UNIVERSAL BUSINESS ORGANIZATION LEGISLATION: WILL IT HAPPEN? WHY AND WHEN

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I. INTRODUCTION

The number and variety of distinct statutory legal forms of business organization have grown dramatically since the late 1980s. This growth in alternatives has resulted from the changing tax rules applicable to business organizations, and a rethinking of the business relationships among the owners of businesses and between those owners and the persons dealing with the businesses. This development has taken place against a background of increased interstate business and international competition, which has placed a premium on business organizations that are unhampered by unnecessary organizational and tax constraints.

This article discusses the trend in the development of business organization law and considers the forces that affect the development of the statutes governing business organizations. In addition, the article discusses recent developments in response to these statutes, and the possible development of these statutes as a result of these pressures. The article suggests that the statutory landscape on which business organizations operate will be transformed into a largely contractual framework in which the activities conducted by the organization and the composition of its ownership are more important to the way that the organization operates than the statutory form it chooses to adopt. The developing statutes will provide default rules generally derived from the disparate business organization rules under which businesses have traditionally functioned, but the developing statutes will be revised to eliminate the differences in the rules that are accidental rather than driven by policy differences.

A. *Terminology*[1]

Because many of the concepts discussed in this article are attempts to understand changing rules and sometimes subtle distinctions, the nomenclature will be important. The term "form" refers to each legal form of organization, such as a corporation, limited liability company (LLC), or limited partnership (LP), having a governing statute that is unique to it. In contrast, individual business enterprises will be referred to as "organizations." The term "entity" is reserved for the discussion in Part II(B)(1) of the organization as a separate entity. Those who own the equity of an organization, whether they be partners, members, shareholders, or the sole proprietor, are referred to herein as "owners."

The term "organic statute" refers to the statute under which an organization is formed and which provides mandatory and default rules for a form of business. In contrast, this article will refer to "universal statutes," which are statutes that while providing mandatory or default characteristics for two or more forms are not organic statutes with respect to those forms. An example of a universal statute is a statute that imposes special rules on any organization established to provide a type of professional services, regardless of which form the organization takes.

The article will refer to the "structure" of an organization. "Structure" refers to the number, type, and participation of the owners and managers or the organization.[2] The article will also refer to the "nature" of an organization, which refers to the type of business or operations carried on by the organization, such as professional services, investment, or active commercial trade or business.

For each business form, its organic statute provides rules. Some rules are mandatory, but most are default rules which may be modified by the agreement of the owners. This article refers to the rules imposed on a form under its organic statute, both mandatory and default, as the

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[1]As with any other attempt to organize subtle distinctions in a changing area into a comprehensible structure, the terminology used in this article is inherently imperfect. Even the use of statutory norms to distinguish among forms will not be entirely satisfactory because there are distinctions within the statutes themselves. A member-managed limited liability company (LLC) may have more properties in common with a limited liability partnership (LLP) than with a manager-managed LLC. This limitation, the article submits, is further evidence of the need for additional coherence and rationalization in the organic statutes governing entities.

[2]For example, note the differences between organizations having many owners who do not actively participate in the business; organizations having a few members, each of whom does participate; and organizations having two members, which tends to be more in the nature of a direct contract among the owners.

"properties" of the form. The relationship between a form and its organic statute is shown in Chart 1.

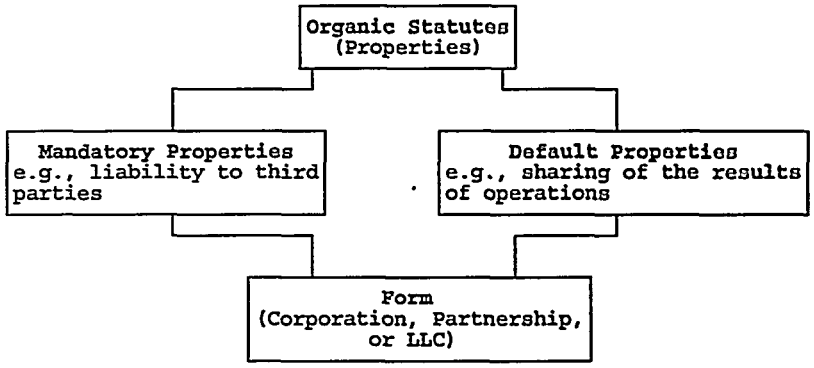

Chart 1
Properties of a Form

The term "characteristics" refers to all of the distinctive features of an organization, including properties supplied by the organic statute, other statutes, and other non-statutory sources of law. There are three sources for the characteristics of any organization: (1) the mandatory and unmodified default properties of the form taken by the organization and characteristics imposed on the organization by statutes (such as universal statutes) other than the organic statute;[3] (2) the agreement of owners governing the operation of the business organization, the relationship among the owners, and the relationship between the organization and its owners and managers;[4] and (3) characteristics of the organization resulting from judicial interpretation of all of the other characteristics.[5]

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[3]Collectively, these properties and other characteristics supplied by statutes other than the organic statute are referred to as "statutory characteristics."

[4]The statutes suggest that the provisions of the agreement of the owners do not restrict the rights of third parties under the acts. REV. UNIF. PARTNERSHIP ACT § 103(b)(10) (amended 1996), 6 U.L.A. 25 (Supp. 1997) [hereinafter RUPA]; UNIF. LTD. LIAB. CO. ACT § 103(b)(7) (amended 1996), 6A U.L.A. 34 (Supp. 1997) [hereinafter ULLCA]. Nonetheless, the rights of third parties dealing with the organization and the owners often will be determined by reference to the agreement of the owners. For example, the owners' rights in the organization and the ability of a third party successor to those rights, either through assignment or charging order, will be determined by the agreement. In other words, because the organization and its rights and assets are characterized by the agreement pursuant to which it is formed, it is reasonable to assume that the rights of third parties interacting with the organization and its members will be based on, and limited by, the owners' agreement.

[5]A contractarian purist might argue that all of these rules may be reduced to the

The sources of the characteristics of an organization are shown in Chart 2.

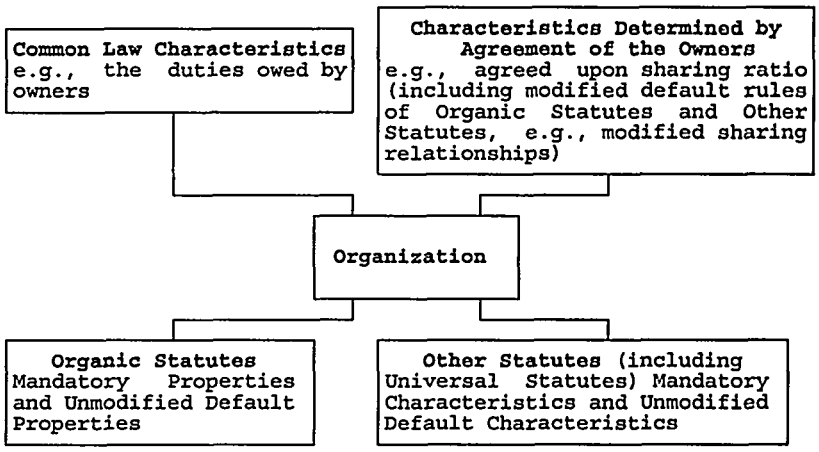

Chart 2
Sources of Characteristics of Organizations

Because organic statutes are becoming increasingly flexible, it is now possible for an organization organized as one form to have characteristics that more closely resemble the properties of another form. For example, because the tax code favors unincorporated business organizations that may be treated as partnerships and many business organizers prefer an organization that has many of the characteristics of a corporation (such as certificated interests, officers, and other corporate characteristics), the result is that many organizers are forming LLCs that contractually adopt characteristics that are corporate in nature.[6]

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contract among the owners and the judicial interpretations of the contract and public policy restrictions on the contracting process such as rules governing fraud and unconscionability. From the point of view of a practitioner, this academic approach has a quality normally ascribed to legal advice — it is absolutely accurate and totally useless. In other words, the entire structure of a business organization may be looked upon as a contract (both with respect to the organization and its owners, and between the organization and third parties), but this analysis ignores two important facts: first, that many aspects of these relationships will not be considered and are supplied by the statutes or the courts; and second, that the "contract" into which the owners, organizations, and third parties enter are not always internally consistent or mutually understood. For these reasons, the importance of the provisions of statutes governing business organizations and the default and mandatory rules supplied by those statutes continue to be important in understanding business organizations, particularly by those actually using these organizations.

[6]For a discussion of the "unincorporation" of an LLC that has adopted corporate

Many of the characteristics, and the ability of the owners to vary characteristics of organizations organized under some of the older organic statutes were determined by common law rather than as properties set forth in the organic statute, while more recent statutory enactments have tended to describe these characteristics explicitly as statutory properties.[7] The more recent organic statutes are also much clearer with respect to the ability of the owners to vary these properties and other characteristics by agreement.[8]

B. *Sources of the Characteristics of Business Organizations*

While this article focuses on the statutory characteristics of business organizations, it is important to recognize that statutes form only one of the three legs on which a business organization is based. Historically, the seminal agreement of the owners has been which form to adopt for the business. This contractual agreement implicates the rules of the organic statute pursuant to which form is chosen, some aspects of other statutes governing the form and the business, and the common law applicable to that statute. Similarly, the ability of the owners to contract with respect to their relationship will be constrained by the provisions of the organic statute, other statutes, and common law restrictions based on interpretations of the statute and public policy with respect to contracts. Finally, in some cases the organic statute may not function in the absence of an agreement with respect to which of any applicable alternative default rules should apply to the organization.[9]

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characteristics including fungible interests, see Robert R. Keatinge, *Corporations, Unincorporated Organizations, and Unincorporations: Check the Box and the Balkanization of Business Organizations*, 1 J. SMALL & EMERGING BUS. L. 201 (1997).

[7]For example, the duties of a partner to a partnership under the Uniform Partnership Act have been determined by the courts under the common law, while RUPA sets forth a partner's duty of care to the partnership and the other partners. RUPA § 404(c) (amended 1996), 6 U.L.A. 58 (1995) (the duty "is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law").

[8]*See* RUPA § 103(b)(1) (amended 1996), 6 U.L.A. 25 (Supp. 1997); ULLCA § 103(a) (amended 1996), 6A U.L.A. 33 (Supp. 1997).

[9]An example of this provision is the application of different rules to term organizations and at-will organizations under the partnership and LLC statutes and the application of different rules for member-managed and manager-managed LLCs. The owners, at the outset, must make these decisions by agreement in order to determine the statutory rules that will apply to the organization. *See* RUPA § 801 (amended 1996), 6 U.L.A. 92-3 (1995); REV. UNIF. LTD. PARTNERSHIP ACT § 801 (amended 1985), 6A U.L.A. 240-241 (1995) [hereinafter RULPA]; ULLCA § 801 (amended 1996), 6A U.L.A. 39 (Supp. 1997).

II. CHARACTERISTICS OF AN ORGANIZATION

Each organization comprises a collection of characteristics that define certain relationships: among the owners; between the owners and the organization; between the owners and organization on one hand, and the managers and agents on the other; and between the owners, managers, agents, and organization on the one hand and the rest of the world on the other. To the extent the organic statute defines a property for the form adopted, these properties will be the characteristics of the organization unless supplanted either by another statute or by the agreement of the owners.

A. *Internal and External Characteristics*

Characteristics of an organization may be divided into those that principally govern the various relationships among the owners, managers, and agents of the organization themselves and with the organization ("internal properties") and those that govern the relationship of third parties to the organization, its owners, and its managers ("external properties"). To the extent that internal properties are limited to persons who are parties to the agreement under which the organization is organized, the owners should be free to modify the default properties consistent with fundamental contractual concepts of fraud and unconscionability. There may be a greater limitation on the modification of external properties as a concession to those who wish to deal with the organization without the necessity of becoming steeped in the internal relationships of the owners and managers of the organization. This distinction is clear in RUPA's statement of freedom of contract among the members, which makes clear that the partners may modify their relationship in the partnership agreement but may not affect the rights of third parties.[10]

B. *Specific Characteristics*

Every business organization should have provisions addressing all characteristics of an organization. While in practice many of these provisions will be addressed in the organic statute, there are several characteristics that should be addressed in a universal statute. The following are some of those properties.

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[10]RUPA § 103(b)(10) (amended 1996), 6 U.L.A. 25 (Supp. 1997). "The partnership agreement may not: . . . restrict rights of third parties under this [Act]." *Id.* (brackets in original).

1. The Organization as a Separate Entity

A business organization is a separate entity capable of holding property separate and apart from its owners and capable of incurring debts in its own name.[11] This separate entity concept is well established in tax law,[12] and is the starting point for the determination of the classification of an organization under the "check the box" regulations.[13] It seems clear that a business formed under a universal organic statute would have the property of being a separate entity.

Recently, unincorporated business organization statutes have increased the entity-like characteristics of these organizations. The new statutes provide rules that are consistent with the unincorporated organization as a separate entity, and, increasingly, have expressly defined

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[11]Several of the current organic statutes refer to the forms they govern as "entities." *See, e.g.*, RUPA § 201 (amended 1996), 6 U.L.A. 32 (Supp. 1997); ULLCA § 201, 6A U.L.A. 443 (1995).

[12]In Board of Trade of the City of Chicago v. Commissioner of Internal Revenue, 106 T.C. 369 (1996), the court considered the Service's position that payments of transfer fees to the Chicago Board of Trade constituted payments for services that should be included in the Board of Trade's income. The Court held that the transfer fees were nontaxable contributions to capital, in part because the fees increased the member's equity in the entity. *Id.* at 389. The court noted the difference between a corporation and a partnership for tax purposes:

> Respondent argues that the members cannot have an investment motive because they enjoy no right to any return of the amount of transfer fees paid in connection with that membership. We are not persuaded. There is no requirement that the payments directly increase the individual payor's equity interest on a dollar-for-dollar basis. Nor is there any requirement that a member must have a right to recover from petitioner the amount of the transfer fee paid.

Id.

> Respondent seems to be arguing that, in order for the transfer fees to be capital contributions, petitioner must maintain a capital account for each member that directly reflects the actual amounts paid in respect of that particular membership interest. Petitioner is a corporation, not a partnership. There is no such requirement for corporations. A corporation is a separate legal entity, whereas a partnership is an aggregate of its partners. Partnership capital accounts reflect what each partner can draw from the partnership. A corporation does not have individual drawing accounts for each of its shareholders. Any shareholder simply has an ownership interest in this separate entity represented by the number of shares owned by him.

Id. at 389-90 n.21.

[13]*Simplification of Entity Classification Rules*, 61 Fed. Reg. 66,584 (1996). *See* James J. Hall, *'Check-the-Box' Finally Here; New Rules Make Business Classification Simpler*, West's Legal News 4235, May 13, 1996, *available in* 1996 WL 265097 (stating that "[t]he new rules will allow taxpayers to classify their businesses as sole proprietorships, partnerships, limited liability companies (LLCs) or S corporations by merely checking a box on their tax returns").

the organizations as "entities."[14] Nonetheless, many of the tax and business rules governing unincorporated business organizations are based on the view of the organization as an aggregate of its owners.[15] For example, owners have an essential relationship with both the formation and dissolution of unincorporated business organizations, but are largely irrelevant to the organization or dissolution of a corporation.[16] The development of new unincorporated business organizations with renewed contractual flexibility has renewed the consideration of the distinction between an aggregate and an entity.[17] Thus, a fundamental characteristic of a business organization is that it is a separate entity capable of holding property separate and apart from its owners and capable of incurring debts in its own name.

2. Vicarious Liability

Prior to the recent changes in the organic statutes, one of the most important properties of a form was the extent to which it imposed vicarious liability on its owners for the obligations of the organization. General partners of both general partnerships and LPs have full individual liability for the obligations of the organization.[18] Vicarious liability was once the characteristic that distinguished corporations from partnerships.[19] In a corporation, unlike a traditional partnership, no owner, as such, was liable for the obligations of the organization.[20] In a partnership, by contrast, at least one owner must be vicariously liable for the obligations

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[14]*See, e.g.*, RUPA § 201(a) (amended 1996), 6 U.L.A. 32 (Supp. 1997) ("A partnership is an entity distinct from its partners."); ULLCA § 201 (amended 1996), 6A U.L.A. 443 (1995) ("A limited liability company is a legal entity distinct from its members.").

[15]*See generally* Keatinge, *supra* note 6.

[16]*See, e.g.*, UNIF. PARTNERSHIP ACT §§ 6-7, 35, 6 U.L.A. 256, 280-81 (1995) [hereinafter UPA]; RUPA §§ 202, 601 (amended 1996), 6 U.L.A. 27-28, 72-74 (1995); ULLCA § 203, 801 (amended 1996), 6A U.L.A. 444-5, 39 (1995 & Supp.1997); REV. MODEL BUS. CORP. ACT §§ 2.05, 14.02 (1996) [hereinafter RMBCA].

[17]This article considers business organizations that constitute separate entities rather than business relationships that do not constitute entities.

[18]JOHN E. MOYE, THE LAW OF BUSINESS ORGANIZATIONS § 4.04, at 89 (2d ed. 1982). *See* RUPA § 306(a) (amended 1996), 6 U.L.A. 36 (Supp. 1997) ("[A]ll partners are liable jointly and severally for all obligations of the partnership . . . ."); RULPA § 403(b) (amended 1985), 6A U.L.A. 177 (1995) (stating that "a general partner of a limited partnership has the liabilities of a partner in a partnership without limited partner to persons other than the partnership and the other partners").

[19]MOYE, *supra* note 18, § 4.04, at 88-89.

[20]*Id.* § 4.04, at 88 (stating that "the investors risk only the amount of their investment and are not individually responsible for corporate obligations").

of the organization.[21] This rule has been modified by the advent of LLCs and LLPs, which allow some unincorporated associations to have the property of limited liability.[22]

3. Management Structure

Corporations are said to have centralized management because the management of the corporation is by elected directors rather than by owners.[23] By contrast, in a partnership, some or all of the owners have the right to participate in the management of the organization.[24] Limited liability companies provide alternative regimes, one of which provides for management directly by the owners (member-management), the other of which allows nonowner management (manager-management).[25]

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[21]ARTHUR D. WOLFE & FREDERICK J. NAFFZIGER, THE LAW OF AMERICAN BUSINESS ORGANIZATIONS: AN ENVIRONMENTAL APPROACH 56-57 (1984) (stating that "[i]n a partnership, each partner may be liable for any and all debts of the partnership acting as a business entity"). *See* RUPA § 306(a) (amended 1996), 6 U.L.A. 36 (Supp. 1997) (stating that "all partners are liable jointly and severally for all obligations of the partnership").

[22]WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 102 (5th ed. 1993) ("The limited liability company (LLC) is a recent statutory development that reflects the importance in the organization of many business entities of two objectives: (a) limitation of the liability of investors to the amount invested in the firm and (b) avoidance of the double tax on corporate income."). In addition, "one of the hallmark features of limited liability companies is the members' protection from personal liability for the LLC's debts, obligations, and liabilities." LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 12.01, at 12-1 (1992 & Supp. July 1993) ("All the LLC statutes provide that neither the members nor managers of an LLC are liable for debts, obligations, or other liabilities of the LLC.").

[23]RMBCA § 8.01(b) (1996).

[24]*See* UPA § 18(e), 6 U.L.A. 526 (1995) (stating that "[a]ll partners have equal rights in the management and conduct of the partnership business"); UPA § 24, 6 U.L.A. 697 (1995) (stating that "[t]he property rights of a partner are . . . his right to participate in the management"); *see also* RUPA § 401(f) (amended 1996), 6 U.L.A. 52 (1995) ("Each partner has equal rights in the management and conduct of the partnership business."); RULPA § 403(a) (amended 1985), 6A U.L.A. 177 (1995) (stating that "a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners").

[25]KLEIN & COFFEE, *supra* note 22.

> Management of the LLC is vested in the members, who are like general partners in this respect, and who not only participate in decision-making but also may have the power to bind the company. It is contemplated, however, that in many instances the members will, in advance, enter into "operating agreements" under which management will be delegated to a smaller managing group.

Id. at 103-04.

4. The Effect of the Dissociation of an Owner on the Continuation of the Organization

Changes in ownership of a corporation do not cause the corporation to dissolve.[26] In an unincorporated organization, the dissociation of an owner will cause a dissolution of the organization,[27] although most LLC and LP statutes allow the remaining members to avoid dissolution by consenting to the continuation of the organization after dissociation.[28]

5. Requirement of Owners at Formation

Corporations differ from partnerships with respect to the requirement that the organization have owners at the point of formation.[29] The formation of a corporation is done by an incorporator who is not necessarily a shareholder.[30] Only after incorporation do the shareholders become owners.[31] Partnerships and LPs come into existence by definition only when there are two or more partners.[32]

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[26]WOLFE & NAFFZIGER, *supra* note 21, at 58 ("[A corporation] is not dissolved on the death of the owner as are proprietorships and partnerships . . . . [And] the owners may choose to sell or transfer their ownership freely without altering the corporate form . . . .").

[27]*Id.* at 57 (stating that "any time a partner dies, is incapacitated, or voluntarily leaves the partnership, the old partnership is dissolved").

[28]LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 11.07, at 11-15 (1992 & Supp. May 1994) ("All LLC statutes provide for continuation of the firm on member consent."); MOYE, *supra* note 18, § 3.06, at 54 (stating that "the right to continue the limited partnership in spite of a dissolution requires a statement to that effect in the certificate or the consent of the members").

[29]*See* MOYE, *supra* note 18, § 4.03, at 79 (stating that "[i]n the general partnership each partner is an owner and each partner is vested with the responsibilities of management"); WOLFE & NAFFZIGER, *supra* note 21, at 56 (stating that "[p]artnerships are created by the contractual understanding . . . of the partners," which necessarily requires that the partners exist at the time of formation).

[30]MOYE, *supra* note 18, § 4.03, at 80 ("The incorporators are responsible for filing the articles of incorporation and securing preincorporation agreements and share subscriptions. The incorporators are usually the 'promoters' of the corporation who work closely with counsel in drafting the appropriate documents to comply with the statutory requirements.").

[31]RMBCA § 2.05 (1996). Under this statutory provision, the corporate business is commenced by the directors or the incorporators who, in turn, organize the corporation and determine the consideration for, and issue, stock to shareholders. *Id.*

[32]*See, e.g.*, UPA § 6(a), 6 U.L.A. 256 (1995); RUPA § 202(a) (amended 1996), 6 U.L.A. 27 (1995); RULPA § 101(7) (amended 1985), 6A U.L.A. 61 (1995).

6. Nature and Fungibility of Ownership Interests

In addition to the restriction on the transfer of shares or partnership interests described above, there are significant differences between the qualities of a share of stock and a membership interest in an unincorporated organization.[33] These differences principally relate to the unique nature of each interest in the unincorporated organization compared with the fungible nature of stock. Under the corporation statutes, shares may be freely transferred and the transferee succeeds to the all the rights of the transferor.[34] In an unincorporated organization, while interests are freely transferrable, the transferee will not be entitled to participate in management to the same extent as the transferor.[35]

7. Sharing Relationships

The manner in which the profits and losses of the organization are shared among the owners will differ from one form to another. In general partnerships and many LLCs, profits and losses are shared on a per capita basis.[36] In LPs and other LLCs, they are shared in proportion to capital contributions.[37] Finally, in corporations, profits are shared

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[33]For example, "the financial interest of each member of an unincorporated organization remains unique, consisting of a capital account, a share of the profits and other results of operations, and a right to distributions." Keatinge, *supra* note 6, at 228 (footnote omitted).

[34]MOYE, *supra* note 18, § 4.03, at 85. *See also* LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY 165 (3d ed. 1994) (stating that a corporation's stock "is freely transferrable without the consent of the other shareholders").

[35]UPA § 27(1), 6 U.L.A. 736 (1995); RULPA § 702 (amended 1985), 6A U.L.A. 478-9 (1995).

[36]MOYE, *supra* note 18, § 2.05, at 15-16 (stating that "if the [partnership] agreement is silent, profits and losses are shared equally"); *see also* UPA § 18(a), 6 U.L.A. 526 (1995) (stating that "[e]ach partner shall . . . share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits").

[37]LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 5.02, at 5-2 (1992 & Supp. May 1994) ("LLC statutes generally allocate LLC members' financial rights, subject to contrary agreement, according to their financial interests, such as contributions to the firm, as in a corporation or limited partnership, rather than on a per capita basis as in a partnership."); JUDSON A. CRANE & ALAN R. BROMBERG, LAW OF PARTNERSHIP § 26, at 143 (1968) (stating that an LP "consists of . . . limited partners, who take no part in management, share profits, and do not share losses beyond their capital contributions to the firm"). *See, e.g.*, RULPA § 503 (amended 1985), 6A U.L.A. 209 (1995) (explaining that unless the partnership agreement provides otherwise, "profits and losses shall be allocated on the basis of the value . . . of the contributions made by each partner").

based on the number of shares held, regardless of the amount paid for those shares.[38]

8. Interim Distribution Decisions

Generally, in unincorporated organizations, the distribution of property before dissolution must be determined by the agreement of all of the owners.[39] In the corporate model, elected directors can determine when profits will be distributed.[40] For an LLC, interim distributions are not required by LLC statutes before a member's withdrawal or the LLC dissolves.[41] "LLC statutes do not provide for periodic distributions because it is very difficult to design a default rule on this matter. Timing will depend on such matters as the members' tax situations and the nature of the firm. Therefore, this matter is best left to customized agreements."[42]

9. Liability for Distributions

The liability of recipients of distributions to creditors of the organization varies among the various forms. In a partnership, recipients are liable for any distributions made when the partnership is insolvent or in violation of partnership agreement.[43] In a corporation, directors are

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[38]*See* Keatinge, *supra* note 6, at 225 ("Within a corporation, each share is identical, except to the extent that the owners have elected to modify this result through preferred stock or voting agreements."); *see also* RMBCA § 6.01(a) (1996) (stating that "[a]ll shares of a class must have preferences, limitations, and relative rights identical with those of other shares of the same class").

[39]MOYE, *supra* note 18, § 2.02, at 11; *see also* RULPA § 503 (amended 1985), 6A U.L.A. 209 (1995) (stating that for an LP, "[i]f the partnership agreement does not so provide in writing, profits and losses shall be allocated on the basis of the value . . . of the contributions made by each partner").

[40]WOLFE & NAFFZIGER, *supra* note 21, at 368-69 ("The directors decide whether a dividend is to be paid and, if so, in what amount and in what form."). "The courts will not interfere with the directors' discretion in these matters unless there is a showing of bad faith, abuse of discretion, unreasonableness, or willful neglect on the part of the directors." *Id. See also* RMBCA § 6.40(a) (1996) ("A board of directors may authorize and the corporation may make distributions to its shareholders subject to restriction by the articles of incorporation . . . .").

[41]LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 6.02, at 6-2 (1992 & Supp. May 1994) (LLC statutes do not provide for any right of LLC members to receive distributions prior to withdrawal.").

[42]*Id.*

[43]MOYE, *supra* note 18, § 2.06, at 18 (explaining that each partner has unlimited liability in a general partnership). RUPA contains no statutory provisions concerning wrongful distributions.

liable for any wrongful distributions,[44] but the recipient shareholders are only liable to the extent that they knew that the distribution was wrongful.[45] In LLPs, the general rule is that no statutory property addresses liability for wrongful distributions.[46] Finally, in LLCs the rules tend to vary between those applicable to corporations and those applicable to partnerships.[47]

10. Apparent Authority of Owners

The authority of an owner to bind the organization with respect to decisions in the ordinary course of business is called apparent authority.[48] In partnership statutes, some or all of the owners have the authority to bind the organization in the ordinary course of business.[49] In corporations, only expressly authorized officers and agents have the authority to bind the organization.[50] In LLCs, apparent authority to bind the organization depends on whether the LLC is member-managed or manager-managed. In member-managed organizations, all members, like general partners, have the authority to bind the organization.[51] In manager-managed LLCs, the members are treated like corporate shareholders and do not have the authority to bind the organization since that power is vested in the managers.[52]

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[44]RMBCA § 8.33(a) (1996) (stating that "[a] director who votes for or assents to a distribution made in violation of section 6.40 or the articles of incorporation is personally liable to the corporation").

[45]KLEIN & COFFEE, *supra* note 22, at 140 (stating that "shareholders are in danger of personal liability for the debts of a corporation if they use the corporation for fraudulent purposes or if they, themselves, disregard the separate character of the corporate entity"); *see also* RMBCA § 6.22(b) (1996) ("Unless otherwise provided in the articles of incorporation, a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.").

[46]This leaves the recoupment of wrongful distributions to the law of fraudulent conveyance.

[47]LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES § 6.05, at 6-4 (1992 & Supp. May 1994) ("Most LLC statutes give creditors a remedy against members who receive excessive distributions . . . ."). See also *id.* §§ 6.06-.08, at 6-6 to -10 for a comparison of LLCs to other business forms in this respect.

[48]*See generally* BLACK'S LAW DICTIONARY 96 (6th ed. 1990) (defining apparent authority in the context of agency law).

[49]*See, e.g.*, RUPA § 301(1) (amended 1996), 6 U.L.A. 33 (1995) ("An act of a partner . . . for apparently carrying on in the ordinary course the partnership business . . . binds the partnership . . . .").

[50]KLEIN & COFFEE, *supra* note 22, at 132.

[51]*Id.* at 103.

[52]*Id.* at 103-04.

11. Transferability of Ownership Interests

As a result of their tax significance, the classification characteristics on which the former Treasury Regulations distinguished partnerships and corporations have received much attention.[53] Until changed by the "check the box" regulations,[54] noncorporate business organizations could maintain partnership status for tax purposes as long as the organization lacked "free transferability of interests."[55] An organization lacks free transferability of interests when members cannot grant a transferee all of the member's rights without the consent of the other members of the organization.[56] This tax trait was part of the reason for the preservation of the distinction between a partner (who has management rights) and an assignee (who is limited to economic rights). The property giving rise to this distinction has survived the changes made to many statutes as a result of the "check the box" regulations because it has been found to serve a useful purpose in some close business organizations.

C. *The Unique Nature of the Single Owner Organization*

The vast majority of business in the United States is conducted by businesses with a single owner. Not only do the number of unincorporated sole proprietorships dwarf the numbers of all other business organizations, but there are also a large number of wholly owned corporate subsidiaries.[57] While corporate divisions and branches have not

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[53]SOLOMON ET AL., *supra* note 34, at 171 (stating that "[t]he principal difference in the tax treatment of business organizations is the treatment of the entity").

[54]*See supra* note 13.

[55]*See* Tassma A. Powers & Deby L. Forry, *Partnership Taxation & the Limited Liability Company: Check Out the Check-the-Box Entity Classification*, 32 LAND & WATER L. REV. 831 (1997).

> The Kinter regulations provided that an entity had the corporate characteristic of "free-transferability of interest" if: "[E]ach of its members or those members owning substantially all of the interests in the organization have the power, without the consent of other members, to substitute for themselves in the same organization a person who is not a member of the organization . . . ."

Id. at 842 (alteration in original).

[56]*Id.* (stating that "the characteristic of free transferability of interests does not exist in a case in which each member can, without the consent of the other members, assign only his right to share in profits but cannot so assign his rights to participate in the management of the organization").

[57]The articles of incorporation contain more detailed information about ownership of business organizations and are filed with the Secretary of State of the state where the corporation has incorporated.

been considered separate businesses for most purposes, the recent availability of single member LLCs and the ability of S corporations to own qualified subchapter S subsidiaries will almost certainly add to the number of new single owner businesses.

The single owner organization exemplifies a business organization that draws its characteristics from its business structure rather than its form.[58] The fact that the organization has only one owner will dictate the characteristics, but some properties of the form chosen by the single member organization will be preserved solely so that the organization may be recognized as a separate entity. The ability of a single owner organization to be treated as a separate entity (like a corporate subsidiary), rather than as a part of the parent (like a corporate division), will be important for many businesses. For example, a single shareholder corporation will operate more like a single member LLC than like a multiple shareholder corporation.[59]

It is in the single owner organization that it is necessary to consider which properties are internal and which are external (or more accurately, how external are each of the properties). A single member should have complete freedom to modify internal properties without limitation, just as a sole proprietor may organize (or, as often as not, fail to organize) his or her affairs in any manner the proprietor desires. With respect to external properties, a sole proprietor has unlimited authority to bind the organization and unlimited personal liability. There is no distinction between the assets that are committed to the business and other assets of the sole proprietor. Once the sole proprietor organizes a separate business organization, several external properties become important. From a third party's perspective the most important question will be what assets belong to the business and what actions need to be taken to bind the organization.

Thus, for the single owner organization, the characteristics that will be critical are the external characteristics (those between the organization and third parties) such as what actions are necessary for the organization to incur binding obligations and effectively acquire, hold, encumber, and transfer property and the liability of the owner for the obligations of the organization. Other financial properties, such as the rules applicable to liability for distributions and unmade contributions and dissolution of the

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[58]One example of a single owner organization is a single member LLC.

[59]Meetings will be dispensed with, for example, as an entirely academic exercise. *See* KLEIN & COFFEE, *supra* note 22, at 135 (stating that "[i]n many jurisdictions, one person can serve as the sole incorporator, sole shareholder, sole director and chief executive officer of the corporation"); WOLFE & NAFFZIGER, *supra* note 21, at 273 (stating that "[i]n some states a single person may incorporate a business . . . [and] may be the only shareholder").

organization, may have important effects on the relationship of the owner and the organization, as well as through the organization to creditors. Unlike a multiple-owner organization, the internal financial rules are not subject to negotiation among owners, but are under the sole control of the single owner. Thus, the external implications of those apparently internal financial properties are particularly important in the single member organization.

In dealing with single owner organizations, the properties of agency and management are normally not an issue, although in some cases, a sole proprietor may wish to turn the operation of the business over to a third party manager. In allowing single shareholder corporations, the policy decision under which a single owner business organization may afford its owner liability protection has already been resolved. Thus, to the same extent, a single owner LLC should have the same property of limited liability.

Furthermore, the default properties with respect to the transfer of a single member's interest in an LLC, either as a voluntary transfer or as a transfer by operation of law should favor transferability without restriction because the types of issues present in a multiple member organization are inapplicable to single member organizations.[60] Thus, the properties applicable to a single member LLC may be more like the properties of a corporation than those of a multiple member LLC. By separating the properties from the form, it may be possible to more easily accommodate this distinction.

III. FORCES SHAPING THE REVISION OF BUSINESS ORGANIZATION LAW

As noted above, the number of forms has increased during this decade as has the flexibility and specificity of the organic statutes governing them. Additions to the established corporation, S corporation, general partnership, and LP include the LLC, the LLP, and the limited liability limited partnership, each of which provides a unique combination of properties. In some cases, the distinctions among the organizations tend to be subtle to the point of nonexistence.[61] These differences, while

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[60]As there are no other members to protect, the functions of limiting the transfer of interests in the organization and requiring creditors to use charging orders to realize on claims against an owner are inapplicable.

[61]For example, the differences between an LLC and an LLP organized under the Uniform Partnership Act (1994 with 1996 amendments) are almost entirely attributable to nonstructural differences in statutes and rules that have not had the opportunity to adjust to the new organizations, such as rules under federal programs, nonclassification aspects of federal tax law, and state regulation.

significant in individual cases, should tend to be reduced as the regulators and legislatures are compelled to consider these rules by the market.

Included in the increase in the number and flexibility of organic statutes has come a significant rethinking of the properties of each of the forms. With the release of the "check-the-box" regulations,[62] a new flurry of legislative activity has taken place, with changes in the organic statutes and the development of universal business statutes.

At the same time the diversity of forms was expanding, a second force has applied itself to the development of the law — codification. Like all recent statutes, business organization statutes have become more specific by trying to deal with particular circumstances and more explicit by trying to more clearly spell out rules.[63] For better or worse, this movement has forced statutory drafters to consider the various features of business organization statutes independently of each other and by reference to similar features in other business organizations.

One byproduct of the increase in the number of business forms under consideration and the specific and explicit consideration of business form legislation is an "exploded view" of business organizations. This leads to organizations with an amalgamation of characteristics, some of which are properties of other forms to provide results desired by business organizers. Thus, for example, LLC statutes incorporate or refer to either corporate or partnership features.[64]

A. *Federal Income Taxation*

Of all the influences on the development of organic statutory regimes, the federal income tax system has had the greatest effect in the area of unincorporated business organizations. Many of the provisions of partnership, LP, and LLC legislation were dictated by the tax classification rules that until recently have governed the operation of the statutes.[65] The general rule of federal income taxation is that the state

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[62]*See supra* note 13.

[63]*Compare* RUPA § 404(c) (amended 1996), 6 U.L.A. 58 (1995) (addressing specifically and explicitly the duty of care of a partner to a partnership) *with* UPA, 6 U.L.A. 125-1011 (1995) (containing no corresponding provision). *Compare* RUPA § 404(b), (c)-(g) (amended 1996), 6 U.L.A. 58-9 (1995) (addressing partner's duty of loyalty) *with* UPA § 21(1), 6 U.L.A. 608 (1995) (stating "[e]very partner must account to the partnership for any benefit . . . from any transaction connected with the formation, conduct, or liquidation of the partnership").

[64]LLCs are taxed as partnerships. *See* SOLOMON ET AL., *supra* note 34, at 176.

[65]*See* Powers & Forry, *supra* note 55, at 835-41. "Under the old regulations, federal income tax classification was a primary concern in business planning due to the different tax consequences associated with corporations and partnerships." *Id.* at 835.

law will determine the rights and obligations of taxpayers, while the Internal Revenue Code and interpretations of it will determine the income tax effects of those rights and obligations.[66]

Many of the provisions of the newer statutes have been driven by the desire to attain specific federal tax results while protecting business owners from vicarious liability for the obligations of their businesses. For example, current LLC statutes provide, either as a default rule or as a mandatory rule, that the dissociation of a member results in the dissolution of the LLC.[67] Thus, the tax and liability rules provided motivation for statutory change while imposing limits on certain types of provisions included in the statute. In formulating new business organization statutes and revising existing statutes, drafters have borrowed provisions from statutes governing one form of organization and have engrafted them into statutes governing others.[68] Thus, many LLC

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[66]The Treasury regulations contain tax classification criteria used to determine under which classification a business organization fits. J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES § 12.11, at 84 (1994).

[67]ALA. CODE §§ 10-12-36 to -37 (1994); ALASKA STAT. § 10.50.400(3) (Michie 1996); ARK. CODE ANN. §§ 4-32-802, 4-32-901(c) (Michie 1996); CAL. CORP. CODE § 17350 (West 1997); CONN. GEN. STAT. ANN. §§ 34-180, 34-206 (West 1987 & Supp. 1996); DEL. CODE ANN. tit. 6, § 18-801(4) (Supp. 1996); D.C. CODE ANN. § 29-1347(3) (1996); FLA. STAT. ANN. § 608.441(1)(c) (West Supp. 1996); GA. CODE ANN. § 14-11-602(4) (1997); HAW. REV. STAT. ANN. §§ 428-601, 428-801(3) (Michie Supp. 1996); IDAHO CODE §§ 53-641 to -642(3) (1994); IND. CODE ANN. § 23-18-1-8, 23-18-6-5, 23-18-9-1(3) (Michie 1995); IOWA CODE ANN. § 490A.1301(3) (West Supp. 1997); KAN. STAT. ANN. § 17-7622(a)(3) (1995); KY. REV. STAT. ANN. §§ 275.015(5), 275.285(3) (Banks-Baldwin 1996); ME. REV. STAT. ANN. tit. 13, § 701(3) (West 1996); MD. CODE ANN. CORPS. & ASSN'S §§ 4A-606, 4A-902(3) (1993); MASS. GEN. LAWS ANN. ch. 156C, § 43(4) (West Supp. 1997); MICH. STAT. ANN. § 21.198(4801)(d) (Law. Co-op. Supp. 1997); MINN. STAT. ANN. § 322B.80 (West Supp. 1998); MISS. CODE ANN. §§ 79-29-307, 79-29-801(d) (1996); MO. ANN. STAT. § 347.103 (West Supp. 1997); MONT. CODE ANN. § 35-8-901(3) (1997); NEB. REV. STAT. ANN. § 21-2622(3) (Michie 1995); NEV. REV. STAT. § 86.491(4) (1995); N.H. REV. STAT. ANN. § 304-C:50.IV (1995); N.J. STAT. ANN. § 42:2B-48.d (West Supp. 1997); N.M. STAT. ANN. §§ 53-19-38 to -39 (Michie 1995); N.Y. LTD. LIAB. CO. LAW § 701(d) (McKinney Supp. 1997); N.C. GEN. STAT. §§ 57C-6-01 (1993); N.D. CENT. CODE § 10-32-109(1)(e) (Supp. 1997); OHIO REV. CODE ANN. §§ 1705.16, 1705.43(A)(4) (Anderson Supp. 1996); OKLA. STAT. ANN. tit. 18, §§ 2001(7), 2036, 2037(4) (West Supp. 1997); OR. REV. STAT. § 63.621(2) (Supp. 1996); 15 PA. CONS. STAT. § 8971(a)(4) (West 1995); R.I. GEN. LAWS § 7-16-39(d) (1992); S.C. CODE ANN. §§ 33-43-802, 33-43-901(c) (Law. Co-op. 1996); S.D. CODIFIED LAWS § 47-34-29(3) (Michie Supp. 1997); TENN. CODE ANN. § 48-245-101(a)(5) (1995); UTAH CODE ANN. § 48-2b-137(4) (Supp. 1997); VT. STAT. ANN. tit. 11, §§ 3081, 3101(3) (1997); VA. CODE ANN. § 13.1-1046.3 (Michie Supp. 1997); WASH. REV. CODE ANN. §§ 25.15.005(2), 25.15.130, 25.15.270(4) (West Supp. 1997); W. VA. CODE §§ 31B-6-601, 31B-8-801(b)(3) (1996); WIS. STAT. ANN. §§ 183.0802, 183.0901(4) (West Supp. 1997); WYO. STAT. ANN. §§ 17-15-123(a)(iii), 17-15-144 (Michie 1997).

[68]*See, e.g.*, RULPA § 403(a) (amended 1985), 6A U.L.A. 177 (1995) ("[A] general partner of a limited partnership has the rights and powers and is subject to the restrictions of

statutes contain provisions borrowed from both traditional corporations and partnerships.[69] This engrafting of features from one organization to another is not new. LPs have adopted by reference the general partnership rules to govern many of the most important considerations of their operation.[70]

1. Classification of Business Organizations

Historically, the organic statutes governing unincorporated business organizations other than general partnerships have been strongly informed by the desire to attain federal tax classification as a partnership. As noted above, the federal tax regulators have enabled the development of new business forms and the elimination of the tax constraints on the choice of form through the adoption of the "check the box" regulations.[71] Under the current rules there are still three distinct sets of business rules: those applicable to the partnership,[72] to the S corporation,[73] and to the C corporation.[74] However, by using an unincorporated business organization, the business organizers have almost complete freedom to select which of the tax systems will apply to the organization.[75]

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a partner in a partnership without limited partners."); RULPA § 403(b) (amended 1985), 6A U.L.A. 177 (1995) ("[A] general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners . . . ."); RULPA § 1105 (amended 1985), 6A U.L.A. 302 (1995) ("In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern.") (brackets in original).

[69]SOLOMON ET AL., *supra* note 34, at 176 ("Limited liability companies are becoming increasingly popular throughout the country because they represent a hybrid of the more appealing features of both the corporation and the partnership."). "The limited liability company affords to its members the limited liability characteristics of the corporation." *Id.* Furthermore, "[f]rom a tax standpoint, . . . the limited liability company avoids the double-taxation snare of corporations . . . [because a] limited liability company is taxed as a partnership." *Id.*

[70]MOYE, *supra* note 18, § 3.01, at 50. *See, e.g.*, RULPA § 403(a) (amended 1985), 6A U.L.A. 177 (1995) (stating that "a general partner of a limited partnership has the rights and powers and is subject to the restrictions of a partner in a partnership without limited partners"); RULPA § 403(b) (amended 1985), 6A U.L.A. 177 (1995) ("[A] general partner of a limited partnership has the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners."). *See also* KLEIN & COFFEE, *supra* note 22, at 101 (stating that the "use of the partnership form allows people to avoid the so-called double tax on corporate income").

[71]*See supra* note 13.

[72]*See* Keatinge, *supra* note 6, at 204.

[73]*See id.* at 205.

[74]*See id.*

[75]*See id.* at 207-08 n.39.

2. Compensation Payments to Owners

The Internal Revenue Service treats compensatory payments to partners differently than those payable to shareholder-employees.[76] As such, the tax treatment of payments to owners will govern not only the choice of form, but also, in many cases, the characteristics of the organization, as owners attempt to control the taxation of payments either as compensation or as returns on investment.

3. Net Earnings from Self-Employment

A partner's distributive share of ordinary income from a trade or business conducted by the partnership is treated as net earnings from self-employment (NESE).[77] NESE does not include

> the distributive share of any item of income or loss of a limited partner, as such, other than guaranteed payments described in section 707(c) to that partner for services actually rendered to or on behalf of the partnership to the extent that those payments are established to be in the nature of remuneration for those services.[78]

NESE is significant for two reasons. First, the amount of employment tax for which an individual is liable (including an uncapped 2.9% hospital tax)[79] is computed by reference to NESE.[80] Second, the NESE of a trade or business in which the taxpayer's services are a material income-producing factor generally will be considered "net

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[76]*See* Keatinge, *supra* note 6, at 204 (explaining that shareholders are subject to tax on income received from the corporation — dividends — but that partners may not be subject to income tax for compensation paid that does not exceed a partner's basis in the partnership).

[77]I.R.C. § 1402(a) (1997). NESE generally includes income from a trade or business other than certain real estate rentals, dividends, interest, capital gains, and other adjustments, and is not reduced by the deduction for health insurance of self-employed individuals. *Id.* § 162(a), (*l*)(1)(4)

[78]*Id.* § 1402(a)(13).

[79]*Id.* § 1401(b). This, and other employment taxes, are ameliorated to some extent by an above the line deduction equal to 50% of the self-employment taxes paid. *Id.* § 164(f). In the case of an individual at the top tax rate, this deduction reduces the effective tax rate of the hospital tax to 2.378%.

[80]*Id.* § 1401 (applying various taxes to "self-employment income"); *id.* § 1402(b) (defining "self-employment income as NESE with modifications). For purposes of this article, the term NESE will be used for both "Net Earnings from Self-Employment" and "Self-Employment Income."

earnings"[81] which support contributions to certain qualified plans. Thus, for individual partners seeking to make contributions to qualified plans, it is important that some or all of the income from a partnership is treated as NESE, while other individual partners will wish to exclude their distributive share of income from NESE to avoid paying employment taxes.

As a result of this exception, individuals seeking to avoid NESE want to be treated as limited partners. While the treatment of limited partners in LPs organized under state law has not been controversial, there has been a question of the appropriate treatment of a member of an LLC as a general partner or limited partner.[82]

Early in 1997, the United States Treasury Department released new proposed regulations (Proposed Regulations) dealing with the treatment of tax partners as limited partners for purposes of determining NESE.[83] These regulations, while clear, rational, and fair, have drawn a firestorm of criticism from Congress and others[84] because they apply to all tax partnerships, including state law LPs, and, thus, in some highly unusual circumstances, might cause an individual's interest which would be characterized as an LP interest under state law not to be treated as an LP interest for purposes of NESE.[85]

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[81]I.R.C. § 401(c)(2). In addition, "earned income" does not include the distributable income of clerics (*id.* § 401(c)(2)(A)(ii)), and certain drivers, home workers, and travelling salespeople (*id.* § 401(c)(2)(A)(iii)); and does not include tax exempt income (*id.* § 401(c)(2)(A)(iv)); and without deducting contributions to qualified plans (*id.* § 401(c)(2)(A)(iv)) or the above-the line deduction for one half of self-employment taxes (*id.* § 401(c)(2)(A)(iv)).

[82]For a more complete description of the history and background of these questions, see Carter G. Bishop & Allan G. Donn, *New Proposals for LLC Self-Employment Tax and Final Regulations for LLC Tax Matters Partners*, 3 J. LTD. LIAB. COS. 183 (1997); Robert R. Keatinge & Risa Lynn Wolf-Smith, *Proposed Self-Employment Tax Regulations Enhance the Use of LLCs*, 1 J. LTD. LIAB. COS. 170 (1995).

[83]Prop. Treas. Reg. § 1.1402-2, 62 Fed. Reg. 1702 (1997).

[84]*See, e.g.*, Sean O'Brien, *Congressional Republicans Assail Limited Partnership Regs*, 75 TAX NOTES 186 (1997); Louis Lyons, *Forbes Chides GOP Leaders for Waffling on Tax Cuts*, 75 TAX NOTES 165, 165-66 (1997); Byron Maldonado, *Conservative Group Blasts Limited Partnership Regs*, 75 TAX NOTES 49 (1997); Sheryl Stratton, *Limited Partners' Self-Employment Tax Liability Debated at Hearing*, 75 TAX NOTES 1035-36 (1997); Editorial, *Stealth Tax*, WALL ST. J., May 5, 1997, at A18.

[85]A state law LP interest would be treated as not being an LP interest for NESE purposes only if:

(1) the individual participates for more than 500 hours during the year in the activities of the LP and does not hold an interest that is identical to the interest of a person who is treated as a limited partner under the Proposed Regulations; or

(2) the individual holding the interest provides more than a de minimis amount of services to an LP, unless substantially all the activities of the partnership involve the

B. *Federal Transfer Taxation*

Recently, federal transfer tax (estate, gift, and generation skipping tax) rules have had a significant impact on the drafting of organic statutes. This effect is a result of the adoption of section 2704 of the Internal Revenue Code (IRC), which was intended to prevent members of family owned businesses from obtaining discounts for transfer tax purposes.[86]

1. I.R.C. Section 2704(b)

Transfer taxes are imposed on the fair market value of property transferred either by gift or at death.[87] The interest in an organization that holds property may be less than a corresponding interest in the property itself as a result of marketability and minority discounts. Thus, one estate planning technique to reduce transfer taxes is to place property into an organization and transfer interests in the organization. The amount of the discount will be increased to the extent the holder of an interest is restricted in his or her ability to liquidate the interest by having the interest redeemed for the fair market value of the percentage of the property represented by the interest or through the complete liquidation of the organization. Thus, to an extent, there are restrictions on an owner's ability to liquidate his or her interest.

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performance of services in the fields of health, law, engineering, architecture, accounting, actuarial science, or consulting.

See Prop. Treas. Reg. § 1.1402(a)-2, 62 Fed. Reg. 1702 (1997).

Thus, the circumstances in which the distributive share of income allocable to an individual's LP interest that would be subject to NESE are limited to cases in which all limited partners either participate in the business or also hold general partnership interests, or where the LP is engaged in a licensed profession or consulting and the partner is providing services. Neither of these circumstances are common, and the individuals owning LP interests who will be adversely affected by the Proposed Regulations should be very few, particularly in comparison to the large number of members of LLCs who will benefit from the certainty that the regulations provide. This article does not address this controversy except to note that it imposed greater uncertainty about using the Proposed Regulations as basis for planning and compliance.

[86]I.R.C. § 2704 (1997). "IRC Sec. 2704 provides corrective measures to address certain perceived valuation abuses that have resulted under case law with respect to lapsing rights . . . ." S. Stacy Eastland, *When Congress Decided to Value the Family Going Concern as the Liquidating Concern: The Legacy of IRC Section 2704*, Q208 ALI-ABA 143, 145 (1991).

[87]*See* BLACK'S LAW DICTIONARY 1498 (6th ed. 1990) (defining transfer tax as "[a] tax upon the passing of the title to property or a valuable interest therein out of or from the estate of a decedent, by inheritance, devise, or bequest"). In this case, the term "transfer tax" also encompasses gift tax on *inter vivos* transfers by gift.

a. *The Operation of I.R.C. Section 2704(b)*

In order to reduce the use of this tax reduction technique, in 1990, Congress adopted I.R.C. section 2704(b) as part of the valuation rules contained in chapter 14 of the Internal Revenue Code.[88] Under section 2704(b), if there is a transfer of an interest in a business organization among family members, and the transferor and members of the transferor's family control the business organization, certain restrictions on the transferor's liquidation rights will be dismissed.[89] The restrictions on liquidation rights which will be disregarded (applicable restrictions) are limitations on the ability to liquidate the organization (in whole or in part) that are more restrictive than the limitations that would apply as a *default* under the state law generally applicable to the organization in the absence of the restriction.[90]

The regulations state that an applicable restriction is "a limitation on the ability to liquidate the entity (in whole or in part) that is more restrictive than the limitations that would apply under the State law generally applicable to the entity in the absence of the restriction."[91] In the lexicon of this article, restrictions are properties of the form in which the organization is formed. Thus, the valuation under I.R.C. section 2704(b) will be determined by reference to the default provisions of the organic statute pursuant to which form of organization is formed, rather than by considering the extent to which the owners could actually create liquidation rights less restrictive than those imposed by the organic statute or could actually liquidate the interest. As such, I.R.C. section 2704(b) encourages the development of organic statutes which contain default rules that restrict or eliminate the right of an individual to liquidate the individual's interest.

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[88]I.R.C. §§ 2701-2704 (1997).

[89]*Id.* § 2704(b)(1).

[90]*Id.* § 2704(b)(2) (defining an applicable restriction as any restriction which effectively limits the ability of a corporation or partnership to liquidate). The regulations define Liquidation Right for purposes of a different portion of I.R.C. § 2704 as the "right . . . to compel the entity to acquire all or a portion of the holder's equity interest in the entity, including by reason of aggregate voting power, whether or not its exercise would result in the complete liquidation of the entity." Treas. Reg. § 25.2704-1(a)(v) (1995). While the term Liquidation Right is not used in the context of applicable restriction, because the regulations expand the definition of applicable restriction to include any restriction on the ability of a corporation to liquidate *(in whole or in part)*, presumably, an applicable restriction should include a limitation on all "liquidation rights." *Id.* § 25.2704-2(b). For a further discussion of the implications of I.R.C. § 2704(b) on entity selection, see Dale A. Oesterle & Wayne M. Gazur, *What's in a Name?: An Argument for a Small Business "Limited Liability Entity" Statute (with Three Subsets of Default Rules)*, 32 WAKE FOREST L. REV. 101 (1997).

[91]Treas. Reg. § 25.2704-2(b) (1995).

The default rules under both the Uniform Limited Liability Company Act (ULLCA) and the Revised Uniform Limited Partnership Act (RULPA) provide that unless there is a specified time for dissolution or withdrawal (a "term") set forth, an owner may withdraw and have the interest purchased for its fair value.[92] In the case of an LLC, the determination of whether to be organized with a term or not is within the control of the owners,[93] while an LP must establish the latest date on which the partnership is to dissolve.[94] In a recent technical advice memoranda,[95] the Internal Revenue Service has indicated that although the organic statutes governing LPs require the inclusion of a term, the designation of a term is nonetheless an applicable restriction and the term will be disregarded.[96] The statutory solution to the issue raised by I.R.C. section 2704(b) is to amend the organic statute to provide a default rule

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[92]*See* ULLCA § 701(a)(2) (amended 1996), 6A U.L.A. 38 (Supp. 1997); RULPA § 604 (amended 1985), 6A U.L.A. 220 (1995).

[93]*See* ULLCA § 203(a)(5) (amended 1985), 6A U.L.A. 444 (1995).

[94]*See* RULPA § 201(a)(4) (amended 1985), 6A U.L.A. 96 (1995).

[95]Tech. Adv. Mem. 97-23-009 (Feb. 24, 1997) provides:

> Under applicable state law, N.Y. Partnership Law, § 121-603 (Mckinneys [sic] supp. [sic] 1997), if a partnership agreement does not specify the time or events upon the happening of which a limited partner may withdraw, then the limited partner may, unless prohibited by the partnership agreement, withdraw upon not less than six months notice to the partnership. As noted above, under Article 1.6 of the partnership agreement, the Partnership is to terminate on December 31, 2029, and under Article 2.12, a limited partner is prohibited from withdrawing from the partnership prior to dissolution or termination. Under Article 9.1(a), dissolution prior to the termination date requires the vote of 65% of the limited partners and the unanimous consent of the general partner. Article 11.11 provides that the agreement may be amended only by the unanimous approval of all the partners.
>
> In the instant case, under the terms of the partnership agreement, the Decedent could not withdraw from the partnership and liquidate her interest. However, under applicable state law, in the absence of the prohibition in the partnership agreement, the decedent could have withdrawn and liquidated on six months notice. The prohibition on Decedent's right to liquidate her interest contained in the partnership agreement is more restrictive than state law, and thus, is an applicable restriction under § 2704(b)(2)(A). See, § 25.2704-2(d), Example 5, illustrating that a restriction on a right to put preferred stock to the corporation is a limitation on the ability to liquidate the entity (in whole or in part) and is disregarded in valuing the preferred stock for transfer tax purposes.

See also Tech. Adv. Mems. 97-25-002 (Mar. 3, 1997) (finding that the provisions of the partnership agreement prohibiting decedent from liquidating his interest constituted an applicable restriction under I.R.C. § 2704 (b)), 97-30-004 (Apr. 3, 1997) (applying I.R.C. § 2704 to restrictions on a limited partner's ability to liquidate the partner's interest).

[96]*See* Tech. Adv. Mem. 97-23-009 (Feb. 24, 1997).

that denies liquidation rights, either by preventing withdrawal or by limiting the rights of a withdrawing partner to receive payment for the member's interest.

b. *Statutory Accommodations to I.R.C. Section 2704(b)*

States have amended organic statutes for the various forms in response to I.R.C. section 2704(b).[97]

1. General Partnerships

In a general partnership organized under the Uniform Partnership Act (UPA), an owner (general partner) has the power to withdraw at any time, even if such withdrawal violates the partnership agreement.[98] Such a unilateral withdrawal is wrongful "when no definite term or particular undertaking is specified."[99] Upon the withdrawal, the partnership dissolves. The partners may continue the business, but such continuation is done through a new partnership.[100] When a business is continued after the death or retirement of a partner, the retiring partner is entitled to

> receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership.[101]

If a partner causes a wrongful dissolution and the remaining partners choose to continue the business, the partner who has caused the dissolution is entitled to "the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution . . . but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered."[102]

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[97]*See* Oesterle & Gazur, *supra* note 90, at 132.

[98]UPA § 31(2), 6 U.L.A. 771 (1995).

[99]*Id.* § 31(1)(b).

[100]*See id.* § 41, at 968-70 (providing that when a new partner is admitted or when a partner dissociates, the "new partnership" is liable for debts of the "dissolved partnership"); Fairway Dev. Co. v. Title Ins. Co., 621 F. Supp. 120 (N.D. Ohio 1985) (holding title insurance company had no liability to "new partnership" formed when two partners in a general partnership sold their partnerships interests).

[101]UPA § 42, 6 U.L.A. 981 (1995).

[102]*Id.* § 38(c)(II), at 881.

Under the default rules set forth in RUPA, a dissociated partner in an at-will partnership is entitled to be paid an amount determined as, "on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date."[103] A partner who wrongfully withdraws before the end of a term shall not receive payment from the buyout price until the completion of the term, unless the dissociated partner can show that such a payment will not cause an undue hardship on the business of the partnership.[104]

In a partnership-at-will, the partnership will dissolve upon the receipt of notice of a partner's withdrawal as a partner.[105] In a partnership for a definite term or a particular undertaking, the partnership will dissolve within ninety days after the dissociation of a partner "unless . . . a majority in interest of the remaining partners . . . agree to continue the partnership."[106] Under RUPA, the partners may modify many of these rules by agreement.[107]

2. Limited Partnerships (LPs)

In an LP, limited and general partners are subjected to significantly different treatment. A general partner is entitled to withdraw at any time.[108] Thus, a general partner in a general or limited partnership will have the right to force the partnership to liquidate that partner's interest either through redemption of the interest or through dissolution and liquidation of the entire partnership.[109]

Under RULPA, a limited partner may withdraw at the time or upon the happening of events specified in the partnership agreement.[110] If the partnership agreement does not provide a definite time or event for either withdrawal or dissolution and winding up of the LP, a limited partner

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[103]RUPA § 701(b) (amended 1996), 6 U.L.A. 81 (1995).

[104]*Id.* § 701(h), at 82 (providing the deferred payment must be secured).

[105]*Id.* § 801(1), at 92.

[106]*Id.* § 801(2)(i).

[107]RUPA § 103(a) (amended 1996), 6 U.L.A. 25 (Supp. 1997). However, the partners may not vary the rule that a partner may dissociate except to require that notice of dissociation be in writing. *Id.* § 103(b)(6).

[108]*See* RULPA § 602 (amended 1985), 6A U.L.A. 216 (1995). The general partner must give written notice to the other partners, and if the withdrawal violates the partnership agreement, the partnership may recover damages from the withdrawing general partner. *Id.*

[109]*Id.* § 604.

[110]RULPA § 603 (amended 1985), 6A U.L.A. 217-18 (1995).

may withdraw upon six months' prior written notice.[111] Most LP statutes follow this approach.[112] RULPA also requires that the certificate of LP set forth the latest date upon which the LP is to dissolve.[113] Although many statutes include this requirement,[114] a significant number of others

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[111]*Id.* The 1976 version of RULPA § 603 referred to the certificate of LP to provide for a definite time for dissolution. *Id.* (including comments listing amendment changes). The reference was changed in the 1985 version to refer to the partnership agreement to provide a definite time for dissolution. *Id.* Because, as noted below, many statutes require that a time for dissolution be included in the certificate of LP, this raises the question of whether the certificate of LP constitutes a partnership agreement. If so, all LPs organized under this type of statute would have a definite time dissolution.

[112]*See, e.g.*, Alabama, ALA. CODE § 10-9A-102(a) (1994); Alaska, ALASKA STAT. § 32.11.260 (Michie 1994); Arizona, ARIZ. REV. STAT. ANN. § 29-333 (West Supp. 1996); Arkansas, ARK. CODE ANN. § 4-43-603 (Michie 1996); Connecticut, CONN. GEN. STAT. ANN. § 34-27c (West 1986); District of Columbia, D.C. CODE ANN. § 41-463 (1981); Hawaii, HAW. REV. STAT. ANN. § 425D-603 (Michie Supp. 1996); Idaho, IDAHO CODE § 53-233 (1991); Illinois, 850 ILL. COMP. STAT. ANN. § 210/603 (West 1993); Indiana, IND. CODE ANN. § 23-16-7-3 (Michie 1995); Iowa, IOWA CODE ANN. § 487.603 (West Supp. 1997); Kansas, KAN. STAT. ANN. § 56-1a353 (1994); Kentucky, KY. REV. STAT. ANN. § 362.465 (Banks-Baldwin 1994); Maryland, MD. CODE ANN. CORPS. & ASSN'S § 10-603 (1993); Massachusetts, MASS. GEN. LAWS ANN. ch. 109, § 33 (West 1990); Minnesota, MINN. STAT. ANN. § 322A.47 (West 1995); Mississippi, MISS. CODE ANN. § 79-14-603 (1996); Nevada, NEV. REV. STAT. § 88.500 (1995); New Hampshire, N.H. REV. STAT. ANN. § 304-B:33 (1995); New Jersey, N.J. STAT. ANN. § 42:2A-41 (1993); New Mexico, N.M. STAT. ANN. § 54-2-34 (Michie Supp. 1996); North Carolina, N.C. GEN. STAT. § 59-603 (1989); North Dakota, N.D. CENT. CODE § 45-10.1-36 (1993); Oklahoma, OKLA. STAT. ANN. tit. 54, § 334 (West 1991); South Carolina, S.C. CODE ANN. § 33-42-1030 (Law. Co-op. 1996); Texas, TEX. REV. CIV. STAT. ANN. art. 6132a-1, sec. 6.03 (West Supp. 1997); Utah, UTAH CODE ANN. § 48-2a-603 (1994); Virginia, VA. CODE ANN. § 50-73.38 (Michie Supp. 1997); West Virginia, W. VA. CODE § 47-9-33 (1996); Wisconsin, WIS. STAT. ANN. § 179.53 (West Supp. 1996); Wyoming, WYO. STAT. ANN. § 17-14-703 (Michie 1997).

[113]RULPA § 201(a)(4) (amended 1985), 6A U.L.A. 96 (1995).

[114]*See, e.g.*, Alaska, ALASKA STAT. § 32.11.010(4) (Michie 1996); Arkansas, ARK. CODE ANN. § 4-43-201(a)(4) (Michie 1996); Connecticut, CONN. GEN. STAT. ANN. § 34-10 (West Supp. 1997); District of Columbia, D.C. CODE ANN. § 41-421(a)(5) (1990); Florida, FLA. STAT. ANN. § 620-108(e) (West Supp. 1996); Hawaii, HAW. REV. STAT. ANN. § 425D-201(a)(5) (Michie 1993); Indiana, IND. CODE ANN. § 23-16-3-2(a)(4) (Michie 1995); Iowa, IOWA CODE ANN. § 487.201(1)(k) (West Supp. 1997) ("A time at which, or an event upon the happening of which, the partnership is to be dissolved and its affairs wound up."); Kansas, KAN. STAT. ANN. § 56-1a151(a)(4) (1994); Kentucky, KY. REV. STAT. ANN. § 362.415(1)(e) (Banks-Baldwin 1994); Maryland, MD. CODE ANN. CORPS. & ASSN'S. § 10-201(a)(4) (1993); Massachusetts, MASS. GEN. LAWS ANN. ch. 109, § 8(a)(5) (West 1990); Mississippi, MISS. CODE ANN. § 79-14-201(a)(4) (Supp. 1997); Nevada, NEV. REV. STAT. § 88.350.1(d) (1995); New Hampshire, N.H. REV. STAT. ANN. § 304-B:8.I.(d) (1995); Oregon, OR. REV. STAT. § 70.075(1)(e) (Supp. 1996); South Carolina, S.C. CODE ANN. § 33-42-210(a)(4) (Law. Co-op. 1990); Utah, UTAH CODE ANN. § 48-2a-201(1)(f) (1994); Virginia, VA. CODE ANN. § 50-73.11.A.11 (Michie 1996); Washington, WASH. REV. CODE ANN. § 25.10.080(1)(d) (West 1994); Wyoming, WYO. STAT. ANN. § 17-14-301(a)(xiii) (Michie 1997).

do not.[115]

Some statutes expressly permit the partnership agreement to contain a provision that a limited partner may *not* withdraw from an LP or assign a partnership interest in an LP prior to the dissolution and winding up of the LP.[116] A limited partner, under the default rules, may withdraw at the time or on the happening of events specified in the partnership agreement. If the agreement does not specify such time or events or a definite time for the dissolution and winding up of the partnership, the limited partner may withdraw on six months' prior notice.[117] Thus, the limited partner may be "locked in" by agreement, but, in the absence of such an agreement, the limited partner may withdraw at any time.

Some LP statutes have reversed this result by providing that a limited partner may only withdraw as provided in the partnership agreement. Under these statutes a limited partner does not have the right to withdraw in the absence of an agreement.[118] Nonetheless, on voluntary withdrawal, a limited partner is entitled to receive the value of the member's interest in the LP based on the member's right to share distributions.[119]

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[115]*See, e.g.*, Alabama, ALA. CODE § 10-9A-20(a)(11) (1994) ("Any time at which or events upon the happening of which the limited partnership is to be dissolved and its affairs wound up . . . ."); Arizona, ARIZ. REV. STAT. ANN. § 29-308(a)(11) (West 1989) ("Any time at which or events upon the happening of which the limited partnership is to be dissolved and its affairs wound up . . . ."); California, CAL. CORP. CODE § 15621 (West 1991); Colorado, COLO. REV. STAT. ANN. § 7-62-201(1) (West 1990); Illinois, 850 ILL. COMP. STAT. ANN. § 210/201(a)(7) (West 1993) ("The latest date, if any, upon which the limited partnership is to dissolve . . . ."); Maine, ME. REV. STAT. ANN. tit. 31, § 421 (West 1996); North Dakota, N.D. CENT. CODE § 45-10.1-36 (1991); Texas, TEX. REV. CIV. STAT. ANN. art. 6132a-1, sec. 2.01(a) (West Supp. 1997).

[116]*See, e.g.*, Delaware, DEL. CODE ANN. tit. 6, § 17-603 (Supp. 1996); Maine, 31 ME. REV. STAT. ANN. tit. 13, § 463 (West 1996); Nebraska, NEB. REV. STAT. ANN. § 67-265 (Michie 1995); Pennsylvania, 15 PA. CONS. STAT. ANN. § 8553(b) (West 1995); Rhode Island, R.I. GEN. LAWS § 7-13-33 (Supp. 1997); Tennessee, TENN. CODE ANN. § 61-2-603 (1989).

[117]RULPA § 603 (amended 1985), 6A U.L.A. 217-18 (1995); *see also supra* note 112 (listing state LPs statutes that follow this approach).

[118]*See, e.g.*, Colorado, COLO. REV. STAT. ANN. § 7-62-603 (West Supp. 1997) ("A limited partner may withdraw from a limited partnership at the time or upon the happening of events specified in writing in the partnership agreement."); Georgia, GA. CODE ANN. § 14-9-603 (1994) ("A limited partner may withdraw from a limited partnership at the time or upon the occurrence of events specified in writing in the partnership agreement.").

[119]RULPA § 604 (amended 1985), 6A U.L.A. 220 (1995).

3. Corporations

In a corporation, no owner has the right to require the liquidation of the corporation or the purchase of the owner's interest.[120] The owner only has the right to compel the liquidation on the occurrence of certain major events that give rise to dissenter's rights.[121] The corporation may only be dissolved if the proposal is adopted by a majority of all votes entitled to cash on the proposal to dissolve.[122]

4. Limited Liability Companies (LLCs)

Until 1997, organic statutes governing LLCs were consistent in that the dissociation of any member would cause a dissolution of the LLC unless the remaining members consented to continue the business of the LLC.[123] In most cases this provision was a default rule that could be changed in the operating agreement. However, the organic statutes differed widely with respect to the members' ability to "put" their interests to the LLC and require it to repurchase their interests.[124]

Most statutes follow RULPA section 603, which allows a member to resign only at the time provided for in the agreement, or, if no agreement, upon the required notice.[125] If a member dissociates and the

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[120]RMBCA § 3.02 (1996).

[121]*Id.*

[122]*Id.* § 13.02.

[123]*See generally* Robert R. Keatinge, *New Gang in Town*, BUS. TODAY, Mar.-Apr. 1995, at 5 (providing a thorough introduction and explanation of LLCs and the general characteristics of most state requirements).

[124]*Id.*

[125]*See, e.g.*, PROTOTYPE LTD. LIAB. CO. ACT § 802(c) (1992), *reprinted in* LARRY E. RIBSTEIN & ROBERT R. KEATINGE, RIBSTEIN AND KEATINGE ON LIMITED LIABILITY COMPANIES app. B (1997) [hereinafter PROTOTYPE] (agreement may preclude withdrawal or may provide for penalties upon withdrawal); see also Alabama, ALA. CODE § 10-12-36(d) (1994); Arkansas, ARK. CODE ANN. § 4-32-802(c) (Michie 1996); Connecticut, CONN. GEN. STAT. ANN. § 34-180 (West Supp. 1997); Delaware, DEL. CODE ANN. tit. 6, § 18-603 (Supp. 1996) (although § 602 allows a manager to resign as a manager at any time); Florida, FLA. STAT. ANN. § 608.427(2) (West Supp. 1996) (following ULPA and speaking of withdrawal of contribution); Idaho, IDAHO CODE § 53-641(3) (1994); Indiana, IND. CODE ANN. § 23-18-6-6(a) (Michie 1995) (unless the operating agreement provides that a member may not withdraw, a member may dissociate on 30 days notice); Iowa, IOWA CODE ANN. § 490A.704 (West Supp. 1997); Kansas, KAN. STAT. ANN. § 17-7616(b) (1995) (also following ULPA); Maryland, MD. CODE ANN. CORPS. & ASSN'S § 4A-605 (1993); Nebraska, NEB. REV. STAT. ANN. § 21-2619(2) (Michie Supp. 1996); Nevada, NEV. REV. STAT. § 86.331. (1995); New Hampshire, N.H. REV. STAT. ANN. § 304-C:27.III (1995); New Jersey, N.J. STAT. ANN. § 42:2B-38 (West Supp. 1997); Pennsylvania, 15 PA. CONS. STAT. § 8948 (West 1995) (operating agreement may preclude voluntary dissociation); Texas, TEX. REV. CIV. STAT. ANN. art. 1528n, art. 5.05 (West 1997)

business is not wound up, many of the statutes provide that the resigning member is entitled to receive, within a reasonable time after resignation, the fair value of the member's membership interest in the LLC as of the date of resignation based upon the member's right to share in distributions.[126]

Some statutes follow RULPA section 602, allowing a member to withdraw in violation of the operating agreement, although the withdrawing member will be liable for damages for the wrongful

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(stating that a member may only withdraw at the time provided in the regulations); Utah, UTAH CODE ANN. § 48-2b-132(2) (1994); Wisconsin, WIS. STAT. ANN. § 183.0802(3) (West Supp. 1997) (member may be precluded from dissociating by the operating agreement, or the operating agreement may permit dissociation in violation of the operating agreement, but provide damages for the violation); Wyoming, WYO. STAT. ANN. § 17-15-120(b) (Michie 1997).

Under the Ohio statute, a member in a member-managed LLC may withdraw at any time, even if such withdrawal violates the operating agreement, Ohio, OHIO REV. CODE ANN. § 1705.16.A (Anderson Supp. 1996). but in a manager-managed LLC the operating agreement may prohibit or otherwise restrict withdrawal, and in the absence of such provision, a member may withdraw on six months' written notice. *Id.* § 1705.16.B.

[126]PROTOTYPE § 602, *reprinted in* RIBSTEIN & KEATINGE, *supra* note 125; ULLCA § 701 (amended 1996), 6A U.L.A. 38 (Supp. 1997); Alabama, ALA. CODE § 10-12-30 (1994); Arizona, ARIZ. REV. STAT. ANN. § 29-707.B (West Supp. 1996); Arkansas, ARK. CODE ANN. § 4-32-602 (Michie 1996); Connecticut, CONN. GEN. STAT. ANN. § 34-180 (West 1997); Delaware, DEL. CODE ANN. tit. 6, § 18-604 (1993); Florida, FLA. STAT. ANN. § 608.427 (West Supp. 1996); Georgia, GA. CODE ANN. § 14-11-405 (Supp. 1997); Idaho, IDAHO CODE § 53-630 (1994); Illinois, 850 ILL. COMP. STAT. ANN. § 180/25-10 (West Supp. 1997); Indiana, IND. CODE ANN. § 23-18-5-5 (Michie 1995); Iowa, IOWA CODE ANN. § 490A.805 (West Supp. 1997); Kansas, KAN. STAT. ANN. § 17-7616 (1995); Maryland, MD. CODE ANN. CORPS. & ASSN'S § 4A-905 (1993); Montana, MONT. CODE ANN. § 35-8-602 (1997); Nevada, NEV. REV. STAT. § 86.331 (1995); New Jersey, N.J. STAT. ANN. § 42:2B-39 (West Supp. 1997); Ohio, OHIO REV. CODE ANN. § 1705.12 (Anderson Supp. 1996); Oklahoma, OKLA. STAT. ANN. tit. 18, § 2027 (West Supp. 1997); Rhode Island, R.I. GEN. LAWS § 7-16-39 (1992); Texas, TEX. REV. CIV. STAT. ANN. art. 1528n, art. 5.06 (West 1997); Utah, UTAH CODE ANN. § 48-2b-132 (1994); Virginia, VA. CODE ANN. § 13.1-1033 (Michie 1993) (repealed by Acts 1995, c. 168); Wisconsin, WIS. STAT. ANN. § 183.0604 (West Supp. 1997); Wyoming, WYO. STAT. ANN. § 17-15-120 (Michie 1997).

The Louisiana statute originally provided that, in the absence of an agreement to the contrary, the withdrawing member is entitled to "fair market value as of the date contributed of the member's capital contribution." Louisiana, LA. REV. STAT. ANN. § 12:1325.B. (West 1994). This provision has been amended to provide that if the LLC is constituted for a term, a member "may withdraw without the consent of the other members prior to the expiration of the term only for "just cause arising out of the failure of another member to perform an obligation." *Id.* § 12:1325.A (West Supp. 1998). If there is no term, a member may withdraw or resign from an LLC at the time or upon the happening of an event specified in a written operating agreement and in accordance with the written operating agreement." *Id.* § 12:1325.B. If there is no provision specifying a time or the events upon the happening of which a member may withdraw or resign, the member "may resign or withdraw upon not less than thirty days prior written notice to the [LLC]." *Id.*

withdrawal.[127] For example, the Rhode Island statute is silent on the right to withdraw.[128] That statute, however, notes that the right to distribution is subject to the relevant provisions in the operating agreement.[129] The Arizona statute has been amended to provide a special limitation on the amount that can be distributed to a family member.[130] The Colorado, Minnesota, and North Dakota statutes provide that if a member dissociates but the LLC is not wound up, the member will be treated as an assignee of the withdrawing member's financial rights owned before the termination of membership.[131]

The Oregon, Virginia, and Washington statutes have been amended to provide that, in the absence of an agreement to the contrary, a member may not voluntarily withdraw from an LLC.[132] These provisions

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[127]Illinois, 805 ILL. COMP. STAT. ANN. § 180/25-1 (West Supp. 1997); Louisiana, LA. REV. STAT. ANN. § 12:1325 (West Supp. 1997); Michigan, MICH. LAWS ANN. § 21.198(4509) (Law. Co-op. Supp. 1997); Oklahoma, OKLA. STAT. ANN. tit. 18, § 2036.C (West Supp. 1997).

[128]R.I. GEN. LAWS § 7-16-39 (1992).

[129]*Id.*

[130]ARIZ. REV. STAT. ANN. § 29-707.C (West Supp. 1996). Section 29-707.C provides:

> If the withdrawn member is a family member of a family controlled limited liability company, then the distributions which the withdrawn member is entitled to receive pursuant to subsection A or B of this section, whichever is applicable in the absence of any provision in an operating agreement shall be based upon the lesser of his right to share in distributions if the limited liability company had completed winding up pursuant to § 29-708 as of the date of withdrawal or his right to share in reasonably anticipated future distributions if the limited liability company were to continue for twenty-five years. For purposes of this subsection, a "family controlled limited liability company" means a limited liability company which, immediately before the event of withdrawal, is controlled by the withdrawn "family member" and the "members of his family" as defined in § 2704 of the internal revenue code as defined in § 43-104.

Id. (footnotes omitted).

[131]Colorado, COLO. REV. STAT. ANN. §§ 7-80-603 (resigning member), 7-80-704 (deceased member) (West Supp. 1997); Minnesota, MINN. STAT. ANN. § 322B.306.3(1) (West 1995); North Dakota, N.D. CENT. CODE § 10-32-30.3(a) (1995). This is sometimes referred to as the "Hotel California" approach ("you can check out any time you want but you can never leave"). EAGLES, *Hotel California*, *on* EAGLES GREATEST HITS VOL. 2 (Elektra/Asylum).

[132]Oregon, OR. REV. STAT. § 63.205 (Supp. 1996); Virginia, VA. CODE ANN. § 13.1-1032 (Michie Supp. 1997); Washington, WASH. REV. CODE ANN. § 25.15.130(3) (West Supp. 1998). The Washington statute was amended to eliminate death and voluntary dissociation from the meaning of withdrawal and as amended, the statute provides:

> A member may withdraw from a limited liability company at the time or upon the happening of events specified in and in accordance with the limited liability company agreement. If the limited liability company agreement does not specify the time or the events upon the happening of which a member may withdraw, a member may not withdraw prior to the time for the dissolution and commencement of winding up of the limited liability

effectively eliminate a member's ability to force the dissolution vote of the company during the life of the member, although the LLC will dissolve on the death of a member unless the remaining members vote to continue the business of the company.

ULLCA contains a right to withdraw from an at-will LLC.[133] Several states follow the ULLCA model.[134]

2. Completed Transfers for Transfer Tax Purposes

Section 2036(a) of the Internal Revenue Code requires decedent's gross estate to include the value of any property he has transferred by *inter vivos* gift, if he retained for his lifetime "(1) the . . . enjoyment of . . . the . . . property, or (2) the right . . . to designate the persons who shall . . . enjoy . . . the income therefrom."[135] In *United States v. Byrum*,[136] the Supreme Court held that the stock in the corporation transferred by the decedent to an irrevocable trust was not included in his gross estate under section 2036.[137] The Court maintained that even though decedent retained the right to vote the transferred shares, the right to veto the sale or acquisition of trust property, and the right to replace the trustee, decedent would not be treated as the owner of the stock as a result of the fiduciary constraints imposed on corporate directors and controlling shareholders.[138] According to the Court, the decedent "did not have an unconstrained *de facto* power to regulate the flow of dividends . . . much less the 'right' to designate who was to enjoy the income from [the] trust property."[139] I.R.C. section 2036(b)(1) was amended in 1976 and 1978 to provide that, for purposes of I.R.C. section 2036(a)(1), the direct or indirect retention of voting rights in transferred stock of a controlled corporation shall be considered to be a retention of the enjoyment of the transferred property.[140]

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company, without the written consent of all other members at the time.

Id.

[133]*See* ULLCA § 701 (amended 1996), 6A U.L.A. 38 (Supp. 1997).

[134]*See* Hawaii, HAW. REV. STAT. ANN. § 428-601 (Michie Supp. 1996); Vermont, VT. STAT. ANN. tit. 11, § 3081 (1997); West Virginia, W. VA. CODE § 31B-6-601 (1996).

[135]I.R.C. § 2036(a) (West 1986).

[136]408 U.S. 125 (1972).

[137]*Id.* at 143.

[138]*Id.* at 143-44. Although the trustee could not dispose of or acquire additional investments without Byrum's confirmation, he was not controlled by Byrum's demands. *Id.*

[139]*Id.* at 143.

[140]I.R.C. § 2036(b)(1) (West 1986).

I.R.C. section 2038(a)(1) provides that the value of the gross estate includes:

> the value of all property . . . [t]o the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-year period ending on the date of the decedent's death.[141]

The Internal Revenue Service ruled that, as a result of the fiduciary duty among partners, neither the income or loss allocated or paid to limited partners/donees, nor the value of an LP interest, will be included in the gross estate of the general partner/donor under I.R.C. sections 2036(a)(2) or 2038(a)(1).[142] While this holding is useful in establishing that the value of a transferred interest will not be brought back into the estate of the transferor, one needs to exercise some care in light of the ability to modify the fiduciary duties owed by partners and members under the newer statutes.

3. *Transfer of a "Present Interest"*

IRC section 2503(b) provides that the first $10,000 of gifts made to any person by the donor during the calendar year shall not be included

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[141] *Id.* § 2038(a)(1).

[142] Priv. Ltr. Rul. 95-46-006 (Aug. 14, 1995); *see also* Priv. Ltr. Rul. 95-46-007 (Aug. 14, 1995) (holding that, in addition to the duty of disclosure, the partnership agreement required the consent of the limited partners to alter the allocations within the partnership or to alter the partnership agreement, and gave the limited partners the right to terminate any agreement with the partnership); Tech. Adv. Mem. 91-31-006 (Apr. 30, 1991) (concluding that "the value of the transferred unfit is . . . not includible in the decedent's gross estate under section 2038 of the Code, because under that section she retained no power to alter the beneficial interests of the other partners"); Priv. Ltr. Rul. 94-15-007 (Jan. 12, 1994) (concluding that "the value of the partnership interests proposed to be transferred by the Transferor will not be includable in his gross estate under §§ 2036 or 2038 by reason of his status as a general partner").

in the total amount of gifts made during such year.[143] The annual exclusion is only available for gifts of present interests in property.[144] Thus, a question exists whether the transfer of an interest in a partnership or an LLC constitutes the transfer of a "present interest." The Service has ruled that gifts of partnership interests constitute outright gifts of ownership interests in a business entity.[145] The donee of such an interest receives the immediate use, possession, and enjoyment of the interest in the partnership.[146] This interest entitles the donee to any current economic benefits generated by the property.[147] In addition, the donee has the right at any time to sell or assign the interests.[148] Finally, management and control of the partnership assets are vested in the general partner on whom strict fiduciary duties are imposed.[149] "Such management powers, therefore, are not the equivalent of a trustee's discretionary authority to distribute or withhold trust income or property; powers which would generally result in characterization of a gift in trust as a future interest."[150]

C. *The Nontax Considerations*

The removal of some federal income tax constraints was the predominant catalyst in the addition of new forms. But nontax considerations, which reflect the changes in the manner in which business is conducted, have also been important in motivating some changes and

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[143]I.R.C. § 2503(b) (West 1986).

[144]*Id.* A present interest in property is an unrestricted right to the immediate use, possession, or enjoyment of the property (such as a life estate or a term certain). Treas. Reg. § 25.2503-3(b) (1976). A "'[f]uture interest' is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time." *Id.* § 25.2503-3(a).

[145]Tech. Adv. Memo. 91-31-006 (Apr. 30, 1991).

[146]*Id.*

[147]*Id.*

[148]In Tech. Adv. Mem. 97-51-003 (Aug. 28, 1997), the Service denied a taxpayer an exclusion under I.R.C. § 2503(b) for an interest in a limited partnership because the partnership agreement allowed the general partner to withhold distributions for any purpose whatsoever. This provision, together with a total prohibition on the transfer of the limited partners' interests in the partnership, cost the general partner the annual exclusion. "The provision effectively obviates the fiduciary duty ordinarily imposed upon a general partner, and clothes the general partner with the authority to withhold income for reasons unrelated to the conduct of the partnership." *Id.* Thus, the general partner had not given up the enjoyment of the partnership property and would not be allowed an annual exclusion under I.R.C. § 2503(b).

[149]Tech. Adv. Mem. 91-31-006 (Apr. 30, 1991).

[150]*Id.*

informing the manner in which other tax-motivated changes are being made.

1. The Need for Business Flexibility

With an increase in the number of small businesses and increased interstate and international business transactions, many business organizers want statutes that confirm the ability of owners to set their own rules governing their relationships. While the external characteristics are difficult to modify, statutes are becoming increasingly flexible in the ability to modify internal characteristics.[151] These provisions are particularly important in dealing with such matters as duties of owners and the economic relationships among the members. Perhaps the most actively discussed element of the current developments in business organization law is the question of fiduciary duties.[152] This element is discussed in terms of the appropriateness of the fiduciary duties which comprise the default properties[153] under the acts and the freedom of owners to modify those duties.

2. The Need for Certainty in Real Estate Transactions

Because business organizations hold real estate, there is a need for certainty with respect to the authority of owners and other agents of the organization to deal with real and other property of the organization. Largely as a result of the permanence and stationary nature of real estate, many organic statutes have specific properties with respect to the persons with authority to bind the organization. These statutes deal with matters affecting title to real property, specifically the recording of documents with the local recorder and the ability of time to cure certain defects in title.[154]

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[151]See, e.g., RUPA § 103 (amended 1996), 6 U.L.A. 25 (1997), and ULLCA § 103 (amended 1996), 6A U.L.A. 33-4 (Supp. 1997), both of which provide for broad flexibility in modifying the properties of the organizations they govern.

[152]*See, e.g.*, Deborah A. DeMott, *Fiduciary Preludes: Likely Issues for LLCs*, 66 U. COLO. L. REV. 1043 (1995).

[153]Both RUPA § 404(a) (amended 1996), 6 U.L.A. 58-9 (1995), and ULLCA § 409(a) (amended 1996), 6A U.L.A. 464 (1995), provide that the only fiduciary duties owed by owners to the organization are a duty of care and a duty of loyalty.

[154]Concepts such as curative statutes (under which errors in the execution of documents become irrelevant if not contested within a certain period of time) and adverse possession (under which a person who holds property openly and adversely to other interests will eventually obtain good title to the property if no other person contests the title), have the effect of ensuring that title defects or abandonment of real estate will not permanently take the

3. The Need for Durability of Business Organizations

Historically, the dissociation of a member would cause a dissolution of an unincorporated business.[155] Moreover, a dissolution would result unless some or all of the remaining members decided to continue the business notwithstanding the dissociation.[156] While many of the effects of dissolution could be avoided through agreement to continue the business of the organization after dissociation, a dissolution nonetheless caused problems for the ongoing business.[157] Because of this complication, the property of durability when owners change has become important to many organizations. One of the last reasons for the preservation of the rule that dissociation will result in dissolution has been eliminated with the adoption of the "check the box" classification rules.[158] Therefore, most statutes are changing the default property to provide that dissociation will not result in dissolution.[159]

4. The Nationalization of Professional Service Organizations

With the establishment of multistate business organizations, many professional organizations, particularly accountants, have sought more flexible noncorporate forms. Accountants first attempted to use LLCs. After finding that not all states would be willing to license multistate limited liability companies, the accountants, in an effort to allow them to practice in all states, opted for the LLP.[160]

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property out of the stream of commerce.

[155]UPA § 31(1)(b), 6 U.L.A. 771 (1995) (stating dissolution is caused by the express will of any partner); RUPA § 801(1) (amended 1996), 6 U.L.A. 92 (1995) (dissolving of a partnership takes place when the partnership receive notice of that partner's desire to withdraw).

[156]RULPA § 801(4) (amended 1985), 6A U.L.A. 240 (1995) (calling for agreement in writing of all partners to continue the business of the LP after dissociation of one partner).

[157]*See, e.g.*, Fairway Dev. Co. v. Title Ins. Co. of Minn., 621 F. Supp. 120 (N.D. Ohio 1985) (holding that a partnership that had a change in membership is a different legal entity from the partnership that existed before the change).

[158]*See supra* note 13.

[159]This change was made to § 801 of ULLCA in 1996 in anticipation of the "check the box" changes.

[160]The "big six" accounting firms became LLPs in 1994 after the enactment of an LLP statute in New York recognizing foreign LLPs. *See* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065 (1995).

D. *The Growth of Arbitration and the Arrest of the Common Law*

Arbitration and other nonjudicial methods of resolving disputes have become a generally accepted part of many business contracts, including the agreements upon which many business organizations are based.[161] While alternative dispute resolution provides certainty, speed, and, occasionally, economy in resolving disputes among contracting parties,[162] it also has the disadvantage of providing unappealable awards and depriving the business community of the benefit of judicial resolution of adversarial arguments. Thus, the common law in this area, if not arrested, is at least reduced as a result of arbitration. This is particularly unfortunate for the development of the body of law for unincorporated business organizations, where the revisions of organic statutes over the past few years have raised significant new issues which could benefit from judicial interpretation.

Ironically, the more recent statutes, in an attempt to codify common law as understood by the statutory drafters, have effectuated an increased number of potential issues that may later require judicial interpretation.[163] Nonetheless, this desire to rely on common law to answer these questions has placed increased pressure on statutory drafters to provide answers that previously would have been left to the courts. While there may be less judicial interpretation available, the benefits of these determinations can be expanded as long as a particular property or other characteristic of different forms are described using the same language.[164]

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[161]*See, e.g.*, G. Richard Shell, *Arbitration and Corporate Governance*, 67 N.C. L. REV. 517 (1989) (describing the increased popularity of arbitration among public corporations as an alternative to the court system).

[162]*See, e.g*, Staklinsti v. Pyramid Elec. Co., 160 N.E.2d 78 (N.Y. 1959) (demonstrating that arbitration may grant remedies that would not ordinarily be granted in litigation).

[163]As noted above, the release of the "check the box" regulations has caused a flurry of activity with changes in organic statutes.

[164]For example, the definition of the statutory amount a member or partner is entitled to when leaving the organization is different for each of the major forms. UPA § 38(2)(c)(II), 6 U.L.A. 881 (1995), simply speaks of "the value of his interest in the partnership . . . but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered." RUPA § 701(b) (amended 1996), 6 U.L.A. 81 (1995), defines the value of an interest as

> the amount that would have been distributable to the dissociating partner under section 807(b) if, on the date of dissociation, the assets of the partnership were sold at a price equal to the greater of the liquidation value or the value based on a sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date.

RULPA § 604 (amended 1985), 6A U.L.A. 220 (1985), provides for the "fair value of his [or

IV. WILL UNIVERSAL BUSINESS ORGANIZATION LEGISLATION OCCUR?

Regardless of whether statutory rules *should* move in the direction of universality, it seems clear that statutes *will* tend to move in that direction. While law professors and uniform law commissioners may consider these matters, statutory drafting in this area is being done almost entirely by practitioners through state bar association drafting committees.[165] The academy has been relegated to watching the development of business legislation in an attempt to document the changes being brought about by others. The National Conference of Commissioners on Uniform State Laws is in the position of attempting to determine the direction of states in order to lead them.[166] Thus, the question is not whether these changes should occur, but whether the changes described in this article are likely to occur. For several reasons, I conclude that statutes will become increasingly universal in their application and operation.

Changes in the tax law and the revision of most organic statutes have afforded those who work with these statutes the freedom to make the changes in them which facilitate the use of forms used by business owners. In doing so, many of the statutory distinctions among forms have disappeared, leaving some statutory forms almost indistinguishable from others.[167] At the same time, in most recently considered organic statutes, there is an explicit statutory freedom to modify the properties by agreement.[168] This has further blurred the distinctions among the forms. These changes have caused the distinctions among organizations and their

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her] interest in the limited partnership as of the date of withdrawal based upon his [or her] right to share in distributions from the limited partnership." Finally, ULLCA § 702(a)(1) (amended 1996), 6A U.L.A. 478 (1995), describes the determination of "the fair value of the interest, considering among other relevant evidence the going concern value of the company, any agreement among some or all of the members fixing the price or specifying a formula for determining value of distributional interests for any other purpose, the recommendations of any appraiser appointed by the court, and any legal constraints on the company's ability to purchase the interest." RMBCA § 13.01(3) (1996) defines "fair value" as "the value of the shares immediately before the effectuation of the corporation action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable."

[165]For a history of the development of LLCs, see Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375 (1992).

[166]For a discussion of the National Conference of Commissioners on Uniform State Laws, see James R. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991).

[167]*See, e.g.*, *supra* text accompanying note 6 (discussing different forms with similar properties).

[168]*See* DEL. CODE ANN. tit. 6, § 18-202(c) (1993) (allowing a certificate of formation to be amended at any time for any proper purpose).

characteristics to be based not on the form chosen, but upon what is generally considered appropriate for the specific type of transaction the organization is using.

Nonetheless, as a result of the constraints imposed by experience and a natural reluctance to undergo more change than is necessary, many prefer the comfort of existing nomenclature attributable to current forms. This has resulted in a diminution in the legal significance of the names, and even in the forms used to establish the organization. While this process might argue in favor of the development of new forms (or a single new form) with properties resembling the characteristics being adopted by agreement, such dislocation is unlikely to occur since most organizers believe they can attain their objectives with contractual modifications of existing forms. This pragmatic response is probably correct from a policy standpoint, as the cost of any change of this sort would probably be repeated over time as the needs of businesses and their owners continue to change.

It is likely, although probably not significant, that over time, the nature and structure of the business, rather than the form selected, will dictate the properties of an organization and the business norms will be based on the nature or structure of the organization. For example, it is likely that the rules developed for personal service organizations will become interchangeable regardless of whether they are personal service partnerships or corporations. As time goes on, the characteristics of organizations will be dictated not by the inherent properties of the form selected but by statutory, common law, and contractual characteristics. These will be based on the structure of the organization or the nature of its business and both owners and third parties will place greater importance on the "personal service" than on the "corporation" or "partnership" when considering an organization engaged in rendering personal services.

A. *Factors Favoring the Creation of Universal Statutes*

Due to the growth in alternative and often indistinguishable forms, the need for an increase in universality of the organic statutes governing the forms is suggested. It is unnecessary to speculate when this sort of universality will come to bear on different forms — it has been occurring over the past few years in some discrete areas. This article suggests that it will be possible to develop universal organic statutes that will provide efficient support for current and future businesses without forcing business people to change the nomenclature of their existing forms. This is particularly true if the statutory developments are considered in the light of the function of organic statutes, and the need for default, semi-

default, and mandatory properties, and if those properties are developed in such a way as to respond to the legal and policy considerations of business structures rather than statutory forms.

1. Consistent Treatment of Common Properties

The use of the same language to describe the same properties in different forms not only facilitates the identification of true differences among forms, but also provides for both legislative and judicial efficiency. Under the current system in which each property is described differently in each business organization, it is difficult to determine whether two properties are equivalent.[169] For example, although most forms have the property of holding owners liable for wrongful distributions, each organic statute describes this property differently. Thus, a member of an LLC may be liable to restore a distribution if it is made at a time when the LLC has insufficient assets to pay its creditors[170] while in a general partnership, a partner may be liable for distributions made at any time.[171] If this distinction in the description of the particular property is attributable to an intended difference in the property from one organization to another, the different language is, of course, appropriate. But it is possible that although the same property was intended, the statutory drafting resulted in different language which yielded differing results. This distinction results in legislative inefficiency in the development of new language to describe the same property and, of greater consequence, judicial inefficiency, in that each description of a property must be considered separately. These inefficiencies are then passed on to those who must use or interpret the statutes in the organization or operation of organizations.

2. Characteristics of an Organization Based on Nature and Structure of Organization Rather than on the Form Selected

The characteristics of business organizations are increasingly dictated by the nature of the business conducted by the organization and

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[169]As noted *supra* Part II, because of the increased flexibility of organic statutes, it is possible for an organization established under one form to have characteristics that more closely resemble properties of another form.

[170]*See* DEL. CODE ANN. tit. 6, § 18-607(b) (Supp. 1996) (stating that a member who knowingly receives a distribution that exceeds the assets of the LLC shall be liable for the amount of the distribution).

[171]*See* UPA § 15, 6 U.L.A. 456 (1995).

its structure rather than by the form selected.[172] Some statutes are beginning to assign properties based on the nature of the business rather than the form selected.[173] Similarly, the structure of an organization, such as an organization controlled by a family or one with widely held interests, will have a greater impact on the characteristics of the organization than will the form selected. In other words, a family partnership will have characteristics of management and sharing more like a family corporation than a widely held investment partnership. The statutory flexibility, particularly in the area of unincorporated business organizations, supports this flexibility and allows the owners to adopt characteristics that efficiently address their needs.[174] Developing statutes that support this trend will enable business organizers to respond to the needs of the owners more directly and efficiently.

3. Single Statute Rather than Several "Similar" Provisions in Different Statutes Reduces Risk of Inconsistency

Where the same property is addressed in different statutes, there is an unnecessary risk of inconsistent treatment. The cost of inconsistent treatment of the same property is largely measured by inefficiency or administrative grace.[175] Using different language to accomplish the same objective, however, leaves both business organizers and courts seeking differences. Particularly in light of the large number of new business entities available, the elimination of meaningless differences will reduce confusion and unnecessary expense.[176] The inclusion of universal

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[172]See, for example, N.Y. PARTNERSHIP LAW § 26(c) (McKinney Supp. 1997-1998), which makes an exception to the rule in section 26(b) that held no partner of an LLP liable for debts or obligations, whether tort, contract, or otherwise. Section 26(c) addresses professional services and makes partners personally and fully liable for any negligent or wrongful act. The section specifically discusses "the case of an attorney and counsel-at-law . . . ."

[173]See, e.g., *infra* discussion of professional entities in the text accompanying notes 197-99.

[174]While the principal advancements in flexibility have occurred in the area of unincorporated associations, it should be noted that corporate statutes have also developed to provide increased flexibility as well. *See, e.g.*, RMBCA § 8.01 (1996) (allowing shareholders in smaller corporations to dispense with the board of directors).

[175]A simple example is the requirement that corporate names be *distinguishable on the records* from other corporate names (RMBCA § 4.03 (1996)) while the names of LPs must not be the *same or deceptively similar to* the name of any corporation or LP (RULPA § 102(3) (amended 1985), 6A U.L.A. 67 (1995)).

[176]Business organization statutes have become more specific by trying to deal with particular circumstances and more explicit by clearly stating the rules, thus reducing confusion and the need for judicial interpretation. For additional discussion, see *supra* text accompanying notes 63-64.

properties in a single statute will also help as the law evolves because reconsideration of a particular property may be accomplished in a single location rather than having to locate the same property in many organic statutes. As such, where policy dictates a change in the treatment of a property, statutory drafters will be able to deal with the change one time for all entities.

4. With the Changes in All Business Organization Statutes, There is an Excellent Opportunity to Make Changes

As noted above, virtually every business organization statute has been significantly revised over the last decade. It is too late to consider whether the cost in terms of lost common law of these changes is worth the clarity, flexibility, and specificity that the new statutes provide.[177] As a result of this change, business organizers and courts will need to make determinations of the meaning of many new statutory provisions. This presents an opportunity to make such necessary changes in order to rationalize the properties of business entities without further invalidating common law and organizers' understandings. The elimination of meaningless distinctions would make the assimilation of the new statutes much easier for all involved.

5. Elimination of Accidental Distinctions Will Enhance the Substantive Statutory Development

After identifying the distinctions among business entity statutes, it is necessary to evaluate each distinction to determine whether it serves a policy purpose. This exercise will provide a useful perspective on many statutory provisions. As noted immediately above, business entity statutes are changing dramatically, and will probably continue to do so until recent tax changes are incorporated and practice has identified statutory problems in need of clarification. The identification of the properties of a business entity and the evaluation of whether a particular property is unique to that entity will be a valuable part of that analysis. Thus, in eliminating inefficiencies, the revision process will provide an opportunity to enhance unique properties while focusing on the significance of their contribution to the business entity to which the property applies.

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[177]For a discussion of the costs of making statutory changes, see Larry E. Ribstein, *Changing Statutory Forms*, 1 J. SMALL & EMERGING BUS. L. 11 (1997).

6. A Universal Statute Will Make Easier the Conversion of an Organization from One Form to Another

One of the consequences of the increase in the number of statutory forms available to business organizers has been an increase in the desire to merge or convert from one form to another. Placing many of the properties of business organizations in a separate universal statute will have two beneficial effects on this process. First, by limiting organic statutes to only those properties that are truly unique to the forms organized under that statute, it will be easier to identify the differences among the forms to determine whether to merge or convert, and to understand the consequences of the merger or conversion. Second, in those cases in which there is a merger or conversion, a business is less likely to be surprised by arbitrary changes in properties.[178]

B. *Factors Causing Resistance to Universal Statutes*

The strongest resistance to universal statutory construction is the dislocation of existing rules and expectations based on existing statutes. The cost of these changes is the loss of the benefit of the understanding generated through the years of developed common law. In addition, movement to universal statutes may disrupt the contracts of the owners and the reliance of third parties on the existing rules.[179] The recent changes in organic statutes demonstrate that the elimination of tax constraints will show that at times business and tax changes yield opportunities that will permit business owners to take advantage of this flexibility and will justify changes in organic statutes. This indicates that there can be no question that a change in the rules governing as complex of a body of law as those governing business organizations will cause some cost of dislocation.

C. *Current Universal Statutes*

The attempt to coordinate provisions of various business organization statutes is not a recent phenomenon. There have been several approaches taken to bring some conformity to business organization statutes.

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[178]For example, ministerial functions such as annual reports may be made universal so that an organization that has developed a method of complying with the requirements would not have to "reinvent the wheel" with respect to such matters after a change in form.

[179]For a thorough discussion of the costs of change, see generally Ribstein, *supra* note 177 (discussing the costs of change).

The traditional approach to providing common properties to more than one business form has been to include the same provision in each of the statutes. This has been the predominant approach to the drafting of LLC statutes, in which drafters have borrowed properties and the statutory language upon which the properties are based from one form and grafted them onto another.[180]

1. Linkage

The LP, although based on the general partnership, is a separate legal form. Many of the rules governing the operation of LPs are drawn from the statute governing general partnerships by way of a relationship between the statutes (known as linkage).[181] Both ULPA and RULPA expressly state that to the extent the LP statute does not provide a rule, the UPA will apply.[182] For this reason, such matters as the authority of the general partner to bind the partnership, the manner in which most management decisions with respect to the partnership are made, and the ability of the LP to own property are drawn from the general partnership act.[183] In some statutes, the duties of managers or agents of one organization are determined by reference to the duties that have developed for the corresponding managers and agents of another.[184]

2. Miscellaneous Corporation Act

In many states there are different types of corporations to conduct different types of businesses. One way to provide common rules for several types of corporations is the adoption of a single statute providing

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[180]Keatinge et al., *supra* note 165, at 379. For example, the initial provisions in most LLC statutes dealing with such properties as dissolution were transfers taken from provisions of other statutes. Also, the Uniform Limited Liability Act is based on the Revised Uniform Limited Partnership Act and the Revised Uniform Partnership Act.

[181]*See generally* Larry E. Ribstein, *Linking Statutory Forms*, 58 LAW & CONTEMP. PROBS. 187 (1995) (describing how business association statutes may be "linked," whereby rules from one statute are applied to a business form created under another statute).

[182]RULPA § 1105, 6A U.L.A. 302 (1995).

[183]For example, RULPA § 403(a), 6A U.L.A. 177 (1995), provides that a general partner has the rights, powers, restrictions, and liabilities of a partner in a partnership with no limited partners. In other words, the authority of a general partner in an LLP is the same as that of a general partner in a general partnership.

[184]*See, e.g.*, Missouri, MO. REV. STAT. § 347.088.1 (West Supp. 1997) (stating members and managers must exercise duties "with the care a corporate officer of like position would exercise under similar circumstances"); Nebraska, NEB. REV. STAT. § 21-2612(2) (1993) (making members or managers of an LLC liable in the same manner as a corporate officer "for unpaid taxes imposed upon a limited liability company").

common rules for different types of corporations. The Texas Miscellaneous Corporation Laws Act[185] provides rules for veteran's corporations,[186] educational corporations,[187] cemetery corporations,[188] and certain railroads.[189] In addition, the Texas Limited Liability Company Act incorporates some of the rules of the Miscellaneous Corporation Laws Act.[190] A 1997 amendment to the Texas Limited Liability Company Act limited the application of the Miscellaneous Corporation Laws Act to rules governing organizational names, registered agents, filing of documents with the secretary of state, and foreign LLCs.[191] Thus, unlike the more generic linkage rules discussed above, the rules of the Texas Miscellaneous Corporation Laws Act incorporated into the LLC statute are specifically defined, reducing the possibility of inconsistency.

3. Junction Box Merger Statutes

One of the factors encouraging the development of universal business legislation is the need for clear rules governing the merger of dissimilar forms of business organization or the conversion of one form of business organization to another. Initially, statutes only provided rules for the merger of two domestic corporations. Because two domestic corporations generally have similar properties, the only question would be changes in the nonstatutory characteristics as a result of the merger. These changes were not qualitatively different than the simple change of the characteristics of the corporation as a result of a modification of the articles of incorporation or bylaws. With the merger or conversion of different forms, dissimilarities in the statutory requirements for accomplishing merger or conversion and the differences in properties of the different forms need to be addressed. The earliest examples of this issue arose when a domestic corporation was permitted to merge with a foreign corporation. While properties of the two corporations may have been different, the corporation form was sufficiently standard that most differences were either not significant or could be addressed through nonstatutory characteristics adopted by the owners.[192]

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[185]TEX. REV. CIV. STAT. ANN. art. 1302-1.01 (West 1997).

[186]*Id.* art. 1302-3.01.

[187]*Id.* art. 1302-3.02.

[188]*Id.* art. 1302-3.03.

[189]TEX. REV. CIV. STAT. ANN. art. 1302-3.05.

[190]*Id.* art. 1528n, art. 8.12 B.

[191]S.B. 555, 75th Leg., Reg. Sess. § 74 (Tex. 1997).

[192]Such matters as the vote required to approve significant actions, preemptive rights, and cumulative voting, while they may differ from state to state, can generally be adjusted by

With the introduction of interform mergers,[193] these issues became more significant. While the properties of corporations organized under different state statutes may differ, they are generally internal properties that can be modified by the agreement of the owners. Different forms of business organization will have different internal and external properties, and it may not be possible to modify the external properties by agreement. For example, when a corporation converts into a general partnership the conversion must involve a modification of the external property of vicarious liability since the former corporate form had no vicarious owner liability, but general partnerships do. Because the characteristic of vicarious liability is a statutory property, the effect of the change in the property of vicarious liability resulting from a merger or conversion should also be addressed in a statute.

There are three alternative places this change could be addressed: the corporation statute, the partnership statute, or an independent statute dealing with mergers. There is a risk in addressing the change in properties in the organic statute governing a form that the provision will either be insufficient to address all consequences of the change, or will contradict a provision in the organic statute governing the other form dealing with the same property. Both of these problems arise from the fact that there may be two organic statutes dealing with the transformation of one form into another. Even if it is possible to ensure that the provisions of the two organic statutes, when taken together, address all of the provisions consistently, the number of provisions dealing with these mergers and conversions that would have to be reviewed each time a change is made, would become unduly burdensome.[194]

Because many of the issues in an interform merger or conversion are similar, some states have adopted an independent, "junction box"

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the agreement of the shareholders in the articles of incorporation. *See, e.g.*, RMBCA §§ 6.30, 7.32 (1996).

[193]For example, Delaware has permitted interform mergers between LPs and other entities since 1988. DEL. CODE ANN. tit. 6, § 17-211 (Supp. 1996) (as amended by 65 Del. Laws, c. 188, § 1).

[194]For example, assuming six forms (corporation, general partnership, LP, LLC, LLP, and limited liability limited partnership), the number of different two form combinations would be 15. Nonetheless, because each organic statute would have to deal with a merger into each of the other five forms, a merger of each of the other forms into the form governed by the organic statute, a conversion into each of the other forms, and a conversion of each of the other forms into the form governed by the organic statute, each organic statute would have to deal with 20 possible interform mergers or conversions. With six organic statutes, that would result in 120 provisions that would have to be reviewed each time a change in the statute is contemplated.

merger statute addressing the method of carrying out a merger or conversion and the effect of the transaction on the properties of the organizations participating in the merger or conversion.[195] These statutes impose special rules on certain types of mergers and conversions. For example, while a merger or conversion may be accomplished with a less than unanimous vote under many organic statutes, the junction box merger statutes tend to require that any person who will become vicariously liable as a result of the merger or conversion should approve the transaction regardless of the forms involved.[196]

4. Professional Organization Statutes and Rules

Professional service organizations present an example of the circumstances in which the nature of the organization has a much greater impact on the organization's characteristics than does the form of the organization. As such, a professional corporation is more similar to a professional partnership in many characteristics than it is to a business corporation. Some states, by statute[197] or rule,[198] have established rules applicable to different business forms engaged in the same activities (in this case, practice as a professional organization). Except to the extent governed by the professional corporation rules, the organic statute governing the particular form will apply.[199] Thus, unlike linkage rules, the professional organization rules "trump" the organic statutes governing the particular form. By imposing properties such as the qualifications of owners and managers or insurance requirements on the organization, it is possible to ensure that appropriate rules governing a profession are applied to all professional firms regardless of the form that they take.

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[195]*See, e.g.*, NEV. REV. STAT. §§ 92A.005-.510 (1997) (new section following 92A.500 but not yet codified); COLO. REV. STAT. ANN. §§ 7-90-201 to -206 (West 1990).

[196]*See, e.g.*, COLO. REV. STAT. ANN. § 7-90-201(4) (West 1990).

[197]OKLA. STAT. ANN. tit. 18, §§ 801-819 (West 1986 & Supp. 1997) (dealing with "professional entities" including domestic corporations, LPs, or LLCs formed for the purpose of rendering professional service).

[198]For example, Colorado Rule of Civil Procedure Rule 265 deals with "professional companies" practicing law, including professional corporations, LLCs, and LLPs. COLO. R. CIV. P. 265.

[199]*See, e.g.*, OKLA. STAT. ANN. tit. 18, § 805 (West Supp. 1997) ("The Oklahoma General Corporation Act shall be applicable to professional corporations, and they shall enjoy the powers and privileges and be subject to the duties, restrictions, and liabilities of other corporations, except where inconsistent with the letter and purpose of this act.").

5. Other Approaches

The interest in eliminating distinctions among statutes has resulted in other attempts to generalize rules applicable to all organizations. For example, in Pennsylvania, legislation was proposed generalizing the standard of care for all business organizations.[200] This undertaking moves into one of the most hotly discussed areas of organizational law and may be somewhat ahead of its time. Nonetheless, the proponents make the argument that the duty of care in business entities is treated by the courts in similar fashion notwithstanding the differences in the language of the different statutes.[201]

V. UNIVERSAL STATUTE OR UNIVERSAL BUSINESS ORGANIZATION?

The forces affecting business organizations described above have caused both the creation of new business forms and changes in the existing forms. In this rapidly evolving forum, continued change is inevitable. The only question that remains is what shapes the change will produce.

A. *Is it Time for a New Organization?*

With the wide variety of organic statutes currently available, yet another form might only exacerbate the problem unless all previous business organization forms were abolished as part of the process. The elimination of all previous forms, while perhaps helpful in some respects, would destroy the common law upon which all forms were understood and would require the imposition of a statutory norm.

1. Statute versus Agreement

As noted above, the statutes have provided owners with increasing flexibility in structuring their agreements. This flexibility might suggest

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[200]*See* William H. Clark, Jr., *What the Business World is Looking for in an Organizational Form: The Pennsylvania Experience*, 32 WAKE FOREST L. REV. 149, 171 (1997). According to Clark, legislation was proposed for three reasons: (1) the potential temptation to explain the difference in language between different statutes as intentional substantive differences; (2) in Pennsylvania, the standard of care for directors already applies to other business forms; and (3) concern over "potential traps for the unsophisticated" by having more than one standard. *Id.* at 171-72.

[201]For example, the "business judgment rule" of *corporate law* has been analyzed under the "gross negligence" standard of care similar to that of *partnership law* as articulated in RUPA § 404(c) (amended 1996), 6 U.L.A. 58 (1995).

that the problems of discontinuity might be solved through a statutory provision that simply provides that owners may structure any relationship they desire. There are several limitations on this solution. First, the statutes have generally provided for an interrelated set of default rules, which may not be effectively modified without careful consideration.[202] Second, the problem discussed above with respect to having the same property described in different ways in different statutes is profoundly greater where individual business organizations attempt to create the same property through individual drafting.

2. New Organic Statute versus Universal Statute

While the flexibility in many LLC statutes may allow the formation of an organization having almost any characteristics that the owners desire, there are still calls for a new organic statute.[203] In contrast, it may be easier to preserve existing entities and eliminate unnecessary distinctions using a universal statute that contains general rules for determining some properties for all business entities. It seems likely that the first properties included in such a statute will relate to administrative matters such as reports, registered agents and names, and matters that inherently should be consistent from one organization to another. As time goes on, other properties such as liability for wrongful distributions, fiduciary duties, and agency authority may ultimately be included in a universal statute, although such a migration should only be allowed after careful consideration.

B. *The Significance of Names*

One factor that has emerged throughout the changes in business structure is the attraction that certain designations have had, even as the forms in which they are used have changed.

1. Officers and Partners

Two examples where designations have drawn attention are (1) the desire for the use of the term "partner" in limited liability forms engaged

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[202]For example, modification of agency authority of an owner may require a separate modification of the default rules governing duties. *See, e.g.*, UPA § 9, 6 U.L.A. 400-01 (1995).

[203]Larry E. Ribstein & Mark A. Sargent, *Check-the-Box and Beyond: The Future of Limited Liability Entities*, 52 BUS. LAW. 605 (1997). Dale Oesterle and Wayne Gazur also speak of a "limited liability entity." *See generally* Oesterle & Gazur, *supra* note 90.

in professional services, and (2) the desire of those using LLCs to be able to designate "officers."

Multistate professional firms, particularly in the area of accounting, initially had a predilection for LLCs.[204] Because an LLC is a separate form, this adoption required the adoption of new statutes or rules allowing LLCs to practice the profession before they could organize the multistate LLC. For this reason, multistate professional firms turned to the LLP, which, pursuant to its organic statute, was arguably a "subform" of the general partnership.[205] Because partnerships had universal acceptance for a multistate professional organization, the LLP could be used in each state without waiting for change in rules and statutes governing form of practice. An incidental benefit of the use of LLPs was the ability of the owners to refer to each other as "partners." Even after some of the regulatory constraints on acceptable forms for practice have been removed, the desire to use the term "partner" to identify owners has caused some organizations to select the LLP form or even to convert from LLCs to LLPs.

The use of "officers" by LLCs is another example of the use of a term that has an association with one form as a characteristic of another. A few of the organic statutes expressly recognize "officers" of an LLC,[206] and there is no restriction on the use of the term "officer" or designation of agents as "officers" or as holding specific offices such as "president" or "treasurer."[207]

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[204]*See supra* Part III.C.4 (discussing that accounting firms' initial interest in the LLC was due to the flexibility of the LLC form).

[205]The LLP is bound by the large body of already existent general partnership law, insofar as the partnership law is not in conflict with the provisions of the state LLP statute. *See* Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 BUS. LAW. 85, 106 (1995).

[206]Arizona, ARIZ. REV. STAT. ANN. §§ 29-610(13), 29-651, 29-654.D (West Supp. 1996) (referring to "officers"); California, CAL. CORP. CODE § 17154 (West Supp. 1997); Florida, FLA. STAT. ANN. § 608.4363 (West Supp. 1996); North Dakota, N.D. CENT. CODE § 10-32-132(3) (1995) ("officer" of limited liability company agent for service); Ohio, OHIO REV. CODE ANN. § 1705.32 (Anderson Supp. 1996) (officers may be indemnified); Rhode Island, R.I. GEN. LAWS § 7-16-2(b) (1992); South Dakota, S.D. CODIFIED LAWS § 47-34-47 (Michie Supp. 1997).

[207]*See, e.g.*, Cinema N. Corp. v. Plaza at Latham Assocs., 867 F.2d 135 (2d Cir. 1989) (holding that a person who signs a document as "vice president" of a partnership has power to bind a partnership notwithstanding New York Statute of Frauds requiring agents be given authority in writing).

2. Separate Legal Forms (UNICORNS, UBOs, and LLEs)

There are two basic approaches to the universal statute. One is to create a single business form, alternatively known as the Universal Contractual Organization (UNICORN),[208] Universal Business Organization (UBO), or Limited Liability Entity (LLE).[209] A UNICORN is an organization that may include: multiple owner business forms such as partnerships, LPs, LLCs, LLPs, limited liability limited partnerships, and corporations; single owner business forms such as sole proprietorships, subsidiary corporations, and possibly divisions and branches; and possibly forms such as nonprofit corporations and unincorporated not-for-profit organizations. The other universal statute approach is to create a "hub and spokes" system in which certain properties common to all business organizations will be set forth in a "hub" and those properties that are unique to particular forms are set forth separately in "spokes."[210]

3. Hub and Spoke

In a hub and spoke regime, all of the alternative approaches to each property would be identified and separately described in the statute. This would require the identification of each property that must be addressed in all business organizations. Each property should be analyzed to determine how many truly distinct alternative rules for that property exist. A single statutory construction should be developed for each of these alternative rules. Once these two steps are taken, the unintended inconsistencies among business forms would be eliminated. Once the properties of forms and the alternative characteristics of these properties have been identified, it should be possible to consider the relationships among characteristics of different properties. For example, one property of a form may be the vicarious liability of owners as such for the obligations of the organization. The characteristics of that property would be alternatively, (1) the owners, as such, are individually liable for the obligations of the organization, or (2) the owners, as such, have no individual liability for the obligations of the organization. The selection

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[208]See generally The Azle Society (an association between George W. Coleman and the author), Universal [Contractual] Organization, presented at a program entitled *Choice of Entity at fin de siècle* presented at the American Bar Association annual meeting in Orlando Florida on Aug. 5 1996 (on file with the *Delaware Journal of Corporate Law*).

[209]As with many properties of business organizations that, while intending to describe the same thing use different language, the concept underlying the UNICORN, UBO, and LLE is approximately the same and will be described in this article under the term "UNICORN."

[210]*See* Ribstein & Sargent, *supra* note 203, at 619-23 (presenting a range of opinions on the "hub and spokes" system).

of the characteristic of vicarious liability may have an effect on the selection of an appropriate characteristic for another property. For example, in an organization in which owners are vicariously liable for the organization's obligations, it may not be necessary to have a rule governing the liability of owners for wrongful distributions.

VI. UNIVERSAL BUSINESS ORGANIZATION LEGISLATION

As noted above, every organic statute provides a series of properties for the business form organized under that statute. A universal organic statute should address (or expressly not address) the properties of the forms it will govern. These properties may be mandatory or default, but should clearly distinguish the mandatory and default rules. In some cases there may be elective alternative properties. However, in many cases, the adoption of a particular property for a universal organic statute will only be the beginning of the examination, as it will lead to questions of whether the property should be mandatory or default and whether the property should be associated with other properties.

A. *Mandatory and Default Characteristics*

In evaluating each characteristic a statute may provide, drafters of a universal statute must consider whether that characteristic should be a mandatory or default rule. In an environment of highly flexible organic statutes, most rules should only apply as a default. There are only three reasons that a property should be mandatory: (1) public policy requires that it be mandatory, (2) it should be mandatory as a result of the fact that third parties will be relying on it, or (3) it should be mandatory as a structural rule.

There are some properties that should, as a matter of public policy, be inviolate. Just as there are limitations on the ability to contract, there should be limitations on the ability to enter into certain arrangements (such as limitations based on fraud and unconscionability). Rules governing such matters as good faith and the ability to waive fiduciary duties will need to be carefully considered.

Properties effecting the relationship between third parties and the organization, the owners, or both, may generally be more limited. Efficient commerce requires that third parties be able to anticipate the consequences of dealing with a particular form, while third parties having significant bargaining power can negotiate for modification of the properties. Examples of these modifications are the creation of bankruptcy remote entities or preferred stock provisions. These circumstances are comparatively rare, and most third parties will rely

upon the existence of default properties of a form to determine the nature of the organization with which they are dealing. This concern about anticipatable agency authority has been the motivation for the expansion of the agency rules.

In the structural context, it might be possible to argue that each form must have the property of being a separate entity, for at least some purposes, and that, at the very least, each form must have the property of being dissolved and wound up on the consent of all the owners. From the policy perspective, there are questions of duties that may not be waived and rights of third parties that cannot be modified in an agreement among the owners.

B. *Relationships Among Characteristics*

In organic statutes, the properties of each form comprise an integrated whole, and it has generally not been necessary to examine the relationship of one property to another. The discussion above might be read to suggest that each property is separate and that properties may be separated from all others and changed. Such an approach would overlook important relationships among properties which should be considered in modifying properties.[211]

VII. THE LIMITS OF UNIVERSALITY

While there are many factors that indicate that there is a migration to more universal organic statutes, there are some limitations on the ability of a single set of rules to apply to all business relationships. There are significant choices that organizers will want to make while organizing a business relationship. As argued above, the distinctions in characteristics are increasingly dictated by factors other than the choice of form, and as the law currently exists, there are still fundamental and immutable differences among forms. An example of this characteristic is the requirement in unincorporated business organizations that there be owners at the time of formation. For the foreseeable future, genuine differences such as these should not be eliminated in the interest of simplicity. Rather than gratuitously eliminating forms, statutory drafters should focus on differences that are either unintentional or anachronistic

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[211]The concern expressed in this section applies with equal or greater force to the agreement of the owners creating the characteristics of an organization. Anyone who has made a thorough review of a partnership agreement understands that changes in one characteristic will have an impact on other characteristics. Because this article considers statutes and statutory drafting, this section deals only with the relationship among properties.

and no longer serve a useful purpose. As the statutory system is made more universal, statutory drafters may find that some distinctions have strong adherents. These distinctions should be preserved, either in the organic statute or in some universal statute as an alternative, unless there is no policy justification to preserve the distinction, such as where a particular distinction has become the basis of a dysfunctional tax consideration.

VIII. CONCLUSION — WHERE WILL WE GO FROM HERE?

This article at once answers too many and too few questions. As noted at the outset, the question of whether and when universal business entity legislation will occur is fairly simple. If it is defined in the manner described above, it is already occurring, and will probably continue to occur. This article has attempted to describe the direction which this legislation is taking — a movement toward statutes describing characteristics based on the nature of the organization's business and the structure of its ownership. If this trend continues, many of the properties currently being addressed will become mandatory, default, or semi-default characteristics in other statutory schemes dealing with particular types of businesses, particular business structures, or particular types of business transactions. The success of this transition will be measured by the degree to which the change in the statutory system may be accomplished without unnecessary disruption of commerce.