

The Substantial Compliance Doctrine: Preserving Limited Liability Under The Uniform Limited Partnership Act

Investors in a partnership can effectively limit their liability to the amount of their investment by ensuring that the partnership forms in "substantial compliance" with the requirements of the Uniform Limited Partnership Act. This comment examines three areas of concern to purported limited partners arising from the substantial compliance determination. It then analyzes the current parameters of the substantial compliance doctrine and discusses the future of the doctrine in the Revised Uniform Limited Partnership Act.

INTRODUCTION

The limited partnership is now a well recognized form of enterprise which allows an investor to contribute capital to a business without risking the unlimited liability characteristic of a general partnership. "Limited" or "special" partners who fully comply with the requirements of the applicable limited partnership act cannot be held liable for amounts in excess of their capital contributions. The Uniform Limited Partnership Act of 1916 (Uniform Act)¹ extended this protection to include certain lim-

¹ UNIFORM LIMITED PARTNERSHIP ACT § 2, reprinted in 6 UNIFORM LAWS ANNOTATED 568 (West 1969) [hereinafter cited as U.L.P.A.] provides:

- (1) Two or more persons desiring to form a limited partnership shall
 - (a) Sign and swear to a certificate, which shall state
 - I. The name of the partnership,
 - II. The character of the business,
 - III. The location of the principal place of business,
 - IV. The name and place of residence of each member; general and limited partners being respectively designated,
 - V. The term for which the partnership is to exist,
 - VI. The amount of cash and a description of and the agreed

ited partners who form a partnership in "substantial compliance" with the statutory requirements. This phrase is retained with slight modifications in the Revised Uniform Limited Partnership Act of 1976 (Revised Act).²

When a purported limited partnership is organized without careful adherence to the statutory formalities, partners who intended to limit their liability to the amount of their investment may be held liable to the full extent of their personal resources. This determination of liability involves three aspects of limited partnership formation. First, to qualify for the limited liability privilege, the partnership must give notice of its special status to third parties with whom it intends to transact business. Second, the members of the enterprise should be well informed of their options in the event the partnership was improperly formed, since some of them may still be able to secure the limited liabil-

value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, at which the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over the other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of [here designate the proper office].

(2) *A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).* (Emphasis added.)

² REVISED UNIFORM LIMITED PARTNERSHIP ACT § 201(b), reprinted in 6 UNIFORM LAWS ANNOTATED 134 (West Cum. Supp. 1980) [hereinafter cited as R.U.L.P.A.].

ity protection. Finally, assuming that a limited partnership was not validly formed, a court must assess the partners' participation in the business to establish the extent of each partner's liability. Clear and consistent guidelines in these areas are essential to maintain this form of investment. Recent authority, however, evidences no such clarity and consistency.

This comment first examines the background of the substantial compliance doctrine in relation to the Uniform Act. It discusses the problem areas outlined above and suggests solutions consistent with the policies expressed by the framers of the Uniform Act. It then explores the elements and parameters of substantial compliance. Finally, this comment looks at the future of the doctrine as modified by the Revised Act.

I. BACKGROUND OF THE SUBSTANTIAL COMPLIANCE DOCTRINE

The limited partnership dates back to 12th century Italy,³ after which it spread throughout continental Europe.⁴ The stated purpose of early limited partnership statutes was to encourage trade by opening new channels of capital.⁵ To this end, these statutes allowed a person to invest in and reap profits from a partnership comprised of individuals with business acumen, while remaining relatively free of liability.

In the early stages of the development of the limited partnership in America,⁶ courts described it as a "creature of statute"⁷ and considered it a privilege granted by the legislature to the

³ The earliest mention of the limited partnership is in the statutes of Florence and Pisa in 1160 A.D. At that time they were "one of the most frequent combinations of trade, and . . . the basis of the opulent maritime cities in Italy." *Ames v. Downing*, 1 Bradf. 321, 329 (N.Y. 1850).

⁴ During the Middle Ages, limited partnerships were "much in vogue in the continental countries." The French Commercial Code contained provisions for them under the name of *la Societe en Commandite*. L. BATES, *THE LAW OF PARTNERSHIP* 479 (1888).

⁵ Comment, *The Nature of Limited Liability Under the Uniform Limited Partnership Act*, 71 U. PA. L. REV. & AM. L. REG. 150, 152 (1922).

⁶ New York passed the first limited partnership act in the United States in 1822. It was fashioned after the French statute. By 1888, all but three states had adopted the New York statute nearly verbatim. See Comment, *Partnerships—Limited—Failure to Comply With Statutes as Basis for Unlimited Liability*, 48 MICH. L. REV. 347, 348 (1950).

⁷ *Id.* at 349. See *Lanier v. Bowdoin*, 282 N.Y. 32, 38, 24 N.E.2d 732, 735, 16 N.Y.S.2d 32, 38 (1939).

profit-seeking investor.⁸ Many courts adhered to the rule that statutes in derogation of the common law were to be strictly construed.⁹ Strict compliance with the statutory requirements was therefore necessary if the limited partner was to avoid liability as a general partner. It often happened that the slightest technical omission in the execution or filing of the limited partnership certificate gave rise to unlimited liability for all partners. The policy behind these decisions was to protect third-party creditors—a protection not afforded by the civil law. The framers of the Uniform Act explicitly rejected such a strict view. They designed the Act to both encourage investment and protect third parties by requiring only substantial compliance with certain formation requisites.¹⁰ Section 2 of the Uniform Act expresses this more relaxed attitude toward limited partnership formation.

Section 2(1) requires that the purported limited partners sign, swear to and file a certificate of limited partnership.¹¹ The Uniform Act lists fourteen statements that are to be included in the certificate.¹² Some of these statements are intended to provide notice to third parties of the make-up of the limited partnership.¹³ The remaining statements are either administrative provisions¹⁴ or contractual guidelines for the partners in their relations *inter se*.¹⁵ Section 2(2) then provides that “a limited partnership is formed if there has been substantial compliance

⁸ See *Cummings v. Hayes*, 100 Ill. App. 347, 355 (1902) (purported limited partners were “endeavoring to avail themselves of a privilege granted by the [limited partnership] statute”). Similarly, corporations owe their existence to state and federal statutes. 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 2.1 (rev. perm. ed. 1975). In *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), Chief Justice Marshall described a corporation as an “artificial being. . .existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter confers upon it. . . .” *Id.* at 636.

⁹ Note, *Partners and Limited Partners Under the Uniform Act*, 36 HARV. L. REV. 1016, 1017 (1922). See also *Cummings v. Hayes*, 100 Ill. App. 347 (1902); *Henkel v. Heyman*, 91 Ill. 96 (1878).

¹⁰ U.L.P.A. § 1 (Official Comment).

¹¹ See note 1 *supra*.

¹² See note 1 *supra*. Depending on the circumstances, all 14 statements may not be required.

¹³ See notes 60-61 and accompanying text *infra*.

¹⁴ See notes 67, 69-81 and accompanying text *infra*.

¹⁵ See notes 68, 82-84 and accompanying text *infra*.

in good faith" with the requirements of section 2(1).

Reduced to its simplest terms, section 2 is a compromise regulating the tension between the privileges of a purported limited partner and the rights of third parties. On one hand, the statute authorizes limited partners to enter into an agreement whereby they can provide capital to a business with the accompanying privilege of limited liability. On the other hand, the statute presumes that all members of the enterprise who participate as general partners will share full liability for partnership obligations.¹⁶ Compliance with section 2, then, serves primarily to alert third parties that not all of the partners have submitted to unlimited liability.

Theoretically, compliance with section 2 is "substantial" when third parties are put on notice that the partnership with which they are transacting business is a valid limited partnership.¹⁷ Absent such notice, the purported limited partners lose their privilege of limited liability to the third parties' right to rely on the partnership's compliance with the statute.

II. ANALYSIS OF CURRENT DOCTRINE

Recent case and statutory authority raises problems in three aspects of limited partnership formation. In preserving its limited liability protection, the partnership must concern itself with the kind of notice provided to third parties, the election presented to purported limited partners when they learn of possible noncompliance and the determination of the noncomplying partners' status. After analyzing each of these problems, this comment will suggest solutions consonant with the policies expressed by the framers of the Uniform Act.

A. *The Notice Requirement*

The basic purpose of section 2 is to give creditors notice of the facts regarding partnership capital and the rules as to additional contributions to and withdrawals from the partnership.¹⁸ A creditor is deemed constructively aware of these facts and rules when the partnership has filed an appropriate certificate in the desig-

¹⁶ U.L.P.A. § 1 (Official Comment).

¹⁷ See Note, *The Limited Partnership*, 2 U.C.L.A. L. Rev. 105, 109 (1954).

¹⁸ See R.U.L.P.A. § 201 (Commissioners' Comment). See also *Tiburón Nat'l Bank v. Wagner*, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968).

nated office. Since constructive notice is sufficient, logic dictates that a partnership should be able to preserve its special status by providing third parties with actual notice of these same essential facts. But two recent cases hold to the contrary.

In *Dwinell's Central Neon v. Cosmopolitan Chinook*,¹⁹ an allegation by a partnership that its limited partnership status was "widely known and publicized" did not raise a genuine issue of fact sufficient to withstand summary judgment. The court held that a third party's knowledge as to the status of a purported limited partnership was irrelevant when the partners had made no attempt to comply with the formation requirements at the time they entered into the contract.²⁰ The partnership was apparently unable to allege that third parties were actually aware of any of the essential facts regarding partnership capital, since these facts were not set out in writing.

This was not the case in *Tiburon National Bank v. Wagner*.²¹ Before making a loan to the partnership, a bank was given a copy of the partnership's certificate specifying that defendant was a limited partner. The certificate was never recorded. When the partnership defaulted on the loan, the bank was allowed to recover from the defendant as a general partner. The court said that a creditor did not need to show actual reliance upon the non-recording of the certificate.²² Instead, the court found that the bank had a right to rely on there being substantial compliance with the statute before the protection of its provisions would extend to any of the partners.²³

The unstated assumption in both of these cases appears to be that a partnership's providing actual notice of its special status

¹⁹ 21 Wash. App. 939, 587 P.2d 191 (1978).

²⁰ *Id.* at 942, 587 P.2d at 194. *Cf.* *Tracy v. Tuffly*, 134 U.S. 206 (1890), where creditors of the partnership dealt with it and recognized it as a limited partnership and were estopped to claim that it was a general partnership for its failure to make proper publication of the certificate.

²¹ 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968).

²² *Id.* at 875, 71 Cal. Rptr. at 837. Thus the court would not require a creditor to allege that it had searched for a recorded certificate. This implies that a creditor need not rely upon discrepancies between the certificate and the actual conduct of the partnership business to recover for misstatements or omissions. But the Uniform Act does seem to require reliance as a basis for recovery. *See* notes 25 and 66 *infra*.

²³ *Tiburon Nat'l Bank v. Wagner*, 265 Cal. App. 2d 868, 875, 71 Cal. Rptr. 832, 837 (1st Dist. 1968).

was not substantial compliance with the filing requirement.²⁴ While this assumption may be justified on the facts of *Dwinell's*, it leads to an absurd result in *Tiburon*. Since the plaintiff in *Tiburon* had a copy of the certificate, it had actual notice of the essential facts of defendant's partnership. Actual notice in the form of a written certificate is at least as protective—if not more protective—of third-party creditors as is the constructive notice provided for under section 2(1)(b). The court in *Tiburon* should thus have found substantial compliance.

As a general principle, courts should safeguard the special status of a limited partnership which has provided its creditors with notice—actual or constructive—of its essential facts in a written certificate. When a partnership can establish that its creditors received a copy of a complying certificate, such actual notice furthers the policy of section 2 to the same extent as would constructive notice via recordation.

Three purposes would be served by allowing a written certificate to be the basis for actual notice. First, a creditor will have concrete terms upon which to rely in order to hold the partnership liable for discrepancies between the certificate and the conduct of the partnership business.²⁵ Second, limited partners will be compelled to come to an agreement as to the terms of their relations *inter se*.²⁶ Finally, a court will have a written instrument upon which to determine the partnership's substantial compliance with the remaining requirements. The additional burden this determination places on a court is mitigated by the fact that the analysis should be identical for recorded and unrecorded certificates.²⁷

Equating such actual notice with constructive notice should

²⁴ See notes 28-30 and accompanying text *infra*.

²⁵ Section 6 of the Uniform Act requires actual reliance by a third party to impose liability on partners who knowingly allow false statements to appear in the certificate. See note 35 *infra*. It follows that a reliance requirement is even more appropriate for liability predicated on noncompliance with § 2 since that section embodies errors and omissions of less "culpability" than § 6.

²⁶ See note 85 and accompanying text *infra*.

²⁷ See text accompanying notes 92-94 *infra*. In many cases, "oral" notice would be as effective as a written certificate in conveying to third parties the essential facts of the partnership. But allowing for oral notice would lead to problems of proof and would not serve the three purposes noted above. These considerations should compel courts to reject oral notice as a substitute for recordation or delivery of a written certificate.

not affect the question of when notice must be given to preserve the limited liability protection. For example, where partners have proceeded only as far as executing the certificate, a delay in filing makes all partners liable as general partners on all contracts entered into prior to such filing.²⁸ Thus the filing or delivery of a complying certificate only assures the limited liability privilege for business transacted after the third party receives constructive or actual notice.²⁹ Of course, where the contract is formed before the partnership takes any steps to comply with the formation requirements, purported limited partners are liable as general partners.³⁰

B. Status of Noncomplying Partners

A fundamental assumption of the Uniform Act is that limited partners are not general partners who secure limited liability by simply filing a certificate.³¹ In other words, limited partners are "investors" and members of the business enterprise, but they are not "partners" in the sense of being liable as general partners unless they take part in the control of the partnership busi-

²⁸ *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111 (6th Cir. 1970) (purported limited partnership was general partnership as to claim arising after execution but prior to filing of certificate of limited partnership). *Cf. Stowe v. Merrilees*, 6 Cal. App. 2d 217, 44 P.2d 368 (3d Dist. 1935) (49-day delay between execution and recordation of certificate was not so unreasonable as to constitute a lack of compliance as to a contract entered into more than two months after the date of recordation); *Franklin v. Rigg*, 143 Ga. App. 60, 237 S.E.2d 526 (1977) (defendants were not liable as general partners because of late recordation of certificate; plaintiff dealt originally only with those who later became general partners and did not raise the issue of limited partnership *vel non* until two years after recordation, during which time defendants had renounced under § 11). *See also* *Ruth v. Crane*, 392 F. Supp. 724 (E.D. Pa. 1975).

²⁹ This assumes, of course, that the limited partners did not otherwise jeopardize their limited liability by taking part in the control of the partnership business. *See* note 35 and accompanying text *infra*.

³⁰ *E.g.*, *Atlanta Stove Works, Inc. v. Keel*, 255 N.C. 421, 121 S.E.2d 607 (1961) (purported limited partners liable as general partners for partnership debt accruing prior to compliance with limited partnership act); *Dwinell's Cent. Neon v. Cosmopolitan Chinook*, 21 Wash. App. 929, 587 P.2d 191 (1978) (partnership considered general partnership as to contract entered into before steps toward compliance with limited partnership act were taken). *See also* *Filesi v. United States*, 352 F.2d 339 (4th Cir. 1965); *Bisno v. Hyde*, 290 F.2d 560 (9th Cir. 1961).

³¹ U.L.P.A. § 1 (Official Comment).

ness.³² This assumption becomes important when a purported limited partnership is improperly formed. While noncompliance with the statutory requirements will bar the formation of a limited partnership, it should not mandate a finding that the resulting entity is a general partnership which includes all purported limited partners. It is only when noncompliance is accompanied by objective manifestations of intent sufficient to form a de facto general partnership³³ that all partners should face unlimited liability.³⁴

This assumption has been the basis for decision in only two recent cases.³⁵ In *Voudouris v. Walter E. Heller & Co.*,³⁶ the defendant intended to become a limited partner in a carpet company, but the general partner failed to file the certificate in the

³² U.L.P.A. § 7. See also note 35 and accompanying text *infra*.

³³ See, e.g., *Zajac v. Harris*, 241 Ark. 737, 410 S.W.2d 593 (1967). Factors relevant to a finding of a de facto general partnership include a person's contribution of capital in return for a share in the profits of the business, a written agreement setting out rights and responsibilities characteristic of partners, the subsequent conduct of the parties during the period of their association, the subjective intent of the parties and any holding out of the parties as partners to third parties. A. BROMBERG, CRANE AND BROMBERG ON PARTNERSHIP § 4 (1968).

³⁴ See C. ROHRLICH, ORGANIZING CORPORATE AND OTHER BUSINESS ENTERPRISES 2-38 (5th ed. 1975), and cases cited therein.

³⁵ See notes 36-37 and accompanying text *infra*. Earlier cases have held in accordance with this fundamental assumption without making it the basis for decision. For example, in *Henningsen v. Howard*, 117 Cal. App. 2d 352, 255 P.2d 837 (1st Dist. 1953), plaintiff sought to impose unlimited liability on defendant limited partner on the basis of false statements in the certificate. Although the court adverted to the purported limited partner's lack of participation in the business and his intent not to become a general partner, it rested its decision on § 6 of the Uniform Act, which precludes liability for false statements absent actual reliance by the injured third party. See also *Filesi v. United States*, 352 F.2d 339 (4th Cir. 1965) (defendant's status was properly that of a general partner because he failed to comply with the formation requirements, though evidence also showed that he had openly and publicly taken an active part in the management and control of the business); *Bisno v. Hyde*, 290 F.2d 560 (9th Cir. 1961) (where defendants' answers recited that they were partners but did not go on to claim status of limited partners, their failure to file a certificate rendered them liable as general partners); *Atlanta Stove Works, Inc. v. Keel*, 255 N.C. 421, 121 S.E.2d 607 (1961) (liability of defendant as general partner was upheld on the basis of his failure to comply with the formation requirements, though evidence also showed that defendant's name was used—with his knowledge—in connection with various advertising and business transactions of the partnership).

³⁶ 560 S.W.2d 202 (Tex. Ct. Civ. App. 1977).

appropriate office. The court concluded that, while a valid limited partnership never came into existence, the defendant was not liable as a general partner since he took no part in the management of the enterprise and gave up his interest in the business upon learning that the certificate had not been filed.

A court reached the same conclusion in *United States v. Conson*.³⁷ Here the partnership also failed to file the certificate, but defendant, a purported limited partner, was relieved of general partnership liability. The court found that the defendant never had the necessary intent to join the partnership in the capacity of a general partner and that, upon learning of noncompliance, he promptly mailed notices renouncing any further interest in the business to the other parties involved.

Many courts have ignored this fundamental distinction between "investors" and "partners" and have found that the limited partners' failure to substantially comply rendered them liable ipso facto as general partners.³⁸ This conclusion, however, is not in harmony with the theoretical framework of the limited partnership.³⁹ Instead, it reinstates some of the harsh results of the common law which the Uniform Act sought to avoid.⁴⁰

California may have taken a further step in the wrong direction. Section 15044 of the California Corporations Code declares, in effect, that a partner who fails to qualify as a limited partner is a general partner.⁴¹ A court could apply this section to a purported limited partner who, as noted above, merely fails to substantially comply with the formation requirements but who oth-

³⁷ 286 F.2d 453 (9th Cir. 1961).

³⁸ *E.g.*, *Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445 (2d Cir. 1975); *Bergeson v. Life Ins. Corp. of America*, 265 F.2d 227 (10th Cir. 1959); *Tiburon Nat'l Bank v. Wagner*, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968); *Dwinell's Cent. Neon v. Cosmopolitan Chinook*, 21 Wash. App. 929, 587 P.2d 191 (1978); *see also Refinite Sales Co. v. Fred R. Bright Co.*, 119 Cal. App. 2d 56, 258 P.2d 1116 (4th Dist. 1953).

³⁹ *See* note 31 and accompanying text *supra*.

⁴⁰ U.L.P.A. § 1 (Official Comment).

⁴¹ CAL. CORP. CODE § 15044 (West 1977) states, in pertinent part:

Every partnership that is not formed in accordance with the law concerning special, limited, or mining partnerships. . . is a general partnership. Every partner who is not a special or limited partner nor a member of a mining partnership is a general partner.

This section was probably intended to apply only to those who show the requisite objective intent to be considered general partners. When so applied, the investor-partner distinction is preserved.

erwise could not be considered a general partner. By declaring such a person to be a general partner instead of merely *liable as* such, the relations of the partners *inter se* may be seriously affected.⁴² Under this section, purported limited partners who are deemed to be general partners would lose their favored position as to distribution of assets upon dissolution of the partnership.⁴³ In addition, the death of a purported limited partner would dissolve the partnership.⁴⁴

Section 15044 goes too far. The *inter se* relations of partners should not be affected by the determination of unlimited liability to third parties. Third-party claims will be satisfied to the same extent whether a person is a general partner or is merely *liable as* a general partner. Since third parties are adequately protected, there is no reason to alter the partners' agreement among themselves.⁴⁵ The courts should impose unlimited liability on a noncomplying limited partner only after assessing both the lack of substantial compliance in formation and the presence of objective intent to become a general partner. Under this analysis, the partner should still only be *liable as* a general partner, retaining special status *inter se* according to the agreement between all members of the partnership.⁴⁶

⁴² The U.S. Supreme Court applied this reasoning in *Abendroth v. Van Dolsen*, 131 U.S. 66 (1899). A purported limited partner made his capital contribution by check instead of cash, as designated in the certificate. In determining his liability under the New York statute, the Court held that noncompliance did not change a limited partnership into a general one, but it simply made purported limited partners liable as general partners to creditors. See also *Kisler v. Gingles*, 88 F. Supp. 9 (W.D. Ark. 1950).

⁴³ U.L.P.A. § 23.

⁴⁴ *Id.* § 20.

⁴⁵ See notes 82-85 and accompanying text *infra*.

⁴⁶ The only California case relying on § 15044, *Tiburon Nat'l Bank v. Wagner*, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968), drew no distinction between investor-type and general-type partners, but neither did it apply the statute literally. The court held instead that the defendant was merely *liable as* a general partner. See also *Farnsworth v. Nevada-Cal Mgt., Ltd.*, 188 Cal. App. 2d 328, 10 Cal. Rptr. 531 (2d Dist. 1961) (for purposes of corporate securities law, an abortive attempt to form a limited partnership results in formation of a general partnership under § 15044).

In *Battista v. Lebanon Trotting Ass'n*, 538 F.2d 111 (6th Cir. 1976), the court held that, under Ohio law, a purported limited partnership was a general partnership as to a contract entered into prior to filing of the certificate. The court cites no authority for this holding. Cf. *Arrow Petroleum Co. v. Ames*, 128 Ind. App. 10, 142 N.E.2d 479 (1957), in which the court held that defendants

C. Section 11 and the Election Problem

Section 2 defines the pre-formation requisites of a valid limited partnership, and section 11 is, in a remedial sense, its post-formation counterpart. Section 11 applies to individuals who have contributed to the capital of a business erroneously believing that they have become limited partners. Such individuals are not liable as general partners if, upon learning of the mistake, they promptly renounce their interests in the profits of the business.⁴⁷

In most of those cases in which compliance was deemed insubstantial, the failure of the purported limited partners to renounce their interests in the partnership under section 11 rendered all partners liable as general partners.⁴⁸ Although receipt of a share of the profits is only prima facie evidence that an individual is a partner in the business,⁴⁹ section 11 requires renunciation of such profits to avoid the conclusion that the limited partner remains in the business as a general partner. By making

were general partners as far as third parties were concerned for failing to record the certificate.

⁴⁷ U.L.P.A. § 11 provides:

A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

Section 11 thus embodies the rationale of the holdings in *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961), and *Voudouris v. Walter E. Heller & Co.*, 560 S.W.2d 202 (Tex. Ct. Civ. App. 1977), *i.e.*, that the purported limited partners exercised no rights inappropriate to their being limited partners and renounced their interests in the partnership promptly upon learning of the non-compliance. See notes 36-37 and accompanying text *supra*.

⁴⁸ *E.g.*, *Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445 (2d Cir. 1975); *Bergeson v. Life Ins. Corp. of America*, 265 F.2d 227 (10th Cir. 1959); *Tiburon Nat'l Bank v. Wagner*, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968); *Dwinell's Cent. Neon v. Cosmopolitan Chinook*, 21 Wash. App. 929, 587 P.2d 191 (1978); see also *Refinite Sales Co. v. Fred R. Bright Co.*, 119 Cal. App. 2d 56, 258 P.2d 1116 (4th Dist. 1953).

⁴⁹ UNIFORM PARTNERSHIP ACT § 7(4), reprinted in 6 UNIFORM LAWS ANNOTATED 38 (West 1969) [hereinafter cited as U.P.A.].

prompt renunciation⁵⁰ the condition upon which limited liability protection continues, these courts avoid an analysis of the resulting entity in terms of a de facto general partnership.⁵¹ This result is desirable for simplicity of analysis, since reference to formation doctrines of general partnerships under the Uniform Partnership Act becomes unnecessary.⁵²

Section 11's "bright-line" requirement of renunciation makes for predictable results when compliance with the formation requirements is clearly substantial or insubstantial. But a close question of substantial compliance serves, in effect, to put purported limited partners to an election. Limited partners jeopardize their privilege of limited liability by taking part in the control of the business.⁵³ Because of their minimal participation, limited partners may be unaware of complications in formation arising after they have executed the certificate and completed their capital contributions.

If limited partners do learn of an instance of noncompliance,⁵⁴

⁵⁰ See, e.g., *Vidricksen v. Grover*, 363 F.2d 372 (9th Cir. 1966), where a purported limited partner in a car agency partnership learned from an attorney of the business that there were problems with formation and that he was "probably in trouble." The court found that his failure to renounce until six months later was not sufficiently prompt under § 11. He was thus considered a general partner insofar as his relationship with third-party creditors was concerned.

⁵¹ See note 33 *supra*.

⁵² In *Giles v. Vette*, 263 U.S. 553 (1923), the Court safeguarded a purported limited partner's limited liability by reference to the Uniform Partnership Act. Investors in a stock brokerage sought to assure themselves limited liability by complying with the Illinois Limited Partnership Act of 1874. This act, however, was replaced by the Uniform Limited Partnership Act the day before the investors filed their papers, and the Uniform Act did not allow limited partnerships in this type of business. When firm debts accrued, creditors sought to impose unlimited liability on the investors as general partners of the brokerage firm. The Court held, under § 7 of the Uniform Partnership Act, that the investors were not partners and were not liable as partners. The fact that the investors took no part in the control of the business and could not act to bind the partnership rebutted the prima facie presumption of partnership status raised by their receipt of a share of the partnership profits.

⁵³ See note 32 *supra*.

⁵⁴ Section 11 is considered "broad and highly remedial." *Giles v. Vette*, 263 U.S. 553 (1923). Thus even if purported limited partners first learn of noncompliance when creditors attempt to hold them liable as general partners, renunciation is still available, at least where the creditors did not rely on the partners' being general partners or anything other than limited partners. *Rathke v. Griffith*, 36 Wash. 2d 394, 218 P.2d 757 (1950).

A third party's actual reliance on the purported limited partnership's non-

they must assume the burden of deciding whether the noncompliance will ultimately be fatal to the formation of a valid limited partnership. When the limited partners correctly determine that the noncompliance is insubstantial, the requisites of section 2 will have been met and their limited liability assured.⁵⁵ If they accurately determine the noncompliance to be so significant as to jeopardize the validity of the partnership, the purported limited partners must resort to a renunciation under section 11 to limit their liability.⁵⁶

The election problem is most acute when complications in formation threaten to lead to litigation. The limited partners might decide that the partnership was formed in substantial compliance, but a court may subsequently determine that it was not. Here the partners' election to retain their interests in the partnership results in their being liable beyond the amount of their capital contributions. Instead, the limited partners might "play it safe" and renounce their interests in the partnership. This assures their limited liability protection at the expense of their interests in a profitable business, notwithstanding the fact that a court might have deemed compliance substantial under the circumstances.

The election that a limited partner may have to make dramatizes the importance of ascertaining the parameters of the substantial compliance doctrine. Certainty as to when substantial compliance has been rendered would take the guesswork out of the purported limited partners' election. The limited partnership would become a safer and more desirable investment vehicle. Such certainty would also reduce the prospects of litigation and the economic disabilities which litigation so often entails.

III. ELEMENTS AND PARAMETERS OF SUBSTANTIAL COMPLIANCE

There are currently few ascertainable limits to the substantial compliance doctrine. Whether specific failures to fully comply

compliance most likely cuts off the renunciation option, though no case so holds. Since actual reliance on the failure to file a certificate or on its contents is probably not a commercial reality, § 11 gives purported limited partners substantial "bail-out" opportunities.

⁵⁵ See, e.g., *Micheli Contracting Corp. v. Fairwood Assoc.*, 68 App. Div. 2d 460, 418 N.Y.S.2d 164 (1979).

⁵⁶ See, e.g., *United States v. Coson*, 286 F.2d 453 (9th Cir. 1961); *Voudouris v. Walter E. Heller & Co.*, 560 S.W.2d 202 (Tex. Ct. Civ. App. 1977).

with the formation requirements fall within the ambit of substantial compliance is determined on a case-by-case basis. Because these piecemeal decisions have not been tied to the basic purpose of section 2—providing third parties with notice of the facts regarding partnership capital⁵⁷—purported limited partners probably cannot be assured of limited liability absent exact compliance. Thus they may find little security in the substantial compliance doctrine, even though it was developed for their benefit.⁵⁸

In line with the basic purpose of section 2, some of the requirements of section 2(1) should be considered mandatory and others merely directory.⁵⁹ The mandatory provisions are those requiring the partners to state their names and status as either general or limited partners,⁶⁰ their respective capital contributions,⁶¹ the details of any additional contributions⁶² and the date on which their contributions are to be returned.⁶³ Only these statements are essential to third parties in deciding whether to extend credit or otherwise deal with the enterprise.

The partnership may expect some leeway in complying with these mandatory provisions. For example, the certificate may describe the amount of cash contributed in terms of a percentage instead of an actual dollar amount,⁶⁴ or it may designate that the partners' monetary contributions will be paid in another way.⁶⁵ Similar rules should apply to additional capital contributions. Absent clear statements of these provisions, a court should find substantial compliance where no third party suffers loss in actual reliance on the omissions or misstatements in the

⁵⁷ See note 18 and accompanying text *supra*.

⁵⁸ See Section I, BACKGROUND OF THE SUBSTANTIAL COMPLIANCE DOCTRINE, *supra*.

⁵⁹ A mandatory provision is one intended by the legislature as essential, the failure to comply with which renders an act done under the statute void. Failure to comply with a directory provision, on the other hand, constitutes a mere irregularity and is not fatal to the act done under the statute. 1 W. FLETCHER, *supra* note 8, § 132, at 539.

⁶⁰ U.L.P.A. § 2(1)(a)IV.

⁶¹ *Id.* § 2(1)(a)VI.

⁶² *Id.* § 2(1)(a)VII.

⁶³ *Id.* § 2(1)(a)VIII.

⁶⁴ See, e.g., *Wilson v. United States*, 246 F. Supp. 613 (N.D. Cal. 1965).

⁶⁵ See, e.g., *Henningsen v. Howard*, 117 Cal. App. 2d 352, 255 P.2d 837 (1st Dist. 1953); *Electric Supply Co. v. United States Fidelity & Guar. Co.*, 79 N.M. 722, 449 P.2d 324 (1969).

certificate.⁶⁶

The remaining requirements of section 2(1) are directory in nature. The directory requirements include both administrative provisions⁶⁷ and contractual guidelines for the partners' relations *inter se*.⁶⁸

The Act requires that the certificate state the name of the partnership.⁶⁹ This requirement forces the partners to consider if the name they desire is prohibited by statute or protected from their use by another business.⁷⁰ The name should also provide third parties with a means of access to the recorded certificate. Thus if creditors can show that they were unable to locate the recorded certificate because of the omission of the partnership name, a court should find such omission to be a lack of substantial compliance. Absent such showing, and in all instances where the partnership has provided its creditors with a copy of its certificate, the omission should not be fatal.

Although the Uniform Act requires that the partnership's principal place of business be stated in the certificate,⁷¹ this provision is intended only to facilitate proper recordation.⁷² Since the partnership must usually file the certificate in each county in which it has a place of business,⁷³ a court should find substantial compliance when the certificate states that the partnership's place of business is in a named city, though the word "principal"

⁶⁶ See *Henningsen v. Howard*, 117 Cal. App. 2d 352, 255 P.2d 837 (1st Dist. 1953) (*dictum*). Section 6 of the Uniform Act provides that one who actually relies on a misstatement and is harmed thereby may hold liable any member of the limited partnership who knew that the statement was false. See notes 30 and 35 *supra*. Probably because this section offers creditors more specific protection from misstatements than that offered by § 2, no case has been found in which liability has been predicated upon § 2 absent third-party reliance as required by § 6.

⁶⁷ U.L.P.A. § 2(1)(a)I-V.

⁶⁸ *Id.* § 2(1)(a)IX-XIV.

⁶⁹ *Id.* § 2(1)(a)I.

⁷⁰ ADVISING CALIFORNIA PARTNERSHIPS 47-49, 133 (Cal. Cont. Educ. Bar 1975) [hereinafter cited as CAL. C.E.B.].

⁷¹ U.L.P.A. § 2(1)(a)III.

⁷² CAL. C.E.B., *supra* note 70, at 133-34. This requirement would assume more importance if a partnership's principal place of business were determinative of its citizenship for purposes of diversity jurisdiction. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DRAFT §§ 1301(b)(2), 1302(b) (1969).

⁷³ See 6 UNIFORM LAWS ANNOTATED at 103-04 (West Cum. Supp. 1980).

is omitted.⁷⁴ Of course, inclusion of this provision should not be necessary when the partnership delivers a copy of the certificate to its creditors in advance of transacting business.

The certificate should also state the character of the business.⁷⁵ While this requirement is of some importance in states which prohibit limited partnerships in certain businesses,⁷⁶ a statement of character will ordinarily not affect the partnership's relation to third parties. Thus its omission should not preclude a finding of substantial compliance.

While the Act requires that the certificate state the name, place of residence and status—general or limited—of each partner,⁷⁷ the statement specifying the partners' places of residence is directory in nature. Third parties are not likely to rely upon such a statement in deciding whether to extend credit to or otherwise deal with the limited partnership. Thus omission or misstatement of only this part of the provision should not be deemed a lack of substantial compliance.

Section 2 also requires that the certificate state the term for which the limited partnership is to exist.⁷⁸ Although including a statement of term might be to the partnership's advantage,⁷⁹ this provision should not be a prerequisite to substantial compliance for two reasons. First, it is already mandatory that the cer-

⁷⁴ Cf. *Ex Parte Spring Valley Water Works*, 17 Cal. 132 (1860), in which the California Supreme Court held that, where a corporation failed to describe its place of business as the "principal" place of business as required by law, this was merely a technical error. As such, it did not violate the state's corporation statute.

Note, however, that statements that the "office" or "operations" of the business are to be carried on in a named city may be insufficient. See *Harris v. McGregor*, 29 Cal. 124 (1865).

⁷⁵ U.L.P.A. § 2(1)(a)II.

⁷⁶ Many states prohibit limited partnerships in the banking and insurance business. Only Kentucky, Maine and Oregon statutes contain no exception to the business which may be carried on by limited partners. KY. REV. STAT. § 362.430 (1972); ME. REV. STAT. tit. 31, § 153 (West 1978); OR. REV. STAT. § 69.170 (1977).

⁷⁷ U.L.P.A. § 2(1)(a)IV.

⁷⁸ *Id.* § 2(1)(a)V.

⁷⁹ A provision for a short term might, for example, limit the general partners' apparent authority to bind the partnership in dealings with third parties. See U.P.A. § 9, authorizing any partner to bind the partnership by acts "for apparently carrying on in the usual way the business of the partnership." The scope of authority is probably narrower in a partnership existing for a short term than one continuing for a long or unstated term.

tificate specify a date when contributions will be returned.⁸⁰ Third parties are alerted of the term for which each partner has capital in an on-going enterprise. Second, other methods of dissolution are provided for in the Uniform Act.⁸¹ Since a stated term is not conclusive of the duration of a limited partnership, it should not be conclusive as to the adequacy of notice to third parties.

The remaining provisions of section 2(1) govern the relations of the partners *inter se* in connection with their respective profit shares,⁸² the substitution or admission of additional limited partners⁸³ and the right of continuation of the business after dissolution.⁸⁴ Omission or misstatement of these provisions gives rise to disputes which are basically contractual in nature and outside the scope of the substantial compliance doctrine. Of course, the same can be said of any claim involving only the partners themselves; no issue of the partnership's statutory validity is raised. Even though a limited partnership may never statutorily form, the parties' rights and duties as to each other are subject to any agreements they made in attempting to form a valid limited partnership.⁸⁵

In addition to including the provisions discussed above, section 2(1)(a) requires partners to sign the certificate and swear to its contents.⁸⁶ It may be argued that the "swear to" provision mandates that a certificate be accompanied by an affidavit, guaranteeing the veracity of the representations, as opposed to an acknowledgment, stating only the existence of a factual situation.⁸⁷ While several states have modified section 2 to expressly permit an acknowledgment,⁸⁸ an acknowledgment should satisfy

⁸⁰ See note 63 and accompanying text *supra*.

⁸¹ U.L.P.A. § 20.

⁸² *Id.* § 2(1)(a)IX, XII, XIV.

⁸³ *Id.* § 2(1)(a)X, XI.

⁸⁴ *Id.* § 2(1)(a)XIII.

⁸⁵ *E.g.*, Weil v. Diversified Properties, 319 F. Supp. 778, 781 (D.D.C. 1970); Lanier v. Bowdoin, 282 N.Y. 32, 38, 24 N.E.2d 732, 735, 16 N.Y.S.2d 32, 38 (1939).

⁸⁶ U.L.P.A. § 2(1)(a).

⁸⁷ See Kratovil & Werner, *Fixing Up the Old Jalopy—The Modern Limited Partnership Under the ULPA*, 50 ST. JOHN'S L. REV. 51, 53 (1975).

⁸⁸ California (CAL. CORP. CODE § 15502(1)(a) (West 1977)), Hawaii (HAW. REV. STAT. § 425-22 (1968)), New York (N.Y. PARTNERSHIP LAW § 91 (Consol. 1948)) and South Dakota (S.D. COMPILED LAWS ANN. § 48-6-2 (1967)) have so modified the Uniform Act.

section 2 even where the Uniform Act remains unmodified.

Similarly, a partner's failure to sign the certificate should not be fatal if the failure was merely inadvertent. However, the courts have taken an overly strict view holding that non-signatory investors are estopped from denying general partner status whenever such a denial would be to their advantage.⁸⁹ In contrast, one court found that a blank signature line for a purported partner who never made his capital contribution or had anything further to do with the partnership did not bind that party to the partnership agreement.⁹⁰ But the court held that it did not render the certificate too vague to bind the partners who *did* sign. The court apparently disregarded the line as mere surplusage.

Thus purported limited partners can assure their limited liability protection by signing the certificate, assuming that the other requisites are met. Their failure to sign should raise a presumption that they are general partners. This presumption would be rebuttable by a showing either that the partners' level of participation in the business did not exceed that appropriate of limited partners or that their failure to sign was inadvertent. To impose general partner liability on these parties without allowing such rebuttal would reinstate the excessive formalism of the common law.⁹¹

Even where there has been actual notice in the form of a written certificate, the recording requirement of section 2(1)(b) has been the decisive issue in most limited partnership cases.⁹² Generally, the purported partner could expect wide latitude as to noncompliance with the statute once the certificate was recorded. In fact, the recording of a certificate that appears valid on its face may even raise a "conclusive presumption" that the limited partnership was validly formed.⁹³ This presumption is not justified by limited partnership theory.⁹⁴ Instead, a court

⁸⁹ *New York Stock Exch., Inc. v. Sloan*, 391 F. Supp. 530 (S.D.N.Y. 1975); *Pacific Inv. Co. v. Townsend*, 58 Cal. App. 3d 1, 129 Cal. Rptr. 489 (2d Dist. 1976).

⁹⁰ *Electric Supply Co. v. United States Fidelity and Guar. Co.*, 79 N.M. 722, 449 P.2d 324 (1969).

⁹¹ See Section I, BACKGROUND OF THE SUBSTANTIAL COMPLIANCE DOCTRINE, *supra*.

⁹² See Section II(A), *The Notice Requirement*, *supra*.

⁹³ CAL. CORP. CODE § 15502(4) (West 1977).

⁹⁴ See Section II(A), *The Notice Requirement*, *supra*.

should determine substantial compliance identically for all certificates, whether they are filed for record or given directly to the creditor.

IV. THE SUBSTANTIAL COMPLIANCE DOCTRINE IN THE REVISED ACT

No state has enacted the Revised Act to date, but recognition of at least some of its provisions is likely soon.⁹⁵ The express

⁹⁵ One impediment to adoption of the Revised Act has been concern over the tax treatment of an entity organized under the Revised Act. The problem stems from the increased rights of the limited partner allowed by § 303 of the Revised Act. Section 303 provides, in pertinent part:

(a) [A] limited partner is not liable for the obligations of a limited partnership unless. . .in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business. . . .

(b) A limited partner does not participate in the control of the business. . .solely by doing one or more of the following. . .

(2) consulting with and advising a general partner with respect to the business of the limited partnership. . .

(4) approving or disapproving an amendment to the partnership agreement; or

(5) voting on one or more of the following matters:

(i) the dissolution and winding up of the limited partnership;

(ii) the sale, exchange, lease, mortgage, pledge, or other transfer of all or substantially all of the assets of the limited partnership other than in the ordinary course of its business. . .

(iv) a change in the nature of the business; or,

(v) the removal of a general partner.

(c) The enumeration in subsection (b) does not mean that the possession or exercise of any other powers by a limited partner constitutes participation by him in the business of the limited partnership.

By increasing the prerogatives of the limited partners before declaring them liable as general partners, the Revised Act has created an entity much like a corporation (*i.e.*, centralization of management, free transferability of interest, limited liability and continuity of life) under the rubric of partnership. Consequently, it is uncertain whether the new combination should be taxed as a separate taxpayer as is a corporation, or taxed as a conduit for an individual's business venture as is a partnership.

This concern over the tax treatment of these partnerships may have been allayed by a recent decision involving CAL. CORP. CODE § 15507 (West Cum. Supp. 1980), which is the near equivalent of § 303 of the Revised Act. In Phil-

purpose of the Revised Act is to "modernize the prior uniform law while retaining the special character of limited partnerships as compared with corporations."⁹⁶ While the revisions relating to limited partnership formation lend some clarity to the language of the Uniform Act, they do little to solve the formation problems discussed above.

As to the content of the limited partnership certificate, the Revised Act retains most of the requirements of the prior Uniform Act with relatively minor modification.⁹⁷ It also retains the

lip G. Larson, 66 T.C. 159 (1976), a majority of the Tax Court held that entities organized under California law were not to be considered "associations" (*i.e.*, separate taxpayers) for federal tax purposes. In March 1979 the Internal Revenue Service acquiesced in this decision. 1979-1 C.B. 1. As a result, a § 303 partnership will probably not be taxed like a corporation. See B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 2.04 (1979).

⁹⁶ R.U.L.P.A. (Commissioners' Prefatory Note).

⁹⁷ See note 1 *supra*. R.U.L.P.A. § 201(a) states:

In order to form a limited partnership two or more persons must execute a certificate of limited partnership. The certificate shall be filed in the office of the Secretary of State and shall set forth:

- (1) the name of the limited partnership;
- (2) the general character of its business;
- (3) the address of the office and the name and address of the agent for service of process required to be maintained by Section 104;
- (4) the name and the business address of each partner (specifying separately the general partners and limited partners);
- (5) 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 in the future;
- (6) 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;
- (7) any power of a limited partner to grant the right to become a limited partner to an assignee of any part of his partnership interest, and the terms and conditions of the power;
- (8) if agreed upon, the time at which or the events on the happening of which a partner may terminate his membership in the limited partnership and the amount of, or the method of determining, the distribution to which he may be entitled respecting his partnership interest, and the terms and conditions of the termination and distribution;

substantial compliance phrase, though the requirement of good faith has been moved to section 304.⁹⁸ Section 304 is the equivalent of Uniform Act section 11 for purposes of this analysis. Under the Revised Act, a purported limited partnership need not show good faith in its failure to exactly comply with the formation requirements. Limited partners who renounce, however, must show that their erroneous belief as to the status of the enterprise was in good faith.

The relationship between section 2 and section 11 of the Uniform Act suggests a possible explanation for this revision. Good faith was seldom an issue in cases concerning substantial compliance with section 2.⁹⁹ It was, however, a central though underlying issue in many cases dealing with renunciation under section 11,¹⁰⁰ which has no express good faith requirement. This

(9) any right of a partner to receive distributions of property, including cash from the limited partnership;

(10) 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;

(11) any time at which or events upon the happening of which the limited partnership is to be dissolved and its affairs wound up;

(12) any right of the remaining general partners to continue the business on the happening of an event of withdrawal of a general partner; and

(13) any other matters the partners determine to include therein.

⁹⁸ Section 304(a) states, in pertinent part:

[A] person who makes a contribution to a business enterprise and erroneously *but in good faith* believes that he has become a limited partner in the enterprise is not a general partner in the enterprise and is not bound by its obligations by reason of making the contribution, receiving distributions from the enterprise, or exercising any rights of a limited partner, if, on ascertaining the mistake, he:

(1) causes an appropriate certificate of limited partnership or a certificate of amendment to be executed and filed;

or

(2) withdraws from future equity participation in the enterprise. (Emphasis added.)

⁹⁹ See, e.g., *Peerless Mills, Inc. v. American Tel. & Tel. Co.*, 527 F.2d 445 (2d Cir. 1975); *Bergeson v. Life Ins. Corp. of America*, 265 F.2d 227 (10th Cir. 1959); *Tiburon Nat'l Bank v. Wagner*, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968); *Dwinell's Cent. Neon v. Cosmopolitan Chinook*, 21 Wash. App. 929, 587 P.2d 191 (1978).

¹⁰⁰ *J.C. Wattenbarger & Sons v. Sanders*, 191 Cal. App. 2d 857, 13 Cal. Rptr.

revision puts the good faith requirement where it is most relevant¹⁰¹ without unduly broadening the doctrine of substantial compliance. Any failure of the partners to comply—whether or not in good faith—should be deemed a lack of substantial compliance if it fails to give third parties the notice for which section 2 was designed.

Section 201(b) of the Revised Act embodies the most salutary change from the Uniform Act. It states, in part: “A limited partnership is formed *at the time of the filing of the certificate of limited partnership*. . .or at any later time specified in the certificate of limited partnership. . .” (emphasis added). While the Uniform Act provided no definite point at which the limited partnership came into legal existence, the Revised Act makes the filing of the certificate a condition precedent to formation of a limited partnership. Thus the date of the filing of the certificate is the date at which persons involved in the business become general and limited partners and liable for subsequently accruing debts accordingly.¹⁰²

This revision serves to codify the holdings of many of the cases previously discussed and makes section 2 easier for the courts to apply. At the same time, it provides a “bright line” for the benefit of purported limited partners. In effect, this revision takes recordation and filing out of the scope of the substantial compliance doctrine and avoids much of the litigation engendered by the vagueness of Uniform Act section 2.

The Revised Act fails, however, to preserve a partnership’s special status as to creditors who have been provided with actual—as opposed to constructive—notice of its essential facts. Since a partnership that supplies third parties with a copy of its

92 (4th Dist. 1961). See also *Tiburon Nat’l Bank v. Wagner*, 265 Cal. App. 2d 868, 71 Cal. Rptr. 832 (1st Dist. 1968).

¹⁰¹ In *J.C. Wattenbarger & Sons v. Sanders*, 191 Cal. App. 2d 857, 13 Cal. Rptr. 92 (4th Dist. 1961), the court reversed a summary judgment entered in favor of the defendant, a purported limited partner. The defendant had sought to avoid liability as a general partner by stating in his answer that he had renounced his interest in the business under the California equivalent of § 11. The court held, however, that such a statement was insufficient as a matter of law to avoid liability where the evidence was in conflict as to whether he had acted in good faith. Otherwise, the court said, this section would serve as an “escape provision” for those acting in bad faith and with intent to defraud creditors. *Id.* at 863, 13 Cal. Rptr. at 95.

¹⁰² R.U.L.P.A. § 201 (Commissioners’ Comment).

certificate satisfies the policy of the filing requirement, enactment of section 201(b) should be accompanied by recognition of actual notice as an alternative to constructive notice.¹⁰³

CONCLUSION

The limited partnership is a relatively safe, sound and desirable investment vehicle. Recent case and statutory authority, however, raises problems with the formation of a limited partnership. The basic premise is that the partnership must provide third parties with notice of its essential facts. Either actual or constructive notice of these facts should preserve the special status of the partnership. When the partnership does not give adequate notice, purported limited partners who fail to renounce their interests in the partnership should be held liable as general partners. They should retain limited partner status in their relations *inter se*. The potentiality of unlimited liability attaching to purported limited partners, or the premature renunciation of their investments to avoid the threat of such liability, suggests that the parameters of the formation requirements be well defined. While the minor modifications of the Revised Act clarify the statutory language, they do little to solve the substantive problems inherent in the substantial compliance doctrine.

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¹⁰³ See Section II(A), *The Notice Requirement, supra*.