"They've Created a Lamb with Mandibles of Death": Secrecy, Disclosnre, and Fiduciary Duties in Limited Liability Firms

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I. INTRODUCTION

The law of unincorporated business organizations has undergone fundamental change during the last decade. Ten years ago, firms could be organized as general partnerships, limited partnerships, or corporations. Now, at the end of the decade, traditional general partnership law has been reworked,[1] general partnerships have

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1. The National Conference of Commissioners on Uniform State Laws ("NCCUSL") first

been mutated into limited liability partnerships ("LLP")[2] and limited partnerships into limited liability limited partnerships ("LLLP"),[3] and a new form, the limited liability company ("LLC"), has been created.[4] Responding to these changes and creations,

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promulgated the Revised Uniform Partnership Act ("RUPA") in 1994, and pronounced it ready for adoption by the states. REVISED UNIF. P'SHIP ACT (amended 1997), 6 U.L.A. 35-152 (Supp. 2000). A majority of the states have adopted some version of the RUPA, including section 403, which contains partner disclosure obligations and information rights, and section 404, which sets forth general standards for partner conduct. *See id.*, 6 U.L.A. 1 (providing a table listing states that have adopted the RUPA); ROBERT W. HILLMAN, ALLAN W. VESTAL & DONALD J. WEIDNER, THE REVISED UNIFORM PARTNERSHIP ACT (2000). For discussions of entity proliferation, 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 (1997) (describing entity forms under Pennsylvania law); 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) (describing entity forms under Colorado law).

2. Texas enacted LLP legislation in 1992. TEX. REV. CIV. STAT. ANN. art. 1528n (2000). *See* Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. COLO. L. REV. 1065, 1067 (1995). Since the Texas enactment, all fifty states have modified their partnership statutes to permit general partnerships to register as LLPs, thereby affording limited liability protection to partners. For a list of state LLP statutes, see J. WILLIAM CALLISON, PARTNERSHIP LAW AND PRACTICE: GENERAL AND LIMITED PARTNERSHIPS § 30A.01, at 30A-2 n.3 (1992). The LLP statutes afford different levels of liability protection, although the trend is toward "full-shield" protection. As with partnerships and LLCs, there is movement toward uniformity in LLP provisions, and in 1996 the NCCUSL passed amendments to the RUPA creating an LLP act. REVISED UNIF. P'SHIP ACT § 306(c), 6 U.L.A. 66; *see, e.g.*, HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 361-62. Although LLP statutes reverse the historic principle that general partners are jointly, or jointly and severally, liable for partnership debts, obligations, and liabilities, because LLPs are partnerships the LLP and the partners remain subject to partnership disclosure and fiduciary duty rules. The default rule for general partnership remains partner liability. *See, e.g.*, CALLISON, *supra*, § 30A.01, at 30A-2 n.3 (listing states with LLP legislation).

3. Several states permit limited partnerships to register as LLLPs, *see* CALLISON, *supra* note 2, § 30A.05, at 30A-10 (indicating states with LLLP legislation), thereby preventing general partners in limited partnerships from having joint and several liability for limited partnership debts and obligations. Although the default rule remains general partner liability, this is under discussion by the NCCUSL as part of its limited partnership law drafting project. *See* Larry E. Ribstein, *Limited Partnerships Revisited*, 67 U. CIN. L. REV. 953, 970-72 (1999).

4. In 1988, the Internal Revenue Service announced that LLCs can combine limited liability protection for all owners with favorable partnership tax status. Rev. Rul. 88-76, 1988-2 C.B. 360. Prior to Revenue Ruling 88-76, the Internal Revenue Service posited that some owner needed personal liability for the entity's debts and obligations before partnership tax classification could be obtained. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: A STATE-BY-STATE GUIDE TO LAW AND PRACTICE § 12.11 (1994) [hereinafter CALLISON & SULLIVAN, STATE-BY-STATE]. After Revenue Ruling 88-76, the LLC form became popular, and by 1996 all fifty states and the District of Columbia had enacted LLC legislation. *See* J. WILLIAM CALLISON & MAUREEN A. SULLIVAN, LIMITED LIABILITY COMPANIES: STATE STATUTES AND FEDERAL MATERIALS (1999) [hereinafter CALLISON & SULLIVAN, LIMITED LIABILITY COMPANIES] (containing all state LLC statutes). Many LLC

work has commenced on fundamental revisions to limited partnership law.[5] Finally, the process of combining the separate business organization forms into a single unified form has begun.[6]

Measured merely by popular acceptance, these reform efforts have been successful. All fifty states have adopted the limited liability company and limited liability

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statutes have been amended at least once since enactment, typically to track more lenient federal income tax classification rules and the Internal Revenue Service's recognition that single-member LLCs can be disregarded for federal income tax purposes. *See* Treas. Reg. § 301.7701-2 (1998). Some LLC statutes are amended frequently. For example, the Delaware LLC act was enacted in 1993 and amended in 1994, 1995, 1996, 1997, 1998, and 1999; the Virginia LLC act was enacted in 1991 and amended in 1992, 1993, 1994, 1995, 1996, 1997, 1998, and 1999; and the Colorado LLC act was enacted in 1990 and amended in 1994 and 1997. The state LLC statutes contain various formulations of information disclosure rules and member and manager fiduciary duties. *See infra* Part II.B. In August 1994, the NCCUSL promulgated a Uniform Limited Liability Company Act ("ULLCA"), UNIF. LTD. LIAB. CO. ACT, 6A U.L.A. 429 (1995), containing its own information disclosure and fiduciary duty rules. *Id.* §§ 408-09, 6A U.L.A. 462. Several states, including Alabama, Hawaii, Illinois, Montana, Oregon, South Carolina, South Dakota, Vermont, and West Virginia, have enacted ULLCA-based LLC statutes, either initially or by replacing their original LLC statutes with the ULLCA, and more may do so in the future. The ULLCA was introduced after most states had already enacted LLC legislation, and at this time has had relatively little effect on preexisting state LLC statutes. In this regard, it can be compared with the RUPA, which has been enacted in a majority of the states.

5. In 1995 the need to revise the Revised Uniform Limited Partnership Act ("RULPA") because of changes in the underlying partnership law was suggested. Allan W. Vestal, *A Comprehensive Uniform Limited Partnership Act? The Time Has Come*, 28 U.C. DAVIS L. REV. 1195 (1995). The NCCUSL has initiated the process. REVISED UNIF. LTD. P'SHIP ACT (Proposed Revisions Draft Mar. 2000), http://www.law.upenn.edu/bll/ulc/ulc_frame.htm ("Re-RULPA"). There have been several drafts of the Re-RULPA. The NCCUSL has ordered the drafters to dc-link the RULPA from the general partnership act. Vestal, *supra*, at 1029.

6. A "universal business entity" may be the newest business organization form on the horizon. The Texas legislature considered a universal business entity bill in 1999, H.B. 2681, 1999 Leg., Reg. Sess. (Tex. 1999), http://www.capitol.state.tx.us/tlo/76r/billtext/HB02681I.HTM, and will likely enact a business entity statute in 2001, *see* H.B. 327, 2001 Leg., Reg. Sess. (Tex. 2001), http://www.capitol.state.tx.us/tlo/77r/billtext/HB00327I.HTM. Colorado and other states have been experimenting with statutes homogenizing certain shared business organization characteristics. *See, e.g.*, COLO. REV. STAT. §§ 7-90-102 to -201 (1999). Proponents of the universal business entity entertain drafting a "one-entity-fits-all" statute that would allow complete statutory flexibility without artificial distinctions among corporations, general partnerships, LLPs, limited partnerships, LLLPs, and LLCs. *See, e.g.*, Thomas F. Blackwell, *The Revolution Is Here: The Promise of a Unified Business Organization Law*, 24 IOWA J. CORP. L. 333 (1999); Keatinge, *supra* note 1; Robert R. Keatinge, *Universal Business Organization Legislation: Will It Happen? Why and When*, 23 DEL. J. CORP. L. 29 (1998); John H. Matheson & Brent A. Olsen, *A Call for a Unified Business Organization Law*, 65 GEO. WASH. L. REV. 1 (1996); 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). It is likely that any statutes enacted as a result of this process will incorporate disclosure and fiduciary duty rules and that the fundamental principles of such formulations will derive from the existing corporate and partnership constructs.

partnership innovations, the Internal Revenue Service has abandoned the field by conceding favorable partnership tax treatment,[7] and practitioners are using the new forms without any apparent hesitation. However, there remains an undercurrent of dissatisfaction with these reforms. Part of this dissatisfaction stems from a perception that the reform process itself was flawed as drafters freely borrowed from existing business organization and commercial statutes without focusing on the theoretical underpinnings of the various forms.[8] This Article examines the process through which various corporate and partnership features were combined to create new unincorporated business organization forms. The discussion focuses on two aspects shared by all business organizations, namely the information access rights and information use restrictions of owners and managers, and on one business organization form, the limited liability company.

This Article commences by examining the information access rights and use restrictions of participants under the ULLCA. It is our position that these ULLCA access rights and use restrictions are seriously and facially flawed, and that the flaws are the result of the drafters combining provisions from dissimilar business organization forms without an adequate underlying theory of the new LLC form. We then consider the history of state adoptions of non-ULLCA-based LLC statutes to determine whether any trend can be discerned on the question of information access rights and use restrictions. It is our position that the state LLC statutes are uneven on these points, and that they do not as a group evidence an adequate underlying theory of the LLC form. This absence of an agreed-upon theory, the want of a clearly

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7. Treas. Reg. § 301.7701-2 (1986); *see* J. William Callison, *New Entity Classification Regulations*, COLO. LAW., April 1997, at 3.

8. Professors Dale Oesterle and Wayne Gazur have noted the lack of scholarly and popular debate about LLCs:

> The LLC was propelled through legislatures by a force of accountants, tax lawyers, and business development lobbies that met little organized opposition. Although sharing both partnership and corporate characteristics, the LLC was a new entity. The newness appeared to be part of the allure, and there was little scholarly debate over the desirable contours of the legislation in advance of enactment.

Oesterle & Gazur, *supra* note 6, at 105; *see also* Larry E. Ribstein, *The Emergence of the Limited Liability Company*, 51 BUS. LAW. 1 (1995) (noting the rapid emergence of the LLC form). The Colorado experience was perhaps typical. The Colorado LLC act was drafted by a group of tax lawyers in late 1989 and enacted in 1990. *See* Colo. Rev. Stat. §§ 7-80-101, -1101 (West 1999). The drafters recognized the client benefits of combining limited liability protection and partnership tax treatment, knew that there were unresolved issues and that further "clean-up" legislation would be required, and made an appropriate political decision to push ahead with early enactment. Even the raison d'etre of the LLC form, limited liability protection, received little scholarly attention while the states were enacting LLC legislation. It was only after most states had enacted LLC legislation that any scholarly analysis of limited liability emerged. *See* William W. Bratton & Joseph A. McCahery, *An Inquiry into the Efficiency of the Limited Liability Company: Of Theory of the Firm and Regulatory Competition*, 54 WASH. & LEE L. REV. 629 (1997); Robert W. Hamilton & Larry E. Ribstein, *Limited Liability and the Real World*, 54 WASH. & LEE L. REV. 687 (1997); Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—the Trap of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717 (1997).

articulated and generally supported purpose, is a failure common to the business organization reforms of the last decade.

Having suggested the absence of an underlying theory as one cause of the flaws in the information access rights and use restrictions under the ULLCA, we turn to a discussion of two competing models for structuring the rights and obligations of participants in unincorporated business organizations. The first, more traditional, model is a community model. The second model is individualistic and is based on party autonomy. We explore both models, place them in the context of the historical development of unincorporated firms, and conclude that a third model, which we term a structural model and which synthesizes the autonomy and community models, is the more appropriate basis for analyzing the LLC information rights and use restrictions. Finally, we suggest revisions to the ULLCA which would, if adopted, conform its information disclosure and use restrictions to the appropriate structural model.

II. LLC MEMBERS' FIDUCIARY DUTIES AND INFORMATION RIGHTS UNDER THE ULLCA AND STATE LLC STATUTES

It cannot be denied that the LLC form has been well accepted by lawyers and clients. The combination of direct control and limited liability presents clear advantages over either the corporate or the partnership form for a wide range of business firms.[9] However, it would be a mistake to treat the popularity of the LLC form as evidence that an underlying theory of the LLC has been well articulated or generally accepted. It would also be a mistake to assume that the LLC form's popularity means that there are not significant variations in the LLC statutes and unresolved policy questions concerning the form's structure.

One example of the remaining unresolved issues arising from the LLC form is the question of what should be the information rights, disclosure obligations, and general fiduciary obligations of LLC participants. One answer is found in the ULLCA; other answers are found in the various state LLC statutes. As we shall see, the former is flawed and the latter do not present a clear and coherent picture.

A. Fiduciary Duties and Member Information Rights Under the ULLCA

1. Fiduciary Duties Under the ULLCA

LLC management structures come in two varieties: member management and manager management.[10] In the member-managed LLC form, the firm's control attributes in the form of operational management and agency authority are retained by the members.[11] In the manager-managed LLC form, control attributes generally are

9. *See* CALLISON & SULLIVAN, STATE-BY-STATE, *supra* note 4, § 2.23 (discussing LLC uses).

10. UNIF. LTD. LIAB. CO. ACT § 101(11)-(12), 6A U.L.A. 432 (1995) (defining "manager-managed company" and "member-managed company").

11. *Id.* § 404(a), 6A U.L.A. 457.

allocated to one or more managers, who may be, but need not be, members.[12]

Under the ULLCA, the fiduciary duties of members in member-managed LLCs and of managers in manager-managed LLCs parallel those of general partners under the RUPA. These participants owe the entity and the other members fiduciary duties of loyalty[13] and care,[14] and are bound in the exercise of their duties to a nonfiduciary obligation of good faith and fair dealing.[15]

On the other hand, under the ULLCA the fiduciary duties of nonmanager members in manager-managed LLCs differ from anything found in the RUPA. The fiduciary duties of these members are simple: they have none. The ULLCA provides that "[i]n a manager-managed [limited liability company] . . . a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member."[16] Nonmanager members in manager-managed LLCs do apparently have a good faith and fair dealing obligation, but only with respect to rights and not duties. "A member shall discharge the duties to a member-managed company and its other members under this [Act] or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing."[17]

As under the RUPA, the ULLCA does not define the nonfiduciary obligation of good faith and fair dealing.[18] Presumably the drafters of the ULLCA joined with the drafters of the RUPA in inviting the courts to develop the meaning of good faith and fair dealing by case decisions.[19] Further, as with the RUPA the good-faith and fair-dealing obligation is grounded in contract, and is not characterized as a fiduciary duty arising from the parties' special relationship.[20] This contractual formulation can be

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12. *Id.* § 404(b).

13. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 201. *Compare* UNIF. LTD. LIAB. CO. ACT § 409(a)-(b), 6A U.L.A. 464, *with* REVISED UNIF. P'SHIP ACT § 404(a)-(b) (amended 1997), 6 U.L.A. 79 (Supp. 2000).

14. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 201. *Compare* UNIF. LTD. LIAB. CO. ACT § 409(a), (c), 6A U.L.A. 464, *with* REVISED UNIF. P'SHIP ACT § 404(a), (c), 6 U.L.A. 58.

15. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 203-04. *Compare* UNIF. LTD. LIAB. CO. ACT § 409(d), 6A U.L.A. 464, *with* REVISED UNIF. P'SHIP ACT § 404(d), 6 U.L.A. 58.

16. UNIF. LTD. LIAB. CO. ACT § 409(h), 6A U.L.A. 464.

17. *Id.* § 409(d) (alteration in original). Although ULLCA section 409(d) speaks to a good-faith and fair-dealing obligation with respect to duties as well as rights, this appears to be trumped by the ULLCA section 409(h)(1) statement that nonmanager members owe no fiduciary duties to the company or the other members.

18. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 203-04. *Compare* UNIF. LTD. LIAB. CO. ACT § 101, 6A U.L.A. 431 (no definition of good faith and fair dealing), *with* REVISED UNIF. P'SHIP ACT § 101, 6 U.L.A. 10 (no definition of good faith and fair dealing).

19. REVISED UNIF. P'SHIP ACT § 404 cmt. 4, 6 U.L.A. 61 ("The meaning of 'good faith and fair dealing' is not firmly fixed under present law . . . . It was decided to leave the terms undefined in the Act and allow the courts to develop their meaning based on the experience of real cases."); HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 203-04; *see* J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, the Uniform Limited Liability Company Act and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 141-53 (1997) (discussing numerous possible variations on good-faith obligation); Allan W. Vestal, *Law Partner Expulsions*, 55 WASH. & LEE L. REV. 1083, 1117-34 (discussing good-faith and fair-dealing obligation in partner-expulsion context).

20. REVISED UNIF. P'SHIP ACT § 404(d) cmt. 4, 6 U.L.A. 60-61; HILLMAN, VESTAL &

seen to eviscerate a traditional good-faith fiduciary duty.[21] In addition, as with the RUPA provision from which ULLCA section 409 is grafted,[22] the formulation of fiduciary duties is intended to be statutory and exclusive, and to displace any common law fiduciary obligations.[23]

2. Member Information Rights Under the ULLCA

The ULLCA drafters also looked to the RUPA for their starting point on member information rights.[24] The information rights of LLC members divide into three parts. First, members have an access right to inspect and copy any records maintained by the LLC.[25] This right is not conditioned on the member's purpose or motive.[26] Second, members have a right, without demand, to information from the LLC concerning the LLC's business or affairs reasonably required for the proper exercise of the member's rights and performance of the member's duties.[27] Third, members have a right to demand additional information from the LLC concerning the LLC's business or affairs, except to the extent the information demanded is unreasonable or

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WEIDNER, *supra* note 1, at 203.

21. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 203; Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 546-49 (1993).

22. *Compare* UNIF. LTD. LIAB. CO. ACT § 409, 6A U.L.A. 464, *with* REVISED UNIF. P'SHIP ACT § 404, 6 U.L.A. 58.

23. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 200-01; *see* UNIF. LTD. LIAB. CO. ACT § 409 cmt., 6A U.L.A. 465 ("Under subsections (a), (c) and (h), members and managers . . . owe to the company and to the other members and managers only the fiduciary duties of loyalty and care set forth in subsections (h) and (c) and the obligation of good faith and fair dealing set forth in subsection (d).").

24. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 180-93. *Compare* UNIF. LTD. LIAB. CO. ACT § 408, 6A U.L.A. 462, *with* REVISED UNIF. P'SHIP ACT § 403, 6 U.L.A. 56.

25. UNIF. LTD. LIAB. CO. ACT § 408(a), 6A U.L.A. 462. As with the RUPA, the ULLCA does not require the LLC to maintain records. The official commentary states:

> Recognizing the informality of many limited liability companies, subsection (a) does not require a company to maintain any records. In general, a company should maintain records necessary to enable members to determine their share of profits and losses and their rights on dissociation. If inadequate records are maintained to determine those and other critical rights, a member may maintain an action for an accounting under Section 410(a). Normally, a company will maintain at least records required by state or federal authorities regarding tax and other filings.

Id. § 408 cmt., 6A U.L.A. 463.

26. The official commentary states:

> The right to inspect and copy records maintained is not conditioned on a member or former member's purpose or motive. However, an abuse of the access and copy right may create a remedy in favor of the other members as a violation of the requesting member or former member's obligation of good faith and fair dealing. See Section 409(d).

Id.

27. *Id.* § 408(b)(1).

otherwise improper under the circumstances.[28] *Unlike member fiduciary obligations, the ULLCA does not differentiate between members who participate in management and members who do not, and all members have the same broad rights to information.*[29] As with the RUPA,[30] it is likely that the drafters would give the LLC the burden of proving a member's demand unreasonable or improper—thereby expanding prima facie member information rights. However, unlike the RUPA, only the LLC, and not other members, is required to provide information concerning the LLC's business and affairs. Thus, if a member has information which is relevant to the conduct of the LLC's business there is no express disclosure requirement.

It should be noted that the ULLCA information provisions arguably correct several problems in the RUPA. For example, the RUPA gives partners access to the partnership's "books and records,"[31] but does not define the term.[32] The ULLCA, in contrast, grants members access to its "records,"[33] and defines the term broadly to include all recorded information.[34] Further, the RUPA limits partnership-agreement modifications to the book and record access requirements, but permits complete modification of the information disclosure obligation.[35] The ULLCA rectifies this discrepancy by restricting operating agreement modifications to both the record access provision and the information disclosure provisions.[36] It is ironic that each of these revisions expand and solidify the information rights of nonmanager members in manager-managed LLCs, while the ULLCA simultaneously provides that such members have no fiduciary duties to the LLC or the other members.

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28. *Id.* § 408(b)(2). In addition, members have a right to make demand to the firm and receive, at the firm's expense, a copy of any written operating agreement. *Id.* § 408(c). This has no parallel in the RUPA. *Cf.* REVISED UNIF. P'SHIP ACT § 403(b), 6 U.L.A. 56 (partnership may charge for documents supplied).

29. *See* UNIF. LTD. LIAB. CO. ACT § 408, 6A U.L.A. 462-63.

30. REVISED UNIF. P'SHIP ACT § 403 cmt. 3, 6 U.L.A. 57.

31. REVISED UNIF. P'SHIP ACT § 403, 6 U.L.A. 56; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 181-83.

32. REVISED UNIF. P'SHIP ACT § 101, 6 U.L.A. 10.

33. UNIF. LTD. LIAB. CO. ACT § 408(a), 6A U.L.A. 462.

34. *Id.* § 101(16), 6A U.L.A. 432 (defining "record" as information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form). The commentary to ULLCA section 408 further states:

> The obligation to furnish access includes the obligation to insure that all records, if any, are accessible in intelligible form. For example, a company that switches computer systems has an obligation either to convert the records from the old system or retain at least one computer capable of accessing the records from the old system.

Id. § 408 cmt., 6A U.L.A. 463.

35. REVISED UNIF. P'SHIP ACT § 103(b)(2), 6 U.L.A. 16 ("The partnership agreement may not . . . unreasonably restrict the right of access to books and records under Section 403(b). . . ."); HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 186-87, 191-92.

36. UNIF. LTD. LIAB. CO. ACT § 103(b)(1), 6A U.L.A. 434 ("The operating agreement may not . . . unreasonably restrict a right to information or access to records under Section 408 . . .").

3. A Lamb with Mandibles of Death

By giving nonmanager members of manager-managed LLCs the gossamer fiduciary obligations of noncontrolling corporate shareholders and the extraordinarily broad information rights of general partners in a structure which eviscerates the traditional fiduciary duty of good faith, the ULLCA drafters created a very odd beast. They borrowed from the RUPA without adequately considering the ways in which manager-managed LLCs are—or should be considered—structurally different from general partnerships. As a result, ULLCA adopted the RUPA concepts in two respects that are individually plausible but which, in combination, create an unexpected and potentially dangerous result.[37] In essence, the ULLCA gives members a broad right to receive information but does not prevent them from using that information for their personal benefit, potentially in competition with the LLC or to usurp opportunities which otherwise could be pursued by the LLC. This anomaly is caused by the ULLCA drafters' importation of RUPA concepts, together with many of the problems and ambiguities created by those concepts, without attending to the management and other distinctions between partnerships and LLCs. The ULLCA has created the equivalent of a lamb with mandibles of death, and sooner or later somebody is going to be eaten by the lamb.[38] This could occur when, for example, a nonmanager member requests and receives information that otherwise provides a competitive advantage to the LLC, and then uses the information in the member's own business activities.

It appears the drafters of the ULLCA recognized this dissonance between the information rights and uses restrictions on nonmanager members in manager-managed LLCs. In what may have been an attempt to fix this fairly basic problem, the drafters add language to the official commentary to ULLCA section 408(a) that "an abuse of the access and copy right may create a remedy in favor of the other members as a violation of the requesting member['s] . . . obligation of good faith and fair dealing."[39] There are several problems with this attempted fix.[40] First, the suggestion is inconsistent with the apparent intent of the good-faith and fair-dealing language which became ULLCA section 409(d). That language was taken from RUPA section

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37. It would have been consistent to couple broad information access rights with broad member use restrictions, or to couple narrow fiduciary obligations with limited information access rights. The ULLCA did neither.

38. BILL WATTERSON, THE AUTHORITATIVE CALVIN AND HOBBES: A CALVIN AND HOBBES TREASURY 116 (1990) ("Yep, mandibles of death, that's what he's got." (Calvin to Uncle Max, with reference to Hobbes)).

39. UNIF. LTD. LIAB. CO. ACT § 408(a) cmt., 6A U.L.A. 463.

40. It should be noted that a similar provision occurs in the official commentary to the RUPA. REVISED UNIF. P'SHIP ACT § 404 cmt. 4, 6 U.L.A. 61 ("In some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative disclosure obligation that supplements the Section 403 duty to render information."). The two are distinguishable, however, since the RUPA commentary is consistent with the argument that the information disclosure provisions of the RUPA were not intended to displace the common law in this area, obviously not a consideration when dealing with the LLC form. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 189-90.

404(d).[41] The official commentary to RUPA section 404(d) makes it clear that the RUPA good-faith and fair-dealing obligation is not a fiduciary duty but a contract concept, and that it is not a separate and independent obligation.[42] This formulation has been criticized as being both conceptually flawed and somewhat internally inconsistent.[43] Second, the commentary suggestion appears to be an inappropriate use of the official commentary. According to the rules of the NCCUSL, "[c]omments should not be used as a substitute for or to modify any substantive provision in an Act."[44] It is awkward to argue that the comment "an abuse of the access and copy right may create a remedy in favor of the other members as a violation of the requesting member or former member's obligation of good faith and fair dealing"[45] is not being used in an attempt to modify the statutory provision that "[i]n a manager-managed company . . . a member who is not also a manager owes no duties to the company or to the other members solely by reason of being a member."[46] Third, taken on its own terms the commentary is flawed since it addresses only information acquired through the inspection and copying provision of ULLCA section 408(a) and not the demand- and non-demand-driven disclosure obligations under the ULLCA section 408(b). Finally, the commentary does not address the situation when a nonmanager member acts in unarguable good faith to obtain information, and only subsequently determines to use such information for his or her personal benefit. Under ULLCA, the LLC would not be able to argue that the member breached a fiduciary duty[47] and would be limited to arguing that the member violated a more general good-faith and fair-dealing obligation. The results are thereby rendered far less certain and, at a very minimum, the statute's prophylactic quality is reduced.[48]

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41. REVISED UNIF. P'SHIP ACT § 404(d), 6 U.L.A. 58 ("A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." (alteration in original)).

42. *Id.* § 404 cmt. 4, 6 U.L.A. 60.

43. *See* HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 203-04.

44. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, 1991-92 REFERENCE BOOK 81 (1991).

45. UNIF. LTD. LIAB. CO. ACT § 408(a) cmt., 6A U.L.A. 463 (1995).

46. *Id.* § 409(h)(1), 6A U.L.A. 464 (Supp. 2000).

47. *Cf.* Tri-Growth Centre City, Ltd. v. Silldorf, Burdman, Duignan & Eisenberg, 265 Cal. Rptr. 330 (Cal. Ct. App. 1989).

> While a limited partner normally would not be involved in the management or otherwise participate in the partnership so as to incur fiduciary obligations to other partners, . . . there can be factual scenarios where a limited partner might be involved in the partnership in such a manner—for example, allowing him access to confidential information—so as to create fiduciary duties.

Id. at 335 (citations omitted).

48. It might be argued that the parties can modify the odd statutory default in this regard. Following the RUPA, the ULLCA provides that statutory provisions may be altered by the operating agreement unless the provisions are included on a listing of statutory provisions as to which the right to amend by agreement is limited. UNIF. LTD. LIAB. CO. ACT § 103(b)(1), 6A U.L.A. 434. But the members' information rights are included in that listing: "The operating agreement may not . . . unreasonably restrict a right to information or access to records under Section 408 . . . ." *Id.* Parties unwilling to depend in structuring their firm on what a court

B. Fiduciary Duties and Member Information Rights Under State LLC Statutes

As discussed above, the ULLCA's treatment of nonmanager-member information access rights and use limitations is dangerously flawed. Particularly since most states have not adopted the ULLCA, it is important to gauge whether the various state LLC statutes provide a consistent and well-defined approach to information access and use rules. The following discussion illustrates that they do not. Therefore, unless clear and universal rules are not desirable, it is necessary to go beyond the ULLCA and the present state LLC acts in an attempt to derive such rules.

1. State Fiduciary Duty Enactments

Nine states have adopted ULLCA-based LLC statutes. The forty-one states which have adopted non-ULLCA-based LLC statutes deal with the fiduciary duties of participants in a wide variety of ways. Nine state LLC statutes ignore the matter altogether,[49] although the same states have statutory provisions governing the fiduciary duties of partners in general partnerships, general partners in limited partnerships, and directors and officers in corporations. The remaining thirty-two states regulate some aspect of the participants' fiduciary duties, but vary significantly in the scope and content of the regulation. The statutory provisions of many of these states can be traced to an origin in the Revised Model Business Corporation Act ("RMBCA") provisions on the standards of conduct of directors and officers.[50]

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would hold to be a "reasonable" restriction on information would be required to address the asymmetry by increasing the duties of nonmanager members. There is no indication under the ULLCA that parties to an operating agreement cannot *increase* fiduciary obligations or define the good-faith and fair-dealing obligation. However, these modifications require ex ante contracting and, even when considered, raise the transaction costs of using the LLC form.

49. The Arizona, Kansas, Maryland, Nebraska, New Mexico, Nevada, Texas, Utah, and Wyoming LLC acts make no reference to member or manager fiduciary duties. These states therefore leave the duty question to the operating agreement or to judicial common-law development. In addition, prior to their adoptions of the ULLCA, the Alabama, South Dakota, and West Virginia LLC acts fell into this category.

50. The RMBCA differentiates only slightly between the standards of conduct applicable to directors and officers:

> General Standards for Directors
>
> (a) A director shall discharge his duties as a director, including his duties as a member of a committee:
>
> (1) in good faith;
>
> (2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
>
> (3) in a manner he reasonably believes to be in the best interests of the corporation.
>
> (b) In discharging his duties a director is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:
>
> (1) one or more officers or employees of the corporation whom the director reasonably believes to be reliable and competent in the matters presented;

These remaining thirty-two non-ULLCA-based state LLC statutes regulate the fiduciary duties of managers in manager-managed LLCs and members (i.e., "managing members") in member-managed LLCs. Of these states, twenty parallel the RMBCA and require managers and managing members to perform in good faith;[51]

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(2) legal counsel, public accountants, or other persons as to matters the director reasonably believes are within the person's professional or expert competence; or

(3) a committee of the board of directors of which he is not a member if the director reasonably believes the committee merits confidence.

(c) A director is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section.

REVISED MODEL BUS. CORP. ACT § 8.30 (1991).

Standards for Conduct of Officers

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner he reasonably believes to be in the best interests of the corporation.

(b) In discharging his duties an officer is entitled to rely on information, opinions, reports, or statements, including financial statements and other financial data, if prepared or presented by:

(1) one or more officers or employees of the corporation whom the officer reasonably believes to be reliable and competent in the matters presented;

(2) legal counsel, public accountants, or other persons as to matters the officer reasonably believes are within the person's professional or expert competence.

(c) An officer is not acting in good faith if he has knowledge concerning the matter in question that makes reliance otherwise permitted by subsection (b) unwarranted.

(d) A officer is not liable for any action taken as an officer, or any failure to take any action, if he performed the duties of his office in compliance with this section.

Id. § 8.42.

51. *See* ALASKA STAT. § 10.50.135(a) (Michie 1998); COLO. REV. STAT. ANN. § 7-80-406(1) (West 1999); CONN. GEN. STAT. ANN. § 34-141(a) (West 1997); FLA. STAT. ANN. § 608.4225(1)(a) (West Supp. 1997); GA. CODE ANN. § 14-11-305(1) (1994 & Supp. 2000); IOWA CODE ANN. § 490A.706(1) (West 1999); LA. REV. STAT. ANN. § 12:1314(1) (West 1994 & Supp. 2000); ME. REV. STAT. ANN. tit. 31, § 652(1) (West Supp. 1996); MICH. COMP. LAWS ANN. § 450.4404(1) (West Supp. 2000); MINN. STAT. ANN. § 322B.69 (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-402(1)(a) (1999); MO. STAT. ANN. § 347.088(1) (West Supp. 2000); N.Y. LTD. LIAB. CO. LAW § 409(a) (McKinney 1999); N.C. GEN. STAT. § 57C-3-22(b) (West 2000); N.D. CENT. CODE § 10-32-96 (1995 & Supp. 1999); OHIO REV. CODE ANN. § 1705.29(B) (Anderson 1997); OKLA. STAT. ANN. tit. 18, § 2016(1) (West 1999); 15 PA. CONS. STAT. ANN. § 8943 (West 1995) (referring to *id.* § 1712(a)); R.I. GEN. LAWS § 7-16-17(a)

twenty parallel the RMBCA and require managers and managing members to act "with the care an ordinarily prudent person in a like position would exercise under similar circumstances;"[52] and nineteen parallel the RMBCA and require managers and managing members to act "in a manner he reasonably believes to be in the best interests of the company."[53] Eighteen of these states include in their statute something approximating the RMBCA defense when the manager or managing member reasonably relies on information supplied by others.[54] There are state variations with

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(1999); TENN. CODE ANN. § 48-241-111 (1995). Before they adopted the ULLCA, Hawaii, Oregon, South Carolina, and Vermont were in this category.

52. REVISED MODEL BUS. CORP. ACT § 8.30(a)(2). Twenty state LLC acts apply some variation of the ordinarily prudent person test to the actions of LLC managers and managing members. These states also impose the good-faith standard. *See* ALASKA STAT. § 10.50.135(a) (Michie 1998); COLO. REV. STAT. ANN. § 7-80-406(1) (West 1999); CONN. GEN. STAT. ANN. § 34-141(a) (West 1997); FLA. STAT. ANN. § 608.4225(1)(c) (West Supp. 1997); GA. CODE ANN. § 14-11-305(1) (1994 & Supp. 2000); IOWA CODE ANN. § 490A.706(1) (West 1999); LA. REV. STAT. ANN. § 12:1314(1) (West 1994 & Supp. 2000); ME. REV. STAT. ANN. tit. 31, § 652(1) (West 1996); MICH. COMP. LAWS ANN. § 450.4404(1) (West Supp. 2000); MINN. STAT. ANN. § 322B.663 subd. 1 (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-402(1)(a)-(b) (1999); MO. REV. STAT. § 347.088(1) (1993); N.Y. LTD. LIAB. CO. LAW § 409(a) (McKinney 1999); N.C. GEN. STAT. § 57C-3-22(b) (2000); N.D. CENT. CODE § 10-32-96 (1995 & Supp. 1999); OHIO REV. CODE ANN. § 1705.29(B) (Anderson 1997); OKLA. STAT. ANN. tit. 18, § 2016(1) (West 1999); 15 PA. CONS. STAT. ANN. § 8943 (West 1995) (referring to *id.* § 1712(a)); R.I. GEN. LAWS § 7-16-17(a) (1999); TENN. CODE ANN. § 48-239-115(a) (1995). Before adopting the ULLCA, Oregon and Vermont were in this category.

53. REVISED MODEL BUS. CORP. ACT § 8.30(a)(3). Nineteen state LLC acts require LLC managers and managing members to perform with the belief that their actions are in the LLC's best interests. These states also impose the good-faith and the due-care tests. *See* ALASKA STAT. § 10.50.135(a), (b) (Michie 1998); COLO. REV. STAT. § 7-80-406(1) (West 1999); CONN. GEN. STAT. ANN. § 34-141(a), (c) (West 1997); FLA. STAT. ANN. § 608.4225(1)(c), (4) (West Supp. 2000); GA. CODE ANN. § 14-11-305(1) (1994 & Supp. 2000); IOWA CODE ANN. § 490A.706(1), (3) (West 1999); LA. REV. STAT. ANN. § 12:1314(1)-(3) (West 1994 & Supp. 2000); ME. REV. STAT. ANN. tit. 31, § 652(1) (West 1996); MICH. COMP. LAWS ANN. § 450.4404(1), (3) (West Supp. 2000); MINN. STAT. ANN. § 322B.663 subd. 1 (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-402(1)(c) (1999); MO. ANN. STAT. § 347.088(1) (West Supp. 2000); N.C. GEN. STAT. § 57C-3-22(b) (West 2000); N.D. CENT. CODE § 10-32-96 (1995 & Supp. 1997); OHIO REV. CODE ANN. § 1705.29(B) (Anderson 1997); OKLA. STAT. ANN. tit. 18, § 2016(1) (West 1999); 15 PA. CONS. STAT. ANN. § 8943 (West 1995) (referring to *id.* § 1712(a)); R.I. GEN. LAWS § 7-16-17(a) (1999); TENN. CODE ANN. § 48-241-111 (1995). The New York LLC act does not set forth a best-interests standard. *See* N.Y. LTD. LIAB. CO. LAW § 409 (McKinney 1999).

54. *See* ALASKA STAT. § 10.50.135 (Michie 1998); COLO. REV. STAT. ANN. § 7-80-406(2) (West 1999); CONN. GEN. STAT. ANN. § 34-141(b), (c) (West 1997); FLA. STAT. ANN. § 608.4225(2), (4) (West Supp. 1997); GA. CODE ANN. § 14-11-305(2), (3) (1994 & Supp. 2000); IOWA CODE ANN. § 490A.706(2), (3) (West 1999); LA. REV. STAT. ANN. § 12:1314(2), (3) (West 1994 & Supp. 2000); ME. REV. STAT. ANN. tit. 31, § 652 (West 1996); MICH. COMP. LAWS ANN. § 450.4404(2), (3) (West Supp. 2000); MINN. STAT. ANN. § 322B.663 subd. 2(a), 2(b) (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-402(2), (3) (1999); N.Y. LTD. LIAB. CO. LAW § 32A-409(b) (McKinney 1999); N.C. GEN. STAT. § 57C-3-22 (West 2000); OHIO REV. CODE ANN. § 1705.29(C), (D) (Anderson 1997); OKLA. STAT. ANN. tit. 18, §

respect to the defense: Alaska adds a reasonable inquiry requirement,[55] and Florida, Minnesota, and Pennsylvania permit managers and managing members to consider any factors that they deem relevant when discharging their duties.[56]

Eight states that address the issue of manager and managing-member fiduciary duties without following the RMBCA model, use a duty-of-care approach and provide immunity from liability absent gross negligence, willful misconduct, or the violation of some other standard.[57] Four states are outliers. The California LLC act

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2016(2), (3) (West 1999); 15 PA. CONS. STAT. ANN. § 8943(b) (West 1995) (referring to *id.* § 1712(a), (b)); R.I. GEN. LAWS § 7-16-17(b), (c) (1999); TENN. CODE ANN. § 48-241-111 (1995).

55. "A person who is a manager or a managing member of a limited liability company shall perform the duties of management . . . with the care, including reasonable inquiry, that an ordinary prudent person in a like position would use under similar circumstances." ALASKA STAT. § 10.50.135(a) (Michie 1998).

56. Florida's statute provides:

> In discharging [his] duties, a manager or managing member may consider such factors as [he] deems relevant, including the long-term prospects and interests of the limited liability company and its members, and the social, economic, legal, or other effects of any action on the employees, suppliers, customers of the limited liability company, the communities and society in which the limited liability company operates, and the economy of the state and the nation.

FLA. STAT. ANN. § 608.4225(3) (West Supp. 2000).

Minnesota's statute provides:

> In discharging the duties of the position of governor, a governor may, in considering the best interests of the limited liability company, consider the interests of the limited liability company's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as the short-term interests of the limited liability company and its members including the possibility that these interests may be best served by the continued independence of the limited liability company.

MINN. STAT. ANN. § 322B.663(5) (West 1995 & Supp. 2000).

Pennsylvania's statute provides:

> In discharging the duties of their respective positions, [managers] may, in considering the best interests of the corporation, consider the effects of any action upon employees, upon suppliers and customers of the corporation and upon communities in which offices or other establishments of the corporation are located, and all other pertinent factors.

15 PA. CONS. STAT. ANN. § 8943 (West 1995) (referring to *id.* § 1716(a)).

57. ARK. CODE ANN. § 4-32-402(a) (Michie 1996) (gross negligence or willful misconduct); IDAHO CODE § 53-622(1) (Micbie 1994) (same); IND. CODE § 23-18-4-2(a) (1998) (willful misconduct or recklessness); KY. REV. STAT. ANN. § 275-170(1) (Michie Supp. 1998) (wanton or reckless misconduct); N.H. REV. STAT. ANN. § 304-C:31(IV) (1995) (gross negligence or willful misconduct); N.J. STAT. ANN. § 42:2B-26 (West Supp. 2000) (same); OHIO REV. CODE ANN. § 1705.29(D) (Anderson 1997) (deliberate intent or reckless disregard); WASH. REV. CODE ANN. § 25.15.155(1) (West Supp. 2001) (gross negligence, intentional misconduct, or a knowing violating of law); WIS. STAT. ANN. § 183.0402(1)(d) (West Supp. 1999) (wilful misconduct). In addition to its RMBCA-based standards, Ohio provides a deliberate-intent or reckless-disregard standard.

states that LLC managers have the same fiduciary duties as partners have to their partnerships and their copartners.[58] The Virginia LLC act provides that managers shall act in their good faith business judgment of the LLC's best interests.[59] The Delaware LLC act states that the LLC agreement may provide for liability for managers who fail to perform in accordance with the agreement, but otherwise specifies no duties.[60] The Massachusetts LLC act recognizes that managers and managing members may have duties at law or in equity but does not state them affirmatively.[61] Other states include provisions requiring managers to hold as trustees profits from certain self-interested transactions[62] and insulating managers acting in good-faith reliance on the operating agreement from liability.[63]

Twenty-five states provide that the managers' and managing members' duties can be modified by agreement of the parties.[64] The Maine LLC act expressly prohibits modification of the managers' and managing members' duties.[65] The remaining

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58. CAL. CORP. CODE § 17153 (West Supp. 2000).

59. VA. CODE ANN. § 13.1024.1(A) (Michie 1999).

60. DEL. CODE ANN. tit. 6, § 18-405 (1999).

61. MASS. ANN. LAWS ch. 156C, § 63(b) (Law. Co-op. 1996).

62. *See* ARK. CODE ANN. § 4-32-402(b) (Michie 1996); CONN. GEN. STAT. ANN. § 34-141(e) (West 1997); HAW. REV. STAT. § 428-409(b)(i) (Supp. 1999); IDAHO CODE § 53-622(2) (Michie 1994); IND. CODE § 23-18-4-2 (1998); KY. REV. STAT. ANN. § 275.170 (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1314A(5) (West 1994 & Supp. 2000); ME. REV. STAT. ANN. tit. 31, § 652(2) (West 1996 & Supp. 1999); MICH. COMP. LAWS ANN. § 450.4404(5) (West Supp. 2000); MO. ANN. STAT. § 347.088(2) (West Supp. 2000); MONT. CODE ANN. § 35-8-310(2)(a) (2000); N.H. REV. STAT. ANN. § 304-C:31(V)(b) (1995); N.M. STAT. ANN. § 53-19-16(D) (Michie 1995 & Supp. 1999); N.C. GEN. STAT. § 57C-3-22(e) (1996); OKLA. STAT. ANN. tit. 18, § 2016(5) (West 1992); OR. REV. STAT. § 63.155(2) (1999); R.I. GEN. LAWS § 7-16-17(e) (1992); S.C. CODE ANN. § 33-43-402(A)(1) (Law. Co-op. Supp. 1999); TENN. CODE ANN. § 48-240-102(a) (1995); VT. STAT. ANN. tit. 11, § 3059(b)(1) (1997); WASH. REV. CODE ANN. § 25.15.155(2) (West 1999); W. VA. CODE ANN. § 31B-4-409(b)(1) (Michie 1996); WIS. STAT. ANN. § 183.0402(2) (West Supp. 2000).

63. *See* CONN. GEN. STAT. ANN. § 34-141 (West 1993); DEL. CODE ANN. tit. 6, § 18-406 (1999); GA. CODE ANN. § 14-11-305(4)(B) (Supp. 1997); MASS. ANN. LAWS ch. 156C, § 63 (Law. Co-op. 1996 & Supp. 2000); N.H. REV. STAT. ANN. § 304-C:35 (1995); N.J. STAT. ANN. § 42:2B-31 (West Supp. 2000).

64. *See* ARK. CODE ANN. § 4-32-404(a) (Michie 1996); CAL. CORP. CODE § 17005(b) (West Supp. 2000); COLO. REV. STAT. § 7-80-108 (West 1999) (limited power to modify); CONN. GEN. STAT. ANN. § 34-143(1) (West 1997); DEL. CODE ANN. tit. 6, § 18-405 (1999) (duties exist by agreement); FLA. STAT. ANN. § 608.4223 (West Supp. 1997); GA. CODE ANN. § 14-11-305(4)(a) (1994 & Supp. 2000); IDAHO CODE § 53-624 (Michie 1994); IND. CODE § 23-18-4-2(a) (1998); IOWA CODE ANN. § 490A.703(1) (West 1999); KY. REV. STAT. ANN. § 275-170(1) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1315 (West 1994); MASS. ANN. LAWS ch. 156C, §§ 8(b), 63(b) (Law. Co-op. 1996 & Supp. 2000); MICH. COMP. LAWS ANN. § 450.4407 (West Supp. 2000); MINN. STAT. ANN. § 322B.115(4) (West 1995); MISS. CODE ANN. § 79-29-403 (1999); MO. ANN. STAT. § 347.081 (West Supp. 2000); N.H. REV. STAT. ANN. § 304-C:31(V) (1995); N.J. STAT. ANN. § 42:2B-26 (West Supp. 2000); N.D. CENT. CODE § 10-32-07(4)(c) (1995 & Supp. 1999) (referring to *id.* § 10-32-71); OKLA. STAT. ANN. tit. 18, § 2017 (West 1999); R.I. GEN. LAWS § 7-16-18 (1999); TENN. CODE ANN. § 48-239-115(d) (1995); VA. CODE § 13.1-1025 (1999); WIS. STAT. ANN. § 183.0402(3) (West Supp. 1999).

65. ME. REV. STAT. ANN. tit. 31 § 652(3) (West 1996 & Supp. 1999).

statutes are silent on modification.

The non-ULLCA-based state-statutory treatments of nonmanaging members also are widely varied. Nine states have no statutory provisions regarding either manager or member fiduciary duties.[66] Eighteen states address the fiduciary duties of managers and managing members, but not of nonmanaging members.[67] Six state statutes provide that nonmanaging members have no fiduciary duties,[68] while four statutes provide that nonmanager members have no fiduciary duties unless such duties are imposed under the operating agreement.[69] Three states charge nonmanager members with the same fiduciary duties as managers.[70] The Massachusetts LLC act recognizes that nonmanaging members may have duties at law or in equity but does not state them affirmatively.[71]

2. State Information Right Enactments

As is the pattern with fiduciary duty provisions, non-ULLCA-based state LLC statutes vary as to the information rights of nonmanager members.[72] Given the

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66. The Arizona, Kansas, Maryland, Nebraska, Nevada, New Mexico, Texas, Utah and Wyoming LLC acts make no reference to member or manager fiduciary duties.

67. California, Colorado, Delaware, Florida, Iowa, Michigan, Minnesota, Mississippi, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, Tennessee, Virginia, and Washington.

68. *See* ARK. CODE ANN. § 4-32-402(c) (Michie 1996); IDAHO CODE § 53-622(3) (Michie 1994); KY. REV. STAT. ANN. § 275-170(3) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1314 (West 1994 & Supp. 2000); N.H. REV. STAT. ANN. § 304-C:31(V)(c) (1995); 15 PA. CONS. STAT. ANN. § 8943(b)(2) (West 1995).

69. *See* ALASKA STAT. § 10.50.130 (Michie 1998); GA. CODE ANN. § 14-11-305(l) (1994 & Supp. 2000); IND. CODE § 23-18-4-2(c) (1998); MO. REV. STAT. § 359-088 (West Supp. 2000).

70. *See* CONN. GEN. STAT. ANN. § 34-141 (West 1997); ME. REV. STAT. ANN. tit. 31, § 652 (West 1996 & Supp. 1999); WIS. STAT. ANN. § 183.0402 (West Supp. 1999).

71. MASS. ANN. LAWS ch. 156C, § 63(b) (Law. Co-op. 1996 & Supp. 2000).

72. It should be noted that the access of managers is not addressed in most state LLC statutes. Similarly, managing members are not expressly given access rights beyond the access rights they obtain as members. *See* ALA. CODE § 10-12-16(b) (1998); ALASKA STAT. § 10.50.870 (1998); ARIZ. REV. STAT. ANN. § 29-607(b) (West 1998); ARK. CODE ANN. § 4-32-405 (Michie 1996); CAL. CORP. CODE § 17106 (West Supp. 2000); COLO. REV. STAT. ANN. § 7-80-411 (West 1999); CONN. GEN. STAT. ANN. § 34-144 (West 1997); FLA. STAT. ANN. § 608.4101 (West Supp. 2000); GA. CODE ANN. § 14-11-313 (1994 & Supp. 2000); HAW. REV. STAT. § 428-408 (Supp. 1999); IDAHO CODE § 53-625 (Michie 1994); 805 ILL. COMP. STAT. ANN. 180/10-15 (West Supp. 2000); IND. CODE § 23-18-4-8 (1998); IOWA CODE ANN. § 490A.709 (West 1999); KAN. STAT. ANN. § 56-1a205 (1994); KY. REV. STAT. ANN. § 275-185 (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1319 (West 1994); MD. CODE ANN., CORPS. & ASS'NS § 4A-406 (1999); MASS. ANN. LAWS ch. 156C, § 10 (Law. Co-op. 1996 & Supp. 2000); MICH. COMP. LAWS ANN. § 450.4503 (West Supp. 2000); MINN. STAT. ANN. § 322B.373 (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-308 (1999); MO. REV. STAT. § 347-091(2) (West 2000); MONT. CODE ANN. § 35-8-405(2) (West 2000); NEV. REV. STAT. ANN. § 86.241 (1999); N.M. STAT. ANN. § 53-19-19 (Michie 1999); N.Y. LTD. LIAB. CO. LAW § 32A-1102(b), (c) (McKinney 1999); N.C. GEN. STAT. § 57C-3-04 (West 2000); N.D. CENT.

breadth of state fiduciary duty rules, it is somewhat surprising that there is even less consistency in the state information access and disclosure rules. Thirty non-ULLCA-based state LLC statutes require that the LLC keep some identified classes of records.[73] These LLC statutes follow the lead of the RMBCA and the RULPA, under which certain classes of records are required to be kept,[74] and not the example of the UPA and the RUPA (and the ULLCA), under which no records are required to be kept.[75] However, six states permit broader contract freedom and require that prescribed records shall be maintained unless otherwise provided in the LLC's articles of organization or operating agreement.[76] Further, four non-ULLCA-based state LLC statutes do not require that any records be kept and do not specify record access rules.[77] Seven state LLC statutes do not affirmatively state that records must be retained, but instead provide that members shall have access to certain records,

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CODE § 10-32-51 (1995 & Supp. 1999); OHIO REV. CODE ANN. § 1705.22 (Anderson 1997); OR. REV. STAT. § 70.050(2) (1999); 15 PA. CONS. STAT. ANN. § 8525 (West 1995); R.I. GEN. LAWS § 7-16-22(b) (1999); S.C. CODE ANN. § 33-43-405 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 47-34-11 (Michie 2000); TENN. CODE ANN. § 48-228-101 to -102 (1995); TEX. REV. CIV. STAT. ANN. art. 1528n, § 2.22(E) (Vernon 1997); UTAH CODE ANN. § 48-2B-119(2) (1998); VT. STAT. ANN. tit. 11, § 3058 (1997); VA. CODE ANN. § 13.1-1028(B) (1999); W. VA. CODE ANN. § 31B-4-408 (Michie 1996); WIS. STAT. ANN. § 183.0405 (West Supp. 1999). Six states do specifically provide for manager access to information, typically granting full access to information required to be maintained for purposes reasonably related to their managerial positions. *See* DEL. CODE ANN. tit. 6, § 18-305(b) (1999); ME. REV. STAT. ANN. tit. 31, § 655(2)(B) (West 1996); N.H. REV. STAT. ANN. § 304-C:28(I), (II) (1995); N.J. STAT. ANN. § 42:2B-25 (West Supp. 2000); OKLA. STAT. ANN. tit. 18, § 2021(C) (West 1999); WASH. REV. CODE § 25.15.135(3) (West Supp. 2000).

73. *See* ALA. CODE § 10-12-16(a) (1998); ARIZ. REV. STAT. ANN. § 29-607(a) (West 1998); CAL. CORP. CODE § 17058 (West Supp. 2000); COLO. REV. STAT. ANN. § 7-80-411 (West 1999); CONN. GEN. STAT. ANN. § 34-144 (West 1997); FLA. STAT. ANN. § 608.4101(1) (West Supp. 2000); 805 ILL. COMP. STAT. ANN. 180/1-35 (West Supp. 2000); IND. CODE § 23-18-4-8(a) (1998); IOWA CODE ANN. § 490A.709(1) (West 1999); KY. REV. STAT. ANN. § 275-185(1) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1319(A) (West 1994); ME. REV. STAT. ANN. tit. 31, § 655(1) (West 1996); MASS. ANN. LAWS ch. 156C, § 9(a) (Law. Co-op. 1996 & Supp 2000); MICH. COMP. LAWS ANN. § 450.4213 (West Supp. 2000); MINN. STAT. ANN. § 322B.373(1) (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-107(1) (1999); MO. ANN. STAT. § 347.091(1) (West 2000); NEV. REV. STAT. ANN. § 86.241(1) (Michie 1999); N.M. STAT. ANN. § 53-19-19 (Michie 1999); N.Y. LTD. LIAB. CO. LAW § 32A-1102(a) (McKinney 1999); N.D. CENT. CODE § 10-32-51(1) (1995 & Supp. 1999); R.I. GEN. LAWS § 7-16-22(1) (1999); S.C. CODE ANN. § 33-43-405(A) (Law. Co-op Supp. 1999); S.D. CODIFIED LAWS § 47-34-11 (Michie 2000); TENN. CODE ANN. § 48-228-101 to -102 (1995); TEX. REV. STAT. ANN. art. 1528n, § 2.22(A) (Vernon 2001); UTAH CODE ANN. § 48-2b-119(1) (1998); VA. CODE ANN. § 13.1-1028(A) (1999); WASH. REV. CODE ANN. § 25.15.135(1) (West Supp. 2000); WIS. STAT. ANN. § 183.0405(1) (West Supp. 1999).

74. REVISED MODEL BUS. CORP. ACT § 16.01 (1996); REVISED UNIF. LTD. P'SHIP ACT § 105(a) (amended 1997), 6A U.L.A. 88-89 (1995).

75. REVISED UNIF. P'SHIP ACT § 403 cmt. 1 (amended 1997), 6 U.L.A. 56 (Supp. 2000).

76. *See* ALASKA STAT. § 10.50.860 (Michie 1998); ARK. CODE ANN. § 4-32-405 (Michie 1996); GA. CODE ANN. § 14-11-313 (1994); IDAHO CODE § 53-625(1) (Michie 1994); MONT. CODE ANN. § 35-8-405(1) (1999); OKLA. STAT. ANN. tit. 18, § 2021(A) (West 1999).

77. Kansas, Nebraska, Pennsylvania, and Wyoming.

such as tax returns, member and manager names and addresses, operating agreements and articles of organization, and information concerning member capital contributions.[78]

The records required to be maintained under the state LLC statutes often include a copy of the LLC's articles of organization and operating agreement, lists of members and managers, tax returns, financial statements, information on capital contributions and the members' rights to distributions, and the like. Some statutes use phrases such as "books and records of account."[79] Access to these core records varies, but in general members have relatively easy access to core materials.[80] One state places no requirements or restrictions on members' rights to inspect records required to be maintained.[81] Twenty-five states place minimal time and place restrictions on the members' inspection rights; typically these limit the members' inspection rights to normal business hours at the LLC's principal place of business.[82] Moving up the scale, twelve states require a written request,[83] thirteen states impose a proper purpose

78. *See* DEL. CODE ANN. tit. 6, § 18-305(a) (1999); MD. CODE ANN., CORPS. & ASS'NS § 4A-406(a) (1999); N.H. REV. STAT. ANN. § 304-C:28(I) (1995); N.J. STAT. ANN. § 42:2B-25(a) (West Supp. 2000); N.C. GEN. STAT. § 57C-3-04(a) (2000); OHIO REV. CODE ANN. § 1705.22(A)(1) (West 1997); VT. STAT. ANN. tit. 11, § 3058 (1997).

79. *E.g.*, ALA. CODE § 10-12-16(b) (1999).

80. "Those records, and any other books and records of the limited liability company, wherever situated, are subject to inspection and copying for any other purpose at the reasonable request, and at the expense of, any member or the member's agent or attorney during regular business hours." ALA. CODE § 10-12-16(b) (1999). "A limited liability company shall make its books and records of account, or certified copies of them, reasonably available for inspection and copying at its registered office or principal office in the state by a member of the company." ALASKA STAT. § 10.50.870(a) (1998).

81. *See* ARIZ. REV. STAT. ANN. § 29-607 (West Supp. 1998).

82. *See* ALA. CODE § 10-12-16(b) (1999); ALASKA STAT. § 10.50.870 (1998); ARK. CODE ANN. § 4-32-405 (Michie Supp. 1996); COLO. REV. STAT. ANN. § 7-80-411 (West 1999); CONN. GEN. STAT. ANN. § 34-144(a) (West 1997); FLA. STAT. ANN. § 608.4101(2) (West Supp. 2000); GA. CODE ANN. § 14-11-313 (1994); IDAHO CODE § 53-625(1) (Michie 1994); 805 ILL. COMP. STAT. ANN. 180/10-15 (West Supp. 2000); IND. CODE § 23-18-4-8 (1998); KY. REV. STAT. ANN. § 275-185(2) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1319(B) (West 1994); MASS. ANN. LAWS ch. 156C, § 9(b) (Law. Co-op. 1996); MICH. COMP. LAWS ANN. § 450.4503(2) (West Supp. 2000); MINN. STAT. ANN. § 322B.373 (West 1995 & Supp. 2000); MISS. CODE ANN. § 79-29-107(2) (1996); MO. ANN. STAT. § 347.091(2) (West Supp. 2000); NEV. REV. STAT. ANN. 86.241(2) (Michie 1999); N.H. REV. STAT. ANN. § 304-C:28(VI) (1995); N.D. CENT. CODE § 10-32-51(2) (Supp. 1997); OKLA. STAT. ANN. tit. 18, § 2021(B) (1999); R.I. GEN. LAWS § 7-16-22(b) (1999); TENN. CODE ANN. § 48-228-102(a) (1994); WASH. REV. CODE ANN. § 25.15.135(2) (West Supp. 2000); WIS. STAT. ANN. § 183.0405(2) (West Supp. 1999).

83. *See* ALASKA STAT. § 10.50.870 (1998); DEL. CODE ANN. tit. 6, § 18-305(e) (1999); KY. REV. STAT. ANN. § 275-185(2) (Michie Supp. 1998); ME. REV. STAT. ANN. tit. 31, § 655(2) (West 1996); MD. CODE ANN., CORPS. & ASS'NS § 4A-406(a) (1999); MICH. COMP. LAWS ANN. § 450.4503(2) (West Supp. 2000); MINN. STAT. ANN. § 322B.373 (West 1995 & Supp. 2000); N.H. REV. STAT. ANN. § 304-C:28(V) (1995); N.J. STAT. ANN. § 42:2B-25 (West Supp. 2000); N.C. GEN. STAT. § 57C-3-04(c) (2000); N.D. CENT. CODE § 10-32-51(2) (Supp. 1997); TENN. CODE ANN. § 48-228-102(a) (1994); TEX. REV. CIV. STAT. ANN. art. 1528n, § 2.22 (Vernon 2001).

requirement,[84] twenty-eight states require a "reasonable request" for the inspection,[85] and six states allow further restrictions on access by agreement.[86] Four states permit access to core information to be restricted to maintain confidentiality.[87] One state prevents member use of disclosed core information.[88]

Twelve non-ULLCA-based statutes provide that members have identical access to core and noncore records.[89] Five non-ULLCA-based statutes do not provide for member access to any information beyond the core records.[90] Four non-ULLCA-based state LLC statutes do not provide any record access rules.[91] Michigan permits

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84. *See* ALA. CODE § 10-12-16(b) (1994); ALASKA STAT. § 10.50.870 (1998); CAL. CORP. CODE § 17106(a) (West Supp. 2000); DEL. CODE ANN. tit. 6, § 18-305(a) (1999); 805 ILL. COMP. STAT. ANN. 180/10-15 (Supp. 2000); ME. REV. STAT. ANN. tit. 31, § 655(2) (West 1996); MINN. STAT. ANN. § 322B.373(2)(b) (West 1995 & Supp. 2000) (noncore records); N.H. REV. STAT. ANN. § 304-C:28(I) (1995); N.J. STAT. ANN. § 42:2B-25(a) (West Supp. 2000); N.Y. LTD. LIAB. CO. LAW § 32A-1102(b) (McKinney 1999); N.C. GEN. STAT. § 57C-3-04(a) (2000); OHIO REV. CODE ANN. § 1705.22(A) (1997); OKLA. STAT. ANN. tit. 18, § 2021(B) (1999).

85. *See* ALA. CODE § 10-12-16(b) (1999); ARK. CODE ANN. § 4-32-405 (Michie 1996); CAL. CORP. CODE § 17106(b) (West Supp. 2000); COLO. REV. STAT. ANN. § 7-80-411 (West 1999); CONN. GEN. STAT. ANN. 34-144(c) (West 1997); DEL. CODE ANN. tit. 6, § 18-305(a) (1999); FLA. STAT. ANN. § 608.4101(3) (West Supp. 2000); GA. CODE ANN. § 14-11-313 (1994); IDAHO CODE § 53-625(2) (Michie 1994); IOWA CODE ANN. § 490A.709(2) (West 1999); KY. REV. STAT. ANN. § 275-185(2) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1319(B) (2000); ME. REV. STAT. ANN. tit. 31, § 655(2) (West 1996); MD. CODE ANN., CORPS. & ASS'NS § 4A-406(a) (1999); MASS. ANN. LAWS ch. 156C, § 9(b) (Law. Co-op. 1996); MICH. COMP. LAWS ANN. § 450.4503(2) (West Supp. 2000); MO. ANN. STAT. § 347.091(2) (West Supp. 2000); NEV. REV. STAT. ANN. § 86.241(2) (Michie 1999); N.H. REV. STAT. ANN. § 304-C:28(I) (1995); N.J. STAT. ANN. § 42:2B-25(a) (West Supp. 2000); N.C. GEN. STAT. § 57C-3-04(a) (2000); OHIO REV. CODE ANN. § 1705.22(A) (1997); OKLA. STAT. ANN. tit. 18, § 2021(B) (1999); R.I. GEN. LAWS § 7-16-22(b) (1999); UTAH CODE ANN. § 48-2b-119 (1998); VA. CODE ANN. § 13.1-1028(B) (Michie 1999); WASH. REV. CODE § 25.15.135(2) (West Supp. 2000); WIS. STAT. ANN. § 183.0405(2) (West Supp. 1999).

86. *See* LA. REV. STAT. ANN. § 12:1319(B) (West 2000); ME. REV. STAT. ANN. tit. 31, § 655(2) (West 1996); N.Y. LTD. LIAB. CO. LAW § 32A-1102(c) (McKinney 1999); N.C. GEN. STAT. § 57C-3-04(a) (2000); OHIO REV. CODE ANN. § 1705.22(A) (1997); VA. CODE ANN. § 13.1-1028(A) (Michie 1999).

87. *See* DEL. CODE ANN. tit. 6, § 18-305(e) (1999); N.H. REV. STAT. ANN. § 304-C:28(III) (1995); N.Y. LTD. LIAB. CO. LAW § 32A-1102(c) (McKinney 1999); OHIO REV. CODE ANN. § 1705.22(B) (1997).

88. *See* N.D. CENT. CODE § 10-32-51(5) (Supp. 1997).

89. *See* ALA. CODE § 10-12-16(b) (1999); ALASKA STAT. § 10.50.870 (1998); ARIZ. REV. STAT. ANN. § 29-607(B) (West Supp. 1996); CONN. GEN. STAT. ANN. 34-144(d) (West 1997); GA. CODE ANN. § 14-11-313 (1994); IDAHO CODE § 53-625(2) (Michie 1994); 805 ILL. COMP. STAT. ANN. 180/10-15 (Supp. 2000); IND. CODE § 23-18-4-8(b) (1998); KY. REV. STAT. ANN. § 275-185(2) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1319(A) (West 1992); OKLA. STAT. ANN. tit. 18, § 2021(B) (1999); S.C. CODE ANN. § 33-43-405(B) (West Supp. 1999).

90. *See* FLA. STAT. ANN. § 608.4101 (West Supp. 2000); NEV. REV. STAT. ANN. § 86.241 (Michie 1999); TENN. CODE ANN. § 48-228-102 (1994); UTAH CODE ANN. § 48-2b-119 (1998); WASH. REV. CODE ANN. § 25.15.135 (West Supp. 2000).

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access to noncore books and records to the extent just and reasonable;[92] Minnesota permits access to noncore records if a proper purpose is shown;[93] North Dakota permits persons who have been members for six months to obtain noncore records upon a showing of proper purpose;[94] and Oklahoma permits access to any noncore record unless otherwise provided in the operating agreement.[95] California has unique and complex disclosure rules.[96]

In addition to the record access rules, twenty-seven states require disclosure of information concerning the LLC's business and financial affairs and of other information to the extent just and reasonable.[97] However, there are various permutations of these statutes. One state requires showing a proper purpose related to the members' interest;[98] one state requires a reasonable purpose;[99] four states limit the information disclosure to things affecting the members' interests;[100] one state limits the information disclosure requirement to "information required to be documented or filed by law";[101] one state requires information disclosure "where circumstances allow";[102] three states require member demand or request;[103] five states require reasonable demand or request;[104] and one state makes the information

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92. MICH. COMP. LAWS ANN. § 450.4503(3) (West Supp. 2000).

93. MINN. STAT. ANN. § 322B.373(2) (West 1995 & Supp. 2000).

94. N.D. CENT. CODE § 10-32-51(3) (Supp. 1997).

95. OKLA. STAT. ANN. tit. 18, § 2021(A) (1999).

96. *See* CAL. CORP. CODE § 17106(c) (West Supp. 2000).

97. *See* ALASKA STAT. § 10.50.870 (1998); ARIZ. REV. STAT. ANN. § 29-607(B) (West Supp. 1998); ARK. CODE ANN. § 4-32-405 (Michie 1996); DEL. CODE ANN. tit. 6, § 18-305(a) (1999); GA. CODE ANN. § 14-11-313 (1994); IDAHO CODE § 53-625(3) (Michie 1994); IND. CODE § 23-18-4-8(c) (1998); IOWA CODE ANN. § 490A.709(2) (West 1999); KY. REV. STAT. ANN. § 275-185(3) (Michie Supp. 1998); LA. REV. STAT. ANN. § 12:1319(B) (West 2000); ME. REV. STAT. ANN. tit. 31, § 655(2) (West 1996); MD. CODE ANN., CORPS. & ASS'NS § 4A-406(a) (1999); MASS. ANN. LAWS ch. 156C, § 10 (Law. Co-op. 1996); MICH. COMP. LAWS ANN. § 450.4503(4) (West Supp. 2000); MISS. CODE ANN. § 79-29-308(1) (1996); MO. ANN. STAT. § 347.091(2) (West Supp. 2000); N.H. REV. STAT. ANN. § 304-C:28(I) (1995); N.J. STAT. ANN. § 42:2B-25(a) (West Supp. 2000); N.Y. LTD. LIAB. CO. LAW § 32A-1102(b) (McKinney 1999); N.C. GEN. STAT. § 57C-3-04(a) (2000); OHIO REV. CODE ANN. § 1705.22(A) (1997); OKLA. STAT. ANN. tit. 18, § 2021(B) (1999); R.I. GEN. LAWS § 7-16-22(a) (1999); S.C. CODE ANN. § 33-43-405(C) (West Supp. 1999); TEX. REV. CIV. STAT. ANN. art. 1528n, § 2.22(D) (Vernon 1997); VA. CODE ANN. § 13.1-1028(B) (Michie 1999); WIS. STAT. ANN. § 183.0405(3) (West Supp. 1999).

98. *See* ARIZ. REV. STAT. ANN. § 29-607(B) (West Supp. 1998).

99. *See* MISS. CODE ANN. § 79-29-308(1) (1996).

100. *See* IND. CODE § 23-18-4-8(c) (1998); KY. REV. STAT. ANN. § 275-185(3) (Michie Supp. 1998); S.C. CODE ANN. § 33-43-405(C) (West Supp. 1999); WIS. STAT. ANN. § 183.0405(3) (West Supp. 1999).

101. N.H. REV. STAT. ANN. § 304-C:28(I) (1995).

102. IND. CODE § 23-18-4-8(c) (1998).

103. *See* GA. CODE ANN. § 14-11-313 (1994); IOWA CODE ANN. § 490A.709(2) (West 1999); MICH. COMP. LAWS ANN. § 450.4503(3) (West Supp. 2000).

104. *See* MISS. CODE ANN. § 79-29-308(1) (1996); MO. ANN. STAT. § 347.091(2) (West Supp. 2000); OKLA. STAT. ANN. tit. 18, § 2021(B) (1999); S.C. CODE ANN. § 33-43-405(B) (West Supp. 1999); VA. CODE ANN. § 13.1-1028(B) (Michie 1999).

disclosure "subject to reasonable standards."[105] Several states allow management to withhold information at least for a limited period of time based on the reasonable belief that nonmanager member access to such records might harm the company or when the information is confidential.[106] Two states permit the LLC to apply for a protective order to prevent disclosure of confidential information to members.[107]

C. A Need for Consistency

Some commentators argued against the need for any top-down consensus when drafting business-organization statutes, and have claimed that over time the state LLC statutes will evolve toward uniformity, at least when such uniformity is efficient.[108] This approach begs several questions. First, it can be argued that economic efficiency is not the single appropriate method for judging statutes and that, for example, common information disclosure and fiduciary duty rules serve the valuable social goal of encouraging truthtelling and the development of trust.[109] As discussed below, unincorporated business law historically has not been driven by the view that participants are autonomous wealth maximizers, but instead has recognized certain communitarian aspects of business organizations. Second, a nonuniform approach, which casts the various state legislatures in the role of experimental laboratories for developing effective statutes, assumes that the drafters will use some theoretical analysis in drafting a state-specific statute. If the state legislatures do not act from any foundation, but instead use ad hoc adaptations from other forms, the laboratory analogy does not fit since there is no experimentation. Third, even if the laboratory analogy initially were to fit and different states followed their own valid logic in

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105. MISS. CODE ANN. § 79-29-308(1) (1996).

106. Seven states allow restrictions on access to noncore materials when management feels access might harm the LLC. *See* DEL. CODE ANN. tit. 6, § 18-305(c) (1999); ME. REV. STAT. ANN. tit. 31, § 655(2) (West 1996); N.H. REV. STAT. ANN. § 304-C:28(III) (1995); N.J. STAT. ANN. § 42:2B-25 (West Supp. 2000); N.Y. LTD. LIAB. CO. LAW § 32A-1102(c) (McKinney 1999); N.C. GEN. STAT. § 57C-3-04(e) (2000); OHIO REV. CODE ANN. § 1705.22(B) (1997).

107. *See* MINN. STAT. ANN. § 322B.373(3) (West 1995 & Supp. 2000); N.D. CENT. CODE § 10-32-51(4) (Supp. 1997).

108. Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464, 468 (1996); Larry E. Ribstein & Bruce H. Kobayashi, *Uniform Laws, Model Laws and Limited Liability Companies*, 66 U. COLO. L. REV. 947, 951 (1995). In a recent article, Professor Ribstein states:

> [U]niform laws reduce innovation and experimentation. . . . No set of provisions can meet perfectly all the applicable criteria at any given time, much less for a significant amount of time in a rapidly changing world. . . . By contrast, competition among the states would continue testing and refining state law. The collective wisdom of fifty-one legislatures, spurred by lawyers and business people all motivated to achieve the right result, is far greater than that of NCCUSL. As Hayek observed, "if left free, men will often achieve more than individual human reason could design or foresee."

Ribstein, *supra* note 3, at 964-65 (citations omitted).

109. *See* Allan W. Vestal, *"Assume a Rather Large Boat . . .": The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487, 523-24 (1997).

adopting statutes, one would expect changes as the states tested and refined their laws. In fact, other than in states that have adopted the ULLCA, the individual state information disclosure and fiduciary duty rules have remained stable over time even though many states have amended their LLC statutes to address other concerns. Fourth, there are costs associated with nonuniformity, including the balkanization of state laws from a national economic community to a collection of separate states and the confusion that stems from applying different rules to otherwise similar business organizations.[110] Uniformity assists in developing a body of generally understood and applied law, reduces search costs and uncertainty in searching for an ideal state statute, and eliminates the ability for participants to seek advantage through choice of law. Finally, when accomplished well, uniform laws permit those who know the nuances of the legal regime in question to discuss the values of different approaches, to reach conclusions concerning how the regime should work, and to craft a uniform act in accordance with those conclusions.

In our view, the benefits of uniform state business-association laws likely outweigh the benefits of evolutionary statutory development and participant flexibility in choosing an optimal statute. One disadvantage of uniformity is the amplification of bad-drafting choices, and it is incumbent on uniform-law drafters to promulgate well-designed and theoretically appropriate uniform acts. Unfortunately, the NCCUSL did not meet this standard when it promulgated the ULLCA.

III. A DISCLOSURE THEORY FOR UNINCORPORATED BUSINESS ORGANIZATIONS

If we wish to improve on the ULLCA information provisions—which without apparent justification treat nonmanager members as partners for information receipt purposes and as noncontrolling shareholders for information use purposes—then it would be helpful to proceed from a clearly articulated theory of how information rights and use provisions should be structured. Three approaches show some promise: party autonomy, communitarianism, and structuralism.

Unincorporated business organizations, through which autonomous persons associate in a limited community to carry on business for mutual advantage, are inherently tense.[111] For example, a partnership is an "association of two or more

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110. Keatinge, *supra* note 1.

111. Robert Keatinge also recognizes this tension:

> Many aspects of associations are apparently contradictory, or at best, ambiguous. On one hand, a partnership has been characterized as no more of an entity than a friendship. On the other, an association is at once a contract among its owners and a separate entity with its own legal identity. The owners are at once self-interested and fiduciaries to the other owners and the association.

Robert R. Keatinge, *The Implications of Fiduciary Relationships in Representing Limited Liability Companies and Other Unincorporated Associations and Their Partners or Members*, 25 STETSON L. REV. 389, 389-90 (1995) (citations omitted).

This recognition of the tension between autonomy and community reflects conflict about the nature of humanity and society and has long been the focus of political philosophers. For example, the starting point for Thomas Hobbes's system was the concrete individual completely isolated from his social context, and Hobbes asserted that it was completely natural

persons to carry on a business as co-owners for profit."[112] As an *association* a partnership is a collective organization, a business community. This collective aspect is evidenced by the fact that, unless the partnership agreement provides otherwise, partners share equally in partnership profits and losses,[113] partners have equal management rights,[114] partners have equal agency authority to act on the partnership's behalf,[115] and (except in the case of limited liability partnerships) partners have joint, or joint and several, personal responsibility for partnership debts, obligations, and liabilities.[116] This collective aspect of partnerships also provides the foundation for partner fiduciary duties with respect to the partnership and among partners.[117]

At the same time, a partnership is an association of *autonomous persons*, each of whom has the independent legal capacity to contract, to own property, and otherwise to pursue their own interests. Furthermore, the association conceives of partners as autonomous individuals who exist prior to the collective, and it is only through voluntary association that partners enter into community. Having agreed to associate, the question becomes the extent to which partners thereby surrender their autonomy in favor of reciprocity, and with such surrender their right to hold property and to pursue their personal interests apart from the partnership and their copartners.[118] Partners, particularly partners in more complex partnerships, frequently have business activities outside the partnership and may possess information and skills from their other activities that are relevant to the partnership and their copartners. For example, a partner in a computer software development partnership may also be engaged in the

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for man to be alone rather than in "sociable communion" with his fellows. *See* THOMAS HOBBES, LEVIATHAN (E.P. Dutton & Co., Inc. 1950) (1651). Thus, to Hobbes all forms of community were artificial rather than natural in origin, and society was simply the result of a voluntary compact between individuals motivated by a desire for self-preservation. Even this social life is marked by distrust and mutual hostility, and it was anticipated that the sovereign would operate in a limited realm in order to leave each individual the maximum of liberty to pursue his personal goals.

Although Jean Jacques Rousseau's starting point was individualist, he emphasized the superiority of social life, through the sovereign general will, over the state of nature. In Rousseau's view, in society man loses his natural liberty, but obtains civil liberty. Man also obtains a right of property, guaranteed by the law, instead of a more precarious possession which is dependent on his own strength. Rousseau stresses the benefit of a social life, and not the need to attempt to preserve in society the values of a state of nature. Rousseau can be viewed as a precursor to a collectivist attitude toward man's place in society rather than as a proponent of individual liberty. JEAN JACQUES ROUSSEAU, THE SOCIAL CONTRACT (George Allen & Unwin Ltd. 1948) (1895); *see also* J.W. GOUGH, THE SOCIAL CONTRACT 164-74 (1957).

112. REVISED UNIF. P'SHIP ACT § 202 (amended 1997), 6 U.L.A. 27 (Supp. 2000).

113. *Id.* § 401(b), 6 U.L.A. 52.

114. *Id.* § 401(f).

115. *Id.* § 301(1), 6 U.L.A. 33.

116. *Id.* § 306(a), 6 U.L.A. 45.

117. *Id.* § 404(a), 6 U.L.A. 58.

118. For discussions of the moral foundations of contract law, stressing ideals of autonomy and reciprocity, see P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979); CHARLES FRIED, CONTRACT AS PROMISE (1981); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1998) (post-Rawlsian discussion of individualism and community).

software development business for its own account or in other partnerships with other partners. It is unlikely that such a partner would seek completely to surrender its autonomy (including the right to maintain as proprietary information developed outside the partnership) upon entry into partnership, particularly when copartners might compete and thereby threaten its independent existence. On the other hand, the ideal of reciprocity derives contractual obligation from the mutual benefits of cooperative arrangements, and implies an independent principle by which the fairness of an exchange can be assessed.

The legal system has wrestled with questions involving the extent to which independent persons surrender autonomy when they enter into the business community, and disclosure obligation and fiduciary duty rules are implicated in this engagement.[119] Business organization law can be viewed, at least in part, as a set of rules mediating autonomy and community. We conclude that the nature and extent of disclosure and fiduciary obligations are best determined by locating particular business organizations (and the individual participants in those organizations) on an autonomy-community continuum. We also conclude that certain rules have changed as the law's approach to unincorporated business organizations has changed from a conception—albeit one never absolute except in the associated rhetoric—that participants surrender their autonomy in favor of community, to a more nuanced conception that participants can retain at least some aspects of their autonomy while participating in a business community.[120] Similarly, we conclude that the autonomy-community concept must be considered when drafting disclosure and fiduciary duty rules and that statutes, such as the ULLCA, which fail to develop or implement an appropriate business organization theory are flawed and dangerous. Fortunately legislative drafting is an evolutionary process, and the recognition of both flaws and alternative models can assist drafters to create better statutes over time.

A. The Autonomy Model and the Case for Nondisclosure

One approach to unincorporated business organization information rights and use restrictions would conceive of the associating parties as atomistic contracting agents engaged in individual wealth-maximizing behavior with constant recalculation of individual advantage.[121] The core distinction between this model and others is in the

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119. There has been a lively debate over the nature of partnerships, particularly in connection with the RUPA's fiduciary duty rules. *See generally* J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29 (1995) (arguing for contract-based formulation with wide latitude for participant-negotiated provisions); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45 (1993) (providing critical analysis of RUPA restrictions on participant-negotiated provisions); Vestal, *supra* note 21 (arguing for traditional fiduciary-based conceptualization). For a summary of this debate, see generally Callison, *supra* note 19.

120. This change may track other social trends. *See, e.g.*, FRANCIS FUKUYAMA, THE GREAT DISRUPTION: HUMAN NATURE AND THE RECONSTITUTION OF SOCIAL ORDER (1999); *see also* Thomas E. Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium* (pts. 1 & 2), 65 TENN. L. REV. 925 (1998), 66 TENN. L. REV. 137 (1998).

121. The theoretical roots of this approach can be found in the law and economics

instantaneously recalculating nature of the individual wealth-maximizing behavior. Presumably all members of business firms seek individual wealth maximization, and the central distinction between rival conceptions of the firm is the extent to which members are required to subordinate immediate individual advantage in order to maximize long-term collective-wealth gains.[122] The autonomy model couples a distinction between the interests of the individual and those of others with a belief that preference for individual interests is legitimate.

Of course, there may be situations in which it is in the collective best interests of the participants to limit the individual participants' ability to recalculate and immediately pursue their individual advantage. This raises the second core distinction of the autonomy model, the virtually unrestricted ability of the participants to arrange their relationship through contractual agreements inter se.[123]

Consider a situation where four individuals form a partnership. At year one any of the four could dissolve the partnership and receive sixteen dollars, with the other partners each receiving ten dollars. But if none of the partners abandon, then at year two each would receive fifteen dollars. Abandonment at year one generates an aggregate return of forty-six dollars; completion of year two generates an aggregate return of sixty dollars. The autonomy model, which approves instantaneous recalculation of individual wealth-maximizing behavior, tends in the absence of ex ante restrictions toward the first outcome and forfeits fourteen dollars in aggregate return. With appropriate contractual restrictions, partners can eliminate the possibility of early termination and realize the highest aggregate return.

How would the autonomy model deal with the disclosure of information within an unincorporated firm? The best analogy is the treatment afforded parties engaged in arm's-length commercial negotiations. Courts have frequently considered the extent to which contracting parties must share information with one another. Unlike fiduciaries, parties dealing at arm's length are not frequently compelled to disclose material facts to one another, nor are they required to share their opinions and analyses concerning a transaction's merits with one another.[124] Thus the law neither

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movement:

> Following the basic precepts of welfare economics, Law and Economics scholars see atomistic contracting agents engaging in maximizing behavior that generally has no impact on third parties. In so doing, the parties are generally expected to reach socially optimal "contractual" arrangements with one another. Each set of contracting parties has maximized its joint wealth, and hence the aggregate value of all contracts cannot be increased.

Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 758 (1995). Corporate norms presuppose that the shareholder relationship is an autonomous one, and shareholders are not assumed to represent each other as agents. Thus, shareholders generally owe no duties, at least in the absence of a controlling shareholder who exercises control over the corporation. *Id.* at 767.

122. *See* Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 465 (1987).

123. *See* J. Dennis Hynes, *Freedom of Contract, Fiduciary Principles, and Partnerships: The Bargain Principle and the Law of Agency*, 54 WASH. & LEE L. REV. 439, 452-53 (1997).

124. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9-32 (1978).

encourages contracting parties to trust one another nor assumes that they do so. Instead, in this individualist model, each party is entitled to retain the advantages he or she enjoys, and each party's duties are those that are expressly contracted for. However, in some cases, parties have been held legally responsible for their failure to disclose material information. Although legal scholars have proffered various theories to distinguish circumstances in which disclosure is required from those in which it is not,[125] it is necessary for this discussion to note only that courts do not generally mandate disclosure when parties transact business on an arm's-length basis. To the extent members of unincorporated business organizations are treated as mutually disinterested and autonomous contracting parties, in the absence of ex ante contractual provisions mandating information disclosure such parties should be able to withhold information from one another to the same extent that parties are able to withhold information during contract negotiations.

In an article applying economic-analysis principles to contract disclosure obligations, Dean Anthony Kronman addresses the question of when "the possessor of . . . information [has] the right to deal with others without disclosing what he knows."[126] Instead of examining the relationship between the contracting parties, Kronman considers whether disclosure is wealth maximizing. He begins by asserting that a disclosure requirement should be presumed because greater information makes it more likely that goods will flow to those persons who most value them.[127] However, Kronman also recognizes that information production is itself a social good and that broad and strict disclosure requirements can create socially undesirable disincentives to information production. He concludes that the legal privilege not to disclose valuable information is a property right, and that courts should permit a contracting party to withhold material information when the information is the product of the party's deliberate effort:

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125. *See, e.g.*, KIM L. SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW (1988); Kronman, *supra* note 124; Andrew Kull, *Unilateral Mistake: The Baseball Card Case*, 70 WASH. U. L.Q. 57 (1992); Saul Levmore, *Securities and Secrets: Insider Trading and the Law of Contracts*, 68 VA. L. REV. 117 (1982); Edward H. Rabin, *A Proposed Black-Letter Rule Concerning Mistaken Assumptions in Bargain Transactions*, 45 TEX. L. REV. 1273 (1967); Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. REV. 337 (1997); Christopher T. Wonnell, *The Structure of a General Theory of Nondisclosure*, 41 CASE W. RES. L. REV. 329 (1991). Professor Deborah DeMott surveyed the scene and concluded that "legal doctrine does not resolve these [disclosure] scenarios in a symmetrical fashion" and that scholarly efforts to isolate a single unifying theme in the disclosure cases or to state a general doctrine that would rationalize their outcomes are doomed to fail. Deborah A. DeMott, *Do You Have the Right to Remain Silent?: Duties of Disclosure in Business Transactions*, 19 DEL. J. CORP. L. 65, 66-67 (1994).

126. Kronman, *supra* note 124, at 33. Although Kronman has become more critical of the legal-economics model, *see* Anthony T. Kronman, *The Fault in Legal Ethics*, 100 DICK. L. REV. 489 (1996), his 1978 article is rooted in economic analysis. The article asserts this analysis not because it believes it to be correct in all accounts, but because it best illustrates the case for nondisclosure among autonomous persons. *Id.* at 17. Several scholars specifically criticize Kronman's analysis. *See, e.g.*, SCHEPPELE, *supra* note 125, at 31-35; Demott, *supra* note 125, at 68-69; Strudler, *supra* note 125, at 349-63.

127. Kronman, *supra* note 124, at 13 ("Allocative efficieney is promoted by getting information of changed circumstances to the market as quickly as possible.").

> *Where nondisclosure is permitted . . . , the knowledge involved is typically the product of a costly search. A rule permitting nondisclosure is the only effective way of providing an incentive to invest in the production of such knowledge.* By contrast, in the cases requiring disclosure . . . the knowledgeable party's special information is typically not the fruit of a deliberate search. Although information of this sort is socially useful as well, a disclosure requirement will not cause a sharp reduction in the amount of such information which is actually produced.[128]

If this individualist model were to be used in a partnership setting, Partner A would not be required to disclose valuable information to Partner B if the information were the product of A's efforts to produce the information.[129] For example, if Partner A expended resources to obtain information concerning oil and gas deposits in the area surrounding partnership property, he would not be required to disclose such information to Partner B when negotiating to acquire partnership property or when negotiating to acquire B's partnership interest.[130] Similarly, Partner A would not be required to disclose the information to Partner B, and Partner B would not have the right to demand disclosure, even when the information is significant to the partnership's business activities.

Even if Dean Kronman's analysis describes the results of certain contract cases, it does not describe the result in most partnership cases.[131] In fact, Kronman recognizes that the principles supporting nondisclosure might not apply when "the nature of the transaction or the relation of the parties [is] such that as to the particular transaction in question, the duties of a fiduciary are imposed upon one or the other party, and such a relation involves a duty of disclosure."[132] Instead, unless the parties contract for nondisclosure, partnership law historically has mandated information disclosure in the negotiations leading to partnership formation, during the partnership's life, and when one partner seeks to acquire the interest of another partner (or to sell its interest to another partner).[133] Furthermore, partnership law historically has compelled partner disclosure of information material to partnership management decisions and has recognized that partners have the right to demand broad disclosure of "things affecting the partnership."[134] The partnership cases do not turn on the question of whether the information is or generally would be the product of a partner's deliberate

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128. *Id.* at 9 (emphasis added). Kronman actually goes a step further. He states that "[t]he cost of administering a disclosure requirement on a case-by-case basis is likely to be substantial" and recommends a blanket rule for particular classes of cases based on "whether the kind of information involved is (on the whole) more likely to be generated by chance or by deliberate searching." *Id.* at 17-18.

129. Or, in Kronman's view, A would have no duty to disclose if A's information were of a type that normally is produced by a deliberate search. *See id.* at 17-18.

130. *See, e.g.*, Peckham v. Johnson, 98 S.W.2d 408 (Tex. Civ. App. 1936) (reliance of partner on copartner to disclose all material facts concerning value of partnership property).

131. However, it probably does describe the position of persons negotiating to become partners under RUPA. *See* Callison, *supra* note 19, at 124-33; Vestal, *supra* note 21, at 556 (both articles criticize RUPA's elimination of preformation fiduciary duties, including the disclosure duty).

132. Kronman, *supra* note 124, at 18 n.49.

133. *See infra* note 139.

134. UNIF. P'SHIP ACT § 20, 6 U.L.A. 602 (1995).

efforts but instead focus on the nature of partnership and the relationship among partners.

If disclosure is the rule rather than the exception in the partnership setting, the question concerns what it is about partnerships that typically mandates disclosure rather than permits secrecy. Answering that question is critical in determining whether changes in legal relationships over the last decade have changed the foundations on which the partnership disclosure rules were established and, if so, whether and the extent to which disclosure rules should also change.

B. The Community Model and the Case for Full Disclosure

A second approach to unincorporated business organization information rights and use restrictions would conceive of the associating parties as members of a community who are engaged in individual wealth-maximizing behavior with temporally restricted recalculation of individual advantage. Again, one core distinction is in the recalculation of individual advantage. Under this approach, the parties are viewed (even in the absence of any explicit statements) as agreeing ex ante to refrain from the recalculation of individual advantage during certain periods of the firm's existence. Here the firm's members subordinate immediate advantage in order to maximize long-term collective-wealth gains.[135]

The community model views the participants not simply as autonomous wealth-maximizing individuals banding together for transitory advantage, but rather as members of a community pursuing collective goals. In this view, even in the absence of express contractual provisions mandating individual sharing or sacrifice, individuals should not be permitted unduly to prefer their interests over the interests of others. Once the collective identity is realized, it becomes possible to consider the existence of duties to the collective and to the other members.[136] Further, once the enterprise is viewed as having an internal social dynamic, it also becomes possible to consider the enterprise as having an external social identity that admits the consideration of obligations flowing outside the enterprise; including obligations to society as a whole. This approach builds on the view that contractual relations create ties of community between the parties, and that such ties create moral imperatives beyond the duties expressly assumed by the parties.[137]

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135. Consider again the situation discussed above in which four individuals form a partnership. At the end of year one, any of the four can dissolve the partnership and receive sixteen dollars, with the other partners each receiving ten dollars. But if none of the partners dissolve, then at year two each partner receives fifteen dollars. The community model, which abandons instantaneous, recalculating individual wealth-maximizing behavior, establishes rules requiring consideration of group gains and thus tends toward the second outcome with the realization of an additional fourteen dollars in aggregate return over the party autonomy model.

136. *See, e.g.*, Vestal, *supra* note 19, at 1127-33 (arguing that a collective-benefit test should be applied to law-partner expulsions); *see also* Callison, *supra* note 19, at 148-53 (collective benefit approach applied to good-faith duty).

137. *See, e.g.*, ATIYAH, *supra* note 118, at 716-37. Professor Duncan Kennedy contrasts individualism with altruism and proposes that altruism is the appropriate morality for contractual relationships. *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1733-35 (1976). In this view, altruism is a morality of

Under this construction, there should be broad disclosure rights in contract-based business communities such that partners cannot obtain personal benefit at the expense of either the collective interests of the partnership or the interests of their copartners. In addition, under the communitarian approach, partners would have broad fiduciary duties, and each partner would have stringent limitations on the personal use of partnership information. Partnership law historically has adopted a communitarian approach to partner information rights and disclosure obligations, both in the Uniform Partnership Act ("UPA")[138] and through the common law of partner fiduciary duties.[139] This approach also has limited how partners can use disclosed

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sharing and individual sacrifice. *Id.* at 1726.

138. Partner disclosure obligations under the UPA can be divided into two broad categories: routine disclosure obligations and nonroutine disclosure obligations. The routine disclosure requirements are not expressly contained in the UPA, but are implied from UPA section 18(e)'s pronouncement that "[a]ll partners have equal rights in the management and conduct of the partnership business." UNIF. P'SHIP ACT § 18(e), 6 U.L.A. 526. When all partners participate equally in partnership management, it is appropriate to imply a requirement that all partners have equal rights to receive, without demand, that information which is required for them to participate meaningfully in management.

The UPA expressly sets forth several nonroutine requirements which operate beyond the implied routine disclosure obligation. These disclosure requirements "are extraordinary because they are not intended to be invoked" in the partnership's ordinary operations, and they are remedial because they seek to "assure access to information when normal patterns of information dissemination have broken down" or are ineffective. Allan W. Vestal, *"Ask Me No Questions and I'll Tell You No Lies": Statutory and Common-Law Disclosure Requirements Within High-Tech Joint Ventures*, 65 TUL. L. REV. 705, 717 (1991). First, UPA section 20 states that "[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." UNIF. P'SHIP ACT § 20, 6 U.L.A. 602. Second, UPA section 19 provides that "every partner shall at all times have access to and may inspect and copy any of [the partnership's books]." *Id.* § 19, 6 U.L.A. 598. The UPA section 19 inspection right is a method for policing the partners' duty of disclosure under UPA section 20 and also is a means by which partners can protect themselves against wrongdoing and make informed decisions concerning partnership operations and management. Finally, partners have information rights pursuant to UPA sections 21, *id.* § 21(1), 6 U.L.A. 608 ("Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."), and 22, *id.* § 22, 6 U.L.A. 650 ("Any partner shall have the right to a formal account as to partnership affairs . . . .").

139. The partnership disclosure cases demonstrate three categories in which the courts have implemented fiduciary duty principles to mandate disclosure: (a) transactions in which parties are negotiating to become partners; (b) self-dealing transactions involving a partner's transfer of property to a partnership or aequisition of property from a partnership; and (c) transactions involving a partner's purchase of a copartner's interest or a partner's sale of an interest to a copartner. Vestal, *supra* note 138, at 729-35; *see also* CALLISON, *supra* note 2, § 12.05. In the first category, persons negotiating to become partners generally have been held to fiduciary standards and have been required to disclose material information. In the second category, involving partner-partnership transactions, the partner's interest in the property and the cost at which the partner obtained the property generally have been held material facts that the

information.[140] The communitarian approach to partnership information disclosure rules was continued in the RUPA, albeit with significant modifications.[141] The most

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partner has a fiduciary duty to disclose. Opus Corp. v. Int'l Bus. Machs. Corp., 141 F.3d 1261, 1269 (8th Cir. 1998) (materiality requirement imposed); Libby v. L.J. Corp., 247 F.2d 78, 82 (D.C. Cir. 1957); Starr v. Int'l Realty, Ltd., 533 P.2d 165, 168-69 (Or. 1975). In the third category, involving partner-partner transactions in which one partner has information that the other partner does not have, the courts generally have imposed a fiduciary-based disclosure obligation. Moser v. Williams, 443 S.W.2d 212, 215 (Mo. Ct. App. 1969) (discussing partner's obligation to disclose contract for sale of partnership asset when purchasing copartner's interest); Johnson v. Buck, 540 S.W.2d 393, 411-13 (Tex. Ct. App. 1976) (discussing managing partner's obligation to disclose when purchasing copartner's partnership interest); Peckham v. Johnson, 98 S.W.2d 408, 412-13 (Tex. Civ. App. 1938) (partner failure to disclose third-party bid for partnership assets).

140. The UPA does not contain a definitive statement of partner fiduciary duties. Instead, UPA section 9(1) states that agency-law principles, presumably including fiduciary principles derived from agency law, apply to partnerships. UNIF. P'SHIP ACT § 9(1), 6 U.L.A. 400-01 (stating that "[e]very partner is an agent of the partnership for the purpose of its business"); *see also id.* § 4(3), 6 U.L.A. 250 (declaring that the "law of agency shall apply under this act"). Fiduciary duties are a standard part of agency law. RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation . . . ."). Further, UPA section 21(1), entitled Partner Accountable as a Fiduciary, requires that a partner account to the partnership for any benefit, and hold as trustee for the partnership any profit, derived without the other partners' consent from transactions connected with the partnership's formation, conduct, or liquidation or from the use of partnership property. UNIF. P'SHIP ACT § 21(1), 6 U.L.A. 608. Beyond this broad requirement that partners account for certain self-dealing transactions, courts have held that a wide variety of fiduciary duties apply to general partners. *See, e.g.*, CALLISON, *supra* note 2, at ch. 12 (discussing partnership fiduciary issues); Vestal, *supra* note 136, at 727-35.

Generally, courts have held that partners have duties of loyalty, care, fairness, and honesty to the partnership and their copartners. *Id.* These duties can be separated into (a) a duty of loyalty (including a duty not to usurp partnership opportunities, a duty not to compete with the partnership, and a duty not to act adversely to the partnership); (b) a duty of good faith and fair dealing; (c) a duty to exercise appropriate care in partnership management; and (d) a duty to fully disclose matters that are material to the partnership and its business. *Id.* In addition, courts have stated that these partnership fiduciary duties, in some form, extend from the period of preformation negotiations through termination of the partnership. See CALLISON, *supra* note 2, at § 12.11. UPA section 21(1) supports this conclusion by its reference to the "formation, conduct, or liquidation of the partnership." UNIF. P'SHIP ACT § 21(1), 6 U.L.A. 608.

Under the UPA, partnership fiduciary duties are broad and somewhat nebulous and, consequently, are subject to judicial expansion and contraction. It should be noted that the courts have generally adopted a communitarian view of partnership fiduciary duties and have prohibited partner transactions that would be acceptable if partners dealt with each other as autonomous contracting parties. This communitarian premise extends to partners' personal use of information provided to them by the partnership or by their copartners. Therefore, even though partners have broad information disclosure obligations under the UPA and partnership common law, disclosing partners also have broad protections against use of disclosed information. The communitarian premise of pre-RUPA partnership law can be said to balance partner obligations and partner responsibilities.

141. The RUPA generally maintains the UPA's communitarian approach to information sharing, at least as a statutory default rule. It also permits partners to contract for autonomy by making the disclosure requirement amendable by the partners' agreement. First, RUPA section

important RUPA modifications involved partner fiduciary duties, which under pre-RUPA law included a non-statutory disclosure duty.[142] The RUPA modifications to

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403(c)(1) codifies the routine disclosure obligation implied by UPA section 18(e): "Each partner and the partnership shall furnish to a partner . . . : (1) without demand, any 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(c)(1) (amended 1997), 6 U.L.A. 78 (Supp. 2000); HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 187-88. Notwithstanding this codification of the routine disclosure requirement, RUPA section 103(a) makes RUPA section 403(c)(1) amendable by the partnership agreement. REVISED UNIF. P'SHIP ACT § 103(a), 6 U.L.A. 16; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 191-92.

Second, RUPA sections 403(a) and (b) guaranty partner access to partnership books and records. Specifically, RUPA sections 403(a) and (b) provide:

> (a) A partnership shall keep its books and records, if any, at its chief executive office.
>
> (b) A partnership shall provide partners and their agents and attorneys access to its books and records. It shall provide former partners and their agents and attorneys access to books and records pertaining to the period during which they were partners. The right of access provides the opportunity to inspect and copy books and records during ordinary business hours. A partnership may impose a reasonable charge, covering the costs of labor and material, for copies of documents furnished.

REVISED UNIF. P'SHIP ACT § 403(a)-(b), 6 U.L.A. 56; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 180-87.

Third, RUPA section 403(c)(2) contains a demand-driven disclosure mechanism: "Each partner and the partnership shall furnish to a partner: . . . on demand, any other information concerning the partnership's business and affairs, except to the extent the demand or the information demanded is unreasonable or otherwise improper under the circumstances." REVISED UNIF. P'SHIP ACT § 403(c), 6 U.L.A. 78; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 188-89.

RUPA section 403(c)(2) narrows the UPA's demand-driven disclosure obligations in two ways. Allan W. Vestal, *The Disclosure Obligations of Partners Inter Se Under the Revised Uniform Partnership Act of 1994: Is the Contractarian Revolution Failing?*, 36 WM. & MARY L. REV. 1559, 1580-81 (1995). First, RUPA section 403(c)(1) uses the formulation "information concerning the partnership's business and affairs" rather than the "all things affecting the partnership" formulation in UPA section 20. *Id.* It is unclear whether the drafters intended this narrowing. The official commentary states "Paragraph (2) continues the UPA rule that partners are entitled, on demand, to any information concerning the partnership's business and affairs." REVISED UNIF. P'SHIP ACT § 403 cmt., 6 U.L.A. 57; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 188-89. Second, RUPA section 403(c)(2) provides an exception to the disclosure requirement where the demand or the information sought "is unreasonable or otherwise improper under the circumstances." REVISED UNIF. P'SHIP ACT § 403(c)(2), 6 U.L.A. 56. The drafters recognized that this "qualification is new to the statutory formulation." *Id.* § 403 cmt., 6 U.L.A. 57. The official commentary further states that "[t]he burden is on the partnership or partner from whom the information is requested to show that the demand is unreasonable or improper." *Id.* As with the RUPA section 403(c)(1) non-demand-driven disclosure requirement, the RUPA section 403(c)(2) demand-driven disclosure requirement is amendable by the partnership agreement. *See id.* § 103(a), 6 U.L.A. 16; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 186-87.

142. Although the RUPA section 403 disclosure rules generally retain the communitarian

premise of the original UPA, RUPA section 404's handling of partnership fiduciary duties and obligations, including partner disclosure obligations in situations not governed by RUPA section 403, moves the RUPA much farther down the path of treating partners as autonomous contracting parties rather than as members of a reciprocal business community. Vestal, *supra* note 141. RUPA section 404(a) contains the following exclusive statement of partnership fiduciary duties: "The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care." REVISED UNIF. P'SHIP ACT § 404(a), 6 U.L.A. 58. Section 104(a) provides that "[u]nless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act]." *Id.* § 104(a), 6 U.L.A. 20. The RUPA thereby attempts to displace common-law rules that coexisted with the UPA, including common-law fiduciary duty rules. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 200-01.

Section 404(b) reduces the partners' duty of loyalty to three components. *See* REVISED UNIF. P'SHIP ACT § 404(b), 6 U.L.A. 58. First, following the self-dealing proscription contained in UPA section 21(1), RUPA section 404(b)(1) states that a partner must "account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business" (but not during the period prior to the partnership's formation) "or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity." *Id.* § 404(b)(1), 6 U.L.A. 58. Second, RUPA section 404(b)(2) states that a partner must refrain from dealing adversely "with the partnership in the conduct or winding up of the partnership business" (but, again, not during the period prior to the partnership's formation). *Id.* § 404(b)(2), 6 U.L.A. 58. Third, section 404(b)(3) states that a partner must "refrain from competing with the partnership in the conduct of the partnership business before [dissolution]." *Id.* § 404(b)(3), 6 U.L.A. 58.

In addition to the duty of loyalty and the duty of care, section 404(d) sets forth an "obligation" of good faith and fair dealing: "A partner shall discharge the duties to the partnership and the other partners under this [Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing." *Id.* § 404(d), 6 U.L.A. 58. The RUPA drafters believed that the good-faith and fair-dealing obligation arises from the partners' contractual relationship; therefore, the RUPA does not treat it as an independent fiduciary duty. *Id.* § 404(d) cmt., 6 U.L.A. 60-61. In addition, the drafters expressly declined to flesh out the meanings of the terms "good faith" and "fair dealing" but instead opted to "allow courts to develop their meaning based on the experience of real cases." *Id.* § 404(d) cmt., 6 U.L.A. 59-60; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 203-04.

Further, RUPA section 404(e) adds an element of partner autonomy to the fiduciary duty and obligation formulation: "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." REVISED UNIF. P'SHIP ACT § 404(e), 6 U.L.A. 58; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 204-05. A comment to section 404(e) states that a partner is not a trustee and is not held to the same standards of selfiessness as a trustee. REVISED UNIF. P'SHIP ACT § 404(e) cmt., 6 U.L.A. 61. Instead, the RUPA conceives that a partner's interests as a principal and owner must be balanced against its duties and obligations as an agent and fiduciary. The RUPA also recognizes that these roles sometimes conflict. Specifically, RUPA section 404(f) elaborates on the concept of self-interest and permits partners to lend money to and transact business with the partnership and, in so doing, to have the same rights and obligations as nonpartners. *Id.* § 404(f), 6 U.L.A. 59; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 206-07.

Finally, the RUPA continues the movement toward partner autonomy by permitting partners to modify their fiduciary duties and obligations. RUPA section 103(b)(3) affords partners broad, but not unlimited, rights to modify their fiduciary duties and obligations through the partnership agreement. REVISED UNIF. P'SHIP ACT § 103(b)(3), 6 U.L.A. 16; HILLMAN, VESTAL

partnership fiduciary duty rules evince a strong move toward the autonomy model, and they also expand the ability of individual partners to use disclosed information.[143]

& WEIDNER, *supra* note 1, at 40-48. Similarly, RUPA section 103(b)(5) permits the partnership agreement to prescribe standards by which the performance of the good-faith and fair-dealing obligation is to be measured. REVISED UNIF. P'SHIP ACT § 103(b)(5), 6 U.L.A. 17.

The RUPA changes prior law with respect to partner disclosure obligations. First, RUPA section 404 does not include disclosure obligations within its duty of loyalty listing and, to the extent that the RUPA continues disclosure obligations beyond those expressed in RUPA section 403, they may be said to come either under the penumbra of the contractual obligation of good faith and fair dealing or under a nondisplaced common-law obligation. HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 189-93. The official commentary provides some assistance in this regard: "In some situations the obligation of good faith includes a disclosure component. Depending on the circumstances, a partner may have an affirmative disclosure obligation that supplements the section 403 duty to render information." REVISED UNIF. P'SHIP ACT § 404(d) cmt., 6 U.L.A. 61.

Second, the RUPA removes certain transactions from the purview of partnership law. These transactions include those involving partner disclosure during the partnership formation stage, those involving partner disclosure when transacting business with the partnership, and those involving disclosure among partners purchasing and selling partnership interests from or to one another. *Id.* § 404(b), 6 U.L.A. 58; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 207-10. Instead, such transactions are deemed to be arm's-length transactions and the parties' disclosure obligations are not to be determined under partnership law. For example, the comments to RUPA section 404(b) state that the drafters eliminated the UPA section 21(1) reference to the formation period "because of concern that the duty of loyalty could be inappropriately extended to the . . . period when the parties are really negotiating at arms' length." REVISED UNIF. P'SHIP ACT § 404(b) cmt., 6 U.L.A. 59. Further, RUPA section 404(f) provides that partners may transact business with the partnership, and as to each such transaction "the rights and obligations of the partner are the same as those of a person who is not a partner, subject to other applicable law." *Id.* § 404(f), 6 U.L.A. 59. Prior to the RUPA, preformation transactions, partner-partnership transactions, and partner-partner transactions were viewed through a fiduciary lens, and the courts imposed broad disclosure duties. Vestal, *supra* note 138, at 727-35.

143. The RUPA provides reduced protection to partners who disclose information to their copartners. As discussed above, prior to the RUPA the courts generally adopted a communitarian view of partnership fiduciary duties and prohibited partner transactions that might be otherwise acceptable if partners dealt with each other as autonomous contracting parties. *See supra* notes 140-41. Therefore, because partners have broad information disclosure obligations under pre-RUPA partnership law, disclosing partners also should have broad protection against their copartners' use of disclosed information. The RUPA, on the other hand, narrows the partner fiduciary duty of loyalty to three discrete situations. First, partners must account for property, profit, or benefit derived from conducting partnership business or from using partnership property. Second, partners must refrain from dealing with the partnership as or on behalf of a party having an interest adverse to the partnership. And third, partners must refrain from competing with the partnership. These fiduciary duties arguably do not apply to situations in which partners derive benefit from businesses other than partnership business, use partner rather than partnership property, act in a manner adverse to partners, or compete with partners. Thus, under a viable reading of RUPA section 404, partners may not be able to claim a fiduciary duty breach against copartners who use valuable information disclosed to them. Although the RUPA provides that partners also must discharge their duties and exercise their rights in a manner consistent with the contract-based obligation of good faith and fair dealing,

The problem with a pure community model is that business firms are voluntary, wealth seeking, and impermanent. A model under which the members abnegate self-interest, such as the mutual agency model of the general partnership, is fundamentally flawed because firm participants only join the firm if they expect their long-term self-interest, in all parts of their economic life, to be maximized.[144] Further,

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this obligation is undefined and is not as robust as a fiduciary duty. Further, RUPA section 404(e) waters down the good-faith requirements by stating that a partner does not violate this obligation merely because the partner's conduct furthers its own interests. The point here is not that a court can not find a breach when a partner uses information disclosed to it by a copartner. Instead, it should be noted that the answers under the RUPA are less certain and therefore the RUPA may engender less partner trust and confidence.

144. Although the underlying communitarian nature of the UPA may make sense in certain business transactions in which partners contemplate surrendering autonomy, it creates numerous problems for partners who intend to retain autonomy in spheres outside the partnership. To the extent that partnership law does not adjust to ameliorate these problems, and thereby increases the potential cost of the partnership form, it becomes less likely that persons will choose to enter into partnerships. These problems are heightened for partnerships that develop valuable information in the course of their business or that use valuable partner information in connection with their business. *See* Vestal, *supra* note 138, at 746-57.

First, under the implied routine disclosure requirement of UPA section 18(e), partners have a right to all information concerning those aspects of the partnership business with respect to which they participate in management decisions. UNIF. P'SHIP ACT § 18(e), 6 U.L.A. 526 (1995). Therefore, even if the partnership or other partners have produced valuable information through deliberate effort, individual partners have the right to receive, without demand, some or all of this information. To the extent that partners agree that such information disclosure is objectionable, they could reduce information flow ex ante by restricting partner-management-participation rights. Further, the partners might attempt to limit partners' information rights through specific ex ante disclosure limitations in the partnership agreement, while retaining a more robust partner-management-participation role under section 18(e). However, the enforceability of such a provision is uncertain and, furthermore, such limitations might be undesirable since they could cause uninformed partners to participate in management decisions.

A second disclosure problem arises under UPA section 19, which provides that "[t]he partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them." UNIF. P'SHIP ACT § 19, 6 U.L.A. 598. The UPA does not expressly permit modification of such access rights. Although courts might respect partnership agreement provisions which limit access rights, particularly when necessary to protect trade secrets and other confidential information, there is little case law on this issue. Assuming that partners cannot or do not modify the section 19 disclosure obligation, the scope of the problem depends on the definition of partnership "books." Again, few partnership cases define "books," and there is a risk that courts will give broad construction to a definition. Even under a restrictive reading of UPA section 19—for example, requiring a nexus to financial audit or tax preparation—a wide range of partnership records could be included as partnership "books." Furthermore, a court could shift its focus from defining "books" to considering what records are in fact kept by the partnership, and fashion a rule that gives partners access to all existing partnership books and records. A broad judicial construction of UPA section 19 would create a significant risk that partnerships will be required to disclose valuable information to individual partners.

Finally, a significant disclosure problem is caused by the UPA section 20 requirement that

the community model in its purest form seems to be inconsistent with private contractual modifications of the social arrangement and does not provide a comfortable description of the private firm in which members must be allowed to contractually arrange the economic terms of their partnership.[145]

C. A Structural Model for Disclosure Rules in Unincorporated Business Organizations

A more appropriate disclosure model would avoid both the atomistic aspects of the autonomy model and the self-abnegation implied by the communitarian model, and it would consider the actual legal relationships among the unincorporated business organization's members. This structural model corrects the communitarian model by recognizing that unincorporated business organizations are not hypothetical contracts occurring behind a veil of ignorance, but instead are devices through which actual persons (who have legitimate preexisting property and other interests outside the organization and knowledge of their positions and goals) establish a limited sphere in which they act together for mutual benefit. The structural model does not require an all-or-nothing complete system of autonomy or community, but pragmatically focuses on overall relationships of the associating parties.

This more appropriate model combines the autonomy model's underlying regard for party wealth maximization with the community model's recognition of both internal and external social dimensions of the firm. It allows for a range of contractual modification without surrendering all aspects of the firm to private reordering, and it establishes socially regarding default rules to alleviate skepticism concerning the parties' contracting process. As to the information rights and use restrictious within the unincorporated firm, this structural model would establish default rules governing disclosure obligations within the sphere of the parties'

"[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." UNIF. P'SHIP ACT § 20, 6 U.L.A. 602. This broad command can be a problem in many partnerships. For example, if a coalition of U.S. research hospitals were to establish a partnership to market their medical services to foreign health insurance companies, information concerning the capacity, growth, and pricing of the partner-hospitals would be important to the partnership's business and, presumably, this information could be a "thing[] affecting the partnership." *Id.* If so, under UPA section 20, each partner would be obligated to disclose this information on demand. However, each partner would probably agree that disclosure of its information to a competitor-partner would be undesirable. Although it can be argued that the UPA section 20's reciprocal nature prevents partners from demanding access to proprietary information due to a tit-for-tat concern that their copartners would also demand their proprietary information, such an assumption should be presumed to work only when the partners' information and secrecy needs are symmetrical. If one partner stands to gain more from the secrets of its copartner than it stands to lose from disclosure to its copartner, UPA section 20 could work to the detriment of the partner with the more valuable information.

145. The extent to which partners can modify their disclosure rights and obligations is uncertain under the UPA. The RUPA makes the disclosure requirements broadly amendable by contract. REVISED UNIF. P'SHIP ACT § 103, 6 U.L.A. 42-43; HILLMAN, VESTAL & WEIDNER, *supra* note 1, at 191-92.

association and would recognize that contracting parties generally can establish ex ante disclosure rules through contract.

At the same time, however, the structural model corrects the autonomy model by recognizing that unincorporated business organizations are not merely blank form business contracts devoid of social context or powerful participant expectations. The law would establish both socially appropriate default rules and limits on party modifications of such default rules. This would assure that specific business organizations are both socially appropriate and consistent with party and social expectations.

Furthermore, the general disclosure rules which operate in the absence of a particular contract would take into account the other aspects of the parties' legal relationship to one another and, in doing so, would recognize that in different circumstances members can have different participation levels in the business community which they create. When there is greater member participation, such as when ownership and management authority converge, the law should assume greater information disclosure rights and increased fiduciary duties.[146] On the other hand, when there is little or no convergence between ownership and management authority, such as when certain members merely contribute capital and share only in the firm's reward attributes, the law should assume reduced information disclosure rights and reduced fiduciary duties. To a great extent, this has been the approach historically taken in unincorporated business organization law.[147] Thus general partners, in which management responsibility and agency authority are vested, generally have been given broad information disclosure rights and obligations, and limited partners, which historically have neither management responsibility nor agency authority, have been given minimal information disclosure rights and obligations. Similarly, general partners historically have had broad and robust fiduciary duties to one another and the partnership, while limited partners historically have had no or weak fiduciary duties.

General partners are more fully within the organization's sphere through their participation as full members in the firm's control, risk, and reward attributes, and limited partners have little connection with the firm other than through financial participation. General partners come closer to the community pole of the autonomy-community continuum and limited partners come closer to the autonomy pole of the continuum. This approach helps make sense of disclosure rules in unincorporated business law, but when rights and responsibilities are assigned without regard to the members' positions within the organizational sphere, the results are incoherent and dangerous.

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146. This convergence theory arguably could apply to the extent ownership and personal liability overlap but, in light of modern trends toward limited liability protection for all enterprise members, this overlap is less likely. *See* Callison, *supra* note 19, at 163.

147. *Id.*; Deborah A. DeMott, *Agency and the Unincorporated Firm: Reflections on Design on the Same Plane of Interest*, 54 WASH. & LEE L. REV. 595 (1997) (discussing the importance of differentiation between ownership and agency); *see also* Claire Moore Dickerson, *Equilibrium Destabilized: Fiduciary Duties Under the Uniform Limited Liability Company Act*, 25 STETSON L. REV. 415, 417, 442-43 (1995).

IV. APPLYING THE STRUCTURAL MODEL TO LLCS

A. A Structural Approach to Disclosure and Duty Rules

What should be the information rights and fiduciary obligations of LLC participants? As discussed above, there are two distinct types of the LLC form: member-managed LLCs and manager-managed LLCs.[148] In member-managed LLCs, the members retain control over the firm's operations.[149] In manager-managed LLCs, the firm's operations are controlled by managers who, although they can be members, participate in management solely in their capacity as managers.[150] The control attributes of participants in the two LLC forms can be compared to the control attributes of participants in the traditional general partnership and limited partnership forms.[151] A member of a member-managed LLC has the control attributes of a partner in a general partnership. Similarly, a manager of a manager-managed LLC has the control attributes of a general partner in a limited partnership. Finally, a nonmanager member of a manager-managed LLC has the control attributes of a limited partner in a limited partnership.

These management participation characteristics should help define the statutory information rights and fiduciary duties of various LLC participants. An appropriate structural model for disclosure rights and fiduciary duties in unincorporated business organizations would consider the actual legal relationships among the members and would recognize that members can have different participation levels in the organization. Under this model, when ownership and management authority converge the law should assume greater information disclosure rights and increased fiduciary duties, and when there is little or no convergence between ownership and management authority the law should assume reduced information disclosure rights and reduced fiduciary duties.

This analysis suggests that members in member-managed LLCs should have the broad information rights and fiduciary duties of partners in general partnerships. Using the RUPA as the standard, such members would have the unrestricted right of access to LLC books and records, the right without predicate demand to information reasonably required for them to exercise any rights and duties relating to the LLC, and the right upon reasonable and proper demand to all information concerning the LLC. As to fiduciary duties under the RUPA, such members would have statutory fiduciary duties of loyalty and care together with a nonfiduciary obligation of good faith and fair dealing.

This analysis also suggests that members who also are managers in manager-managed LLCs should have the broad information rights and fiduciary duties of general partners in limited partnerships. Assuming the cross-references in the RULPA to general partnership law are deemed to be to the RUPA,[152] then such member-

148. *See supra* text accompanying note 10.

149. *See supra* text accompanying note 11.

150. *See supra* text accompanying note 12.

151. The status-based risk attributes of all participants in both species of LLCs are comparable to limited partners in a limited partnership or shareholders in a corporation.

152. REVISED UNIF. LTD. P'SHIP ACT § 1105 (amended 1985), 6A U.L.A. 302 (1995).

managers would have the unrestricted right of access to LLC books and records, the right without predicate demand to information reasonably required to exercise their rights and duties relating to the LLC, and the right upon reasonable and proper demand to all information concerning the LLC. As to fiduciary duties, such member-managers would have statutory fiduciary duties of loyalty and care, together with a nonfiduciary obligation of good faith and fair dealing.

Finally, this analysis suggests that nonmanager members in manager-managed LLCs should have the narrow and weaker information rights and fiduciary duties of limited partners in limited partnerships. If one adopts the limited partner analogy, such nonmanager members would have a somewhat restricted statutory right to information, which includes the right to inspect and copy basic firm records[153] and the right to obtain from the managers

> from time to time upon reasonable demand (i) true and full information regarding the state of the business and financial condition of the [LLC], (ii) promptly after becoming available, a copy of the [LLC's] federal, state, and local income tax returns for each year, and (iii) other information regarding the affairs of the [LLC] as is just and reasonable.[154]

This nonmanager-member information right would be substantially narrower than that

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153. *Id.* § 305(1), 6A U.L.A. 167 ("Each limited partner has the right to . . . inspect and copy any of the partnership records required to be maintained by Section 105 . . . .").

RULPA section 105 requires the limited partnership to maintain a specific list of not very helpful documents:

> (a) Each limited partnership shall keep at the office referred to in Section 104(1) the following:
>
> (1) a current list of the full name and last known business address of each partner, separately identifying the general partners (in alphabetical order) and the limited partners (in alphabetical order);
>
> (2) a copy of the certificate of limited partnership and all certificates of amendment thereto, together with executed copies of any powers of attorney pursuant to which any certificate has been executed;
>
> (3) copies of the limited partnership's federal, state and local income tax returns and reports, if any, for the three most recent years;
>
> (4) copies of any then effective written partnership agreements and of any financial statements of the limited partnership for the three most recent years; and
>
> (5) unless contained in a written partnership agreement, a writing setting out:
>
> (i) the amount of cash and a description and statement of the agreed value of the other property or services contributed by each partner and which each partner has agreed to contribute;
>
> (ii) the times at which or events on the happening of which any additional contributions agreed to be made by each partner are to be made;
>
> (iii) any right of a partner to receive, or of a general partner to make, distributions to a partner which include a return of all or any part of the partner's contribution; and
>
> (iv) any events upon the happening of which the limited partnership is to be dissolved and its affairs wound up.

Id. § 105(a), 6A U.L.A. 88.

154. *Id.* § 305(2), 6A U.L.A. 167.

for members who participate in LLC management. Instead of access to all books and records, the member would be given access to only a short list of basic documents.[155] Instead of receiving some information without a predicate demand, information is received only following a reasonable demand.[156] Instead of access to all LLC information, such members would have access only to limited information. On the fiduciary duty side, under the limited partner analogy, a nonmanager member would have no statutory fiduciary duties.[157] Under this analysis, the ULLCA's dangerous mismatch between the community model's information rights regime and the autonomy model's fiduciary duty regime would be eliminated.

B. A Possibility for Redemption—the Re-RULPA

The NCCUSL has appointed a drafting committee to prepare a new Revised Uniform Limited Partnership Act ("Re-RULPA").[158] The Re-RULPA drafters have noted that limited partnerships are intended for situations in which there is strong, entrenched centralized management and passive investors.[159] Given this clear statement that limited partnership use is anticipated for businesses in which some owners exercise the firm's control attributes and other owners participate only in the firm's reward attributes, the Re-RULPA drafters should consider where the participants fit on the autonomy-community continuum and should draft disclosure and fiduciary duty rules with this in mind. As set forth above, an appropriate

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155. *Compare id.* §§ 105(a), 305(1), 6A U.L.A. 88, 167 (access only to "partnership records required to be maintained by section 105"), *with* REVISED UNIF. P'SHIP ACT § 403(b) (amended 1997), 6 U.L.A. 78 (Supp. 2000) (access to "books and records" without limitation).

156. *Compare* REVISED UNIF. LTD. P'SHIP ACT § 305(2), 6A U.L.A. 167 ("upon reasonable demand . . . true and full information"), *with* REVISED UNIF. P'SHIP ACT § 403(c)(1), 6 U.L.A. 56 (specification of information required to be furnished "without demand").

157. *Compare* REVISED UNIF. LTD. P'SHIP ACT art. 3, 6A U.L.A. 137-69 (no fiduciary duties in article 3 limited partners), *with id.* art. 4, 6A U.L.A. 170-202 (fiduciary duties for general partners through section 403). The courts have in some cases imposed limited fiduciary duties on limited partners. *See* CALLISON, *supra* note 2, § 21.16 (discussing limited partner fiduciary duties).

158. REVISED UNIF. LTD. P'SHIP ACT (Proposed Revision Draft Mar. 2000), http://www.law.upenn.edu/bll/ulc/ulc_frame.htm.

159. The prefatory note to Re-RULPA states:

> Re-RULPA is a "stand alone" act, "de-linked" from the general partnership act. To be able to stand alone, Re-RULPA incorporates many provisions from RUPA and some from ULLCA. . . .
>
> . . . Re-RULPA therefore targets two types of enterprises that seem largely beyond the scope of LLPs and LLCs: (i) sophisticated, manager-entrenched commercial deals whose participants commit for the long term, and (ii) estate planning arrangements (family limited partnerships). Re-RULPA accordingly assumes that, more often than not, people utilizing the act will want:
>
> - strong centralized management, strongly entrenched, and
> - passive investors with little right to exit the entity.
>
> Re-RULPA's rules, and particularly its default rules, have been designed to reflect these assumptions.

Id. at prefatory note.

structural model would consider the actual legal relationships among the members. To the extent that owners participate in management and control, the law should assume greater information disclosure rights and increased fiduciary duties, and to the extent that they do not so participate, the law should assume reduced information disclosure rights and reduced fiduciary duties. Thus, in a limited partnership, general partners should have broad information rights and fiduciary duties, and limited partners should have narrow information rights and fiduciary duties.

How does the current draft of the Re-RULPA stack up with respect to general partner information rights and fiduciary duties? First, Re-RULPA section 407(a)(1) provides general partners with the right to inspect and copy the limited partnership's core "required records"[160] and the right to inspect and copy "any other records maintained by the limited partnership regarding the limited partnership's business, affairs, and financial condition."[161] The distinction between the core record inspection rights and the noncore record inspection rights relates to the place of inspection. The Re-RULPA also follows the RUPA and provides in section 407(b) that each general partner and the limited partnership must provide to a general partner, "without demand, any information concerning the limited partnership's business and affairs reasonably required for the proper exercise of the general partner's rights and duties,"[162] and, "on demand, any other information concerning the limited partnership's business and affairs, except to the extent the demand or he information demanded is unreasonable or otherwise improper under the circumstances."[163] Thus, the Re-RULPA follows the RUPA's communitarian bent with respect to general partner information rights.

With respect to general partner duties, the Re-RULPA section 408 also follows the RUPA and provides that general partners owe the limited partnership and the other partners fiduciary duties of loyalty and care, and are bound in the exercise of their duties to a nonfiduciary "obligation of good faith and fair dealing."[164] Thus, the RUPA's substantially modified communitarian premise continues to apply to Re-RULPA general partners. Although the Re-RULPA likely imports many of the fiduciary issues created by the RUPA, there is a sensible match between broad information rights and fairly broad fiduciary duties.

With respect to limited partner information disclosure rights, Re-RULPA section 305(a) provides that, upon "10 days' written demand to the partnership, a limited partner may inspect and copy" the limited partnership's core "required records."[165]

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160. "Required records" are given narrow definition in Re-RULPA section 111(a), and consist of core documents such as a list of the partners' names and addresses, a copy of partnership's organizational documents, copies of tax returns and financial statements, and copies of any record of partner consents and votes. *Id.* § 111(a). Re-RULPA can therefore be contrasted with the RUPA and the ULLCA, neither of which mandate that the entity keep specified records.

161. *Id.* § 407(a)(2).

162. *Id.* § 407(b)(1).

163. *Id.* § 407(b)(2). The burden of proving that the information requested is unreasonable or improper likely rests with the limited partnership or the general partner from whom information is requested.

164. *Id.* § 408.

165. *Id.* § 305(a).

This can be compared with the ULLCA's broader grant of nonmanager-member access rights to all "records."[166] Re-RULPA section 305(b) further provides that limited partners may demand to "inspect and copy true and full information regarding the state of the business and financial condition of the limited partnership and other information regarding the affairs of the limited partnership . . . as is just and reasonable."[167] However, to obtain such noncore information the limited partner must seek the "information for a purpose reasonably related to [its] interest as a limited partner," the demand must set forth with "reasonable particularity the information sought and the [limited partner's] purpose for seeking the information," and the information sought must be "directly connected to the limited partner's purpose."[168] In addition, Re-RULPA section 305(g) states that the "limited partnership may impose reasonable limitations on the use of information" provided to a limited partner,[169] and Re-RULPA section 110 states that "the partnership agreement may impose reasonable limitations on the availability and use of information . . . and may define appropriate remedies, including liquidated damages, for a breach of any reasonable" use limitation.[170] In the event of a dispute concerning demanded information, the current comments to Re-RULPA section 305(c)(3) would impose the burden of proof on the limited partner making the demand.[171]

Limited partner information rights under Re-RULPA would differ in substantial ways from nonmanager-member rights under the ULLCA. First, rather than providing limited partners with rights to all "records" broadly defined, the Re-RULPA provides access only to a confined core of "required records." Second, rather than providing general access on demand to other information concerning the company's business or affairs, the Re-RULPA requires that limited partners first demonstrate a proper purpose related to their interest and require a direct connection between the information sought and the limited partner's purpose. Third, the Re-RULPA clearly permits the partnership agreement to specify reasonable limitations on information availability and use. Thus, the limited partner information rules under the Re-RULPA are consistent with the limited partners' lack of participation in management and control. Limited partners have a right to noncore information only if they can demonstrate that such information somehow relates to their actual interests as partners.

With respect to limited partner fiduciary duties, Re-RULPA section 306(a) generally follows the ULLCA's lead and provides that limited partners owe no fiduciary duties to the limited partnership or to other partners.[172] The NCCUSL drafting committee is considering further choices creating limited partner duties to the extent that limited partners participate (or perhaps are vested with power to participate) in limited partnership management.[173] Thus, the fiduciary duty rules under

166. UNIF. LTD. LIAB. CO. ACT § 408(a), 6A U.L.A. 462-63 (1995).

167. REVISED UNIF. LTD. P'SHIP ACT § 305(b) (Proposed Revision Draft Mar. 2000).

168. *Id.*

169. *Id.* § 305(g). In the event of a dispute, "the limited partnership has the burden of proving reasonableness." *Id.*

170. *Id.* § 110(b)(3).

171. *Id.* § 305(c) cmt.

172. *Id.* § 306(a).

173. *Id.* § 306(b) (two versions).

Re-RULPA generally track the limited partners' participation rights. The drafters should consider extending limited partner fiduciary duties to cover the personal use of partnership information disclosed to the limited partners. Under Re-RULPA section 306(c), limited partners are required to discharge their duties (if any) and exercise their rights in accordance with the obligation of good faith and fair dealing.[174]

The purpose of this discussion is not to fully critique the information disclosure and fiduciary obligation rules of the Re-RULPA,[175] but rather to demonstrate that the NCCUSL drafters are capable of conceptualizing participants' information rights and fiduciary duties based on their differentiated roles within the organization. One can hope that the NCCUSL will consider its entire process of drafting unincorporated business organization statutes to be an evolutionary one holistically involving general partnerships, limited liability companies, and limited partnerships, and the NCCUSL will acknowledge their success in drafting a limited partnership statute recognizing that partners have differentiated roles and that their information rights and fiduciary duties should track their roles. The Re-RULPA presents the NCCUSL with yet another chance to get the disclosure rules and fiduciary duties of participants right, and provides a reason for the NCCUSL to revisit decisions made in the ULLCA and ultimately to restate the ULLCA provisions. There simply is no reason to set a uniform act in concrete until it is right, particularly when work continues on related statutes and when it has not been widely adopted. The ULLCA's information rules are inferior and should be changed to follow the formulation which appears to be forthcoming in the Re-RULPA.

V. CONCLUSION

This Article demonstrates that legislative drafters can commit profound errors when they combine provisions from dissimilar business organization forms without adequately considering underlying theory. It proposes a theory, which focuses on the member's participation in an entity's management and control in addition to participation in economic benefits and losses, to distinguish entity participants' rights and obligations. It shows how this appropriate theory, when applied to limited liability company information rights and use restrictions, would remedy the ULLCA's errors and would provide a logic and consistency presently lacking in most state LLC statutes. Finally, and importantly, it points out the fact that the NCCUSL is engaged

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174. *Id.* § 306(c). Re-RULPA section 306(c) also states that "the [good-faith and fair-dealing] obligation stated in this subsection displaces any obligation of good faith and fair dealing at common law or otherwise." *Id.* The drafters' comments indicate the drafters' intent that the obligation should be used only to protect agreed-upon arrangements from conduct that is manifestly beyond what a reasonable person could have contemplated when the contractual arrangements were made. *Id.* § 306(c) cmt. Thus, section 306(c) appears to contemplate limiting the good-faith obligation beyond the RUPA version of the same language, and may limit good faith to something approaching the UCC "honesty in fact" standard. *Compare id.* § 306(c), *with* U.C.C. §§ 1-201(19), 2-103(b) (2000). This further deviation from an already limited RUPA standard should be reconsidered.

175. Such critiques are possible and will be made. *See, e.g.*, Ribstein, *supra* note 3, at 981-86.

in an ongoing entity drafting process. Further developments and insights, including those derived from drafting a New Revised Uniform Limited Partnership Act, can figure in, correcting the mistakes of ULLCA. In light of the fact that the NCCUSL and others will likely be called on to draft an enormously complex unified business entity statute, it is critical that appropriate and socially desirable theories of entity forms and participant rights and responsibilities be discussed, identified, and implemented.