"WIDE OPEN": NEVADA'S INNOVATIVE MARKET IN PARTNERSHIP LAW

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I. INTRODUCTION

A decade ago, as the Revised Uniform Partnership Act ("RUPA") was being drafted, I wrote an article[1] questioning whether the act should be retroactive in application.[2] As drafted, RUPA applies to pre-existing partnerships after a certain date, typically bringing to a close a brief transition period after the initial effective date.[3] I proposed that the more equitable arrangement would be to have pre-existing partnerships continue to be governed by pre-RUPA partnership law, with partnerships formed after the effective date of RUPA governed by the new statute.[4]

I was almost alone in questioning retroactive application,[5] and as promulgated by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"), RUPA provided for retroactive application. The first thirty-six jurisdictions that adopted RUPA almost uniformly failed to adopt my suggestion, and instead implemented the inequitable retroactivity regime.[6] And then along came Nevada, and a jurisdiction finally got it right.

This discussion looks at the retroactivity issue with specific reference to the fiduciary duties of partners, and suggests that Nevada provides a useful model. The following section briefly looks at the RUPA retroactivity regime, the criticisms of that regime, and the state variations. The third section suggests a better approach to retroactivity. The fourth section examines, and rejects, interstate competition as a

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1. Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994* Really *Be Retroactive?*, 50 BUS. LAW. 267 (1994).

2. *See id.* at 268-69.

3. *See* UNIF. P'SHIP ACT § 1206(a)(1), 6 U.L.A. 266 (1997).

4. *See* Vestal, *supra* note 1, at 285-88.

5. *See* Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 77-78 (1993).

6. ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT app. B at 507-10 (2005). Two states adopted partial modifications of the RUPA regime: 1) Arizona, which made RUPA retroactively applicable to LLPs, but not traditional GPs, and 2) Wyoming, which excluded RUPA retroactivity as to only one section. Two other states adopted comprehensive modifications of the RUPA regime: New Mexico and Kentucky acted in conformity with my suggestion and made the application of RUPA to pre-existing partnerships fully elective. *See infra* note 48 and accompanying text.

solution to the retroactivity problem. The fifth section reviews, with approval, the Nevada model. Finally, in the conclusion, I suggest how the Nevada model might be profitably incorporated by those states that have yet to adopt RUPA.

II. THE RETROACTIVE APPLICATION OF RUPA: RENEGOTIATION WITH A GUN TO YOUR HEAD

RUPA provides for retroactive application of the new partnership law regime to pre-existing partnerships. The uniform language provides for an effective date and for a transition period. Partnerships formed after the effective date are governed by RUPA.[7] Partnerships formed prior to the effective date are governed by pre-RUPA partnership law during the transition period, although they may elect to be governed by RUPA even during the transition period.[8] At the conclusion of the transition period, all partnerships—even pre-existing partnerships that do not elect to come under RUPA during the transition period—are governed by RUPA.[9]

The theory behind the transition period followed by mandatory application to pre-existing partnerships is that the mechanism "affords existing partnerships and partners an opportunity to consider the changes effected by RUPA and to amend their partnership agreements, if appropriate."[10]

I have criticized the retroactive application of RUPA on several grounds. The essential problem is that the retroactive application of RUPA takes the deal negotiated by the partners and changes it without their consent, and does so in ways that may advantage some partners over others. The official commentary to RUPA casts this process in designedly neutral terms—retroactivity "affords existing partnerships and partners an opportunity to consider the changes effected by RUPA and to amend their partnership agreements, if appropriate,"[11] while in fact the process is anything but neutral. Retroactivity does not "afford[] . . . an opportunity";[12] it mandates a change.[13] The partners do

7. REVISED UNIF. P'SHIP ACT § 1206(a)(1), 6 U.L.A. 266 (2001) ("(a) Before January 1, 199_, this [Act] governs only a partnership formed: (1) after the effective date of this [Act] . . . .").

8. REVISED UNIF. P'SHIP ACT § 1206(a)(2), 1206(c), 6 U.L.A. 267 (2001) ("(a) Before January 1, 199_, this [Act] governs only a partnership formed: . . . (2) before the effective date of this [Act], that elects, as provided by subsection (c), to be governed by this [Act].").

9. REVISED UNIF. P'SHIP ACT § 1206(b), 6 U.L.A. 267 (2001) ("(b) On and after January 1, 199_, this [Act] governs all partnerships.").

10. REVISED UNIF. P'SHIP ACT § 1206 cmt., 6 U.L.A. 267 (2001).

11. *Id.*

12. *Id.*

13. *See id.*

not "consider the changes effected by RUPA"[14] in some neutral manner; they engage in a self-interested calculation of the advantages and disadvantages afforded by the change in the terms of their agreement from the UPA/common law regime to the RUPA regime.[15] They do not "amend their partnership agreements, if appropriate"[16] in some neutral manner; they calculate their self-interest and determine on that basis whether to amend their partnership agreement or simply await the imposition of RUPA to change their agreement for them.[17]

Retroactive application of a new statute only matters if the substantive provisions of the new statute differ from those of the statute being displaced.[18] In the case of RUPA and the UPA/common law regime it seeks to displace, the differences are significant.[19] RUPA makes several important changes in the underlying theory of the prior uniform act. The new regime tends toward rejection of the aggregate theory of the partnership relationship, and toward the entity theory.[20] The role of the partnership agreement is changed, and partners are given much broader statutory latitude to vary their relationship from that provided in the statute.[21]

Other changes included in RUPA involve changes in the authority of partners to bind the partnership,[22] changes in the nature of the partnership interest,[23] changes in the mechanism for transfer of the partnership property,[24] changes in the formulation of partner liability for the debts of the partnership,[25] and changes in the way in which a partner's interest in the partnership is conceived and calculated.[26] A significant range of changes addresses what happens when a partner wants out of the relationship. Any of these differences could significantly alter the calculus of the deal originally struck by the partners, making the retroactive application of RUPA, I believe, fundamentally unfair.

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14. *Id.*
15. *See* Vestal, *supra* note 1, at 279.
16. REVISED UNIF. P'SHIP ACT § 1206 cmt., 6 U.L.A. 267 (2001).
17. *See* Vestal, *supra* note 1, at 279.
18. *See id.* at 273.
19. *See id.* at 274-81 (noting that differences between regimes include partner authority, the nature of a partnership interest in property, rules governing the transfer of partnership interests, and capacity to dissolve the partnership).
20. *See id.* at 274 & n.35.
21. *See id.* at 280-83; *see also* REVISED UNIF. P'SHIP ACT § 103(a), 6 U.L.A. 73 (2001).
22. *See* Vestal, *supra* note 1, at 275 & n.36.
23. *See id.* at 275 & n.37.
24. *See id.* at 275 & n.38.
25. *See id.* at 275 & n.39.
26. *See id.* at 275-76 & n.40.

For example, imagine a situation where Able, Baker and Clark form a partnership under the UPA to buy racehorses. Able and Baker, who know each other well and have done business together frequently in the past, put up fifty percent of the capital. Clark puts up the remaining fifty percent of the capital. The partnership agreement expresses the agreement of the partners that the partnership is one at will, and not for a definite term or particular undertaking.

Clark is unsure about how things will work out with Able and Baker, who he only knows in passing, but he understands that he is protected by the provisions of the UPA. Clark can cause the dissolution of the partnership by his express will at any time.[27] Upon dissolution, Clark knows, the authority of the partners to act for the partnership is terminated, except as is necessary to wind up the partnership's affairs or complete transactions already begun.[28] Finally, Clark knows that he has the right to participate in the winding up.[29] In short, Clark knows that he can dissolve the partnership and force a winding up—or, in more practical terms, dissolve the partnership and negotiate from a position of strength—if the relationship with Able and Baker does not work out.

But what if the jurisdiction where Able, Baker and Clark formed their partnership adopts RUPA and the transition period expires before Clark realizes the relationship is not going to work out? Because of the retroactive application of RUPA, Clark is left with a set of partnership termination provisions far different from those upon which he counted at the inception of the partnership. Under RUPA section 601, Clark can dissociate from the partnership—a concept and term new to partnership law.[30] Clark's dissociation is not wrongful,[31] but neither is it within the range of circumstances that requires the partnership to be dissolved and its affairs wound up.[32] Under RUPA, Clark's partnership interest is purchased for a price established under the statute.[33] In short, Able and

27. *See* UNIF. P'SHIP ACT § 31(1)(b), 6 U.L.A. 370 (2001).
28. *See* UNIF. P'SHIP ACT § 33, 6 U.L.A. 436 (2001).
29. *See* UNIF. P'SHIP ACT § 37, 6 U.L.A. 470 (2001).
30. *See* UNIF. P'SHIP ACT § 601(1), 6 U.L.A. 163 (2001).
31. *See* UNIF. P'SHIP ACT § 602(b), 6 U.L.A. 169 (2001).
32. *See* UNIF. P'SHIP ACT § 801, 6 U.L.A. 189-90 (2001).
33. *See* UNIF. P'SHIP ACT § 701, 6 U.L.A. 175-76 (2001). Under section 701(a), if there is no dissolution and winding up, "the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (b)." *Id.* Section 701(b) sets the purchase price as:

> [T]he 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 the sale of the entire business as a going concern without the dissociated partner and the partnership were wound up as of that date.

Baker can determine to continue the partnership and simply buy Clark out—in the transition from the UPA to RUPA Clark has lost the ability to force a winding up of the partnership business, and with that lost the position of strength he had under the UPA. The problem with the retroactive application of RUPA is that this loss of position for Clark is unavoidable. Even if Clark recognizes the disadvantage under RUPA and tries to amend the partnership agreement to preserve the partners' pre-RUPA positions, the other partners have no incentive to agree to the amendment; they have only to wait out the transition period to have the law put Clark in a position of disadvantage.

The most problematic features of RUPA, the changes which make the retroactive application of the new regime the most unfair, are the changes RUPA makes in regard to the fiduciary duties of the partners *inter se*. For example, RUPA removes the duty to disclose from the group of fiduciary duties—a status it had under the UPA/common law regime—and makes it a non-fiduciary "obligation."[34]

As to those obligations which RUPA leaves as "fiduciary," the language of the uniform act purports to be an exclusive formulation which precludes common law development.[35] The formula limits the fiduciary obligations to those of a duty of loyalty and a duty of care.[36] An "obligation of good faith and fair dealing"—purportedly non-fiduciary in character—arguably restricts the UPA/common law formulation.[37] Additionally, RUPA's fiduciary duties are narrowly defined[38] and temporally restricted.[39] It is, as one noted commentator observed to the assembled Commissioners on Uniform State Laws, a "pinched and almost mean-spirited vision of the duty of loyalty."[40]

The potential uneven fiduciary duty effects of the movement from the UPA/common law regime to RUPA as applied to pre-existing partnerships are legion. A situation which might call for fiduciary-based disclosures under the common law might not require disclosure under

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Id.

34. HILLMAN, VESTAL & WEIDNER, *supra* note 6, at 184-86.

35. *See id.* at 192-94. Professor Melvin Eisenberg took issue with this formulation in his famous letter to the assembled Commissioners on Uniform State Laws. Letter from Melvin A. Eisenberg to The Commissioners on Uniform State Laws, at 2 (July 27, 1992) (on file with author) [hereinafter Eisenberg July 27, 1992 Letter] ("[T]he duty of loyalty rests in large part on social understandings of fairness and morality, and those understandings are always changing.").

36. HILLMAN, VESTAL & WEIDNER, *supra* note 6, at 192-93.

37. *Id.* at 195-97.

38. *See id.* at 194.

39. *See id.* at 200-04.

40. Eisenberg July 27, 1992 Letter, *supra* note 35, at 4. Professor Eisenberg characterized the reformulation of the fiduciary duties of partners *inter se* as "appalling." *Id.* at 1.

RUPA.[41] A fact pattern which would impose sanctions on a partner for violation of the common law fiduciary duty of good faith under the UPA/common law regime might not come within the ambit of the RUPA non-fiduciary obligation of good faith and fair dealing.

Retroactive application of RUPA would be less of a problem if partners under the new RUPA regime had an obligation "to consider the changes effected by RUPA and to amend their partnership agreements, if appropriate" tempered by a fiduciary obligation to conform to some notion of the collective good.[42] Such would be the case if, for example, RUPA charged partners in pre-existing partnerships to amend the partnership agreement in such a way as to duplicate the original deal as closely as possible. This would create a situation in which "each partner had an obligation to subordinate his or her individual interest to the collective interest . . . ."[43] But, of course, this is not the way in which RUPA is structured. RUPA provides that "[a] partner does not violate a duty or obligation under this [Act] or under the partnership agreement merely because the partner's conduct furthers the partner's own interest."[44]

Note that this is not a *constitutional* argument. I assume that the RUPA savings clause tracks the minimum requirements of the Constitution.[45] The argument has always been one of public policy and the fair formulation of our legal rules.

Thirty-six jurisdictions other than Nevada have adopted RUPA as this is being written. Sixteen adopted the retroactivity provision without modification by simply inserting the applicable dates.[46] Another sixteen

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41. One such fact pattern is found in *Alexander v. Sims*, 249 S.W.2d 832 (Ark. 1952). The case involved two partners in a jewelry store. They had entered into an agreement that the survivor of them would receive the deceased partner's interest in the partnership. At the time of the agreement, one partner knew that the other had terminal cancer. The sick partner was not aware of her illness. *See id.* at 832-33. There had been no demand, so there was no UPA section 20 duty to disclose. UNIF. P'SHIP ACT § 20, 6 U.L.A. 188 (2001) ("Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . ."). The court found a common law obligation to disclose. Under RUPA, assuming that section 403 is construed to displace the common law, the result would be different unless the knowledge of the ill partner's medical condition is "information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or this [Act] . . . ." REVISED UNIF. P'SHIP ACT § 403, 6 U.L.A. 140 (2001). Certainly an interpretation bringing this factual situation within the RUPA disclosure obligation is possible; just as surely it is not the only credible interpretation.

42. REVISED UNIF. P'SHIP ACT § 1206 cmt., 6 U.L.A. 267 (2001).

43. Vestal, *supra* note 1, at 279.

44. REVISED UNIF. P'SHIP ACT § 404(e), 6 U.L.A. 143 (2001).

45. *See* Vestal, *supra* note 1, at 274 n.34; *see also* REVISED UNIF. P'SHIP ACT § 1207 & cmt., 6 U.L.A. 272 (2001).

46. *See* HILLMAN, VESTAL & WEIDNER, *supra* note 6, at 510. Not that merely inserting the effective dates proved all that easy a task. West Virginia managed to insert the dates in such a way

jurisdictions modified the retroactivity provisions in ways that did not change the underlying policy of retroactivity.[47] Only four of the adopting jurisdictions other than Nevada modified the retroactivity provisions in ways that changed the underlying policy of RUPA.[48] The most extreme

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that the transition period ran from June 9, 1995 through July 1, 1995—all of three weeks. Uniform Partnership Act, 1995 W. Va. Acts, ch. 250, § 47B-10-4 (codified at W. VA. CODE § 47B-11-4 (2006)).

47. Alaska changed the language to make specific reference to limited liability partnerships and to specify which statute applied to partnerships not governed by RUPA. Uniform Partnership Act, 2000 Alaska Sess. Laws, ch. 115, § 10. Arkansas made stylistic changes. Uniform Partnership Act, 1999 Ark. Acts 1518, § 1205. Connecticut added a subsection specifying which statute applied to partnerships not governed by RUPA. Uniform Partnership Act, 2000 Conn. Legis. Serv. 00-50, § 3 (codified at CONN. GEN. STAT. § 34-398 (2006)). The District of Columbia made stylistic changes. Revised Uniform Partnership Act, 4 D.C. Reg. 777 (Apr. 9, 1997) (codified at D.C. CODE § 33-112.04 (2001)). Florida changed the election language to specify the period during which an election could be made. Revised Uniform Partnership Act, 1995 Fla. Sess. Laws Serv., ch. 95-242, § 14 (repealed 2005). Idaho made stylistic changes. Uniform Partnership Act, 1998 Idaho Sess. Laws, ch. 65, § 2 (codified at IDAHO CODE ANN. § 53-3-1204 (2006)). Illinois made stylistic changes. 2002 Ill. Legis. Serv. P.A. 92-740, § 1206 (codified at 805 ILL. COMP. STAT. 206/1206 (2002)). Kansas made stylistic changes. Uniform Partnership Act, 1998 Kan. Sess. Laws, ch. 93, § 68 (codified at KAN. STAT. ANN. § 56a-1304 (2005)). Montana omits the section entirely. UNIF. P'SHIP ACT § 1206, 6 U.L.A. 269 (2001) (section entitled "Action in Adopting Jurisdictions" following Comment). Mississippi made stylistic changes. Uniform Partnership Act, 2004 Miss. Laws, ch. 458, § 1205 (codified at MISS. CODE ANN. § 79-13-1205). Nebraska made stylistic changes. Uniform Partnership Act of 1998, 1997 Neb. Laws L.B. 523, § 64 (codified at NEV. REV. STAT. § 67-464 (2006)). Oklahoma changed the language to make specific reference to limited liability partnerships and to make stylistic changes. Oklahoma Revised Uniform Partnership Act, 1997 Okla. Sess. Law Serv., ch. 399, § 63 (West) (codified at OKLA. STAT. tit. 54, § 1-1206 (2006)). South Dakota changed the language to make specific reference to limited liability partnerships. Uniform Partnership Act, 2001 S.D. Sess. Laws, ch. 249, § 1206 (codified at S.D. CODIFIED LAWS § 48-7A-1206 (2006)). Tennessee makes stylistic changes. Revised Uniform Partnership Act of 2001, 2001 Tenn. Pub. Acts, ch. 353, § 1206 (codified at TENN. CODE ANN. § 61-1-1206 (2006)). Vermont makes stylistic changes. 1998 Vt. Acts & Resolves 149, § 1 (codified at VT. STAT. ANN. tit. 11, § 3312 (2005)). The Virgin Islands made stylistic changes. Uniform Partnership and Limited Partnership Acts, 1998 V.I. Sess. Laws 6205 (codified at V.I. CODE ANN. tit. 26, § 273 (2005)). Virginia made stylistic changes. Uniform Partnership Act, 1996 Va. Legis. Serv., ch. 292, § 1 (codified at VA. CODE ANN. § 50-73.147 (2006)).

48. Arizona changed the retroactivity policy of RUPA to make RUPA retroactive at the end of the transition period only to pre-existing partnerships that filed a statement of qualification as a limited liability partnership. Revised Uniform Partnership Act, 1996 Ariz. Legis. Serv., ch. 226, § 48 (West) (incorporated into Historical and Statutory Notes, ARIZ. REV. STAT. ANN. § 29-1001 (2006)) ("Beginning January 1, 2000, title 29, chapter 5, Arizona Revised Statutes, governs all partnerships, including all general and limited partnerships that have filed a statement of qualification under section 29-1101, Arizona Revised Statutes, or an application for registration as a limited liability partnership under prior law."). Wyoming excluded pre-existing partnerships from the operation of W.S. 17-21-802 (continuation of the partnership after dissolution) and provided that "[t]his chapter does not impair the obligations of a contract existing on January 1, 1994 or affect an action or proceeding begun or right accrued before January 1, 1994." Uniform Partnership Act, 1993 Wy. Sess. Laws, ch. 194, § 1 (codified at WY. STAT. ANN. § 17-21-1003 (2005)). Only New Mexico and Kentucky eliminated retroactivity, providing that pre-existing partnerships would be governed by RUPA only if they elected to do so. Uniform Partnership Act, 1997 N.M. Laws, ch. 76, § 13 (codified at N.M. STAT. ANN. § 54-1A-1205 (West 2006)); 2006 Ky. Laws, ch. 149, § 79 (to be

of these are the two states—New Mexico and Kentucky—which adopted the "coexistence model" I suggested as RUPA was being drafted.[49] This is the better solution, and is outlined in the next section. Nevada, discussed in the fifth section, took its statute a significant step further.

III. THE BETTER SOLUTION: NO RETROACTIVE APPLICATION

As I suggested a decade ago, the better approach is not to retroactively apply RUPA, but rather to leave pre-existing partnerships under pre-RUPA partnership law.[50] This is the co-existence model, and it is sufficient to protect the interests of all the partners by not imposing upon them changes in the calculus of the deal they struck.[51]

A reasonable addition to the co-existence model would be an opt-in provision, under which the partners could agree to the application of RUPA. RUPA has a number of progressive features; it is entirely possible that partners in pre-existing partnerships would see mutual advantage in coming under the new regime.

New Mexico and Kentucky modified RUPA to provide that pre-existing partnerships will not be governed by RUPA unless they elect to come within its coverage.[52]

IV. INTERSTATE COMPETITION IS NO SOLUTION TO RETROACTIVE APPLICATION

If one accepts the argument that it is inequitable to some partners to, in effect, impose a renegotiation of their deal by retroactively applying RUPA, the fair treatment of pre-existing partnerships is to leave them under the UPA/common law regime unless they elect to come within the RUPA regime.[53] One might argue that the availability

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codified at KY. REV STAT. ANN. § 362).

49. *See* Vestal, *supra* note 1, at 285-86. I should note, just for the record, that elimination of retroactivity in Kentucky came about at the insistence of a member of the Legislature, not at my suggestion, and I wrote a letter arguing against this departure from the otherwise near-uniform adoption of RUPA section 1206(b). The original draft of RUPA as submitted to the Kentucky General Assembly, as to which I testified favorably on numerous occasions, did not modify section 1206. One cannot help but admire the legislator's intuitive good sense, however.

50. Vestal, *supra* note 1, at 285-86.

51. *See id.* at 274 ("[T]he Revised Act operates indirectly to change the calculus of the deal embodied in existing partnership relations by changing the essential background relation of the parties and the function of the partnership agreement.").

52. Uniform Partnership Act, 1997 N.M. Laws, ch. 76, § 13 (codified at N.M. STAT. ANN. § 54-1A-1205 (West 2006)); 2006 Ky. Laws, ch. 149, § 79 (to be codified at KY. REV STAT. ANN. § 362.1-1204).

53. To avoid the same problem one faces with retroactive application of RUPA—the forced re-negotiation of the partners' deal—such an election would presumably have to be either unanimous or less than unanimous by virtue of a prior agreement of the partners. This follows the

of the UPA/common law regime in other, non-RUPA-adopting jurisdictions would be sufficient to preserve fairness. In effect, one could depend upon an interstate market in partnership law to protect these partners.

Such an argument would be in error in several respects. First, thirty-seven jurisdictions have already adopted RUPA in one form or another.[54] It is quite conceivable that RUPA will eventually be adopted in all jurisdictions and the option of taking refuge in non-adopting states will be lost.[55]

Second, with respect to partnerships that do not make a limited liability partnership election, RUPA provides that "the law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners and between the partners and the partnership."[56] Thus, general partnerships cannot as easily change the applicable legal regime as can corporations.[57] Indeed, the problem

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RUPA provision for such an election during the transition period. Under section 1206(c), "a partnership voluntarily may elect, in the manner provided in its partnership agreement or by law for amending the partnership agreement" during the transition period to be governed by RUPA. REVISED UNIF. P'SHIP ACT § 1206(c), 6 U.L.A. 267 (2001). Under section 401(j), "an amendment to the partnership agreement may be undertaken only with the consent of all of the partners." UNIF. P'SHIP ACT § 401(j), 6 U.L.A. 133 (2001). Note that the provisions of section 401(j) are not subject to a limitation on agreed modification under section 103(b). *See* REVISED UNIF. P'SHIP ACT § 103(b), 6 U.L.A. 73 (2001).

54. HILLMAN, VESTAL & WEIDNER, *supra* note 6, app. B at 507-11 (showing thirty-six jurisdictions adopted RUPA, not including Kentucky's adoption of the statute, post-publication). With the addition of Kentucky, thirty-seven jurisdictions adopted RUPA in some form. *See* 2006 Ky. Laws, ch. 149, § 79 (to be codified at KY. REV STAT. ANN. § 362.1-1204).

55. The coexistence model statutes in New Mexico and Kentucky do not suffice since they limit the availability of the UPA/common law regime to partnerships which pre-dated their respective adoptions of RUPA; partnerships formed after the initial date of RUPA (RUPA § 1206(a)(1)) may not elect to be governed by the UPA. Uniform Partnership Act, 1997 N.M. Laws, ch. 76, § 13 (codified at N.M. STAT. ANN. § 54-1A-1205 (West 2006)); 2006 Ky. Laws, ch. 149, § 79 (to be codified at KY. REV STAT. ANN. § 362.1-1204). Nevada's competition model statute would be available, but is insufficient for reasons developed later in this Article. *See infra* Part V.

56. REVISED UNIF. P'SHIP ACT § 106(a), 6 U.L.A. 88 (2001). One might argue that a partnership which did not make a limited liability partnership election would be free to make a choice of law apart from the chief executive office rule of section 106(a). Indeed, the official comments to section 106 note that "[t]he choice-of-law rule provided by subsection (a) is only a default rule, and the partners may by agreement select the law of another State to govern their internal affairs, subject to generally applicable conflict of laws requirements." REVISED UNIF. P'SHIP ACT § 106 cmt., 6 U.L.A. 88 (2001). Nevertheless, such a change would require unanimity under section 401(j), as an amendment to the partnership agreement. REVISED UNIF. P'SHIP ACT § 401(j), 6 U.L.A. 133 (2001). In contrast, partnerships that make a limited liability partnership election are governed by the law of the jurisdiction in which they file. REVISED UNIF. P'SHIP ACT § 106(b), 6 U.L.A. 88 (2001).

57. *Compare* REVISED UNIF. P'SHIP ACT § 106(a), 6 U.L.A. 88 (2001), *with* MODEL BUS. CORP. ACT § 2.03 (2002) (incorporation), *and* MODEL BUS. CORP. ACT § 9.20 (2002) (domestication).

becomes even more complex when one considers the choice of law rules of the UPA/common law jurisdictions, which are quite different from the RUPA "chief executive office" rule.[58]

Third, and most importantly, *any* attempt to change the governing law by moving for choice of law purposes to a non-RUPA-adopting jurisdiction would presumably require the consent of all the partners. This leaves the partner disadvantaged by the retroactive application of RUPA in the same position of being at the mercy of the partners advantaged by the retroactive application. This appears to be true in the context of both a general partnership, which has not made the limited liability partnership election,[59] and one which has made the election.[60]

As to pre-existing partnerships in RUPA-adopting states, it is clear that interstate competition—a situation in which some states do not adopt RUPA and thus offer the alternative of the *status quo ante*—is not sufficient. If interstate competition is not sufficient, what is required is *intra*-state competition.

By adopting coexistence model statutes, New Mexico and Kentucky got this partially right. But Nevada, as it turns out, took the non-retroactivity analysis one step further with its statute. Nevada provides that any partnership, no matter when it is formed, has the right to choose between the UPA/common law partnership law regime and RUPA.[61] In so doing, Nevada has created a comprehensive, intra-state market in partnership law.

V. THE BRAVE NEW WORLD IN NEVADA

The state tourism slogan of Nevada is "Wide Open."[62] The slogan might as accurately be applied to Nevada's partnership law regime. Nevada took the coexistence model statutes of New Mexico and Kentucky and went one significant step further: Nevada adopted a

58. Allan W. Vestal, *Choice of Law and the Fiduciary Duties of Partners Under the Revised Uniform Partnership Act*, 79 IOWA L. REV. 219, 225-30 (1994).

59. The presumption is that any act sufficient to move the chief executive office of the partnership for purposes of RUPA section 106(a), especially if done for purposes of effectuating such a change, would by definition be "[a]n act outside the ordinary course of business of a partnership" and would thus require "the consent of all of the partners." REVISED UNIF. P'SHIP ACT § 401(j), 6 U.L.A. 133 (2001).

60. Again, the presumption is that filing as a limited liability partnership in another jurisdiction for purposes of RUPA section 106(b), especially if done for purposes of effectuating such a change, would by definition be "[a]n act outside the ordinary course of business of a partnership" and would thus require "the consent of all of the partners." *Id.*

61. *See* NEV. REV. STAT. ANN. § 87.025.1 (LexisNexis 2005); HILLMAN, VESTAL & WEIDNER, *supra* note 6, at 366.

62. *See* Nevada: Wide Open, http://www.travelnevada.com/facts_student.asp (last visited Oct. 12, 2006).

"competition model statute" under which every partnership can elect to be governed by either the UPA/common law regime or RUPA.[63]

This is not to say that Nevada does not differentiate between partnerships that pre-existed the effective date of RUPA and partnerships that were formed after the effective date. Because partnership is the default form of business entity, provisions must of course be made for inadvertent partnerships and partnerships that are created without the benefit of legal counsel. The Nevada enactment of RUPA thus differentiates between partnerships that pre-existed the effective date of the statute—which are by default initially governed by the Nevada UPA/common law regime[64]—and those that are formed on or after the RUPA effective date—which are by default initially governed by Nevada RUPA.[65] Like every other enactment of RUPA, Nevada RUPA allows pre-existing partnerships to opt in to RUPA.[66] Where Nevada is unique is that under Nevada RUPA, partnerships formed after the effective date of the new act may opt into the *old* UPA/common law regime.[67] By allowing any partnership to elect to be governed by either partnership law regime, Nevada has established a true intrastate market in partnership law.

While the Nevada development is potentially important, it is necessary to note what the Nevada statute does not do. First, the Nevada formulation does not provide a useful path to partners in partnerships

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63. *See* Vestal, *supra* note 1, at 287-88; HILLMAN, VESTAL & WEIDNER, *supra* note 6, at 366.

64. *See* NEV. REV. STAT. ANN. § 87.025 (LexisNexis 2005).

65. *See* NEV. REV. STAT. ANN. § 87.4314 (LexisNexis 2005). Actually, Nevada got the statutory language wrong. The provision makes the UPA-based statute automatically applicable to (a) partnerships formed before the July 1, 2006 effective date of RUPA, which do not elect to be governed by RUPA; and (b) to partnerships formed after the effective date of RUPA, which elect to be governed by the UPA-based statute. NEV. REV. STAT. ANN. § 87.025 (LexisNexis 2005). But the provision, which should make RUPA automatically applicable to (a) partnerships formed on or after the July 1, 2006 effective date of RUPA that do not elect to be governed by the UPA-based statute; and (b) partnerships formed before the effective date of RUPA that elect to be governed by RUPA, gets it exactly backwards: "The provisions of NRS 87.4301 to 87.357, inclusive [RUPA], apply to a partnership: 1) Which was formed *before* July 1, 2006 (the effective date of RUPA), . . . or 2) Which is formed *on or after* July 1, 2006, and which voluntarily elects to be governed by the provisions of NRS 87.4301 to 87.4357, inclusive [RUPA]." NEV. REV. STAT. ANN. § 87.4314 (LexisNexis 2005) (emphasis added). Of course, the provision should read the reverse: The provisions of NRS 87.4301 to 87.357, inclusive [RUPA], apply to a partnership: 1) Which was formed *on or after* July 1, 2006 (the effective date of RUPA); or 2) Which is formed *before* July 1, 2006, and which voluntarily elects to be governed by the provisions of NRS 87.4301 to 87.4357, inclusive [RUPA]. *See* UNIF. P'SHIP ACT § 1206, 6 U.L.A. 267 (2001).

66. *See* NEV. REV. STAT. ANN. § 87.4314.2 (LexisNexis 2005).

67. *See* NEV. REV. STAT. ANN. § 87.025.2 (LexisNexis 2005) ("The provisions of NRS 87.010 to 87.430 [the UPA-based statute], inclusive, apply to a partnership . . . 2. Which is formed on or after July 1, 2006 (the effective date of RUPA), and which voluntarily elects to be governed by the provisions of NRS 87.010 to 87.430, inclusive.").

governed by state law other than Nevada's when their interests are threatened by the prospect of the retroactive application of RUPA in their state.[68] Second, the Nevada provisions do not help inadvertent partnerships or partnerships formed without the benefit of reasonably sophisticated legal counsel. As a default matter, only those of such partnerships which come within the more general Nevada choice of law analysis (as to the UPA/common law regime) or which have their chief executive office in Nevada (as to the RUPA regime) will have the benefit of the Nevada formulation.[69]

What Nevada's unique retroactive application provision does is to allow partners *ex ante* to choose the UPA/common law regime without having to worry that the calculus of their deal will be undone. That is something they cannot do in jurisdictions that have already adopted RUPA, where new partnerships are governed by the new act. Nor can they do that in jurisdictions which have yet to adopt RUPA, where such partnerships will be governed by RUPA after the transition period unless the state adopts either a coexistence or competition model statute.

Are there prospective partners who would *ex ante* choose the UPA/common law regime over RUPA? Of course there are. Simply imagine a partnership of three essentially equivalent, very powerful and sophisticated parties. Assume their contributions to the firm are very substantial but come at different points in the project. Anticipate that the venture is to be of long duration and that the path it will follow is largely unpredictable. Finally, give the participants lawyers who lack the hubris to think they can anticipate all of the possible eventualities, and who value the good faith application of intelligent and dispassionate judicial oversight over mechanical predictability. In such a situation, the parties might well decide to opt into the UPA/common law regime rather than RUPA.

Now, it might be argued that, using the partner agreement primacy provisions of RUPA, the new regime could duplicate the UPA/common law regime, thus providing the partners the other benefits of RUPA—deemed partner accounts, the dissociation mechanism, filed statements, readily available suits for accounting, and the like—while maintaining

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68. This is due to, as noted earlier, the presumption that any act sufficient to move the chief executive office of the partnership for purposes of RUPA section 106(a), or the act of making a limited liability partnership election to trigger RUPA section 106(b) (especially if done for purposes of effectuating such a change), would by definition be "[a]n act outside the ordinary course of business of a partnership," and would thus require, "the consent of all of the partners." UNIF. P'SHIP ACT § 401(j), 6 U.L.A. 133 (2001).

69. *See* NEV. REV. STAT. ANN. § 87.4319 (LexisNexis 2005) (providing that "the law of the jurisdiction in which a partnership has its chief executive office governs relations among the partners").

the availability of common law analysis in the area of fiduciary duties. Is the argument well-taken? Perhaps not.

The ability of the partners to duplicate the UPA/common law regime within RUPA depends on the interpretation of RUPA section 103. The analysis begins with RUPA section 103(a): "Except as otherwise provided in subsection (b), relations among the partners and between the partners and the partnership are governed by the partnership agreement. To the extent the partnership agreement does not otherwise provide, this [Act] governs relations among the partners and between the partners and the partnership."[70]

Could the partners, in the partnership agreement, vary the essential fiduciary duty policy under RUPA—that "[t]he only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (b) and (c)"[71]—to reinstitute the pre-RUPA reliance on the common law? To do so would require a basic reworking of RUPA section 404. The question arises: Does RUPA section 103 permit such a fundamental change in the fiduciary duty rules?

RUPA section 103(b) specifies certain provisions as to which the ability of the partners to vary the statutory provision by their agreement is restricted. Both the fiduciary duty of loyalty and the fiduciary duty of care—the two components of the statutory formulation of partner fiduciary duties—appear in RUPA section 103(b). As to the duty of loyalty, the section provides that the partners may not "eliminate the duty of loyalty."[72] As to the duty of care, the section provides that the partners may not "unreasonably reduce the duty of care."[73] Since the proposed action—the expansion of the fiduciary duties of partners through a reinstitution of the common law—would preserve, not eliminate, the duty of loyalty and expand, not reduce, the duty of care, RUPA section 103(b) would seem to be satisfied.[74]

And yet, for two reasons, I hesitate to think that one should depend upon partnership agreements under RUPA to return the fiduciary duties

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70. UNIF. P'SHIP ACT § 103(a), 6 U.L.A. 73 (2001).

71. UNIF. P'SHIP ACT § 404(a), 6 U.L.A. 143 (2001).

72. UNIF. P'SHIP ACT § 103(b)(3), 6 U.L.A. 73 (2001).

73. UNIF. P'SHIP ACT § 103(b)(4), 6 U.L.A. 73 (2001).

74. It would be utterly consistent with the underlying theory of RUPA to allow partner agreements to expand the duty of loyalty and raise the duty of care. The official commentary to section 103 says as much as to the duty of care. *See* UNIF. P'SHIP ACT § 103 cmt. 6, 6 U.L.A. 75 (2001) ("The standard may, of course, be increased by agreement to one of ordinary care or an even higher standard of care."). This was in fact done in the Kentucky adoption of RUPA, which radically altered RUPA § 404(c) and adopted a formulation akin to a standard of ordinary care. *See* 2006 Ky. Laws, ch. 149, § 79 (to be codified at KY. REV STAT. ANN. § 362).

of the partners *inter se* to the pre-RUPA state. First, I would be apprehensive that a judge might balk at enforcing such a fundamental revision of the fiduciary duty provisions of RUPA. Second, I would be hesitant to rely upon the common law process to interpret the fiduciary duties of the partners in a situation where the robust development of the common law had been brought to a general halt by the passage of RUPA. For those reasons, I would think the partners would be better off relying upon the Nevada statutory formulation, rather than partner agreements under RUPA section 103, to have their partnership fiduciary duties governed by the common law.

The Nevada retroactivity provisions supply prospective partners with the ability to adopt and maintain a UPA/common law formulation of fiduciary duties, rather than being forced to look to the RUPA formulation.[75] The Nevada enactment represents a significant advance in partnership law over what is provided in RUPA.

VI. CONCLUSION: TO THOSE STATES THAT HAVE NOT YET ACTED

Nevada may be said to have led the way with its innovative solution to the retroactivity question. Could other states, which have yet to adopt RUPA, profitably follow Nevada's lead? Yes, for two reasons.

The first reason other states should emulate Nevada on the question of RUPA retroactivity is that such a system is fundamentally fairer to partners in pre-existing partnerships than is the RUPA retroactivity regime. By eliminating the threat of retroactive application, the Nevada competition model statute—and the coexistence model statutes of New Mexico and Kentucky—preserve the calculus of the original deal and allow the partners to negotiate as to whether they will make a transition to RUPA from positions neither enhanced nor diminished by the legislature.

The second reason other states should emulate Nevada on the question of RUPA retroactivity is entrepreneurial. By providing newly forming partnerships a way in which to come under the UPA/common law regime, and a reasonably secure prospect of remaining there, the Nevada competition model statute—but not the coexistence model statutes of New Mexico and Kentucky—serves an otherwise unmet market.

Nevada has led the way. One can but hope that the jurisdictions that adopt RUPA in years to come will live up to Nevada's tourism slogan "Wide Open," and not the marketing slogan of Las Vegas, "what

75. *See supra* note 67 and accompanying text.

happens here, stays here."[76]

76. Newt Briggs, *Slogan's Run: Jeff Candido and the Five Words that Revitalized Las Vegas*, LAS VEGAS MERCURY, Apr. 8, 2004, *available at* http://www.lasvegasmercury.com/2004/MERC-Apr-08-Thu-2004/23579319.html.