so by the consent of transferees owning a majority of
the rights to receive distributions as transferees at the time the consent is to be effective. A
person appointed under this subsection:

(1) has the powers of a sole manager under section 8847(c) and is deemed to be a
manager for the purposes of section 8834(a); and

(2) shall promptly deliver to the department for filing an amendment to the
company’s certificate of organization stating:

(i) that the company has no members;

(ii) the name and street and mailing addresses of the person; and

(iii) that the person has been appointed under this subsection to wind up the company.

(e) Judicial supervision. – The court may order judicial supervision of the winding up of a dissolved limited liability company, including the appointment of a person to wind up the company’s activities and affairs:

(1) on the application of a member, if the applicant establishes good cause;

(2) on the application of a transferee, if:

(i) the company does not have any members;

(ii) the legal representative of the last person to have been a member declines or fails to wind up the company’s activities; and

(iii) within a reasonable time following the dissolution a person has not been appointed under subsection (c); or

(3) in connection with a proceeding under section 8871(a)(4) (relating to events causing dissolution).

(f) Certificate of termination. – When all debts, obligations and other liabilities of the limited liability company have been paid and discharged or adequate provision has been made therefor and all of the remaining property and assets of the company have been distributed to the members, a certificate of termination shall be delivered to the department for filing along with the certificates required by section 139 (relating to tax clearance of certain fundamental transactions). The certificate of termination shall set forth:

(1) The name of the limited liability company.

(2) Subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the registered office of the company.

(3) That all debts, obligations and other liabilities of the company have been paid and discharged or that adequate provision has been made therefor.

(4) That all the remaining property and assets of the company have been distributed among its members in accordance with their respective rights and interests.
(5) That there are no actions pending against the company in any court or that adequate provision has been made for the satisfaction of any judgment that may be entered against it in any pending action.

(6) That the company is terminated.

(g) Cross references. - See:

Section 134 (relating to docketing statement).
Section 135 (requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).
Section 8815(c)(16) (relating to contents of operating agreement).
Section 8823 (relating to signing of filed documents).

Committee Comment (2016):
This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 702.

Under the default rules of this chapter, dissolution does not change governance arrangements. However, dissolution does change the context for determining, with regard to a member-managed limited liability company, whether a matter is in or outside “the ordinary course of the activities and affairs of the company.” 15 Pa.C.S. § 8847(b)(3) and (4).

As for determining the post-dissolution power of a member or manager to bind the limited liability company, other law, primarily agency law, supplies the rules. Thus, dissolution does not change the applicable source of law for determining actual and apparent authority.

Subsection (b) - The particular circumstances determine how long winding up may continue without giving “good cause” for court intervention. In some circumstances, a long period of winding up is not only appropriate but necessary.

14 S.W.3d 576, 581 (Mo. 2000).

Subsection (b)(2)(i) and (f) - For the constructive notice effect of a certificate of dissolution or termination, 15 Pa.C.S. §§ 8813(c)(1) and (2) and 8832(h).

Subsection (c) - This subsection applies whenever a dissolved limited liability company has no members, regardless of whether there is still a non-member manager of the company in place. The operating agreement can give such a manager the authority to wind up the company, but in the absence of such a provision the manager will not have the authority to conduct the winding up. Because the focus of the winding up process is on the payment of creditors and maximization of the remaining value of the company for the benefit of those holding residual claims to that value, subsection (c) presumes that the best person to conduct winding up will be a person representing the last person to have been a member.

15 Pa.C.S. § 8834 provides a shield for managers as well as members against automatic, vicarious liability for a company’s debts, obligations, and other liabilities. 15 Pa.C.S. § 8847 provides default rules for a manager’s actual authority. Some of those rules provide for consent by members. 15 Pa.C.S. § 8847(c)(3). Those rules are inapposite in the circumstances contemplated by this subsection.
15 Pa.C.S. § 8849.1 does not apply to a person appointed under this section. Such person will inevitably be an agent of the dissolved limited liability company, acting pursuant to a contract. Thus, agency and contract law will determine the person’s duties.

**Subsection (e) -** 15 Pa.C.S. §§ 8849.1 and 8849.2 do not apply to a person appointed under this section. The applicable standards of conduct might come from any or all of these sources: the court order, state law pertaining to receiverships, agency law, and contract law.

“Personal representative” is defined in 1 Pa.C.S. § 1991 as “The executor or administrator of a decedent.” “Executor” is defined in 1 Pa.C.S. § 1991 as “A fiduciary named in a will to execute its provisions and administer the estate of the testator.” and “administrator” is defined in 1 Pa.C.S. § 1991 as “A fiduciary appointed under authority of law by a register of wills or court to administer the estate of a decedent.”

**Subsection (e)(1) -** Managers do not have standing under this provision. If a non-member manager has so lost control of the limited liability company as to desire dissolution, the non-manager’s remedy is to: (i) seek court enforcement of the relevant provisions of the operating agreement, management agreement, or both; or (ii) resign.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

- “certificate of organization”
- “distribution”
- “limited liability company”
- “manager”
- “member”
- “transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- “court”
- “department”
- “obligation”
- “property”

**§ 8873.** (Reserved.)

**§ 8874.** Known claims against dissolved limited liability company.

(a) General rule. – Except as provided in subsection (d), a dissolved limited liability company may give notice of a known claim under subsection (b), which has the effect provided in subsection (c).

(b) Required notice. – A dissolved limited liability company may notify in record form its known claimants of the dissolution. The notice must:

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(1) specify the information required to be included in a claim;

(2) state that a claim must be in writing and provide a mailing address to which the claim is to be sent;

(3) state the deadline for receipt of a claim, which may not be less than 120 days after the date the notice is received by the claimant; and

(4) state that the claim will be barred if not received by the deadline.

(c) Claims barred. – A claim against a dissolved limited liability company is barred if the requirements of subsection (b) are met and:

(1) the claim is not received by the specified deadline; or

(2) if the claim is timely received but rejected by the company:

   (i) the company causes the claimant to receive a notice in record form stating that the claim is rejected and will be barred unless the claimant commences an action against the company to enforce the claim within 90 days after the claimant receives the notice; and

   (ii) the claimant does not commence the required action within 90 days after the complainant receives the notice.

(d) Later arising claims. – This section shall not apply to a claim based on an event occurring after the effective date of dissolution or a liability that on that date is contingent.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 704.

1 Pa.C.S. §§ 8874 through 8876 provide rules under which a dissolved limited liability company may achieve finality with regard to claims.

1 Pa.C.S. § 1908 provides that when a period of time is referred to in a statute, the period “shall be so computed as to exclude the first and include the last day of such period.” That section also provides that “Whenever the last day of any such period shall fall on Saturday or Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation.”

The term “limited liability company” used in this section is defined in 15 Pa.C.S. § 8812.

The term “record form” used in this section is defined in 15 Pa.C.S. § 102.

§ 8875. Other claims against dissolved limited liability company.
(a) Permissive notice. – A dissolved limited liability company may publish notice of its
dissolution and request persons having claims against the company to present them in
accordance with the notice.

(b) Notice procedure. – A notice under subsection (a) must:

(1) be officially published one time;
(2) describe the information required to be contained in a claim, state that the claim
must be in writing and provide a mailing address to which the claim is to be sent; and
(3) state that a claim against the limited liability company is barred unless an action
to enforce the claim is commenced within two years after publication of the notice.

(c) Claims barred. – If a dissolved limited liability company publishes a notice in
accordance with subsection (b), the claim of each of the following claimants is barred unless the
claimant commences an action to enforce the claim against the company within two years after
the publication date of the notice:

(1) a claimant that did not receive notice in record form under section 8874
(relating to known claims against dissolved limited liability company);
(2) a claimant whose claim was timely sent to the company but not acted on; and
(3) a claimant whose claim is contingent at, or based on an event occurring after,
the effective date of dissolution.

(d) Claims not barred. – A claim not barred under this section or section 8874 may be
enforced:

(1) against a dissolved limited liability company, to the extent of its undistributed
assets; and
(2) except as provided in section 8876 (relating to court proceedings), if assets of
the company have been distributed after dissolution, against a member or transferee to the
extent of that person’s proportionate share of the claim or of the company’s assets
distributed to the member or transferee after dissolution, whichever is less, except that a
person’s total liability for all claims under this paragraph may not exceed the total amount
of assets distributed to the person after dissolution.

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 705.

Subsection (d)(2) – Liability under this paragraph extends to those who have received distributions
under a charging order. The Committee Comment to 15 Pa.C.S. § 8852(a) (explaining that the
beneficiary of a charging order is a transferee). Unlike 15 Pa.C.S. § 8846(c) (recapture of improper
interim distributions), this paragraph contains no “knowledge” element.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“member”
“transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“officially publish”
“record form”

§ 8876. Court proceedings.

(a) Determination of security. – A dissolved limited liability company that has officially
published a notice under section 8875 (relating to other claims against dissolved limited liability
company) may file an application with the court for a determination of the amount and form of
security to be provided for payment of claims that are reasonably expected to arise after the date
of dissolution based on facts known to the company and:

(1) at the time of application:
   (i) are contingent; or
   (ii) have not been made known to the company; or

(2) are based on an event occurring after the effective date of dissolution.

(b) When security not required. – Security is not required for any claim that is or is
reasonably anticipated to be barred under section 8875(c).

(c) Notice. – Within ten days after the filing of an application under subsection (a), the
dissolved limited liability company shall give notice of the proceeding to each claimant holding a
contingent claim known to the company.

(d) Guardian ad litem. – In any proceeding under this section, the court may appoint a
guardian ad litem to represent all claimants whose identities are unknown. The reasonable fees
and expenses of the guardian, including all reasonable expert witness fees, must be paid by the
dissolved limited liability company.

(e) Effect on contingent claims. – A dissolved limited liability company that provides
security in the amount and form ordered by the court under subsection (a) satisfies the
company’s obligations with respect to claims that are contingent, have not been made known to
the company or are based on an event occurring after the effective date of dissolution. The
claims may not be enforced against a member or transferee that received assets in liquidation.

**Committee Comment (2016):**

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 706.

This section is similar to 15 Pa.C.S. § 1995.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:
- “limited liability company”
- “member”
- “transferee”

The following terms used in this section are defined in 15 Pa.C.S. § 102:
- “court”
- “officially publish”

§ 8877. Disposition of assets in winding up.

(a) Creditors. – In winding up its activities and affairs, a limited liability company shall
apply its assets to discharge its obligations to creditors, including members that are creditors.

(b) Surplus. – After a limited liability company complies with subsection (a), any surplus
shall be distributed in the following order, subject to any charging order in effect under section
8853 (relating to charging order):

(1) to each owner of a transferable interest that reflects contributions made and not
previously returned, an amount equal to the value of the unreturned contributions; and

(2) among owners of transferable interests in proportion to their respective rights to
share in distributions immediately before the dissolution of the company.

(c) Insufficient assets. – If a limited liability company does not have sufficient surplus to
comply with subsection (b)(1), any surplus must be distributed among the owners of transferable
interests in proportion to the value of the respective unreturned contributions.

(d) Form of payment. – All distributions made under subsections (b) and (c) must be paid
in money.

**Committee Comment (2016):**

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended
2013) § 707.
Subsection (a) – As to non-member creditors, this subsection is not a default rule. 15 Pa.C.S. § 8815(c)(20) (stating that the operating agreement may not "restrict the rights under this title of a person other than a member or manager"). A creditor has a cause of action if prejudiced by a violation of this subsection.

However, if the creditors are willing, a dissolved limited liability company may certainly make agreements with them specifying the terms under which the company will “discharge its obligations to creditors.”

Subsections (b), (c) and (d) – For the most part, these subsections state default rules. For example, operating agreements often provide for different distribution rights upon liquidation than during operations. However, distributions under these subsections (or otherwise under the operating agreement) are subject to 15 Pa.C.S. § 8853 (charging orders).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“contribution”
“distribution”
“limited liability company”
“member”
“transferable interest”

The following terms used in this section are defined in 15 Pa.C.S. § 102:

“obligation”
“transfer”

§ 8878. Voluntary termination by members or organizers.

(a) General rule. – The members or organizers of a limited liability company that has never transacted business or held assets other than money received as capital contributions may effect the termination of the company by delivering to the department for filing a certificate of termination signed by an organizer or a member and stating:

(1) the name of the company;
(2) subject to section 109 (relating to name of commercial registered office provider in lieu of registered address), the address, including street and number, if any, of the registered office of the company;
(3) that the company has never transacted business or held assets other than money received as capital contributions;
(4) that the amounts, if any, actually paid in as capital contributions, less any part disbursed for necessary expenses, have been returned to those entitled to the return of the amounts;
(5) that all liabilities of the company have been discharged or that adequate provision has been made for those liabilities; and

(6) that a majority of the organizers or a majority in interest of the members elect that the company be terminated.

(b) Effect. - Upon the filing of the certificate of termination, the existence of the limited liability company shall cease.

(c) Cross references. - See:

Section 134 (relating to docketing statement).
Section 135 (relating to requirements to be met by filed documents).
Section 136(c) (relating to processing of documents by Department of State).

Committee Comment (2016):

This section is patterned after 15 Pa.C.S. § 1971.

Tax clearance certificates are not required to be delivered to the department in connection with the filing of a certificate of termination under this section.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“contribution”
“limited liability company”
“member”
“organizer”

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter H
Actions by Members

Section

8881. Direct action by member.
8882. Derivative action.
8883. Security for costs.
8884. Special litigation committee.
8885. Proceeds and expenses.

§ 8881. Direct action by member.

(a) General rule. - Subject to subsection (b), a member may maintain a direct action against another member, a manager or the limited liability company to enforce the member’s rights and protect the member’s interests, including rights and interests under the operating
agreement or this title or arising independently of the membership relationship.

(b) Required injury. — A member maintaining a direct action under this section must plead and prove an actual or threatened injury that is not solely the result of an injury suffered or threatened to be suffered by the limited liability company.

(c) Cross reference. — See section 8815(c)(17) (relating to contents of operating agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 801.

Subsection (a) — A member’s rights under this subsection are subject to the rule of standing stated in subsection (b). The phrase “protect the member’s interests” pertains to remedies and creates no additional causes of action.

The last phrase of this subsection (“or arising independently ...”) does not create any new rights, obligations, or remedies, and is included merely to emphasize that a person’s membership in a limited liability company does not preclude the person from enforcing rights existing “independently of the membership relationship” — , as a creditor.

Subsection (b) — The distinction between direct and derivative claims protects the operating agreement. If any member can sue directly over any management issue, the mere threat of suit can interfere with the members’ agreed-upon arrangements.

Although in ordinary contractual situations it is axiomatic that each party to a contract has standing to sue for breach of that contract, within a limited liability company different circumstances typically exist. A member does not have a direct claim against a manager or another member merely because the manager or other member has breached the operating agreement. Likewise a member’s violation of this chapter does not automatically create a direct claim for every other member. To have standing in his, her, or its own right, a member plaintiff must be able to show a harm that occurs independently of the harm caused or threatened to be caused to the company.

EXAMPLE: Through grossly negligent conduct, in violation of 15 Pa.C.S. § 8849.2(c), the manager of a manager-managed limited liability company reduces the net assets of the company by 50%, which in turns decreases the value of Member A’s investment by $3,000,000. Member A has no standing to bring a direct claim. Member A’s damage is merely derivative of the damage directly suffered by the company. The member may, however, bring a derivative claim.

EXAMPLE: Same facts, except in addition to violating 15 Pa.C.S. § 8849.2(c), the manager’s conduct breaches an express provision of the operating agreement to which Member A is a signatory. The analysis and the result are the same as in the prior example.

EXAMPLE: An operating agreement defines “distributable cash” and requires the limited liability company to periodically distribute that cash among all members. The company’s manager fails to distribute the cash. Each member has a direct claim against the manager and the company.

The reference to “threatened injury” is to encompass potential claims for preventative relief, such as
This section’s standing rule is subject to reasonable alterations by the operating agreement. The Committee Comment to 15 Pa.C.S. § 8815(c)(17).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“manager”
“member”
“operating agreement”

§ 8822. Derivative action.

(a) General rule. – Subject to subsection (b), a member or manager may maintain a derivative action to enforce a right of a limited liability company only if:

(1) the plaintiff first makes a demand on the other members in a member-managed limited liability company, or the managers of a manager-managed limited liability company, requesting that they cause the company to bring an action to enforce the right, and:

(i) if a special litigation committee is not appointed under section 8884 (relating to special litigation committee), the company does not bring the action within a reasonable time; or

(ii) if a special litigation committee is appointed under section 8884, a determination is made:

(A) under section 8884(e)(1) that the company not object to the action; or

(B) under section 8884(e)(5)(i) that the plaintiff continue the action;

(2) demand is excused under subsection (b);

(3) the action is maintained for the limited purpose of seeking court review of committee action under section 8884(f); or

(4) the court has allowed the action to continue under the control of the plaintiff under section 8884(f)(3)(ii).

(b) Prior demand excused. –

(1) A demand under subsection (a)(1) is excused only if the plaintiff makes a specific showing that irreparable harm to the limited liability company would otherwise
If demand is excused under paragraph (1), demand should be made promptly after commencement of the action.

(c) Contents of demand. – A demand under this section must be in record form and give notice with reasonable specificity of the essential facts relied upon to support each of the claims made in the demand.

(d) Additional claims. – If a derivative action is commenced after a demand has been made under this section and includes a claim that was not fairly subsumed under the demand, a new demand must be made with respect to that claim. The new demand shall not relate back to the date of the original demand for purposes of subsection (e).

(e) Statute of limitations. – The making of a demand tolls any applicable statute of limitations with respect to a claim asserted in the demand until the earlier of the date:

(1) the plaintiff making the demand is notified either:

(i) that the managers or members have decided not to bring an action and not to appoint a special litigation committee; or

(ii) of a determination under section 8884(e) after the appointment of a special litigation committee under section 8884; or

(2) the plaintiff commences an action asserting the claim.

(f) Cross reference. – See section 8815(c)(17) (relating to contents of operating agreement).

Committee Comment (2016):


In , 692 A.2d 1042 (Pa. 1997), the Pennsylvania Supreme Court adopted Sections 7.02 – 7.13 of the ALI Principles in a case involving a business corporation. The ALI Principles themselves limit their scope to business corporations because Section 1.12 of the ALI Principles defines a “corporation” for purposes of the ALI Principles as a business corporation. In the final footnote to its opinion in , however, the Pennsylvania Supreme Court encouraged Pennsylvania courts to consider the application of the ALI Principles more broadly than the actual holding of the Supreme Court in . This subchapter generally follows the ALI Principles, but with changes that recognize the differences between business corporations and limited liability companies.

Subsections (a) and (b) follow Section 7.03 of the ALI Principles in adopting a “universal demand” requirement subject to an exception for irreparable injury. Except in the limited situation described in subsection (b)(1), a plaintiff must always demand that the members or managers bring an action and
allow the limited liability company to respond as provided in this subchapter before the plaintiff may
commence a derivative action. This section thus rejects the law as it has developed in Delaware and other
states that excuse pre-suit demand in circumstances where it is alleged that demand would be futile.

Section 7.02(c) of the ALI Principles provides that a director has standing to bring a derivative
action unless the court finds that the director is unable to represent fairly and adequately the interests of
the shareholders; and Section 7.03(a) of the ALI Principles requires a director to make demand in the
same manner as a shareholder. In some limited liability companies managers occupy a position similar to
executive directors, while in other companies the position of manager is closer to a corporate officer.

Subsection (a) gives a manager standing to maintain a derivative action, but that right can be restricted or
eliminated in the operating agreement. In contrast, the operating agreement may not unreasonably restrict
the right of a member to maintain a derivative action. The Committee Comment to 15 Pa.C.S. §
8815(c)(17).

The rights that may be enforced in a derivative action include the right to seek redress for a wrong
to the limited liability company.

If “immediate and irreparable injury” is shown as required by subsection (b), that will not excuse
the plaintiff altogether from making demand; judicial review will begin with the response of the members
or managers. If “immediate and irreparable injury” justifies the commencement of the action without
demand and the court grants an injunction to preserve the status quo, subsection (b) contemplates that the
members or managers would still be given an appropriate time to respond and that further inquiry by the
court will focus on the response of the members or managers, or a special litigation committee if one is
appointed as provided in 15 Pa.C.S. § 8884.

If a derivative action is commenced before demand has been made and the failure to make demand
is not excused under subsection (b), under the ALI Principles the appropriate sanction will not be
dismissal of the action, but rather an award of costs against the responsible attorney under Section 7.04(d)
of the ALI Principles. This approach is consistent with the general policy expressed in Section 7.04(d) in
favor of sanctions directed at the attorney (or, when appropriate, the individual client) instead of a
dismissal affecting the interests of all members.

Subsection (c) requires that a demand be in record form, but this section does not prescribe the
manner in which the demand must be delivered to the members or managers. The plaintiff should verify
that the demand was received to avoid a challenge that demand was not made.

If the members or managers do not appoint a special litigation committee in response to a demand,
further action by the members or managers and the demanding plaintiff will be subject to ALI Principles
§§ 7.04 - 7.10 and 7.13, as modified by 15 Pa.C.S. §§ 8883 and 8885. If a special litigation committee is
appointed, further action by the members, managers, committee, and plaintiff will be subject to those
sections of the ALI Principles, as modified by this subchapter including specifically 15 Pa.C.S. § 8884
with respect to special litigation committees.

If a derivative action is commenced after a demand has been made and the action includes a claim
that was not fairly subsumed under the original demand, subsection (d) requires that a new demand must
be made with respect to that claim. With respect to the new claim, the tolling of the statute of limitations
under subsection (e) will begin with the date of the new demand and not the date of the original demand.

Section 804 of the ULLCA requires that the complaint in a derivative action state that demand was
made and the response to the demand, or that demand should be excused. Section 804 has been omitted
from Chapter 88 because Pa.R.Civ.Pro 1506 imposes a similar requirement.
The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“limited liability company”
“manager”
“manager-managed limited liability company”
“member”
“member-managed limited liability company”
“record form”

§ 8883. Security for costs.

In any action or proceeding instituted or maintained by members holding transferable interests entitled to receive less than 5% of any distribution by a limited liability company, unless the transferable interests held by the members have an aggregate fair market value in excess of $200,000, the company in whose right the action or proceeding is brought shall be entitled at any stage of the proceedings to require the plaintiffs to give security for the reasonable expenses, including attorneys’ fees, that may be incurred by the company in connection therewith or for which it may become liable pursuant to section 8848(b) (relating to reimbursement, indemnification, advancement and insurance) to which security the company shall have recourse in such amount as the court determines upon the termination of the action or proceeding. The amount of security may, from time to time, be increased or decreased in the discretion of the court upon showing that the security provided has or may become inadequate or excessive. The security may be waived or limited by the court if the court finds after an evidentiary hearing that undue hardship on plaintiffs and serious injustice would result.

Committee Comment (2016):

This section is patterned after 15 Pa.C.S. § 1782(c).

Section 803 of the Uniform Limited Liability Company Act (2001) (Last Amended 2013) specifies that a plaintiff member must be a member at the time a derivative suit is commenced and also must have been a member when the conduct underlying the suit occurred or whose status as a member devolved on the plaintiff from a person who was a member at the time the conduct occurred. That section has been omitted from Chapter 86 because Pa.R.Civ.Pro. 1506(a) imposes a similar requirement.

The term “verified” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

“distribution”
“limited liability company”
“member”
“transferable interest”

The reference in this section to “court” implies any court of competent jurisdiction and not merely the court as defined in 15 Pa.C.S. § 102.
§ 8884. Special litigation committee.

(a) General rule. – If a limited liability company or its members or managers receive a demand to bring an action to enforce a right of the company, or if a derivative action is commenced before demand has been made on the company or its members or managers, the members in a member-managed limited liability company, or the managers in a manager-managed limited liability company, may appoint a special litigation committee to investigate the claims asserted in the demand or action and to determine on behalf of the company or recommend to the managers or members whether pursuing any of the claims asserted is in the best interests of the company. The company shall send a notice in record form to the plaintiff promptly after the appointment of a committee under this section notifying the plaintiff that a committee has been appointed and identifying by name the members of the committee. A committee may not be appointed under this section if:

(1) every member of the company is also a manager of the company; or

(2) the company is member-managed and every member is actively involved in the management of the company.

(b) Discovery stay. – If the members or managers appoint a special litigation committee and an action is commenced before a determination has been made under subsection (e):

(1) On motion by the committee made in the name of the limited liability company, the court shall stay discovery for the time reasonably necessary to permit the committee to make its investigation, except for good cause shown.

(2) The time for the defendants to plead shall be tolled until the process provided for under subsection (f) has been completed.

(c) Composition of committee. – A special litigation committee shall be composed of two or more individuals who:

(1) are not interested in the claims asserted in the demand;

(2) are capable as a group of objective judgment in the circumstances; and

(3) may, but need not, be members or managers.

(d) Appointment of committee. – A special litigation committee may be appointed:

(1) in a member-managed limited liability company:

(i) by a majority of the members not named as actual or potential parties in the demand or action; and
(ii) if all members are named as actual or potential parties in the demand or action, by a majority of the members so named; or

(2) in a manager-managed limited liability company:

(i) by a majority of the managers not named as actual or potential parties in the demand or action; and

(ii) if all managers are named as actual or potential parties in the demand or action, by a majority of the managers so named.

(e) Determination. – After appropriate investigation by a special litigation committee, the committee or the managers or members may determine that it is in the best interests of the limited liability company that:

(1) an action based on some or all the claims asserted in the demand not be brought by the company but that the company not object to an action being brought by the party that made the demand:

(2) an action based on some or all the claims asserted in the demand be brought by the company;

(3) some or all the claims asserted in the demand be settled on terms approved by the committee;

(4) an action not be brought based on any of the claims asserted in the demand;

(5) an action already commenced continue under the control of:

(i) the plaintiff;

(ii) the company; or

(iii) the committee;

(6) some or all of the claims asserted in an action already commenced be settled on terms approved by the committee; or

(7) an action already commenced be dismissed.

(f) Court review and action. – If a special litigation committee is appointed and a derivative action is commenced either before or after a determination is made under subsection (e):

(1) The limited liability company shall file with the court after a determination is made under subsection (e) a statement of the determination and a report of the committee.
The company shall serve each party with a copy of the determination and report. If the company moves to file the report under seal, the report shall be served on the parties subject to an appropriate stipulation agreed to by the parties or a protective order issued by the court.

(2) The company shall file with the court a motion, pleading or notice consistent with the determination of the committee under subsection (e).

(3) If the determination is one described in subsection (e)(2), (3), (4), (5)(ii), (6) or (7), the court shall determine whether the members of the committee met the qualifications required under subsection (c)(1) and (2) and whether the committee conducted its investigation and made its recommendation in good faith, independently and with reasonable care. If the court finds that the members of the committee met the qualifications required under subsection (c)(1) and (2) and that the committee acted in good faith, independently and with reasonable care, the court shall enforce the determination of the committee. Otherwise, the court shall:

(i) dissolve any stay of discovery entered under subsection (b);

(ii) allow the action to continue under the control of the plaintiff; and

(iii) permit the defendants to file preliminary objections and other appropriate motions and pleadings.

(g) Attorney General – Nothing in this section limits the rights, powers and duties of the Attorney General under other applicable law with respect to a limited liability company organized for a charitable purpose.

(h) Cross reference. – See section 8815(c)(18) (relating to contents of operating agreement).

Committee Comment (2016):

This section is patterned in part after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 805.

Although special litigation committees are best known in the corporate field, they are no more inherently corporate than derivative litigation or the notion that an organization is a person distinct from its owners. A special litigation committee can serve as an ADR mechanism, help protect an agreed upon arrangement from strike suits, protect the interests of members who are neither plaintiffs nor defendants (if any), and bring the benefits of a specially tailored business judgment to any judicial decision.

This section’s approach corresponds to established law in most jurisdictions, modified to fit the typical governance structures of a limited liability company. Use of a special litigation committee is optional. An operating agreement can preclude the use of a special litigation committee, rendering this section inapplicable, but cannot otherwise vary this section. 15 Pa.C.S. § 8815(c)(18).

Subsection (a) – The statement in subsection (a) that a special litigation committee may “determine
... whether pursuing any of the claims asserted is in the best interests of the company" means that a committee appointed under this section may be given the authority to act on behalf of the company without further action by the members or managers.

Subsection (f) – Subsection (f) provides for review of the determination of a special committee in two scenarios: (i) where the plaintiff commences a derivative action before the committee has made a determination, or (ii) where the committee makes its determination before an action is commenced. If an action is commenced before the committee makes its determination, judicial review of the committee’s determination will occur in the context of that action. In the second scenario, where an action has not been commenced before the committee makes its determination, the plaintiff may seek review of the determination under this subsection by filing a derivative action.

The standard stated for judicial review of the determination of a special litigation committee
follows , 419 N.Y. S.2d 920 (N.Y. 1979) rather than , 430 A.2d 779 (Del. 1981), because the latter’s reference to a court’s business judgment has generally not been followed in other states. In essence, a special litigation committee is intended to function as a surrogate decision-maker, allowing the limited liability company to make what is fundamentally a business decision. If a court determines that the members of the committee were disinterested and independent and that the committee conducted its investigation and made its recommendation in good faith, independently, and with reasonable care, it makes no sense to substitute the court’s legal judgment for the business judgment of the committee.

, 556 N.E.2d 51, 58 (Mass. 1990) contains an excellent explanation of the court’s role in reviewing a decision by a special litigation committee:

The value of a special litigation committee is coextensive with the extent to which that committee truly exercises business judgment. In order to ensure that special litigation committees do act for the [entity]'s best interest, a good deal of judicial oversight is necessary in each case. At the same time, however, courts must be careful not to usurp the committee's valuable role in exercising business judgment. . . . [A] special litigation committee must be independent, unbiased, and act in good faith. Moreover, such a committee must conduct a thorough and careful analysis regarding the plaintiff's derivative suit. . . . The burden of proving that these procedural requirements have been met must rest, in all fairness, on the party capable of making that proof— the [entity].

For an extensive discussion of how a court should approach the question of independence, see , 612 N.W.2d 78, 91 (Wis. 2000).

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

limited liability company
manager
manager-managed limited liability company
member
member-managed limited liability company

The following terms used in this section are defined in 15 Pa.C.S. § 102:
court
record form
§ 8885. Proceeds and expenses.

(a) Proceeds. – Except as provided in subsection (b):

(1) any proceeds or other benefits of a derivative action, whether by judgment, compromise or settlement, belong to the limited liability company and not to the plaintiff; and

(2) if the plaintiff or its counsel receives any proceeds, the proceeds shall be remitted immediately to the company.

(b) Expenses. – If a derivative action is successful in whole or in part, the court may award the plaintiff reasonable expenses, including reasonable attorney fees and costs, from the recovery of the limited liability company, but in no event shall the attorney fees awarded exceed a reasonable proportion of the value of the relief, including nonpecuniary relief, obtained by the plaintiff for the company.

(c) Cross reference. – See section 8815(c)(13) (relating to contents of operating agreement).

Committee Comment (2016):

This section is patterned after Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 806(a) and (b), except the last clause of subsection (b) which is patterned after American Law Institute, Principles of Corporate Governance: Analysis and Recommendations (1994) § 7.17.

Subsection (c) of the Uniform Act, which provides that "a derivative action ... may not be voluntarily dismissed or settled without the court’s approval" has been omitted because Pa.R.Civ.Pro. 1506(d) provides the same result.

The term “limited liability company” used in this section is defined in 15 Pa.C.S. § 8812.

The term “court” used in this section is defined in 15 Pa.C.S. § 102.

Subchapter I
Benefit Companies

Sec.
8891. Application and effect of subchapter.
8892. Definitions.
8893. Benefit company status.
8894. Purposes.
8895. Standard of conduct for members.
8896. Standard of conduct for managers and officers.
8897. Right of action.
§ 8891. Application and effect of subchapter.

(a) General rule. - This subchapter shall apply to all benefit companies.

(b) Limited application of subchapter. - The existence of a provision of this subchapter shall not of itself create any implication that a contrary or different rule of law is or would be applicable to a limited liability company that is not a benefit company. This subchapter shall not affect any statute or rule of law that is or would be applicable to a limited liability company that is not a benefit company.

(c) Laws applicable to benefit companies. - Except as otherwise provided in this subchapter, the provisions of Part I (relating to preliminary provisions) and this chapter shall apply generally to benefit companies. The provisions of this subchapter shall control over inconsistent provisions of this title.

(d) Organic rules may not be inconsistent. - See section 8815(c)(19) (relating to contents of operating agreement).

Committee Comment (2016):

This subchapter authorizes the organization of a form of limited liability company that offers entrepreneurs and investors the option to build, and invest in, businesses that operate in a socially and environmentally responsible manner. Enforcement of those responsibilities comes not from governmental oversight, but rather from new provisions on transparency and accountability included in this subchapter.

Because subsection (c) provides that the provisions of this subchapter control over the provisions of Part I, this subchapter will control over the provisions of Chapter 3 regarding entity transactions. For example, the requirement of approval of certain actions by a “minimum status vote” will control over the provisions in 15 Pa.C.S. Subch. 3B for approving transactions under Chapter 3.

The term “limited liability company” used in this section is defined in 15 Pa.C.S. § 1103.

The term “benefit company” used in this section is defined in 15 Pa.C.S. § 8892.

§ 8892. Definitions.

The following words and phrases when used in this subchapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

"Benefit company." A limited liability company that is subject to this subchapter.

"Benefit enforcement proceeding." A claim or action for:

(1) failure to pursue or create the general public benefit purpose of the benefit company or any specific public benefit purpose set forth in its certificate of organization; or
(2) violation of any obligation, duty or standard of conduct under this subchapter.

"General public benefit." A material positive impact on society and the environment, taken as a whole and assessed against a third-party standard, from the business and operations of a benefit company.

"Independent." When a person has no material relationship with a benefit company or any of its subsidiaries. A material relationship between an individual and a benefit company or any of its subsidiaries will be conclusively presumed to exist if:

(1) the person is or has been within the last three years an employee of the benefit company or any of its subsidiaries;
(2) an immediate family member of the person is or has been within the last three years an executive officer of the benefit company or any of its subsidiaries; or
(3) the person, or an association of which the person is a governor or officer or in which the person owns beneficially or of record 5% or more of the outstanding interests, owns beneficially or of record 5% or more of the outstanding interests of the benefit company. The percentage of ownership in an association shall be calculated as if all outstanding rights to acquire interests in the association had been exercised.

"Minimum status vote." As follows:

(1) In the case of a limited liability company, in addition to any other required approval or vote, the satisfaction of the following conditions:
   (i) The members of every class or series must be entitled, as a class, to vote on the action regardless of a limitation stated in the certificate of organization or operating agreement on the voting rights of any class or series.
   (ii) The action must be approved by a vote of the members of each class or series entitled to cast at least two-thirds of the votes that all members of the class or series are entitled to cast on the action.
(2) In the case of a domestic association other than a limited liability company, in addition to any other required approval, vote or consent, the satisfaction of the following conditions:
   (i) The holders of every class or series of interest in the association that are entitled to receive a distribution of any kind from the association must be entitled as a class to vote on or consent to the action regardless of any otherwise applicable limitation on the voting or consent rights of any class or series.
   (ii) The action must be approved by vote or consent of the holders described in subparagraph (i) entitled to cast at least two-thirds of the votes or consents that all of those holders are entitled to cast on the action.
"Specific public benefit." The term shall have the meaning specified in section 3302 (relating to definitions).

"Subsidiary." The term shall have the meaning specified in section 3302.

"Third-party standard." A standard for defining, reporting and assessing overall social and environmental performance which is:

1. Comprehensive in that it assesses the effect of the business and its operations upon the interests listed in section 8895(a)(1)(ii), (iii), (iv) and (v) (relating to standard of conduct for members).

2. Developed by an organization that is independent of the benefit company and satisfies the following requirements:

   (i) Not more than one-third of the members of the governing body of the organization are representatives of any of the following:

   (A) An association of businesses operating in a specific industry the performance of whose members is measured by the standard.

   (B) Businesses from a specific industry or an association of businesses in that industry.

   (C) Businesses whose performance is assessed against the standard.

   (ii) The organization is not materially financed by an association or business described in subparagraph (i).

3. Credible because the standard is developed by a person that both:

   (i) Has access to necessary expertise to assess overall social and environmental performance.

   (ii) Uses a balanced multistakeholder approach, including a public comment period of at least 30 days to develop the standard.

4. Transparent because the following information is publicly available:

   (i) About the standard:

   (A) The criteria considered when measuring the overall social and environmental performance of a business.

   (B) The relative weightings, if any, of those criteria.

   (ii) About the development and revision of the standard:
(A) The identity of the directors, officers, material owners and the
governing body of the organization that developed and controls revisions to the
standard.

(B) The process by which revisions to the standard and changes to the
membership of the governing body are made.

(C) An accounting of the sources of financial support for the
organization, with sufficient detail to disclose any relationships that could
reasonably be considered to present a potential conflict of interest.

Committee Comment (2016):

“Benefit company.” The provisions of this subchapter apply to a limited liability company while
it has the status of a benefit company because its certificate of organization contains a statement that it is
a benefit company. If that statement is deleted under 15 Pa.C.S. § 8893, the company will cease to be a
benefit company immediately upon the effectiveness of the deletion.

“Benefit enforcement proceeding.” This definition not only describes the action that may be
brought under 15 Pa.C.S. § 8897, but it also has the effect of excluding other actions against a benefit
compny and its members and managers because 15 Pa.C.S. § 8897(a)(1) provides that “no person may
bring an action or assert a claim against a benefit company or its members, managers or offices” with
respect to violation of the provisions of this subchapter except in a benefit enforcement proceeding.

The obligations that may be enforced through a benefit enforcement proceeding include the
obligations of a benefit company under 15 Pa.C.S. § 8898 to post its benefit reports on its Internet website
and to supply copies of its benefit report if it does not have an Internet website. In the case of a failure to
provide a copy of a benefit report, a benefit enforcement proceeding to enforce that obligation may only
be brought by the persons listed in 15 Pa.C.S. § 8897(b) and not by the person requesting the copy of the
report.

“General public benefit.” By requiring that the impact of a business on society and the
environment be looked at “as a whole,” the concept of general public benefit requires consideration of all
of the effects of the business on society and the environment. What is involved in creating general public
benefit is informed by 15 Pa.C.S. § 8895(a)(1) which lists the specific interests that the members or
managers of a benefit company are required to consider.

“Minimum status vote.” An amendment of the certificate of organization or a fundamental
change that has the effect of changing the status of a limited liability company so that it either becomes a
benefit company or ceases to be a benefit company must be approved by the minimum status vote. 15
Pa.C.S. §§ 8893.

The second paragraph of the definition extends the policy of requiring a supermajority vote to other
forms of entities so that, for example, a merger of a business corporation into a benefit company must be
approved by the shareholders of the business corporation by at least a two-thirds vote.

The two-thirds vote required by the definition is in addition to any other vote required in the case of
any particular limited liability company or other form of association. If the operating agreement of a
company were to require, for example, an 80% supermajority vote to approve a merger, a 70% vote to
approve a merger of the company into another company that is a benefit company would be sufficient to
satisfy the requirement that the merger be approved by the minimum status vote but would not be
sufficient for valid approval of the merger.
“Specific public benefit.” Every benefit company has the purpose under 15 Pa.C.S. § 8894(a) of creating general public benefit. A benefit company may also elect to pursue one or more specific public benefit purposes. Since the creation of specific public benefit is optional, paragraph (8) of the definition in 15 Pa.C.S. § 3302 permits a benefit corporation to identify a specific public benefit that is different from those listed specifically in paragraphs (1) through (7) of the definition.

“Third-party standard.” The requirement in 15 Pa.C.S. § 8898 that a benefit company prepare an annual benefit report that assesses its performance in creating general public benefit against a third-party standard provides an important protection against the abuse of benefit company status. The performance of a regular limited liability company is measured by the financial statements that the company prepares. But the performance of a benefit company in creating general or specific public benefit will not be readily apparent from those financial statements. The annual benefit report is intended to permit an evaluation of that performance so that the members can judge how the company has been managed. The annual benefit report is also intended to reduce “greenwashing” (the phenomenon of businesses seeking the cachet of being more environmentally and socially responsible than they actually are) by giving consumers and the general public a means of judging whether a business is living up to its claimed status as a benefit company.

§ 8893. Benefit company status.

(a) Formation of benefit company. – A benefit company shall be formed in accordance with section 8821 (relating to formation of limited liability company and certificate of organization) except that its certificate of organization shall also state that it is a benefit company.

(b) Election of benefit company status. – An existing limited liability company may elect to become a benefit company by amending its certificate of organization so that it contains, in addition to the requirements of section 8821, a statement that the company is a benefit company. The amendment shall not be effective unless it is adopted by at least the minimum status vote.

(c) Election of status in a fundamental transaction. – If an association that is not a benefit company is a party to a merger or division or is the exchanging association in an interest exchange, and the surviving, new or any resulting association in the merger, division or interest exchange is to be a benefit company, then the plan of merger, division or interest exchange shall not be effective unless it is adopted by the association by at least the minimum status vote.

(d) Termination of benefit company status. – A benefit company may terminate its status as a benefit company and cease to be subject to this subchapter by amending its certificate of organization to delete the provision required by subsection (a) or (b) to be stated in the certificate of organization of a benefit company. The amendment shall not be effective unless it is adopted by at least the minimum status vote.

(e) Termination of status in a fundamental transaction. – If a plan would have the effect of terminating the status of a limited liability company as a benefit company, the plan shall not be effective unless it is adopted by at least the minimum status vote. Any sale, lease, exchange or other disposition of all or substantially all of the assets of a benefit company, unless the transaction is in the usual and regular course of business, shall not be effective unless the transaction is approved by at least the minimum status vote.
Committee Comment (2016):

Subsection (a) provides for how a limited liability company that is being newly formed may elect to be a benefit company. Existing companies may become benefit companies in the manner provided in subsection (b). Subsection (c) applies when a company is becoming a benefit company indirectly in the context of a fundamental transaction. Under subsections (b) and (c), the change to benefit company status must be approved by at least the minimum status vote.

Subsections (d) and (e) provide for how a benefit company may voluntarily terminate its status as a benefit company. The last sentence of subsection (e) provides a special rule for a sale of all or substantially all of the assets of a benefit company. Such a transaction will not result in a termination of the status of the company as a benefit company, but will have effectively the same result since it will terminate the operations of the business. Thus it was considered appropriate to require approval of a sale of assets by the minimum status vote.

This subchapter only applies to domestic limited liability companies. A foreign company that has a status in its home jurisdiction similar to the status of a benefit company under this subchapter is not subject to this chapter and has the status simply of a foreign limited liability company.

15 Pa.C.S. § 8894(d) with respect to changing the identification of a specific public benefit that it is the purpose of a benefit company to pursue.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”
“limited liability company”

The following terms used in this section are defined in 15 Pa.C.S. § 8892:

“benefit company”
“minimum status vote”

§ 8894. Purposes.

(a) General public benefit purpose. - A benefit company shall have a purpose of creating general public benefit. This purpose is in addition to its purpose under section 8818(b) (relating to characteristics of limited liability company).

(b) Optional specific public benefit purpose. - The certificate of organization of a benefit company may identify one or more specific public benefits that it is the purpose of the benefit company to create in addition to its purposes under subsection (a) and section 8818(b). The identification of a specific public benefit does not limit the obligation of a benefit company to create general public benefit.

(c) Effect of purposes. - The creation of general and specific public benefit as provided in subsections (a) and (b) is in the best interests of the benefit company.

(d) Amendment. - A benefit company may amend its certificate of organization to add, amend or delete the identification of a specific public benefit that it is the purpose of the benefit company to create.
company to create. The amendment shall not be effective unless it is adopted by at least the minimum status vote.

(e) Professional companies. – A professional company that is a benefit company does not violate a restriction on its permissible purposes or activities by having the purpose to create general public benefit or a specific public benefit.

Committee Comment (2016):

Every benefit company has the purpose of creating general public benefit. A benefit company may also elect to pursue specific public benefits under subsection (b). Subsection (c) confirms that pursuing general and specific public benefit is in the best interests of the benefit company.

The following term used in this section are defined in 15 Pa.C.S. § 8812.

“certificate of organization”
“professional company”

The following terms used in this section are defined in 15 Pa.C.S. § 8892:

“benefit company”
“general public benefit”
“minimum status vote”
“specific public benefit”

§ 8895. Standard of conduct for members.

(a) Consideration of interests. – The members of a member-managed limited liability company that is a benefit company, when discharging their duties under this title or under the operating agreement:

(1) shall consider the effects of any action upon:

(i) the members of the benefit company;

(ii) the employees and work force of the benefit company and its subsidiaries and suppliers;

(iii) the interests of customers as beneficiaries of the general or specific public benefit purposes of the benefit company;

(iv) community and societal considerations, including those of any community in which offices or facilities of the benefit company or its subsidiaries or suppliers are located;

(v) the local and global environment;

(vi) the short-term and long-term interests of the benefit company, including benefits that may accrue to the benefit company from its long-term plans and the
possibility that these interests may be best served by the continued independence of
the benefit company; and
(vii) the ability of the benefit company to accomplish its general public benefit
purpose and any specific public benefit purpose; and
(2) may consider any other pertinent factors or the interests of any other group that
they deem appropriate; but
(3) shall not be required to give priority to the interests of any person or group
referred to in paragraph (1) or (2) over the interests of any other person or group unless the
benefit company has stated in its certificate of organization its intention to give priority to
certain interests related to its accomplishment of its general public benefit purpose or of a
specific public benefit purpose identified in the certificate.
(b) Coordination with other provisions of law. – The consideration of interests and
factors in the manner required under subsection (a) shall not constitute a violation of section
8849.1 (relating to standards of conduct for members).
(c) Exoneration from personal liability. –
(1) A member shall not be personally liable for monetary damages for any action
taken as a member of a member-managed limited liability company in the course of
performing the duties specified in subsection (a) unless the action constitutes self-dealing,
willful misconduct or a knowing violation of law.
(2) A member shall not be personally liable for monetary damages for failure of the
benefit company to pursue or create general public benefit or a specific public benefit.
(d) Limitation on standing. – A member of a member-managed limited liability company
that is a benefit company does not have a duty to a person that is a beneficiary of the general
public benefit purpose or a specific public benefit purpose of the benefit company arising from
the status of the person as a beneficiary.
Committee Comment (2016):
This section is at the heart of what it means for a member-managed limited liability company to be
a benefit company. The same requirements apply to manager-managed limited liability companies under
15 Pa.C.S. § 8896.
By requiring the consideration of interests of constituencies other than the members, the section
rejects the holdings in . 170 N.W. 668 (Mich. 1919), and
. 16 A.3d 1 (Del. Ch. 2010), that directors must maximize the financial value of a corporation.
Subsection (a) makes it mandatory for the members of a member-managed benefit company to consider
certain interests and factors that they would otherwise simply be permitted to consider in their discretion
under 15 Pa.C.S. §§ 8849.1.
The term “act” used in this section is defined in 15 Pa.C.S. § 103 to include failure to act.
The following terms used in this section are defined in 15 Pa.C.S. § 8812:
The following terms used in this section are defined in 15 Pa.C.S. § 8892:

“benefit company”
“general public benefit”
“specific public benefit”
“subsidiary”

§ 8896. Standard of conduct for managers and officers.

(a) Managers. - Each manager of a manager-managed limited liability company that is a benefit company shall consider the interests and factors described in section 8895(a) (relating to standard of conduct for members) when discharging his or her duties under this title and under the operating agreement.

(b) Officers. - If a benefit company has a person serving in the capacity of an officer, the person shall consider the interests and factors described in section 8895(a) when discharging the person’s duties under this title and under the operating agreement if:

(1) the officer has discretion to act with respect to a matter; and
(2) it reasonably appears to the officer that the matter may have a material effect on the creation by the benefit company of general public benefit or a specific public benefit identified in the certificate of organization of the benefit company.

(c) Coordination with other provisions of law. - The consideration of interests and factors by a manager in the manner described in subsection (a) shall not constitute a violation of section 8849.2 (relating to standards of conduct for managers).

(d) Exoneration from personal liability. -

(1) A manager or officer shall not be personally liable, as such, for monetary damages for any action taken as a manager or officer in the course of performing the duties specified in subsection (a) or (b) unless the action constitutes self-dealing, willful misconduct or a knowing violation of law.
(2) A manager or officer shall not be personally liable for monetary damages for failure of the benefit company to pursue or create general public benefit or a specific public benefit.
(d) Limitation on standing. – A manager or officer does not have a duty to a person that
is a beneficiary of the general public benefit purpose or a specific public benefit purpose of a
benefit company arising from the status of the person as a beneficiary.

Committee Comment (2016):

This section is at the heart of what it means for a manager-managed limited liability company to be
a benefit company. The same requirements apply to member-managed limited liability companies under
15 Pa.C.S. § 8895.

As an agent of a limited liability company, an officer is generally required to follow the instructions
of his or her principal. But in those instances where an officer has discretion to act with a respect to a
matter, subsection (b) requires the officer to consider the interests of the benefit company’s constituencies
in the same manner as required of the managers.

The term “act” used in this section is defined in 15 Pa.C.S. § 103 to include failure to act.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”
“manager”
“manager-managed limited liability company”
“operating agreement”

The following terms used in this section are defined in 15 Pa.C.S. § 8892:

“benefit company”
“general public benefit”
“specific public benefit”

§ 8897. Right of action.

(a) Limitations. –

(1) Except in a benefit enforcement proceeding, no person may bring an action or
assert a claim against a benefit company or its members, managers or officers with respect
to:

(i) failure to pursue or create general public benefit or a specific public
benefit set forth in its certificate of organization; or

(ii) violation of a duty or standard of conduct under this subchapter.

(2) A benefit company shall not be liable for monetary damages under this
subchapter for any failure of the benefit company to pursue or create general public benefit
or a specific public benefit.

(b) Parties with standing. – A benefit enforcement proceeding may be commenced or
maintained only:
(1) directly by the benefit company; or

(2) derivatively by:

   (i) a member that owned at least 2% of the total number of interests of a class or series outstanding at the time of the act complained of;

   (ii) a manager of a manager-managed limited liability company;

   (iii) a person or group of persons that owns beneficially or of record 5% or more of the interests in an association of which the benefit company is a subsidiary at the time of the act complained of; or

   (iv) such other persons as may be specified in the certificate of organization or operating agreement of the benefit company.

(c) Cross reference. – The provisions of Subchapter H (relating to actions by members) shall apply to derivative actions under this section.

Committee Comment (2016):

This section only applies to actions or claims relating to the duties of members and managers under this subchapter, and the general and specific public benefit purposes of a benefit company. Lawsuits for breach of contract by members, managers, officers, or the benefit company, as well as lawsuits for breach of duties not arising under this subchapter, are not subject to this section.

The cross reference in subsection (c) is a reminder that the provisions on derivative actions in 15 Pa.C.S. Subch. 88H will apply to a derivative action under this section. 15 Pa.C.S. § 8891(c).

The following terms used in this section are defined in 15 Pa.C.S. § 102:

   “act”
   “association”

The following terms used in this section are defined in 15 Pa.C.S. § 1103:

   “certificate of organization”
   “manager”
   “member”
   “operating agreement”

The following terms used in this section are defined in 15 Pa.C.S. § 3302:

   “benefit company”
   “benefit enforcement proceeding”
   “general public benefit”
   “specific public benefit”
   “subsidiary”
§ 8898. Annual benefit report.

(a) Contents. – A benefit company must deliver to each member an annual benefit report including:

(1) A narrative description of:

(i) the ways in which the benefit company pursued general public benefit during the year and the extent to which general public benefit was created;

(ii) the ways in which the benefit company pursued any specific public benefit that the certificate of organization states is the purpose of the benefit company to create and the extent to which that specific public benefit was created;

(iii) any circumstances that have hindered the creation by the benefit company of general or specific public benefit; and

(iv) the process and rationale for selecting or changing the third-party standard used to prepare the benefit report.

(2) An assessment of the overall social and environmental performance of the benefit company against a third-party standard applied consistently with any application of that standard in prior benefit reports or accompanied by an explanation of the reasons for any inconsistent application. The assessment does not need to be audited or certified by a third-party standards provider.

(3) A statement of any connection between the organization that established the third-party standard, or its directors, officers or any holder of 5% or more of the governance interests in the organization, and the benefit company or its members, managers or officers or any holder of 5% or more of the outstanding interests in the benefit company, including any financial or governance relationship which might materially affect the credibility of the use of the third-party standard.

(b) Timing of report. – A benefit company shall annually send a benefit report to each member either:

(1) within 120 days following the end of the fiscal year of the benefit company; or

(2) at the same time that the benefit company delivers any other annual report to its members.

(c) Internet website posting. – A benefit company must post all of its benefit reports on the public portion of its Internet website, if any, except that any financial or proprietary information included in the benefit report may be omitted from the benefit report as posted.

(d) Availability of copies. – If a benefit company does not have an Internet website, the benefit company shall provide a copy of its most recent benefit report, without charge, to any
person that requests a copy, but any financial or proprietary information included in the benefit report may be omitted from the copy of the benefit report provided.

(e) Filing of report. – Concurrently with the delivery of the benefit report to members pursuant to subsection (b), the benefit company must deliver a copy of the benefit report to the department for filing, except that any financial or proprietary information included in the benefit report may be omitted from the benefit report as filed under this section. The department shall charge a fee of $70 for filing a benefit report.

Committee Comment (2016):

A benefit company may change from year to year the standard it uses under subsection (a)(2) for assessing its performance. But if a benefit company uses the same standard for assessing its performance in more than one year, the standard must either be applied consistently or the benefit company must provide an explanation of the reasons for any inconsistent use of the standard.

The term “department” used in this section is defined in 15 Pa.C.S. § 102.

The following terms used in this section are defined in 15 Pa.C.S. § 8812:

“certificate of organization”
“interest”
“manager”
“member”

The following terms used in this section are defined in 15 Pa.C.S. § 8892:

“benefit company”
“general public benefit”
“specific public benefit”
“third-party standard”

Chapter 89
Limited Liability Companies

Subchapters A, B, C, D, E, F, I and K

(Repealed.)

Subchapter L
Restricted Professional Companies

§ 8995. Application and effect of subchapter.

* * *

(c) Laws applicable to restricted professional companies. – Except as otherwise provided in this subchapter, [this chapter] Chapter 88 (relating to limited liability companies) shall be
generally applicable to all restricted professional companies. The specific provisions of this
subchapter shall control over the general provisions of [this chapter] Chapter 88.

(d) Election of restricted professional company status. – At the time an existing limited
liability company that has previously conducted a business not involving the rendering of a
restricted professional service begins to render one or more restricted professional services, the
company shall amend its certificate of organization to include [the statement required by
section 8913(7) (relating to certificate of organization)] a statement that it is a restricted
professional company. For purposes of sections [8925] 8835 (relating to taxation of limited
liability companies) and 8997, the company shall be deemed to have become a restricted
professional company on the first day of the taxable year of the company following the taxable
year in which the amendment of its certificate of organization required by this subsection is filed.

(e) Termination of restricted professional company status. – Except as provided in this
subsection, the status of a restricted professional company as such shall terminate, and the
company shall cease to be subject to this subchapter, at such time as it ceases to render any
restricted professional services. Upon ceasing to render any restricted professional services, the
company shall amend its certificate of organization to delete the statement required by [section
8913(7)] subsection (d). For purposes of sections [8925] 8835 and 8997, the company shall be
deemed to have ceased being a restricted professional company on the first day of the taxable
year of the company following the taxable year in which it ceased to render any restricted
professional services.

Amended Committee Comment (2016):

This subchapter sets forth special rules applicable to the class of restricted professional companies.
The following terms used in this section are defined in 15 Pa.C.S. § 8903:

“certificate of organization”
“limited liability company”
“restricted professional company”
“restricted professional services”

§ 8997. Taxation of restricted professional companies.

(a) General rule. – Except as provided in subsection (b) [and in section 8925(b)
(relating to taxation of limited liability companies)], for the purposes of the imposition by the
Commonwealth or any political subdivision of any tax or license fee on or with respect to any
income, property, privilege, transaction, subject or occupation, other than the corporate net
income tax, capital stock and foreign franchise tax and personal income tax, a domestic or
[qualified] registered foreign restricted professional company shall be deemed to be a limited
partnership organized and existing under Chapter [85] 86 (relating to limited partnerships), and a
member of such a company, as such, shall be deemed a limited partner of a limited partnership.

(b) Exception. – A domestic or qualified foreign restricted professional company shall be
subject to section [8925(a)] 8835(a), instead of subsection (a), for the whole of any taxable year of the company during any part of which the company has:

(1) engaged in any business not permitted by section 8996(a) (relating to purposes of restricted professional companies);
(2) (Repealed 2006.)
(3) been a member of a limited liability company.

Amended Committee Comment (2016):

The rule of this section applies only to limited liability companies organized under Pennsylvania law and to limited liability companies that have registered to do business in Pennsylvania under 15 Pa.C. Ch. 4. A foreign limited liability company that has not qualified or registered to do business in Pennsylvania is not a “registered foreign restricted professional company” even if it provides restricted professional services in some other state. The provision of restricted professional services in Pennsylvania is, of course, the type of activity that should require it to register to do business.

A foreign limited liability company that provides restricted professional services in another state may limit its activities in Pennsylvania, however, to activities that do not require registering to do business, such as, for example, investing some of its assets in Pennsylvania real estate (15 Pa.C.S. §§ 4122(11) and 8582(b)). In such a case, it will be viewed for purposes of Pennsylvania law as just engaging in those of its activities conducted in Pennsylvania. In addition to not being subject to this section, it will also not be subject to any of the other provisions of this subchapter, including the restrictions in 15 Pa.C.S. § 8996.

Subsection (b) was added at the insistence of the Department of Revenue to address what it considered possible tax avoidance schemes.

Section 35.1(b) of Act 7 of 1997 provided that section 8997 is repealed insofar as it is inconsistent with Act 7.

The following terms used in this section are defined in 15 Pa.C.S. § 8903:

“domestic restricted professional company”
“limited liability company”
“member”
“qualified foreign restricted professional company”

§ 8998. Annual registration.

* * *

(g) Cross [references. - See section 8907 (relating to execution of documents) and] reference.--See 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Amended Committee Comment (2016):
This section requires all domestic and qualified or registered foreign restricted professional companies to pay an annual registration fee based on the number of members in the company. Of the total fee, $25 is deposited in the Corporation Bureau Restricted Account, with the remainder being deposited in the General Fund.

The requirement to pay the annual fee imposed by this section is independent of the tax status of the company. Regardless of how the company is taxed under 15 Pa.C.S. § 8997, the annual fee will be payable with respect to any year as to which the company satisfies the requirements of subsection (a).

As a means of enforcing payment of the annual registration fee, subsection (f)(1) provides that nonpayment will create a lien on the assets of the company. The reference to property in which a security interest can be perfected “in whole or in part” recognizes that fully perfecting a security interest in some types of property requires filing in locations other than just the Department of State. Subsection (f)(1) is intended to be an exception to those requirements of multiple filing, and notation of the lien on the records of the Department of State is intended to be sufficient for the lien to be valid and fully perfected.

The provisions of subsection (f) on penalties and interest were added by the GAA Amendments Act of 2001 and were patterned after sections 1703 and 806, respectively, of the act of April 9, 1929 (P.L. 343, No. 176), known as The Fiscal Code.

The following terms used in this section are defined in 15 Pa.C.S. § 8903:

“department”
“domestic restricted professional company”
“members”
“qualified foreign restricted professional company”

Chapter 91
Unincorporated Nonprofit Associations

§ 9115. Ownership and transfer of property.
(a) General rule. - A nonprofit association may acquire, hold or transfer, in its name, an interest in property.
(b) Testamentary and fiduciary dispositions. - A nonprofit association may be a beneficiary of a trust or contract, a legatee or a devisee.
(c) Authority to take and hold trust property. - Every nonprofit association organized for a charitable purpose or purposes may take, receive and hold real and personal property as may be given, devised to or otherwise vested in the nonprofit association, in trust, for the purpose or purposes set forth in its governing principles. The managers of the nonprofit association shall, as trustees of the property, be held to the same degree of responsibility and accountability as other trustees, unless a lesser degree or a particular degree of responsibility and accountability is prescribed in the trust instrument, or unless the managers remain under the control of the members of the nonprofit association or third persons who retain the right to direct, and do
direct, the actions of the managers as to the use of the trust property from time to time.

(d) Nondiversion of certain property. – Property of a nonprofit association committed to charitable purposes shall not, by any proceeding under Chapter 3 (relating to entity transactions) or otherwise, be diverted from the objects to which it was donated, granted or devised, unless and until the nonprofit association obtains from the court an order under 20 Pa.C.S. Ch. 77 (relating to trusts) specifying the disposition of the property.

Amended Committee Comment (2016):

Subsections (a) and (b) were enacted in 2013 and are patterned after Uniform Unincorporated Nonprofit Association Act (2008) (Last Amended 2011) § 6. Subsections (c) and (d) were added in 2015 by the Unincorporated Entities Act and are patterned after 15 Pa.C.S. § 5547.

Subsection (a) is based on section 3-102(8) of the Uniform Common Interest Ownership Act. It reverses the common law rule. Because a nonprofit association was not a legal entity at common law, it could not acquire, hold, or convey real or personal property. Harold J. Ford, UNINCORPORATED NON-PROFIT ASSOCIATIONS, 1-45 (Oxford Univ. Press 1959); Warburton, , Conveyancer 318 (September-October 1985).

The strict common law rule has been modified in various ways in most jurisdictions by courts and statutes. For example, courts have held that a gift by will or inter vivos transfer of real property to a nonprofit association is not effective to vest title in the nonprofit association, but is effective to vest title in the officers of the nonprofit association to hold as trustees for the members of the nonprofit association. , 571 P. 2d 880 (Okla. A pp. 1977).

As is the case with many of the problems created by the view that a nonprofit association is not an entity, the statutory solutions are often partial—limited to special circumstances and associations. Subsection (a) solves this problem for all nonprofit associations, for all kinds of transactions, and for both real and personal property. Since Pennsylvania has not modified the common law rule as clearly as other states, subsection (a) is an important advance in Pennsylvania law. 15 Pa.C.S. § 9111(b) with respect to attempted transfers of real and personal property to a nonprofit association that were made before the effective date of this subchapter.

Even if the governing principles of a nonprofit association were to provide that it “may not acquire real property,” subsection (a) makes effective a transfer of real property to the nonprofit association. A different result would obviously disrupt real estate titles. The remedy for this violation of an internal governance rule lies not in preventing title from passing but, as with other organizations, in an action by members against their nonprofit association and its appropriate officers to undo the transaction.

Subsection (b) is a necessary corollary of subsection (a) and, thus, it may be unnecessary. However, several states currently have statutes which expressly provide that an unincorporated, nonprofit association may be a legatee, devisee, or beneficiary. , M d. Estates & Trusts Code Ann. section 4-301 (1991). Therefore, the Committee decided it would be desirable to include this as an express rule. Subsection (b) applies to both trusts and contracts. Not all existing state statutes apply expressly to both.

The following terms used in this section are defined in 15 Pa.C.S. § 9112:

“governing principles”
“managers”
The following terms used in this section are defined in 15 Pa.C.S. § 102:

- "members"
- "nonprofit association"

The following terms used in this section are defined in 15 Pa.C.S. § 102:

- "charitable purpose"
- "property"

**Chapter 93
Professional Associations**

§ 9302. Application of chapter.

(a) General rule. – This chapter shall apply to and the word “association” in this chapter shall mean a professional association organized under the act of August 7, 1961 (P.L. 941, No. 416), known as the Professional Association Act, which has not:

1. Reorganized as an electing partnership under Chapter 87 (relating to electing partnerships).
2. Elected to become a professional corporation in the manner provided by section 2905 (relating to election of professional associations to become professional corporations).
3. Converted to a limited liability company under Subchapter E of Chapter 3 (relating to conversion).

(b) No new associations. – An association may not be originally organized under this chapter.

**Chapter 95
Business Trusts**

§ 9501. Application and effect of chapter.

(a) General rule. –

1. Unless the context clearly indicates otherwise, this chapter shall apply to and the words “business trust” in this chapter shall mean an association organized as a trust:

   (i) Hereafter established under the laws of this Commonwealth. Whose deed of trust or other organic document has been filed in the department and is in effect under this chapter.

   (ii) Whose deed of trust or other organic document states, by amendment or
otherwise, that the trust exists subject to the provisions of this chapter, in the case of a business trust heretofore established under the laws of this Commonwealth or heretofore or hereafter established under the laws of any other jurisdiction.

(2) The words "business trust" in this chapter shall not include:

   (i) A trust contemplated by section 1768 (relating to voting trusts and other agreements among shareholders) or any similar provision of law.

   (ii) A trust for creditors.

   (iii) A mortgage, deed of trust or other indenture or similar instrument or agreement under which debt securities are outstanding or to be issued.

   (iv) A trust for the benefit of one or more investors with respect to a lease of real or personal property, unless the instrument creating the trust is filed under this chapter.

(b) No franchise. – This chapter shall not confer on a business trust the power to engage in any activity that may be undertaken only in corporate form.

(c) Effect on taxation. – This chapter is enacted to codify and clarify certain common law principles applicable to business trusts and is not intended to affect the liability of any business trust to any tax. A trust that is subject to this chapter shall not be deemed to be organized or created by or under this or any other statute or to have the benefit of any state franchise for the purpose of existing law relating to taxation.

(d) Multistate application. – It is the intent of the General Assembly in enacting this chapter that the legal existence of business trusts organized in this Commonwealth be recognized outside the boundaries of this Commonwealth and that, subject to any reasonable requirement of registration, a domestic business trust transacting business outside this Commonwealth be granted protection of full faith and credit under the Constitution of the United States.

Amended Committee Comment (2016):

Section 202 of the General Association Act of 1988 amended 20 Pa.C.S. § 711(3) to provide that a business trust, including one subject to this chapter, is not an “inter vivos trust” as defined in that section and thus is not subject to the jurisdiction of the orphans' court division of the courts of common pleas. As a result, a business trust is not a trust subject to 20 Pa.C.S. Ch. 71. 20 Pa.C.S. § 102 (definitions of “fiduciary” and “trust”).

Subsection (c) was repealed to the extent it would affect any tax imposed under Articles III, IV or VI of the Tax Reform Code of 1971 (72 P.S. §§ 7301 et seq., 7401 et seq., 7601 et seq.) for any taxable year beginning on or after January 1, 1995, pursuant to 1994, June 16, P.L. 279, No. 48, § 42(c).

§ 9506. Liability of trustees and beneficiaries.
(a) General rule. –

(1) Except as otherwise provided in the instrument, the beneficiaries of a business trust shall be entitled to the same limitation of personal liability as is extended to shareholders in a domestic business corporation.

(2) Except as otherwise provided in the instrument, the trustees of a trust, as such, shall not be personally liable to any person for any act or obligation of the trust or any other trustee.

(3) An obligation of a trust based upon a writing may be limited to a specific fund or other identified pool or group of assets of the trust.

(b) Standards and immunities. – Except as otherwise provided in the instrument governing the trust, the provisions of Subchapters B (relating to fiduciary duty) and D (relating to indemnification) of Chapter 17 shall be applicable to representatives of a business trust.

(c) Certain specifically authorized debt terms. – A business trust shall be subject to section 1510 (relating to certain specifically authorized debt terms) to the same extent as if it were a business corporation.

(d) Professional relationship unaffected. – Subsection (a) shall not afford trustees or beneficiaries of a business trust providing professional services with greater immunity than is available to the officers, shareholders, employees or agents of a professional corporation. See section 2925 (relating to professional relationship retained).

(e) Disciplinary jurisdiction unaffected. – A business trust providing professional services shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the court, department, board, commission or other government unit regulating the profession in which the business trust is engaged. The court, department, board or other government unit may require that a business trust include in its instrument provisions that conform to any rule or regulation heretofore or hereafter promulgated for the purpose of enforcing the ethics of a profession. This chapter shall not affect or impair the disciplinary powers of the court, department, board, commission or other government unit over licensed persons or any law, rule or regulation pertaining to the standards for professional conduct of licensed persons or to the professional relationship between any licensed person rendering professional services and the person receiving professional services.

(f) Permissible beneficiaries. – Except as otherwise provided by a statute, rule or regulation applicable to a particular profession, all of the ultimate beneficial owners of interests in a business trust that renders one or more restricted professional services shall be licensed persons. [As used in this subsection, the term “restricted professional services” shall have the meaning specified in section 8903 (relating to definitions and index of definitions).] in the profession the trust practices if the trust renders any of the following professional services: chiropractic, dentistry, law, medicine and surgery, optometry, osteopathic medicine and surgery.
(g) Conflict of laws. – The personal liability of a trustee or beneficiary of a business trust to any person or in any action or proceeding for the debts, obligations or liabilities of the trust or for the acts or omissions of other trustees, beneficiaries, employees or agents of the trust shall be governed solely and exclusively by this chapter and the laws of this Commonwealth. Whenever a conflict arises between the laws of this Commonwealth and the laws of any other state with respect to the liability of trustees or beneficiaries of a trust organized and existing under this chapter for the debts, obligations and liabilities of the trust or for the acts or omissions of the other trustees, beneficiaries, employees or agents of the trust, the laws of this Commonwealth shall govern in determining such liability.

(h) Medical professional liability. – A business trust shall be deemed to be a professional corporation for purposes of section [811 of the act of October 15, 1975 (P.L. 390, No. 111), known as the Health Care Services Malpractice Act] 744 of the act of March 20, 2002 (P.L. 154, No. 13), known as the Medical Care Availability and Reduction of Error (Mcare) Act.

(i) Failure to observe formalities. – The failure of a business trust to observe formalities relating to the exercise of its powers or management of its activities and affairs is not a ground for imposing liability on a beneficiary or trustee of the trust for a debt, obligation or other liability of the trust.

Amended Committee Comment (2016):

Subsection (a). Subsection (a) was rewritten by the GAA Amendments Act of 2001 for the purpose of clarifying the intended effect of the prior language. The revision should not be read to imply that beneficiaries or trustees were subject to greater personal liability prior to the revision.

Subsection (b). The term “representative” used in subsection (b) is defined in 15 Pa.C.S. § 102 and includes the trustees, officers and other representatives of the business trust.

One of the provisions that subsection (b) makes applicable to a business trust is 15 Pa.C.S. § 1713 which permits the shareholders to adopt a bylaw protecting corporate directors from certain personal liabilities. Because Chapter 95 does not provide for the adoption of bylaws by a business trust, if the beneficiaries of a business trust wish to adopt such a limitation on the personal liability of the trustees it should be placed in the instrument.

Subsection (f). The type of ownership structure that subsection (f) is intended to permit includes, for example, a business trust in which the beneficial interests are owned by professional corporations. 15 Pa.C.S. §§ 2922(b), 8105 and 8996(b).

Subsection (i). Subsection (i) was added in 2015 by the Unincorporated Entities Act. It is patterned after Uniform Limited Partnership Act (2001) (Last Amended 2013) §§ 303(b) and 404(d) and Uniform Limited Liability Company Act (2006) (Last Amended 2013) § 304(b).

Subsection (i) pertains to the equitable doctrine of “piercing the veil” – conflating an entity and its owners to hold one liable for the obligations of the other. In the corporate realm, “disregard of corporate formalities” is a key factor in the piercing analysis. In the realm of business trusts, that factor is inappropriate, because complete control of the affairs of the trust by the trustees is common. The
formalities at issue are the process formalities of governance.

Subsection (i) has no relevance to another key piercing factor – disregard by an entity’s owners of the formal economic separateness between entity and owner. Subsection (i) also has no relevance to a beneficiary’s claim of oppression. In some circumstances, disregard of agreed-upon formalities can be a “freeze out” mechanism. Likewise, subsection (i) has no relevance to a beneficiary’s claim that the disregard of agreed-upon formalities is a breach of the organic rules.

Title 54
Names

Chapter 5
Corporate and Other Association Names

§ 501. Register established.

(a) General rule. – A register is established by this chapter which shall consist of such of the following names as are not deleted therefrom by operation of section 504 (relating to effect of failure to make filings) or 506 (relating to voluntary termination of registration by corporations and other associations):

* * *

(6) In the case of a limited partnership or limited liability company subject to 15 Pa.C.S. Ch. [85] 86 (relating to limited partnerships) or [89] 88 (relating to limited liability companies), the name of the partnership or company as set forth in the certificate of limited partnership, certificate of organization or application for registration as a foreign limited partnership or foreign limited liability company, as the case may be.

* * *

(8) In the case of a [registered] limited liability partnership subject to 15 Pa.C.S. Ch. 82 (relating to [registered] limited liability partnerships and limited liability limited partnerships) that is not also a limited partnership, the name of the partnership as set forth in the statement of registration as a [registered] foreign association.

* * *

§ 502. Certain additions to register.

* * *

(d) Annual renewal. – A person who has in effect a registration of a [corporate] name may renew the registration from year to year by annually filing an application for renewal setting forth the facts required to be set forth in an original application for registration. A renewal
application may be filed between October 1 and December 31 in each year and shall extend the
registration for the following calendar year.

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