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Corporations and Partnerships in Virginia

Editor: Heman A. Marshall, III



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Corporations and Partnerships in Virginia

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VIRGINIA LAWYERS PRACTICE HANDBOOK

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IN VIRGINIA

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Volumes I & II

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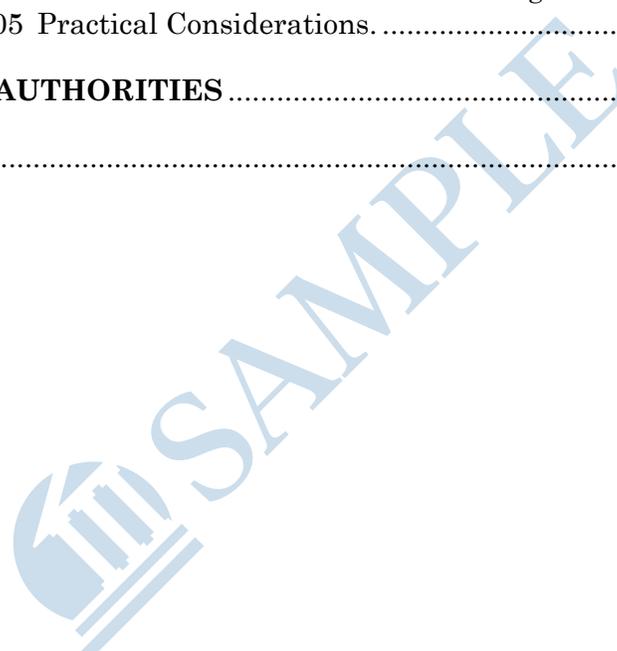
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CHAPTER 13

NATURE OF PARTNERSHIP AND PARTNERSHIP RELATIONS

13.1 NATURE OF A PARTNERSHIP

The fundamental rules dealing with the nature of a partnership are found in Article 2 of the Virginia Revised Uniform Partnership Act (VRUPA), codified as sections 50-73.87 through 50-73.90 of the Virginia Code.

13.101 The Partnership as an Entity. VRUPA expressly provides that a partnership is an entity distinct from its partners.¹ The Virginia Uniform Partnership Act (VUPA), on the other hand, reflected both the “entity” and the “aggregate” theories of partnerships. For example, VUPA’s concept of partners’ co-ownership of partnership property through “tenancy in partnership” reflected an “aggregate” theory.² VRUPA, in addition to containing an express statement that a partnership is a distinct entity, has been drafted to eliminate those provisions of VUPA that reflected an aggregate approach.

13.102 Formation of a Partnership.

A. Generally. Under VRUPA, as under VUPA, a partnership is formed if the factual elements specified in the statute are present. It is not necessary that the persons involved specifically intend to form a partnership. It is sufficient that they intend to create or bring about the factual elements of a partnership.

B. Elements of a Partnership. Section 50-73.88(A) of the Virginia Code is a cornerstone of VRUPA. It provides that “the association of two or more persons to carry on as co-owners a business for profit forms a partnership.” This is true whether or not the persons intend to form a partnership. But an association formed under a statute other than VRUPA, VUPA, or a comparable statute of another jurisdiction is not a partnership. This provision clarifies that business associations such as corporations, limited

¹ Va. Code § 50-73.87.

² See Va. Code § 50-25 (repealed effective Jan. 1, 2000).

partnerships, and limited liability companies formed under other statutes are not partnerships.

In VUPA, the elements of a partnership were defined in former section 50-6 of the Virginia Code. In VRUPA, the elements have been recast into an operative rule of law, but no substantive change in law is intended by this new approach.³

C. Specific Rules. Like VUPA, VRUPA makes no attempt to determine whether a partnership is formed under particular fact patterns but sets forth certain specific rules designed to assist in determining whether a partnership exists.

A person who receives a share of profits of a business is presumed to be a partner in the business.⁴ The presumption, however, does not apply if the profits are received in payment of a debt, for services as an independent contractor or employee, as rent, as an annuity or other retirement benefit, as interest on a loan, or for the sale of the goodwill of a business or property.⁵

VRUPA also restates the rule that joint tenancy, tenancy in common, tenancy by the entirety, or other joint ownership does not by itself establish a partnership, even if the co-owners share profits made by the use of the property.⁶ Furthermore, the sharing of gross returns does not by itself establish a partnership even if the persons sharing the gross returns have a common right or interest in the property generating the returns.⁷

13.103 Partnership Property.

A. Generally. Sections 50-73.89 and 50-73.90 of the Virginia Code set forth rules for determining whether property associated with a partnership or its business is property of the partnership or of the partners individually. Section 50-73.89 provides that “[p]roperty acquired by a partnership is property of the partnership and not of the partners individually.”

³ RUPA § 202 cmt. 1.

⁴ See also section 50-73.88(D) of the Virginia Code, which provides that a person may be admitted as a partner to a general partnership and receive a partnership interest therein without making, or being required to make, a contribution to the partnership, and a person may be admitted as a partner without acquiring a transferable interest in the partnership.

⁵ Va. Code § 50-73.88(C)(3).

⁶ Va. Code § 50-73.88(C)(1).

⁷ Va. Code § 50-73.88(C)(2).

Section 50-73.90 provides guidance concerning when property is acquired by a partnership. Section 50-73.90(A) provides that property is partnership property if it is acquired either in the name of the partnership or in the name of one or more partners where the transferring instrument indicates either the person's capacity as a partner or the existence of a partnership but does not indicate the name of the partnership. Section 50-73.90(B) goes on to state that property is acquired in the name of a partnership (within the meaning of section 50-73.90(A)) by a transfer to the partnership in its name or to one or more partners in their capacity as partners if the name of the partnership is stated in the transferring instrument.

B. Presumptions. Subsections (C) and (D) of section 50-73.90 set forth two presumptions that apply in certain cases.

First, property is presumed to be partnership property if it is purchased with partnership assets, even if it is not acquired in the name of the partnership or of one or more partners with an indication of partner capacity or partnership existence.⁸ Second, property acquired without use of partnership assets and without an indication in the transferring instrument of the transferee's capacity as a partner or of the existence of a partnership is presumed to be separate property, even if it is used for partnership purposes.⁹

It is important to note that subsections (C) and (D) of section 50-73.90 set forth rebuttable presumptions only, while subsections (A) and (B) of section 50-73.90 set forth per se rules.

13.2 RELATIONS OF PARTNERS TO THIRD PARTIES

The basic rules governing the relationship between partners and their partnership, on the one hand, and persons dealing with the partnership, on the other hand, are found in Article 3 of VRUPA, codified as sections 50-73.91 through 50-73.98 of the Virginia Code.

13.201 Agency of a Partner.

A. Generally. VRUPA generally continues the rules established in VUPA pertaining to a partner's power to bind the partnership and the liability of a partnership for the actionable conduct of a partner.

⁸ Va. Code § 50-73.90(C).

⁹ Va. Code § 50-73.90(D).

B. Power to Bind the Partnership. Section 50-73.91 states that, subject to the effect of a statement of partnership authority,¹⁰ an act of a partner “for apparently carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership” binds the partnership, unless the partner had no authority to act for the partnership in the matter, *and* the person with whom the partner dealt “knew or had received a notification” that the partner lacked authority. The meaning of “knew or had received a notification” is specified in section 50-73.80.

Subject to the effect of a statement of partnership authority, an act of a partner that is *not* “apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership binds the partnership only if the act was authorized by the other partners.”¹¹ Under VUPA, section 50-9(3) of the Virginia Code listed five acts that required the unanimous consent of the partners before the partnership was bound. VRUPA omits this list and leaves it to the courts to decide which acts are not apparently for carrying on in the ordinary course the partnership business or business of the kind carried on by the partnership.

C. Actionable Conduct. Section 50-73.95 indicates when a partnership is liable for the actionable conduct of a partner. Under section 50-73.95(A), a partnership is liable to a person (which could include a partner) as a result of actionable conduct of a partner “acting in the ordinary course of business of the partnership” or with actual authority of the partnership. VUPA referred to liability to a person “not being a partner in the partnership.”¹² Deletion of these words from VRUPA permits a partner to sue the partnership during the term of the partnership for actionable conduct of a fellow partner, rather than being limited to the remedy of an accounting following dissolution.¹³

Section 50-73.95(B) provides that if a partner receives or causes the partnership to receive money or property in the course of the partnership’s business or while acting with actual authority of the partnership, and the money or property is misapplied by the partner, the partnership is liable for the loss.

¹⁰ See *infra* ¶ 13.204.

¹¹ Va. Code § 50-73.91(2).

¹² Va. Code § 50-13 (repealed effective Jan. 1, 2000).

¹³ RUPA § 305 cmt.; see *infra* ¶ 13.305.

13.202 Nature of a Partner's Liability.

A. Generally. VRUPA clarifies several important rules related to a partner's liability for partnership debts and obligations. Except in the context of a limited liability partnership (LLP), all partners are liable "jointly and severally" for all obligations of the partnership.¹⁴ Under VUPA,¹⁵ partners' liability for torts was joint and several, while their liability for contracts was joint but not several.

Notwithstanding the joint and several liability established under section 50-73.96(A), a judgment creditor of the partnership generally must first exhaust partnership assets before enforcing a judgment against the separate assets of a partner.¹⁶

B. Incoming Partners. Section 50-73.96(B) continues the VUPA rule regarding the liability of a person admitted as a partner into an existing partnership. An incoming partner is not personally liable for any partnership obligation incurred before his or her admission as a partner. In effect, only the incoming partner's investment in the partnership is at risk for the satisfaction of partnership obligations incurred before his or her admission.¹⁷

C. Limited Liability Partnerships. The rules regarding liability of partners for partnership obligations are, of course, substantially different for an LLP. In an LLP, a partner is not liable (whether by way of indemnification, contribution, assessment, or otherwise) for debts, obligations, or liabilities of the partnership that are incurred, created, or assumed while the partnership is an LLP.¹⁸ Furthermore, VRUPA specifically states that a partner in an LLP is not a proper party to a proceeding to recover damages from or collect on liabilities or obligations of the partnership.¹⁹ For a more detailed discussion of LLPs, see Chapter 16 of this book.

D. Purported Partners. Section 50-73.98 generally continues and clarifies the rules in VUPA pertaining to "partnership by estoppel" or

¹⁴ Va. Code § 50-73.96(A).

¹⁵ Va. Code § 50-15 (repealed effective Jan. 1, 2000).

¹⁶ See Va. Code § 50-73.97(D); *infra* ¶ 13.206(C).

¹⁷ RUPA § 306 cmt. 2.

¹⁸ Va. Code § 50-73.96(C).

¹⁹ Va. Code § 50-73.96(D).

liability of “purported partners.”²⁰ The section provides the exclusive basis for imposing liability as a partner on a person who is not a partner in fact.²¹

Under subsections 50-73.98(C) and (D), a person is *not* liable as a partner merely because he or she is named by another in a statement of partnership authority, and a person does not continue to be liable as a partner merely because of a failure to file a statement of dissociation or to amend a statement of partnership authority to reflect the partner’s dissociation.

13.203 Transfer of Partnership Property.

A. Generally. Section 50-73.92 of the Virginia Code sets forth three basic rules governing how titled real and personal partnership property may be transferred. First, subject to the effect of a statement of partnership authority,²² partnership property held in the name of the partnership may be transferred by an instrument executed by a partner in the partnership name.²³ Second, if partnership property is held in the name of one or more partners with an indication in the instrument transferring the property to the partners of their capacity as partners or of the existence of a partnership, the property may be transferred by an instrument executed by the persons in whose name the property is held.²⁴ Third, partnership property held in the name of one or more persons (other than the partnership) without an indication in the instrument transferring the property to the persons in the capacity of either as partners or of the existence of a partnership may be transferred by an instrument executed by the persons in whose name the property is held.²⁵

B. “Holder in Due Course” Concepts. Section 50-73.92(B) limits the ability of a partnership to recover transferred partnership property. The limitations are based on principles analogous to the principles of a “holder in due course.”

The partnership may recover property from a transferee only if the partnership proves that the execution of the transfer instrument did not bind the partnership under section 50-73.91, *and* (i) as to a subsequent transferee who gave value for property transferred under subsection (A)(1) or (A)(2) of

²⁰ Va. Code § 50-16 (repealed effective Jan. 1, 2000).

²¹ RUPA § 308 cmt.

²² *See infra* ¶ 13.204.

²³ Va. Code § 50-73.92(A)(1).

²⁴ Va. Code § 50-73.92(A)(2).

²⁵ Va. Code § 50-73.92(A)(3).